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The Reaffirmation of Federalism as a Viable Limitation Upon the Commerce Power

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INTRODUCTION

As THE Constitution was being formulated, Article I, Section 8, clause 3, giving Congress the power "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes," was added because of the Framers' grave concern with the erection of trade barriers between the states, a problem which had inhibited interstate trade under the old Articles of Confederation. The federal government's regulation of commerce was meant to provide substantial equality of access to a free national market, avoiding what has been unhappily referred to as "the intolerable experience of the economic Balkanization of America."[1]

Although the power to regulate commerce was granted, it was to come into conflict with another ideal held by the Framers in the construction of the new nation: Federalism. The Framers felt that the nation should consist of a two-tier government, one national and one local, but each sovereign in its own sphere. From time to time the Supreme Court has taken cognizance of the federalism limitation on the Commerce Clause, noting, for instance, that the authority of the federal government "must be considered in the light of our dual system of government and may not be extended so as to . . . obliterate the distinction between what is national and what is local and create a completely centralized government."[2] However, the Court has also recognized that the commerce power may be virtually limitless.[3]

The conflict between the regulation of commerce by the federal government and the exercise of state sovereignty can best be examined in light of the Fair Labor Standards Act (FLSA) of 1938[4] and the cases involving its application. The FLSA was enacted by Congress as the country was struggling to rebuild itself after being devastated by depression, primarily to aid the economy by placing controls on the nation's work force in the nature of a minimum wage floor and a maximum hour ceiling.[5] The Act

[1] American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 628, 517 P.2d 691, 696 (1973).

[2] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). *See* Light, *The Federal Commerce Clause,* 49 VA. L. REV. 717 (1963); THE FEDERALIST No. 45 (J. Madison) (Jones ed. 1972).

[3] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824). *See* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

[4] 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201-19 (1970 & Supp. V, 1975). (hereinafter referred to as FLSA).

[5] *See* Willis, *The Evolution of the Fair Labor Standards Act,* 26 U. MIAMI L. REV. 607 (1972). [hereinafter cited as Willis].

was passed pursuant to Congress' power to regulate commerce, and "through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as possible to eliminate" certain labor conditions found detrimental to the maintenance of health, efficiency, and general well-being.[6]

Congress explicitly noted five reasons for the finding that labor conditions within FLSA coverage affected commerce among the several states. It found that such conditions:

(1) caused commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states;
(2) burdened commerce and the free flow of goods in commerce;
(3) constituted an unfair method of competition in commerce;
(4) led to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;
(5) interfered with the orderly and fair marketing of goods in commerce.[7]

Throughout its history, the constitutional basis of the FLSA has remained anchored in the Commerce Clause. However, despite the legitimacy of that purpose, the FLSA has been the subject of constant attacks since its inception, the most fervent of which has been the challenge to its constitutionality on state sovereignty grounds.[8]

Two recent United States Supreme Court cases construing the constitutionality of the FLSA and its amendments reflect not only the changing judicial posture toward extension of the Act to matters of state concern, but also the differing attitudes toward extension of the Commerce Clause itself.

[6] FLSA, ch. 676, § 2, 52 Stat. 1060 (1938), *as amended*, 29 U.S.C. § 202 (1970). Besides setting maximum hour and minimum wage standards, however, the FLSA also restricted child labor abuses and retaliation by recalcitrant employers. 29 U.S.C. §§ 212, 215(3) (1970).

[7] The present text of the congressional policy and findings section remains virtually unchanged but for an addition, following the fifth element, "That Congress further finds that the employment of persons in domestic service in households affects commerce." 29 U.S.C. § 202 (a) (Supp. V, 1975).
The Equal Pay Act provisions housed within the FLSA have been viewed as resting upon a different basis than those listed. In Usery v. Allegheny County Inst. Dist., 45 U.S.L.W. 2251 (3d Cir. Sept. 13, 1976), *cert. denied*, 45 U.S.L.W. 3651 (1977), the court said, "The Equal Pay Act is a separate law that was enacted at a different time and aimed at a separate problem—discrimination on account of sex in the payment of wages." 45 U.S.L.W. at 2252. Thus the constitutional basis of The Equal Pay Act is not the Commerce Clause, but Section 5 of the fourteenth amendment. This distinction is important, since the tenth amendment limitations on Commerce Clause enactments have not been applied analogously to enactments under the fourteenth amendment. *See* Fitzpatrick v. Bitzer 96 S. Ct. 2666 (1976).

[8] Willis, *supra* note 5, at 609. *See generally* Dodd, *The Supreme Court and Fair Labor Standards*, 1941-45, 59 HARV. L. REV. 321 (1946), for a statement of early Supreme Court cases dealing with the coverage problems of the FLSA.

From the date of the Act's passage until 1976, the Court adopted a deferential approach to questions of state sovereignty when the federal government was acting through its commerce power.[9] This approach appears in *Maryland v. Wirtz*,[10] decided in 1968, and it supposes that where the Court has found, "that the legislators have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce," the Court's investigation of the legislation is at an end.[11] In 1976 however, the Court's opinion in *National League of Cities v. Usery*[12] reversed *Wirtz* and announced that it was willing to go much further in limiting powers exercised under the Commerce Clause than it had prior to that time. Thus, against the commerce power were placed the "attributes of sovereignty attaching to every state which may not be impaired by Congress,"[13] an explicit recognition of state sovereignty limitations upon the Commerce Clause.

Although *Usery* appears to add new vitality to the tenth amendment and, at the same time, reaffirm the validity of the concept of federalism, it departs from the decades of logic, experience, and precedent which have made the commerce power the broadest power of Congress. The magnitude of this departure, as well as its significance for future judicial scrutiny of congressional enactments under the Commerce Clause, are discoverable only by analyzing *Usery* in light of past decisions regarding limitations on congressional authority in this area.

I. THE FLSA AMENDMENTS, *Wirtz* AND *Usery*

Three major amendments to the FLSA occurred after 1960. The "enterprise" concept was introduced into the FLSA in 1961, shifting the basis of coverage from the work performed by the individual employee to the business unit in which a particular employee works. While under the original Act it was possible to have one employee in an establishment covered by the Act although a fellow-worker was not, the 1961 Amendments suggested that "all the employees of a particular business unit may be covered by the Act, regardless of the relationship of their individual duties to commerce or the production of goods for commerce."[14] In 1966, a more drastic

[9] *See* United States v. Darby, 312 U.S. 100 (1941).

