

**NATIONAL LEAGUE OF CITIES v. USERY:
STATE SOVEREIGNTY AS A LIMITATION
ON FEDERAL POWERS**

The Fair Labor Standards Act of 1938 required employers engaged in interstate commerce to pay employees a minimum wage and a premium for working more than forty hours per week.¹ States and their political subdivisions were exempt from the requirements of the FLSA,² which was held constitutional in *United States v. Darby*.³ In 1966, Congress extended coverage under the FLSA to employees of state schools and hospitals.⁴ The 1966 amendments were held constitutional in *Maryland v. Wirtz*,⁵ in which the Supreme Court said that the federal government may override state interests when exercising a delegated power.⁶ In 1974, Congress again amended the FLSA and extended minimum wage and overtime regulations to nearly all state, county, and city employees.⁷ Various states and cities, seeking declaratory and injunctive relief, brought an action in federal district court to prevent the application of the 1974 amendments.⁸ A three-judge court,⁹ on the basis of *Wirtz*, reluctantly dismissed the complaint for failure to state a claim upon which relief could be granted.¹⁰

1. Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. § 202-16 (1970)).

2. FLSA § 3(d).

3. 312 U.S. 100, 125-26 (1941).

4. 29 U.S.C. § 203(d)(1) (1970).

5. 392 U.S. 183, 187-88 (1968).

6. *Id.* at 195.

7. The expansion was accomplished by adding the words "public agency" to the definition of employer and by including "any individual employed by a State, political subdivision of a State, or an interstate governmental agency" among employees. There are some exceptions in coverage which involve principally elected officials and their appointees. 29 U.S.C. § 203(d), (e)(2)(C) (1970 & Supp. IV 1974).

8. *National League of Cities v. Brennan*, 406 F. Supp. 826 (D.D.C. 1974).

9. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.
28 U.S.C. § 2282 (1970).

10. They [plaintiffs] contend that the amendments here will intrude upon the state's performance of essential governmental functions far more than did those reviewed in *Wirtz*, although here, as there, the federal requirements are nominally limited to wage and

The Supreme Court reversed and remanded in *National League of Cities v. Usery*,¹¹ overruling *Wirtz*¹² and striking down the 1974 amendments.¹³

In deciding *Usery*, the Court recognized state sovereignty as an affirmative constitutional limitation on Congress' authority to exercise the commerce power.¹⁴ At first glance, such a limitation seems to represent a radical shift in the philosophy of the Court with regard to the extent of federal powers.¹⁵ Closer analysis shows that the independent functioning of state governments has been a serious issue to the Supreme Court. The Court has usually held that federal legislation would not be invalidated by state sovereignty claims. The Court has generally intimated, however, that there exists a point beyond which federal powers would not be allowed to encroach upon state powers.¹⁶ *Usery*, with its affirmation of state sovereignty, represents that point.

More importantly, *Usery* clarifies the parameters of the state sovereignty issue. If one accepts the Court's assertion that previous decisions denying state sovereignty have not been overruled,¹⁷ then reconciling *Usery* with those decisions leads to a more coherent understanding of the extent of federal powers in relation to state powers than has been possible prior to *Usery*. This comment attempts such a reconciliation.

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Justice Rehnquist, writing for the Court,¹⁸ stated that the commerce power,¹⁹ though otherwise plenary, may be limited

hour regulations. We are troubled by these contentions, and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands.

National League of Cities v. Brennan, 406 F. Supp. 826, 888 (D.D.C. 1974).

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

12. *Id.* at 855.

13. *Id.* at 852.

14. *Id.*

15. *Id.* at 860-61 (Brennan, J., dissenting).

16. *See, e.g.*, text at notes 99 and 114 *infra*.

17. *Usery* at 854-55 n.18.

18. Joining Justice Rehnquist in the Court's opinion were Chief Justice Burger, and Justices Stewart and Powell.

19. State activities, even if completely intrastate, fall within the definition of commerce because they affect commerce. At one time, Ohio was held not liable to the United States for penalties under the Agricultural Adjustment Act of 1938 for growing wheat on state-owned farms in excess of federally imposed acreage allotments, even though none of the wheat

where its exercise conflicts with other constitutional requirements.²⁰ Exercises of the commerce power which are valid when applied to individuals and corporations may not be valid when applied to states.²¹ A state is not "merely a factor in the 'shifting economic arrangements' of the private sector of the economy,"²² because states have an essential role in the federal system of government.²³ Due to that role, congressional acts which impair the independent functioning of integral state government operations are forbidden by the Constitution.²⁴

The Court decided that the application of the 1974 amendments would endanger the independent functioning of state governments²⁵ in that it would interfere with employer-employee relationships in such traditional state government areas as fire prevention, police protection, sanitation, public health, and parks and recreation.²⁶ Imposing minimum wage requirements on state governments could force them to choose between raising additional revenues or cutting back on essential state government programs.²⁷ While a minimum wage policy might be desirable if adopted voluntarily by the states,²⁸ the Court concluded that there would be little left of the states' "separate and independent existence"²⁹ if they could not make fundamental employment decisions in performing essential governmental functions.³⁰

The Court then discussed two cases in order to clarify the holding of *Usery*.³¹ It overruled *Wirtz*, which had upheld minimum wage requirements for hospital and school employees,³² and it distinguished *Fry v. United States*,³³ a case involving the consti-

so produced entered or could have entered interstate or foreign commerce. *United States v. Ohio*, 354 F.2d 549, 557 (6th Cir. 1965), *rev'd per curiam*, 385 U.S. 9 (1966). As basis for its reversal, the Court cited *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942). See: *Recent Developments—Constitutional Law*, 66 Mich. L. Rev. 750, 758-59 n.37 (1968).

