Restoring the Balance in Federalism

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ARTICLES

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INTRODUCTION

In the last forty-five years the United States has witnessed a shift in governmental responsibility from the state and local levels to the federal. This development has taken place for reasons ranging from the recognition of the federal government's role in the nation's economic matters to the intransigence of some states in carrying out the guarantees embodied in the post-Civil War amendments. Over the past decade the Supreme Court has rekindled the debate over the proper allocation of governmental power in the federalist scheme. More importantly, attention is being focused on the existence

† The author suggests that while the decision in National League of Cities v. Usery, 426 U.S. 833 (1976), indicates a more activist posture of the Supreme Court and is significant to scholars of modern federalism, the decision has been dead for quite some time. This article was completed prior to the United States Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Auth., 53 U.S.L.W. 4136 (Feb. 19, 1985), which overruled National League of Cities v. Usery.

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and role of the sovereign states in the federal union.

This article emphasizes the importance of the role of state sovereignty in modern constitutional analysis of federalism issues. An initial review of the major Court decisions is undertaken to establish and critique the current judicial methodology in resolving federalism controversies. The article proceeds to examine the underlying values of federalism in an endeavor to establish a nexus between the original concept of the framers of the Constitution and the present judicial approach to federalism issues. Further, an argument is made that political accountability is the critical link necessary in the establishment of that nexus to a principled form of judicial review. Finally, the article recommends the use of a judicial balancing process that accords determinative weight to the fundamental value of political accountability in such disputes.

I. SUPREME COURT DECISIONS

A. National League of Cities v. Usery

In National League of Cities v. Usery, 1 the United States Supreme Court rendered an historically significant decision regarding the role of the tenth amendment 2 in the constitutional scheme of federalism. 3 The case is significantly important for two distinguishable reasons: (1) The opinion marked the return of the Court as a more activist reviewer of federal laws passed under the commerce clause. Forty years had passed since the deci-

2. U.S. Const. amend. X provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
3. The phrase "constitutional scheme of federalism" is intended to limit the definition of federalism to that which is clearly inferable from constitutional text, history or structure. The conflict and interdependence of federal and state legislative bodies are express products of a political, rather than legal, theory of federalism and are thereby omitted from the definition.
sion in *Carter v. Carter Coal Company* wherein the Court last overturned a federally-based commerce clause enactment on the basis of the tenth amendment. That type of judicial interpretation had become so discredited with the passage of time that the Usery opinion engendered both shock and unabashed criticism for its supposed return to the precepts of “dual federalism,” and its misguided constitutional methodology.\(^7\) (2) The case


5. Criticisms of a strong “state’s rights” or dual federalism position under the constitution are recurrent throughout the legal literature of the last one-half century. For representative samples, see Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) and Boudin, *Truth and Fiction about the Fourteenth Amendment*, 16 N.Y.U.L. REV. 19 (1938).


is also centrally important as constituting the theoretical framework for modern federalism review. The majority opinion, authored by Justice Rehnquist, contains a patchwork of dicta from previous cases that weaves together to form a state sovereignty concept that includes affirmative constitutional limitations on the federal government. The defects of the majority opinion have been roundly criticized; however, these imperfections do not


8. Justice Rehnquist delivered the Court’s opinion. The opinion was joined by Chief Justice Burger and Justices Stewart, Powell and Blackmun. Justice Blackmun’s separate concurring opinion has lead some commentators and courts to mistakenly describe the opinion as one of a plurality, rather than a majority of the Court. See, e.g., Bogen, Usery Limits on National Interest, 22 ARIZ. L. REV. 733, 766 (1980); United Trans. Union v. Long Island R.R., 634 F.2d 19, 24 (2d Cir. 1980), rev’d, 455 U.S. 678 (1982); Note, Constitutional Limitation of Congressional Commerce Clause Power, 58 CHI.-KENT L. REV. 109, 131 (1981).


10. Tribe, supra note 7, at 1066 (“I make no claims about what the Justices intended or ‘really had in mind.’ I haven’t a clue what that might have been . . . .”); Cox, supra note 6, at 23 (“Justice Rehnquist, following the example of many of his predecessors, asserted Humpty Dumpty’s power over words.”); Gelfand, The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980’s, 21 B.C.L. REV. 763, 813 (1980) (“[T]he opinion failed to pronounce adequate guidelines for determining which state and local government activities warrant such protection.”) (footnote omitted); Barber, supra note 7, at 164 (“The decision departs from the expressed terms of the Constitution even as Mr. Justice Rehnquist himself previously understood those terms. . . . The decision seems in conflict with Mr. Justice Rehnquist’s expressed views that judicial policy making is contrary to the language and intent of the framers.”) (footnotes omitted).
lessen the major thrust of the holding that the central underpinning of the tenth amendment is an affirmative limitation based on a respect for state sovereignty.

The *Usery* case involved a challenge to the minimum wage, maximum hour and overtime provisions of the Fair Labor Standard Act.\(^{11}\) The original Act of 1938 specifically exempted states and political subdivisions from being covered. Amendments to the Act were passed in 1974 that extended the challenged provisions to most public employees of the states and their subdivisions.\(^{12}\)

Justice Rehnquist's majority opinion began by recognizing the expansive nature of the power granted to Congress under the commerce clause. Quoting *Gibbons v. Ogden*,\(^{13}\) the power was characterized as a grant of plenary authority to Congress which included "the power to regulate . . . to prescribe the role by which commerce is to be governed."\(^{14}\) The commerce power's applicability to "wholly private activity" within a state was reaffirmed as to acts purely intrastate in nature if the acts in question affected interstate commerce.\(^{15}\) In the process of carefully distinguishing the rationale of *Usery* from the discredited dual federalism analysis,\(^{16}\) Justice Rehnquist


\(^{13}\) 22 U.S. (9 Wheat.) 1 (1824).

\(^{14}\) 426 U.S. at 840, quoting 22 U.S. (9 Wheat.) at 196.

\(^{15}\) 426 U.S. at 840.

\(^{16}\) The Court's opinion comes close to adopting the traditional dual federalism analysis, but has one major difference. A pure dual federalism approach would have as a tenet that the states would enjoy the prerogative of choosing the valid objectives of government and segregating unto themselves the final authority to regulate the area. *E.g.*, *Hammer v. Dagenhart*, 247 U.S. 251, 263 (1918) ("Congress has no
admitted that congressional decisions may override or pre-empt contrary state law determinations. The majority reaffirmed the modern view of the commerce power’s reach and appeared to implicitly adopt the prevailing modern view that the tenth amendment cannot be viewed as an affirmative limitation on the power. However, the Court quickly dispelled any such inference regarding the tenth amendment.

The Court revealed a corollary premise to the expansive commerce power as one that constitutionally adopted a state sovereignty limitation on the congressional exercise of the enumerated powers. This state sovereignty premise was supposedly existent in prior constitutional decisions, and forthrightly stood for the proposition that a state must retain the power to maintain its identity in the federal system. This retention of a
general police power; it may exercise a police power only over a subject-matter already under its jurisdiction...”); Bailey v. Drexel Furniture Co., 259 U.S. 20, 39 (1922) (“[H]ere the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution.”); Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936) (“Working conditions are obviously local conditions... Such effect as they may have upon commerce... is secondary and indirect.”)

17. 426 U.S. at 840. This feature of the majority’s opinion is the principal distinguishing characteristic from adopting a “dual federalism” approach.

18. Obviously, Justice Rehnquist did not intend to convey this impression, but the opinion initially provided for only a minimum standard of review: “Congressional power... even when its exercise may pre-empt express state-law determinations contrary 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 adapted to the end...’” 426 U.S. at 840 (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964)). Thus, the initial formulation of a rational basis test is consistent with the view that: “The Supreme Court today interprets the commerce cause [sic] as a complete grant of power. The tenth amendment is no longer viewed as a reservation of certain subjects for state regulation.” J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 161 (2d ed. 1983); United States v. Darby, 312 U.S. 100, 124 (1941) (“The [tenth] amendment states but a truism that all is retained which has not been surrendered.”).
separate state identity and existence was considered to be based in the theory of federalism.

Justice Rehnquist's discovery of this principle consisted largely in fashioning its major premise from the dicta of several prior cases that were, at best, only tangentially on point. To support the notion that the congressional commerce power has some constitutional limits he cited two cases involving the sixth and fifth amendments. Since these decisions were clearly without precedential value, the Court relied on *Maryland v. Wirtz* as an example of state sovereignty limiting the exercise of an enumerated power. Hinting that the Court had a special function of protective review in this area, the opinion cited language that could lead one to assume that a politically-oriented rationale underlaid the


20. Leary v. United States, 395 U.S. 6 (1969) (fifth amendment due process violation where federal statute provided that possessor of marijuana is deemed to know of its unlawful importation).


22. "[T]he Court took care to assure the appellants that it had "ample power to prevent . . . the utter destruction of the State as a sovereign political entity." . . ." 426 U.S. at 842 (quoting Maryland v. Wirtz, 392 U.S. at 196).

23. The implication is clear: the Court has a residual power to review federal acts that would tend to destroy the political entity of a state. Of course, this is inconsistent with the historical interpretation of the guaranty clause of the Constitution. "The United States shall guarantee to every State in this Union a republican form of government . . . ." U.S. Const. art. IV, § 4. See, Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (federal court is incompetent to decide whether a state government is "republican"); Compare Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (Con-
basis of the federalism position that allowed the Court to intervene in a dispute concerning the proper allocation of governmental powers between the national and state governments.  

A major theoretical point of the Court's opinion was the recognition that states possessed certain inalienable "attributes of sovereignty" that were cognizable under a protective scheme of constitutional federalism. The progress possesses power under the guaranty clause to the exclusion of the judiciary. See, E. Corwin, The Constitution and What it Means Today 266 (14th rev. ed. 1978); L. Tribe, American Constitutional Law 73-74 (1978) [hereinafter cited as American Constitutional Law]; Bonfield, The Guaranty Clause of Article IV, Section 4: A Study of Congressional Desuetude, 46 Minn. L. Rev. 513 (1962).

Since there is no textual basis for the Court's concern over "guaranteeing" the non-destruction of a coordinate political unit, it must arise from the Court's perception of its proper role in the maintenance of a functioning, responsive federalistic system of government. John Ely has previously advanced the theory that the Court should give heightened scrutiny for minorities that are unable to fully participate in the political process. Ely, Toward a Representation — Reinforcing Mode of Judicial Review, 37 Md. L. Rev. 451 (1978). If the Court should involve itself in policing the political process at all, one could assert that judicial review is required in instances where the more powerful actor changes the basic relationship of power allocation and political accountability between itself and the inferior party. A judicial decision under such circumstances that reallocates the relative dynamics between the parties should be regarded as a "signal" to Congress (or any powerful actor) to return to a responsible relationship with the aggrieved party that allows the latter's interests to be protected.

24. For the view that the Court should not decide issues of power allocation between the national and state governments, but allow the political process to determine the issues see, J. Choper, Judicial Review and the National Political Process 171-259 (1980); Choper, The Scope of National Power Vis-a'-Vis the States: The Dispensability of Judicial Review, 86 Yale L.J. 1552 (1977); 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) [hereinafter cited as Wechsler].

25. "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government . . . ." 426 U.S. at 845.

26. "[Attributes of sovereignty] may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." Id.
justification for legitimizing such a position rests on the theoretical base of the implied tax immunity between the federal and state governments. Justice Rehnquist cited New York v. United States and Texas v. White for the principle that the essential foundation of American federalism is the inviolability of the states' sovereign spheres. These "attributes of sovereignty" were to be found somewhere within the theoretical notion of state autonomy. The locations of these crucial areas were determined to rest within the very heart of the processes of state government. Quoting from a footnote in Fry v. United States, Justice Rehnquist wrote "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." Thus, the formulation devised by the Court broadly stated the guiding principle of federalism review as one that required the recognition of an autonomous sphere of state control surrounding both its very existence as a state and certain governmental functions that allowed it to structure its operations effectively in a federal system.

27. 326 U.S. 572 (1946) (indicating that federal government may not constitutionally tax unique state property and that neither federal nor state governments could substantially impair the powers of the other).

28. "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." 426 U.S. at 844 (quoting Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869)).

29. Quoting from Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869), Justice Rehnquist wrote:

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.