[10] 392 U.S. 183 (1968).

[11] *Id.* at 190, *citing* Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964).

[12] 96 S.Ct. 2465 (1976), *rev'g* National League of Cities v. Brennan, 406 F. Supp. 826 (D.D.C. 1974).

[13] *Id.* at 2471. The constitutional basis for the state sovereignty argument is the tenth amendment, which provides:

> The Powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[14] Willis, *supra* note 5, at 625. Many sections of the Act refer to an employee who is merely "employed in an enterprise engaged in commerce." *See, e.g.*, 29 U.S.C. §§ 206(b), 207(a)(2) (1970).

change in the Act took place from the states' viewpoint. The FLSA's definition of "Employer" was expanded to include state employees "employed (1) in a hospital, institution, or school . . ., or (2) in the operation of a railway or carrier . . .,"[15] removing the total exemption the states had previously held since the Act's inception.

These two amendments were challenged in *Maryland v. Wirtz* as overreaching the bounds of constitutionally permissible regulation of interstate commerce. Petitioners in that case, 28 states and one school district, asserted that the "enterprise concept" was beyond the power of Congress under the Commerce Clause and also that coverage of state-operated hospitals and schools was beyond the federal commerce power.[16] They sought relief from Federal District Court in the State of Maryland in the form of a declaratory judgment and injunction of the Act's application to hospitals, schools, and other institutions in which the state was involved, but that relief was denied.[17] The Supreme Court affirmed, Justice Harlan delivering the opinion of the Court.

With respect to the "enterprise concept", Harlan found two bases for expanded coverage: First, "that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production may lead to strife disrupting an entire enterprise,"[18] and secondly, "that strife disrupting an enterprise involved in commerce may disrupt commerce."[19] Moreover, Harlan relied upon the Court's earlier approval of vast commerce powers in *United States v. Darby*[20] and *Wickard v. Filburn*[21] to support the "enterprise concept" in *Wirtz*. In *Darby* the constitutional issue involved was whether Congress could prohibit interstate shipment of lumber which had been the product of labor by workers not paid in accordance with the FLSA's standards even though the actual manufacture involved was purely intrastate. In upholding the prohibition, the Court said that regulation was permissible where intrastate transactions "are so commingled with or related to interstate commerce that all must be

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[15] 29 U.S.C. § 203(d) (1970).

[16] 392 U.S. at 187. Petitioners also argued that the remedial provisions of the Act would conflict with the eleventh amendment and that schools and hospitals did not have the statutorily required relationship to interstate commerce. As to the first contention, Justice Harlan stated, "[W]e decline to be drawn into an abstract discussion of the numerous complex issues that might arise in connection with the Act's various remedial provisions." The latter question was also deferred until a concrete case was brought before the judiciary. 392 U.S. at 200-01.

[17] 269 F. Supp. 826 (1967).

[18] 392 U.S. at 192.

[19] *Id.*

[20] 312 U.S. 100 (1941).

[21] 317 U.S. 111 (1942).

regulated if the interstate commerce is to be effectively controlled."[22] *Wickard v. Filburn* involved the issue of whether the amount of wheat grown for home consumption could be regulated by Congress under the Agricultural Adjustment Act of 1938, although that wheat never passed over state boundaries. The Court held that even purely local agricultural activity could be regulated because of its impact on the national marketing scheme, saying, "[I]f we assume that it [the wheat] is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.[23]

Justice Harlan argued that the second issue in *Wirtz,* whether the commerce power affords a constitutional basis for extension of the Act to state-operated schools and hospitals, could be decided by the controlling precedent of *United States v. California.*[24] That case centered upon the extension of the Federal Safety Appliance Act to a state-owned railroad operating entirely within California as a nonprofit venture for the purpose of facilitating transportation at San Francisco harbor. After having determined the railroad was subject to federal regulation, the Court rejected the claim by California that its involvement precluded federal regulation, reasoning that a business plainly within the terms and purpose of an Act of Congress could not be exempted merely because the business was carried on by a state.[25] Similarly, in *Wirtz,* Harlan reasoned that the Court would not "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the states for the benefit of their citizens."[26]

Justice Douglas directed his dissent to the second issue and stated in brief what was to become the gravamen of Rehnquist's majority opinion in *Usery.* Douglas believed that the 1966 Amendments invaded state sovereignty as protected by the tenth amendment and were thus unconstitutional.[27] He contended that in no case cited by the majority on behalf of the proposition that the commerce power was unrestrained by state sovereignty limitations had the federal regulation overwhelmed state fiscal policies.[28] As his dissent

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[22] 312 U.S. at 121.

[23] 317 U.S. at 128. *Accord,* United States v. Wrightwood Dairy Co., 315 U.S. 110 (1941).

[24] 297 U.S. 175 (1936).

[25] *Id.* at 186.

[26] 392 U.S. at 198-99.

[27] *Id.* at 201 (Douglas, J., dissenting). The majority had argued against this contention by relying upon Sanitary District v. United States, 266 U.S. 405 (1925), which, in Harlan's view, dispelled the notion that state concerns might "outweigh" the importance of an otherwise valid federal statute. *Id.* at 195-96. *See* note 45 and accompanying text *infra.*

[28] 392 U.S. at 203.

noted, "It is one thing to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas."[29] The effect upon state sovereignty, it was argued, was likely to be far greater because the regulation in *Wirtz* unduly impaired state functions of government, significantly distinguishing the *Wirtz* case from other cases decided under the Commerce Clause. Douglas, although recognizing what could aptly be termed the "essential function" theory voiced by Rehnquist in *Usery*, provided no test for determining when uniquely sovereign functions of the state were involved and, as indicated below, Rehnquist did not improve the argument in this respect.[30]

In 1974, Congress continued to expand the coverage of the FLSA with the significant difference that the 1974 Amendments acknowledged no limitation on the basis of the employer being a state or its political subdivision. Quite to the contrary, the new amendments stated that the definition of "Employer" "includes a public agency."[31] While in *Wirtz* Harlan had discounted the dissent's theory that the "enterprise concept" could declare a whole state an "enterprise" affecting commerce and usurp its budgeting activities, the unrelenting expansion of the Act's coverage offered no such assurance to affected states.[32]

Thus, immediately following the passage of the 1974 Amendments, another challenge to the constitutionality of the FLSA was started in the courts. In *National League of Cities v. Brennan*[33] individual cities and states, the National League of Cities, and the National Governors' Conference challenged the 1974 Amendments to the FLSA as beyond the power of Congress under the Commerce Clause. Petitioners contended that the amendments purported to extend coverage of the FLSA to nonsupervisory state and municipal employees, requiring that state and municipal subdivisions adhere to the minimum wage and maximum hour provisions set forth in that Act. They contended that the amendments would require substantial increases in local expenditures or reduction in services and per-

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[29] *Id.*

[30] *See* note 103 and accompanying text *infra.*

[31] 29 U.S.C. § 203(d) (Supp. V, 1975). *See* 29 U.S.C. § 203(x) (Supp. V, 1975), which provides:

> "Public agency" means the Government of the United States, the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission); a State, or a political subdivision of a State; or any interstate governmental agency.