20. *Usery* at 841, citing *Leary v. United States*, 395 U.S. 6, 12 (1969) (fifth amendment, due process clause); *United States v. Jackson*, 390 U.S. 570, 582-83 (1968) (sixth amendment, right to trial by jury).

21. *Usery* at 854-55.

22. *Id.* at 849 (citation omitted).

23. *Id.*

24. *Id.* at 851-52.

25. *Id.* at 851.

26. *Id.*

27. *Id.* at 848.

28. *Id.* at 848.

29. *Coyle v. Smith*, 221 U.S. 559, 580 (1911).

30. *Usery* at 851.

31. *Id.* at 852.

32. *Id.* at 855.

33. 421 U.S. 542 (1975) [hereinafter cited as *Fry*].

tutionality of wage freezes as applied to state employees.³⁴

Although the Court overruled *Wirtz*, it said that there were "obvious differences" between the regulation of schools and hospitals considered in *Wirtz* and the regulation of fire and police departments.³⁵ However, it did not indicate what the differences were. The reasons given for overruling *Wirtz* were, first, that *Wirtz* was based on the premise, rejected in *Usery*, that states stand on the same footing as individuals under the commerce clause;³⁶ and second, that schools and hospitals are traditional governmental functions.³⁷ The Court did not explain which, if either, of these considerations weighed most heavily in its decision.

Although *Fry* also involved federal control over state employees' salaries, the crucial difference between *Usery* and *Fry* was that the federally imposed wage freeze challenged in *Fry* was developed in response to a national emergency requiring collective action for its resolution.³⁸ The Court noted that the wage freeze law was carefully limited in time and that it froze rather than restructured existing state policy.³⁹ This kind of interference with state fiscal policies was justifiable in a national emergency.⁴⁰ "The limits imposed upon the Commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency."⁴¹

Justice Blackmun concurred in the Court's opinion.⁴² Though troubled by some possible implications of the opinion, he said:

In my view, the result with respect to the statute under challenge here is necessarily correct. I may misinterpret the Court's opinion, but it seems to me that it adopts a *balancing approach*, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. . . . With this understanding on my part of the Court's opinion, I join it.⁴³

34. *Usery* at 853. Several other cases, all involving federal control over state activities, were listed and noted as "consistent with" or "unimpaired by" *Usery*. *Usery* at 854-55 n.18.

35. *Id.*

36. *Id.* at 854.

37. *Id.* at 855.

38. *Id.* at 853.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 856.

43. *Id.* (emphasis added).

Justice Brennan, who wrote one of two dissenting opinions,⁴⁴ accused the majority of ignoring an interpretation of the commerce power which has been established for 152 years, since Chief Justice Marshall wrote the opinion in *Gibbons v. Ogden*.⁴⁵ Justice Brennan claimed that the Court usurped the role of the political process⁴⁶ and dealt "a catastrophic judicial body blow at Congress' power under the Commerce Clause."⁴⁷ While conceding that Congress may accomplish the ends of the amendments indirectly,⁴⁸ Justice Brennan nevertheless found "an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision."⁴⁹

The Brennan dissent recognized restraints upon the power of Congress to regulate commerce which are explicitly prescribed by the Constitution,⁵⁰ but "explicitly rejected" state sovereignty as a limitation upon the commerce power.⁵¹ This rejection was based on several factors. First, the power to regulate commerce was removed from the states to the extent that it was granted to the federal government, necessarily limiting the power of the states to interfere with congressional exercise of the commerce power.⁵² Second, as the members of Congress are elected from the states, the states' interests are not likely to be disregarded by Congress.⁵³

44. Justices White and Marshall joined Justice Brennan's dissent. Justice Stevens filed a separate dissenting opinion.

45. 21 U.S. (9 Wheat.) 1 (1824). *Usery* at 857. The dissent stated that the only line of cases found to support the Court's interpretation of the commerce power was the series of "overly restrictive" decisions which "ultimately provoked a constitutional crisis for the Court." *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); and *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by United States v. Darby*, 312 U.S. 100, 116-17 (1941). *Usery* at 867-68.

46. *Usery* at 858.

47. *Id.* at 880.

48. *Id.* citing *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 144 (1947).

49. *Usery* at 880.

50. *Id.* at 858. See, e.g., note 20 *supra*.

51. *Id.*

52. *Id.* at 859, citing *United States v. California*, 297 U.S. 175, 184 (1936). The federal regulation of a state-owned railroad was upheld in this case, and Justice Stone stated, "The state can no more deny the [commerce] power if its exercise has been authorized by Congress than can an individual." 297 U.S. at 185. The *Usery* Court approved the holding, *Usery* at 854-55 n.18, but rejected the statement as dicta and "simply wrong," *Usery* at 854-55.

53. *Usery* at 876-78. The majority agreed that the states are represented in Congress but stated that even if this could be construed as consent by the states to the passage of a bill, such "consent" would not bar Supreme Court review of the constitutionality of that bill. *Usery* at 841-42 n. 12.