30. 421 U.S. 542, 547 n.7 (1975).

31. 426 U.S. at 843 (quoting Id.).
The Usery test consists of two distinguishable inquiries: (1) Is there an interference with an attribute of state sovereignty? and (2) whether such attribute is essential to its "separate and independent existence" in the federal scheme. The Court cited Coyle v. Oklahoma for the proposition that "attributes of sovereignty" have been recognized by the Court. With this scant foundation, the Court wrote "One undoubted attribute of state sovereignty is the States’ power to determine the wages which shall be paid . . . what hours those persons will work, and what [overtime] compensations will be provided." This attribute was further construed to be essential to a state’s separate and independent existence because of its probable impact on state economic and governmental prerogatives.

The effect of extending the 1974 amendments to the states was considered to be disruptive and onerous because of the increased budgetary costs that the states would necessarily bear. However, these costs were not

32. 426 U.S. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).
33. 221 U.S. 559 (1911).
34. The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained.

Id. at 565.
35. 426 U.S. at 845.
36. Id. Justice Brennan’s dissent points out that a naked assessment of costs proves nothing because the question is whether the states’ political power is sufficiently strong to command massive amounts of federal aid. The enormous amount of federal funds satisfied Justice Brennan “that the States’ influence in the political process is adequate to safeguard their sovereignty.” 426 U.S. at 878 (footnote omitted) (Brennan, J., dissenting).

This position is illogical for the obvious proposition that the acceptance by states of conditional grants creates a clear tension between the tenth amendment and federal spending power. The conditions attached to the funds constitute a widely-used method of injecting federal policy choices into the state and local spheres of government. See, e.g., Wallick &
the determinative factor in the federalism equation. Disclaiming a responsibility to analyze any "particularized assessments of actual impact," the majority stated that the congressional attempt to regulate the states in their capacities as separate political sub-units would impair the states' ability to function independently in the federal scheme. Thus, the regulation of the state qua state comprises the sine qua non of Usery's heightened federalism review.

Justice Rehnquist placed great emphasis upon the idea that these amendments had the practical effect of coercing the states away from their considered legislative judgments in the employment area. Therefore, the result would be a significant displacement of services administered to the states' citizens, and the further substitution of a federally-coerced policy controlling the delivery of these services. The specter of the federal government restructuring the traditional methods by which local and state governments conduct their governmental affairs was articulated as an overriding concern of the Court.


37. 426 U.S. at 851.

38. "[T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments." Id. at 852.

39. Id. at 847.

40. "But it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials . . . ." Id. at 848.

41. Id. at 849. The Court did not provide any generalized set of criteria to determine when an activity becomes a traditional state function. Even more troublesome was the majority's apparent position that the slightest infringement would constitute a violation of state sovereignty.
While the *Usery* decision certainly constituted a dramatic change in the Court's position regarding the proper scope of review appropriate in power allocation cases, the opinion of the Court contained rationalizations and disclaimers that limited the scope of the holding. The most notable unpersuasive rationalization of Justice Rehnquist was his attempt to factually distinguish *Fry*. In that case the Court upheld the applicability of the Economic Stabilization Act of 1970 to the wages of state and local government employees. Justice Rehnquist's opinion noted that the federal measure was an "emergency" action in response to the severe inflation of the era. Some degree of congressional flexibility may be properly inferable under the commerce power. Such flexibility may, in turn, give rise to a broader expanse of an enumerated power under emergency conditions. That is an interesting theory, but is is quite beside the point. If *Usery* was indeed based on the dual restrictions of an impermissible attempt to regulate states in their sovereign capacities and the displacement of state choices in crucial governmental areas, the fact that an emergency existed is irrelevant. The wage freeze upheld in *Fry*


42. 421 U.S. 542 (1975).


45. 426 U.S. at 853.

46. "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1933) (rejecting contract clause challenge to state law that extended redemption periods from mortgage foreclosure sales).

47. Although the *Usery* opinion did not so indicate — the proper scope of judicial review may be a more deferential one during a national emergency. Compare *Korematsu v. United States*, 323 U.S. 214 (1944) (uphold-
would clearly work to displace or prevent all future state choices in the identical area deemed so essential in *Usery*.

The opinion was further limited by the Court's reluctance to venture an opinion on future congressional attempts to structure state and local government operations by utilizing the spending power or section 5 of the fourteenth amendment. There appears to be an indicating the racial exclusion of Japanese-Americans on a justifiable military imperative) *with* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (executive order directing federal authority to take possession of steel mills during the Korean war was held unconstitutional).

48. 426 U.S. at 852 n.17. The spending power of Congress historically has been given an extremely broad scope in authorizing the expenditure of public funds for purposes limited only by the restriction that such payments be for the general welfare. United States v. Butler, 297 U.S. 1 (1936).

Lower courts have consistently rejected a *Usery* attack on intrusive federal programs promulgated under the spending power. The crucial issue in these cases is whether the state voluntarily chose to accept the federal conditions attached to the grant of funds or whether there was "coercion" applied to the state. The enormity of the grant has no analytical relevance to the issue of "coercion." *See*, e.g., Montgomery County v. Califano, 449 F. Supp. 1230 (D. Md. 1978), *aff'd mem.*, 599 F.2d 1048 (4th Cir. 1979); Florida Dep't of Health and Rehabilitative Serv. v. Califano, 449 F. Supp. 274 (N.D. Fla. 1978), *aff'd mem.*, 585 F.2d 150 (5th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979); Walker Field, Colorado Pub. Airport Auth. v. Adams, 606 F.2d 290 (10th Cir. 1979).

49. 426 U.S. at 852 n.17. The scope of congressional power under the enforcement clause of the fourteenth amendment comprises the most potent instrument in the congressional arsenal. As Justice Rehnquist noted in a case decided only four days after *Usery*:

In [§ 5] Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority. *Fitzpatrick v.Bitzer*, 427 U.S. 445, 456 (1976) (both the eleventh amendment and state sovereignty are limited by the enforcement provision of the fourteenth amendment). *Cf.*, *Rome v. United States*, 446 U.S. 156, 179-80 (1980) (fifteenth amendment is deliberate expansion of federal power to intrude on state sovereignty).
tion from the opinion that because the freeze in 
Fry op-
erated to reduce, rather than increase the pressure on
the state budget, a similar federal initiative relying on
the spending power would prove to be dispositive on the
issue. 50

The majority opinion was both far-reaching and
mysterious. The Court indicates that affirmative limits
on the national government exist in the tenth amend-
ment, but is unable to fashion a test suitably sturdy for
structural analysis. What are the other "attributes of
sovereignty"? Is there a judicial position regarding the
economic prosperity of the nation as opposed to its sev-
eral units? Can state officials voluntarily relinquish their
responsibility to make policy choices if they accept fed-
eral funds? Is the political accountability of local officials
any concern in a federalism analysis?

The 
Usery
opinion provided the necessary beginning
for analysis and reexamination of the Court's proper role
of review in federalism controversies. The decision was
somewhat obfuscated by the disparate strands of reason-
ing of the majority opinion and Justice Blackmun's cru-
cial concurring opinion. 51 This confusing decision re-
mained unclarified for the subsequent five years while

50. 426 U.S. at 853.
51. Justice Blackmun authored a separate concurrence which briefly
stated that he understood the majority opinion as one adopting a balancing
test. "I may misinterpret the Court's opinion but it seems to me that it
adopts a balancing approach, and does not outlaw federal power in areas
such as environmental protection, where the federal interest is demonstra-
bly greater and where state facility compliance with imposed federal stan-
dards would be essential." Id. at 856 (Blackmun, J., concurring).

Unsurprisingly, many lower courts found Justice Blackmun's balancing
approach to be more coherent than Justice Rehnquist's structurally-orien-
ted opinion. See, e.g., Colorado v. Veterans Admin., 430 F. Supp. 551, 559
(D. Colo. 1977), aff'd, 602 F.2d 926 (10th Cir. 1979), (with modification)
cert. denied, 444 U.S. 1014 (1980); Woods v. Homes & Structures, Inc., 489
ism of the Supreme Court: Diminished Expectations of National League of
Cities, 43 Mont. L. Rev. 181, 185-87 (1982) (outlining other strands of rea-
soning by lower courts in response to 
Usery).
the Court absorbed the scholarly criticisms and formulated a refinement to the Usery principle.


The Supreme Court attempted to apply and clarify the Usery rationale in 1981 when it decided the cases of Hodel v. Virginia Surface Mining and Reclamation Association, Inc.,52 and Hodel v. Indiana.53 The cases came before the Court as a result of appeals from lower court decisions that responded to constitutional challenges brought against the Surface Mining Control and Reclamation Act of 1977 (SMCRA).54

The Act is an attempt by the federal government to establish a nationwide regulatory program for the coal mining industry. A primary purpose of SMCRA is to protect society and the environment from the hazardous effects of surface coal mining.55 This purpose was to be


55. 30 U.S.C. § 1202(a)(d) (Supp. 1983) (“It is the purpose of this chapter to . . . (a) establish nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;” and (d) “to assure that surface coal mining operations are so conducted as to protect the environment . . . .”).
effectuated by the promulgation of federal guidelines that provided a two-stage program of regulation.

The first, or interim, phase of the program requires the immediate promulgation and enforcement of certain sections of the Act's environmental standards. During this period a federal inspection and enforcement scheme is established for each state. The Secretary of the Interior has the primary responsibility for enforcing these interim guidelines. The states may continue to authorize surface mining operations, but such activities must strictly conform to the interim federal measures.

The second, or permanent, phase features a procedure whereby any state desiring to acquire permanent regulatory authority over "non-federal lands" within its borders must submit a proposed program to the Secretary. The state's burden is to demonstrate that it has legislatively enacted laws that implement the Act's standards for environmental protection, and also to show that it has the requisite ability to maintain and enforce the standards. In the event that a state fails to submit a plan or the Secretary refuses to approve a plan, the Act

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56. Under 30 U.S.C. § 1252(c) (Supp. 1983) the Secretary of the Interior is directed to promulgate an interim regulatory program during which the Act's performance standards become mandatory for mine operators. Included in this program are standards governing: (a) restoration of land after mining to its prior condition; (b) restoration of land to its approximate original contour; (c) segregation and preservation of topsoil; (d) minimization of disturbance to the hydrologic balance; (e) construction of coal mine waste piles used as dams and embankments; (f) revegetation of mined areas; and (g) spoil disposal. 30 U.S.C. § 1265(b) (Supp. 1983).


58. Id.

59. 30 U.S.C. § 1252(b) (Supp. 1983) ("All surface coal mining operations on lands on which such operations are regulated by a State . . . shall comply . . . with, the provisions set out in . . . this section.").

60. 452 U.S. at 271 n.6.

61. 30 U.S.C. § 1253(a) (Supp. 1983) ("Each State . . . which wishes to assume exclusive jurisdiction over the regulation of surface coal mining . . . shall submit to the Secretary . . . a State program . . . ").

will be administered by the Secretary. 63

The plaintiffs 64 primarily challenged the performance standards of the interim regulatory program. 65 The plaintiffs charged that the Act violated the commerce clause, 66 the equal protection and due process guarantees of the due process clause of the fifth amendment, 67 the just compensations clause of the fifth amendment 68 and the tenth amendment. 69

63. The Secretary shall prepare and . . . promulgate and implement a Federal program for a State . . . if such state —

(1) fails to submit a State program covering surface coal mining and reclamation operations by the end of the eighteen-month period beginning on August 3, 1977;

(2) fails to resubmit an acceptable State program within sixty days of disapproval of a proposed State program . . . or

(3) fails to implement, enforce, or maintain its approved State program as provided for in this chapter.


64. The plaintiffs were an association of coal producers in Virginia, some of its member coal companies, individual landowners, the Commonwealth of Virginia, and the Town of Wise, Virginia.


66. “The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States . . . .” U.S. Const. art. I, § 8, cl.3.

67. The due process guarantee of the fifth amendment provides that “No person shall . . . be deprived of life, liberty or property, without due process of law. . . .” Id. at amend. V. The equal protection guarantee of the fifth amendment is not explicitly set out therein, but is considered to be an included norm in the due process clause. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation of public schools in District of Columbia violates due process guarantee of fifth amendment). The Court rejected the plaintiffs' claims under the due process clause on the basis that the criteria set out in the Act were specific enough to control any governmental action when immediate cessation orders were issued. 452 U.S. at 301. An objection to the civil penalties provision was regarded as premature since it was a facial challenge. Id. at 304.

