# ARTICLES

## *USERY* LIMITS ON NATIONAL INTEREST

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During the first third of this century, the Supreme Court invalidated a number of federal statutes for exceeding the powers of Congress and invading the exclusive power of the states.[1] The resulting national frustration led to a confrontation between President Franklin Roosevelt and the Court.[2] Since that time, the Court invariably upheld federal legislation against claims of exclusive state power[3] until *National League of Cities v. Usery*[4] was decided in 1976. While *Usery* demonstrates that the Court will use state sovereignty to impose limits on congressional power, the propriety of a limit and the principles of the particular limit found in *Usery* need to be discussed.

### I. THE PRINCIPLE OF FEDERALISM

Justice Brennan's dissent in *Usery* objected that "there is no restraint based on state sovereignty requiring or permitting judicial en-

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1. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918).

2. *See generally* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

3. *E.g.*, Perez v. United States, 402 U.S. 146 (1971); Daniel v. Paul, 395 U.S. 298 (1969); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

4. 426 U.S. 833 (1976).

forcement anywhere expressed in the Constitution."[5] Although the majority found support for limiting federal power in "the essential role of the States in our federal system of Government,"[6] the only textual basis explicitly referred to was the tenth amendment.[7] The form of that provision is a remainder clause rather than a limit on powers already granted.[8] Better textual support for the decision can be found, however, in an unlikely place.

The first sentence of the fourteenth amendment to the Constitution states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."[9] In affirming the existence of dual citizenship, the fourteenth amendment, which has been used primarily by federal authorities to limit state government,[10] also serves paradoxically as a basis to protect the states from federal law. Such an outrageous statement demands an explanation, and this Article attempts to provide it.

The first sentence of the fourteenth amendment was adopted primarily to reverse the *Dred Scott* case, where Chief Justice Taney's plurality opinion stated that Negroes are not citizens of the United States and therefore could not bring suit in federal court.[11] The fourteenth amendment made clear that blacks, like all other persons born in the United States, are part of the political body of the United States and are entitled to the rights of citizens including the right to bring suit in federal courts.[12] The right of the citizen to go to court for the protection of the laws is hollow if laws are created for the benefit of a monarch. The value of the right depends on the fairness of the law itself. The only way to ensure that laws are made for the benefit of the people

5. *Id.* at 858 (Brennan, J., dissenting).

6. *Id.* at 844.

7. *Id.* at 842-43.

8. U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Supreme Court has stated that "[t]he amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941).

9. U.S. CONST. amend. XIV, § 1.

10. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); New York Times v. Sullivan, 376 U.S. 254 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Brown v. Board of Educ., 347 U.S. 483 (1954).

11. Scott v. Sandford, 60 U.S. (19 How.) 393, 427 (1857). *See generally* Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956).

12. The framers of the fourteenth amendment had no quarrel with Chief Justice Taney's definition of citizens as synonymous with the people of the United States—"they both describe the political body who . . . hold the power and conduct the Government through their representatives." Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857). Their concern was to include blacks within the class of citizens. Senator Henderson, after citing with approval Chief Justice Taney's definition of citizenship, said: "The great error into which Chief Justice Taney falls consists in the fact that he arbitrarily excluded all negroes, though free, from this sovereignty." CONG. GLOBE, 39th Cong., 1st Sess. 3031-33 (1866).

is to make lawmakers dependent on satisfying the people.[13] Thus, in the United States, the basic guarantee of fairness is that law is a product of representative government.[14]

Central to representative government is the power of representative institutions to make the laws. Thus, article I provides: "*All* legislative powers herein granted shall be vested in a Congress of the United States. . . ."[15] In other words, the source for the creation of enforceable obligations against the citizen must be a representative institution.

The power of Congress to make law is not, however, unlimited. Since *Marbury v. Madison*,[16] the Supreme Court has asserted the power to invalidate legislative enactments which contravene the Constitution. Even in spheres in which Congress is expressly permitted to act, such as regulation of interstate commerce, its power is limited by express constitutional prohibitions as interpreted by the Court.[17] Thus, rights implicit in the concept of citizenship in the United States are twofold. First, the citizen is subject to governmental action only insofar as the authority for that action can be traced to the elected representatives of the people. Second, the citizen is protected even from the actions of his elected representatives if those actions exceed the limits established by the Constitution.[18]

The basic nature of citizenship in a state is the same as citizenship in the United States. The state has independent lawmaking power vested in an elective body. This is implied by article I[19] and made ex-

13. Representative government did not mean that every citizen had a right to vote. Article I of the Constitution provides that the House of Representatives shall be chosen "by the People of the several States," but also states that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2. The sweeping reference to choice "by the People" can be reconciled with the limited qualifications of electors through the idea of "virtual representation." Voting was a privilege conferred upon those judged sufficiently intelligent, independent, and mature to exercise it. The "people" were viewed as a politically homogeneous and cohesive body possessing common goals and aspirations, so that those qualified to vote were voicing the interests of the whole people. *See* Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 459 (1978). The legislators were responsible to the electorate. So long as the interests of the electorate and that of those ineligible to vote coincide and nonvoters can invoke the laws and assert the same rights as voters, the lawmaking body is forced to be responsive to all the "people."

14. *See* THE FEDERALIST No. 39 (J. Madison), at 250 (J. Cooke ed. 1961). "[N]o other form [of government] would be reconcileable [sic] with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." *Id.*

15. U.S. CONST. art. I, § 1 (emphasis added).

16. 5 U.S. (1 Cranch) 137 (1803).

17. *See* United States v. Brown, 381 U.S. 437, 449-50 (1965); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).

18. This discussion of the "rights" of citizens is not intended as a description of their "privileges and immunities" under the fourteenth amendment. Nevertheless, to the extent that privileges of citizenship are defined as including all existing rights under the Constitution, the textual description remains accurate. *See* Slaughter-house Cases, 77 U.S. (10 Wall.) 273 (1870).

19. Article I of the Constitution assumes an elected state legislature as a predicate for determining membership in the federal legislature. Voters in congressional elections "shall have the

plicit in article IV which states: "The United States shall guarantee to every State in this Union a Republican Form of Government."[20] The Supreme Court has stated: "[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."[21]

Like the federal legislature, the state legislature's powers are limited. State laws may be invalid because they violate specific constitutional prohibitions such as those contained in the fourteenth amendment[22] or because they conflict with federal laws which, if constitutionally enacted, take precedence over state laws under the supremacy clause.[23]

In sum, citizenship under the Constitution means membership in a body whose rules are formulated through a representative process subject to the limitations established by the Constitution. The dual citizenship affirmed by the first sentence of the fourteenth amendment assumes the existence of two bodies whose rules are established by that process. State citizenship carries with it the right to have the laws of that state based on the representative process within that state. Similarly, United States citizens are entitled to have federal laws based on a national representative process. Where properly enacted federal law conflicts with state law, the federal law prevails by virtue of the supremacy clause. The power to enact preemptive federal laws, however, does not carry with it the power to enact state laws or to order the state to enact a specific law.[24] The meaning of state citizenship is that

qualifications requisite for electors of the most numerous branch of the State legislature." U.S. CONST. art. I, § 2.

20. U.S. CONST. art. IV, § 4. The Court has found that enforcement of this section poses a political question. Baker v. Carr, 369 U.S. 186, 209 (1962). One reason may be that many governmental forms would be "republican" and the article does not aid in determining the rightful one. *See* Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CAL. L. REV. 245, 245-52 (1962).

21. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

22. *See* Brown v. Board of Education, 347 U.S. 483, 495 (1954).

23. *See* U.S. CONST. art. VI, which provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

"As early as Gibbons v. Ogden, 9 Wheat. 1 (1824), Chief Justice Marshall stated the governing principle—that 'acts of the State Legislatures . . . [which] *interfere with*, or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid under the Supremacy Clause. . . ." Perez v. Campbell, 402 U.S. 637, 649 (1971) (emphasis in original).

24. In litigation over the Clean Air Act, the federal government appeared to concede that it could not require states to enact specific laws:

> [T]he federal parties have not merely renounced an intent to pursue certain specified regulations; they now appear to admit that those remaining in controversy are invalid unless modified in certain respects: "The administrator . . . concedes the necessity of removing from the regulations all requirements that the States submit legally adopted regulations; the [Administrator's] regulations contain no requirement that the State adopt laws."

the constituent body of the state, not of the nation, is the ultimate source of state lawmaking authority. The federal government may enact federal law and, in so doing, may invalidate state law, but it has no legislative authority to enact or require the enactment of state law.

This view of the limitations of federal power is derived from the text of the Constitution. It is consistent with the policies of federalism and the legitimate scope of the national interest. It is properly enforced by the Court because the election of congressmen from the states is an ineffective protection for federalism when the limit is transgressed.[25] Finally, it is consistent with the Court's decision in *Usery* although quite different from the views of that decision offered by most commentators.

