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NATIONAL LEAGUE OF CITIES V. USERY: THE SUPREME COURT AND CONTEMPORARY FEDERALISM

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ABSTRACT

The purpose of this thesis is to analyze the development of American federalism in three cases arising under the Fair Labor Standards Act. This objective is pursued by an examination of oral arguments and appellant briefs as well as the opinions of the Supreme Court. By this method it is possible to isolate the predominate theories of federalism in United States v. Darby, Maryland v. Wirtz, and National League of Cities v. Usery. The focus is on the Usery case and its significance in the Court's effort to redefine the parameters of the federal system.

From Gibbons v. Ogden through United States v. Darby and Maryland v. Wirtz, the trend of constitutional interpretation has enhanced the power of the National government to regulate interstate commerce. Consequently, many observers accepted the view that the reserved powers of the states were negligible and that the states had become little more than administrative departments of the National government. The majority opinion in National League of Cities v. Usery represents an attempt to reevaluate the power relationship between the National government and state governments in the federal system.

In Maryland v. Wirtz and National League of Cities v. Usery the arguments of counsel are practically identical. Appellants in both cases maintain that the Federal government could not regulate state employees under the commerce power due to considerations of federalism. The Government, on the other hand, asserted the plenary nature of the power

of Congress under the commerce clause and maintained that the states were not exempt from an otherwise valid regulation of commerce. The outcome of Usery, however, was diametrically opposed to, and in fact overruled, Wirtz.

Other factors might have been relevant in the switch in the Supreme Court's position in the eight years between Wirtz and Usery. In the 1970's there has been a reversal of the trend toward National dominance prevalent in the preceding three decades. The change in Court personnel has reflected this trend. As a coordinate branch of government, the Supreme Court is exposed to often-subtle political and economic pressures. Thus, a change in the political and economic environment might also have been influential.

At this writing (August 1978) it is still too early to assess the impact of the Usery decision on the nature of federalism. Cases and commentary in the aftermath of Usery indicate that it will probably be construed narrowly. The Burger Court, however, seems to be willing to give greater latitude to state initiatives and to be solicitious of a wider range of cooperative effort among all levels of government. Reflecting this inclination, the Usery case might be viewed as an attempt to revitalize federalism by asserting that the states must once again become viable partners within the system.

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INTRODUCTION

Despite the attempt by some observers of the Supreme Court to confine the role of the Court to strictly an adjudicative function, most scholars would acknowledge that the Court also performs a policy making function within our governmental system. As Archibald Cox noted in a recent appraisal, "Our judges are less attentive to the letter of law or to precedent. . . . Both bench and bar make greater use of statistical and other social studies, and the line between law and policy is often blurred."[1] Through the power of judicial review the Supreme Court can declare an act of Congress or a statute of a state legislature null and void, if the Court believes it contravenes the United States Constitution. Since the Court has the power to review the constitutionality of legislation, it has assumed the task of maintaining the balance of power between the National government and state governments. As John R. Schmidhauser would say, the Court is the "arbiter" of the Federal system.[2] The Supreme Court is not merely a legal tribunal, but as one of the three coordinate branches of government, it is also a political body with a policy making role as well. It is with

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[1] Archibald Cox, The Role of the Supreme Court in American Government (New York: Oxford University Press, 1976), p. 1.

[2] John R. Schmidhauser, The Supreme Court as Final Arbiter in Federal-State Relations, 1789-1957 (Chapel Hill: University of North Carolina Press, 1958, p. 178.

this underlying assumption that a study of National League of Cities v. Usery[3] is undertaken.

The purpose of this paper is to analyze the development of federalism in three cases arising under the Fair Labor Standards Act. Through an examination of the arguments of counsel and the opinion of the Court, it should be possible to isolate the predominate theories of federalism present in United States v. Darby,[4] Maryland v. Wirtz,[5] and National League of Cities v. Usery. The focus of this paper will be on the Usery case and its significance in the Supreme Court's continual effort to redefine federalism.

National League of Cities v. Usery involved the 1974 amendments to the Fair Labor Standards Act which brought state merit system employees under the Federal minimum wage and maximum hour requirements. The appellants asserted that certain provisions infringed upon each State's sovereign right to govern itself under the Tenth Amendment. These governmental functions were the ability to structure state employer/employee relations and to make fiscal decisions without Federal interference. The Supreme Court held that the 1974 amendments were not within the power of Congress under the commerce clause. If enforced, they would "impair the States' ability to function effectively in a federal system."[6]

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

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

[5]Maryland v. Wirtz, 392 U.S. 183 (1968).

[6]426 U.S. 833 at 852.

CHAPTER I

AMERICAN FEDERALISM IN PERSPECTIVE

Some Definitions

Anyone who has studied American government has had to try to define the elusive concept of federalism. Richard Leach notes that federalism "involves two major levels of government, each, at least in democratic societies, assumed to derive its power directly from the people. . . . Each level of government in a federal system insists upon its right to act directly upon the people."[1] As Michael Reagan points out this "old style federalism is a legal concept, emphasizing a constitutional division of authority and functions between a national government and state governments with both level having received their powers independently of each other from a third source--the people." Reagan differentiates between "old style federalism" which is a static concept, and "new style federalism" which is a more dynamic and pragmatic concept.[2] New style federalism, with its emphasis on the cooperative dimension, is, perhaps, better understood as an aspect of intergovernmental relations.

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[1]Richard Leach, American Federalism (New York: W. W. Norton and Co., Inc., 1970), p. 1.

[2]Michael D. Reagan, The New Federalism (New York: Oxford University Press, 1972), p. 3.

In Pragmatic Federalism Glendening and Reeves review various definitions of federalism and, then, arrive at a new definition. They stress the dual nature of government over the same territory and the dual citizenship of the people as well as the legal integrity of both governments.[3] Federalism, then, is a structural form of government in which power relationships are established between at least two legally independent levels of government. Each government assumes certain functions either independently or in cooperation with the other government(s). Both levels of government act directly upon the people and operate within the same territorial limits.

Federal relationships are both vertical and horizontal. A vertical relationship is one in which the parties are interacting between two or more levels of government, such as Nation-State relations. This relationship tends to be formalistic and legalistic, although close interlevel cooperation is becoming more prevalent, especially along functional lines. Deil Wright comments upon "vertical functional autocracies," or the cooperation among personnel along program lines without reference to their governmental positions, in his discussions of intergovernmental relations.[4] One the other hand, horizontal federalism describes the relationship among legally equal political units, such as interstate relations. Horizontal federalism tends to be

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[3]Parris N. Glendening and Mavis Mann Reeves, Pragmatic Federalism (California: Pacific Palisades, 1977), pp. 6-8.

[4]Deil Wright, "Intergovernmental Relations: An Analytical Overview," Annals 416 (November 1974): 14.

more informal; it is often encouraged by National incentives or is the result of the regional character of problems which overlap proximate jurisdictions.[5]

Although the terms federalism and intergovernmental relations are sometimes used synonymously, intergovernmental relations encompasses much more than federalism. Even the "new style" federalism which is dynamic and flexible only takes into account the relationship between the National and state governments.[6] Intergovernmental relations, as defined by Deil Wright, is a "body of activities or interactions occurring between governmental units of all types within the federal system."[7] Thus, intergovernmental relations encompasses any imaginable interaction, formal or informal, among political units. The federal--that is, the Nation-State relationship--is only one segment of all of the possible dynamic relationships which exist in this governmental structure. The Usery case deals primarily with the federal relationship, although it has ancillary effects upon the whole field of intergovernmental relations.

The Constitutional Basis of Federalism

Legally, federalism in the United States is reflected in specific guarantees in the Constitution regarding the relationship between the

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[5]Glendening and Reeves, p. 9.

[6]Reagan, p. 3.

[7]Wright, p. 1.

central and state governments. These guarantees are apparent in the limited number of enumerated powers delegated to the National Government and in the reserved power of the states under the Tenth Amendment. The resulting tension between such provisions as the commerce clause and the Tenth Amendment reflects the continual efforts to define the federal relationship. Many of these controversies have been resolved by the Supreme Court in its role as arbiter of the federal system.[8]

As early as 1824, Chief Justice John Marshall in Gibbons v. Ogden said, "The power of Congress over interstate commerce is complete in itself. . . . and acknowledges no limitations, other than are prescribed by the Constitution."[9] Since that time the Supreme Court has been continually debating what, if any, are the constitutional limitations on the commerce power. Since the Constitutional Revolution of 1937, the commerce clause has been interpreted by the Supreme Court to provide a wide basis for the exercise of power delegated to the National Government.

The Fair Labor Standards Act, for example, was one of the many pieces of New Deal legislation proposed by Franklin Roosevelt to cope with the economic crisis of the Depression. Passed by Congress in 1938, the Act prescribed Federal minimum wage and maximum hour requirements. Its authority rested upon the commerce clause which gave the National government the power to regulate commerce "among the several states."

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[8]Schmidhauser, pp. 177-212.

[9]Gibbons v. Ogden, 9 Wheaton 196 (1824).

Thus, if it was demonstrated that the enforcement of a certain statute was a valid exercise of the commerce power, then any secondary effects of the statute were, for the most part, immaterial to its constitutionality. In United States v. Darby[10] the FLSA was sustained as a valid regulation under the commerce power despite its residual effects upon labor conditions in industries in the states.

The decisions of the Warren Court in the 1960's legitimized the use of the commerce power to sustain the validity of the Civil Rights Act of 1964.[11] The Civil Rights Act, which gave Black Americans access to restaurants and other places of public accommodation, was held to be a valid regulation of interstate commerce, because discriminatory practices disrupted the free flow of commerce among the states. In the area of minimum wage legislation, the Supreme Court in Maryland v. Wirtz[12] held that the amendments extending the coverage of the FLSA to some state employees were constitutional under the commerce power. In National League of Cities v. Usery, however, the Burger Court rejected the 1974 amendments to the FLSA which extended the wage and hour coverage to state and local merit system employees. The Court held that these amendments threatened the sovereign existence of the states. When the commerce power has been asserted as the constitutional basis for

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

[11]See, e.g., Katzenbach v. McClung, 379 U.S. 294, and Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[12]Maryland v. Wirtz, 392 U.S. 183 (1968).

Congressional legislation, the Supreme Court has generally upheld its application. Since the decision in the Usery case, this interpretation of the commerce clause has been challenged holding that the Tenth Amendment and considerations of federalism were valid limitations upon the commerce power.

A Note on the Origins of American Federalism

The Founding Fathers adopted the federal system as a compromise between the feelings of state patriotism and the developing attitude of "Americanism." The Framers basically agreed upon the desirability of republican government, but they also believed in placing limits upon governmental power in order to protect individual liberty. Establishment of a federal system was the means which they adopted in order to attain the end of containing arbitrary power of the National and State governments.[13] Federalism is one jewel in the "sacred triad" of American government. Joined by separation of powers and judicial review, all three aim at circumscribing arbitrary governmental power.[14]

In the Federalist Papers Alexander Hamilton and James Madison tried to spell out the balance of power within this new governmental system. In Federalist No. 51 separation of powers was discussed as an intra-governmental check on the abuse of National power. The "federal

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[13] Leach, pp. 1-7.

[14] Reagan, p. 5.

principle" was the intergovernmental check on arbitrary power exercised by either the National or by the State governments.[15] One practical method which the delegates to the Constitutional Convention adopted to approach their goal of a limited government was the federal system.

Many scholars have attempted to trace the development and the significance of federalism. William Riker saw military necessity as the prevalent factor in the development of federalism. William Livingston, however, viewed federalism as being rooted in the heterogenity of American society. Charles Beard, on the other hand, felt that the economic self-interest of the Founding Fathers was decisive in the adoption of the federal system. Richard Leach, among others, saw the development of American federalism as a pragmatic response to the political and economic conditions prevalent in 1789.[16]

Just as there are many theories regarding the adoption of the federal system in the United States, there are as many conflicting theories regarding its maintenance. Morton Grodzins and Daniel Elazar believe that "dual federalism," or a dichotomy between the spheres of interest of the National and state governments, has always been a fiction. They insist that "cooperative federalism," the overlapping functions of all levels of government, has always been the realistic

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[15]James Madison, "Federalist No. 51," in The Federalist Papers, eds. Willmoore Kendall and George W. Carey (New York: Arlington House, 1966), pp. 320-325; See also, "Federalist No. 45," pp. 288-291.

[16]William H. Riker, Federalism (Boston: Little, Brown and Co., 1964), pp. 12-16; William S. Livingston, "A Note on the Nature of Federalism," Political Science Quarterly 67 (March 1952): 81-95; Leach, pp. 1-24.

situation. Grodzin's thesis is that the decentralization of the party system has maintained the federal system. David Truman, conversely, maintains that federalism has helped to maintain the decentralized nature of the party system. Riker, however, would agree with Grodzins and Elazar that it is the decentralized nature of the party system which has strengthened federalism. Livingston would cite the increasing diversity and complexity of society as a determinative factor in the continuance of federalism.[17] Despite the Grodzins/Elazar thesis that cooperative federalism has always been the political reality, most scholars would accept the division of federalism into two fundamental types, dual and cooperative federalism.

Dual federalism stressed that both governments were considered sovereign in their own sphere and they were considered to be equal partners in the federal relationship. Cooperative federalism, on the other hand, emphasized the overlapping functions of both levels of governments and close working relationship to solve common problems through National goals.[18] During the period when dual federalism was most influential, there was a bifurcation in the Nation between the Centralists and the States Righters. Although during the era of John Marshall and Federalist influence on the Supreme Court there was a

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[17]Morton Grodzins, "American Political Parties and the American System," Western Political Quarterly 13 (December 1960): 974-993; Daniel Elazar, "Federal State Collaboration in the Nineteenth-Century United States," Political Science Quarterly 79 (June 1974): 248; Riker, pp. 91-100; Livingston, pp. 81-95.

[18]Leach, pp. 10-14.

definite bias toward National supremacy,[19] the Taney Court returned to a reliance upon the notion of dual federalism.[20]

The Pre-Civil War period evidenced the mounting tension between these two positions culminating in the Civil War. The federal system survived this political test intact with a definite tendency toward centralization. Dual federalism still prevailed, however, in the minds of the Supreme Court justices. Between 1890 and 1937 the Court relied increasingly on dual federalism to limit the power of the National Government to regulate labor conditions under the commerce power or to tax, since regulation was a police power "reserved" to the states.[21]

By 1937 the economic necessity caused by the Depression and the Roosevelt court-packing plan forced the acceptance of the New Deal. The Constitutional Revolution opened the way for more cooperative efforts among all levels of government.

> The major premise of the Roosevelt Court . . . has been a disposition to construe the American constitution broadly, giving the legislature and the executive wide scope of authority in meeting problems unforeseen by the founding fathers in 1787.[22]

During the 1960's the United States witnessed a continuation of the post-New Deal trend toward the development and centralization of

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[19] McCulloch v. Maryland, 4 Wheaton 316 (1819).

[20] Cooley v. Board of Wardens, 12 Howard 299 (1851).

[21] Hammer v. Dagenhart, 247 U.S. 257 (1918); United States v. Butler, 297 U.S. 1 (1936).

[22] C. Herman Pritchett, The Roosevelt Court, 1937-1947 (New York: Octagon Books, 1963), p. 74.

programs by the National government. In the 1970's, however, we have seen a counter-trend toward greater latitude toward state programs and a wider range of cooperative effort between state and National governments. This "New Federalism" is characterized by the Nixon Administration's development of federal revenue sharing.[23] The adoption and development of federalism can be explained by many theories, and it is not the purpose of this chapter to accept or reject any of them. This summary merely points out the conflicting perceptions and approaches that the Supreme Court has confronted over the years.

It is apparent from this synopsis of the contradictory theories of the development of the American federal system that it is constantly being reevaluated. The Supreme Court, in its role as arbiter of the federal system, confronts these theories in cases arising under the commerce power. United States v. Darby was a seminal case in this regard; it was one of the block upon which the theory of cooperative federalism was built. Maryland v. Wirtz arose during the height of what David B. Walker has termed Creative Federalism. During this period President Johnson's Great Society programs emphasized the implementation of national goals through categorical grants along functional lines.[24]

During the 1970's there has been a revitalization of policymaking power in the states. Despite the pessimistic tone of Brennan's dissent

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[23] Deil Wright, "Intergovernmental Relations," pp. 1-14; Wright, Federal Grant-in-Aid: Perspectives and Alternatives (Washington, D.C.: American Enterprise Institute, 1973), pp. 113-153.

[24] David B. Walker, "How Fares Federalism in the Mid Seventies," Annals 416 (November 1974), pp. 17-31.

in Usery, most scholars would agree that there is little chance that the old notions of dual federalism will regain pervasive support. It is evident that the National government is encouraging the state and local governments to become more effective partners in the federal relationship. One method being employed to effect this transfer of power and responsibility is federal revenue sharing as opposed to categorical grants in which federal money appropriated to the states is contingent upon compliance with strict Federal guidelines. The National government is trying to shore up the fiscal resources of the states while at the same time transfering decision making power to them. The Usery case arose during this stage which has been designated the "New Federalism."[25]

A Critique of Federalism

According to the last Justice Felix Frankfurter,

> Of all the means for ordering the political life of a nation, a federal system is the most complicated and subtle; it demands the most flexible and imaginative adjustments for harmonizing national and local interests.[26]

Although few commentators on the federal system, except Riker,[27] would argue with this assessment of the system as a whole, they are divided regarding the shape that intergovernmental mechanisms should assume.