68. U.S. Const. amend. V provides in part that private property shall not “be taken for public use without just compensation.” The Court held that the plaintiffs' claim presented no concrete controversy regarding a taking. 452 U.S. at 295.

The lower federal courts in Virginia Surface Mining and Reclamation Association, Inc. v. Andrus\textsuperscript{70} and Indiana v. Andrus\textsuperscript{71} relied on National League of Cities v. Usery\textsuperscript{72} to hold that the Act "operates to 'displace the states' freedom to structure integral operations in areas of traditional functions,' . . . and therefore, is in controversion of the Tenth Amendment."\textsuperscript{73} Although the Act was directed at the private activity of coal mining, the ultimate consequence impacted "on the states' legislative authority on state control of land within its boundaries."\textsuperscript{74}

A unanimous Supreme Court rejected the plaintiffs' numerous challenges to the constitutionality of the SMCRA in Hodel v. Virginia Surface Mining and Reclamation Association, Inc.\textsuperscript{75} and Hodel v. Indiana.\textsuperscript{76} In the process of upholding the provisions of the SMCRA that were successfully challenged in the lower courts, Justice Marshall, writing for the Court,\textsuperscript{77} illuminated the murky analytical framework of Usery by slightly clarifying its proper scope. The Court further indicated that Justice Blackmun's concurrence in Usery advocating a balancing approach would be adopted as an integral part of the

\textsuperscript{72} 426 U.S. 833.
\textsuperscript{73} 483 F. Supp. at 435 (quoting Id. at 852); accord 501 F. Supp. at 465.
\textsuperscript{74} 483 F. Supp. at 432; 501 F. Supp. at 465 ("Land use planning and control through zoning laws and their provisions 'are peculiarly within the province of state and local legislative authorities'") (quoting Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975)).
\textsuperscript{75} 452 U.S. 264.
\textsuperscript{76} 452 U.S. 314. Only Virginia Surface Mining will be discussed hereafter because the portion of that opinion dealing with the tenth amendment and commerce clause were considered to be controlling in Indiana. See 452 U.S. at 321-30. Hereinafter, Virginia Surface Mining will be referred to as Hodel.
\textsuperscript{77} Justice Marshall's opinion was joined by Chief Justice Burger and Justices Brennan, Stewart, White, Blackmun, Powell and Stevens. Chief Justice Burger and Justice Powell filed concurring opinions, while Justice Rehnquist concurred only in the judgment.
analysis in similar tenth amendment cases.\textsuperscript{78}

Justice Marshall initially considered a claim by the plaintiffs that the SMCRA was an unauthorized exercise of congressional power because it exceeded the proper legislative scope of the commerce power.\textsuperscript{79} They asserted that the principal issue was "whether land \textit{as such} is subject to regulation under the Commerce Clause, i.e. whether land can be regarded as \textquoteleft in commerce.\textquoteright"\textsuperscript{80} There is no doubt that land-use control is a traditional and important state function,\textsuperscript{81} but the Court refused to allow that fact to be determinative of the issue of federal power.

The Court reverted to its traditional test of congressional power in commerce clause cases. The initial question is whether the activity in question "affects" interstate commerce. The answer, in large part, is to be determined by reference to the legislative judgment on the point.\textsuperscript{82} The Court "must defer to a congressional

\textsuperscript{78} "Demonstrating that [the three-prong test] requirements are met, does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." 452 U.S. at 288 n.29 (citations omitted).

\textsuperscript{79} 452 U.S. at 275-83.

\textsuperscript{80} Id. at 275.


\textsuperscript{82} The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted . . . .

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

The above quote is often cited for one of the broadest statements of an unencumbered commerce power. However, a challenge to expansive congressional regulation can be brought under a theory that the "affect" on interstate commerce was insignificant. "Neither here nor in \textit{Wickard} has the Court declared that Congress may use a relatively trivial impact on
finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.\textsuperscript{83} Justice Marshall proceeded to cite an impressive array of legislative history that demonstrated the SMCRA was enacted only after considerable deliberation.\textsuperscript{84} The legislative record showed that Congress was concerned that the lack of uniform national standards would have an adverse effect on the environment. Thus, the decision enacting SMCRA was "rational."\textsuperscript{85}

The Court then focused its opinion on the tenth amendment argument. The separate analytical attention is important because it varies from the traditional judicial position that state power under the tenth amendment was not an affirmative limitation on the commerce power.\textsuperscript{86} This indicates that the Court will continue to analyze federalism claims under a dual examination that

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commerce as an excuse for broad general regulation of state or private activities." Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968). See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("[T]he scope of this power must be considered in light of our dual system of government and may not be extended so as to embrace effects . . . so indirect and remote . . . ."); Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) ("The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions."). The practical difficulty in employing this test is that Congress has continued the practice of making extensive findings of fact that demonstrate (at least for the legislative record) that the several minimal acts, taken together, have a substantial economic effect on interstate commerce. See Wickard v. Filburn, 317 U.S. 111 (1942); American Constitutional Law, supra note 23, at 237 (1978).\textsuperscript{83} 452 U.S. at 276.\textsuperscript{84} Id. at 277-80. An extensive review of the legislative history of SMCRA may be seen at A Symposium on the Surface Mining Control and Reclamation Act of 1977, 81 W. Va. L. Rev. 553 (1979).\textsuperscript{85} Id. at 281.\textsuperscript{86} See, e.g., United States v. California, 297 U.S. 175, 184 (1936) ("[T]he power of the state is subordinate to the constitutional exercise of the granted federal power."); Wickard v. Filburn, 317 U.S. 111, 120 (1942) ("[a]t the beginning Chief Justice Marshall . . . [m]ade emphatic the embracing and penetrating nature of [the commerce] power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes.").
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reviews: (1) the proper scope of the commerce power, and (2) any affirmative limitations emanating from the tenth amendment by virtue of the attributes of state sovereignty.

Justice Marshall sought to refine the principle of *Usery* by formulating a three-pronged test for determining whether a federal statute, passed under the commerce clause, violates the tenth amendment.

It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirement. First, there must be a showing that the challenged statute regulates the “States as States.” Second, the federal regulation must address matters that are indisputably “attribute[s] of state sovereignty.” And, third, it must be apparent that the States’ compliance with the federal law would directly impair their ability “to structure integral operations in areas of traditional governmental functions.”

The Court was not required to apply the reformulated test in its entirety because the challenged law did not regulate the “States as States” under the first prong. Thus freed of further analysis on the final two prongs, the Court promptly added a fourth and crucial prong to the *Hodel* test. Citing Justice Blackmun’s concurrence in *Usery*, Justice Marshall wrote that a challenge to congressional commerce power that successfully satisfied the three-prong test would not prevail if “the nature of the federal interest advanced may be such that it justifies state submission.”

The opinion further clarified three remaining issues. The requirement that the law regulate the “State as

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87. 452 U.S. at 287-88 (citation omitted).
88. *Id.* at 288.
89. *Id.* at 288 n.29.
States” amplifies the language used in Usery, and constitutes a clear and workable principle to analyze in future cases. Second, and more important, the decision reaffirms the plenary authority of Congress in regulating interstate commerce. Finally, the Court unambiguously rejected the theory that the tenth amendment affirmatively limits congressional power to displace state choices on the regulation of private activities affecting interstate commerce.

In addition to these elucidations on state sovereignty matters, the Court’s dictum and characterizations raise more questions than the opinion satisfactorily can answer. One of the foremost is the exemption of regulated private acts from tenth amendment scrutiny. It would appear that a state may well be exercising a very obvious attribute of sovereignty in defining the parameters of private conduct within its sovereign territory. Moreover, the overturning of such state regulations by

90. 426 U.S. 833 at 852 (“[T]he dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe . . . [to] the States in their capacities as sovereign governments”). See supra text accompanying notes 36-38.

91. If the Usery decision can be properly viewed as a “signal” to Congress to resume its proper guardianship role as the allocator of federal legislative power, the identical point can be made for Hodel. The criticism and bewilderment surrounding Usery undoubtedly had some impact on all interested parties and Hodel presented the opportune factual case (a 9-0 decision) to reaffirm the post-New Deal position of the Court. The passage of five years between the Usery and Hodel cases can only reinforce the notion that Usery was a messenger to Congress. The fact that the Court did not render another opinion until Hodel may well represent that it wanted the basic message of respect for federalistic protection to be understood. See supra note 23.

92. 452 U.S. at 289-90.

93. In questioning whether Usery was an attempt to segregate the essential functions of states into that of a protected employer and provider of services as opposed to one of lawmaker and regulator of private conduct, one commentator has written: “But surely no less essential is the function of defining the scope of permissible conduct within a state’s or municipality’s borders through regulations aimed at private parties.” Tribe, supra note 7, at 1074.
an exercise of the commerce power could impair its ability "to structure integral operations in areas of traditional governmental functions." The resolution of this problem lies not in the application of the Hodel test, but rather a principled appreciation of the supremacy clause. Endless confrontations between federal and state laws regulating identical or similar private activities would engender a flood of litigation and produce a skewed doctrine that would eventually eviscerate any principled approach to the supremacy of federal law.

Another issue that may prove to be uncertain is the appropriate standard of review when the challenge is made that Congress exceeded the permissible scope of the commerce power. Justice Marshall's opinion reads as a highly deferential one, but the fact remains that he carefully scrutinized the congressional basis for the "affecting commerce" decision. There also appears to be at least two members of the Court who express dissatisfaction with present doctrine that allows Congress to

94. 426 U.S. at 852.
95. In rejecting the plaintiffs' tenth amendment challenge to congressional regulation of private activity, the Court stated:
   A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law . . . . Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.
452 U.S. at 290 (citations omitted).
97. 452 U.S. at 277-80.
reach activities that merely "affect" rather than "substantially affect" interstate commerce.\(^98\)

The majority's characterization of the SMCRA as an example of "cooperative federalism" rather than coercion is simply baffling.\(^99\) Such a program may not amount to "coercion" in the sense that most persons consider it; but, assuming that the dictionary meaning of "coercion" is "compulsion under legal authority"\(^100\) one can easily make a persuasive case that "coercion" is precisely what the SMCRA is about. The basis of cooperation articulated by the Court appears to be the fact that the states have a choice (albeit a Hobson's choice) to submit a state plan for surface mining.\(^101\)

Finally, the Court failed to sharpen the debate on the meaning of the final two prongs. Some dictum would have been welcomed on these issues — especially considering that the Court added the fourth "balancing" component to the test. One must surmise that the Court expects lower courts to be guided by the pre-1937 cases where the Supreme Court balanced competing federal and state interests. Of course, it is more complicated now

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98. "In my view, the Court misstates the test. [It] has long been established that the commerce power does not reach activity which merely 'affects' interstate commerce. There must instead be a showing that regulated activity has a substantial effect on that commerce." Id. at 312 (Rehnquist, J., concurring). Chief Justice Burger agreed with Justice Rehnquist on this point. Id. at 305 (Burger, C.J., concurring).

99. Id. at 288-89.


101. [The States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

452 U.S. at 288.
because the balancing question is intended to play the crucial part in the tenth amendment equations of limiting federal power. From a doctrinal standpoint, it constitutes a retreat from a principled adjudication of federal-state power allocation issues. A similar perspective on the use of balancing may lead to the conclusion that it steers the Court toward an ad hoc judgment on the importance of competing interests. Such questions properly are within the scope of legislatures. History demonstrates that the judiciary is ill-equipped to balance these matters.\textsuperscript{102}

\textit{C. Federal Energy Regulatory Commission v. Mississippi}

The Public Utility Regulatory Policies Act of 1978 (PURPA)\textsuperscript{103} was enacted as one of the many pieces of legislation passed on the same day as part of a comprehensive package\textsuperscript{104} tailored to combat the nation’s energy crisis.\textsuperscript{105} PURPA was designed to regulate electrical and gas utilities and sought to encourage the conservation of

\textsuperscript{102} The area of economic due process is an example where the Court withdrew from carefully scrutinizing the legislative enactment and substituting its judgment for the legislature’s. The classic statement of the Court’s proper position was delivered by the first Justice Harlan: “Whether or not this be wise legislation it is not the province of the court to inquire. [T]he courts are not concerned with the wisdom or policy of legislation.” Lochner v. New York, 198 U.S. 45, 69 (1905) (Harlan J., dissenting). See, McCloskey, \textit{Economic Due Process and the Supreme Court: An Exhumation and Reburial}, 1962 Sup. Ct. Rev. 34.


energy, efficient use of facilities and resources, and the assessment of equitable rates to consumers. The complex scheme of PURPA was to require that each state regulatory authority and nonregulated utility consider the adoption of several federal standards relating to rate structures, electrical service terms and "lifeline rates." Under PURPA the states retained the choice of whether to finally adopt the proposed federal energy guidelines. The similarity to the SMCRA scheme in Hodel is striking because under both plans the states theoretically had a choice concerning the adoption of the federal proposal. The consideration of the proposed regulations under PURPA was required if the states wished to retain regulatory authority in the area. The incremental intrusiveness contained in PURPA was the additional requirement that the states must follow the procedural rules promulgated by the federal government when they consider the adoption of the guidelines.