## II. THE VALUE OF FEDERALISM

Among the values served by a federal as opposed to a national system of government are "diversity, pluralism, protection from arbitrary majoritarianism and overcentralization, and a greater degree of citizen participation."[26] Self-government by smaller units produces significant differences among the units with prohibition in one state and legalized prostitution in another. This diversity enables people to compare different regulations in practice to determine which is more satisfactory. Thus, Justice Brandeis referred to the states as laboratories for the nation.[27] Different laws also respond to differences in the physical, social, and economic environments of the states. Given freedom of movement, the flourishing of different legal systems provides a wider choice for citizens of the United States in determining the society

EPA v. Brown, 431 U.S. 99, 103 (1977) (citations omitted).

An imperfect analogy may be made to the powers of nations over foreign nationals. A nation will have both the power and the right to prescribe the behavior of foreign nationals within its boundaries and can compel them to conform their behavior to its laws despite directly contrary commands of the nation of which they are citizens. This power to regulate individual conduct, however, does not extend to commanding the foreign government to enact new laws.

The analogy is imperfect, because the states in the union are themselves within the territorial boundaries of the United States and subject to the supremacy clause. It is useful, nevertheless, because it points up the common understanding that preemptive power exists over individuals who are subject to laws of two different sovereigns, although neither sovereign would claim authority over the other nation. The difficult issue for American government is the extent to which the differences between the federal system and the international analogy justify federal laws directed at the state itself.

25. Congress is responsive to the interests of the people of the state rather than to the state as an institution. The interests of the state citizens and the state as a governmental institution coincide with respect to proposals for federal regulation of private conduct. They do not necessarily coincide where the proposal is to regulate the operations of the state. See discussion of political safeguards of federalism at text & notes 43-50 *infra*.

26. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM 105 (1969).

27. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory. . . ." *Id.*

in which they wish to live. Diversity and plural decisionmaking need not be totally destroyed in a national system of government.[28] The values of diversity and pluralism would be given less weight, however, if the national government had the ultimate responsibility for determining the nature and functions of local institutions of government. Thus, the constitutional recognition of the independent lawmaking power of the states contributes to the diversity and pluralism of our legal system.[29]

The federal system was chosen to ensure that citizens at the local level would have an institution responsive to their needs as they saw them, although their neighbors in other states might have a different view. The independence of the states enhances the ability of a majority in a small group (the state) to act as they desire despite the disapproval of the majority in a larger group (the nation). The implementation of the various decisions of local majorities is likely to produce much greater aggregate satisfaction than uniform enactment of the decision of the national majority.[30]

Finally, the individual citizen is likely to have a closer relationship with his government in the smaller unit of the state. His power to affect policy is likely to be inversely related to the size of the polity. The smaller the governmental unit, the fewer the number of interests competing for attention and the greater the political power of the individual voter. The increased power to affect the process is likely to produce greater participation,[31] or at least greater satisfaction with the respon-

28. The central government could decide that most matters should be dealt with at a local level by institutions designed and created locally. Different laws and programs in separate states would be justified either by the unique situation in those states or by the utility of experimenting with a variety of ways of dealing with particular subject matter. Indeed, they might even be justified on the basis of satisfying local majorities in the absence of a need for uniform standards.

29. People who favor a policy usually believe that those who disagree with them are wrong. They will, therefore, tend to favor implementing the "right" law everywhere unless convinced that it is none of their business. If the national government is ultimately viewed as responsible for local law, voters and legislators on the national level are likely to consider it their business. The national government would be viewed as responsible for state laws if it was conceded to have the power to control state legislatures. In such an atmosphere, opponents of proposed national legislation would shoulder the burden of proving that diversity is better than a uniform rule. If state legislatures are regarded as independent bodies, it would be the proponents of national law that would need to demonstrate the need for uniformity. The locus of the burden of justification could have a significant effect on which laws are enacted.

30. In simple mathematical terms, the national majority is the sum of majorities in some states plus minorities in other states. The sum of the majorities from each state will exceed the national majority by the sum of the margins in states where the majority is in the national minority. For example, if 80 million people choose between red and blue, 50 million might choose red and 30 million blue. This in turn could be the result of 35 million people choosing red in states where the majority prefer red and 15 million choosing red in states where the majority (20 million) prefer blue. A uniform standard of red satisfies 50 million, but permitting local control results in satisfying 55 million.

31. Participation in this sense is not limited to voting. Indeed, local elections tend to generate less interest and excitement than national ones. Media attention on national networks is naturally focused on national offices. Further, the macrocosmic issues of foreign policy and the state of the economy are largely federal matters. Thus, voting in national elections is perceived as a far more

siveness of government to citizens' concerns.

The existence of independent lawmaking authority in the states serves important political values, but it is also a constant source of conflict with federal concerns. Even that conflict, however, has positive values. The division of lawmaking power between the states and the national government was designed to encourage each governmental body to check the excesses and abuses of power of the other.[32] This checking function helps to preserve the freedom of the individual.[33] The decision to limit the power of national government by creating a system of dual government is firmly embedded in the Constitution and can be appropriately changed only through amendment of that document.

## III. THE NATIONAL INTEREST

The interests of diversity, pluralism, protection from over-majoritarianism, and increased citizen participation are not the only values federalism was meant to protect. The Constitution opted for a new form of government rather than a confederation because there are important values to be served by a strong central government. In dealing with certain problems, state and local governments may be inefficient or powerless to devise solutions and may be the source of harm to the individual and to sister states.

This is illustrated by article I, which vests a large number of discrete powers in Congress, including the power to regulate commerce among the several states.[34] This clause reflects the view that the citizens of the nation are better off if they forego trade barriers erected to secure peculiar local advantages and rely on a national economy regulated by a central authority.[35] The exercise of federal power undoubtedly diminishes the independence of state government. Nevertheless, if

significant event than voting on local offices. Nevertheless, if participation is broadly defined to include lobbying, testifying in committees, and even litigating, so that it encompasses all the mechanisms by which lawmakers may be persuaded to take specific action, the individual is more likely to participate in local matters.

32. *See* THE FEDERALIST No. 51 (J. Madison), at 351 (J. Cooke ed. 1961).

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul [sic] each other; at the same time that each will be controuled [sic] by itself.

33. *See* Strong, *Court vs. Constitution: Disparate Distortions of the Indirect Limitations in the American Constitutional Framework*, 54 N.C. L. REV. 125, 126-27 (1976).

34. *See* U.S. CONST. art. I, § 8, which states in pertinent part: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several states. . . ."

35. *See* A. BEVERIDGE, 1 THE LIFE OF JOHN MARSHALL 311 (1916). " 'New Jersey placed between Phila & N. York, was likened to a cask tapped at both ends; and N. Carolina, between Virga & S. Carolina to a patient bleeding at both Arms.' Merchants and commercial bodies were at their wits' end to carry on business and petitioned for a general power over commerce." *Id.* (quoting James Madison) (footnotes omitted).

a federal law governs private transactions substantially affecting interstate commerce, its displacement of state law is well accepted.[36] The supremacy clause makes it clear that the obligation of the citizens to conform their conduct to federal law enacted pursuant to express constitutional powers is superior to the obligation to obey a conflicting state law.[37] Thus, the national interest in regulating private transactions results in a corresponding reduction in the ability of the states to control such transactions among their own citizens.

The national interest may also conflict with nonregulatory activities of the state. A state may injure the citizens of other states through pollution produced by the operations of state government[38] or other physical injuries inflicted by state employees acting in an official capacity in other states.[39] If open warfare between the states is to be avoided, the federal government must have power to halt the infliction of such injuries.[40] Other harms may be a product of economic pressures. The decision of one state to provide public services will exert pressures on other states.[41] Further, the number of jobs and the level of wages in the public sector may affect the labor market in the private sector with ripple effects throughout the economy.[42] Consequently, the federal government may assert an interest in regulating the effects on interstate commerce of state governments' operations. Vindication of that interest, however, may require overriding the independence of the state lawmaking authority. The Court thus confronts a difficult dilemma when faced with federal laws that attempt to control the state government itself in order to regulate interstate commerce.

## IV. POLITICAL SAFEGUARDS OF FEDERALISM

The policies of federalism require the protection of independent state lawmaking power. That protection could be provided by the courts or by the structure of the political system. The experience of the 1930's demonstrated that judicial intervention may impair the ability of

36. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 69 (1924); Stern, *The Scope of the Phrase Interstate Commerce*, 41 A.B.A.J. 823, 874 (1955).