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[25] Leach, pp. 194-220; Richard P. Nathan, et al., Revenue Sharing: The Second Round (Washington, D.C.: The Brookings Institution, 1977), pp. 159-177.

[26] Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (Cambridge: Belknap Press, 1961), p. 96.

[27] Riker, pp. 137-155.

James Sundquist, for example, focuses upon the development of interlevel political mechanisms to foster intergovernmental cooperation. Michael Reagan has denounced the "New Federalism" as "a cop-out rather than a panacea as far as the responsibility of the national government to make real judgments of its own in response to its own analysis of domestic needs is concerned." Like Riker, Reagan believes that the states are inadequately equipped to fulfill their role in the federal system. "Again, it is a question of which priorities shall prevail, those of the national community or those of the lesser, narrower communities . . . ?" On the other hand, Deil Wright points out that revenue sharing may become an important federal mechanism due to its simplicity, and attractiveness to the public and to state and local officials.[28]

According to Edward S. Corwin, "The attempt to set up the reserved powers of the States as an independent limitation upon the delegated powers of the United States is neither more nor less than a proposal to destroy the most vital single provision of the Constitution--the supremacy clause--in the guise of construing the Constitution."[29] In one of his later works, "The Passing of Dual Federalism," Corwin suggests that the centralizing tendencies which he formerly advocated may have gotten out of hand.[30]

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[28]James Sundquist, Making Federalism Work (Washington, D.C.: The Brookings Institution, 1969), pp. 242-278; Reagan, pp. 130-131; Wright, Federal Grant-in-Aid, pp. 142-153.

[29]Edward S. Corwin, "National-State Cooperation--Its Present Possibilities," Yale Law Journal 46 (1937): 599-623.

[30]Edward S. Corwin, "The Passing of Dual Federalism," Virginia Law Review 36 (February 1950): 1-23.

Lindsey Cowen traces the development of Tenth Amendment doctrine and concludes that "we have adopted clearly, and apparently permanently, the Hamiltonian philosophy" of a federal government with virtually unlimited power and state government with vast, but overlapping power.[31] Cowen agrees with Herbert Wechsler that the States must use their political power within the National government, i.e., in Congress, to ensure input into policy decisions.[32] Professor Cowen concludes,

> As things now stand, there may not be any powers which are "not delegated to the United States by the Constitution"; nevertheless the Tenth Amendment stands as a constant reminder that the states were not intended to deteriorate into historical oddities, that they have broad governmental experience, that they are willing and able to carry efficiently a major portion of that governmental load, and that in many if not most instances that purposes for which the Union was founded will be best furthered by permitting the states to act.[33]

This evaluation of the Tenth Amendment doctrine and federalism, in general, is reflected by Justice Rehnquist in the majority opinion in Usery:

> . . . our federal system of government imposes definite limitations upon the authority of Congress to regulate the activities of States as States by means of the commerce power. . . . If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' separate and independent existence."[34]

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[31]Lindsey Cowen, "What is Left of the Tenth Amendment?" North Carolina Law Review 39 (1960): 182.

[32]Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," Columbia Law Review 54 (1954): 543-560.

[33]Cowen, p. 183.

[34]426 U.S. 833 at 842-851.

The arguments of counsel and the decision of the Supreme Court in National League of Cities v. Usery focus attention upon the conflicting theories of federalism. The majority opinion indicates an attempt to redefine the power relationships in the federal system. From Givvons v. Ogden through United States v. Darby and Maryland v. Wirtz the trend of constitutional interpretation enhanced the power of the National government to the point where the reserved powers of the states were negligible. After Wirtz although the American system was still theoretically federal, the National government had succeeded in centralizing power in itself, so that many observers accepted the view that the States had become little more than administrative units.

As previously noted, in the 1970's there has been a reversal of the trend toward National dominance prevalent in the preceding three decades. The change in Supreme Court personnel has reflected this trend. It is in this context that the Usery case is important. Since Usery was a closely divided decision (5-4), it would be premature to conclude that it represents a complete reversal of constitutional interpretation of National power under the commerce clause. Nevertheless, Usery indicates that the outer limits of the plenary power of Congress to regulate "commerce among the states" are, for the first time in more than a generation, being seriously reconsidered. The Usery case may be viewed as an attempt to revitalize federalism by asserting that the states must once again become viable partners within the system.

CHAPTER II

POST NEW DEAL FEDERALISM FROM DARBY TO WIRTZ

Maryland v. Wirtz[1] was the first major Supreme Court case arising under the Fair Labor Standards Act after United States v. Darby[2] in which the appellants maintained that an otherwise valid regulation of commerce was inapplicable to function of state government. Maryland based its assertion on considerations of constitutional federalism under the penumbra of the Tenth Amendment. Since Darby, however, the Tenth Amendment had been considered nothing more than a constitutional appendage. As Chapter I pointed out, the backbone of constitutional federalism was posited in Article I, Section 8, the enumerated powers of the National government. This enumeration of powers implied a limited scope of National authority and, hence, reserved all other powers to the states. More than a quarter of a century after the Darby decision the State of Maryland presented a States' Rights argument based upon the notion that the Tenth Amendment placed a limitation on Congress' power to regulate commerce.

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[1]Maryland v. Wirtz, 392 U.S. 183 (1968).

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

The Fair Labor Standards Act (1938)

The Fair Labor Standards Act (FLSA)[3] was originally passed in 1938 as a part of Franklin D. Roosevelt's New Deal legislation. Before the Constitutional Revolution of 1937 the Supreme Court had consistently invalidated attempts by Roosevelt to extend the power of the National government to regulate the economy under the auspices of the commerce power. The Fair Labor Standards Act rested its authority squarely on the power of Congress to regulate interstate commerce. The congressional finding and declaration of policy in Section 202(a) of the FLSA contained the most vivid expressions of the relationship between the exercise of the commerce power and labor conditions.

> The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of the workers (1) causes 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) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.[4]

The purpose of the FLSA, therefore, was the regulation of labor conditions of employees who handled goods in commerce or in the production of these goods for commerce. By including employees engaged

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[3] Fair Labor Standards Act, 29 U.S.C. sec. 202 et seq (1975).

[4] Ibid., sec 202a.

in production activities the Congress regulated manufacturing concerns which were, perhaps, the most notorious offenders of any attempts to improve labor conditions at the state level.

The Fair Labor Standards Act prescribed minimum wage, maximum hour and overtime standards for employees engaged in commerce or in the production of goods for commerce. In 1961 the "enterprise concept" was added to the FLSA. An enterprise engaged in commerce "means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person. . . ."[5] Under this definition practically all employees of any business establishment, with the exception of those explicitly exempt from the Act, were subject to its provisions.

Section 203(c) of the FLSA was amended in 1966 to remove the exemption for employees of the states and their subdivisions who worked in schools and hospitals. The original Act states that an employer was "any person acting directly or indirectly in the interest of any employer in relation to an employee, but shall not include the United States or any State or political subdivision of a State. . . ." This section was amended to include "employees of a State, or a political subdivision . . ., employed . . . in a hospital, institution or school. . . ."[6]

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[5] Ibid., sec 203s.

[6] Ibid., sec 203d.

The Fair Labor Standards Act was amended again in 1974. This amendment brought practically all state merit system employees under the purview of the federal minimum wage and maximum hour standards.

United States v. Darby

The constitutionality of the Fair Labor Standards Act was challenged in 1941 in United States v. Darby. Appellee, Fred Darby, operated a lumber company in Statesboro, Georgia, which shipped its finished product to customers in other states. Thus, it was a business engaged in interstate commerce. Darby employed his worker at an amount below the standards prescribed by the FLSA. Numerous indictments charged that he also violated the maximum hour, and overtime provisions and failed to keep a record of his employee's work hours. The District Court ruled that the FLSA was unconstitutional. Responding to the Government's appeal of this decision, Darby sought to have the ruling sustained on the ground that Congressional regulation of labor conditions under the commerce clause was unconstitutional.[7]

The argument for the Government by Solicitor General Biddle emphasized the fact that

> No State, acting alone, could require labor standards substantially higher than those obtaining in other States whose producers and manufacturers competed in the interstate market. Employers with lower labor standards possess an unfair advantage in interstate competition and only the national government can deal with the problem.[8]

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[7] 312 U.S. 100.

[8] 312 U.S. 100 at 102.

He also noted that the Congress made conclusive findings which substantiated the contention that only the federal government acting under the commerce power could remedy the "evils resulting from long hours and low wages."[9]

The Government rested its case on the precedents found in Gibbons v. Ogden, and the Minnesota Rate Case.[10] "The decisions of this court, from the beginning recognized that the commerce clause gives Congress power to meet the economic problems of the Nation, whatever they may be." Biddle commented that the decision in Hammer v. Dagenhart,[11] striking down a federal Child Labor Restriction enacted in 1916, was obsolete and should be overruled. With regard to the Tenth Amendment he noted, however, that Martin v. Hunter's Lessee, and Wright v. Union Central Life Ins. Co.[12] "recognize that the Tenth Amendment adds nothing to the Constitution."

Counsel for Darby, Mr. Archibald B. Lovett, argued that the FLSA attempted "to regulate conditions in the production of goods, and cannot be sustained as a power delegated to Congress to regulate interstate commerce." He argued, furthermore, that even though a majority of the states shared a common problem, Congress did not necessarily have the power to deal with that problem. Lovett relied

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[9] Ibid.

[10] 9 Wheaton 1 (1824); 230 U.S. 352 (1913).

[11] 247 U.S. 251 (1918).

[12] 1 Wheaton 304 (1816); 304 U.S. 502 (1937).

upon Schechter Poultry Corp. v. United States, and Carter v. Carter Coal Co.,[13] as he tried to demonstrate that in order for Congress to regulate intrastate commerce the local activities must have a direct relationship to interstate commerce. He also based his case upon the precedents set in Hammer v. Dagenhart, and United States v. Butler.[14] Finally, he stated that "the Government's argument is an indirect attack upon the dual system of government established by the Constitution."[15]

The opinion of the Court by Mr. Justice Stone "rejected the argument that the 'motives' or 'consequences' of a regulation of commerce determine[s] its validity."[16] Stone noted, "While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of commerce." Therefore, Congress could prohibit the shipment of goods made in violation of the FLSA under the commerce clause. Darby explicitly overruled Hammer v. Dagenhart, in which Congress had been denied the power to prohibit the shipment of goods in interstate commerce made by child labor.[17]

The Court held that Congress had the power to regulate intrastate commerce when it has a substantial (not a direct) effect upon interstate commerce. Furthermore, the means which Congress adopted to eliminate the

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[13]298 U.S. 495 (1935); 298 U.S. 238 (1935).

[14]247 U.S. 251 (1917); 297 U.S. 1 (1935).

[15]312 U.S. 100 at 119-124.

[16]Stern, pp. 888-889.

[17]312 U.S. 100 at 113-117.

evils aimed at in the declaration of findings was appropriate, and, thereby, within the commerce power. Finally, the most often quoted line from the Darby decision was in regard to the Tenth Amendment. The Court held that the Tenth Amendment was "but a truism that all is retained which has not been surrendered."[18] To support this contention the Court cited numerous precedents including Martin v. Hunter's Lessee, McCulloch v. Maryland, and the Lottery Case.[19]

Mr. Justice Stone's opinion for a unanimous Court reaffirmed John Marshall's broad interpretation of the commerce clause found in Gibbons v. Ogden. The Court also deferred to the Congressional determination of the need for the legislation.[20] The distinction between direct and indirect effect on commerce, so prominent in the Carter Coal Co. case, was not discussed in Darby.

> On several occasions the word "substantial" was employed--but "substnatial" lack the notion of proximate causation . . . and suggests a pragmatic standard. . . . The undoubtedly deliberate departure from the direct-indirect formula in the Darby opinion was a healthy reversion to first principles, to the Constitution itself."[21]

In sustaining the validity of the Fair Labor Standards Act "the idea that production was beyond congressional reach, the distinction between direct and indirect effects were all given the quietus."[22]

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[18] 312 U.S. 100 at 119-124.

[19] 4 Wheaton 316 (1819); 188 U.S. 321 (1903).

[20] Schmidhauser, p. 178.

[21] Stern, pp. 890-891.

[22] Robert G. McCloskey, The American Supreme Court (Chicago: The University of Chicago Press, 1960), p. 185.

In The Court and the Constitution former Justice Owen J. Roberts commented upon the significance of the Darby decision. He maintained that the constitutionality of the FLSA put the control of wages and hours of all persons under the control of Congress and "completely supersede[d] state exercise of the police power in this field." Roberts noted the increasingly broad interpretation of the FLSA and commented that once Congressional power had been granted in a specific area, the Court found it difficult "to limit the legislative exercise of that power, however sweeping." In effect Congress had preempted state regulation of the business activity.[23] According to Schmidhauser,

> The Darby decision . . . laid to rest the questionable doctrine of dual federalism. The existence of state power in any particular field no longer could serve as a bar to the exercise of a granted federal power, or what . . . [was] more important, a necessary and proper extension of it.[24]

The District Court Decision

The State of Maryland and others challenged the constitutionality of the 1966 amendments to the Fair Labor Standards Act which extended the FLSA to employees of State schools and hospitals. They contended that the amendments were an unconstitutional extension of the power of Congress to regulate commerce and, furthermore, that the Tenth Amendment precluded the extension of minimum wage and maximum hour provisions to state employees. The enterprise concept which had been

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[23] Owen J. Roberts, The Court and the Constitution (Cambridge: Harvard University Press, 1951), pp. 56-58.

[24] Schmidhauser, p. 185.

added to the FLSA was also being challenged. In a divided opinion the United States District Court for the District of Maryland held that the 1966 amendments and the enterprise concept were constitutional under the commerce power and reiterated that the Tenth Amendment was a truism.[25]

The opinions written by the District Court judges identified the conflict between National government and state governments which the Supreme Court eventually had to "solve." A preview of this conflict in the three separate opinions at the District Court level would, perhaps, clarify the problems as an introduction to a summary of the arguments of counsel submitted to the Supreme Court. Chief Judge Winter held that all of the provisions of the 1966 amendments were constitutional. Judge Northrop, on the other hand, decided that the amendments were all unconstitutional. Judge Thomsen split the difference and held that the minimum wage provisions were constitutional, but that the overtime provisions were questionable.[26]

The constitutional question, according to Winter, was "whether such activities are commerce or affect commerce, even though local in nature, and hence [are] within the power of Congress to regulate commerce." The fiscal evidence indicated that the States and their subdivisions were engaged in commerce, and that these activities had a substantial impact on interstate commerce. However, the effects of the 1966 amendments were nonjustifiable, because they presented

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[25] 296 F. Supp. 826.

[26] Ibid.

a hypothetical case. Winter cited as precedent for his decision cases involving the commerce power or other plenary powers, such as the war power, as controlling in Wirtz. He dismissed the cases relied upon by Maryland involving the taxing power, since it was a concurrent power, not a plenary power.[27]

Judge Thomsen, on the other hand, felt that Winter's language was too broad. Thomsen could not accept the argument that the federal government could regulate essential governmental functions, such as the budgeting and taxing functions of the State. He felt that the impact of the 1966 amendments to the FLSA had to be taken into consideration in order to assess the constitutionality of the Act. "If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufferance of the federal government." Thomsen held, though, that the 1966 amendments did not tip the balance between Congressional regulation and Congressional usurpation of State sovereignty. Consequently, the amendments in question were constitutional.[28]

Judge Northrop agreed with the analysis presented in Thomsen's decision. In his opinion he held that the National government was usurping the State's power over their budgetary function under these amendments to the FLSA. Northrop criticized Winter's opinion as holding

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[27]Maryland v. Wirtz, 392 U.S. 183, "Transcript of District Court Record 269 F. Supp. 826 (1967)," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 742, 1967), pp. 10a-18a.

[28]Ibid., pp. 36a-43a.

> that from the beginning federalism, as embodied in our Constitution, existed by the will of Congress rather than the will of the people. No case has gone that far. It is supported neither by history nor by the structure of the Constitution.[29]

Keeping in mind this backdrop of litigation concerning the commerce clause and the Tenth Amendment, a synopsis of the oral arguments and briefs of counsel for both sides will not be presented. A comparison of these arguments with the text of the Supreme Court decision will indicate which interpretation of the commerce clause and the Tenth Amendment the Court accepted in Maryland v. Wirtz. This interpretation, in turn, demonstrates the balance of power between the National government and state governments in the federal system.