Finally, there is some danger that the states might extend their activities and assert immunity from congressional control in new areas.⁵⁴

In a separate dissenting opinion,⁵⁵ Justice Stevens stated that he thought the minimum wage policy unwise but could not allow this to affect his judgment with respect to its validity.⁵⁶ As those adversely affected by the legislation are not without political power, he thought any pressing problems would probably soon be solved by "appropriate tailor-made regulations."⁵⁷ He concluded, "Since I am unable to identify a limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid."⁵⁸

THE CONSTITUTIONAL BASIS OF STATE SOVEREIGNTY

Congress may exercise only those powers enumerated in the Constitution or necessary to implement an enumerated power.⁵⁹ Congress may also use any means reasonably adapted to the ends in the exercise of an enumerated power.⁶⁰ However, other parts of the Constitution may limit the exercise of an otherwise legitimate power.⁶¹ In *Usery*, the Court determined that a constitutional requirement of state sovereignty may limit the commerce power granted to Congress.⁶²

The Court relied partially upon the tenth amendment as a constitutional basis for that conclusion.⁶³ This is a deviation from precedent, since the tenth amendment has generally been accepted to mean only that Congress should have no powers except those granted to it. *United States v. Darby* contains the classic statement of this position:

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the

54. *Id.* at 872.

55. *Id.* at 880-81.

56. *Id.* at 881.

57. *Id.*

58. *Id.*

59. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-413 (1819).

60. *Id.* at 421.

61. *See, e.g.*, note 20 *supra* and accompanying text.

62. *Usery* at 852.

63. *Id.* at 842-43. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than 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 fully their reserved powers. . . . From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.⁶⁴

By this interpretation, the tenth amendment places no limitations on the powers which have been granted to Congress, and a challenge to congressional exercise of the commerce power, if based solely upon the tenth amendment, should fail.⁶⁵

However, the *Usery* Court, quoting from a footnote in *Fry*, stated that "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. . . ."⁶⁶ Justice Douglas had also attributed this meaning to the tenth amendment in his dissent in *Wirtz*.⁶⁷ There are few clues as to the origin of this reading of the tenth amendment.

One commentator,⁶⁸ writing shortly after *Darby* was decided, said that this interpretation of the tenth amendment with regard to the commerce power⁶⁹ was first enunciated in *Hammer v. Dagenhart*,⁷⁰ and was expanded in a series of cases decided in the

64. *United States v. Darby*, 312 U.S. 100, 124 (1941) (citations omitted) [hereinafter cited as *Darby*]; see also *United States v. Sprague*, 282 U.S. 716, 733-34 (1931). Had the tenth amendment never become a part of the Constitution, the Court might have found the limitations expressed in it inherent in the nature of constitutional government. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324-25 (1816).

65. *Darby* at 124.

66. *Usery* at 842-43 (quoting *Fry* at 547 n.7).

67. *Wirtz* at 201.

68. A. Feller, *The Tenth Amendment Retires*, 27 A.B.A.J. 223 (1941).

69. The beginnings of this interpretation with regard to the taxing power existed in *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124-28 (1870). 27 A.B.A.J. at 225.

70. 247 U.S. 251, 275 (1918). See 27 A.B.A.J., *supra* note 68, at 225. The change was accomplished by reading the word "expressly" into the amendment. *Id.* at 225-26. Thus, the tenth amendment language, "The powers not delegated . . . are reserved . . ." became "The powers not expressly delegated . . . are reserved." *Hammer v. Dagenhart*, 247 U.S. at 275 (emphasis added). Such an addition is significant only in light of Chief Justice Marshall's comment that the word "expressly" had been

1930's.⁷¹ He stated that *Darby* overruled *Hammer v. Dagenhart* specifically because of the view of the tenth amendment expressed in *Hammer v. Dagenhart*.⁷² This interpretation is supported by the probability that the forceful "but a truism"⁷³ statement in *Darby* was a reaction to an existing interpretation of the tenth amendment. It is weakened by the fact that some of the cases he discusses do not explicitly refer to the tenth amendment.⁷⁴ At any rate, until *Fry* and *Usery*, the *Darby* view seems to have been challenged only by Justice Douglas' dissent in *Wirtz*.

Such a shift in interpretation, unaccompanied by reasoning or explanation, would be more startling if there were not already a well-established Supreme Court policy favoring state sovereignty. The traditional doctrine, which was cited by the Court in *Usery*,⁷⁵ stated that the Constitution as a whole requires state sovereignty.⁷⁶ In *Lane County v. Oregon*,⁷⁷ Chief Justice Chase stated: "In many articles of the Constitution the necessary existence of the States, and within their proper spheres, the independent authority of the

deliberately omitted from the tenth amendment, "leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). The only evident difference that the wording makes is that the addition of "expressly" would probably read implied powers of Congress out of the Constitution. Since the scope of the commerce power, rather than the existence of implied powers, was at issue in *Hammer v. Dagenhart* and since the delegation of implied powers, if read out, was soon read back in to the tenth amendment, *United States v. Butler*, 297 U.S. 1, 68 (1936), the issue of the word "expressly" does not seem especially significant.

71. 27 A.B.A.J., *supra* note 68, at 225-27, citing and discussing *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513, 528-29 (1936); *United States v. Butler*, 297 U.S. 1, 68 (1936); and *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 335-39 (1935).

72. 27 A.B.A.J., *supra* note 68, at 226.

73. See text at note 64 *supra*.

74. *Hammer v. Dagenhart* and *Ashton v. Cameron County Water Improvement Dist. No. One* do not refer to the tenth amendment. Nevertheless the inferences drawn by Mr. Feller are not without merit.