37. This is typically the situation in preemption cases. *See, e.g.*, Jones v. Rath Packing, 430 U.S. 519, 525 (1977); McDermott v. Wisconsin, 228 U.S. 115, 132 (1913).

38. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); New York v. New Jersey, 256 U.S. 296 (1921); Missouri v. Illinois, 200 U.S. 496 (1906).

39. *See* Nevada v. Hall, 440 U.S. 410, 426 (1979) (employee of State of Nevada while driving on official business in California negligently injured California citizen).

40. Stewart, *Pyramid of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1226-30 (1977).

41. Particular combinations of taxes and services may encourage businesses to relocate in another state. In order to retain the employment and tax base represented by such businesses, the state of origin must respond with similar attractions.

42. *See* Fry v. United States, 421 U.S. 542, 547 (1975).

the federal government to respond to the needs of its citizens. Thus, until *Usery*, the Court relied on political processes to protect the independent power of state governments. *Usery* marks the recognition by a majority of the Court that the political safeguards of federalism are not effective when proposed federal laws are directed at requiring the state to enact laws.

Justice Brennan, dissenting in *Usery*, found adequate safeguards in the political process.[43] Citing Professor Wechsler's well known article,[44] Justice Brennan stated the case for relying on political safeguards:

> Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises. Congress is constituted of representatives in both the Senate and House elected from the States. . . . Decisions upon the extent of federal intervention under the Commerce Clause into the affairs of the States are in that sense decisions of the States themselves. . . . Any realistic assessment of our federal political system, dominated as it is by representatives of the people *elected from the States*, yields the conclusion that it is highly unlikely that those representatives will ever be motivated to disregard totally the concerns of these States. . . .
>
> . . . Given [the] demonstrated ability to obtain funds from the Federal Government for needed state services, there is little doubt that the States' influence in the political process is adequate to safeguard their sovereignty.[45]

Under the original terms of the Constitution, senators were elected by the state legislature.[46] This forced them to be responsive to the interests of the state government. After the seventeenth amendment, however, all congressional members represent people and not the interests of state government.[47] Thus, the members of Congress no longer have an inherent interest in protecting state sovereignty.[48] Nevertheless, election from the states results in some structural protection for the independence of state government. Local experimentation may be protected because the federal representatives may reflect the same interest groups that led to the adoption of state legislation. Thus, a state that

43. 426 U.S. at 858 (Brennan, J., dissenting). It bears repeating " 'that effective restraints on . . . exercise [of the commerce power] must proceed from political rather than from judicial processes.' " *Id.* (citation omitted).

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

45. 426 U.S. at 876-78 (1976) (Brennan, J., dissenting) (emphasis in original).

46. U.S. CONST. art. I, § 3 (amended in 1913 by U.S. CONST. amend. XVII).

47. *See* U.S. CONST. amend. XVII.

48. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1071 (1977). *See* Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1885 n.117 (1976).

dares to be different will probably have congressional representatives striving to maintain that difference. Where the issue involves regulation of the conduct of private persons within a state and the policies of one state have very little effect on the ability of neighboring states to pursue differing policies, congressional respresentatives are well placed to block any attempt at regimentation. The representatives can trade favors or obstruct votes on bills important to others to persuade their colleagues not to adopt a bill which runs counter to their state's policy. Where the state policy has little or no effect on neighboring states, the representatives of the neighboring states will have little interest in pursuing national legislation in the face of determined opposition. Thus, passage of federal legislation regulating the conduct of private persons is likely to reflect fairly the judgment that the need for national standards outweighs the benefits of local diversity. The interest of the federal legislator in responding to the interest groups that succeeded on the state level assures that the political safeguards of federalism will be effective.

The political process, however, is not an effective protector of state interests where proposed federal regulation is directed at the state government rather than private citizens. Professor Tribe has argued that political restraints are at their greatest when the federal government attempts to regulate the state government because the resulting addition to the tax burden of state citizens produces a natural coalition to oppose federal action.[49] This assessment appears to misread the political process. Regulation of private conduct involves a determination of what conduct is "good" and what is "bad." The operation of state government, on the other hand, involves allocation of resources among competing claims, all of which may be "good." The impact of federal legislation is not to require higher taxes, as Professor Tribe assumes, but to force local officials to choose between higher taxes or less services. Thus, the political forces which resulted in the state policy will not be reflected in the federal legislature. The congressmen will get credit while state officials will get the blame. In other words, if Congress says that Paul Employee must be paid, it is necessary to take from someone. It is the state official, however, who must determine whether the loss will fall on Peter Taxpayer or Jane Service. If the state decides to rob Peter to pay Paul, Peter will throw darts (or Proposition 13) at his state representative while Paul throws bouquets and political support to the federal representative. The state official may attempt to shift the onus for higher taxes to congressional action but the member of Congress will respond that increased tax burdens could have been

49. Tribe, *supra* note 48, at 1075.

avoided if the state officials were more efficient and did not waste money on their bureaucracy or unspecified unneeded services.

In short, political self-interest will lead the congressman to fight to preserve the state's policy concerning the regulation of private conduct. Where that policy has no significant national effect, the senator or representative is well situated to prevent national legislation. On the other hand, the federal legislator may win support from a significant voting bloc for enacting laws requiring specific state action, while the blame for resulting adverse impacts falls on the state officials who must reallocate state resources. Because the political safeguards of federalism fail to operate when the federal government attempts to require enactment of specific state laws,[50] the state needs judicial protection to preserve its integrity as an independent governmental unit.

## V. *USERY* LIMITS ON FEDERAL REGULATORY POWER

Judicial protection of state government from federal legislation has not followed a steady progression. In *Collector v. Day*,[51] the Court struck down federal income taxes on state employees as an interference with the operation of state government.[52] This was followed by a series of cases invalidating federal taxes imposed on persons doing business with the state.[53] The taxes in these cases were levied on persons, not on the state directly. The persons taxed were residents of the United States and received the benefits of federal laws. The taxes violated no state law and did not unfavorably discriminate against state employees. The extraordinary solicitude for the state exemplified in these decisions disappeared rapidly in the wake of national action to meet the problems of the depression.[54] Not only were state workers brought within federal taxing power,[55] but the state itself was held to be subject to federal employment laws.[56] Concern for state sovereignty reached its lowest point in two decisions of this decade, *Wirtz v. Maryland*[57]

50. The lack of political safeguards does not mean that the federal government should be powerless; it means only that judicial consideration of the proper limits of federal power will be necessary, rather than simple deference to the outcome of the political process.

51. 78 U.S. (11 Wall.) 113 (1870).

52. *Id.* at 126-27.

53. *E.g.*, Indian Motocycle Co. v. United States, 283 U.S. 570 (1931) (federal sales tax on goods sold to a municipal corporation invalidated); Pollock v. Farmers' Loan & T. Co., 157 U.S. 429 (1895) (federal tax on income received from state bonds invalidated).

54. *See generally* Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945); Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757 (1945).

55. Helvering v. Gerhardt, 304 U.S. 405, 424 (1938) (sustaining federal tax on income received by employees of bi-state port authority).

56. Fry v. United States, 421 U.S. 542, 548 (1975); Wirtz v. Maryland, 392 U.S. 183, 196-97 (1968).

57. 392 U.S. 183 (1968).

and *Fry v. United States*.[58]

In *Wirtz*, the state of Maryland attacked the constitutionality of extending the minimum wages established by the Fair Labor Standards Act to employees in public schools and hospitals. Justice Harlan for the Court said: "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."[59] Schools and hospitals are often operated by private bodies. If they are required to pay their employees more than comparable public institutions, they will be placed at a competitive disadvantage which may destroy them.[60] Payment of low wages by public institutions will tend to depress wages in comparable private institutions. Thus, regulation of wages paid by public schools and hospitals was thought necessary to give full effect to federal policy with respect to employees of private institutions. The Court was careful to point out that the federal law did not regulate the manner in which public employees were to perform their services, but only the minimum wages to be paid. The Court reiterated earlier statements that the "Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."[61] But the Court carefully limited its opinion to "enterprises indistinguishable in their effect on commerce from private businesses."[62] *Wirtz* did not reach the regulation of public employees who performed tasks that are not performed in the private sector.