Appellant's Arguments in Wirtz

In challenging the constitutionality of the 1966 FLSA Amendments, the State of Maryland contended that: "Never before in this history of this nation [had] the federal government presumed to enact a law which both in theory and in practice, [served] as the basis for the utter destruction of the state as a sovereign political entity. . . ."[30]

> The issue here, simply, [was] whether, by virtue of its power to regulate interstate commerce, Congress [had] the ability to require state legislatures to levy taxes in excess of what they otherwise would levy, to appropriate funds in excess of what they otherwise would appropriate and for

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[29] Ibid., pp. 45a-49a.

[30] Maryland v. Wirtz, 392 U.S. 183, "Appellant's Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 742, 1967), pp. 9-10.

> purposes for which they would not otherwise provide them, or, in the alternative, to require that elected and appointed state officials violate the Constitution and laws of their state. Also at issue [was] whether purely state matters--taxes, appropriations, merit systems, public schools and hospitals--[were] subject to an overriding Congressional control.[31]

Maryland's argument rested upon the fact that the operation of public schools and hospitals were not enterprises which engage in commerce or in the production of goods for commerce. The operation of state schools and hospitals, furthermore, were purely governmental functions. Therefore, the Government had no basis under the commerce clause to regulate the wages and hours of employees of state schools and hospitals, but in any case the nature of our federal system precluded the government from regulating integral state functions.[32]

The State of Maryland asserted that schools and hospitals operated by the state did not engage in commerce. They did not affect commerce in such a way that made them subject to direct Congressional regulation. The Government, on the other hand, contended that since the schools and hospitals of the states affected commerce by the volume of their purchases, they were regulable under the commerce clause. It was not on that basis, however, that Congress originally enacted the FLSA. To justify these amendments, the Government relied upon the arguments that

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[31] Ibid.

[32] "Arguments Before the Court--State Employees Wages," U.S. Law Week 36 (April 30, 1968): 3409.

hospitals and schools made out-of-state purchases, accepted federal funds, and engaged in out-of-state correspondence.[33]

Maryland pointed out,

> Coverage on the theory that these institutions [bought] goods and services from out-of-state would enable Congress to regulate every official and agency of State government, a power which neither was contemplated by the convention in 1787 nor has ever been countenanced by this Court.

Furthermore, the schools and hospitals were ultimate consumers of the goods which they purchased. There were not, therefore, engaged in commerce or in the production of goods for commerce and were exempt from the Act. Accordingly, the 1966 amendments to the FLSA were an unconstitutional extension of the commerce power over State-funded institutions which--at best--have "a remote and inconsequential effect on commerce."[34]

In addition, there was no evidence that the application of the federal minimum wage and maximum hour overtime standards would have any effect on

1-the volume of purchases made in interstate commerce,

2-the amount of correspondence carried on with persons out-of-state, or

3-the inflow of federal funds.

Furthermore, there was no evidence of an unusual number of strikes in schools and hospitals. "In sum, no <u>real</u> relationship [existed] between the operation of schools and hospitals and flow of commerce."[35]

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[33] Appellant's Brief, pp. 12-14.

[34] Ibid., p. 8.

[35] Ibid., pp. 21-22.

Counsel for Maryland insisted that "the creation, maintenance and control over a system of public education [was] a State governmental function." Brown v. Board of Education[36] was evidence of the Supreme Court's acknowledgment of the importance of State-funded education. Appellants asserted, furthermore, that State schools were nonprofit and purely governmental ventures which were not in substantial competition with private school systems. In 1968 "less than 1 percent of the children [in the United States attended] nonpublic, nonreligiously affiliated schools."[37]

The 1966 amendments went beyond regulating state schools and hospitals and regulated state government itself. For example, the amendments would go into effect in the middle of a fiscal year, thereby forcing the states to call a special session to allocate more money for the salaries of state employees. "It [does not] matter whether the law increases costs $10,000 or $100,000 the effect [was] the same--the federal government [was] forcing the states into making them pay more than they were planning upon paying."[38] Furthermore, the amendments authorized "private citizens to sue the States for civil damages in federal courts . . ." in derogation of the Eleventh Amendment which prohibits suits against the states by private citizens without the states' consent.[39]

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[36] 347 U.S. 483 (1954).

[37] Appellant's Brief, pp. 23-24.

[38] "Arguments Before the Court," p. 3409.

[39] Appellant's Brief, pp. 8-27.

Counsel for Maryland concluded,

> By no legitimate test [had] the employment relationship of public school and hospital personnel been shown to have a substantial effect on commerce, whether by the illusion of competing with private institutions or by purchasing goods and services from out-of-state. These [were] functions of government and [had] not more than a remote and incidental effect on commerce as do all functions of State government.[40]

If the 1966 amendments to the Fair Labor Standards Act were permitted to stand, "it [would lie] within the power of Congress to convert the States into nothing more than federal districts."[41]

The State of Maryland based its case upon the similarity of the Congressional power to regulate commerce and the power to tax. Both of these powere were, according the appellants, enumerated powers under Article I of the Constitution. They argued that if the power of the federal government to tax was subject to some limitations, such as intergovernmental tax immunity, then, the commerce power could be limited by the same consideration of federalism. Maryland cited New York v. United States[42] as a case in point. In New York the Supreme Court sustained a tax on the state's sale of mineral water, but reaffirmed the principle of intergovernmental tax immunity, i.e., one government may not levy a tax on a sovereign function of another government. This principle was first elucidated in McCulloch v. Maryland in which the Court overruled an attempt by the State of Maryland to tax the Bank of the United States.

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[40] Ibid., pp. 10 and 28.

[41] "Arguments Before the Court," p. 3410.

[42] 362 U.S. 572 (1946).

Collector v. Day[43] reenforced the principle by exempting state judges' salary from federal taxation. Although the principle has become restricted over the years,[44] its modern expression is found in the New York case. "There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves."[45] Thus, in order to prevent one government from taxing another government out of existence, sovereign functions were immune from taxation. Appellants in Wirtz were arguing that there was a similar limitation on the commerce power, when it attempted to regulate state governmental functions.

Although not involving the commerce clause, Appellants noted that the Court held in United States v. Sprague that the method of ratification of amendments to the Constitution was within the discretion of Congress and was not limited by the Tenth Amendment. The Court said, "The Tenth Amendment, it may be conceded, added nothing specifically to the Constitution; it neither enlarged nor restricted any particular State or national power."[46]

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[43] 11 Wallace 113 (1871).

[44] See generally, South Carolina v. U.S., 199 U.S. 437 (1905); Graves v. New York ex rel O'Keefe, 306 U.S. (1939).

[45] 326 U.S. 572 (1946).

[46] 282 U.S. 716 (1930).

Maryland maintained that the cases relied upon by the Government could be distinguished from Wirtz and divided those cases into two categories: (1) those cases involving businesses as opposed to a state, and (2) those cases involving a state acting in its proprietary capacity. The first group of cases included National Labor Relations Board v. Jones & Laughlin Steel Corp., United States v. Darby, Wickard v. Filburn, Heart of Atlanta Motel v. United States and Katzenbach v. McClung.[47] Although all of these cases raised the issue of the reserved power of the states, the "involved a misapplication of both the doctrine and the Tenth Amendment; and its rejection by the Court did not lessen their true and intended existence and effect. No reserved power of the States was being denied in any of these cases."[48]

The second group of cases distinguished from Maryland v. Wirtz were cases involving the valid regulation under the commerce clause of states acting in their proprietary capacity. Maryland conceded that the States were subject to regulation, if that regulation did not interfere with integral governmental functions. Some of the more prominent cases which were discussed extensively in the briefs of counsel were United States v. California,[49] in which the Court held that the operation of a railroad by the State of California was regulable under the commerce clause, and

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[47] 301 U.S. 1 (1937); 312 U.S. 100 (1941); 317 U.S. 111 (1942); 379 U.S. 241 (1964); 379 U.S. 294 (1964).

[48] Appellant's Brief, pp. 38-45.

[49] 297 U.S. 175 (1936).

Sanitary District of Chicago v. United States,[50] in which it was held that an action by the city of Chicago to divert water from Lake Michigan into the sewer system to protect the health of its citizens disrupted the flow of commerce. In the California case, however, the Court did not distinguish between a State acting in its private or governmental capacity, but affirmed the plenary power of Congress to regulate commerce. Maryland noted that ". . . in not one of these cases was there any showing that the federal regulation would substantially interfere with the exxential sovereignty of the State."[51]

Two briefs amicus curiae were filed for Appellants by the Fort Worth Independent School District and the State of Texas. The Texas brief recognized the broad interpretation of the commerce clause under Chief Justice Marshall, but then, distinguished between "a power to regulate commerce and a power to regulate commerce 'among the states' . . . ." This line of reasoning, however, has not been sustained since the National Labor Relations Board v. Jones & Laughlin Steel Corp. and United States v. Darby. The brief filed by the Fort Worth Independent School District pointed out that independent school districts were political creatures of the State and were subject to the 1966 amendments. These amendments would place undue hardship on these

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[50] 266 U.S. 405 (1925).

[51] Appellant's Brief, pp. 45-56.

districts, possibly even causing them to collapse.[52]

Appellee's Arguments in Wirtz

The Government's argument was as follows: First, the operation of State hospitals, schools and related institutions had a substantial effect upon interstate commerce, and Congressional regulation of the wage and hours of employees of such institutions was a valid exercise of the commerce power. Next, the States enjoy no constitutional immunity under the power of Congress to regulate commerce, and, furthermore, the enterprise concept in the FLSA was constitutional.

The Government's argument emphasized that "The facts . . . clearly establish that the Congress could reasonably have determined that the operation of schools and hospitals [had] a substantial impact on interstate commerce. . . . In one year over 3.8 billion dollars [was] spent on the operation of public education institutions and 3.9 billion dollars [was] spent for operating public hospitals." Congress enacted the 1966 amendments to the Fair Labor Standards Act to prevent labor disputes which could affect the flow of goods in commerce. "Congress must certainly have been aware of the increasing frequency of labor disputes and strikes of public employees."[53]

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[52] Maryland v. Wirtz, 392 U.S. 183, "Amicus Curiae Briefs on Behalf of the Fort Worth Independent School District and the State of Texas," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc. Inc., 742, 1967), p. 5.

[53] Maryland v. Wirtz, 392 U.S. 183, "Appellee's Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 742, 1967), pp. 5-6 and 12.

The argument presented by counsel for Maryland, that the schools and hospitals were ultimate consumers, was factually and legally in dispute. The employees of those institutions were engaged in commerce and were subject to the FLSA. Furthermore, "The interstate flow of school and hospital supplies and equipment [was] in large part, inevitable because of the nondiffusion of manufacturing suppliers."[54]

The Government contended, "Appellants have presented no compelling reason for this Court to find that considerations of competitive fairness did not constitute a rational basis for Congressional extension of the coverage of the Fair Labor Standards Act to public institutions that have a substantial impact on the flow of goods in commerce." The Act was passed not merely to provide a base for truly fair competition but to reduce labor unrest and to improve living standards. Congress could have felt that remedying the worker's economic condition could have a stabilizing effect of the free flow of commerce.[55]

With regard to the validity of the FLSA under the Tenth Amendment, Appellees pointed out that "the uniform decisions of [the] Court [made] it plain that Congress may regulate state activities which [had] a substantial effect upon commerce. And [the] Court has [made] it equally clear that the fact that the State activity may be purely governmental or an essential State function [did] not immunize it from regulation under the commerce clause." In United States v. Darby, this Court said,

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[54]Ibid., pp. 7-10.

[55]Ibid., p. 14; "Arguments Before the Court," p. 3410.

Congress may "by appropriate legislation regulate intrastate activities, where they have a substantial effect on interstate commerce. And, [the Tenth Amendment] states but a truism that all is retained which has not been surrendered."[56]

Furthermore, Appellees argued that the State of Maryland was mistaken in its assertion that the Eleventh Amendment authorized suits by private citizens against the states for recovery of back pay. The correct statutory interpretation was, rather, that the Secretary of Labor representing the aggrieved citizens, would bring suit against the states. Therefore, it would be a suit brought by the United States, and not in contravention of the Eleventh Amendment.[57]

The Court's decision in United States v. California demonstrated that the distinction between proprietary and governmental functions was no longer valid. Although the State activities in this case were of a commercial nature, i.e., the operation of a railroad, the Court deemed it "unimportant to say whether the State conducted its railroad in its sovereign or in its private capacity."[58] The Court also held that "where some employees [were] engaged in commerce, it necessarily followed that the activities of their employer [affected] commerce."[59] Therefore, "it [was] clearly within the power of Congress to regulate

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[56]Appellee's Brief, p. 15.

[57]Ibid., p. 28-29.

[58]297 U.S. 175.

[59]316 U.S. 517 (1942).

the wages and hours of all employees of that employer, even though some of the employees [were] engaged in purely local activities."[60] Thus, the enterprise concept was constitutional.

The Government concluded that where a rational basis for Congressional action has been established, the Supreme Court need not concern itself with hypothetical cases regarding the effects of the 1966 amendments. If

> it is beyond the realm of dispute that running schools and hospitals [affected] commerce, and since Congress [had] the power to regulate commerce, then, Congress had the power to regulate commerce, then, Congress had the power to regulate wages and hours in schools and hospitals even though conducted by the State.

The 1966 amendments to the FLSA were consistent with the original purpose of the Act, and it was "clearly within the Constitutional power of Congress to regulate commerce."[61]

The Government based its case upon precedent, such as United States v. Darby and Wickard v. Filburn,[62] in which the Supreme Court had recognized a broad interpretation of the commerce power. Appellee did not, however, try to distinguish between plenary and concurrent powers as Judge Winter had attempted in his District Court decision.

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[60] 317 U.S. 111 (1942).

[61] "Arguments Before the Court," p. 3410.

[62] 317 U.S. 111 (1942).

Oral Arguments in Maryland v. Wirtz

According to U.S. Law Week, "the Supreme Court gave little clue to its own thinking" as it listened to the oral arguments in Maryland v. Wirtz. Mr. Justice Fortas and Mr. Justice White questioned the Counsel for Maryland on the distinction between privately-operated and State-operated schools and hospitals. He pointed out that Maryland was arguing that only State institutions, not all schools and hospitals, should be exempt from the 1966 amendments. State hospitals did not "charge patients, for the most part, and therefore lower wages [could not] make them substandard competitors to private hospitals." The same line of reasoning could be applied to public schools.[63]

The Solicitor General emphasized in his oral argument that the distinction between proprietary and governmental functions was not valid. He noted that Maryland relied upon a lack of competition which was not grounds for invalidating legislation enacted under the authority of the commerce clause. When Mr. Justice White asked a question regarding the extension of the federal standards to employees of State Courts, the Solicitor General replied that the Act could be extended to these employees. Furthermore, it might be argued that Congress could prescribe "prices" for State schools. In rebuttal Counsel for Maryland reiterated that if the 1966 Amendments to the FLSA were held constitutional, he did not see "any stopping point."[64]

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[63] "Arguments Before the Court," p. 3409.

[64] Ibid., p. 3410.

The Wirtz Decision

The following questions were confronted by the Supreme Court in Maryland v. Wirtz:

1 - Did the 1966 Amendments to the Fair Labor Standards Act exceed Congressional power under the commerce clause by extending the federal minimum wage and maximum hour standards to employees of State schools and hospitals?

2 - Was the Tenth Amendment a valid limitation on the commerce power?

3 - Did the 1966 Amendments violate the Eleventh Amendment to the Constitution?

The majority opinion was written by Mr. Justice Harland and represented the view of five other members of the Court: Chief Justice Warren, and Associate Justices Black, Brennan, White and Fortas. The Court held that the 1966 amendments to the FLSA (including the enterprise concept), as applied to State schools and hospitals, were constitutional. The Court noted that there was a rational basis upon which Congress enacted the legislation. The enterprise concept, accordingly, did not enlarge the category of employer under the FLSA. It merely extended the coverage to other employees. Therefore, the category of employer was still valid as it had been in United States v. Darby.[65] The majority opinion reflected the major points in the Government's argument.

The rational basis referred to by the Court was the promotion of labor peace through the stabilization of the wages, hours, and working conditions of employees engaged in commerce or in the production of goods

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[65] 392 U.S. 183 at 183-191.

for commerce. This reasoning was applied by the Roosevelt Court in National Labor Relations Board v. Jones & Laughlin Steel Corp. Furthermore, the State, qua State, was not exempt from the provisions, since the activities are regulable under the commerce clause.[66]

With reference to the distinction between proprietary and governmental functions, the Court cited the decisions in United States v. California, and Sanitary District v. United States as controlling. The majority held that there was no distinction to be made between a state acting in its commercial capacity or in its governmental capacity. Moreover, the National interest in the unobstructed flow of commerce overrode particular State interests. Harlan noted that the commerce power had some limits, but a State did not have constitutional immunity from an otherwise valid regulation of commerce.[67]

The majority also refused to decide Wirtz on the basis of "hypothetical cases" regarding the effect of the amendments upon the States. In accord with the District Court decision the Supreme Court also refused to consider the claims that the FLSA amendments violated the Eleventh Amendment. The question presented by Appellants regarding the status of schools and hospitals as ultimate consumer was not decided by the Court. Harlan did mention, however, that the State institutions did purchase out-of-state commodities. Nevertheless, this argument was not relevant to the constitutional question.[68]

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[66]Ibid., pp. 191-195.