The case of Federal Energy Regulatory Commission v. Mississippi (FERC) arose when the plaintiffs

106. Id. at § 2611.
107. Id. at § 2621(a) & (d).
108. Id. at § 2623.
109. Id. at § 2624. "Lifeline rates" are lower rates for residential consumers that reflect service charges for meeting the essential needs of the consumers.
110. "Nothing in this subsection prohibits any State regulatory authority or nonregulated utility from making any determination that it is not appropriate to implement [or adopt] any such standard, pursuant to its authority under otherwise applicable state law." Id. § 2621(a); § 2623(a); 15 U.S.C. § 3203(a).
111. See supra text accompanying notes 60-63.
112. See infra text accompanying notes 134-149.
113. "The consideration shall be made after public notice and hearing. The determination shall be (A) in writing, (B) based upon findings and upon the evidence presented at the hearing, and (C) available to the public." 16 U.S.C. § 2621(b)(1).
115. The plaintiffs in the case were Mississippi Power and Light Company, Mississippi Public Service Commission and the State of Mississippi.
sought a declaratory judgment that pertinent provisions of PURPA were unconstitutional. The district court, in an unreported opinion, held that Congress violated the scope of its powers under the commerce clause, and that PURPA violated the principle of state sovereignty articulated in *Usery.* The Supreme Court reversed the district court on both constitutional issues. The Court unanimously concluded that the Congress was within its power under the commerce clause, but sharply divided 5-4 in rejecting the plaintiffs' tenth amendment challenge.

The opinion of the Court, authored by Justice Blackmun, quickly dismissed the commerce clause challenges as having little or no merit. The plaintiffs' central arguments were that: (1) Congress was not regulating commerce, but was attempting to regulate the nonconsenting states under PURPA by utilizing federal procedures, and (2) The proper test for a regulated activity is whether it has a "substantial effect," rather than a mere "effect," on interstate commerce. The Court's reply to these arguments was to merely cite the extensive legislative history that the activities had an "immediate effect" on interstate commerce, and that prior judicial decisions have held that it was permissible for Congress to regulate intrastate power transmission "because of the interstate nature of the generation and supply of electrical power." Concluding that the congressional choice

116. The trial court held that the PURPA provisions were void because "they constitute a direct intrusion on integral and traditional functions of the State of Mississippi," 456 U.S. at 753 (quoting Jurisdictional Statement, FERC, No. J79-0212(c) app. B at 8a-9a (S.D. Miss. Feb. 27, 1981)).


118. 456 U.S. at 754-55.
119. *Id.* at 755.
120. *Id.*
121. *Id.* (citing FPC v. Florida Power & Light Co., 404 U.S. 453 (1972)).
of means was reasonably adapted to the permissible end, the Court held that Congress was not irrational in its belief that PURPA was essential to protect interstate commerce.\textsuperscript{122}

Justice Blackmun divided the tenth amendment challenge into three convenient parts for analytical clarity: (1) States' mandatory enforcement of FERC standards, (2) mandatory consideration of specified ratemaking standards, and (3) imposition of certain procedures on state commissions.\textsuperscript{123} In turn, he separated the mandatory enforcement question into two analytically distinct sections of section 210.\textsuperscript{124} In quickly upholding that part of section 210 that authorized FERC to exempt certain qualified power facilities from state laws, the majority wrote that "it does nothing more than pre-empt conflicting state enactments in the traditional way."\textsuperscript{125}

The second part of section 210 required that each state's regulatory authority, "after notice and opportunity for public hearing, implement such rule . . . for each electric utility for which it has ratemaking authority."\textsuperscript{126} The Court construed this portion of PURPA as merely requiring a state to "resolve disputes between qualifying facilities and electric utilities."\textsuperscript{127} Thus stated, PURPA required no additional burden on the state because this "is the very type of activity customarily engaged in by the Mississippi Public Service Commission."\textsuperscript{128}

After interpreting this section of PURPA as one that simply required a state to settle disputes, the Court cited\textit{ Testa v. Katt}\textsuperscript{129} for the proposition that the state

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\item \textsuperscript{122} 456 U.S. at 758.
\item \textsuperscript{123} \textit{Id.} at 759.
\item \textsuperscript{124} 16 U.S.C. § 824a-3 (1983).
\item \textsuperscript{125} 456 U.S. at 759.
\item \textsuperscript{126} 16 U.S.C. § 824a 3(f)(1) (1983).
\item \textsuperscript{127} 456 U.S. at 760.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} 330 U.S. 386 (1947).
\end{itemize}
could be required to employ federal law (PURPA) in the settlement of any disputes. In Testa the Court upheld the provision of the Emergency Price Control Act that gave jurisdiction over claims arising under the Act to both state and federal courts. The Testa Court reasoned that the dictates of the supremacy clause\(^{130}\) required state courts to recognize that "the policy of the federal Act is the prevailing policy in every state"\(^{131}\) and "should be respected accordingly in the courts of the state."\(^{132}\) The fact that the Mississippi Public Service Commission was not a state court, but an executive agency of the state that had administrative duties was considered to be constitutionally insignificant.\(^{133}\)

130. 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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

131. 330 U.S. at 393 (quoting Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 57 (1912)).

132. Id. at 392.

133. 456 U.S. at 760. The Court noted that "the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge." Id. at 760-61 n.24 (citation omitted). Justice O'Connor drew a sharp distinction with the majority's approach to extending the Testa principle to state entities other than courts. Application of Testa to legislative power, however, vastly expands the scope of that decision. Because trial courts of general jurisdiction do not choose the cases that they hear, the requirement that they evenhandedly adjudicate state and federal claims falling within their jurisdiction does not infringe any sovereign authority to set an agenda. As explained above, however, the power to choose subjects for legislation is a fundamental attribute of legislative power, and interference with this power unavoidably undermines state sovereignty. Accordingly, the existence of a congressional authority to "enlist . . . the [state] judiciary . . . to further federal ends," does not imply an equivalent power to impress state legislative bodies into federal service.

Id. at 784-85 (O'Connor, J., dissenting in part) (footnotes and citation omitted).
Justice Blackmun then turned his attention to the provisions of PURPA that required the mandatory consideration of FERC standards.\textsuperscript{134} The Court acknowledged that a state's authority to choose among alternatives and make fundamental decisions "is perhaps the quintessential attribute of sovereignty."\textsuperscript{135} This attribute of sovereignty was further recognized as central to the successful fulfillment of a state's role in a federal system.\textsuperscript{136} The state's right to make these policy choices is recognized as limited in modern times because the state is not viewed as sharing a coequal sovereignty with the federal government.\textsuperscript{137}

In addition to relying on \textit{Testa},\textsuperscript{138} the Court cited \textit{Fry}\textsuperscript{139} and \textit{Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n}\textsuperscript{140} as precedents for the fact that the judiciary had validated federal restrictions on the state's right to make policy in important areas. The cases cited lend support to the propositions that the federal government may not merely intervene in the area of state employment matters,\textsuperscript{141} but also may require that state agencies prepare administrative regulations consistent with federal law.\textsuperscript{142}

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\item \textsuperscript{135} 456 U.S. at 761 (citing \textit{Usery}, 426 U.S. at 851).
\item \textsuperscript{136} 456 U.S. at 761 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977) and Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861)).
\item \textsuperscript{137} 456 U.S. at 761.
\item \textsuperscript{138} 330 U.S. 386.
\item \textsuperscript{139} 421 U.S. 542. \textit{See supra} text accompanying notes 42-45.
\item \textsuperscript{140} 443 U.S. 658 (1979).
\item \textsuperscript{141} The majority rejected Justice Rehnquist's analysis in \textit{Usery} that distinguished \textit{Fry} because the wage freeze displaced no state choices. "It seems absurd to suggest . . . that a federal veto of the States' chosen method of structuring their employment relationships is less intrusive in any realistic sense than are PURPA's mandatory consideration provisions." 456 U.S. at 763 n.27. \textit{See supra} text accompanying notes 42-47.
\item \textsuperscript{142} In the \textit{Fishing Vessel Ass'n} case the Court upheld a federal court's authority to enforce a treaty by compelling a state agency to "prepare" certain regulations guaranteeing obedience to federal law. Importantly, the
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The Court concluded that PURPA was not as intrusive as other federal mandates because it required the states to merely consider the federal standards.\(^{143}\) Recognizing that some states may face a difficult choice in deciding whether to consider the federal standards or abandon regulation of the field,\(^{144}\) Justice Blackmun found ample precedent\(^{145}\) that the federal government may properly legislate with a purpose "to induce state action in areas that otherwise would be beyond Congress' regulatory authority."\(^{146}\) The Court hinted that in the absence of direct compulsion, federal action designed to induce state compliance would not threaten the independent existence of the state, nor impair its ability to function effectively in the federal system.\(^{147}\)

The majority continued the same mode of analysis it used when it cited precedent for federal intrusion, but characterized PURPA as mandating only "consideration" when it held that the immediate field of regulation was not "beyond Congress' regulatory authority,"\(^{148}\) but rather in an area that was largely pre-emptible.

Similarly here, Congress could have pre-empted the field, at least insofar as private rather than state

\(^{143}\) 456 U.S. at 764.  
\(^{144}\) Id. at 766.  
\(^{145}\) Oklahoma v. United States Civil Serv. Comm., 330 U.S. 127 (1947) (rejecting challenge to federal law prohibiting state employees in federally-funded jobs from taking an active part in political activities).  
\(^{146}\) 456 U.S. at 766.  
\(^{147}\) There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence," and do not impair the ability of the States "to function effectively in a federal system." To the contrary, they offer the states a vehicle for remaining active in an area of overriding concern. Id. at 765-66 (citations omitted).  
\(^{148}\) Id. at 766.
activity is concerned; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards. While the condition here is affirmative in nature — that is, it directs the States to entertain proposals — nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one.¹⁴⁹

The third portion of PURPA to be reviewed by the Court required the states follow certain notice and comment procedures when the federal standards were being considered.¹⁵⁰ The majority employed the same analytical framework used for the mandatory "consideration" provisions in the second part of the opinion. Noting that these procedures would not be a burden on Mississippi because state law already provided for certain procedural rights,¹⁵¹ the Court stated: "If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field — and we hold today that it can — there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks."¹⁵²

Whatever course a future Court chooses to chart in federalism analysis, the FERC decision could prove itself to be more important than Usery. The majority's reliance on the possibility of preemption in areas that are subject to federal regulation provides the federal government with the key to future legislation. At present, one must conclude that FERC substantially limits the Usery rationale by allowing the imposition of federal conditions

¹⁴⁹. Id. at 765 (footnote omitted).
¹⁵⁰. Id. at 770.
¹⁵¹. Id. at 770-71 n.34.
¹⁵². Id. at 771.
on a state-regulated field that is subject to federal pre-emption. The distinguishing feature from *Usery* is that case had no federal conditions attached to the FLSA provisions. The federal law simply extended the coverage of the Act to the states. In other words, the states’ budgets were clearly going to suffer because the federal government most assuredly was not prepared to pick up the difference in the wage differential.