[32] 392 U.S. at 196 n.27.

[33] 406 F. Supp. 826 (D.D.C. 1974), *rev'd,* National League of Cities v. Usery, 96 S.Ct. 2465 (1976).

sonnel or both, with resultant layoffs.[34] Petitioners also believed that the amendments would result in large-scale reconstitution of tours of duty, without any showing that state practice had formerly resulted in the types of dangers the FLSA was designed to cure. Defendant, the Secretary of Labor, opposed the temporary injunction requested by petitioners and moved to dismiss for failure to state a claim upon which relief could be granted. The three-judge district court dismissed the complaint.[35]

The Supreme Court, in a majority opinion written by Justice Rehnquist, held for petitioners on the ground that "the vice of the Act as sought to be applied here is that it directly penalizes the states for choosing to hire governmental employees on terms different from those which Congress has sought to impose,"[36] altering the freedom of States to "structure integral operations in areas of traditional government functions."[37] In so holding, the Court overruled *Wirtz,* because, like the fire and police departments claimed to be affected by the 1974 Amendments in *Usery,* the employees extended protection in *Wirtz* were deemed to provide "an integral portion of those governmental services which the states and their political subdivisions have traditionally afforded their citizens."[38] Justice Blackmun concurred with the majority's view, because he viewed the Court's opinion as adopting a "balancing approach" between the countervailing powers of nation and state.[39]

Justice Brennan, joined by Justices White and Marshall in dissent, noted that "my Brethren are also repudiating the long line of our precedents holding that a judicial finding that Congress has not unreasonably regulated a subject matter of 'commerce' brings to an end the judicial role."[40] His argument focused on Chief Justice Marshall's opinion in *Gibbons v. Ogden* as supporting the proposition that the restraints upon plenary commerce power abuse lie in the political rather than the judicial process, although the judiciary must find that the legislature had a rational basis for adopting contested legislation.[41] Moreover, Brennan found the "essential function

[34] *Id.* at 828. The Court stated that it was "troubled" by the states' contentions, but nevertheless adhered to the formalistic approach adopted in *Maryland v. Wirtz.*

[35] *Id.*

[36] National League of Cities v. Usery, 96 S. Ct. 2465, 2473 (1976).

[37] *Id.* at 2474.

[38] *Id.* at 2476.

[39] *Id.*

[40] *Id.* at 2478 (Brennan, J., dissenting).

[41] *Id.* at 2476. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9 (1824), where Chief Justice Marshall said:

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are . . . the sole restraints . . . . They are the restraints on which the people must often rely solely in all representative governments.

test" used by the Court in supporting its opinion and overruling *Wirtz* to be "conceptually unworkable",[42] since it involved questions peculiar to Congress, not to the courts. The Court, in his view, has said that regulation of wages and hours is an undoubted attribute of state sovereignty, but has not said why. By disclaiming reliance on the costs of compliance the Court avoided analysis of the wisdom, need, or effectiveness of FLSA application to the states as "employers", questions for Congress, but it left open the possibility that "however insignificant that cost, any federal regulation under the commerce power 'will nonetheless significantly alter or displace the states' abilities to structure employer-employee relationships'."[43]

II. TENTH AMENDMENT LIMITATIONS

Thirty-five years ago, the constitutionality of the FLSA was challenged for the first time in *United States v. Darby,* and it was there that the tenth amendment was found to be a truism, the Court stating that "The amendment states but a truism that all is retained which has not been lost."[44] Yet, Rehnquist imposes the tenth amendment as a restriction upon the federal government's commerce power, and goes beyond the line of cases establishing this power as plenary.

As long ago as 1924, the principle had been established that state concerns could not constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce. In *Sanitary District v. United States,*[45] Congress had imposed statutory limits on the diversion of water from Lake Michigan by the State of Illinois, but Justice Holmes, speaking for a unanimous Court, announced that the state's needs were "irrelevant" because federal power over commerce was "superior to that of the States" to provide for the welfare or necessities of its inhabitants.[46] In *Oklahoma v. Atkinson Co.*[47] the "plenary" aspect of the commerce power was even supported where a dam and reservoir project extending into Oklahoma was engineered to avert damaging floods and to promote navigation by regulating stream-flow although the exercise of the power would obliterate part of a state's boundary, interfere with the state's project for water development, and impair the tax revenue of the state. It has been stated that the tenth amendment is of no effect in such controversies since "the Amendment by

[42] *Id.* at 2487.

[43] *Id.* at 2484-85.

[44] 312 U.S. at 124. *See also* United States v. Sprague, 282 U.S. 716 (1931).

[45] 266 U.S. 405 (1925).

[46] *Id.* at 426.

[47] 313 U.S. 508 (1941). The Court also stated:

> It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. *Id.* at 527.

its terms is not a limitation of power", and thus, the ability to act pursuant to the Commerce Clause cannot be denied solely by reference to that provision of the Constitution.[48]

Justice Rehnquist departed from this line of authority, both in his *Usery* opinion and in *Fry v. United States,*[49] where he dissented from the majority's view that the Economic Stabilization Act of 1970 could be validly extended to state employees notwithstanding their sovereign status. While the majority in *Fry* had recognized that the Economic Stabilization Act was an emergency measure to counter severe inflation and that the federal effort would be drastically impaired if state employees were immune from the Act's coverage, the extension of coverage to the States was justified on the basis of the Court's decision in *Maryland v. Wirtz.*[50] In *Fry,* Rehnquist criticized not the reasoning in *United States v. California* which the Court had relied on in *Wirtz* and other cases, but the precedential value of the case in supporting the contention that state sovereignty is not a factor in determining constitutional power under the Commerce Clause. Although *Sanitary District* had dispelled the notion that the tenth amendment should form an obstacle to the exercise of the commerce power eleven years earlier. Rehnquist found that the Court's decision in *United States v. California,* announcing that valid general regulations of commerce did not cease to be valid because a state was involved, was based to a great extent on the historical context of that case. Rehnquist said in *Fry:*