[67]Ibid., pp. 195-199.

[68]Ibid., 199-201.

On the other hand, Mr. Justice Douglas' dissenting opinion, supported by Mr. Justice Stewart, accepted Maryland's argument that the Tenth Amendment precluded the regulation of State activities by the National Government under the guise of the commerce power. Douglas criticized the majority for limiting themselves to the Rational Basis Test. He maintained that the cases involving the power to tax should have been controlling in this case. He also attempted to defend the "dual nature of our federal system," and noted that the unique and noncompetitive nature of State governmental functions which were subject to regulation by these amendments were essential for the maintenance of State sovereignty.[69]

Critique

Criticism of Maryland v. Wirtz focused upon Appellant's assertion that the interest of National regulation under the commerce clause should be balanced with the interest of the state to carry out its sovereign functions. A student note in the Georgetown Law Journal commented,

> it seems that the Supreme Court, in order to preserve the federal system, may have to reevaluate Congress' interstate commerce powers by balancing the need for legislation with the corresponding interference with the state's performance of its sovereign functions. . . . The summary statement that Congress' power to regulate interstate commerce is plenary may be obsolete.[70]

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[69] Ibid., pp. 201-205.

[70] "A Balancing Test for the Commerce Power?" Georgetown Law Journal 56 (December 1967): 398-399.

The "undue interference" test proposed by Judge Thomsen at the District Court level would seem to be the practical application of this balancing test. If the act interfered with "the State's performance of its sovereign and indispensable functions of government," then the act would be invalid, or at least it would be weighed against the interest of the federal government's regulation of interstate commerce.[71] The balance of power in the federal system would, therefore, be readjusted to take into account the state's right to be legally independent.

Under the Balancing Test proposed for the commerce clause, the Supreme Court would take an active policy making role. It would not rely solely upon the Rational basis test found in the majority opinion in Wirtz. A student comment in the Harvard Law Review suggested, however, that since the Wirtz case presented a political question, "the primary constitutional guardian of the federal system should be the Congress." The Court should, therefore, defer to the judgment of Congress except where "no reasonable assessment of the evidence of the ruinous effect of federal action on the states can sustain the federal action.[72]

The note in the Harvard Law Review was highly critical of the District Court Opinion. Regarding the distinction made by Judge Winter between

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[71] Ibid., p. 398.

[72] "Constitutional Law--Relation Between State and Federal Government-Nonprofessional, Nonadministrative State Employees are Subject to Federal Fair Labor Standards Act," Harvard Law Review 81 (May 1968): 1575; See, also Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," Columbia Law Review 54 (1954): 543-560.

plenary and concurrent powers and their respective limitations within the federal system, it noted that Winter's analysis tested "on a metaphysics of constitutional powers." It also commented that "since modern concepts of interstate commerce place state activities within the reach of Congress, federal legislation under the commerce power might well interfere with state sovereignty."[73] Note that Harlan's majority opinion did not try to distinguish between the limits of plenary and concurrent powers. He simply stated that the commerce power was limited, but the limitation had not been transgressed in Wirtz.

Since the inception of our Constitutional system, the questions of the limitation of the commerce power and the nature of our federal system have been confronted by the Supreme Court. Maryland v. Wirtz was not destined to answer these questions decisively. Wirtz did juxtapose the commerce power with the Tenth Amendment, and pointed to one of the dynamic characteristics of the Supreme Court, i.e., the consideration of recurring constitutional questions in the light of a new set of facts.

The majority opinion might also be indicative of a continuing confidence in the system of cooperative federalism between the states and the Federal Government. In the mid-1960's President Lyndon Johnson was in the midst of initiating his Great Society programs, which--like Roosevelt's New Deal programs--relied upon the preeminence of National control in these socioeconomic fields for their implementation.

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[73]Ibid., p. 1573.

Considerations of the balance of power in the federal system would surface in subsequent cases, such as Younger v. Harris and Fry v. United States, and in further litigation under the FLSA in National League of Cities v. Usery.[74] The decision in Maryland v. Wirtz indicated that the balance of power during this era of cooperative federalism was shifted toward the National government. In 1976 the Burger Court attempted to redress the balance of power between the National government and state governments in the Usery case.

[74] 401 U.S. 989 (1971); 421 U.S. 547 (1975); 426 U.S. 833 (1976).

CHAPTER III

THE USERY CASE: READJUSTING THE BALANCE OF POWER

The decision of the Burger Court in National League of Cities v. Usery,[1] has been hailed as a turning point in constitutional federalism. It has also been discounted by some constitutional scholars as a conservative reaction by a majority of this Supreme Court. Since United States v. Darby,[2] the Court has consistently held that it is within Congress' power to regulate wages and hours of employees under the commerce clause regardless of whether the business that is regulated is proprietary or governmental in character. The Usery case is a decisive departure from this line of precedent.

Younger v. Harris and Fry v. United States

Two cases decided between Wirtz and Usery merit our consideration. In 1971 the Supreme Court in Younger v. Harris[3] held that a district court injunction had violated a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." Justice Black held in the majority opinion that although the California criminal syndicalism statute might be, on

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[1] 426 U.S. 833 (1976).

[2] 312 U.S. 100 (1941).

[3] Younger v. Harris, 401 U.S. 37 (1971).

its face, unconstitutional, there was no reason to enjoin a state proceeding which was enforcing that statute in good faith. Only if the danger of irreparable injury was immediate could a federal court enjoin a state criminal prosecution.[4]

The dissenting opinion by Mr. Justice Douglas stressed that this case presented one of those exceptional circumstances in which the federal government could enjoin a state proceeding. Douglas maintained that since the statute was unconstitutional, there was a possibility that the First Amendment freedom of speech might be violated. The abrogation of this fundamental right would constitute irreparable injury. Douglas, however, would agree that the general principle remained that federal courts should not enjoin state court proceedings except under extraordinary circumstances.[5]

In the majority opinion Justice Black commented upon federalism implicit in the Constitution. "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." Black, then, went on to describe the concept of "Our Federalism" which was promulgated by the Founding Fathers, and still survives in our system today. "What the concept does represent is a system in which there is a sensitivity to the legitimate interests of both State and National Governments. . . ." without blind obedience to theories espousing either States Rights or a Strong Central government.[6]

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[4]Ibid., pp. 37-44.

[5]Ibid., pp. 58-65.

[6]Ibid., pp. 43-44.

Black also tied the common law notion of comity to this theory of cooperative federalism. He commented that this comity was

> a proper respect for state functions, a recognition of the fact that the entire country was made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions were left free to perform their separate functions in their separate ways.[7]

The dicta employed by the Court in the majority opinion in Younger demonstrated an independent role for the State Courts in the federal system unless unusual circumstances were involved. Black did not use the Tenth Amendment to bar federal interference with State functions. He did, however, speak in terms of constitutional federalism and the importance of its preservation in our system of government. Although Younger did not deal with the power of Congress under the commerce clause to regulate State employees, it implicitly recognized that State functions--or at least State Court proceedings--should be free from undue interference by the Federal government. The holding in Younger foreshadowed the argument advanced by the appellants and adopted by Justice Rehnquist in the Usery case.

Another case which was, perhaps, more on point with the Usery decision was Fry v. United States (1975).[8] This case involved the

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[7]Ibid.

[8]Fry v. United States, 421 U.S. 542 (1975); See also, G. Gunther, "Constitutional-Law-Commerce Clause," Harvard Law Review 89 (November 1975): 49-51.

constitutionality of the Economic Stabilization Act[9] of 1970 which was enacted under the commerce power. The Act provided for the imposition of wage and salary ceilings by the President. The State of Ohio passed a law raising the salaries of state employees in excess of the amount set by the President. Ohio challenged the constitutionality of the Economic Stabilization Act by arguing that the Act did not apply to State employees. The Supreme Court affirmed the Court of Appeals decision which held that the Act was constitutional as it applied to State employees.[10]

The majority opinion by Justice Marshall referred to the Congressional intent of the ESA and concluded that the statute applied to <u>all</u> persons whether private or government employees. Rejecting Ohio's argument that the Act interfered with State sovereign functions, Marshall concluded that there was no distinction between proprietary and governmental functions for purposes of regulation under the commerce clause. Furthermore, Congress might reasonably conclude that "general raises to state employees could inject millions of dollars of purchasing power into the economy and might exert pressure on other segments of the work force to demand comparable increases." Marshall argued that the Act was far less intrusive upon State governments than the 1966 amendments to the FLSA which were constitutional. At the end of the opinion he mentioned briefly that the Act was an emergency measure,

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[9] 12 U.S.C.S. sec 1904 (1975).

[10] 421 U.S. 542.

but the decision rested on the commerce power, not on an "emergency" power.[11]

Justice Rehnquist cast the lone dissenting vote in Fry. His opinion was a brief outline of the majority opinion he would eventually write in the Usery case. He maintained that Maryland v. Wirtz, United States v. California, and Fry v. United States were a "detriment" to constitutional federalism and should be overruled. Rehnquist claimed that the Court in the California case gave a "somewhat short shrift to a claim of State's Rights." He encouraged the Court to confront the issue of federalism. "Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments."[12] Rehnquist was reviving the notion that state governments should be immune from federal interference in the execution of their sovereign functions. Black's majority opinion in Younger augmented by the dissenting opinion in Fry, provides the appellants in National League of Cities v. Usery with a recent precedent upon which to advance a states sovereignty argument.

The Facts of the Usery Case

The 1974 amendments to the Fair Labor Standards Act redefined employer to include public agencies. The wage and hour requirements of the FLSA were thereby extended to employees of states and their

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[11]Ibid., pp. 545-548. [12]Ibid., pp. 550-559.

political subdivisions. The National League of Cities, the State of California and others challenged the 1974 amendments as an unconstitutional extension of Congressional power under the commerce clause. Appellants sought declaratory and injunctive relief. The three judge District Court dismissed the action and NLC and California appealed. In a five to four decision Justice Rehnquist writing for the majority of the Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted to Congress by Article I, Section I, cl. 3, [the commerce clause]."[13]

Voluminous briefs of Counsel and amicus curiae were on file for both appellants in the Usery case. Since this case was consolidated (NLC and California), there were two sets of appellant briefs. Furthermore, the case was first argued on April 16, 1975 and was, then, reargued on March 2, 1976. Consequently, Supplemental briefs and Reply briefs were filed.

Appellant's Arguments in Usery

National League of Cities and the State of California challenged the constitutionality of the 1974 amendments to the Fair Labor Standards Act as applied to employees of the States and their subdivisions. They maintained that these amendments were a "patent denigration of the

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[13] 426 U.S. 833 at 835-852.

sovereign and reserved rights of the States to deal with their respective personnel and to conduct their manifest governmental activities."[14]

The amendments were based upon Congress' power to regulate commerce. The Usery case, however, concerned more than just National regulation under the commerce clause. National League of Cities argued that what was at stake was the principle of federalism as laid down by the Founding Fathers in the Constitution. They argued that power had become so centralized in the National government that constitutional federalism was the only protection which State and local governments had in the face of National usurpation of vital governmental functions.[15]

California argued that the 1974 amendments to the FLSA could only be accepted "if the Court [accepted] the bald premise that everyone but supervisory or executive personnel of a State [were] engaged in interstate commerce." The only factor upon which the District Court held that the States were engaged in interstate commerce was the purchase of goods shipped in interstate commerce. Since these goods were used only to perform essential governmental functions, the States were ultimate consumers. "Commerce in a national free trade market is

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[14]National League of Cities v. Usery, 426 U.S. 833, "California Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 0112, 1975), p. 6.

[15]National League of Cities v. Usery, 426 U.S. 833, "National League of Cities Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, 0112, 1975), pp. 3 and 43; National League of Cities v. Usery, 426 U.S. 833, "NLC Reply Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 0112, 1975), p. 51.

important but so is our Federal system of Government. Protecting that system of Government is more important than protecting commerce, as that governmental system just in turn protect commerce."[16]

". . . The guarantees [that were] embodied in the Tenth Amendment are a fundamentally protected Constitutional right." The spirit of federalism which was symbolized by the Tenth Amendment is also evidenced in the Article I powers which delegate a limited number of powers to the central government. "One cannot ignore the Tenth Amendment as a guarantee to the People and to the States of State governmental powers or as a guarantee to the People of their paramount power." Furthermore, the history of the adoption of the Eleventh Amendment, also, recognized "the unique status of the States under the Constitution," by prohibiting suits by private citizens against the states. The 1974 amendments to the FLSA would authorize that same type of suit.[17]

Furthermore the Court's decision in Maryland v. Wirtz must be confined to the facts of that case. "In Wirtz, this Court acknowledged that the ability of Congress to interfere with essential State functions was limited to those economic activities that [were] engaged in by private persons." The competition theory and labor dispute theory relied upon by the Government in Wirtz were inapplicable to the purely State functions affected by the 1974 amendments. The opinion of the Court in Wirtz held

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[16]"California Brief," pp. 6-7; "NLC Brief," pp. 44-45 and 128.

[17]"NLC Brief," pp. 3, 12, 99, 54-55, and 128.

that the extension of the wage and hour provisions to employees of state schools and hospitals did not place an undue burden of State government. However, "the impact of the totality of the [1966 amendments] upon State and local Governments by the Federal Government . . . [was] not adequately considered or evaluated in Wirtz." The briefs of counsel and the decision in Wirtz focused upon the commerce power and, thus, questions of constitutional federalism received "scant attention."[18]

> To conclude that Maryland v. Wirtz [was] controlling would be to create a preeminence for the commerce clause that borders on omniscience, without one shred of evidence in our constitutional history that the commerce power was so enshrined.[19]

In reference to Fry v. United States the NLC Supplemental Brief noted that the Court balanced the compelling need for national economic legislation with the impact of that legislation upon State and local government. The decision in Fry required that a nexus with interstate commerce be demonstrated, but Appellees in the Usery case have not "identified any State of City employees receiving wages below the Labor Act's standard." National League of Cities maintained, however, that even if this nexus was conclusively proven, the fiscal impact upon the States and their subdivisions would invalidate the 1974 amendments as undue interference with State budgetary functions. "The Appellee [was] caught in the dilemma" of trying to convince the Court that the Act

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[18]"California Brief," p. 45; "NLC Brief," pp. 44-45 and 128.

[19]"NLC Reply Brief," p. 51.

would have had no fiscal impact, but that the Act [was] necessary to remedy a great disparity in the wages of State employees.[20]

The 1974 amendments would touch

> the very heart of State sovereignty. . . . The State budget [would need to] be restructured and numerous State statutes which regulated the wages, hours and working conditions of employees performing indispensable public services [would] be nullified.

The anticipated fiscal impact upon the State was enormous. Many state constitutions have established tax and debt limits which through this "Congressional mandate" had to be broken.[21] Appellants noted the impact of the 1974 amendments upon the federal system. Over the 200 years of this country's existence the day-to-day functioning of our federal system has been forged in the competing fires of interlevel and intralevel conflict. However, "the impact of these Amendments on intergovernmental relations [would be] devastingly enormous." American intergovernmental relations have been characterized by many different types of cooperation. The recent adoption of the Intergovernmental Personnel Act was characteristic of the tendency of all levels of government to work together toward the goal of efficient administration. "If one Government is seeking to control an element as vital as

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[20]National League of Cities v. Usery, 426 U.S. 833, "NLC Supplemental Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc. 0112, 1975), pp. 50-58.

[21]"California Brief," pp. 8-11; "NLC Brief," p. 38; "NLC Reply Brief," pp. 2-4.

personnel management of the other,"[22] cooperation will be replaced by conflict.

Consequently, if these amendments were held constitutional, the greatest loss to our political system would be the "flexibility, adaption to change, and experimentation," as a result of the imposition of uniform requirements. "The variety of our Federal system is strengthened by the wholesomeness of local and regional variations." Local control over local budgetary considerations would be superseded by these amendments; State budgetary decisions would be mandated by the federal government. Thus, the "ballot box control" over local officials would be rendered meaningless by federal action.[23]

The California brief insisted that the 1974 amendments to the FLSA should be evaluated with reference to a more stringent standard than the traditional rational basis test. The Government should have to prove that (1) there was a compelling national interest, and that (2) there was no undue interference with "the State's performance of its crucial public functions."[24]

Amicus curiae briefs filed on behalf of the appellants urging reversal of the District Court decision reemphasized the arguments presented by NLC and California. Amicus curiae on behalf of Virginia

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[22] "NLC Brief," pp. 57 and 72.

[23] Ibid., pp. 82-113.

[24] Ibid., p. 96; "California Brief," p. 6; "NLC Reply Brief," p. 51.