75. *Usery* at 843-44.

76. One commentator has written: "[I]t [the tenth amendment] should not be characterized as so devoid of meaning as to leave the central government at liberty to exercise the commerce power to the exclusion of all state interests." 14 WAYNE L. REV. 627, 632 (1968). If the tenth amendment were the sole constitutional protection of state interests, this comment would be valid. However, Congress could be prevented from excluding all state interests even in the absence of the tenth amendment. See text at notes 77-81 *infra*.

77. 74 U.S. (7 Wall.) 71, 76 (1869) (States could require payment of taxes in gold or silver coin and refuse to accept United States notes. *Id.* at 77-78).

states, is distinctly recognized."⁷⁸ More recently, in *South Carolina v. United States*,⁷⁹ Justice Brewer wrote:

[T]hat which is implied is as much a part of the Constitution as that which is expressed. . . . Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government. . . .⁸⁰

Thus, the changed interpretation of the tenth amendment is not as significant as it might appear. What has happened is that an established doctrine has been tied to a specific clause of the Constitution as well as being implied by the instrument as a whole.⁸¹

THE HISTORY OF STATE SOVEREIGNTY

While the Court has enunciated the doctrine that a state may not be deprived of its ability to function in a federal system,⁸² it has not developed a clear-cut set of rules for dealing with the parameters of state sovereignty. At one time, there was an attempt to sift out essential governmental functions in determining what could not be regulated.⁸³ However, this test was rejected as unworkable,⁸⁴ and no test appeared to replace it. Since the Court has generally rejected state sovereignty arguments, the fact that a test of a valid state sovereignty argument did not emerge is not surprising. Nonetheless, the cases decided prior to *Usery*,⁸⁵ even if they largely rejected state sovereignty, did establish some basic principles which set the stage for *Usery*.

In order to understand the cases and the principles they stand for, it is helpful to sort the cases which relate to state sovereignty into two basic categories. The main issue in the first category has been the effect of commerce power legislation on conflicting state policies and laws. In a second category, the one with which this comment is primarily concerned, the issue has been whether a state government is subject to congressional regulation to the same extent as an individual or a corporation. This second category may be divided into two subcategories, depending on whether Congress

78. *Id.* at 76.

79. 199 U.S. 437, 451 (1905) (A state-owned liquor business was, nevertheless, held subject to a federal tax. *Id.* at 463).

80. *Id.* at 451.

81. *Usery* at 842-43 (quoting *Fry* at 547 n.7).

82. *Id.* at 852.

83. *Helvering v. Gerhardt*, 304 U.S. 405, 417-18 (1938).

84. *Case v. Bowles*, 327 U.S. 92, 101 (1946).

85. See text accompanying notes 86-99 *infra*.

has attempted to act directly and exclusively on state government or whether the state has been involved in an activity, such as running a railroad, which Congress has regulated generally.

In the first category of cases, federal legislation was challenged because it preempted or invalidated conflicting state policies or laws, but not because it involved direct federal control of state governments. The dispositive factor in such cases was whether the legislation was a valid regulation of commerce.⁸⁶ If it was, it could supersede conflicting state policies⁸⁷ and laws.⁸⁸ The emphatic language of *Darby*⁸⁹ suggests that mere preemption of state powers is never a valid argument against otherwise valid federal legislation of commerce.⁹⁰ The Court in *Usery* recognized this rule.⁹¹

However, the same rule does not apply in the second category when the issue is congressional control of state governments. In such cases, the Supreme Court has examined state sovereignty issues much more closely. The problem has been to maximize Congress' ability to exercise its powers while insuring the existence of state governments as meaningful entities.⁹² The rule evolved that Congress could not interfere directly with state governments or purely governmental functions, but it could regulate activities in which a state was one of many participants. The only example of the first type of case is *Coyle v. Smith*,⁹³ which arose when Con-

86. See, e.g., *United States v. Sullivan*, 332 U.S. 689, 697-98 (1948) (federal prohibition against misbranding of drugs held for retail sale did not invade powers reserved to states); *Darby* at 113-15. See also *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (tenth amendment no bar to federal enforcement of treaty to preserve migratory birds).

87. *United States v. Sullivan*, 332 U.S. 689, 697-98 (1948); *Darby* at 114.

88. *McDermott v. Wisconsin*, 228 U.S. 115, 137 (1913) (Wisconsin statute conflicting with Federal Foods and Drugs Act held invalid).

89. See text at note 64 *supra*.

90. *Darby* at 124-25.

91. Congressional power over areas of private endeavor, even when its exercise may preempt express state law determinations contrary to the result which has commended itself to collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 . . . (1964). *Usery* at 840.

92. The Court said that the ability to determine wages paid to state employees was an "undoubted attribute of state sovereignty." *Usery* at 845. However, the Court proceeded to consider whether that attribute was essential to the states' separate and independent existence. *Id.* at 845-46. Apparently, the effect of legislation on states must be direct and substantial before state sovereignty claims can prevail. See *Helvering v. Gerhardt*, 304 U.S. 405, 420 (1937).