The Supreme Court did reach such regulation in *Fry v. United States*,[63] where it upheld the Economic Stabilization Act as applied by the President to temporarily freeze wages of employees including state and local government workers.[64] "It seems inescapable," wrote Justice Marshall for the Court, "that the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employeees were left outside the reach of these emergency federal wage controls."[65]

58. 421 U.S. 542 (1975).
59. 392 U.S. at 197.
60. Private schools and hospitals are often supported in part by direct grants from federal and state governments, such as Hill-Burton funds to build hospital facilities, as well as indirect grants in the form of tax exemptions for private donations. If their operating costs are substantially higher than comparable public institutions because of higher wages, direct grants may be reduced because they are perceived as economically inefficient.
61. 392 U.S. at 195.
62. *Id.* at 198-99.
63. 421 U.S. 542 (1975).
64. *Id.* at 548.
65. *Id.*

In both these cases, Congress apparently decided that the particular state expenditures would interfere with federal regulation of the private sector, and enacted the challenged laws to make federal policy effective. Although the laws operated directly on state government performance of normal governmental functions, a majority of the Court at that time was willing to give the federal interest precedence over state decisions concerning the operation of state government.

Lest the rationale of the decisions in these cases be pressed too far, the Court added a cautionary footnote in *Fry*: "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. . . . [W]e are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty."[66]

The caution became a stop sign in *National League of Cities v. Usery*.[67] The growth of national power encouraged by *Fry* was arrested and the *Wirtz* decision was tossed in the can. In *Usery*, the National League of Cities challenged the constitutionality of the 1974 amendments to the Fair Labor Standards Act [FLSA]. The amendments provided minimum wage coverage for all state and local employees except non-civil service personnel and elective officers and their assistants at policy making levels.[68] The League contended this was an impermissible interference with the states' fiscal policy and an invalid regulation of employees who had no counterparts in the private sector.[69]

In *Usery*, the Court held the FLSA amendments beyond the authority of Congress insofar as they "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[70] *Wirtz* was summarily overruled.[71] Justice Rehnquist, for the plurality, wrote that "Congress may not exercise that power [to regulate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[72] But Justice Rehnquist was apparently forced by his colleagues to give some elbow room to federal interests since his opinion reaffirmed the Court's decision in *Fry* in which he had dissented. *Fry* was distinguished on the grounds that "[t]he limits imposed upon the commerce power when Congress seeks

66. *Id.* at 547-48 n.7.
67. 426 U.S. 833 (1976).
68. *Id.* at 836.
69. *Id.* at 837.
70. *Id.* at 852.
71. *Id.* at 855.
72. *Id.*

to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency."[73]

Justice Rehnquist's opinion created three situations under which Congress may enact legislation directly applicable to the states under the commerce clause—laws involving nonessential decisions, laws affecting nonintegral governmental functions, or laws needed to cope with a national emergency. Justice Brennan's dissent argued that no such principled lines of distinction could be drawn.[74] In a separate dissent, Justice Stevens emphasized this problem through the use of concrete examples:

> The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck, or from driving either the truck or the governor's limousine over 55 miles an hour. . . .
>
> . . . .
>
> . . . Since I am unable to identify a limitation on that federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible, I am persuaded that this statute is valid.[75]

The fate of future legislation regulating state government may depend on the response to Justice Stevens' remarks. Yet the plurality opinion did not directly deal with the issues posed by Justice Stevens' dissent. Several possible views may be taken of the *Usery* case, and the choice among them will determine the validity of subsequent federal laws regulating state activities.

### A. *Balancing State Sovereignty and National Need*

Justice Blackmun's concurrence provided the fifth vote to invalidate the FLSA amendments in *Usery*. He interpreted the Court's stance as a balancing approach: "[I]t seems to me that it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[76]

Support for the balancing thesis is found in the *Usery* Court's treatment of *Fry*.[77] The Court distinguished *Fry* on the basis of the

73. *Id.* at 853.
74. *Id.* at 874-75 (Brennan, J., dissenting).
75. *Id.* at 880-81 (Stevens, J., dissenting).
76. *Id.* at 856 (Blackmun, J., concurring).
77. *Id.* at 852-53.

need for federal action. It pointed out that the inflation problem addressed by the legislation involved in *Fry* was "an extremely serious problem . . . which only collective action by the National Government might forestall."[78] The Court thus implied that the failure of some state governments to pay minimum wages to their employees did not pose an extremely serious problem. It may have thought that competition from the private sector, which is covered by minimum wage laws, would prevent the problem from becoming worse. The Court, however, proffered no economic analysis of the seriousness of the problem of low wages in government employment to demonstrate that its view was better than that of Congress.

The *Usery* Court also emphasized that the temporary wage freeze in *Fry* was minimally disruptive to the States.[79] The federal government made no new choices for the state, but merely froze for a limited period the choice which the state had previously made. Furthermore, according to the Court, the freeze operated to reduce pressures on state budgets rather than increase them. The Court ignored the argument that low wages might cause an exodus of the ablest public employees to the private sector, resulting in a need to hire a greater number of replacements to do the same work—thus increasing the strain on the state budget.

Whether low wages or inflation is the more serious problem would seem to be a debatable issue calling for value judgments of a political rather than a judicial nature. A judgment on the importance of the federal interest appears to be implicit in any balancing of interests. The necessity for such a judgment in limiting federal power by a balancing test contributed to Justice Brennan's rejection of a judicial limitation. He argued that the judgment of Congress that the national interest is of greater urgency than local sovereignty should not be overturned by the courts, which are no better equipped than Congress to engage in such a weighing process.[80]

Even if the Court were able to isolate every factor to be properly considered in balancing interests, it could not give the factors specific weights without referring to a theory or purpose for the balancing. Unless such weights are established, balancing results in ad hoc decisions which provide little guidance to Congress or the lower courts. The balancing standard applied by Justice Blackmun seems to entail an arbitrary judgment on the wisdom of a particular federal law that regulates state government. Accepting Congress' view of the need for national

78. *Id.* at 853.
79. *Id.*
80. *Id.* at 876 (Brennan, J., dissenting).

legislation, as Justice Brennan urges, might be preferable to ad hoc judgments of the Court, which would create great uncertainty and friction in federal-state relations.

It should be noticed, however, that the balancing language in Justice Rehnquist's opinion is found in his discussion of *Fry*, a case in which he dissented. The other portions of his opinion in *Usery* contained no such balancing language. A balancing test would seem to require careful weighing of the effect of a law on the state and on the accomplishment of a national objective. Nevertheless, Justice Rehnquist stated: "[W]e do not believe particularized assessments of actual impact are crucial to resolution of the issue presented."[81] His constant invocation of the analogy to restraints on the taxing power indicates his belief that particular areas of state operations are per se beyond federal regulation.[82] Justice Rehnquist thus seems to be pointing to a clearer dividing line than would exist if balancing were the appropriate test.

Although Justice Blackmun's vote may be necessary to form a majority in future cases, balancing alone will not be the appropriate test since the four members joining in the plurality opinion appear to apply a different test. If Justice Stevens can be convinced that a workable principle exists to limit federal interference with state government, he might join the others to provide a majority.[83] Consequently, it is useful to explore the nature of the principle avowed by Justice Rehnquist's opinion.

### B. *The Traditional Government Functions Distinction*

The plurality opinion authored by Justice Rehnquist 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 Congress by Article I, § 8, cl. 3."[84] The reference to "traditional governmental functions" seems to stem from the intergovernmental tax immunity cases. Indeed, Justice Rehnquist rejected Justice Brennan's attempt to distinguish the tax immunity cases from the commerce power question involved in *Usery*.[85] Justice Rehnquist referred with approval to Justice Stone's opinion in *New York v. United States*,[86] where Justice Stone stated that even a general nondiscriminatory tax

81. *Id.* at 851.
82. *See* text & notes 85-87 *infra*.
83. *See* 426 U.S. at 880-81 (Stevens, J., dissenting).
84. *Id.* at 852 (emphasis added).
85. *Id.* at 843. Justice Rehnquist also quoted that portion of United States v. California, 297 U.S. 175 (1936), that distinguishes between the federal taxing power and the commerce power. He then stated: "We think the dicta from *United States v. California* simply wrong." *Id.* at 854-55.
86. 326 U.S. 572 (1946).

could not constitutionally be applied "to the State's capitol, its Statehouse, its public school houses, public parks, or its revenues from taxes or school lands, even though all real property and all income of the citizen is taxed."[87]

If the state engages in activities previously performed by the private sector, it is eliminating a source of tax revenue for the federal government. To prevent this erosion of the tax base, the Court has stated that immunity from federal taxation does not extend to such activities.[88] The exemption from taxation of traditional governmental activities does not affect the historic resources that each sovereign may tap, but the refusal to extend the exemption to other functions of state governments preserves those resources.

The plurality opinion in *Usery* applied this reasoning to the commerce power. If the state could not be regulated when it takes over private activities previously governed by federal law, federal power would be diminished. Justice Rehnquist apparently conceded that state sovereignty should not have that effect.[89] Thus, in Justice Rehnquist's opinion, state sovereignty poses no bar to federal regulation of the nontraditional activities of the state including, one surmises, regulation of the wages and hours of state employees engaged in those activities.