> The claim of "states' rights" had so frequently been invoked in the past as a form of *ius tertii,* not by the State but by a business enterprise seeking to avoid congressional regulation, that the different tenor of the claim made by the State of California may not have impressed the court.[51]

Thus, Rehnquist seemed to suggest that American industry had so perverted the state sovereignty limitation into a "hands-off" tool in order to avoid congressional regulation that its utility as a device for maintaining the proper balance between state and federal powers had been almost totally obscured. To suggest that laissez-faireism inhibited the Court's decision, however, ignores not only the prior decision in *Sanitary District,* but also the subsequent reaffirmation of the tenth amendment's restricted role in *Darby* and *Wirtz.*

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[48] Bogen, *The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause,* 8 WAKE FOREST L. REV. 187, 191 (1972). *See also* United States v. Perez, 426 F.2d 1073 (2d Cir. 1970).

[49] 421 U.S. 542 (1975).

[50] *Id.* at 548. *See* note 24 and accompany text *supra.*

[51] *Id.* at 551.

In *Usery*, no such lengthy analysis was given to *United States v. California*. Rehnquist said, first, that "We think the dicta from *United States v. California* was wrong," and left to footnote discussion the remainder of the argument.[52] He conceded that *United States v. California* was consistent with *Usery* in that the former case did not involve an integral part of governmental activity, only operation of a railroad engaged in interstate commerce, but further noted that the case did not enable the commerce power to stretch to states as *states*.[53] Nevertheless, while *United States v. California* expressly held that, in tax cases, activities in which the states have "traditionally engaged" place a limit on federal taxing power, the Court also stated that "there is no such limitation upon the plenary power to regulate commerce."[54] Rehnquist's failure to give this determination critical weight in *Usery*, like many of his arguments, is explained by reference to *Fry*, wherein Rehnquist noted that the immunity from taxation was apparently grounded on a concept of constitutional federalism which should likewise limit federal power under the Commerce Clause.[55] This view, at the least, ignores the historical reasons for granting broad commerce power to the federal government, obstensibly to end the economic fragmentation of America, by trying to analogize it to the taxing power which had encountered judicial opposition from the very beginning.[56]

More importantly, the development of the modern social structure seems to require a relaxing of both the limits on the commerce power and the limits on the taxing power. The Framers saw a distinction between the powers necessary to a federal government and the preservation of sovereign powers necessary for control of the states' internal affairs, but the difference has been blurred by the increasingly interdependent nature of this nation's economic structure.[57] With respect to the commerce power, it has been said that "In today's interdependent economy and social structure, every activity within any state will 'affect the states generally' even if only tenuously."[58]

In *Wirtz*, the Court expressly declared that Congress could not use the relatively trivial impact of state activity on commerce as an excuse

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[52] 96 S. Ct. at 2475 nn. 18 & 19.

[53] *Id.*

[54] 297 U.S. at 185.

[55] 421 U.S. at 554.

[56] *See, e.g.*, Collector v. Day, 78 U.S. (11 Wall.) 113, 125 (1871) ("the means and instrumentalities employed for carrying on the operation of [State] governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired . . . ."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 415, 436 (1819).

[57] *See* Bogen, *supra* note 48, at 193.

[58] *Id.* at 190.

for broad general regulation of state or private activities, but the fear that expanding state activities (and, thus, an expanding immunity) would *prevent* exercise of federal power has been a formidable issue since the beginning of the century.[59] As state activities expanded by operating railroads, gas, water, and electric utilities, and becoming involved in traditionally private concerns, the Supreme Court modified the principle which since 1871 and the case of *Collector v. Day*[60] had immunized state activities from federal taxation. *Collector v. Day* involved an assessment by a collector of the internal revenue of the United States upon a judge of the Court of Probate in the State of Massachusetts, which assessment, the Supreme Court maintained, interfered with the power of the state to administer justice "and to employ all necessary agencies for legitimate purposes of State government."[61]

However, the Court was able to draw a distinction between taxation of a state judicial officer and taxation of state agents who had taken charge of the business of selling liquor. In *South Carolina v. United States,*[62] where the state had established dispensaries for the wholesale and retail sale of liquor and the federal government had demanded license taxes from the dispensers, the Supreme Court announced that while immunity could stretch to activities of a state which were of a strictly governmental character, the protection from taxation did not extend to the state in the carrying on of an ordinary private business. This principle was affirmed in *New York v. United States,*[63] where Justice Frankfurter took the opposite approach of Rehnquist's analogy in *Fry* and observed in his majority opinion that "surely the power of Congress to lay taxes has impliedly no less reach than the power of Congress to regulate commerce."[64]

Justice Brennan also posed the fear of an expansion of immunity in *Usery* when he noted that under Rehnquist's new rule for the Commerce Clause, states could engage in businesses competing with the private sector and then enter the courts arguing that by withdrawing those employees from the private sector they could successfully evade the power of the

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[59] P. ODEGARD, THE AMERICAN REPUBLIC: ITS GOVERNMENT AND POLITICS 174 (2d ed. 1964).

[60] 78 U.S. (11 Wall.) 113 (1871).

[61] *Id.* at 128.

[62] 199 U.S. 437 (1905).

[63] 326 U.S. 572 (1946).

[64] *Id.* at 582. While Rehnquist relies on Coyle v. Smith, 221 U.S. 559 (1911) for his view that "essential" and "peculiar" state powers could not be shorn away by Congress, the more recent case of *New York v. United States* supports the proposition that while there are "uniquely" state activities, as long as Congress taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a state, the Constitution does not forbid it simply because its incidence falls on a state. Apparently, this view is not embraced by Rehnquist's "integral operations in areas of traditional governmental functions" test in *Usery*. 326 U.S. at 582.

federal government to regulate commerce.[65] Rehnquist's view, in light of this charge, proceeds in the opposite direction of the tax cases which recognize the threat of a steady enlargement of state immunity. If this is true, then the Court's opinion fails to recognize the historical context in which the Commerce Clause has been used. Forkosch notes that, "beginning with 1887, and especially since 1933, the Congress has used the Clause as the base upon which to build a federal empire of regulations, controls, and mandates."[66] Before this time, the Commerce Clause had been used only to overturn the states' efforts to enter the interstate area.[67] Thus, the Commerce Clause has been used to support federal action primarily during that time frame when the tax power immunity was being restricted. That this new use of the commerce power should be burdened with extensive immunity given to the states would be inconsistent with the leaning away from that immunity in the tax cases.