93. 221 U.S. 559 (1911).

gress attempted to condition Oklahoma's admission to the Union on an agreement that Oklahoma not move the state capitol for several years. The condition was declared void.⁹⁴ The second type of case, where a state is involved in an activity which Congress has regulated generally, is more common, and Congress has been allowed to regulate or tax⁹⁵ state-owned railroads⁹⁶ and liquor businesses,⁹⁷ and the state sale of mineral waters.⁹⁸ In one such case, the Court said that a state had no more power to deny congressional exercise of the commerce power than did an individual.⁹⁹

Chief Justice Stone was not comfortable with the idea that any activity in which a state was involved could be regulated as long as others were also involved in the activity. In *New York v. United States*, which upheld Congress' power to tax New York's sale of mineral waters, he wrote:

[A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government

If the phrase "non-discriminatory tax" is to be taken in its long accepted meaning as referring to a tax laid on a like subject matter, without regard to the personality of the

94. *Id.* at 579-80.

95. While Justice Brennan argues that tax and commerce cases are different, many of the same arguments apply to both. *Usery* at 863-64. In his dissent in *Fry*, Justice Rehnquist wrote,

It is not apparent to me why a State's immunity from the plenary authority of the National Government to tax . . . should have been thought by the California court to be any higher on the scale of constitutional values than is a State's claim to be free from the imposition of Congress' plenary authority under the Commerce Clause. Especially is this true because the immunity from taxation has no explicit constitutional source and appears to rest solely on a concept of constitutional federalism which should likewise limit federal power under the Commerce Clause. Indeed, if history and precedent offered no guide, I would think as a matter of logic that it would be less of an encumbrance upon a State to pay a nondiscriminatory tax . . . than it would be to comply with a nondiscriminatory regulation. . . .

Fry at 553 (citations omitted).

One commentator has said:

It is true that the power of the *state* to tax differs from the power of the *state* to regulate interstate commerce in the sense that Congress could totally displace the latter but not the former. This does not mean, however, that the *national* taxing power is any less plenary than the *national* commerce power.

Percy, National League of Cities v. *Usery*: *The Tenth Amendment is Alive and Doing Well*, 51 *TULANE L. REV.* 95, 102-03 (1976).

96. *United States v. California*, 297 U.S. 175, 185-89 (1936).

97. *South Carolina v. United States*, 199 U.S. 437, 463 (1905).

98. *New York v. United States*, 326 U.S. 572, 582 (1946).

99. *United States v. California*, 297 U.S. 175, 185 (1936).

taxpayer, whether a State, a corporation or a private individual, it is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government.¹⁰⁰

In so writing, Chief Justice Stone foreshadowed *Wirtz* and *Usery*, which do not fit comfortably into either of the two categories of federal action on state governments.

WIRTZ AND USERY

In *Usery*, the Supreme Court decided, as Chief Justice Stone had suggested, that some state activities could not be regulated by Congress even by nondiscriminatory legislation.¹⁰¹ Thus, it becomes important to determine the differences between state activities which may be regulated by Congress and those which may not. *Usery* does not offer a clear test for state sovereignty, but many of the factors which the Court will consider in a state sovereignty case can be derived by comparing *Usery* to previous cases.

The *Usery* Court said that the operation of fire and police departments is a "traditional" and "essential" state activity,¹⁰² and in overruling *Wirtz*, indicated that the operation of schools and hospitals is a "traditional" state activity.¹⁰³ The failure to differentiate between traditional and essential activities supports a conclusion that no practical distinction was intended. At any rate, classification of differences among state activities in these terms has proven unsuccessful and was rejected by the Court in 1946.¹⁰⁴

Since governmental services change,¹⁰⁵ allowing state sovereignty claims to prevail only if a service is traditional might exclude some services from state sovereignty protection which logically should be included. Furthermore, the Court has often allowed federal regulation of state activities which it conceded were within

100. *New York v. United States*, 326 U.S. 572, 587 (1946) (citations omitted) (Stone, C.J., concurring. Justices Reed, Murphy, and Burton joined Chief Justice Stone in this opinion).

101. *Usery* at 852. See text at note 114 *infra*.

102. *Usery* at 845-46 (essential), 855 (traditional). The Court subsequently refers to "integral" functions which seem to be the same thing as "essential" functions. *Id.* at 852, 855.

103. *Id.* at 855.

104. *Case v. Bowles*, 327 U.S. 92, 101 (1946).

105. For example, state mental hospitals were not in general operation until 1850. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 284 n.2 (1973).

the powers reserved to the states,¹⁰⁶ which leads to the conclusion that determining whether an activity is traditional is of little value in predicting the outcome of cases. Characterizing an activity as essential to the state is no more precise in determining whether that activity could be regulated. Assuming that the word "essential" is clear,¹⁰⁷ even if a state could prove that a railroad was essential to its government, Congress could probably regulate the railroad.¹⁰⁸ Clearly, the Supreme Court meant something by the terms "traditional" and "essential," but the words are not self-defining.

The words "traditional" and "essential" may refer to the nature of the activity being regulated. It seems reasonable that the nature of the state activity would be a factor in determining whether it is subject to federal control, but a better description of that aspect of state activity which is critical to a state sovereignty claim is necessary. One commentator has suggested that the critical aspect of state activity is "whether the state activity contributes to the public health, safety, and welfare and would not otherwise be provided were the state to curtail its activities."¹⁰⁹ While this test is not without ambiguities, it seems to be a reasonable starting point for determining the types of state activity which should be candidates for state sovereignty protection, and it is consistent with the Court's decision to overrule *Wirtz* and hold the 1974 amendments invalid.