The most troubling aspect of a judicial reliance on a "preemptible" doctrine is a political one, but deserves mention. Assuming that a court may properly locate precedent to accurately determine the fields that are preemptible, one must remain concerned about the political accountability of Congress. If the "political" remedy makes up a constitutive part of constitutional jurisprudence under the commerce clause, the Court should be prepared to assure that the voters are able to focus on their elected representatives' actions. It has always taken some degree of courage to vote for preemption in an area regulated by a state. The doctrine of "conditional preemption" may allow federal intrusion

153. In asserting that outright federal pre-emption is less intrusive than PURPA’s scheme Justice O’Connor argues that political accountability is damaged by PURPA.

Local citizens hold their utility commissions accountable for the choices they make. Citizens, moreover, understand that legislative authority usually includes the power to decide which ideas to debate, as well as which policies to adopt. Congressional compulsion of state agencies, unlike pre-emption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.


154. In *Gibbons v. Ogden*, Chief Justice commented on the sole check against congressional abuse: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, ... the sole restraints on ... its abuse." 22 U.S. (9 Wheat.) 1, 197 (1824).

155. For a defense of "conditional preemption" and the FERC decision,
with no political accountability. The possibility exists that opaque political coalitions could explain their votes as merely "attaching conditions" to federal regulations. Indeed, one could surmise that the congressional votes would be lacking for preemption in many areas because of the price of local accountability at the ballot box. There is certainly no empirical answer to the problem, but the Court should be required to articulate its rationalization of lowering political accountability in an area of constitutional law that has a primary dependence on the political remedy.\textsuperscript{156}

\textbf{D. EEOC v. Wyoming}

The fourth major decision\textsuperscript{157} of the Supreme Court construing the affirmative limitations of the tenth

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157. In the case of United Transportation Union v. Long Island R.R., 455 U.S. 678 (1982), the Supreme Court held the provisions of the Railway Labor Act of 1926 could supersede a state labor relations law as applied to a state-owned railroad. The Court held the operation of a railroad was not a "traditional governmental function" under the third prong of the \textit{Hodel} test. \textit{Id.} at 684-87. The decision, as such, is irrelevant to the present discussion because it does not constitute a major example of the tenth amendment's evolution in this area. For critiques of the Supreme Court decision \textit{see} Alfange, \textit{Congressional Regulation of the "States Qua States": From National League of Cities to EEOC v. Wyoming}, 1983 SUPR. CT. REV. 215, 251-54, and Rotunda \textit{supra} note 155, at 304-06. Commentary on the Sixth Circuit decision in \textit{Long Island R.R.} may be found in \textit{Note, The Commerce Clause and the Balancing Approach: The Delineation of Federal and State Interests: United Transportation Union v. Long Island Rail Road}, 1981 B.Y.U. L. REV. 189, and \textit{Note, Constitutional Limitation of Congressional Commerce Clause Power}, 58 CHI. [-] KENT L. REV. 109 (1981).
amendment was delivered in *EEOC v. Wyoming*. In yet another 5-4 decision the Court upheld the extension of the Age Discrimination in Employment Act of 1967 (ADEA) to local and state employees. In affirming one more intrusive federal law the Court provided an additional nail for *Usery's* eventual coffin.

The ADEA prohibits an employer from discriminating against an employee or potential employee between the ages of 40 and 70 on the basis of age unless "age is a bona fide occupational qualification reasonably necessary to the normal operations of the particular business, or where the differentiation is based on reasonable factors other than age." In 1974, the term "employer" under the Act was amended to extend its coverage to local and state governments.

The present controversy arose when the EEOC filed suit against the state of Wyoming on the basis that the involuntary retirement of a state game warden at the age of 55 violated the ADEA. The state law provided that upon reaching the age of 55 an employee of the state agency could continue employment only on a year-to-year contractual basis with the approval of the employer. The law further mandated mandatory retire-

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160. *Id.* at § 623(f)(1).
161. *Id.* at § 630(b).
162. The Wyoming State Highway Patrol and Game and Fish Warden Retirement Act, *Wyo. Stat.* § 31-3-107 (1977) provided in part:

   a) Any employee who has four (4) or more years of service to his credit shall be eligible to receive a retirement allowance under this act when he attains the age of fifty (50).

   b) During the period from July 1, 1973, through June 30, 1977, an employee who has twenty-five (25) or more years of service may retire when that employee reaches the age of sixty (60) years, at the discretion of the employer, and receive a benefit as described in *W.S. 31-3-110* of the statutes. An employee may retire at an earlier age, at the discretion of the employer, provided the benefit payable at such earlier age shall be the actuarially determined equivalent value to the benefit commencing at age sixty (60). After June 30,
ment for those employees who reach the age of 65. The
district court found the ADEA to be in violation of the
tenth amendment doctrine first articulated in Usery be-
because it impermissibly interfered with the protected em-
ployer-employee relationship between the state and its
employees.

Justice Brennan authored the opinion of the Court and moved quickly to reinterpret the essence of the Usery principle. The Court continued its two-step analysis of federal-state controversies by first examining the scope of the congressional commerce power. Following Justice Marshall's pattern in Hodel, Justice Brennan recited the lengthy legislative history preceding the passage of the ADEA to demonstrate a considered and rational legislative decision by Congress. The Court noted that the plaintiffs did not directly challenge the congressional exercise of power as being excessive. In view of the Court's recitals of legislative purpose and rationality, such a challenge would have been futile in the present case. Thus, the issue of the proper scope of

1977, an employee with twenty-five (25) or more years of service may elect to retire and receive a benefit upon attaining age fifty-five (55) as described in W.S. 31-3-110 of the statutes, or at an earlier age on an actuarially determined equivalent basis.

c) An employee may continue in service on a year-to-year basis after age sixty (60) until June 30, 1977, and thereafter age fifty-five (55), with the approval of employer and under conditions as the employer may prescribe.

163. "d) Any employee in service who has attained the age of sixty-five (65) years, shall be retired no later than the last day of the calendar month in which his 65th birthday occurs." Id.


165. Justice Brennan's opinion was joined by Justices Marshall, Blackmun, White and Stevens. Justice Stevens also filed a separate concurrence.

166. See supra text accompanying notes 79-81.

167. See supra text accompanying notes 82-85.

168. 452 U.S. 264.

169. 460 U.S. at 229-233.

170. Id. at 235.
the commerce clause was not central to the decision.

Justice Brennan next considered the assertion that the ADEA violated the tenth amendment. In analyzing the first prong of the Hodel test — that the federal enactment regulate the "states as states" — he readily admitted that the ADEA easily fulfilled the requirement.171 However, a careful distinction was drawn; the Usery principle was explicitly rejected as a "broad limitation on federal authority"172 and construed as a "specialized immunity doctrine"173 whose purpose was "to ensure that the unique benefits of a federal system ... not be lost through undue federal interference in certain core state functions."174 The obvious question is what will be the precise difference in viewing the state’s complaint as one of immunity rather than one of lack of federal power?

The theoretical difference between the two approaches appears to favor Justice Brennan’s approach in EEOC. Moreover, establishing a federalism principle based on immunity offers both formal and functional advantages. The formal benefit is that such an approach standardizes the Court’s analysis of the doctrine of federal legislative power.175 Limitations on the federal tax-

171. Id. at 237.
172. Id. at 237 n.10.
173. Id.
174. Id. at 236. (emphasis added).
175. Chief Justice Marshall wrote long ago that:
[A]mong the enumerated powers . . . we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution.
ing power are based both upon notions of federalism and state immunity.\textsuperscript{176} A similar limitation on the federal commerce power preserves a coherent doctrine in the area of enumerated powers. The functional advantage to Justice Brennan’s resolution is that it places the first part of the two-step \emph{Hodel} analysis into its proper perspective. It has been difficult for the Court to explicate the constitutional doctrine that the tenth amendment interpretation in \emph{Usery} constituted an affirmative limit on federal power. Brennan’s theory is that the protection guaranteed a state arises from its “shield.” The state does not possess a federalism “sword” to cut back the scope of federal powers. Further, when the Court scrutinizes the exercise of federal legislative power to determine if a rational basis exists, it will carry no mystical constitutional doctrine of power limits. Congress may reach the states’ integral activities, but the Court retains the power to hold that such action may not affect the states because they are constitutionally immune.

The second prong of \emph{Hodel} — that the federal law address an “undoubted attribute of state sovereignty” — presented Justice Brennan with “significantly more difficulties.”\textsuperscript{177} The majority opinion bypassed any resolution of the second prong in favor of directly addressing the

\begin{quote}
Thus, if the enumerated powers of the federal government are to be properly understood and applied, Marshall suggests that the ends must be considered in the power equation. So long as Congress is truly pursuing the legitimate end of regulating interstate commerce there is no constitutional limit (except express provisions) to the reach of that power. The immunity principle is no bar to the \emph{initial} reach of the exercise of the commerce power. This position is consistent with the structure contemplated by Hamilton when he wrote:

\begin{quote}
A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, \ldots 
free from every other control, but a regard to the public good and to the sense of the people.
\end{quote}

\textbf{The Federalist No. 31, at 190} (A. Hamilton) (Modern Library ed. 1937). \textsuperscript{176} \textit{E.g.}, \emph{Tribe supra} note 23, at 300-06. \textsuperscript{177} 460 U.S. at 238.
\end{quote}
third prong test. The only clear indication of the Court's thinking on the attributes of state sovereignty emanated from Chief Justice Burger's dissent. The first factor thought to be important by this group of four justices was that a majority of other governmental units had passed mandatory retirement laws. These several laws provide "persuasive evidence that such laws are traditional methods for insuring an efficient work force for certain governmental functions." More important to the dissenters was the fact that Congress explicitly applied the ADEA to the states, but "carefully preserved its own freedom to select employees on any basis it chooses." The Chief Justice did not explain why a limited congressional exemption clearly demonstrates that "defining the qualifications of employees is an essential attribute of sovereignty." One could suggest that the dissenters were scrutinizing the inequality of treatment of the states by Congress, rather than scrutinizing the very words of Congress. Of course, equality between the federal and state governments is nowhere mandated in the Constitution. To suggest that this notion forms an underlying basis of federalism review is untenable. On the other hand, the dissenters may be inferring that the positive act of Congress excepting certain categories of federal employees from ADEA coverage demonstrates that the supreme governmental unit (along with a majority of states) explicitly recognizes through law and practice that defining certain employment qualifications constitutes both a traditional and contemporary essential

178. Id.
179. Id. at 251-65. Justices Powell, Rehnquist and O'Connor joined in the Chief Justice's dissent. Justice Powell filed a separate dissent in which Justice O'Connor joined. Id. at 265-75.
180. Id. at 253 (Burger, C.J. dissenting).
181. Id.
182. Id. at 254.
183. Id.
184. Id.
governmental practice.

The final prong of the *Hodel* test — that the federal law directly impair a state’s ability to structure integral operations in areas of traditional governmental functions — proved to be the crucial factor in rejecting the challenge to the ADEA. While the majority clearly conceded that the management of state parks constitutes a traditional state function,185 the overriding purpose of the specialized immunity doctrine was to protect the states “separate and independent existence”186 in the federalist scheme. Justice Brennan stressed that the resolution of this issue must necessarily depend on “considerations of degree.”187 He quickly noted that the degree of federal intrusion in the present case was not nearly the magnitude of that experienced in *Usery*.188 This approach of focusing on the “degree” of intrusion is a reversal of the analysis employed by Justice Rehnquist in *Usery*.

The *Usery* principle was not centered on degree, but rather on the displacement of state choices.189 Justice Rehnquist stated that “particularized assessments of actual impact”190 were not essential to the resolution of the tenth amendment challenge. Rather, the probable alteration or displacement of the states’ “ability to structure employer-employee relationships”191 in key areas was considered to be crucial. Thus, one may readily discern a movement by the Court away from the acceptance of speculative state claims of structural displacement, and a movement toward a more searching scrutiny of the degree of actual impact of the federal law.