Notwithstanding the strong precedent opposing Rehnquist's sovereign immunity argument, Brennan also felt compelled to answer the immunity claim on the basis of the FLSA Amendments themselves. He stated that the 1974 Amendments had not "displaced State policies" as Rehnquist had contended, for the amendments neither imposed policy objectives on the states nor denied the states complete freedom to fix their own objectives.[68] On its face, this argument is unclear, for the majority opinion[69] sets forth anticipated damages resulting from the application of the Act of such an extreme nature that, if accurate, would necessitate state policy alterations. However, the fiscal burdens placed upon the states by congressional action are judicially irrelevant, regardless of their enormity. In the case of *Employees v. Missouri Public Health Department,*[70] where state immunity from suit against employees of its nonprofit organizations who were charging violation of the FLSA was upheld, Justice Douglas noted that "when Congress does act, it may place new or even enormous fiscal burdens on the states."[71]

How a federal regulation may compel a change in state *policy* is illustrated by *District of Columbia v. Train.*[72] In *Train,* the federal government had sought through the Clean Air Act Amendments of 1970 to prohibit states from registering or allowing to operate on their streets or highways

[65] 96 S. Ct. at 2484. *See also* South Carolina v. United States, 199 U.S. 437, 454-55 (1905), discussing a similar impact on revenue generation.

[66] M. FORKOSCH, CONSTITUTIONAL LAW, § 211 (2d ed. 1969).

[67] *Id.*

[68] 96 S. Ct. at 2484.

[69] *Id.* at 2471-72.

[70] 411 U.S. 279 (1973).

[71] *Id.* at 284.

[72] 521 F.2d 971 (D.C. Cir. 1975), *cert. granted,* 96 S. Ct. 2224 (1976).

any vehicles not properly equipped with emission control equipment. These amendments were upheld, the Court stating that the regulation was "directly related to existing activities presently being carried on by the states, and it does not specify the manner in which the state is to comply."[73] Similar logic is applicable to the FLSA amendments questioned in *Usery*. However, other Clean Air Act Amendments involved in *Train,* those requiring the states to enact laws establishing retrofit programs (programs for the installation of emission control equipment) were ruled unconstitutional because Congress had sought "under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation."[74] If under the FLSA Congress had attempted to require the states to establish programs in the same way it had in *Train,* a stronger argument could be made for sovereignty limitations than that posed by Rehnquist. But since Congress has not made suggestions for new programs or policy choices, but only prohibited substandard employment conditions, the states still possess the freedom to fix their own objectives and methods for effecting those objectives, thus retaining the "ability to function effectively in a federal system."[75]

III. SUPREME COURT TEST OF CONSTITUTIONALITY

It is next necessary to analyze the test which, prior to *Usery,* had been used by the Supreme Court in analyzing Congress' exercises of power pursuant to the Commerce Clause, for it is only by doing so that Brennan's contention that the Court in *Usery* has reverted to no real test at all comes to full view. The guiding principle for congressional action, as set forth by Chief Justice John Marshall in *McCulloch v. Maryland,*[76] was:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional.[77]

There are two factors to the analysis: first, that the end be within the scope of the Constitution and, secondly, that the means be appropriate. Whether the end was within the scope of the commerce power as amplified by the Necessary and Proper Clause was tested by two means constructed by the Court.[78] The now obsolete "direct" and "indirect" distinction arose,

[73] *Id.* at 991.

[74] *Id.* at 992.

[75] United States v. Darby, 312 U.S. 100, 124 (1941).

[76] 17 U.S. (4 Wheat.) 415 (1819).

[77] *Id.* at 421.

[78] The Necessary and Proper Clause, U.S. CONST., Art. I, § 8, cl. 18, provides that Congress shall have power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers resting by this Constitution in the Government of the United States, or in any Department or Officer thereof.

providing that only activities with "direct" effects on interstate commerce were within the commerce power,[79] and the broader test of "substantial economic effect" on interstate commerce followed.[80] One cannot find cases during the last thirty-five years in which a "substantial" relationship has not been found, but as noted above, the *Wirtz* case reaffirmed the point that a relatively trivial impact would not be sufficient to justify broad general regulation.[81] Such seemingly outright acquiesence in the acts of Congress led Wechsler to question

> Whether there are any neutral principles that might have been employed to mark the limits of the commerce power of the Congress in terms more circumscribed than the virtual abandonment of limits in the principle that has prevailed.[82]

The second facet to be considered is whether the legislative means are appropriate. Since 1922 and the case of *Stafford v. Wallace,*[83] the Court has recognized a "rational basis" test for congressional action. In *Stafford,* a stockyard company incorporated by the State of Illinois challenged the constitutionality of the Packers and Stockyards Act of 1921 insofar as that Act provided for supervision by the federal government over business conducted by commission men and live stock dealers throughout the country. Finding that Congress had amply studied the restraint on interstate commerce caused by price-fixing in the stockyards industry, the Court concluded, "This court will certainly not substitute its judgment for that of Congress in such a matter unless relation of the subject to interstate commerce and its effect upon it are clearly nonexistent."[84]

The "rational basis" has been found where the full range of the

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[79] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[80] Wickard v. Filburn, 317 U.S. 111, 122-23 (1942) announced that the "direct"-"indirect" test was a fiction of the past; NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, (1937), regarded the issue as one of degree rather than category.

[81] 392 U.S. at 197, n. 27. *See also* Perez v. United States, 402 U.S. 146, 157 (1976) (Stewart, J., dissenting).

[82] Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 23-24 (1959). *See* FORKOSCH, *supra* note 66, § 211, where it was noted:

> To a degree, even Congress has recoiled from the ultimacy of its power, and has legislatively limited statutes judicially upheld, or has accepted judicial constructions which did not permit extreme power where not specifically authorized, assuming existence.

[83] 258 U.S. 495 (1922).