Justice Rehnquist's analogy to the intergovernmental tax immunity cases seems strained because taxation and regulation of state functions have different impacts on the functioning of the federal system. The legitimate purpose of taxation is to raise revenue. If traditional state operations were taxable, the state would raise revenues to pay such a tax by using its own powers of taxation. Since the subjects of state taxation are also taxable by the federal government, a prohibition on taxation of traditional state activities does not diminish the power of the federal government to raise revenue. It merely forces the federal government to raise the money directly from the citizens instead of indirectly through the states. The effect of the state immunity from federal taxation is to assure that state taxes reflect revenue needs established by the policies of the state rather than those of the federal government. Thus, a bar on federal taxation of state activities serves to

87. *Id.* at 587-88. Although Justice Stone stated that the distinction between governmental and proprietary interests is "untenable," he still argued that the immunity of the state from federal taxation depends on the nature of the activity of the state. *Id.* at 586-87.

88. *Id.* at 589 (dicta). The exception to the bar on federal taxation of traditional state activities was recently stated in Massachusetts v. United States, 435 U.S. 444 (1978), where the Court upheld a federal aviation tax as applied to state police helicopters. The justification was that the state should pay its fair share of the costs of federal air regulation from which the state profited. *Id.* at 467-70. Although Justice Brennan's plurality opinion in *Massachusetts* pointed toward a repudiation of the governmental-proprietary distinction, the concurring justices in *Massachusetts* gave no indication that they would alter the *Usery* decision.

89. 426 U.S. at 854 n.18.

enhance the political accountability of both state and federal officials without impairing any legitimate federal interest.[90]

On the other hand, there may be a large variety of legitimate purposes for federal regulation. One such purpose may be to prevent state activities from impeding interstate commerce. If the federal government finds it advisable to regulate traditional state activities, it cannot fully accomplish the same end if restricted to regulation of nongovernmental activities. Both Justice Blackmun's concurrence and Justice Stevens' dissent in *Usery* point to the need for federal environmental laws regulating interstate effluents produced in the course of traditional governmental activities.[91] If state sovereignty barred such regulation, it would indeed impair the power of the federal government to regulate commerce among the several states. Thus, the plurality's reliance on cases exempting state operations from federal taxation to support an exemption from federal commerce regulation is misplaced.

In addition to attacking the use of intergovernmental taxation principles to support restrictions on federal regulatory power, Justice Brennan's dissent found insuperable institutional obstacles to Justice Rehnquist's "traditional governmental functions" test for limiting that power. He argued that no meaningful distinctions could be drawn between traditional and nontraditional governmental acts: "[T]hat the [traditional governmental function] test is unworkable is demonstrated by my Brethren's inability to articulate any meaningful distinctions among state-operated railroads . . . , state-operated schools and hospitals, and state-operated police and fire departments."[92]

Justice Rehnquist's opinion for the plurality did not define the traditional operations of state and local government. Justice Rehnquist stated that the administration of public law and the furnishing of public services are functions of government.[93] He listed fire prevention, police protection, sanitation, public health, and parks and recreation as examples of traditional state activities.[94] Further, in overruling *Wirtz*, Justice Rehnquist apparently found schools and hospitals to be tradi-

90. See discussion of political safeguards at text & notes 43-50 *supra*.

91. 426 U.S. at 856 (Blackmun, J., concurring); *id.* at 880 (Stevens, J., dissenting).

92. *Id.* at 880 (Brennan, J., dissenting). In light of Justice Brennan's comments, it is interesting to note the relative paucity of cases raising questions of the nature of state activity for federal tax purposes. *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978), in which Justice Brennan noted that the most recent such case was New York v. United States, 326 U.S. 572 (1946). 435 U.S. at 457. This may be explained either on the grounds that the distinction between governmental and proprietary acts is clearer than Justice Brennan suggests, or that the federal government has avoided unnecessary confrontation by refusing to attempt to tax state activities where a substantial question could be raised. If the latter is true, it demonstrates that the distinction may serve a significant political purpose in advancing federalism beyond the specific holdings of the cases.

93. 426 U.S. at 851.

94. *Id.*

tional state activities. Justice Rehnquist did not, however, provide specific guidance for determining whether particular governmental operations are traditional. Although Justice Blackmun's balancing test offers little hope of principled application, Justice Rehnquist's distinctions might be workable if an adequate rationale supported them. The inadequacy of the analogy to taxation, however, leaves the plurality opinion without any useful principle to guide future courts in applying *Usery*.

### C. *The Tribal League*

In a stimulating discussion of *Usery*, Professor Tribe proposes yet another rationale for the decision:

> [P]olicy-based legislation by Congress that endangers the provision of certain traditional services, unlike similar legislation directed only at private parties or at government services usually only provided privately, is constitutionally problematic not because it strikes an unacceptable balance between national and state interests as such, but because it hinders and may even foreclose attempts by states or localities to meet their citizens' legitimate expectations of basic government services.[95]

This rationale is novel, but hardly revolutionary. The revolutionary impetus stems from Professor Tribe's argument that "legitimate expectations" means "rights" of individuals to receive basic services from government. The language of the Constitution establishes institutions of government, grants powers to those institutions, and places limits on the exercise of those powers. The only commands of the document requiring the enactment of particular laws are those directly relating to the process of establishing the institutions of government. The idea that the legislature is bound to enact specific substantive laws is derived, not from the language or structure of the Constitution, but from the novel theory of Professors Michelman and Tribe.[96]

Some of the problems with a theory of affirmative rights to goods and services are obvious and were anticipated by its proponents. There are no simple answers to the questions of what goods and services citizens should be constitutionally entitled to receive, how much of that good or service is the constitutional minimum, and what kind of remedy should be given for violations of such rights. "Difficulties of definition and remedy," according to Professor Tribe, "should limit the

95. Tribe, *supra* note 48, at 1076.

96. Professor Tribe's theory relies on Michelman's earlier work, Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969), and is related to the concurrent publication of Michelman, *States' Rights and States' Roles: The Permutations of State Sovereignty in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

courts to the elimination of gaps in, or withdrawals of, such basic services or programs of assistance as the legislature has already undertaken."[97] This suggestion would reduce the problem for the courts. The types of goods or services to which a citizen might be entitled would be limited to those the government has at some point chosen to provide; the constitutional minimum would not exceed the highest level provided by government to individuals in the past; and the remedy would be an order to provide the minimum goods or services to persons not presently receiving them.

Nevertheless, in the view of both Professors Michelman and Tribe, the requirement that the state have previously provided the service to some persons before a court can declare that such a service is a minimum right for all persons is merely a prudential limit on identification of citizens' rights against the state.[98] The principle of affirmative rights to goods and services is not inherently so limited. If a court accepts the principle that it is charged with the definition and enforcement of affirmative rights, it may find it very difficult to resist the temptation to mandate the provision of goods or services despite total legislative inaction. The plaintiff's cry for goods or services will not go unheeded if the difficulties of definition and remedy are the only obstacles. *Roe v. Wade*[99] and the reapportionment cases[100] demonstrate the willingness of the court to draw arbitrary lines to resolve perceived social ills, while the desegregation decisions[101] provide a primer for innovative and intrusive remedial measures. If a court accepting Professor Tribe's theory of affirmative rights resists the temptation to mandate rights in the absence of any legislative action, it will likely be because a legislature which does not take steps to provide its citizens with basic goods and services will not long survive. But if the major function of Professor Tribe's theory is to fill in the gaps of legislation, that function may be served without such a radical break with the traditional understanding of the Constitution.

Accepting the idea that affirmative constitutional rights must be related to the text of the Constitution, Professor Tribe argues that individuals who are unable to obtain minimal needs in a society whose structure is determined by government action and selective inaction has been treated unjustly by the state—"an injustice perpetrated by exclud-

97. Tribe, *supra* note 48, at 1089.

98. *Id.* (citing Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls Theory of Justice*, 121 U. PA. L. REV. 962 (1973)).

99. 410 U.S. 113 (1973).

100. *See, e.g.*, Chapman v. Meier, 420 U.S. 1 (1975); Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

101. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

ing them from the *equal protection* of its laws and, in sufficiently extreme cases, by depriving them of life *without legal process*."[102] To support his thesis, Professor Tribe cites several cases striking down limitations on the provision of services or requiring procedural protections for individuals denied such services.[103] Those cases, however, dealt with limits on legislative power rather than affirmative rights.[104]

The textual strain in Professor Tribe's argument is apparent. It is difficult to find a deprivation by government of an individual's life, liberty, or property when the government has simply failed to act. Further, the thrust of the due process clause is to require appropriate procedures.[105] Requiring the government to provide specific goods or

102. Tribe, *supra* note 48, at 1088 (emphasis added).

103. *Id.* at 1089 (citing Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969)).