Perhaps more instructive of this new analytical

185. *Id.* at 239.
186. *Id.* (quoting *Usery*, 426 U.S. at 851).
187. *Id.* at 239.
188. *Id*.
189. 426 U.S. at 849.
190. *Id.* at 851.
191. *Id.*
framework is the acceptance by the Court of an overlapping federal procedure that necessarily causes some alteration of state choices, but permissibly creates a federal standard within which a state may be required to operate. Since the sole purpose advanced to support Wyoming's retirement policy was the "physical preparedness" of the game wardens, the Court stated that such a policy could easily continue under the ADEA.\textsuperscript{192} Wyoming simply would be required to prove that age is a "bona fide occupational qualification" under the terms of the ADEA.\textsuperscript{193} Therefore, "in distinct contrast to [Usery] . . . the State's discretion to achieve its goals in the way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard."\textsuperscript{194}

The majority opinion continued the shift away from the Usery analysis by discounting the harrowing impact projected by the state of Wyoming. The increased budgetary costs of the states emanating from the ADEA was tested under a normative legal analysis that focused on the "direct and obvious effect of the federal legislation on the ability of the states to allocate their resources."\textsuperscript{195} Although not so obvious to the dissenters,\textsuperscript{196} the majority

\begin{itemize}
  \item \textsuperscript{192} 460 U.S. at 239.
  \item \textsuperscript{193} Id. at 240.
  \item \textsuperscript{194} Id. (citations omitted).
  \item \textsuperscript{195} Id. (quoting Usery, 426 U.S. at 851-52).
  \item \textsuperscript{196} It is beyond dispute that the statute can give rise to increased employment costs caused by forced employment of older individuals. Since these employees tend to be at the upper end of the pay scale, the cost of their wages while they are still in the work force is greater. And since most pension plans calculate retirement benefits on the basis of maximum salary or number of years of service, pension costs are greater when an older employee retires. The employer is also forced to pay more for insuring the health of older employees because, as a group, they inevitably carry a higher-than-average risk of illness. Since they are — especially in law enforcement — also more prone to on-the-job injuries, it is reasonable to conclude that the employer's disability costs are increased.
  \item Id. at 255-56 (Burger, C.J., dissenting) (citations and footnote omitted).
\end{itemize}
stated that:

[W]e cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances. Older workers with seniority may tend to get paid more than younger workers without seniority, and may by their continued employment accrue increased benefits when they do retire. But these increased costs, even if they were not largely speculative in their own right, might very well be outweighed by a number of other factors: Those same older workers, as long as they remain employed, will not have to be paid any pension benefits at all, and will continue to contribute to the pension fund. And, when they do retire, they will likely, as an actuarial matter, receive benefits for fewer years than workers who retire early.¹⁹⁷

Justice Brennan concluded his opinion by hinting that the final test of balancing would militate strongly for the "well-defined federal interest"¹⁹⁸ articulated by Congress. Rejecting the dissent's view that the exemption of certain federal jobs demonstrated that the federal interest was insufficient,¹⁹⁹ the majority asserted that:

Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration, and must from that point on evaluate the sufficiency of the federal interest as a matter of law rather than of psychological analysis.²⁰⁰

Although the problem of "balancing" is addressed elsewhere in this article,²⁰¹ it is obvious that in view of the recognized ability of Congress to define and articulate a

¹⁹⁷. Id. at 241 (footnote omitted).
¹⁹⁸. Id. at 242-43 n.17.
¹⁹⁹. See supra text accompanying notes 182-84.
²⁰⁰. 460 U.S. at 243 n.17.
²⁰¹. See infra IV.B.
federal interest in any given situation, the instances in which a state's interest will prevail over the federal one will be rare — if not completely non-existent.

Therefore, these four Supreme Court decisions constitute what may be termed the building blocks of modern federalism review. What can be seen is an attempt by the majority of the Court in *Usery* to reestablish some form of balance in the federal-state governmental relationship. This attempt was in direct opposition to the previous forty years of constitutional jurisprudence and, for a short time, placed the Court in a reviewing position similar to the pre-1937 era. The undoubted goal of the *Usery* majority was not to fashion a finely-crafted constitutional test for tenth amendment cases for the future, but to remind Congress and its subordinate agencies that the Court would not allow the utter destruction of the states as independent political units of the republic.

This praiseworthy attempt of reminding the federal government that the structure of the Constitution contemplates and protects at least some degree of sovereignty of the states also created certain problems which ultimately were responsible for limiting *Usery* to its facts. Foremost among the troubling issues was the use of the obviously vague phraseology and standards of the majority. *Hodel* attempted to streamline the contours of Justice Rehnquist's opinion in *Usery*, but only succeeded in employing the identical terminology in a one-two-three step formulation. Even the passage of time and the decisions of the Court in the interim eight years have been unable to illuminate the meanings of "integral" and "traditional" governmental functions.202

202. Justice Rehnquist listed governmental activities such as police, fire prevention, sanitation, public health and parks and recreation, but quickly noted that "these examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at
The inherent vagueness of the Court's standards engendered certain institutional fears. The obvious fear was the muddled message being sent to lower federal and state courts. If the decision was to be understood as a revolutionary vindication for state sovereignty, the resulting dismemberment of federal administrative programs by lower courts would cause institutional paralysis and confusion. This fear was further fueled when Usery was read in conjunction with numerous Court decisions over the previous decade that reflected judicial concern over state sovereignty. In retrospect, one can see that this fear was well-founded and undoubtedly caused the subsequent limitation of the Usery principle by the Court.

The final problem of the Usery decision arose from Justice Blackmun's separate concurrence that advocated a balancing approach that utilized the competing federal and state interests. The problem is critical because there is nothing in the majority opinion that weighs the federal interest at stake. Thus, the majority opinion clearly rejects a balancing approach as the preferred methodology. As a result, several inconsistent lower court decisions emerged because courts could not fathom

851 n.16. No other indication was given in Usery concerning the identification of traditional integral state functions.


204. The lower court decisions in Hodel, FERC and EEOC reflected the concern over state sovereignty that the judiciary experienced after Usery. See supra text accompanying notes 70-74, 114-16, and 162-64.

205. See supra note 51 and accompanying discussion.

whether a balancing test was to be employed.\textsuperscript{207}

\section{Recognizable Values of Federalism}

The Court’s continuing struggle to preserve and protect the states’ sovereignty has been and will be an ongoing process of adjudication. The wrong approach to these problems would be to view the controversy as a federal-state power struggle with the Court acting as an arbiter. That perspective may be accurate for a superficial overview, but is woefully inadequate in measuring the incremental gains and losses that constantly occur in a federalist government.\textsuperscript{208}

These “gains and losses” are the direct by-products of judicial decisions over state sovereignty and the tenth amendment. As such, it becomes important to isolate and identify these important variables present in federalism that interact to keep the state, local and federal governments functioning in a responsible and coherent manner. It would seem crucial for any court to consider carefully the functional justifications of federalism before attempting to structure a judicial standard of review. In the process, a court should allow each separate value the opportunity to maximize its worth in the legal and political environments. Of course, this may prove to be difficult, but it is pointless to proceed to any sort of solution without a clear understanding of what it is that we should attempt to preserve.

One well-recognized advantage of allowing states to independently pursue their diverse goals is that the sum

\textsuperscript{207} Compare Peel v. Florida Dep’t of Transp., 600 F.2d 1070 (5th Cir. 1979); Friends of the Earth v. Carey, 552 F.2d 25 (2nd Cir. 1977) (adopting balancing) with Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979); Tennessee v. Louisville & Nashville R.R. Co., 478 F. Supp. 199 (M.D. Tenn. 1979) (rejecting balancing).

\textsuperscript{208} For a description of the changes in federalism over the past several years see Merriam, \textit{Federalism in Transition: The Dynamics of Change and Continuity}, in \textit{Federalism Today} 5 (1969).
of their experiences may well inure to the benefit of the remainder of the nation. Justice Brandeis described this principle as "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." Numerous examples of state experimentation are present in a wide variety of fields such as political suffrage, unemployment compensation, minimum wage laws and no-fault automobile insurance. One corollary to maintaining a vibrant and flexible state system of experimentation is that the economic and social burdens resulting from these experimental programs would not be borne by the non-participating states. In short, no impairment or displacement of local programs would occur until the results of the experiment are analyzed and a national mandate is created for the desired change.

A closely allied concept to state experimentation is the proposition that certain benefits are present in the maintenance of a diverse federal system. Noncentralized decisions permit local decisionmakers to fashion regulatory standards that more accurately reflect the local conditions. The state or its political sub-unit can take into account the distinguishing economic, social and cultural mores indigenous to the area in the formation of its program. Moreover, it would appear likely that these unique state programs play an important part in the shaping of the people's lives and attitudes toward government and society.


210. For a reference to the statutory history of these state innovations see, 456 U.S. at 788-89 n.21-25.

211. The progressive diminution of potential experiential heterogeneity not only narrows our own search and dialogue, but even more that our heirs who are threatened with a double impoverishment: First,
The two foregoing attributes of a federalist system of government are two of the more well-known justifications of allowing states to govern certain traditional areas of state concern. It seems abundantly clear that the most significant reason for curtailing the encroachment of federal power into integral state matters is the probable repercussion to the political framework of the republic. The primary characteristic of a federalist system of government is that the division of governmental power into several smaller units encourages self-democracy by enhancing the possibilities of participation in local and state government. The participation of the local or state citizenry in the democratic ruling process ultimately serves the purpose of checking the abuses of federal power.

The Federalists regarded the states’ relationship with its citizens as the cornerstone of an effective barrier

our own impoverishment will produce a less rich distillation of experience for us to bequeath to them. Second, the preference-shaping aspect of experience creates a danger of progressive habituation to and acquiescence in degradation that makes it less likely that steps will be taken to improve or increase the range of environmental quality in the future. The collective search of society over time for the most satisfying ends of existence will be less likely to succeed, and the multifaceted development of human potential through collective specialization of effort, which is a cooperative endeavor that occurs over time between generations as well as among members of a given society at a given time, will also be impeded.


212.

It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies. It is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large.

I A. de TOCQUEVILLE, DEMOCRACY IN AMERICA 169-70 (H. Reeve trans. 1945) [hereinafter cited as Tocqueville].
to federal encroachment. The theory was that the state should have the sovereign power to establish a framework between itself and its citizens for the purpose of structuring a bond of political loyalty. Through this political bond the state would be able to organize opposition to the intrusion of the federal government. The combination of the sovereign states and their alerted citizenries would present a united front and successfully thwart the federal encroachment. History demonstrates that Hamilton and Madison structured this argument in response to the pervasive fear that a central concentration of power in the federal government would eventually force the annihilation of the states. Thus,

213. See, e.g., The Federalist No. 17 (A. Hamilton); No. 45 (J. Madison); No. 46 (J. Madison).

214. This sovereign power was to be accomplished by a division of authority and power between the federal and state governments. In turn, this would enable the states to regulate the everyday life of its citizens, and would thus establish a strong respect for the state government.

There is one transcendent advantage belonging to the province of the State governments ... . This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government.

The Federalist, supra note 175; No. 17 at 103 (A. Hamilton).

215. Id., No. 46 (J. Madison).

216.

The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State ... which would be added on such occasions ... would form ... very serious impediments; and ... would present obstructions which the federal government would hardly be willing to encounter.

Id., at 308-09. See, e.g., W. Bennett, American Theories of Federalism 58-59 (1964) [hereinafter cited as Bennett].

217. For a representative summary of the concerns of the framers toward a strong federal government see, e.g., Bennett, supra note 216, at 53-
each state must remain able to provide its choice of unique services to its citizens in order to keep cemented the political bond that guards against the abuse of federal power.218

The fragmentation of governmental power into several states serves other important political and moral ideals in our culture. Perhaps two of the foremost purposes are its encouragement of individualism and self-determination. These goals are furthered by the fact that local decisionmaking necessarily allows the individual a greater voice in the determination of an issue. It logically follows that as the local governmental unit decreases in size, the number of dissatisfied persons in it who lose at the ballot box will also decrease. It would seem even more probable that communication, understanding and debate over the issue in question would be more thorough than possible in a situation where a multitude of national representatives hold discussions at a distant location. Moreover, when an individual becomes involved locally in political matters he contributes to his own development in educational, moral and cultural areas.219

Finally, the Court should not be overly reluctant to recreate a vibrant tenth amendment doctrine of state power that can, on occasion, come in conflict with the enumerated powers. This would not be done to return the nation to the pre-1937 era, or to ignore the mandate of the supremacy clause. Rather, the purpose would be consistent with the views of Madison who foresaw that dual governments would serve as checks on the abuses of the other.220 This dual system would, in turn, serve as a

220.
strengthened guarantor of individuals' rights because any abuse of power would be quickly placed in controversy by the other governmental unit. Thus, the doctrine of federalism does not contemplate two separate and autonomous sovereign bodies, but two sovereigns that interact and conflict occasionally. The conflict necessarily focuses the public's attention on the matter at hand, and serves a communicative function by illuminating the purposes and goals of the respective governments. A system of judicial review that relies on an expansive doctrine of preemption,\textsuperscript{221} or worse yet — "conditional pre- emption"\textsuperscript{222} places a premium on predictable results, rather than the more basic political value of allowing some conflict in order for the foundational issue of values to be exposed and debated.