An examination of the cases decided prior to *Usery*, some of which were specifically listed as "unimpaired by" *Usery*,¹¹⁰ clarifies the requirements for a valid state sovereignty claim. In general, the cases in which the Court has held that state sovereignty must yield to federal power have had three common elements. First, the legislation in question was a nondiscriminatory regulation of an

106. *New York v. United States*, 326 U.S. 572, 580-81 (1946); *Case v. Bowles*, 327 U.S. 92, 101 (1946); *California v. United States*, 297 U.S. 175, 183 (1936); *South Carolina v. United States*, 199 U.S. 437, 453-54 (1905).

107. Even if it were clear, any state activity could probably ultimately be connected with an essential activity, and problems with the use of the word begin to arise. Schools are probably essential, and the means for financing the schools should logically be considered essential also, but the Court has not so held. See *Case v. Bowles*, 327 U.S. 92, 101 (1946); and *Trustees of the University of Illinois v. United States*, 289 U.S. 48, 59 (1933).

108. While the holding in *United States v. California*, in which congressional regulation of state-owned railroads was upheld, was called consistent with *Usery* on the grounds that railroads are not integral state activities, it seems unlikely that the Court would uphold federal railroad regulations in some states and not in others. *Usery* at 854-55 n.18.

109. *Recent Developments—Constitutional Law*, 66 MICH. L. REV. 750, 770 (1968).

110. *Usery* at 854-55 n.18.

activity in which states happened to be involved and was not directed specifically at the states.¹¹¹ Second, the states appeared to have some discretion about being involved in the activities.¹¹² Third, the states were in competition with private enterprise, and it seemed unfair that they should have any special advantage.¹¹³

With reference to the first element, it seems clear that the FLSA, which applies to all employers engaged in interstate commerce, is nondiscriminatory; this factor was not in issue in *Usery*. This ground rule for legislation affecting states was articulated by Justice Frankfurter in *New York v. United States* when he said, "Thus, for Congress to tax State activities while leaving untaxed the same activities pursued by private persons would do violence to the presupposition derived from the fact that we are a Nation composed of States."¹¹⁴ Discrimination exempting states from the application of statutes is allowed.¹¹⁵

Second, the importance of the state's ability to choose to be involved in an activity is indicated by the Supreme Court's handling of two eleventh amendment¹¹⁶ cases decided prior to *Usery*. The state activities in question had already been held subject to federal control,¹¹⁷ and the issue was whether the states could be sued by their citizens for violations of the federal standards.¹¹⁸ Where the activity was the operation of a railroad, the Court said that Alabama had waived its immunity by entering a field subject to congressional regulation.¹¹⁹ The Court did not find such a waiver

111. *New York v. United States*, 326 U.S. 572, 582 (1946).

112. See text at notes 116-23 *infra*.

113. *New York v. United States*, 326 U.S. 572, 579, 581 (1946) (competition); and *Helvering v. Gerhardt*, 304 U.S. 405, 421 (competition and unfair advantage).

114. *New York v. United States*, 326 U.S. 572, 575-76 (1946). While Justice Frankfurter was joined only by Justice Rutledge in his opinion, the other opinions in that case were even more protective of state sovereignty. See text at note 100 *supra* (opinion of Stone, C.J.). Justice Douglas thought that all state activities should be immune from federal taxation. *Id.* at 591 (Douglas, J., dissenting).

115. *New York v. United States*, 326 U.S. 572, 582 (1946).

116. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Court has construed the eleventh amendment to bar suits against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

117. *Wirtz* (minimum wages for state hospital employees); *United States v. California*, 297 U.S. 175 (1936) (railroads).

118. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 280 (1972) (wages); *Parden v. Terminal Ry.*, 377 U.S. 184, 196 (1964) (railroads).

119. *Parden v. Terminal Ry.*, 377 U.S. 184, 196 (1964).

of immunity in Missouri's continued operation of hospitals.¹²⁰

The only significant difference between the two cases seems to be in the nature of the activity regulated.¹²¹ The Court in the Missouri case said that railroads are normally run by private enterprise, while hospitals are usually allocated to the public sector.¹²² However, Justice Marshall, in a concurring opinion, stated emphatically that the state could not choose whether to operate schools and hospitals and did not consent to federal jurisdiction simply by continuing to operate them after the passage of the 1966 amendments to the FLSA.¹²³

Third, the *Usery* Court indicated that competition with private enterprise was a factor by its cryptic comment about *Wirtz*. The Court said that there were "obvious differences" between schools and hospitals, and fire and police departments, without describing the differences.¹²⁴ One major difference is that schools and hospitals are generally known to be in competition with private enterprise, while fire and police departments generally are not. State-operated railroads are clearly in competition with private enterprise, and Justice Frankfurter noted in *New York v. United States* that New York sold mineral waters "in competition with private waters."¹²⁵

The elements of competition and the state's ability to choose to be involved in an activity are highly interrelated. First, "[W]here a state actually competes with private enterprise, it is difficult to argue that its activity is 'indispensable' since even in the absence of state action the service would be provided by private concerns."¹²⁶ Second, those fields which a state has no choice about entering are usually so "economically marginal" that private enterprise could not handle them.¹²⁷ These factors suggest that there is a significant difference between a state railroad and a state school system. Assuming a social goal of universal education, schools become an "economically marginal" proposition, since many people

120. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 284-85 (1972).