New York, and Virginia Municipal League and Virginia Association of Counties argued that if the original purpose of the FLSA was examined the Court would find that the 1974 amendments transgressed "Congressional Boundaries" and that Wirtz was not controlling. Following the rationale in Wirtz the National Association of Counties in its amicus curiae brief asserted that the key to the Usery case was that the Government had not shown a rational basis for enacting the 1974 amendments. The National Institute of Municipal Law Officers stated that the Court must balance the impact of the 1974 amendments upon State budgetary concerns with "an extremely attenuated nexus to commerce and an extremely weak national concern." Finally, the brief of the Public Service Research Council focused upon the effect of the amendments upon "the responsiveness of local and state governments to their constituents," as a result of federal control of state budgets.[25]

Appellee's Arguments in Usery

According to the Government, the question presented in this case was whether the 1974 amendments to the Fair Labor Standards Act exceeded Congress' power under the commerce clause, thereby infringing upon State sovereignty. The Government argued in its brief that where an otherwise

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[25]National League of Cities v. Usery, 426 U.S. 833, "Amicus Curiae Briefs," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 0112, 1975); Commonwealth of Virginia; State of New York; Virginia Municipal League; Virginia Association of Counties, pp. 1-29; National Institute of Municipal Law Officers, pp. 1-42; Public Service Research Council, pp. 1-32.

valid regulation of commerce existed, and where state sovereignty was not seriously threatened, the States were not exempt from Congressional regulation under the commerce power.

In response to Appellant's arguments, the Government maintained that "the issues raised were all resolved by the Court . . . with respect to the same statute in Maryland v. Wirtz." No essential differences existed between the case at hand and Wirtz. The Supreme Court's decision in Wirtz was "soundly based on an unbroken line of Commerce Clause decisions and should be controlling." Congress, furthermore, had a rational basis upon which to enact the 1974 amendments.[26]

Appellants "[sought] to distinguish Maryland [v. Wirtz] on the ground that the public agencies covered by the 1974 Amendments--unlike those covered by the 1966 Amendments--[were] not in competition with the private sector." The Government argued that this assertion was misleading. First, the States and their subdivisions competed among themselves for industry. If the states were permitted to pay their employees less than the minimum wage, they could decrease their taxes to attract business. The result would be an unfair competitive advantage to States not in compliance with the wage and hour requirements. Many types of State employees, such as secretaries, custodians,

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[26]National League of Cities v. Usery, 426 U.S. 833, "Appellee's Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 0112, 1975), pp. 3-10.

accountants, and cooks, had counterparts in the private sector and would be in substantial competition with them.[27]

Congressional findings also revealed the existence of "substandard labor conditions in State and Local governments." Recent history has demonstrated that labor unrest among public employees could affect commerce. In addition, the sheer amount of goods and services purchased by state and local government further supported the assertion that the States did engage in commerce. Purchases of 135 billion dollars by public agencies constituted 12 percent of the gross national product in 1971.[28]

Appellee argued, "More generally, in enacting the 1974 Amendments, Congress recognize[d] that substandard wages were destroying the incentive to work and thus burden . . . the nation's welfare rolls." The imposition of a minimum wage would encourage those people already on welfare to seek jobs in the public sector. "In any event, poverty and unemployment have an effect on interstate commerce. . . . Conversely, a minimum wage and the creation of new jobs by encouraging the hiring of more personnel, rather than using overtime hours [would] have a direct effect on the purchase and movement of goods in commerce." Therefore, Congress had established a rational basis for enacting the 1974 Amendments to the FLSA.[29]

The Government asserted, "The 1974 Amendments [did] not threaten to destroy the sovereignty of the States guaranteed by the Constitution.

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[27]Ibid., pp. 10-22. [28]Ibid., p. 12. [29]Ibid., pp. 27-28.

They [did] not displace State policy, they only require[d] that in pursuit of that policy . . ., the State must satisfy very minimum standards as to wages and hours." Moreover, the alleged impact upon State fiscal policy by the Appellants was unsubstantiated and was based upon a misreading of the amendments and their subsequent regulations. In any event the fiscal impact of the 1974 Amendments was not a factor in the consideration of their constitutionality.[30]

With regard to the Tenth Amendment, the Government claimed, "The Tenth Amendment does not affect the validity of action taken within the commerce power." This principle has been recognized since Chief Justice Marshall's opinion in Gibbons v. Ogden. It was reiterated in United States v. Darby in which Mr. Justice Stone stated that the Tenth Amendment was a "mere truism." A series of commerce power cases from United States v. California through Case v. Bowles have reaffirmed this established precedent. "It is the Supremacy Clause, not the Tenth Amendment or its penumbra, that defines the relationship between the federal government and the States."[31]

Appellants also raised the question of the Eleventh Amendment prematurely. "The question of how the Act may be enforced against noncomplying States should await the determination whether the substantive provisions of the Act may be constitutionally applied to

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[30]Ibid., pp. 11-12 and 37-40.

[31]Ibid., pp. 12 and 53-56; National League of Cities v. Usery, 426 U.S. 833, "AFL-CIO Supplemental Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 0112, 1975), p. 10.

them. . . ." In any event the Eleventh Amendment is "not applicable to suits brought by the Secretary of Labor" against the states.[32]

Fry v. United States presented further evidence that the 1974 amendments should be upheld.

> The holding in Fry that the Economic Stabilization Act was valid under the Commerce Clause and did not violate the Tenth Amendment rested not on the fact that the statute was emergency legislation, but on the fact that it did not constitute an impermissible interference by the federal government with state sovereignty.[33]

In conclusion, the Government argued that a broad interpretation of the commerce clause was necessary, if Congress was to be able to regulate interstate commerce effectively. "Contrary to appellant's contention . . ., the Commerce Power is not limited to strictly 'commercial' matters; it is broad enough to permit Congress to deal with national economic problems."[34]

> We must always be concerned about the perservation of federalism. But that concern is not best translated into constitutional law by striking down a statute like this on the theory that any principle may be pushed so far as to obliterate equally important opposing principles. The task of judicial judgment is one of assessing balances and degrees. To draw the line here would be to draw it in the wrong place, at the wrong time for the wrong reasons.[35]

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[32]"Appellees Brief," pp. 12 and 62.

[33]National League of Cities v. Usery, 426 U.S. 833, "Appellee's Supplemental Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 0112, 1975), p. 14.

[34]"Appellee's Brief," pp. 29-30 and 56.

[35]Ibid., p. 41.

Amicus curiae briefs on behalf of Appellee came from a variety of sources. Briefs from labor groups supported the validity of the 1974 amendments. The AFL-CIO asserted that *Maryland* v. *Wirtz* was controlling and accused Appellants of "emotive appeals." Accordingly, reliance upon the taxing power cases was also unfounded. The International Conference of Police Associations and the Florida Police Benevolent Association maintained that public employees were entitled to minimum subsistence pay and standard labor conditions which private sector employees received.[36]

Two unusual *amicus curiae* briefs were filed by the State of Alabama and by Senators Harrison A. Williams, Jr. (D. New Jersey) and Jacob R. Javits (R. New York). The Alabama brief substantiated the competition theory argument. The brief filed by the Senators argued three points: (1) *Wirtz* was controlling; (2) No undue burden was placed on the States; (3) Congress correctly relied upon the traditional objectives of the FLSA in enacting these amendments.[37]

Oral Arguments in *Usery*

An examination of a transcript of the reargument of *National League of Cities* v. *Usery* revealed that the Justices were primarily interested

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[36] "*Amicus Curiae* Briefs: AFL-CIO Brief," pp. 15-18; International Conference of Police Associations, pp. 1-9; Florida Police Benevolent Association, pp. 1-12.

[37] Ibid., State of Alabama, pp. 1-17; Harrison A. Harrison, Jr. and Jacob K. Javits, pp. 1-21.

in the impact of the 1974 amendments upon the nature of the federal system. Governor Rampton of Utah, representing the governors of the 50 states, presented an argument which focused on the impact of the amendments. Mr. Charles Rhyne, counsel for Appellants, formulated two arguments. First, he argued that Congress had not demonstrated a substantial nexus between interstate commerce and the regulated employees. Second, the statute was overbroad and was invalid on its face. The argument for Appellees was presented by Solicitor General Robert Bork. His oral argument reviewed the points made in the Government's brief. However, Bork also suggested a no-discrimination test which would protect constitutional federalism but would, at the same time, permit Congress to prescribe wage and hour regulations for State ministerial employees.[38]

Governor Rampton began his argument by outlining some of the alleged effects of the 1974 amendments. He contended that State merit system policies would be displaced, and that the overtime provisions for public safety employees would place an enormous fiscal burden on the States. Furthermore, the burden on the courts would increase as a result of the ambiguous regulations. Governor Rampton relied upon the distinction between proprietary and governmental functions in his argument. With regard to the labor dispute theory, Rampton replied to a question that public employee strikes were not generally permitted, but that the governors' position was that "you cannot strike against

[38] National League of Cities v. Usery and California v. Usery (Transcript of Oral Arguments) Washington, D.C.: Hoover Reporting Co., Inc., March 2, 1976.

the public welfare." He argued also that the activities covered by the amendments were purely governmental functions. When questioned by Justice White whether his position was that the commerce power did not extend to the activities covered by the amendments, or whether the commerce power was limited by other mitigating factors, Rampton answered that the commerce power was limited.[39]

Mr. Rhyne's argument began his remarks by refuting the Government's argument that there was a substantial nexus to commerce to justify the regulation of State employees. He asked where were the 95,000 employees who received the allegedly substandard wages. Rhyne challenged the labor dispute theory by asking the Government to indicate a public employee strike, other than teachers who are exempt from the Act which has had an impact on commerce. Rhyne scoffed at the two ads in the New York Times presented in support of the competition theory. Finally, he criticized the decrease in unemployment and welfare roll theories as extremely tenuous.[40]

Rhyne distinguished Fry v. United States from the instant case by stating that the Economic Stabilization Act was an emergency measure in response to a compelling national interest. Rhyne believed that the decision in Fry did not have any bearing on the Usery case, except that it noted that the Tenth Amendment might be a possible limitation on the commerce power. Rhyne insisted that the 1974 amendments were overbroad and were, thus, invalid on their face. Mr. Justice White asked whether

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[39]Ibid., pp. 1-10.

[40]Ibid., pp. 10-16.

there were state employees engaged in commerce? Rhyne replied that there were, but these employees should be legislated for according to occupation.[41]

At the conclusion of his argument Rhyne was asked whether he had a test in mind to distinguish state employees who engaged in commerce from those who did not. He answered that he did not. When he was asked if he would accept the proprietary/governmental test suggested by Rampton, Mr. Rhyne acknowledged that he would accept this test even though it had proven to be too nebulous to be practical. Rhyne was, then, led through a series of hypothetical situations regarding the employees of state power companies and state lotteries. Rehnquist and White asked Rhyne whether the problem was that the statute was not severable. Rhyne reiterated that the functions that a city performs were difficult to categorize. Therefore, since the 1974 amendments were too broad, they were invalid. Justice Stevens asked Rhyne if he was relying primarily on the lack of nexus test or the sovereign immunity of the States in this argument.[42] Rhyne replied,

> I am really relying on both. . . . I wanted to point out to you that there was no evidence, and secondly, that I was relying on constitutional federalism which . . . invalidates this act on its face.[43]

Solicitor General Bork began the reargument by recognizing the central issue as the "effect of the '74 amendments to the Fair Labor Standards Act upon federalism." Bork demonstrated that Congress had

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[41]Ibid., pp. 17-24. [42]Ibid., pp. 17-31. [43]Ibid., p. 24.

reason to believe that State employees receiving substandard wages affected commerce. Chief Justice Burger had a hard time accepting the decrease in the welfare rolls theory. Justice Rehnquist asked Bork whether he believed that the proprietary/governmental distinction was valid. Bork answered that it was not. He also emphasized that the Tenth Amendment contained no limitation on the commerce power.[44]

Bork's arguments were founded upon the notion that the 1974 amendments did not substantially intrude upon the sovereignty of the states. He argued that merely prescribing wage and hour standards for employees was not nearly as intrusive as the preemption by the federal government of a State policy area, such as labor relations. Finally Bork suggested a no-discrimination test which he believed would be a safeguard against the destruction of constitutional federalism in the area of wage and hour regulation. Basically, the no-discrimination rule was the stipulation that the federal government would not place any more stringent regulations upon the states than it placed on itself. Thus, "the federal government, without destroying itself, can never destroy federalism."[45]

Both litigants maintained that Wirtz did not need to be overruled. Apparently, Rhyne contended in his first argument that it should be overruled, but he reversed this position and distinguished Wirtz from Usery with regard to the far-reaching impact of the 1974 amendments. Bork asserted that Wirtz was decided correctly and predicted that if

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[44]Ibid., pp. 31-71.

[45]Ibid., pp. 45-71.

this precedent was overruled, there would be a "constitutional counterrevolution" which would return the interpretation of the commerce clause to the pre-New Deal era.[46]

The Decision in Usery

The majority opinion was written by Justice Rehnquist and was supported by Chief Justice Burger and Justice Powell and Stewart. Justice Blackmun joined the majority and wrote a separate concurring opinion. Justice Brennan wrote a highly critical dissent in which he was joined by Justices White and Marshall; Justice Stevens wrote a separate dissenting opinion. The Court held that the 1974 amendments to the FLSA were unconstitutional on the ground that considerations of federalism preclude interference by the federal government in the sovereign functions of the states, including the structure of the employer/employee relationship.[47]

Rehnquist began his majority opinion by outlining a history of the Fair Labor Standards Act and its amendments. He noted that when the FLSA was initially passed state employees were excluded from its provisions. Rehnquist restated appellant's argument using the term "intergovernmental immunity" as the basis of their complaint. He also indicated that the District Court had grave reservations about its decision, but resolved the case in line with the precedent established by *Wirtz*. The Court reversed the District Court decision and explicitly overruled *Maryland* v. *Wirtz*.[48]

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[46]Ibid., pp. 31-32. [47]426 U.S. 833. [48]Ibid., pp. 833-840.

According to Rehnquist, the broad interpretation of the commerce power was not diminished as it applied to activities which have been held to be within the commerce power. Even the activities which NLC challenge were generally within the scope of the commerce power. However, considerations of federalism preclude the regulation of the "State *qua* State" under the commerce power. "The Court recognize[d] that an express declaration of this limitation is found in the Tenth Amendment." Rehnquist stated that cases involving intergovernmental tax immunity were controlling. The opinion of the Court did not reach the Eleventh Amendment raised in the briefs of counsel, because the amendments were unconstitutional.[49]

He asserted, "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions . . ." After an extensive discussion of the alleged impact of the 1974 amendments, Rehnquist concluded that in interfering with State budgetary allocations "Congress has sought to wield its power in a fashion that would impair the State's 'ability to function effectively within a federal system.'"[50]

Rehnquist distinguished the *Fry* decision from the case at hand by noting that the Economic Stabilization Act was an emergency measure in response to a compelling national interest. The temporary nature of the statute did not impair the State's ability to carry out its sovereign

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[49]Ibid., pp. 840-846.

[50]Ibid., pp. 846-852.

functions. However, Maryland v. Wirtz was overruled because the employees regulated under the 1966 amendments provided "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens.[51]

The dissenting opinion by Justice Brennan accused the majority of repudiat[ing] principles governing judicial interpretation of our Constitution settled since the time of Chief Justice John Marshall . . . ." He reiterated that the commerce power was plenary and was not limited by any considerations of state sovereignty or the Tenth Amendment. Brennan relied upon commerce power cases and believed that the reliance by the majority on taxing power cases was misplaced. He also accused the majority of merely invalidating a Congressional policy with which they did not agree. Brennan pointed out that the "cavalier" rejection of the 1974 amendments stood in clear opposition to the balancing principle upheld in Fry. He accused Rehnquist of "sophistry" in reference to the statement in the Majority opinion that the ESA "displaced no State choices." Brennan concluded, "Today's holding patently is in derogation of the sovereign power of the Nation to regulate interstate commerce."[52]

The separate concurring and dissenting opinions by Justices Blackmun and Stevens, respectively, put the arguments for both opposing views into a much less emotional context. Blackmun believed that the Usery case should have been decided by balancing the interests

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[51] Ibid., pp. 852-856.

[52] Ibid., pp. 856-880.

of the federal government with the interest of the states. Stevens, on the other hand, held that Congress had plenary power under the commerce clause and that there was no limitation on that power. Therefore, state employees were not immune from an otherwise valid regulation under the commerce power.

Appellants argued that constitutional federalism, as enunciated in the Tenth Amendment, placed a limitation on Congress' power to regulate State governmental functions under the commerce clause. Appellee insisted, on the other hand, that the states were not exempt from regulation under the commerce power. Rehnquist's majority opinion reflected the position of the appellants, but went much further than they were urging. The dissenting opinion adopted essentially the Government's argument. However, while Appellee would acknowledge some limitations on the commerce power, Justice Stevens' opinion held that the commerce power was plenary.