104. This is neither the time nor the place to attempt a comprehensive defense of the Court's decisions in this area. Nevertheless, it should be pointed out that the Court consistently and expressly rejects the affirmative rights theory proposed by Professors Michelman and Tribe. *See* Califano v. Aznavorian, 439 U.S. 170 (1978) (upholding cutoff of welfare benefits during time recipient is outside the United States); Califano v. Jobst, 434 U.S. 47, 58 (1977) (sustaining cutoff of benefits to disabled dependent children who marry nonbeneficiaries even if the nonbeneficiary is disabled); James v. Valtierra, 402 U.S. 137, 141 (1971) (approving state constitutional amendment that made it more difficult for poor to obtain public housing); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970) (applying rational basis standard to welfare classifications). The Michelman-Tribe suggestion that the affirmative rights theory has decisional support is based on an amalgamation of a disparate set of cases. Professor Tribe argues that right to travel cases such as Shapiro v. Thompson, 394 U.S. 618 (1969), must involve welfare rights because the Court has approved durational residence requirements for other purposes as in Sosna v. Iowa, 419 U.S. 393, 404-10 (1976). But the latter decisions are based on support for the domestic relations laws of neighboring states or on characteristics validly linked to brief residence. They do not undercut the principle that states may not act for the purpose of discouraging persons who wish to become residents from moving there. *See generally* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979).

Professor Tribe also argues that the requirement of pretermination hearings for welfare benefits enunciated in Goldberg v. Kelly, 397 U.S. 254, 270 (1970), when contrasted with decisions such as Arnett v. Kennedy, 416 U.S. 134, 157 (1974) which uphold termination of government employment prior to the hearing, demonstrates that welfare recipients have rights beyond those created by the state. The cases involve the modern problem of assertions of "property" rights to continued payments by government rather than the seizure of tangible objects in the possession of the individual. The Court's decisions appear to focus on whether subsequent payment for improperly withheld payments can adequately compensate the individual, and this judgment seems to depend on the immediacy of the individual's need.

Finally, Professor Tribe points to the decisions in United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973), and United States Dep't of Agriculture v. Murry, 413 U.S. 508, 514 (1973), striking down classifications denying food stamps, as demonstrating that government may not refuse to meet the basic needs of individuals "at least once it has undertaken to deal with such needs on a more general level." Tribe, *supra* note 48, at 1084. The Court considered the classifications to be arbitrary and unrelated to the purposes of the laws. Whatever the merits of those decisions, they are expressly rooted in the propriety of particular legislative classifications rather than any notion of affirmative rights to welfare.

105. Facially, the words "due process" refer to appropriate procedures. To the extent that the due process clause of the fourteenth amendment has been used to incorporate the Bill of Rights, it has incorporated primarily procedural guarantees. The revival of substantive due process has, thus far, been limited to the controversial new right of privacy. *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980).

services is a substantive matter unless the requested service is itself procedural as in the case of access to the courts.[106]

The equal protection clause is also an awkward place in which to locate a right to minimum goods and services from the state. Minimums, by implication, allow for inequalities in the total goods or services provided. If equal protection of the laws means more than justification for classifications, if it is understood as embodying a requirement that the government give each person at least a minimum amount of some good or service, the interpretation cannot be based on the history of the clause.[107]

Under Professor Tribe's theory, the determination of which good or service must be afforded and the minimum amount which must be provided is to be made by the court, whose function is to eliminate gaps in and prevent withdrawal of basic goods and services. The basis for such a determination appears to be Professor Michelman's and Professor Tribe's idea of a "just" society.[108] In effect, Professor Tribe is saying to the Court: " 'I wish you'd take his Ring. You'd put things to rights. . . . You'd make some folks pay for their dirty work.' "[109]

Thus far, the Court, like Galadriel in *The Lord of the Rings*, has replied " 'I would. . . . That is how it would begin. But it would not stop with that, alas! We will not speak more of it.' "[110] The premises on which our government has operated have been that governmental power should be rooted in the people of the nation rather than imposed on them, and that concentrations of power, even in the hands of the people, are dangerous and must be checked.[111] If the Court can both require the appropriation of money and prohibit the repeal of legislation on the basis of its own conceptions of "legitimate expectations" of citizens, the power to make law shifts to a small appointed body which is independent of political pressure and acknowledges no lawful superior to its authority.

Thus, Professor Tribe's defense of *Usery* is not only based on a concept of rights which cannot be founded upon the language of the Constitution, but, more importantly, it is based on value premises

106. *See* Boddie v. Connecticut, 401 U.S. 371, 377 (1971); Griffin v. Illinois, 351 U.S. 12 (1956). *Cf.* United States v. Kras, 409 U.S. 434, 449 (1973).

107. The fourteenth amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." Strauder v. West Virginia, 100 U.S. 303, 306 (1879). *See also* J. JAMES, *supra* note 11. From the unjustified nature of the racial classification, a general requirement that classifications must be rational may be constructed—but that construction does not support a notion of minimum requirements.

108. *See* Tribe, *supra* note 48, at 1089 n.100 (citing Michelman, *supra* note 98, at 962).

109. J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING 382 (2d ed. 1965).

110. *Id.*

111. THE FEDERALIST No. 47 (J. Madison), at 323-31 (J. Cooke ed. 1961).

which are antithetical to our constitutional traditions. The fundamental right of citizenship embraces the right to be bound only by laws enacted through a representative process in which citizens are political equals.[112] Although constitutional principles may require laws providing goods or services to be more inclusive, citizens have the right to decide whether to have such a law at all. With no clear constitutional warrant, Professor Tribe would have the small collegial body of the Court impose laws on an unwilling citizenry. Justice Brennan remarked in his dissent in *Usery*: "[T]he paradigm of sovereign action—action *qua* State—is in the enactment and enforcement of state laws."[113] The Court has consistently held that the Constitution and the federal government acting pursuant to the Constitution may invalidate the action of state legislatures, but it has never suggested that the state may be required to enact specific laws. In defending the *Usery* decision on the grounds that the federal statute impermissibly interfered with the constitutionally mandated obligation of the state to provide basic goods and services, Professor Tribe stands the decision on its head. *Usery* is correct not because the Constitution requires a representative governmental body to pass specific laws, but because it does not.[114]

### D. *A Better View of Usery*

Professors Tribe and Michelman provide a valuable insight by insisting that the basis for the restriction of federal power in *Usery* must be traced to individual rights.[115] They err in relying on social and economic rights unsupported by the language and antithetical to the premises of the Constitution rather than on political rights which are woven into its fabric. Justice Blackmun's balancing test provides a useful emphasis on the needs of the nation, but it lacks a principle to guide its application and prevent ad hoc decisions based on the subjective value judgments of individual justices. Justice Rehnquist's distinction between traditional governmental operations and other state activities seems more promising, but he fails to provide an adequate definition of his terms. Further, his reliance on the analogy to intergovernmental tax immunities ignores important differences beween taxation and reg-

112. *See* text & notes 5-25 *supra.*

113. 426 U.S. at 875 (1976) (Brennan, J., dissenting).

114. The *Usery* Court invalidated the FLSA amendments as an interference with the political process of representative government in the states. The focus on process rather than substantive outcomes is far more consistent with the nature of the Constitution. *See generally* J. ELY, *supra* note 105.

115. Tribe, *supra* note 48, at 1075-76; Michelman, *States' Rights and States' Roles: The Permutations of State Sovereignty in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1192-93 (1977).

ulation, and thus overlooks the greater need for federal regulatory power over the states.

Focusing on the individual's right to have the laws of his state based on the representative process within that state leads to a better view of the *Usery* decision. The corollary of the citizen's right is the principle that the federal government may not impose its own processes for state decisionmaking nor require the state to enact a specific law. Determining whether this principle was violated in *Usery* requires an examination of the nature of both the affected state function and the federal law which affects it.

1. The Nature of the Affected State Function

State and local governments regulate the conduct of private persons and entities, raise money to finance the administration of the law, and provide goods and services to the population. The state citizen has a right to expect these determinations to be made by a process itself determined by the state—subject to the limits imposed on that process by the Constitution. Federal regulation of the state decisionmaking process violates the fundamental principles of political self-determination. Prohibition of such federal regulation is essential to assure that the state government is a creation of its own citizens.[116] The exception to this limit on federal power is federal legislation pursuant to specific constitutional limitations on the processes of state government.[117] Although there is no general federal power to control the processes of state government, the federal government may take steps to assure that state government conforms to constitutional prohibitions. Where the state political process observes the limits established by the constitution, the federal government has no legitimate interest in interfering with the process. Federal interests are likely to be threatened only by the outcome of the process, not by the process itself.[118]

The state citizen's right to have the state lawmaking process governed by the state itself does not, however, extend to protection of the outcome of the process from federal invalidation. The citizen is subject

116. Thus, the proposals for national legislation governing the public sector labor relations of the states should be unconstitutional. *See* Brown, *Federal Legislation for Public Sector Collective Bargaining: A Minimum Standards Approach*, 5 U. TOL. L. REV. 681 (1974); Fox, *Federal Public Sector Labor Relations Legislation: The Aftermath of National League of Cities v. Usery*, 26 KAN. L. REV. 105 (1977).