121. Alabama had started operating a railroad after the effective date of the relevant federal statute; Missouri was already operating hospitals when the 1966 amendments became effective. *Id.* at 296. This difference did not seem to influence the Court's decision.

122. *Id.* at 284.

123. *Id.* at 296.

124. *Usery* at 855.

125. *New York v. United States*, 326 U.S. 572, 581 (1946).

126. 66 MICH. L. REV., *supra* note 109, at 771.

127. *Id.* at 770.

can not afford the costs of education. Thus, a public school system is only partially in competition with private enterprise, because it is also serving a group that would not be served if the area of education were left entirely to private enterprise.

Provided that the legislation in question is nondiscriminatory, when a state has discretion about entering a field and is also in competition with private enterprise, state sovereignty claims against a federal regulation are inappropriate. The *Usery* Court's statement that the holding in *United States v. California*,¹²⁸ in which federal regulation of a state-owned railroad was upheld, was "quite consistent" with *Usery* supports this conclusion.¹²⁹ The fact that the Court chose to overrule *Wirtz* indicates that a state's ability to choose to be involved in an activity is critical to a state sovereignty claim and that whether the state is competing with private enterprise is secondary. Of course, where, as in *Usery*, the state has no choice about engaging in the activity and is not competing with private enterprise in any significant way, a clear cut state sovereignty claim exists.

In borderline cases, two other considerations would probably come into play. The federal legislation must affect the states directly and must have a substantial impact on the states if state sovereignty claims are to prevail.¹³⁰ For example, the federal taxation of judges' salaries has been held constitutional since it affects states only indirectly.¹³¹ It also seems unlikely that the Supreme Court would overturn congressional legislation in order to preserve state programs which contribute only slightly to "the public health, safety, and welfare."

LIMITATIONS ON STATE SOVEREIGNTY

Justice Blackmun's concurring opinion stated that he joined in the majority opinion with the understanding that the Court was adopting a balancing approach to the relationship between the federal government and the states.¹³² Since *Usery* was a 5-4 decision, Justice Blackmun's understanding is not without significance. *Usery* indicates that even a clear cut state sovereignty claim can be negated by an overriding federal priority.¹³³ The *Usery* Court

128. 297 U.S. 175 (1936).

129. *Usery* at 854-55 n.18.

130. See note 91 *supra*.

131. *Graves v. New York ex. rel. O'Keefe*, 306 U.S. 466, 486, 487 (1939), *overruling* *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871).

132. *Usery* at 856.

133. *Id.* at 853; *id.* at 856 (Blackmun J., concurring).

discussed one limitation to state sovereignty,¹³⁴ and Justice Blackmun indicated another.¹³⁵ This section will consider the most likely limitations on state sovereignty.

In *Usery*, the Court distinguished *Fry*, thereby adding one important limitation to the concept of state sovereignty.¹³⁶ Legislation otherwise within a congressional power which is tailored to combat a national emergency will not be invalidated by state sovereignty arguments if state compliance is necessary to the resolution of the emergency.¹³⁷ *Case v. Bowles*,¹³⁸ though it was a war powers case, seems consistent with *Usery*.¹³⁹ In that case, state sales of timber from state-owned lands were not allowed to exceed congressionally-set ceiling prices.¹⁴⁰ The inflation caused by the war could be considered a national emergency requiring state compliance for resolution; nothing in *Case v. Bowles* indicates that war powers legislation would be effective against states if it lacked these elements.¹⁴¹

In addition to situations of national emergency, state sovereignty arguments will not prevail in situations where federal action is necessary and state compliance is essential to the success of the action. Thus, Chicago¹⁴² could be ordered to refrain from draining excessive amounts of water from Lake Michigan despite the fact that the water was essential to its sanitation system,¹⁴³ and the federal government could flood state-owned land while constructing a dam in a flood control program.¹⁴⁴ Environmental protection controls, if otherwise valid, would probably not be sub-

134. *Id.* at 853.

135. *Id.* at 856.

136. *Id.* at 853.

137. *Id.*

138. 327 U.S. 92 (1946).

139. However, the Court said that nothing in *Usery* reflected on Congress' authority under its war power. *Usery* at 854-55 n.18.

140. *Case v. Bowles*, 327 U.S. 92, 101-02 (1946).

141. *Id.* at 102.

142. The *Usery* Court said that the political subdivisions of states derive their power from the states and hence are also "beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself." *Usery* at 855-56 n.20. *Lincoln County v. Luning*, 133 U.S. 529, 530-31 (1890), rejected this derivative notion with regard to eleventh amendment immunity to suit. However, the Court has construed the eleventh amendment narrowly and it is unlikely that *Luning* has been reversed. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974); *Moor v. County of Alameda*, 411 U.S. 693, 717-18 (1972).

143. *Sanitary District v. United States*, 266 U.S. 405, 431-32 (1925).

144. *Oklahoma ex. rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-26 (1941).

ject to state sovereignty arguments, as Justice Blackmun indicated in his concurring opinion.¹⁴⁵

Where fourteenth amendment rights are at stake, state sovereignty claims are also overruled.¹⁴⁶ While there are various theories about what rights are included in the fourteenth amendment, it is clear that state sovereignty claims may not displace rights to due process or equal protection.¹⁴⁷ *Usery* is consistent with cases where the Court has overturned residency requirements for admission to state hospitals¹⁴⁸ or mandatory resignation requirements for teachers who become pregnant.¹⁴⁹

Another practical limitation should be considered. Congress has the option of conditioning grants of federal funds to states upon compliance with federal standards.¹⁵⁰ As a practical matter, such a condition probably has the same effect as direct federal legislation, particularly if the state program in question is heavily dependent on federal funds. However, the possibility of noncompliance does exist for states which have strong objections to the federal standards.