Appellants urged that the Government had not demonstrated a substantial nexus between commerce and the regulated interest. Next, NLC asserted that the statute was overbroad and indiscriminately infringed upon the operation of state government. Rehnquist's majority opinion did not deal with the nexus test. He acknowledged that the activities which the 1974 amendments sought to regulate were within the scope of the commerce power. However, if these activities were performed by state employees, then they were not regulable, because these activities were traditional state functions. During his Oral Argument, Mr. Rhyne, counsel for appellants, admitted that there could be some state employees who were engaged in commerce. These employees could be subject to federal wage and hour regulations. Rehnquist held, however, that if these employees were engaged in traditional governmental functions, even if they were engaged in commerce, then the employees were not regulable under the commerce power.

Rehnquist's opinion implicitly relied on the distinction between proprietary and governmental functions. He relied upon the taxing power cases in setting up this immunity of the states from regulation under the commerce power. The alleged impact of the 1974 amendments upon the ability of the states to perform their budgetary functions and to make policy decisions was crucial in the Usery decision. He apparently adopted the dicta in Fry that the regulation of the wages of state employees would be valid as long as it did not unduly interfere with state governmental functions. Rehnquist pointed out that the ESA in Fry was temporary in nature and did not displace state policy decisions.

The majority went one step further than Appellants were suggesting. NLC and California wanted to establish the distinction between governmental and proprietary functions. They did not argue persistently, however, that all traditional functions of the state should be immune from regulation. Rehnquist set up a sphere of "State" activity. These traditional governmental functions were exempt from regulation by the National Government under the commerce clause (although presumably not exempt from regulation under the taxing power). Accordingly, not only would the distinction now have to be made between governmental and nongovernmental functions, but also between traditional and nontraditionl functions of state and local government. The dissenting opinions by Justices Brennan and Stevens agreed with the argument presented by Solicitor General Bork for the Government. Bork's argument refused to make the distinction between governmental and proprietary functions. Furthermore, he argued that the plenary power of Congress under the commerce clause was not subject to limitation by the Tenth Amendment. This position was reflected in Justice Steven's opinion. Brennan echoed Bork's fears of a constitutional counterrevolution as he denounced the radical departure from precedent in the majority opinion. Noticeably missing, though, from the dissenting opinions was Bork's no-discrimination rule. Apparently, this test was dismissed by the Court, and it was not mentioned in any of the opinions.

Justice Blackmun's concurring opinion suggested that the Usery case should have been decided by balancing state with federal interests. This approach was suggested in the California brief's higher than rational basis test. The higher than rational basis test, which requires strict scrutiny of National regulation under the commerce clause, was also the same as the compelling national interest test which Rehnquist believed was controlling in Fry, but was inapplicable in the Usery case.[53]

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[53]Ibid., pp. 856 and 880-881.

Some Reflections

Justice Rehnquist's majority opinion went further than necessary in adopting the proprietary/governmental distinction and in setting up a sphere of traditional governmental functions. A more moderate resolution of the dispute would have been the balancing test established in Fry and suggested by Justice Blackmun in his concurring opinion. The Blackmun opinion did not differentiate between state proprietary or governmental interests, but between state and federal interests. This compelling national interest test has been used by the government when uniform national regulation was desirable. Under the balancing test, the impact of the regulation upon the state would be decisive in determining whether or not the need for federal intervention outweighed the intrusion into state affairs. The balancing test, a well-known device used by the Supreme Court, might have been more credible than the distinctions drawn by Rehnquist.

Conversely, the dissenting opinions by Brennan and Stevens could be easily squared with constitutional precedent. Furthermore, Fry was consistent with the holding in Wirtz. A perusal of the Fry decision revealed that the decision was based squarely on the commerce power not on the emergency nature of the situation. In Fry, Justice Marshall, writing for the majority, opened the door to state sovereignty claims under the Tenth Amendment, but it should be noted that he dissented in Usery. Rehnquist, the lone dissenter in Fry, announced the judgment of the Court in Usery and wrote the majority opinion in which he took the

Tenth Amendment argument much further than the Fry majority was willing to go.

The long-range implications of the Usery decision on federalism are impossible to gauge in just two years. An examination of cases in the immediate aftermath of Usery might forecast the Burger Court's committment to the Usery precedent. Since many articles have also been written dealing with the holding in Usery, a survey of this literature might also point out some of the key factors to watch for in future decisions. The underlying question in this examination is what are the possible effects of the Usery decision on the nature of our federal system and intergovernmental relations?

Cases and Comment in the Aftermath of Usery

The following cases dealt, at least in part, with considerations of constitutional federalism. In Elrod v. Burns the Court confronted the constitutionality of state patronage systems under the First and Fourteenth Amendments. Fitzpatrick v. Bitzer was a case arising under the Eleventh Amendment. The question in Bounds v. Smith was whether the "constitutional" right of access to the federal courts required state prisons to provide libraries and counsel.[54] The constitutionality of a New Jersey statute which had the effect of impairing a contract was challenged in United States Trust Co. v. New Jersey. Lastly, in

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[54]Elrod v. Burns, 427 U.S. 347 (1976); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Bounds v. Smith, 52 L.Ed2 272 (1977).

U.S. Steel Corp. v. Multistate Tax Commission the question was whether the compact clause of the Constitution was violated by an interstate compact that did not have Congressional approval.[55]

Although not involving the commerce clause, Elrod v. Burns involved the constitutionality of the action of certain elected State officials in dismissing noncivil service employees because of their party affiliation. Writing for a divided Court, Brennan held that the operation of State political patronage systems was unconstitutional by virtue of the First and Fourteenth Amendments. A dissenting opinion written by Burger reiterated the holding in Usery that the operation of state government was a sovereign function. The decision in Elrod unduly interfered with legislative and policy matters of the states. The dissent rested its argument upon the Tenth Amendment. Another dissenting opinion by Powell and joined in by Burger and Rehnquist criticized the Court for holding "unconstitutional a practice as old as the Republic, a practice which was contributed significantly to the democratization of American politics." The Burger dissent made it clear that he was trying to reverse the centralization of power in the National government. He felt that the Usery decision signified a change in the flow of power and would "arrest the down grading of the States to a role comparable to the departments of France."[56]

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[55]United States Trust Co. v. New Jersey, 52 L.Ed2 92 (1977); United States Steel Corp. v. Multistate Tax Commission, 54 L.Eds 682 (1978).

[56]427 U.S. 347 at 349-388.

Fitzpatrick v. Bitzer involved a class action suit by male employees who charged that the state's retirement plan was discriminatory. The district court granted injunctive relief, but would not award damages or attorney's fees against the state.[57] Rehnquist, speaking for seven members of the Court, reversed the District Court decision with regard to damages, but affirmed with regard to attorney's fees. The Court held that the Fourteenth Amendment which gave Congress the power to enforce its provisions by appropriate legislation authorized Congress to enforce the award of damages against the states, despite the Eleventh Amendment. In this clash between federal and state rights, Rehnquist's opinion indicated that if discrimination arising under the equal protection clause could be proven, states could be held liable for monetary awards. The majority opinion also suggested that Congress' power under the commerce clause was subject to some limitations. On the other hand, legislation enacted pursuant to Section 5 of the Fourteenth Amendment was not limited by virtue of the Tenth or Eleventh Amendments. Besides, the award of attorney's fees would have an "ancillary effect" on the State Treasury.[58] Again, Rehnquist returned to the question of the degree of intrusion into state affairs which was permissable.

The Supreme Court in Bounds v. Smith held that State prison authorities were required to assist prisoners in gaining meaningful access to federal courts by providing law libraries and legal aid.

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[57] 427 U.S. 445.

[58] Ibid., pp. 445-457.

Marshall's majority opinion held that without these aids prisoners were denied access to the Courts. This denial violated their rights under the Fourteenth Amendment. Justices Burger, Stewart, and Rehnquist wrote dissenting opinions which criticized the Court for reading into the Fourteenth Amendment the "constitutional right" to access.[59]

According to Burger, "where the federal right in question is of statutory rather than a constitutional nature, the duty of the State is merely negative; it may not act in such a manner as to interfere with the individual exercise of such federal rights." The Stewart opinion in Bounds also noted that "proper federal-state relations preclude such intervention in the 'complex and intractable' problems of prison administration." The dissenting justices were drawing a distinction between federal statutory rights as opposed to constitutional rights. Justice Stewart's comment regarding federal-state relations was reminiscent of the majority opinion in Younger v. Harris.[60]

Two final cases which have been decided in the aftermath of Usery were the U.S. Trust Co. case and the Multistate Tax Commission case. U. S. Trust Co. involved the validity of a state statute which had the effect of impairing a contract between the Port Authority and its bond holders. The statute repealed a covenant regarding the use of revenues from Port Authority bonds for other than stated purposes. The Supreme Court of New Jersey held that the repeal was not prohibited by the

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[59] 52 L.Ed2 272 at 272-286.

[60] Ibid., 287-289.

contract clause of the Constitution and was a reasonable exercise of the state police power.[61]

The Supreme Court reversed the State Court decision and in an opinion by Justice Blackmun held that the State had demonstrated no rational relationship between the statutory repeal and the purpose stated by New Jersey, i.e., the encouragement of the use of public transportation. Furthermore, "Whether or not the protection of contract rights comports with current views of wise public policy, the Contract clause remains part of our written Constitution." The dissenting Justices Brennan, White, and Marshall, believed that the relatively small infringement of the contract clause was outweighed by public policy considerations. In footnote No. 51 the dissenting opinion criticized the Court for inconsistency in its concept of state sovereignty and referred specifically to the Usery decision.[62] Although the Usery decision seemed to give the states a wide latitude in the implementation of their public policy decision, the Contract Clause apparently placed a limitation upon the exercise of that power.

In the Multistate Tax Commission Case the Supreme Court confronted the issue of whether an interstate compact which had not received Congressional approval violated the compact clause of the Constitution (Article I, Section 10, clause 3). Writing for seven members of the Court Justice Powell held that the Multistate Tax Compact did not enhance

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[61] 52 L.Ed2 92.

[62] Ibid., pp. 92-135.

the political power of any of the member states vis a vie the federal government. Therefore, it was valid under the Compact Clause. The Court examined the various provisions of the compact and concluded that it was an administrative device to be used for taxing purposes. The Compact did not create any collusive powers among the states which would threaten the existence of the federal system. Justices White and Blackmun dissented expressing the view that the Compact was clearly in violation of the Constitutional prohibition, even if only the potential existed to alter the balance of power between the federal government and state governments.[63]

The decision in the Multistate Tax Commission case is more in line with the Usery decision than the U.S. Trust Co. case. The Multistate Tax Commission case gives states freedom to choose how they will implement their public policy decisions. On the other hand the U.S. Trust Co. case reenforces a literal interpretation of the Constitution and places limitations on state action under the reserved powers of the states. The majority opinion in the Multistate Tax Commission case suggests a balancing approach, while U.S. Trust Co. suggests a strict interpretation of the Constitution.

These cases in the aftermath of the Usery decision indicate confusion in the development of the concept of federalism. The cases thus far suggest that the Court is employing a balancing technique with regard to state and National interests. Rehnquist seems immediately

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[63] 54 L.Ed2 682.

suspicious of limitations on state power due to the commerce power (see Usery and Hughes v. Alexandria Scrap Corp.[64]). On the other hand, federal legislation enacted pursuant to Section 5 of the Fourteenth Amendment is not circumscribed by considerations of state sovereignty (see Fitzpatrick). The dissenting opinions in Elrod and Bounds indicate that Rehnquist, Burger and possibly Powell and Stewart believe that the states should be able to operate their governmental systems with a minimum of federal intervention. Conversely, the majority opinions in Elrod and Bounds sanction "regulations" of state governmental functions by insisting that other constitutional rights may provide countervailing considerations. Finally, state policy decisions seem to be limited by the contract clause (U.S. Trust Co.), but not by the compact clause (Multistate Tax Commission). In any case the Usery decision has been construed narrowly by employing the balancing technique.

An examination of the literature concerning the impact of the Usery decision upon constitutional interpretation and upon the functioning of the federal system also presents conflicting views. According to Sotirios Barber, the Usery decision can be viewed as a reaction by the Supreme Court against "the theory that the Tenth Amendment counts for nothing." Barber, however, sees serious limitations in the Rehnquist opinion. Furthermore, he believes that notions of dual federalism "were

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[64]Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); See also, "Constitutional Law-Commerce Clause," Harvard Law Review 90 (November 1976); 62-63.

destroyed by the triumph of Hamiltonian economics, increased commitments to the Civil War Amendments and the nationalization of the Bill of Rights."[65]

Vanaskie would agree with Barber in his interpretation of the significance of the Usery decision. He views Usery as a reactionary decision "reminiscent" of the pre-New Deal era Court. He calls for a limited interpretation of the Usery case and for a return to the notion of the plenary power of Congress to regulate commerce.[66]

After a discussion of the constitutional significance of the interpretation of the Tenth Amendment, Kathleen McGuiness suggests that "flexibility could be gained and deference to state autonomy preserved if the federal government were forced to prove a compelling interest in order to regulate traditional governmental functions." She feels that a sliding scale is necessary to implement this balancing test, i.e., "the more a proposed measure interferes with the function, the greater the scrutiny it will undergo." In spite of practical problems of implementing this balancing test, the McGuiness article

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[65] Sotirios A. Barber, "National League of Cities v. Usery: New Meaning for the Tenth Amendment," in The Supreme Court Review, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1976), pp. 161-164.

[66] Thomas I. Vanaskie, "State Sovereignty Doctrine Since National League of Cities v. Usery: New Constitutional Interpretation under the Commerce Clause," Dickinson Law Review 81 (Spring 1977): 599-625.

does not see the shift toward this test as harmful to the doctrinal development of the Tenth Amendment.[67]

Frank Michelman and Lawrence Tribe take a position opposing that of Barber and Vanaskie. The former view the Usery decision as reactionary only if its significance is confined by a narrow interpretation of the decision. A broader perspective is that "the Supreme Court [has] intervened on the behalf of the interests of citizens in receiving free social services." According to Tribe, the Usery decision might be a recognition that there are "constitutional norms establishing minimal entitlement to certain services . . . ." The states are in a better position than the National government to supply these services. Michelman and Tribe believe that the precedent set by Usery should be expanded in order to reverse the trend of recent court decisions which have demonstrated a "retreat from the vigorous defense of liberty and equality."[68]

In a student note in the Arkansas Law Review David Knight has considered the impact of the Usery decision on the functioning of the federal system. Knight is mainly concerned with the question of the constitutionality of the Age and Discrimination in Employment Act (ADEA)

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[67]Kathleen G. McGuiness, "An Affirmative Constitutional Right: The Tenth Amendment and the Resolution of Federal Conflicts," San Diego Law Review 30 (Fall 1976): 877-896.

[68]Frank I. Michelman, "States' Rights and States' Roles: Permutation of 'Sovereignty' in National League of Cities v. Usery," Yale Law Journal 86 (May 1977): 1165-1194; Laurence H. Tribe, "Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services," Harvard Law Review 90 (April 1977): 1065-1104.

in the aftermath of Usery. He believes that the holding is so ambiguous that it is difficult to apply it to other federal regulations. He notes, however, that a key factor in Usery was the impact upon the states. The ADEA requirements are not nearly as instrusive as the alleged impact of the 1974 amendments. Even if the ADEA was unconstitutional under the commerce clause, section 5 of the Fourteenth Amendment may provide another basis to uphold the Act. At the conclusion of his discussion Knight asserts, "Since the power to discriminate in employment is not a proper attribute of state sovereignty, it is a matter of national concern that the ADEA be left intact."[69] The Court's recent decision in Elrod v. Burns supports his argument that Section 5 of the Fourteenth Amendment provides a basis for the imposition of federal standards in the area of state personnel practices.

In an article by William Kilberg and Linda Fort consideration is given to the impact of Usery on the Equal Pay Act and the ADEA. They conclude, like Knight, that the ADEA and the EPA are constitutional under the balancing test. Kilberg and Fort cite Elrod v. Burns as an indication that other constitutional considerations must also be weighed in the balance between federal and state interests. They also point out that if other federal regulations are enacted pursuant to the

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[69] David A. Knight, "The Constitutionality of the ADEA after Usery," Arkansas Law Review 30 (Fall 1976): 363-375.

taxing and general welfare clause or the war power clause, then they do not seem to be restricted by considerations of state sovereignty.[70]

In conclusion,

> National League of Cities holds only that federal power derived from the commerce clause is not plenary, as was previously thought. The Court requires a balancing of national interests manifested by federal legislation and the legitimate needs of state and local government. Properly struck, that balance can prove to be healthy for federal-state relations.[71]

The consensus is that the Usery decision will not have any substantial impact upon federal regulation of state employees either under the commerce clause or other enumerated powers.

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[70] Wm. J. Kilberg and Linda B. Fort, "National League of Cities v. Usery: Its Meaning and Impact," George Washington Law Review 45 (May 1977): 613-632.

[71] Ibid., p. 632.