117. *See* South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966) (sustaining the Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974 (1965), pursuant to U.S. CONST. amend. XV).

118. The national legislature might desire to control the state legislative process because particular state decisionmaking structures would increase the likelihood of a federally desired decision or would make the decision more acceptable to the population of the nation. Nevertheless, if the national legislature retains power to invalidate unpalatable state substantive outcomes, its interest in interfering with the process is slight, while the impact of such an interference on the nature of a state as a "sovereign political entity" would be significant.

to regulation by the federal as well as the state government, and the supremacy clause makes clear that federal regulations prevail over inconsistent state law.[119] Thus, the citizen does not have any right to expect state regulation to be insulated from federal law.

The problem is different where state provision of goods and services is the subject of federal regulatory legislation. Here the federal law applies, not to the individual, but to the state, which is an independent institution of government. Thus, the federal law commands the state to reach a specific result in its legislative process if it chooses to provide the regulated good or service. The conflict between the federal interest and the right of the individual to have state law determined by the polity of the state is evident.

There is no real threat to the integrity of the state legislative process in preventing the state from using the magical word "sovereignty" to avoid federal regulation of private conduct. If the state government were immune from federal regulation, the people of the state might opt to have the state government, rather than the private sector, engage in the regulated activity in order to avoid federal preemption. Thus, federal regulation of the state when it performs functions normally undertaken by the private sector is a necessary adjunct of the federal power to regulate private conduct. The concern for federalism should be adequately protected by the political process. The federal legislator from a state will be responsive to the same interest groups that succeeded in getting that state to perform that function. Unless there is a significant national interest in federal regulation, the state's federal representatives should be able to block undesired legislation.[120] As long as the same

119. Thus, Justice Rehnquist stated in *Usery*:

> Congressional power over areas of private endeavor, even when its exercise may preempt express state law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adopted to the end permitted by the Constitution."
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> . . . It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

426 U.S. at 840, 845.

120. See text & notes 43-50 *supra*. If the state operation is financed by its users, federal regulation should not affect the decisions of the local government in any other area. If federal regulation increases costs, they are passed to the user rather than paid for from revenues otherwise available for different purposes. Since there is no allocative effect due to federal regulation, the political safeguards of federalism apply. The pressures that lead the state to operate in a specific manner should encourage its federal representatives to fight to enable the state to continue that mode of operation.

In deciding whether to regulate the private sector, Congress weighs the benefits to be achieved against the side effects, such as increased cost of goods or decreased supply, produced by the operation of the market. Where comparable goods or services are provided by the state through user charges, the same factors are weighed. Where, however, the state funds its opera-

regulations apply to both public and private operations, the people of the state are free to choose to have the state government compete with or even completely oust private enterprise—but their choice will not be influenced by the desire to avoid federal regulation of private enterprise.

This analysis results in an understanding that the traditional governmental functions test is designed to protect the acknowledged federal power to regulate private conduct. Although neither Justice Rehnquist's opinion in *Usery* nor the intergovernmental tax immunity cases on which he relies adequately define "traditional governmental activities," it is possible to attempt such a definition by generalizing from the examples of governmental activities that Justice Rehnquist sets forth. Most of his examples, such as fire and police protection,[121] are normally funded primarily by general revenues rather than user charges. This suggests that the line of demarcation for *Usery* purposes turns largely on the method of financing. User financed activities, other than lawmaking and law enforcement activities, are subject to federal regulation, while activities supported by general tax revenues are "traditional government functions" which the federal government may not regulate.

If a good or service provided by the government is fully funded from user charges, the private economy is presumably capable of supplying the same good or service to the same users. With the exception of services of a regulatory nature like the motor vehicle administration, the state could leave user financed operations to the private sector rather than comply with federal regulations itself. This is not to suggest that user financed operations are inappropriate for state and local government, but rather that federal regulation still leaves to the state the basic choice of whether goods and services will be provided by the public or private sector.

By contrast, state operations financed to a substantial degree from general revenues—income, sales, and property taxes—are likely to reflect a judgment that the private sector is either unable to perform that function or that total user financing would exclude people who should have access to that good or service. Many services provide such major benefits to society that it is imperative to provide them even to those who cannot pay. Basic education is an example of such a service.

tions from general revenues, federal regulation affects state choices rather than the market. Thus, the extension of federal regulation to state operations funded from general revenues requires an analysis and weighing process very different from federal decisions to regulate either the private sector or state operations funded by user charges. Further, the political safeguards of federalism may well not apply to federal regulation of general revenue funded state operations.

121. National League of Cities v. Usery, 426 U.S. at 851 ("fire prevention, police protection, sanitation, public health, and parks and recreation").

Other examples include sanitation and fire protection, where failure to provide the service to the poor could endanger the lives and health of others. General revenues also provide resources desired by the community that cannot be wholly financed by user charges because of their effect in deterring utilization. In this category are libraries, museums, parks and other recreational facilities.[122] The decision to burden all the taxpayers of the state through use of general revenues indicates that the private sector would not perform the function to the satisfaction of the state. Thus, federal regulation of functions that the private sector cannot satisfactorily perform results in a regulation of the state itself, because the state is unable to leave the function to be performed by others.

This section has suggested that in determining whether federal law improperly dictates the content of state law, the method of financing goods and services is relevant. Nevertheless, if the validity of federal law depends on the method of financing that each individual state or local government happens to use, federal law would not have uniform application. Indeed, state financing might occur not as a judgment on the importance of providing a particular good or service but as a means to avoid the impact of federal law. Thus, state operations have no immunity from federal regulation unless they are "traditional" in the sense of being typically financed through general revenues. This requirement enhances the predictability of application of federal law and deters any distortion of the political process. Determination of whether an operation is "traditional" requires an assessment of how many governments so act and how long they have so acted. Today's innovations swiftly become tomorrow's traditions. Thus, the concept of "tradi-

122. Justice Rehnquist's opinion points to railroad operations as an area that states have not "regarded as integral parts of their governmental activities." *Id.* at 854 n.18. Public utilities and mass transportation are examples of desirable services whose efficient provision demands some form of monopoly. This results either in heavy regulation of private provision of such services or in state provision. The services are normally financed by user charges, but state and local governments may choose to subsidize such services with substantial amounts of funding from general revenue sources. Where this occurs, the service appears to fall into the category of "integral" governmental operations, *i.e.*, those whose full provision to the public requires government action. Over time, if the forces that led to non-user financing persist, the non-user financed operations will be perceived as "traditional governmental functions."

The Wage and Hours Administrator of the Department of Labor has promulgated regulations effective December, 1979, that characterize the following governmental functions as nontraditional: alcoholic beverage stores; off-track betting corporations; local mass transit systems; generation and distribution of electric power; residential and commercial telephone and telegraphic communications; production and sale of organic fertilizer as a by-product of sewage processing; production, cultivation, growing, or harvesting of agricultural commodities for sale to consumers; and repair and maintenance of boats and marine engines for the general public. 44 Fed. Reg. 75,630 (1979) (to be codified at 29 C.F.R. § 775.3).

The regulations also identify the following activities as traditional governmental functions: schools and hospitals; fire prevention; police protection; sanitation; public health; and parks and recreation. 29 C.F.R. § 775.2 (1979). These lists appear to be consistent with Justice Rehnquist's view of traditional functions and with the views expressed in this Article.

tional" government operations insulated to some degree from federal law is a dynamic one.[123]

## 2. The Nature of the Federal Regulation

Limiting state immunity from federal law to traditional governmental operations serves to protect federal power over the people of the nation while preserving the basic choices of state operation to the state. Even traditional governmental operations, however, can pose problems for legitimate federal interests. By focusing on the method that is used to vindicate the federal interest, it is possible to reconcile the federal concern with preservation of state autonomy. Earlier in this Article it was argued that limits on the exercise of law-creating power are not inconsistent with the republican form of government, which vests the power to create law in representative institutions, but that a requirement that a representative institution enact a specific law is inconsistent with the independence of that body and places ultimate lawmaking authority in the one exercising compulsion.[124] Thus, it is important to distinguish limits on state power from forced enactments.