[84] *Id.* at 521. The Court noted that for two decades the "Big Five" packing establishments (which did not include Stafford Brothers) had engaged in violation of the Anti-Trust Law, and in 1917 the President ordered the Federal Trade Commission to investigate. The Commission concluded:

> The "Big Five" packing firms had complete control of the trade from the producer to the consumer, had eliminated competition, and that one of the essential means by which this was made possible was their ownership of a controlling part of the stock in the stockyard companies of the country. *Id.* at 500.

wheat industry was being regulated;[85] where discrimination by restaurants, if left unchecked, could have a substantial effect on commerce;[86] and where extortionate credit transactions, viewed as a class, were seen to affect interstate commerce, including interstate crime.[87] In most recent cases involving the commerce power, the "rational basis" test has been met.

Although the tenth amendment has been relegated to the position of a "truism" in regard to exercises of the commerce power, its significance for the "rational basis" test deserves more than passing mention. The fact that the amendment's purpose was to "allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise in full their reserved powers" justifies insisting that some care be taken by the courts to assure the congressional finding of a "rational basis" required to support the commerce power exercise in a particular instance has been made.[88] Therefore, in commerce cases involving congressional authority to act, the Supreme Court has been careful in assuring, even if not specifically stated in the act, that Congress has found a relationship between the particular act and the commerce power granted.[89] This practice is sharply distinguishable from those cases where the Court has been engaged in examining state legislation with respect to the Equal Protection Clause, since it has in those cases engaged in sheer speculation to determine whether the state legislature had conceived of the relationship between a law and the legitimate state interest.[90]

Even in commerce cases, however, except for finding a "rational basis" for the legislation, the Court has decried the policy of weighing the dangers which prompted congressional action and substituting its determination for

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[85] Wickard v. Filburn, 317 U.S. 111 (1942).

[86] Katzenbach v. McClung, 379 U.S. 294 (1964).

[87] Perez v. United States, 402 U.S. 146 (1971).

[88] United States v. Darby, 312 U.S. 100, 124 (1941).

[89] *See, e.g.*, Chicago Board of Trade v. Olsen, 262 U.S. 1, 17 (1923) (In determining whether the Grain Futures Act of 1922 was unconstitutional because the obstacle or burden to interstate commerce sought to be alleviated did not exist, the Court stated, "When the existence of constitutional power depends on a certain fact or condition, this Court must for itself determine whether that fact or condition really exists".); Hill v. Wallace, 259 U.S. 44, 68 (1922) ("A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind . . . ."). *See* Stafford v. Wallace, note 83 and accompanying text *supra*.

[90] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 426-27 (1961) ("The record is barren of any indication that this apparently reasonable basis [for exceptions to the Maryland Sunday Closing Laws] does not exist."); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) ("The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem" [as do advertising vehicles]).

that of Congress.[91] In the recent case of *United States v. Bass,*[92] treating the relationship of Section 1202(a)1 of the Omnibus Crime Control and Safe Streets Act to interstate commerce, the Court imposed a new limitation upon probative facts which could be used to satisfy the "rational basis" test. The Court in that case noted that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[93]

Rehnquist focused neither on the "rational basis" test nor the effect the tenth amendment has had on that test since *Stafford.* On the contrary, he argued that the appellants were not challenging the authorities establishing the breadth of authority under the Commerce Clause, but that "when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations . . . ."[94] The other limitations referred to are represented by the cited cases of *United States v. Jackson*[95] and *Leary v. United States*[96], involving fifth (due process) and sixth (trial by jury) amendment limitations on exercise of the commerce power. Each case involved an individual seeking to uphold his constitutionally granted rights on the basis of the Bill of Rights. In *Jackson,* the Court declared unconstitutional one part of the Federal Kidnapping Act because it made "the risk of death" the price one would pay in requesting a trial by jury, since only with a jury finding could a defendant be executed. In *Leary,* the Court held that the statutory presumption resting in the Marihuana Tax Act that a possessor of marijuana was deemed to know of its unlawful importation denied petitioner due process of law under the fifth amendment.

Justice Rehnquist, as indicated more clearly in his *Fry* dissenting opinion, was seeking to place the state claiming violation of right under the tenth amendment on the same basis as an individual claiming violation under the fifth or sixth amendments.[97] Such a view is tenuous at best for two reasons.

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[91] Stafford v. Wallace, 258 U.S. 495, 521 (1922). *See* Maryland v. Wirtz, 392 U.S. 183, 190 n.13, (1968), where the Court said, "We are not concerned with the manner in which Congress reached its factual conclusions."

[92] 404 U.S. 336 (1971).

[93] *Id.* at 349. The fact that the Court required a rational nexus to interstate commerce be proven in the case of all three offenses set forth in the Act, "possession", "receipt", or "transportation" of firearms, is not the result of a desire to provide stricter scrutiny in "rational basis" analyses, but follows from the ambiguity of the statutory language itself. *See* 404 U.S. at 339.

[94] 96 S. Ct. at 2469.

[95] 390 U.S. 570 (1968).

[96] 395 U.S. 6 (1969).

[97] 421 U.S. at 553 (Rehnquist, J., dissenting).

First, it has already been noted that the tenth amendment has not been capable, at least in this century, of providing absolute immunity to states while engaged in "private" activities.[98] However, the application of the fifth and sixth amendments has not been so limited by the function in which the individual claiming their protection has engaged. Secondly, the rule laid down by the courts in both the tax cases[99] and the commerce cases[100] has been that a state engaging in economic activities that are validly regulated when private persons engage in them renders the state amenable to the regulation. This rule places the state and the individual on a closer parallel than Rehnquist's view, because if the individual can challenge an allegedly valid regulation of commerce successfully, so too may a state.

But there was a deeper problem with the type of "state interest" analysis engaged in by Rehnquist when examining the protection afforded by the tenth amendment. This is the problem indicated by the Brennan dissent, and suggested by the Blackmun concurring opinion that the Court "adopts a balancing approach."[101] The Court sacrificed its judicial role and adopted a legislative function, as borne out by the legislative history of the 1974 Amendments to the FLSA. Although an initial veto of the amendments was sustained because they had interfered with state prerogatives, the President later signed the amendments after Congress had moderated its position, noting that, "Congress has reduced some of the economic and social disruptions this extension could cause by recognizing the unique requirements of police, fire, and correctional services."[102] Clearly, Congress was forced to recognize and take account of the burden it was imposing upon the states. For the Court to proceed in the same sort of investigation that Congress has undertaken, to examine the degree of displacement of state power, the cost to the state in compliance, and whether there was any factual predicate for the legislation, adopts a balancing that should go on in Congress. In *Usery*, Rehnquist denied reliance upon these factors,[103] yet a test involving the question whether "Congres has sought to wield its power in a fashion that would impair the states' 'abilities to function effectively [with] in a federal system' " is an empty test unless based on such an analysis.[104]

Nor would this be the first time a nonjudicial role had been adopted by the judiciary, although it is the first time it has been adopted in the context of

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[98] *See* notes 59-64, and accompanying text *supra*.