CHAPTER IV

FEDERALISM REDEFINED

A Comparison of the Court's Opinion in Wirtz and Usery

In the preceding chapters the development of constitutional federalism has been traced as it has emerged through the adjudication of cases involving the Fair Labor Standards Act and its amendments. United States v. Darby established the power of Congress to regulate labor conditions in manufacturing and other industries through the FLSA. The Warren Court's decision in Maryland v. Wirtz extended this power to include state employees of schools and hospitals. National League of Cities v. Usery, however, explicitly overruled Wirtz and held that minimum wage and maximum hour requirements of the FLSA were not applicable to state merit system employees. In all of the above cases, the conflict was between an enumerated Congressional power, the commerce power, and the reserved power of the states, as recognized by the Tenth Amendment.

Although this study is primarily concerned with Maryland v. Wirtz and National League of Cities v. Usery, the arguments of counsel presented in the Darby case should be mentioned. In this case appellee, Darby, contended that the Federal government could not regulate labor conditions in private industry, because this power was reserved to the states. It was in this context, then, that he raised the question of the reserved powers of the states under the Tenth Amendment. Since the Constitutional Revolution of 1937, Congress has preempted state policy in the area of labor relations when individual or state action had a substantial effect on commerce which required the imposition of National standards. As appellants asserted in both Maryland v. Wirtz and in National League of Cities v. Usery, regulation by the Federal government of a private activity is substantially different from Federal regulation of state governmental functions. Accordingly, the Wirtz and Usery cases focus upon considerations of constitutional federalism, or more precisely, whether Congress can regulate state activities under its power to regulate commerce among the states?

In 1968 the Warren Court answered the above question affirmatively. In Wirtz the majority of the Court accepted the argument presented by the Government that Congress had a rational basis for extending the coverage of the FLSA to certain state employees. States could not claim to be exempt from these provisions on the basis of the federal relationship. Eight years later, however, in National League of Cities v. Usery, the majority of the Burger Court led by Justice Rehnquist accepted the argument that the impact of the 1974 amendments to the FLSA interfered substantially with the state's ability to function effectively in the federal system. Is there anything substantially different between the facts or the arguments of counsel in Wirtz and Usery which would possibly account for the shift in the position of the Court?

In Maryland v. Wirtz the 1966 amendment to the FLSA included state merit system employees of schools and hospitals in the definition of employee; the 1974 amendments challenged in the Usery case extended the provisions of the FLSA to state and local merit system employees. If impact was measured by the number of employees subject to regulation, then the 1974 amendments could have had a much greater impact than the 1966 amendments. As the conflicting testimony of Mr. Allen Pritchard and other representatives of the National League of Cities pointed out, the actual dollar impact of the 1974 amendments upon the states was in some dispute.[1]

In both Wirtz and Usery, the constitutional question arose under the power of Congress to regulate activities under the commerce clause as opposed to the allegedly reserved power of the states to structure their employer/employee relationships without undue Federal interference. Since the constitutional question was fundamentally the same in each case,[2] the only difference was, perhaps, the extent of coverage of the amendments and their subsequent impact. Impact was barely considered in Wirtz, but it was of primary importance in the Usery case.

In the arguments of counsel in both Maryland v. Wirtz and National League of Cities v. Usery, the similarities are easily recognizable.

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[1]National League of Cities v. Usery, 426 U.S. 833, "Transcript of Deposition of Allen E. Pritchard, Jr.," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 0112, 1975), pp. 91-92.

[2]National League of Cities v. Usery, 426 U.S. 833, "Appellee's Brief," Supreme Court Records, Briefs (Washington, D.C.: Microcard Editions, Inc., 0112, 1975), pp. 3-10.

Appellants in Wirtz presented numerous arguments to refute the Government's assertion that state employees were engaged in commerce. They contended, however, that a state was not subject to regulation when acting in its governmental capacity. Appellants in Usery granted that some state employees may be engaged in commerce. However, they also argued that wages and hours of state employees could not be regulated when those employees were performing essential governmental functions.

In both Wirtz and Usery, Appellants emphasized that the state employees were not engaged in commerce by virtue of the state's position as ultimate consumers of the goods which they received. (In Usery this point was presented more extensively in the California Brief than in the National League of Cities Brief.) The main thrust of counsel's argument, though, was that since the ability to structure employer/ employee relationships was an integral state function, the Federal government could not regulate it under the guise of regulating commerce. The Tenth Amendment and the spirit of constitutional federalism were viable limitations upon the commerce power.

The arguments for the Government in both Wirtz and Usery were practically identical. The Government insisted in Wirtz that since the impact of the 1966 amendments presented a hypothetical case and was unsubstantial, it was not germane to the constitutional question. The Government maintained basically the same position in Usery by contending that the impact of the 1974 amendments was inconsequential. Its position in both cases was that the activities engaged in by state employees affected commerce. Therefore, even though the commerce power might be limited, the states were not exempt from an otherwise valid regulation of commerce.

A comparison of the facts and arguments in Wirtz and Usery reveals that they are essentially the same. Although appellants in both cases warn against the deleterious effects of the amendments, the fundamental difference in the two cases is the consideration of impact in Usery and not in Wirtz. At least two-thirds of Rehnquist's opinion in Usery outlines the ultimate impact of the 1974 amendments on state sovereignty.

Other Influential Factors

Since the arguments of counsel and the facts of each case are essentially the same, and since the Supreme Court does not operate in a vacuum, then other factors, such as a change in the political environment and in the membership of the Court, may have been determinative of the divergent opinions. It is open to speculation which of the political or economic factors may have influenced the Burger Court decision. The most obvious political factor would be the change in the composition of the Court between 1968 and 1976. The appointment process, itself, is highly political and the appointee is often thought to reflect the political ideology of the President who appoints him. The change in the political and economic climate in the intervening years might also have been an unconscious consideration in the Usery decision.

Between 1968 and 1976 former Presidents Richard M. Nixon and Gerald R. Ford had the opportunity to nominate five justices to the Supreme Court. Mr. Nixon appointed Chief Justice Burger and Associate Justices Blackmun, Powell and Rehnquist; Mr. Ford appointed Associate Justice Stevens. Philip Kurland pointed out, ". . . the personnel of the Court has changed, and with that change has come a change in the apparent values of the justices . . . ."[3] This change could alter the perspectives with which a majority of the Court viewed established precedent. As Gary Jacobsohn noted, constitutional adjudication requires a delicate mixture of principle, fact, and doctrine.

> The statesmanlike judge will adapt the Constitution to changing social realities _without_ altering the meaning of the document. The substantive content of constitutional principle thus remains fixed, but prudence demands that doctrine (which consists of the application of principle to facts) reflect the circumstances of time and place.[4]

Whether the Nixon appointees will have any ideological impact upon judicial policy making remains to be seen. However, it is clear that "Richard Nixon wanted to change the Supreme Court's policy-making . . . ."[5] In his 1968 Presidential campaign Mr. Nixon often noted that he intended "to do something about the trend of constitutional

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[3]Philip B. Kurland, "The New Supreme Court," _The John Marshall Journal of Practice and Procedure_ 7 (Fall 1973): 4-5.

[4]Gary J. Jacobsohn, "Constitutional Adjudication and Judicial Statesmanship: Principle, Fact, and Doctrine," _Emory Law Journal_ 23 (Winter 1974): 137-138.

[5]Richard Funston, "The Burger Court: New Directions in Judicial Policy-Making," _Emory Law Journal_ 23 (Summer 1974): 644.

decisionmaking in the 1960's."[6] Nixon's abortive appointments of Clement Haynesworth and G. Harrold Carswell represented his conservative ideology. "The President set the tone for the debate in both cases when he indicated that both Haynesworth and Carswell would be Justices whose decisions would conform to his own views." It has also been suggested that Justice Rehnquist's confirmation "reflected support for the conservative brand of legal philosophy represented by the President and his earlier selections."[7]

Although in 1968 Richard Nixon campaigned against the Warren Court's decisions in the criminal justice area, he also propounded a theory of cooperative federalism which would reemphasize the role of the states in the federal system. In a radio message on June 28, 1968, Nixon called for a ". . . thorough reappraisal and a substantial revamping of the Federal system." Furthermore, he stated that "one crucial step . . . would be for the Federal Government to relinquish some of its powers and responsibilities to state and local governments, voluntary associations and individuals."[8]

The Republican Party Platform in 1968 advocated, "A new, vital partnership of government at all levels. . . ." In relation to the crisis of the cities the Platform promised, "Presidential leadership

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[6] William F. Swindler, "The Court, the Constitution, and Chief Justice Burger," Vanderbilt Law Review 27 (April 1974): 444.

[7] Justin J. Green, John R. Schmidhauser and Larry L. Berg, "Variations in Congressional Responses to the Warren and Burger Courts," Emory Law Journal 23 (Summer 1974): 727-728.

[8] "Nixon Urges Cut in Federal Power," New York Times, June 28, 1968, sec. 1, p. 5.

which will buttress state and local government and vigorous Federal support for innovative state programs." More concretely, it pledged, "revision of the system of providing Federal funds and reestablishment of the authority of state governments in coordinating and administering Federal programs."[9] The restructuring of the federal grant-in-aid system was to become one of the major goals in the Nixon administration.

In August of 1969 Nixon unveiled his revenue sharing proposal which he christened the "New Federalism." He hailed it as "a gesture . . . of faith in American's states and local governments and in the principle of democratic self-government."[10] He promised that there would be "a reversal of the New Dealism that tried to reshape American society from the center . . ."[11] In his address to the National Governors Conference Nixon pledged, "Washington will no longer dictate without consulting. A new day has come in which we recognize that partnership is a two-way street, and if the partnership is to thrive that street has to be traveled--both ways."[12] In the State of the Union Message in 1970 "New Federalism" was described as the means to

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[9]"Excerpts from Republican Platform Proposed by the Committee on Resolutions," New York Times, August 5, 1968, sec. 1, p. 25.

[10]James M. Naughton, "Nixon Proposes Revenue Sharing," New York Times, August 9, 1969, p. 11.

[11]Max Frankel, "The Presidency--Nixon Tackles a Formidable Agenda," New York Times, August 10, 1969, sec. 4, p. 1.

[12]Robert B. Semple, Jr., "President Urges Governors to Aid New Federalism," New York Times, September 2, 1969, p. 36.

reverse the flow of "power which had been increasingly centralized in the National government. . . ."[13] Again in 1971 the State of the Union address reemphasized the necessity "to introduce a new and more creative balance in our approach to government."[14] Finally, in the General Revenue Sharing Message to Congress in February of 1971 Nixon portrayed revenue sharing as the method "to revitalize the Federal system and renew our Nation."[15]

Former President Nixon's conservatism included not only his stance on law and order, but also his perceptions on the balance of power in the federal system. While Mr. Nixon may have felt that Congressional action, such as revenue sharing, or Executive action, such as the establishment of an office of Intergovernmental Relations, were the means to affect the decentralization of power, his appointment of conservative justices to the Supreme Court may also have an influence on the balance of power in the federal system.

The actual impact of the Nixon appointees on the Court is in dispute. J. Woodford Howard notes that "contrary to journalistic cries of 'crises,' . . . the Burger Court has not plunged the country into

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[13]"Transcript of the President's State of the Union Message to Joint Session of Congress," New York Times, January 23, 1970, pp. 22.

[14]117 Congressional Record 165-169 (1971) (The State of the Union--Address by the President of the United States).

[15]117 Congressional Record 1640-1644 (1971) (General Revenue Sharing--Message from the President).

some reactionary hell."[16] There is general agreement with this position, although commentators are quick to note that the Burger Court's approach to policy making is decidely different from the Warren Court. "Perhaps the greatest difference between the Warren and Burger Courts has been that the Burger Court tends to frame issues narrowly, whereas the Warren Court chose to frame them broadly."[17] However, "If the Burger Court has worked no major counterrevolution, neither has it abdicated."[18] Thomas Peebles points out that Justice Rehnquist's ". . . philosophy is a formidable one . . . and it is likely to have a significant impact upon constitutional adjudication for some time to come."[19]

For the purposes of this discussion a liberal justice is one who is predisposed to protect the rights of minorities and of criminal defendants. In the post New Deal era it generally connoted those justices who took a permissive view with respect to the constitutionality of the exercise of Congressional power under the commerce clause, for example United States v. Darby and Wickard v. Filburn. As we have moved farther from the conditions of this period this definition seems increasingly inadequate. Conversely, a judicial conservative is one who urges "a kind of go-slow attitude in opposition to the protection

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[16] J. Woodford Howard, Jr., "Is the Burger Court a Nixon Court?" Emory Law Journal 23 (Summer 1974): 746.

[17] Funston, p. 649.

[18] Howard, p. 763.

[19] Thomas H. Peebles, "Mr. Justice Frankfurter and the Nixon Court: Some Reflections on Contemporary Judicial Conservatism," American University Law Review 24 (Fall 1974): 90.

of rights of accused criminals." Furthermore, they are "deferential to the rights of the individual states to experiment . . . ."[20]

Judicial activism is identified with the willingness of the Court to intervene in Congressional or Executive policy decisions. In these cases the burden of proof is generally on the Federal government to demonstrate the necessity for the interference with the individual or the state's rights. On the other hand, judicial self-restraint is characterized as a limited role for the judiciary in the political policy making process. It is usually identified by a presumption of constitutionality in favor of the National government, and the individual or state must prove the unreasonableness of the statute.

It should be noted that even though liberals are usually associated with judicial activism, this is not necessarily the case.[21] For example, according to the above definitions, the Harlan majority opinion in Wirtz was a liberal decision, but since it relied upon the rational basis test, it was also made in the temper of judicial self-restraint. Since liberal-restraint decisions are possible, it is just as likely that an opinion could be conservative-activist. While the Usery decision was "deferential to the rights of individual states,"[22] the burden of proof was placed on the Federal government to demonstrate the

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[20]Ronald R. Davenport, "Judicial Conservatives and the Supreme Court," Duquesne Law Review 10 (Winter 1971): 168-176.

[21]A. E. Dick Howard, "Mr. Justice Powell and the Emerging Nixon Majority," Michigan Law Review 70 (January 1972): 452.

[22]Davenport, p. 169.

necessity of the regulation. Therefore, the majority opinion in Usery was conservative-activist. (Note Brennan's dissenting opinion in Usery where he criticizes the Court for lack of judicial self-restraint.)

Since Justice Rehnquist, a Nixon appointee, wrote the dissent in Fry v. United States which presaged his majority opinion in Usery, his role on the Court, along with his colleagues, should be considered. In Rehnquist's essay on "A Living Constitution," the role of the Supreme Court is "merely interpreting an instrument framed by the people." Therefore, judges "should be detached and objective."[23] Rehnquist agrees with the Holmesian version of a living Constitution in which the language of the Constitution is sufficiently broad to adapt to contemporary problems. He does not, however, believe in a living Constitution with a vengeance. In other words, he discards the theory the "nonelected members of the federal judiciary may address themselves to a social problem simply because other branches may have failed or refused to do so."[24]

According to Rehnquist's notions of the "nature of political value judgments in a democratic society," the Supreme Court does not have the responsibility to act as a super-legislature. With reference to federalism Rehnquist notes, "Limitations were indeed placed upon both

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[23]Wm. H. Rehnquist, "The Notion of a Living Constitution," Texas Law Review 54 (May 1976): 693-696.

[24]Ibid., pp. 695-698.

federal and state governments in the form of both a division of powers and express protection for individual rights."[25]

David Shapiro criticizes Justice Rehnquist for his "inflexibility of ideological commitments."[26] Shapiro believes that Rehnquist establishes his position based upon one or more of the following propositions:

> (1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual; (2) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states; and (3) Questions of the exercise of federal jurisdiction . . . should . . . be resolved against such exercise.[27]

Shapiro criticizes, furthermore, Rehnquist's notion of a living Constitution in reference to the dichotomy which his theory posits between the political environment and the neutral nature of the role of a judge.[28]

Justice Rehnquist is also inconsistent in applying his "strict constructionist" theory. With regard to the Usery case Shapiro notes that "the clear import is that implicit notions of state sovereignty, nowhere expressed in the Constitution, limit the exercise of power under the commerce clause."[29] Shapiro's assertion that Rehnquist's theory of

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[25]Ibid., p. 699.

[26]David L. Shapiro, "Mr. Justice Rehnquist: A Preliminary View," Harvard Law Review 90 (December 1976): 299.

[27]Ibid., p. 294.

[28]Ibid., pp. 301-302.

[29]Ibid., p. 307.

state sovereignty is not expressed in the Constitution may be a hasty generalization. His point is clear, however, that "too often . . . unyielding insistence on a particular result appears to have contributed to a wide discrepancy between theory and practice in matters of constitutional interpretations."[30]

The three other Nixon appointees, Warren Burger, Harry Blackmun, and Lewis Powell, lean toward judicial conservatism in the area of federal-state relations, although at times the conservative tendency is coupled with judicial activism rather than self-restraint. William Swindler notes that Chief Justice Burger is an activist in the area of court reform and judicial modernization and works to make legislative and judicial functions more compatible by suggesting legislative alternatives in his opinions.[31] "During Burger's years as an appeals court judge, he had consistently argued that judges should read the Constitution narrowly . . . ." At this time he also "developed a reputation as a conservative, especially in criminal justice cases."[32] Leonard Levy notes, ". . . Burger was a highly articulate and aggressive hard-liner who freely spoke his mind both on and off the bench." He also characterizes Burger as generally a self-restraintist, although

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[30]Ibid., p. 299.