With respect to traditional governmental operations, federal requirements force the state to enact legislation which embodies the terms fixed by the federal government. Under these circumstances, the federal government has violated the rights of state citizens to have state law created by representative state institutions. If the federal legislation affects other areas of state government—areas which can be left to the private sector—the state at least has the choice of complying or ceasing the activity.[125] By hypothesis, the option of ceasing the activity is not available for the traditional government operations which trigger *Usery*: those functions which can only be performed by the public sector.

123. The rationale for intergovernmental tax immunity—that each government, federal and state, must be able to preserve the resources historically available to it—has been outmoded for decades. The advent of personal income taxation gave the federal government power to reach the source of state revenues and affect it so deeply that the state's taxing ability is impaired. Thus, the revenue needs of the states send them today to the federal government—hat in hand. *See* Monaghan, *The Burger Court and "Our Federalism"*, LAW AND CONTEMP. PROB., Summer, 1980, at 39 (speech given at annual AALS Convention in Phoenix, January, 1980).

A principle that allowed the relative roles of federal and state government to turn on the historical accident of which functions states performed in 1789 would be an outworn straightjacket. Justice Stone's opinion in New York v. United States, 326 U.S. 572, 587-88 (1946), and Justice Rehnquist's in *Usery*, 426 U.S. at 855, would insulate public schools from federal power. The Court has recognized that the movement for free public schools was a product of the nineteenth century. *See* Brown v. Board of Education, 347 U.S. 483, 489 n.4 (1954). Compulsory attendance laws were uncommon prior to the adoption of the fourteenth amendment. Thus, the notion of traditional governmental operations insulated from federal taxes and regulations must be based on a broader principle than the functions of state government in 1789.

124. See text & notes 5-25 *supra*.

125. See text & notes 120-21 *supra*.

Although federal requirements compel the enactment of state law, limits on state power do not have the same effect. Indeed, the distinction is in the operation of the federal law rather than its language. It is possible to cast a requirement in the language of limitation. If the state must pay a minimum wage, the requirement may be expressed as a limit on state power: The state may not pay its workers less than $3.00 an hour. At the same time, a limit on state authority may be expressed in the language of a requirement. If the state's salaries are limited to present levels, the limit may be cast as a requirement: the state must pay its workers no more than they are presently receiving. The difference lies in the effect of such laws. A requirement implies a right against the state for a specific good or service or a specific mode of performance. State officials have no discretion in the performance of such services. Although limits could result in invalidation of state law or an injunction against specific behavior, the state officers still retain discretion to choose alternative modes of proceeding. The parameters of action may be confined, but the integrity of state government as the source of creation of state law is maintained. The distinction between requirements and limits permits the federal government to vindicate national interests without violating the principle that the state must be the source of state law. It is only when the federal government compels legislation rather than invalidating it that the core of state government is exposed, the political safeguards have failed, and the Court must intervene to protect the right of the state citizen to have state law made by the state.

The distinction between forbidden requirements and permissible limits with respect to traditional governmental functions is consistent with the *Usery* opinion. Viewed in the light of this distinction, Justice Rehnquist's references to displacing "State's freedom to structure integral operations"[126] and forcing directly on the state federal "choices as to how essential decisions regarding conduct of integral government functions are to be made"[127] are simply prohibitions against supplanting state law with federal law. Limitations on available state choices would not "displace" the right of the state to determine the structure of its operations nor would it "force directly" on the state a specific choice concerning the conduct of governmental operations.

This reading of Justice Rehnquist's opinion would permit the Court to distinguish the hypotheticals posed by Justice Stevens without resort to a balancing technique.[128] Justice Stevens objected to the tradi-

126. 426 U.S. at 852.
127. *Id.* at 855.
128. See text & note 75 *supra.*

tional governmental operations test because the means of performance of a large variety of governmental functions could endanger the health and safety of others unless subjected to federal regulations. State employees normally have discretion in the manner of performing their responsibilities, and prohibition of one means as dangerous would neither conflict with any state legislative choice nor deprive the employee of all choice of means. Even if the state law mandates the means of performance—for example, requiring garbage to be dumped untreated into the state waterway—a federal environmental protection law may simply foreclose that method without requiring a specific manner of garbage disposal. The result of such a federal law would be to force the state legislature to make a new choice of means or to leave such a choice to the executive branch. The ultimate decision remains that of the state, although federal law may have limited the parameters of the choice.[129]

The only hypothetical raised by Justice Stevens that is not easily dealt with by this analysis is one that poses little threat to state functioning—namely, federal income tax withholding requirements.[130] Withholding, like reporting requirements, is a specific act that federal law requires of the states in their capacity as an employer. The command is directed at the executive branch of the state and requires no state legislation to implement. Nevertheless, it raises the spectre of federal direction of state officers for federal purposes. Unlike Justice Stevens' other hypotheticals, this federal action is incident to the taxing power rather than the commerce power of the federal government. The tax is imposed on individuals rather than on the state, and the state is required to cooperate with minimal effect on its decisions regarding the proper allocation of resources and the manner of providing services. In Justice Rehnquist's terms, a federal law imposing a duty on the state that does not require state legislative action to implement it and that has no significant impact on the allocation of state resources or the manner in which public services are performed is not an "essential decision" of the state. In terms of the analysis presented in this Article, the integrity of the state lawmaking authority is not impinged upon by requiring ministerial acts of state officials that do not affect the manner in which the public is provided with services.

This interpretation of *Usery* as protecting the integrity of the state

129. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972); New Jersey v. City of New York, 283 U.S. 433 (1931).

130. Most of Justice Stevens' hypotheticals involve the manner in which subordinate state employees perform their functions. He moves closer to the heart of representative government when he posits limits on state power to fire its employees. Such a law, however, would be based on federal enforcement of constitutional prohibitions. *See* text & note 117 *supra.*

lawmaking authority assists in understanding Justice Rehnquist's distinction of *Fry*.[131] Justice Rehnquist's comment that the federally imposed wage freeze at issue in *Fry* "displaced no state choices as to how governmental operations should be structured nor did it force the states to remake such choices themselves"[132] glosses over the enormous impact such legislation must have had on the choices which the states subsequently made. Nevertheless, the point is well taken if it refers to the federal legislation's effectiveness without the need for further state enactments to implement it. Enjoining the payment of a portion of an appropriated sum does not require the state to make any new appropriations.

If *Usery* is read as protecting the relationship of the citizen to his state, insulating the lawmaking authority of the state from direct coercion, its scope is narrow. Under this interpretation, the federal government retains power to prevent state governments from harming the interests of individuals and sister states, so that the results of the proposed analysis are likely to accord with Justice Blackmun's sense of balance.[133] The restriction of the means by which the federal government may act, however, should give the national legislators cause to reflect on the values of federalism that are affected by regulating the operations of the state.

## CONCLUSION

The position of the states in the constitutional system and the recognition of citizenship in a state require independent state lawmaking authority. This means that while federal law may operate to limit state law, it may not compel specific state enactments. Requirements regarding traditional governmental operations violate that principle where they compel specific enactments. Limits on the range of permissible state choices are valid, however, if they do not compel specific enactments. The power to limit state action should be sufficient to vindicate the federal interest without displacing state lawmaking power.

The proposed reading of *Usery* poses no threat to the increasing exercise of power by the national government. The exercise of federal power in regulating private conduct, raising taxes, and spending money

131. See text & notes 73, 77-79 *supra*.

132. 426 U.S. at 853.

133. *See id.* at 856 (Blackmun, J., concurring). In additional to federal power to regulate nontraditional (*i.e.*, user financed) state operations, to limit traditional state operations, and to invalidate state laws and procedures that violate the Constitution, the federal government may also condition its grants on compliance with federal standards related to the operations for which the grant is given. This provides fully adequate means to vindicate federal interests. At the same time, if Congress wishes to enforce federal standards against the states through conditional grants, the necessity for congressional appropriation assures that Congress is directly accountable for the costs of such standards.

to provide for the general welfare deeply affects state power. The ability of the state to provide services to its citizens is largely dependent on the state of the national economy and on grants received from the federal government. The dependence of state government on federal policy is a fact of modern life, and *Usery* makes no attempt to change it.

If the Court's decision in *Usery* prevented the federal government from meeting perceived national needs, it would precipitate a crisis. It does not do so. Nevertheless, the *Usery* decision may have a profound effect on the nature of our government. Its assertion of a core of local government activities that cannot be directly commanded by national law preserves the recognition of the states as autonomous units in the federal system. The Court's assertion of a large sphere of state autonomy will surely affect the attitude taken toward proposed federal legislation even in areas where *Usery* itself poses no bar to action. Where *Usery* does bar direct federal regulation, it will force our federal legislators to rethink the value of imposing federal policies upon local governments.