[99] *See, e.g.*, New York v. United States, 326 U.S. 572 (1946); South Carolina v. United States, 199 U.S. 437 (1905).

[100] *E.g.*, Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968).

[101] 96 S. Ct. at 2476.

[102] 10 WEEKLY COMP. OF PRES. DOCS. 392 (1974).

[103] 96 S. Ct. at 2471.

[104] *Id.* at 2474.

congressional legislation under the Commerce Clause. When the Court was using the Commerce Clause to limit state action infringing on interstate commerce, the two cases of *Southern Pacific Co. v. Arizona*[105] and *Dean Milk Co. v. City of Madison*[106] point to the fact that the Court was involved in a balancing between the burden on commerce relative to the state's benefit.[107] In *Southern Pacific,* the Court observed that it had full power to decide

> The nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make applicable the rule, generally observed, that the free flow of commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.[108]

Then the Court proceeded to weigh the relevant factors causing conflict among states and reached a determination that the Arizona law interfered with interstate commerce. In *Dean Milk Co.,* Justice Clark stated that since "reasonable and adequate alternatives are available", which he proceeded to denote, the City of Madison had adopted "a regulation not essential for the protection of local health interests."[109]

In each case, the opinion of the Court was followed by a vigorous dissent by Justice Black. In *Southern Pacific,* Black said:

> If under today's ruling a court does make findings, as to a danger contrary to the findings of the legislature, and the evidence heard "lends support" to these findings, a court can then invalidate the law. In this respect, the Arizona County Court acted, and this Court today is acting, as a "super-legislature".[110]

In *Dean Milk Co.,* Black countered the opinion of the Court not only with the contention that a health law had never previously been struck down on the ground that some other method of safeguarding health would be as good as the one the Court was called upon to review, but with the argument that if the Court were going to propose legislation, it should at least have hearings on its proposals.[111] In such a manner, Justice Black sought to narrow the role

[105] 325 U.S. 761 (1945).

[106] 340 U.S. 349 (1951).

[107] *See also* Burns Baking Co. v. Bryan, 264 U.S. 504 (1924).

[108] 325 U.S. at 770-71.

[109] 340 U.S. at 354-56.

[110] 325 U.S. at 788 (Black, J., dissenting). The problem recognized by Black was that the type of balancing advocated by the Court necessitated study of all the evidence offered as to why the legislature passed the law, the Court sitting as a final body of review as to the validity of those reasons.

[111] 340 U.S. at 358-60.

of the Court in overruling legislation on a "legislative" rather than a judicial basis. The final fruition of Black's view was stated in *Fireman v. Chicago R.I. & P.R. Co.*,[112] where Black, speaking for the Court, said that in looking to the financial burden of compliance with the law in question and the added burden to the railroad, "the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause."[113]

The entrance into the domain of state interest in *Usery* might be thought necessary if Congress itself had not weighed the conflicting considerations adequately. The possibility is at least partially overcome by the fact that Congress itself stated its findings in Section 202(a) of the amended FLSA.[114] There is, thus, a probative fact upon which the Court could base a decision that Congress had found a rational basis between its legislation and the protection of interstate commerce. Viewing this fact and confirming that there was a "rational basis" for the legislation should end the analysis, and Brennan fully recognizes this fact.[115] Nevertheless, Rehnquist states a rule necessarily requiring the Court to adopt precisely those functions denounced by Justice Black if it is to be other than nonsense.

IV. LIMITS ON THE COMMERCE POWER

Although Rehnquist's argument flies in the face of the logic in inescapable precedent, it is not without its own justification. At one time, the Commerce Clause was viewed as having one steadfast limitation, but that has all but disappeared. Chief Justice Marshall noted that the Commerce Clause did not "comprehend that commerce which is completely internal, which is carried on between man and man in a State, . . . and which does not extend to or affect other States . . .".[116] It has been contended, however, that because of the decision in *Wickard v. Filburn* it is difficult to discern a meaningful limit to the power.[117] Indeed, Justice Murphy, delivering the opinion of the Court in *North American Co. v. SEC*[118] four years later, said that "nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality."[119] Such decisions have given rise to the feeling that the only com-

[112] 393 U.S. 129 (1968). In *Fireman*, a group of interstate railroads operating in Arkansas challenged the Arkansas "full crew" laws, which required minimum train crews for interstate rail operations, as unconstitutional, because they exempted intrastate railroads from their requirements.

[113] *Id.* at 136.

[114] *See* note 7 and accompanying text *supra.*

[115] *See* note 40 and accompanying text *supra.*

[116] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 7 (1824).

[117] Light, *supra* note 2, at 728.

[118] 327 U.S. 686 (1946).

[119] *Id.* at 711. *See* American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946).

merce questions left to be decided by the Court are those involving statutory interpretation.[120] Rehnquist's opinion may then be viewed as a conscious and justifiable, even if unstructured, backstep from a line of judicial precedent granting Congress too much discretion in the exercise of commerce power.

More to the point, it has been recognized that "a consistent trend of unrelenting expansion of [the FLSA] protection to employees, heretofore without embrace is clearly discernible."[121] Even more importantly, much of the advancing augmentation of the Act's outward reach is not being fostered by Congressional amendment, but by the judiciary.[122] Indeed, the Court in *Kirschbaum Co. v. Walling*[123] noted:

> Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations.[124]

Thus, expansion of the Act's coverage is not difficult, and no less inviting because the states have failed in their moral responsibility to the laboring classes.[125] If it is true that the Supreme Court now carries the burden of protecting the states from creeping nationalism and the destruction of the concept of federalism, as exhibited by expanding federal coverage of lake shipping, railroads, airplanes, broadcasting, and other areas, then is it also true that the Supreme Court must take a more active role in what it perceives to be a diminishing recognition of state interests?[126] It would seem that by limiting Congress' power by an examination of state interests, the Court would be, as it is in *Usery*, passing on the wisdom of the legislature while clothing the decision with the formalities of constitutional construction.