[31]Wm. F. Swindler, "The Court, the Constitution, and Chief Justice Burger," Vanderbilt Law Review 27 (April 1974): 447; See also, Monrad G. Paulsen, "Some Insights Into the Burger Court," Oklahoma Law Review 27 (Fall 1974): 679.

[32]Congressional Quarterly, ed. Elder Witt, (Washington, D.C.: Congressional Quarterly, Inc., 1977), p. 157.

his predilection toward a "literal interpretation" of the Constitution might provoke some activistic tendencies.[33]

Harry A. Blackmun, Chief Justice Burger's colleague from Minnesota, was originally thought to be another member of the "conservative bloc" but "he has broken frequently enough with his conservative colleagues to earn a reputation as an independent, if still fundamentally a conservative justice." As counsel for the Mayo Clinic, he became adept at handling medical cases which may be one reason that he wrote the decision in Roe v. Wade,[34] the abortion case. While on the bench of the United State Court of Appeals for the eighth circuit, he became known for "his scholarly and thorough opinions."[35] In the Senate Judiciary Committee hearings on the nomination Blackmun said that the Constitution ought to be construed "according to its determined meaning" but "many times this is obscure."[36] Some observers of the Burger Court have also noted that the Chief Justice and Blackmun tend to disapprove of the exclusionary rule and like Frankfurter reject an "absolute" view of the First Amendment.[37] Therefore, Blackmun can be generally labeled as a

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[33] Leonard W. Levy, Against the Law (New York: Harper & Row, 1974), pp. 12-36.

[34] Roe v. Wade, 410 U.S. 113 (1973).

[35] Congressional Quarterly, pp. 159-160.

[36] Nomination of Harry A. Blackmun. Hearing before the Committee on the Judiciary. U.S. Senate, 91st Cong., 2d Session, April 29, 1970, p. 33, quoted in Leonard W. Levy, Against the Law (New York: Harper & Row, 1974), p. 46-47.

[37] Howard, pp. 453-460; See also Randall Walton Bland, "Justice Thurgood Marshall: An Analysis of His First Years on the Court, 1967-1971," North Carolina Central Law Journal 4 (Spring 1973): 183-202.

conservative, especially in the area of criminal justice, but with a tendency toward liberal-activism in the area of privacy.

Nixon's final appointee was Lewis Powell, a Virginian who "was hailed for his professional excellence and for the moderation of his political views." On the Supreme Court Powell has continued to build his reputation of being a moderate. As President of the American Bar Association Powell demonstrated both liberal and conservative tendencies in the areas of civil liberties and criminal justice, respectively. According to a student article in the University of Richmond Law Review, the key to Powell's judicial philosophy is a balancing approach "that has sought to accommodate all the competing interests."[38] The Court's recent decision in the Bakke case[39] is indicative of Powell's balancing approach. According to the student article, Powell's three overriding concerns are judicial restraint, the American system of federalism and the need for an ordered society." Furthermore, he advocates a flexible approach and is wary of broad decisions in the Warren Court tradition.[40]

According to A. E. Dick Howard, a fellow Virginia, Lewis Powell is a political conservative within a Southern Bourbon-tradition. He has a legalistic attitude while at the same time he is acutely sensitive to

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[38] Congressional Quarterly, pp. 160-161; "Balanced Justice: Mr. Justice Powell and the Constitution," University of Richmond Law Review 11 (Winter 1977): 335-430.

[39] Regents of the University of California v. Allan Bakke, New York Law Journal, June 29, 1978, pp. 21-40.

[40] "Balanced Justice," pp. 337-430.

social problems. "Powell leans to a pragmatic, problem-oriented style [and has] a special sensitivity to the integrity of the [judicial] process." Howard also highlights the balancing approach which is characteristic of Powell's decision making. He notes, however, "If Powell does 'balance' in first amendment cases, it remains to be seen how that balance may be affected by his views of the separation of powers, of federalism, and of judicial self-restraint."[41]

The final appointee on the Burger Court, nominated by Gerald R. Ford in 1975, John P. Stevens is, perhaps, the most difficult of all of the recent appointees to characterize,[42] since he has only been on the Court for three terms. "The concensus which emerged [from court watchers is] that Stevens was neither a doctrinaire liberal nor a conservative, but a judicial 'centrist,' whose well crafted, scholarly opinions made him a judge's judge." He is registered as a Republican, but he has not been active in partisan affairs. Mr. Justice Stevens displays an independent attitude in his decisions. He tends to be favorably disposed to the exercise for federal power vis a vís the states except in the area of civil liberties and criminal justice where he has a tendency to join with Brennan, Marshall and occasionally White and Stewart.[43]

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[41]Howard, pp. 453-464.

[42]See, generally, F. X. Beytagh, Jr., "Mr. Justice Stevens and the Burger Court's Uncertain Trumpet," Notre Dame Lawyer 51 (July 1976): 946-955.

[43]Congressional Quarterly, pp. 61-64.

Justices Brennan and Marshall, holdovers from the Warren Court are noted for their liberal-activist proclivity. According to Levy, Brennan "became a cautious supporter of the Warren-Black-Douglas wing of the [Warren] Court on most civil-liberties issues . . . ."[44] While on the Burger Court, he "has continued to rise in the esteem of legal scholars" due to his "diligent and systematic proofs."[45] In the area of criminal justice Brennan represents the Warren Court's liberal-activist tendency. He also seems, however, to be predisposed toward the exercise of National power, except when it interfers with individual liberties.

Justice Thurgood Marshall, a former counsel for the NAACP, was appointed by the late President Lyndon B. Johnson. Randall Bland says, "The addition of Marshall to the Court to replace Tom Clark strengthened the 'liberal' majority to include Warren, Fortas, Brennan and Douglas." Furthermore, it is "sufficient to note that with few exceptions [Marshall] voted with the 'liberal bloc.'"[46] Monrad Paulsen and Randall Bland both agree that Marshall's judicial scholarship suffers from "little original thought."[47] Bland describes Marshall's liberal philosophy as a "general support of the government in exercising its

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[44] Levy. p. 39.

[45] Congressional Quarterly, p. 151.

[46] Bland, pp. 183-195.

[47] Paulsen, p. 679; See also, Bland, p. 202.

delegated powers, but not arbitrarily at the expense of the constitutional rights of individuals."[48]

The last two members of the Burger Court, also members of the Warren Court, are Potter Stewart and Byron White. Steward was appointed by President Eisenhower in 1958. He has often been characterized as a "swing" justice. "It was a reputation which lapsed during the years of the Warren Court's solid majorities, but one which revived with the advent of a more tightly divided Burger Court."[49] According to Levy, Stewart is a moderate whose most characteristic traits are "deference and self-restraint . . . . He [is] deeply mistrustful of judicially imposed limitations that cut into government powers."[50] Stewart believes "that the narrowest decision is often the best one." His philosophy of the federal system is that "when the action of another branch of government is rational, [he] will accept it, even if he thinks it is unwise."[51]

Bryon White, appointed by Kennedy in 1962, "is noted for his quick and precise legal mind and his peppery and incisive questioning during

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[48]Bland, p. 202.

[49]Congressional Quarterly, p. 158; Philip B. Kurland, 1971 Term: The Year of the Stewart-White Court," in The Supreme Court Review, ed. Philip B. Kurland (Chicago: University of Chicago Press, 1973), pp. 181-329.

[50]Levy, p. 40-41.

[51]James F. Simon, In His Own Image (New York: David McKay Co., 1973), pp. 176-177.

oral arguments."[52] Simon notes that White has more of a tendency to be a pragmatist, than a dogmatist. White is more often concerned with the facts of the case rather than its overriding constitutional question.[53] Philip Kurland notes that White along with Stewart usually "find themselvelves in the middle grouping . . . , Powell and Rehnquist are more usually found in association with the Chief Justice [Burger] and Mr. Justice Blackmun." Justices Brennan and Marshall continue to form a separate bloc. In the 1971 term White and Stewart "dominated the Court because of their crucial, but unpredictable votes.[54]

Generally, "The Court of Blackmun, Burger, Powell and Rehnquist, Stewart and White . . . places its primary emphasis upon the practical consequences . . . of a decision."[55] Data compiled by Kurland on the 1971 term indicate that even at this early date "the Burger-Blackmun-Powell-Rehnquist grouping occurred in 70.6 percent of the closely divided cases in which they all sat. The Douglas-Brennan-Marshall bloc were together 64.1 percent of the time. Only once in all these cases was a majority made up without either White or Stewart."[56] By 1976 "the votes of Burger, Rehnquist and Blackmun were predictably conservative

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[52] Congressional Quarterly, pp. 158-159.

[53] Simon, pp. 170-174.

[54] Kurland, pp. 181-185.

[55] Swindler, p. 449.

[56] Kurland, pp. 181-187.

on most issues; those of Brennan and Marshall were consistently liberal. Powell, Stewart and White were the 'swing' men--a position Stevens also adopted."[57]

Rohde and Spaeth note, "The Liberal majority of the last years of the Warren Court disappeared almost overnight," with the resignations of Warren and Fortas in 1969. Although they characterize Stewart as a Moderate, the study labels Burger, Blackmun, Powell and Rehnquist as Conservatives. Both Stewart and White are the moderate swing men on the Burger Court. Conversely, Brennan and Marshall are the former Warren Court liberals. (The Rohde and Spaeth study does not include Stevens, but does characterize Douglas, his predecessor, as a liberal.)

The study employs quantitative methods (cluster analysis, metric multidimensional scaling and factor analysis) to reveal three major values which "explain more than 85% of the Court's decisions during both the Warren and Burger Court periods." These values are identified as follows: (1) "freedom" or civil liberties, (2) "equality" or political, economic, or racial discrimination, and (3) "New Dealism" or post-New Deal governmental regulation. It is the last value which is pertinent to the redefinition of federalism by the Burger Court. According to Rohde and Spaeth, the Liberals on the Warren Court supported "New Dealism" and, in general, upheld National economic regulatory efforts. The Burger Court, especially the Nixon appointees,

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[57] Congressional Quarterly, p. 33.

[58] David W. Rohde, and Harold J. Spaeth, Supreme Court Decision Making (San Francisco: W. H. Freeman and Company, 1976), pp. 141-145.

oppose the trend of post-New Deal economic which has been prevalent since the late 1930's.[59] Therefore, the decisions of the Warren Court tended to enhance the power of the National government in the sphere of economic regulation. On the other hand, the Burger Court takes a dim view of National power in this area and has begun to reevaluate the relationship between the National government and state governments.

Rehnquist's attempt in the Usery case to redress the balance of power between the National government and state governments reflects a conservative tendency of the Burger Court, especially the Nixon appointees. The hallmarks of this interpretation are a reliance upon the intent of the framers in the foundation of the federal system in addition to "the court's inclination to heed the complaints of the states confronted with ever-expanding federal regulation."[60] Finally, it should be noted that the majority opinion in Usery was more in the activist rather than in the self-restraint tradition. The burden of proof was shifted to the National government to demonstrate the necessity for the imposition of federal wage standards on state employees.

A change in the economic climate of the United States between 1968 and 1976 may also have been a factor in the shift in the Court's position. In an article by Harry Scheiber, he states,

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[59] Ibid., pp. 134-145.

[60] Congressional Quarterly, p. 32.

> Power has shifted over time between the national government and the constituent state governments; and these structural shifts have had an impact upon policy processes and outcomes . . . .[61]

Scheiber maintains that the increase in intergovernmental cooperation and the development of functional bureaucracies is a result of the centralization of power in the National government. This concentration of power, in turn, has an impact on the "dynamics of economic change."[62] Therefore, the nature of the federal system may have an impact upon economic development. The state of the economy, however, may also influence the effective functioning of the federal system.

By 1976 the economic indicators were predicting a turn for the better, but the nation was just beginning to recover from a severe case of inflation and recession. This new disease was quickly labeled by the economists as stagflation.[63] During the 1970's the economy had slowly deteriorated, especially with the advent of the energy crisis and the imminent financial collapse of the big cities.[64] An article in the Harvard Law Review noted, "The financial crisis in New York City

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[61]Harry N. Scheiber, "Federalism and the American Economic Order, 1789-1910," Law and Society Review 10 (Fall-Winter 1976): 57.

[62]Ibid., pp. 107-108.

[63]See, e.g., "Upturn: Less Inflation, More Spending," Time, May 26, 1975, pp. 70-71; "Long-range Inflation is Still the Worry," Business Week, May 26, 1975, pp. 22-23; "Stagflation," New Republic, December 1, 1973, pp. 8-9.

[64]See, e.g., "Pay More, Get Less: Oil Gas Outlook," U.S. News and World Report, January 27, 1975, pp. 35-36; "Will New York Bring Other Cities Down?" U.S. News and World Report, November 17, 1975, p. 78; Default: The Economic Consequences," Business Week, October 20, 1975, p. 100.

has focused new attention on the available mechanisms for a municipality or other public agency to secure relief in time of insolvency."[65] The author believed that the Usery case demonstrated "an invigorated solicitude for state interests." Furthermore, it was a realization of the fact that "the states cannot function in a federal system if their component parts are unable to secure any relief when on the brink of financial disaster."[66] The Usery case can be seen as a political response to the Nation's financial crisis.

Laurence Tribe regards the Usery decision as much more than a renewed interest in state sovereignty. He states that "the Court's real concern was not with state and municipal autonomy . . . but with such autonomy as a means of satisfying individual claims . . ." to certain political and economic benefits. His thesis is that individuals are entitled to benefits, such as police protection and health care, and the best means to provide them is through the states and their subdivisions. The Usery case places an affirmative responsibility on the states to render services which the National government could not effectively administer.[67]

The political environment may also have influenced the Burger Court's decision in Usery. As Philip Kurland points out, "One more

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[65] "Municipal Bankruptcy, the Tenth Amendment, and the New Federalism," Harvard Law Review 89 (June 1976): 1871.

[66] Ibid., pp. 1884-1903.

[67] Laurence H. Tribe, "The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking," Creighton Law Review 10 (March 1977): 447-449.

factor in the fashioning of the Burger Court will be the action or inaction of other branches of the American government."[68] Wallace Mendelson also notes that "in a democracy . . . judicial coercion is possible only when the political processes are too weak to hold their own domain." Therefore until "a party coalition in command of a sufficiently stable majority [is] able to advance a unifying set of policies,"[69] the Burger Court "is not likely to prove less activist, but only less liberal."[70]

As indicated in Chapter I Presidential responses to the needs of society were a study in contrasts between the 1960's and the 1970's. These two approaches were so different, in fact, that they coined two 'types' of federalism. Prompted by the Great Society Programs of President Lyndon Johnson, Creative Federalism symbolized the attempt by this Democratic president to solve problems by centralizing programs in the National government. President Nixon's New Federalism was an attempt to decentralize decision making back to the states, while at the same time trying to back-stop their precarious financial situation through revenue sharing. Creative Federalism relied upon an expansive power by the National government. New Federalism, on the other hand, reflected the tendency to increase the role of the states, while maintaining a cooperative intergovernmental relationship. The shift in

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[68]Kurland, p. 11.

[69]Wallace Mendelson, "The Politics of Judicial Activism," Emory Law Journal 24 (Winter 1975): 57-63.

[70]Kurland, p. 5.

Presidential politics may have been a factor in the shift of the Supreme Court's position between the decisions in Maryland v. Wirtz and National League of Cities v. Usery.

Conclusion

In Maryland v. Wirtz and National League of Cities v. Usery the arguments of counsel are mirror images of each other. Yet, the outcome of Usery is diametrically opposed to, and in fact overrules, Wirtz. Other factors may have been relevant in the switch in the Supreme Court's position in the eight years between Wirtz and Usery. A change in the composition of the Court, in the political and economic environment, and in Presidential approaches to federal problem solving could be possible factors.

The impact of the Usery decision on the nature of federalism is yet to be seen. Since the Usery case involves primarily consideration of vertical federalism, that is the relationship between the National and state governments, the broader sphere of horizontal federalism and intergovernmental relations is only indirectly affected. Cases and commentary in the aftermath of Usery indicate that it will probably be construed narrowly.[71] The Burger Court, however, seems to be giving wide latitude to state initiatives to solve their own problems.

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[71] See, e.g., Chapter III, above, and the Multistate Tax Commission Case, 54 L.Ed2 862 (1978).

According to Paul Freund,

> The role of the courts in maintaining a working federalism is precisely this task of mediation between large principles and particular problems, the task of interposing immediate principles more tentative, experimental and pragmatic.[72]

Although Justice Rehnquist may not agree with this active role for the judiciary, the Burger Court's decision in National League of Cities v. Usery highlights the continual efforts of the Supreme Court to redefine the limits of our federal system.

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[72] Paul A. Freund, "Umpiring the Federal System," Columbia Law Review 54 (1954):578.

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