III. THE GROWTH OF FEDERAL POWER

It is convenient to blame the Supreme Court for the decline in federalist values in the nation, but the true problem is one that is much more basic than occasional judicial decisions. There is something that is causing the flow of power from the states to Washington, D.C., and it has its roots in both structural and contemporary phenomena. The standard explanation for federal growth is that it arises from a tendency of any central government in a federalist structure. The initial establishment of the central government by the several states carried with it the inevitable assumption that the power of central gov-

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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 control each other, at the same time that each will be controlled by itself. 

The Federalist, supra note 175; No. 51 at 339 (A. Hamilton & J. Madison). 
221. See supra note 96. 
222. See supra text accompanying notes 152-56.
ernmental would increase. After all, it started with absolutely no power. What occurs next is the expansion of the federal government through the normal and expected development of its regulatory authority through the enumerated powers. Thus, one must recognize that any central government so created has a natural tendency to expand its powers.

Another structural cause arises from the nature of the enumerated powers. The powers to raise and support armies, regulate commerce, borrow money and declare war are of such an integral nature to a nation that their development will necessarily expand the contours of federal power to its most efficient level. The emergency use of these powers during times of economic depression and war also presented the judiciary with controversies that were centered in issues of the most vital national interest. It was during or immediately following these near castatrophic events that federal power made its most dramatic gains.

224. Id.
226. Id. at cl.3.
227. Id. at c.2.
228. Id. at cl.11.
229. In defining the proper scope of the commerce power during the depression Chief Justice Hughes wrote: "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in a national vacuum." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, (1937). In upholding Title II of the Housing and Rent Act of 1947 on the basis of the war power Justice Douglas commented:

We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. But we cannot assume that Congress is not alert to its constitutional responsibilities.

230. Wheare, supra note 223, at 239.
The nationalization of many aspects of traditional areas of state law has also had an effect on the balance of federal-state power. It has been argued persuasively that many attributes of commercial\textsuperscript{231} and criminal\textsuperscript{232} law are being regulated at the federal level. This, of course, springs from at least three separate forces: (1) the perceived need for national uniformity,\textsuperscript{233} (2) the development and extension of individual rights,\textsuperscript{234} and (3) the tendency of political lobbies to simply lay aside the federalist values for the opportunity to pass legislation that favors their particular causes.\textsuperscript{235}

The final contributing factor may be described as the existence of a "moralistic" political culture\textsuperscript{236} in our society that constantly seeks to bring about reform. As Daniel Elazar explains: "[I]ndividualism is tempered by a general commitment to utilizing communal — prefera-

\begin{itemize}
\item \textsuperscript{231} Cramton, Regulation, Federalism, and Interstate Commerce 140 (A. Tarlock ed. 1981).
\item \textsuperscript{232} See, e.g., Gunther, Cases and Materials on Constitutional Law 129-32, 195-204 (10th ed. 1980).
\item \textsuperscript{234} See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (woman's right of privacy during first trimester precludes state regulation of abortion); Solem v. Helm, 103 S. Ct. 3001 (1983) (state’s sentence of life imprisonment for recidivist who committed only non-violent crimes deemed to be disproportionate under the eighth and fourteenth amendments).
\item \textsuperscript{235} A major reason . . . is the impossibility of resisting demands for specific and concrete objectives with an abstraction. Everyone is for federalism except when national control of some matter would further a specific personal interest, and few see the value of maintaining a federal system as a serious obstacle to congressional action except when they also oppose the action on other grounds. The result has been to reduce the federalism argument to a makeweight outweighed by a feather. Graglia, supra note 218, at 26.
\item For an interesting discussion of the national media and its effect on federalism, see the remarks of Professor Holland Id., at 37.
\item \textsuperscript{236} The term is taken from D. Elazar, American Federalism: A View from the States 96 (2nd ed. 1972).
\end{itemize}
bly nongovernmental, but governmental if necessary — power to intervene into the sphere of ‘private’ activities when it is considered necessary to do so for the public good or the well-being of the community.”

This reform-minded culture may well seek to intervene locally, but it will graduate on to higher levels of government, if necessary to accomplish its mission. This type of attitudinal culture is pervasive in states such as New York and California. Thus, one could rationally expect the legislative representatives from these states to place an emphasis on reform at the expense of certain federalism values that are based in traditional notions.

The multitude of factors that contribute to the growth of federal power are complex in nature and tend to array themselves over a wide spectrum of national life. It is a bit much to presume that the Supreme Court can establish a bulwark against this flow. It actually appears, for varying reasons, that a substantial portion of the population desires governmental intervention to improve their lot in life. This statement of the problem reaffirms the belief that meaningful judicial review must be based on fundamental principles that are relevant and understandable by those who either cannot comprehend or simply ignore the values of federalism.

237. Id., at 97.
238. Id., at 98.

239. Elazar’s map demonstrates that most states have a synthesis of two or more of three possible political subcultures (moralistic, traditionalist and individualistic). The moralistic-individualistic trait appears especially pronounced in the western, northeastern and northern portions of the United States. Id., at 106-07.

240. The concept of governmental power in a moralistic political culture is broad, encompassing the belief that new governmental programs should be initiated without public pressure if they are considered to be in the public interest. Id., at 100. This view differs dramatically from the perspectives of the two other subcultures. Id., at 93-104.
IV. SAFEGUARDING STATE SOVEREIGNTY

If judicial review is to perform a central function in the protection of state sovereignty, that process must be formed by both the structural demands of the constitution and the realities of the nation’s political processes. The former consideration is required for a number of reasons. The structure of the Constitution makes explicit provision for the states’ police power through the tenth amendment. Admittedly, the judicial interpretation of this clause over the last forty-five years does not contemplate an affirmative limitation on federal legislative power, 241 but that oft-repeated position simply begs the real question. A proper structural analysis of the constitutional significance of state sovereignty would necessarily include the perceived role of the states in the overall scheme of government. That question is not satisfactorily answered by using the terms “affirmative” or “passive” in describing a necessarily complex arrangement of power allocation and sovereign duties. Thus, the deepening of the inquiry would allow the Court to fashion an accurate, normative statement of a constitutional principle. 242 Perhaps even more importantly, such an analysis would yield principles of law that would permanently serve as guideposts in an area of constitutional interpretation that sorely needs them.

The inclusion of the realities of the political process

241. See supra note 82 and accompanying discussion.
242. Herbert Wechsler advocated this belief in stating:
I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?
in judicial review of this area necessarily carries with it an assumption of the answer posed by the structural inquiry. An analysis of the text and structure of the Constitution should not merely reveal the fact that the states and their police powers are explicitly set out, but also that they constitute separate and distinguishable political units of the nation.\textsuperscript{243} If the solution to the problem of federalism review is lodged within the notion that there is an identifiable and coherent system in the political process in the United States, the final question would clearly be whether such an investigation would produce a set of principled propositions that would be susceptible of judicial management.

\section{A. Limits of Political Safeguards}

The main argument preventing the Court from shaping a structural analysis of federalism has been the potent theme that the states' possess adequate political safeguards to prevent unwarranted federal encroachment. These safeguards are considered to be embodied in the "composition and selection of the central government."\textsuperscript{244} The essential component of this entire theory is based on the supposition that the elected representatives of the people will actively guard the interests of the states.

The accuracy of this structural mechanism is indubitable. The Senate was originally conceived as the "one branch of the legislature [that represented] the

\footnotesize{\textsuperscript{243} A structural analysis of the Constitution leads to a rather clear inference that one of the main functions of the states was to serve as a unit for the internal political expressions of their citizens. An inference of self-determination and representation can be inferred through the guarantee clause and is somewhat offset by the specific limitations on state power included in Article I. See Note, \textit{On Reading and Using the Tenth Amendment}, 93 \textit{Yale L.J.} 723, 736-37 (1984) (tenth amendment should be interpreted through a structure and relationship analysis).

\textsuperscript{244}} Wechsler, \textit{supra} note 24, at 558.
states."245 Thus, each state would be represented equally — regardless of the disproportionately larger populations of some states. A coalition of twenty-six states (comprising a relatively small percentage of the population)246 could thereby successfully block any federal legislation considered to be against the states' best interests. In addition to this protective framework erected by the Constitution, the members of the Senate were to be appointed by the respective state legislatures.247 These legislatures or "select bodies of men"248 would exercise "peculiar care and judgment"249 in appointing Senators who would provide a continual and functional nexus between the Senate and state legislatures.250

The House of Representatives, to a much lesser extent, theoretically serves as another political check of encroaching federal power. The House was envisioned as a "representation of the citizens,"251 and also as a political organ that was vitally concerned in the possibility of abusive government.252 Moreover, since the citizens of the several states were considered to possess a greater af-

245. The Federalist, supra note 175; No. 58 at 378 (A. Hamilton & J. Madison).

246. Professor Wechsler estimated that, based on the 1950 census, only 19% of all the residents of the states would be represented in a coalition of the twenty-five least populous states. Wechsler, supra note 24, at 547. Professor Kaden estimates that the figure has declined to 16.76% of the population when based on the 1970 census. Kaden, supra note 156, at 859.


248. The Federalist, supra note 175, No. 27 at 167 (A. Hamilton).

249. Id.

250. "It is recommended by the double advantage of favoring a select appoint, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems. Id.; No. 62 at 401 (A. Hamilton & J. Madison).

251. Id.; No. 58 at 378 (A. Hamilton & J. Madison).

252. "But will not the House of Representatives be as much interested as the Senate in maintaining the government in its proper functions, and will they not therefore be unwilling to stake its existence or its reputation on the pliancy of the Senate?" Id. at 380.
fection and loyalty for their state governments,\textsuperscript{253} it would be logical to assume that these same citizens would elect representatives to the House that would reflect their basic political allegiance.

This foundational theory has been in existence as long as the republic itself, but has recently gained new impetus. Professor Choper has intensified the attention of the political safeguards concept by expounding his “Federalism Proposal.”

The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the state; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates “states’ rights” should be treated as nonjusticiable, final resolution being relegated to the political branches - i.e., Congress and the President.\textsuperscript{254}

Choper justifies his abdicative posture by emphasizing that to do otherwise would exhaust the Court’s “Institutional capital” and cause it to lose the prestige of the public.\textsuperscript{255} He further argues that the Court is particularly unsuited to render the necessary \textit{ad hoc} decisions weighing the merits of “isolated local ordinances with the broad demands of the federal system.”\textsuperscript{256}

Choper’s arguments rest on the idea that the Supreme Court’s true function is to decide questions of individual rights and liberties.\textsuperscript{257} This “rights consciousness” exemplified by Choper is symptomatic of the thrust of modern constitutional scholarship.\textsuperscript{258} Of course,

\textsuperscript{253} See supra text accompanying notes 213-16.
\textsuperscript{254} Choper, supra note 24, at 175.
\textsuperscript{255} Choper argues that “[t]he people’s reverence and tolerance is not infinite and the Court’s public prestige and institutional capital is exhaustible. The fortress of judicial review stands or falls with public opinion . . . .” Id. at 139.
\textsuperscript{256} Id. at 208.
\textsuperscript{257} Id. at 60-128.
\textsuperscript{258} See, e.g., J. Rawls, A Theory of Justice (1971); R. Dworkin,
the important point is not the development of a rights-based jurisprudence, but rather the pedantic treatment of structural values that are subordinated in rights analysis. The radicalism of the "Federalism Proposal" is a far cry from Herbert Wechsler's caveat that acceptance of the theory of political safeguards must not "depreciate the role played by the Court."^260

The theory that political safeguards are sufficient to guarantee state sovereignty and the values of federalism must be rejected. The very premises underlying the structure of the political process, as envisioned by the framers, have become increasingly attenuated to the realities of the modern governmental framework.