Actions of Congress which pierce the sphere of state action are not without restriction, for Brennan himself argues that the control of Congress

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[120] Light, *supra* note 2, at 728.

[121] Willis, *supra* note 5, at 632.

[122] *Id.* at 633.

[123] 316 U.S. 517 (1942).

[124] *Id.* at 523.

[125] Willis, *supra* note 5, at 634, stating:

> The most ideal avenue for elimination of such confusion and achievement of FLSA protection lies within the legislatures of the states. Unfortunately, it seems the states have developed the habit of shirking their responsibilities of social legislation, leaving the task to the overburdened federal government.

See also Comment, *Colorado Wage and Hour Law: Analysis and Some Suggestions*, 36 U. COLO. L. REV. 223 (1964).

[126] *See* M. FORKOSCH, *supra* note 66. *But 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, 559 (1954).

is vested in the people who have the power to elect their representatives.[127] The weakness in the contention that this control is sufficient for protection of state sovereignty, however, is that it fails to recognize that elected Congressmen may perceive a greater benefit to the public good from federal control than from state sovereignty. Thus, the limitation, at best, seems insubstantial in this regard. Wechsler would disagree, for he believes that, "Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration."[128] He finds that despite the rise of national parties and the shift to popular election of the Senate, the Madisonian analysis of the state government as a constituent and essential part of the federal government still prevails.[129]

Yet, Wechsler's contention suffers from the same weakness of equivocation Brennan's suffers from: Decisions by representatives of the people are *not* necessarily decisions of the states themselves. Rehnquist himself points to the obvious distincting in his criticism of the dissenting opinion in *Usery,* stating that Brennan's contention that "Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves",[130] follows from unclear reasoning, since members of the House are *elected* from the states and, since adoption of the seventeenth amendment, Senators are not dependent upon the state legislatures for their appointment.[131]

Wechsler, however, views the election of Congressmen at the local level as supplemented by other inherent tendencies of Congress to limit itself in its own exercise of power. Wechsler notes that "Even when Congress acts, its tendency has been to frame enactments on an ad hoc basis to accomplish limited objectives, supplanting state-created norms only so far as may be necessary for the purpose."[132] There are two reasons for this self-limitation: (1) Control may be imposed where the local majority finds control unnecessary, and (2) Congress may attenuate control in areas where it is really needed. Yet, in the five years between setting forth this belief and his discussion on neutral principles of constitutional law, Wechsler found an additional factor, the Supreme Court, to be an integral factor in the control,

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[127] 96 S. Ct. at 2477.

[128] Wechsler, *supra* note 126, at 558.

[129] *Id.* at 546.

[130] 96 S. Ct. at 2486.

[131] *Id.* at 2469 n.12.

[132] Wechsler, *supra* note 126, at 545.

or lack of it, over the commerce power.[133] He believes that a real factor in the failure of the Court to contain national power as it did in cases like *Hammer v. Dagenhart,*[134] where the Court determined that a prohibition on interstate shipment of goods produced by child labor was invalid under the tenth amendment because its practical effect was to control production, was the inability to articulate an adequate analysis of the restrictions it imposed on Congress in favor of the states, whose representatives "broadly acquiesced" in the congressional enactments.[135] Wechsler does not conclude that a larger role by the Court would have been more proper in application of the Commerce Clause, however. At best, he suggests that judicial thought should have centered upon neutral principles better adapted to the situation than the "virtual abandonment of limits in the principle that has prevailed."[136] He does not seem to condone the type of unstructured "balancing" analysis undertaken by Rehnquist even if a larger judicial role were desired.

CONCLUSION

The more difficult question presented by *Usery* is the one not answered here: How much regulation of commerce, whether interstate or intrastate which affects interstate commerce, should be permitted under the Commerce Clause? An argument can be made from the States'-righters side and from the nationalist position, each side having equal justification for its view.[137] But the answer involves a series of value judgments. A second question presented by *Usery* is whether the Supreme Court should adopt the function of an arbiter between national and state powers to prevent infringement of one tier upon another's rights and the concurrent destruction of federalism. In the face of precedent and the ideal of separation of powers, it is wholly inappropriate for the Court to place itself in the shoes of the legislature to determine the wisdom of certain laws beyond a mere "rational basis" and a criticism of the *Usery* opinion standing on this ground will find only fault in Justice Rehnquist's opinion. Whether a justification of that opinion upon the historical ground of an ever-expanding national power under the Commerce Clause will rise above the criticism of Rehnquist's opinion on judicial grounds depends upon the answer to the first, and more difficult, question.

But perhaps the most detrimental aspect of the *Usery* opinion is its escape from the judicial test that interstate commerce must be "affected" and that there must be a "rational basis" for congressional regulation of commerce. Left to itself, Rehnquist's opinion in *Usery* says nothing about

[133] Wechsler, *supra* note 82.

[134] 247 U.S. 251 (1918), *overruled in* United States v. Darby, 312 U.S. 100, 115-116 (1941).

[135] Wechsler, *supra* note 82, at 23.

[136] *Id.* at 24.

[137] J. BURNS, J. PELTASON, & T. CRONIN, GOVERNMENT BY THE PEOPLE 91 (9th ed. 1975).

the next case to come before the Court, outside of the fact that congressional power cannot interfere with functions essential to state sovereignty. What test shall be used in making the determination of functions essential for this purpose is not clear. Reliance on cost of compliance to make the determination is, of course, denied, but no guidelines are set out to replace the rejected formula.

Moreover, even if valid judicial guidelines were provided, the detriment to the judicial process over the last thirty years, and perhaps to the next thirty as well, may be substantial. Consistency in application of principle is at least as important as principled decisions themselves, for one aspect of the problem no less than the other may lead to arbitrariness, genuine or imagined. Consistency has been upset by the opinion in *Usery,* as suggested by Professor David Bogen:

> For almost thirty years, the Court has recognized that 'even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.' For thirty years the court has stated that if Congress has power under the commerce clause, its power is not limited by the Tenth Amendment.[138]

Yet, the question remains whether the Court will continue to assert the sort of ad hoc balancing of interests approach employed in *Usery* rather than continue in its apparently non-restrictive, but principled, approach consistently accepted in cases like *Wirtz.* At the least, *Usery* and its aftermath will require the Court to make a closer examination of its own perceived functions in the area of congressional exercises of power under the Commerce Clause.

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[138] Bogen, *supra* note 48, at 188.