145. Justice Blackmun conditions his agreement with the Court on the understanding that such regulations will remain valid. *Usery* at 856.

146. *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976). Decided after *Usery*, this case held the Cook County patronage system to be in violation of the first and fourteenth amendments despite a "vital need for government efficiency and effectiveness." *Id.* at 372. Though the opinion of the Court ignores the state sovereignty issue, Chief Justice Burger raised it in his dissent. *Id.* at 375-76.

147. *Id.* In *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923), Nebraska was not allowed to prohibit the teaching of foreign language in its schools. The Court said, "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." *Id.* at 402. In *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), Oregon was not permitted to compel children's attendance at public schools, though Oregon's right to set reasonable requirements for all schools was conceded. In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 646-47 (1973), a state's interest in efficient procedures for administering schools could not justify mandatory resignation requirements for teachers who became pregnant. In *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 263-64 (1974), Arizona's fiscal interest could not justify a one-year residency requirement for indigents needing medical care. All of these cases would fall within the area protected by state sovereignty as outlined in *Usery*, were it not for the due process and equal protection considerations which they contain. *But see Kelley v. Johnson*, 425 U.S. 238, 249 (1976), where state regulation of the hair styles of the police force was held not to violate any Fourteenth Amendment rights. Evidently, a sufficient state interest can override a borderline Fourteenth Amendment claim.

148. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

149. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

150. *Usery* at 880 (Brennan, J., dissenting); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S., 143 (1947).

CONCLUSION

Justice Stevens' separate dissent expresses the position in which the *Usery* opinion, on its surface, leaves the law. He can see no way of distinguishing valid and invalid federal regulations.¹⁵¹ *Usery* answers most questions about state sovereignty only by inference. While general rules might be too ambiguous to be helpful, a clear-cut analysis of the factors leading to the Court's decision would have been illuminating.

Instead, the Court simply asserted that state sovereignty exists and that the power to decide the wages of state employees is fundamental to that sovereignty. While it stated that there are obvious differences between *Wirtz* and *Usery*, it did not state what those differences are or why they are important. The few attempts to relate *Usery* to other, apparently contradictory, holdings were relegated to the footnotes.

The dissent, in taking the stance that state sovereignty never limits congressional exercise of the commerce power, failed to distinguish among types of state activity. The failure to recognize the clear differences between the operation of a railroad and a police department weakened the force of its argument. The dissent's position seems to be that no reputable opinion in the history of the Court has ever recognized state sovereignty as valid in opposition to the commerce power or hinted that there are circumstances under which it might exist.¹⁵² While such a stance may be technically correct, it minimizes the importance of the state sovereignty issue and is not a substitute for careful analysis of that issue.

The Court implies that *Usery* does not represent a radical shift in its position, and such a conclusion is reconcilable with the general history of the Court's treatment of state sovereignty. However, *Usery* does represent a shift in the recent thinking of the Court, as is shown by the fact that *Wirtz* was overruled. Whether that change will lead to further limitations upon federal power with regard to state governments remains an open question.

If state-operated railroads and state employees' salaries are viewed as the opposite ends of a "federally regulable—not federally regulable" continuum, it becomes apparent that there is a large intermediate area which may or may not be held to be protected by state sovereignty from federal regulation.¹⁵³ The limita-

151. *Usery* at 867-68.

152. *Id.* at 869-71.

153. Justice Stevens suggests some examples of "intermediate" cases. *Id.* at 880-81.

tions to state sovereignty which have been discussed do not completely clarify this area. Thus, there is room for expansion and elucidation of the concept of state sovereignty in future cases. At the very least, the Court has affirmed the existence of state sovereignty in opposition to a delegated power.

So far, the question of whether a Court decision in favor of state sovereignty was necessary has been ignored. One commentator, writing before *Wirtz* was decided by the Supreme Court, said that questions of the legitimacy of federal action are primarily political and that judicial review of such questions should be extremely narrow.¹⁵⁴ Others were alarmed by the potentially broad scope of the commerce power¹⁵⁵ and the possibility "that Congress might attempt to regulate under the commerce clause such an obvious state function as to be improper."¹⁵⁶ Congress is not allowed to be the ultimate judge of the constitutionality of other legislation, and there seems to be no compelling reason to make an exception in this case.

Given the sweeping scope of the definition of commerce, some limitation of that power where state governments are concerned is probably necessary if state governments are to retain any freedom of action¹⁵⁷ and not become mere administrative units.¹⁵⁸ It is possible that good arguments could be made for state governments becoming administrative units, but uniformity is not necessarily a worthwhile goal as long as the federal government has the power to act where uniformity is vital. To those who believe that diverse governments can best meet diverse needs, *Usery* is a good decision.

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154. *Recent Cases—Constitutional Law*, 81 HARV. L. REV. 1572, 1575 (1968).

155. *Recent Decisions—A Balancing Test for the Commerce Power?*, 56 GEO. L.J. 392, 399 (1967).

156. *Recent Decisions—Constitutional Law*, 2 GA. L. REV. 311, 313 (1968).

157. *Wirtz* at 204. (Douglas, J., dissenting).

158. 66 MICH. L. REV., *supra* note 109, at 765.