The most fundamental change was the passage of the seventeenth amendment. No longer do United States Senators depend upon the state legislatures for their appointments. The crucial "link" between the Senator and the policy-making body of the state has vanished. This change has been accompanied by decisions of the Court that restricted the states' power to countour the boundaries of congressional districts. This course of events was followed by a combination of a judicial decision, legislative act and constitutional amend-


260. Wechsler, supra note 24, at 560.

261. "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . . U.S. CONST. amend. XVII, § 1.

262. Supra note 250.

263. Wesberry v. Sanders, 376 U.S. 1 (1964) (recognizing an individual right to have the legislative representatatives apportioned according to population).


ment that synthesized to produce dramatic restrictions on the states' ability to control the qualifications of voters in congressional elections.

The continual attention between the states and the structural guarantees that formed the bases of federalism was accompanied by more subtle shifts in the national political process. As one commentator has noted:

The last twenty-five years have brought enormous changes in the types of persons elected to the Senate and House. . . . The care element in this transformation has been the decline in importance of state party organizations . . . . The consequences are varied, but clearly point in one direction. As Senators and Members of the House develop independent constituencies among groups such as farmers, businessmen, laborers, environmentalists, and the poor, each of which generally supports certain national initiatives, their tendency to identify with state interests and positions of state officials is reduced.

Professor Kaden continues his narrative of erosion between a state's national legislative representatives and the perceived interests of the state by documenting the increasing roles of campaign contributions media techniques and internal modifications of congressional rules to demonstrate that the chasm of values separating the state and its officials elected to national office is

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266. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI, § 1.
267. The state is given primary control of voter qualification through the provision that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . . U.S. Const. art. I, § 4.
268. Kaden, supra note 156, at 862-63 (emphasis added).
269. Id. at 863-64.
270. Id. at 864-65.
271. Id. at 865-67.
too wide for the normal political process to cross. The end result of determining that the present political process is inadequate to safeguard the interests of the states is to face again the proposition that political accountability serves as the cornerstone of federalism.

B. Balancing the Proper Interests

While the factor of political accountability is central to the proper workings of American federalism, it remains more difficult to reduce this conception to a workable formulation for the judicial branch. The three-pronged *Hodel* test was developed by the Court for the rather obvious necessity of harnessing Justice Rehnquist's broad language in *Usery* in an attempt to draft a judicial standard capable of application.\(^{272}\) The problem with the *Hodel* test is that while its primary focus is on the structural questions of the federal government regulating the "states qua states" and the consequent implications on sovereignty and integral function, the balancing equation in the fourth step weighs federal and state interests that are inappropriately compared.

In the *EEOC* case, Justice Brennan re-emphasized that balancing may be the key in a proper case.

Even if the minimal character of the federal intrusion in this case did not lead us to hold that the ADEA survives the third prong of the *Hodel* inquiry, it might still, when measured against the well-defined federal interest in the legislation require us to find that the nature of that interest justifies state submission.\(^{273}\)

This *ad hoc* balancing approach applied on a case-to-case basis is precisely what causes current federalism analysis to break down. If the "nature" or importance of a federal interest is to be weighed against the state's interest on an *ad hoc* basis, the Supreme Court is surely

\(^{272}\) See supra text accompanying notes 75-102.

not the proper organ to perform that function. The present Court proposes to measure articulated policy choices of Congress against those of the particular state involved in the controversy. The entire deliberate processes of the Congress are to be "balanced" against a single state's choice. It takes little acumen to realize that the reasons underlying a particular state law will appear pale when contrasted to the importance of national legislation. A few possible comparisons may prove beneficial in illustrating this point. In *Usery*, the federal interest in the Fair Labor Standards Act would be the guarantee of a "living" wage and humane conditions and hours of employment for covered workers. The Surface Mining Control and Reclamation Act's purpose in *Hodel* to protect society and the environment from the effects of surface coal mining. The *FERC* case dealt with the nationwide concern over the conservation of energy during a crisis. In *EEOC*, the national interest was to protect older workers from the invidious effects of age discrimination. Those are very weighty interests. It is highly improbable that a single state could conjure up an interest that could tip the scales toward it in a particular case. By definition, problems of a national scope are more pervasive than the typical ones confronted by states and their subdivisions. Consequently, the articulated national interest in remedying these issues would always possess a concomitant importance that overbear the state's interest.

The *ad hoc* balancing approach may be the best judicial tool available in some circumstances, but it produces numerous problems in a constitutional area that demands at least some structural analysis. Neither the understanding nor development of the tenth amend-

ment, state sovereignty, or political accountability is advanced by the Court when it poses the rhetorical inquiry examining the degree of importance of the respective interests. *Ad hoc* balancing does not move beyond a process that simply labels these interests as “crucial,” “very,” “supreme” or “minimal.” The decision is made on the basis of only the facts and attendant interests presented in the controversy at hand. The resolution by the Court amounts to no more than an affirmance of the original policy of Congress. Congress initially made the decision as to which of the interests should prevail; that decision can not be re-legislated through the judiciary without engendering deserved criticism of incompetence and abuse of power.

There is no doubt that the present Court has shown concern over the federal-state equation — however misguided its balancing approach has been. That justifiable concern should focus on the mutation of the state political process when a state is directed to coordinate policy that was conceived at the national level. The displacement of certain state services or programs, or the implementation of new procedural requirements at the local level would naturally cause some state citizens to call upon their local or state officials to account for these developments. Assuming that such reaction is negative, the aggrieved citizens discover that it was not the local officials, but rather Congress that mandated the changes. Of course, in a “cooperative” federalism setting the states will be designated as the implementers of the federal policy. Thus, the elected officials administering the programs have no real accountability for the policy choice. The members of Congress have successfully sheltered themselves from the state complainants by the buffering of state agencies and officials under them.

This situation leads to the questioning of certain fundamental premises of the political system. It initially leads one to doubt the legitimacy of the governing pro-
cess than can so easily divert political accountability to a sovereign state that has probably evidenced a contrary policy choice in the first place. This process also quickens the erosion of the states as sovereign political units that possess the independent ability to make policy choices and be held accountable for them. These are only two of the sobering concerns raised, but are sufficient to reveal the serious shortcomings of the Court's failure to factor political accountability into the analysis.

A method of judicial analysis is required that utilizes the institutional concerns of accountability and also produces some constitutional norms in the process. The ad hoc process of balancing accomplishes neither of these objectives. A preferred method must provide sufficient flexibility for the Court to consider the competing national and state interests. It seems evident that if the latter goal is to be reached, some form of balancing is required.

The type of balancing process that would encompass all of the above considerations can be termed "structural" balancing.\textsuperscript{275} The structural method varies from the ad hoc method in several important aspects, and moreover, begins the Court on a course of analysis that results in more definitive answers to federalism issues. The term "structural" denotes a process that balances competing constitutional claims that are rooted in the text or structural implications of the Constitution.\textsuperscript{276}

Unlike ad hoc balancing, the structural method is not limited to the facts of a particular case. Instead, it balances two competing claims in a manner that focuses

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\textsuperscript{275} Professor Henkin has described this form of balancing as "exegetic" — a mode of constitutional interpretation. See generally, Henkin, \textit{Infallibility Under Law: Constitutional Balancing}, 78 COLUM. L. REV. 1022, 1027 (1978).

\textsuperscript{276} \textit{E.g.}, Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . the latter occupy a preferred position").
solely on the Constitution and proper inferences therefrom. There would be no necessity to measure a state’s interest in employing only physically fit game wardens against the national interest of ending employment discrimination against older citizens as was done in EEOC. The proper balance to be struck in such cases would be to assess the federal interest in terms of its goals and power bases. Thus, while ending discrimination would constitute the purpose of the Age Discrimination in Employment Act, the structural balance must also include a consideration of the congressional power under the commerce clause and § 5 of the fourteenth amendment. If a decision were to be contrary to the federal government in such a case, it should be predicated on the respective allocation of power that the Constitution dictates, and not on the imponderable question of how much more important is ending age discrimination by employers than a healthy game warden, police officer, fireman, truck driver, etc. All of the above variations can be worked out if one had the time and patience. Unfortunately, it proves nothing about federalism, or constitutional law in general.

The state’s interest under a set of facts similar to those in EEOC would not be sufficient to raise concern over political accountability issues. Although state policy choices are clearly displaced, the state merely has expended an uncertain amount of funds for the continued employment of the game wardens. This amount of funds may be offset by the probability of increased savings resulting from the concomitant deferral of both the pension payments to the older wardens and the required replacement training for new wardens. The state effectuation of the federal guidelines amounts to a minor intrusion because the mandate simply requires that the voluntary, employer-employee relationship continue unless the state can prove that the warden is not physically
capable of performing his duties.\footnote{277} Under that fact situation there is no requirement that the state alter its functioning political apparatus to set up regulatory bodies for the administration of policy conceived at the federal level. Thus, the political accountability issue would not be raised; the federal government would have the obvious responsibility of promulgating the ADEA.

An adoption of new federal policy at the state level will necessarily include a greater burden on the state budget. It would be beyond dispute that if the increased expenditures at the state level directly caused the termination or severe curtailment of essential state services such as police or fire protection, principles of accountability would be implicated by the drastic displacement of state policy choices. This appeared to be such an extreme case it is unlikely to occur. Therefore, in a typical case, the increased expenditures by the state should not have a significant impact on structural balancing. The focus of the inquiry is not on the amount of funds expended, but rather if identifiable political accountability values are negatively implicated by the additional outlays.

The use of a structural balancing approach would also require the Court to develop certain constitutional norms respecting federalism. The careful balancing of the competing values of proper power allocations would continue on a case-by-case basis resulting in the refining of the general principles set forth in the initial decision. During the lengthy interim period of refinement, lower courts, state legislatures, and both houses of Congress would be able to seek guidance from these constitutional norms. At the very least, these judicial pronouncements would be centered on a constitutional interpretation and not on the characterization of a federal statute's degree of intrusiveness.

\footnote{277. See supra text accompanying notes 192-94.}
A capsule summary of the structural balancing proposal would now seem appropriate. The Supreme Court should invoke this federalism analysis in those cases where a federal law or regulation substantially interferes or displaces state policy choices in traditional or essential areas of state government. The substantiality of the interference or displacement must either cause, or pose a substantial risk of causing, a negative impact on the political accountability implicated under the facts of the case. On the rare occasions when a state could demonstrate an actual confusion by its citizens as to which level of government has accountability, the impact may appear to be obvious. Those situations will be rare, and will involve the Court in assessing factual allegations that are not relevant to constitutional adjudication or interpretation. The wiser approach is to forego a strict factual approach and assess the risk involved to the political values inherent in federalism. This standard would be truer to the appellate judicial task of weighing and allocating the respective constitutional claims. For example, the existence of a contrary state policy choice in a traditional area would carry a much greater negative impact than a situation where a state has no antithetical policy in force. The accountability issue would be implicated in its highest sense in cases where the federal government exclusively uses state resources to carry out federal policy. The utilization of state employees, state funds and state regulatory processes to execute federal policy is a paradigmatic example of Congress refusing to authorize outright federal preemption because of the political consequences. The convenient alternative of assigning to the states a federal regulatory duty does not so much foster local control as it erodes the essential relationship between legislative governance and political accountability.
Conclusion

Since the 1976 decision in Usery, the Supreme Court has traveled a wavering path toward a coherent federalism analysis. The decisions since 1976 have evidenced an uncertain, but steady, movement toward the reaffirmation of the principle that the tenth amendment is not an affirmative limitation on the enumerated federal powers. During this era, the values of federalism underlying our system of government have been given too little emphasis in the Court’s analysis of state sovereignty questions. The model of structural balancing that is proposed will not constitute a quick fix, or even establish convenient categories where difficult cases may be placed for judicial resolution. The main attribute of this approach would be to alter the present position of the Court from its ad hoc balancing approach with its myopic focus on the resolution of particular cases to one that accords some weight to federalist values and that fashions a principled constitutional doctrine in an area long neglected. Utilizing the concept of political accountability in the balance poses no lasting threat to federal power. A judicial decision declaring that an improper federal intrusion occurred would normally reflect a judgment that the chosen means and not the purpose of the law violated fundamental precepts of accountability. In the final analysis, the Court would be able to fashion a predictable corpus of law in the area, and to strengthen the most basic assumption of accountability in a representative democracy.