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Usery in the Wake of *Federal Energy Regulatory Commission v. Mississippi*

*Ronald D. Rotunda**

I. INTRODUCTION

In 1941, the Supreme Court characterized the tenth amendment as a "truism" of little practical importance.[1] This restrictive view echoed even earlier interpretations,[2] and portended the Court's view of federalism for nearly the next four decades. By the mid 1970's, the tenth amendment was reduced to a mere expression of sentiment whose time had passed. Then in June of 1976, in *National League of Cities v. Usery*[3] the Supreme Court, for the first time since the Court Packing Plan, invalidated an Act of Congress utilizing tenth amendment principles. This paper will focus on the leading post-*Usery* decision, *Federal Energy Regulatory Commission (FERC) v. Mississippi,*[4] and conclude that it significantly restricts *Usery*'s impact.

In *Usery* itself, the precise issue was the validity of the 1974 Amendments to the Fair Labor Standards Act, extending the Act's minimum wage, maximum hour, and overtime provisions to almost all public employees. By a five to four vote,[5] the Supreme Court invalidated the law. Overruling prior decisions, the Court asserted that to the extent the Fair Labor amendments operated to "directly displace the State's freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the commerce clause]."[6]

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

2. As Chief Justice Marshall noted over 150 years ago, the tenth amendment had been framed merely "for the purpose of quieting the excessive jealousies which had been excited. . ." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819).

3. 426 U.S. 833 (1976).

4. 456 U.S. 742 (1982).

5. Justice Blackmun wrote a concurring opinion but also joined the majority opinion. Several courts and commentators have erroneously characterized the majority decision as a plurality opinion. *E.g.*, United Transportation Union v. Long Island Railroad Company, 634 F.2d 19, 24 (2d Cir. 1980), *rev'd,* 455 U.S. 678 (1982).

6. 426 U.S. at 852. Fire prevention, police protection, sanitation, public health, and

Justice Rehnquist, for the majority, conceded that this legislation was within the plenary commerce power granted to Congress. As applied to "States *qua* States,"[7] however, the legislation encountered the "constitutional barrier"[8] of state sovereignty.[9]

The Court saw a state's power to set the wages of its employees as an "undoubted attribute of state sovereignty."[10] By imposing wage and hour limits, the federal statute could potentially force reductions in state-provided public services, as well as severely restrict the states' control over their own employees. In short, the Act was invalid because it "directly supplant[ed] the considered policy choices of the states' elected officials"[11] in areas of "integral governmental functions."[12]

Justice Blackmun cast the pivotal fifth vote. His separate concurrence interpreted the majority opinion as adopting a balancing approach, in which the burden imposed upon the states and the extent of interference with state autonomy are weighed against the magnitude of the federal interest. For example, he said, the decision would not "outlaw federal power in areas such as environmental protection where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[13] Many lower courts and commentators quickly adopted Blackmun's balancing approach.[14]

Justice Brennan, in a dissent joined by Justices White and Marshall, vigorously attacked the foundation of the majority opinion and asserted that the legislature is the only appropriate

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parks and recreation were enumerated as examples of "traditional governmental functions." *Id.* at 851.

7. *Id.* at 847.

8. *Id.* at 841.

9. *Id.* at 845.

10. *Id.*

11. *Id.* at 848.

12. *Id.* at 855.

13. *Id.* at 856 (Blackmun, J., concurring).

14. *See, e.g.*, Woods v. Homes Structures, Inc., 489 F. Supp. 1270, 1296-97 (D. Kan. 1980) (*balancing* federal interest in requiring bond issues to comply with federal antifraud provisions against local government's power to issue bonds); Colorado v. Veterans Admin., 430 F. Supp. 551, 559 (D. Colo. 1977) (federal interest in monitoring veterans educational benefits program *balanced* against interference with state educational institutions), *modified*, 602 F.2d 926 (10th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). See also Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 164 (*Usery* "would thus transport us from a regime which has sacrificed states' sovereignty for congressional supremacy to a regime in which the Court will balance states' rights against interests represented by Congress."); Note, *Practical Federalism After National League of Cities: A Proposal*, 69 GEO. L.J. 773, 780 (1981) ("the majority's treatment of *Fry* and Justice Blackmun's concurrence point to the conclusion that *Usery* employs a balancing test").

forum for the resolution of such federalism questions.[15] Characterizing the majority's analysis as "an abstraction without substance, founded neither in the words of the Constitution, nor on precedent,"[16] he condemned the majority for engaging in unabashed policymaking and manufacturing a lengthy legal argument merely as "a transparent cover for invalidating a congressional judgment with which they disagree."[17] Justice Stevens, also dissenting, concluded that the statute was valid since he was "unable to identify a limitation on [the commerce power] that would not also invalidate federal regulations of state activities that I consider unquestionably permissible. . . ."[18] Outside the Court, *Usery* precipitated criticism and comment that was extraordinary both for its breadth and its severity.[19]

II. LIMITATIONS PRIOR TO *FERC v. MISSISSIPPI*

By its terms, *Usery* applies only to statutes enacted pursuant to Congress' commerce power. By way of footnote the Court explained that it was not deciding whether the tenth amendment also limited Congress' spending power,[20] its enforcement power under section five of the fourteenth amendment,[21] or the war power.[22]

Many lower court decisions have concluded that the tenth amendment places no limits on the exercise of congressional powers derived from these sources.[23] No evidence exists that the

15. 426 U.S. at 858 (Brennan, J., dissenting). *See also* 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), *cited in* 426 U.S. at 877. Brennan also found insurmountable practical obstacles to applying the "traditional government functions" test. 426 U.S. at 880.

16. *Id.* at 860.

17. *Id.* at 867.

18. *Id.* at 881 (Stevens, J., dissenting).

19. *See, e.g.*, Beard & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 GA. L. REV. 35 (1976); Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1 (1978); Heldt, *The Tenth Amendment Iceberg*, 30 HASTINGS L.J. 1963 (1979); Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 420-421 (1981).

20. 426 U.S. at 852, n.17. See U.S. CONST. art. I, § 8, cl. 1.

21. 426 U.S. at 855, n.17.

22. *Id.* at 854, n.18, *citing with approval* Case v. Bowles, 327 U.S. 92 (1946).

23. *See, e.g.*, New Hampshire Department of Employment Security v. Marshall, 616 F.2d 240, 247 (1st Cir. 1980) (spending power); Jennings v. Illinois Office of Education, 589 F.2d 935, 938 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979) (war power); North Carolina *ex. rel.* Morrow v. Califano, 445 F. Supp. 532, 536 n.10 (E.D.N.C. 1977) (spending power), *aff'd mem.*, 435 U.S. 962 (1978).

Supreme Court would disagree with these lower court decisions.[24] Recent Supreme Court case law reaffirms the principle that *Usery* is inapplicable to federal regulations which states must accept as a condition of receiving federal grants, because even if the federal bribe is very high, the states have a "choice" whether to participate.[25] Similarly, only four days after *Usery,* Justice Rehnquist, writing for the Court in *Fitzpatrick v. Bitzer,*[26] reasoned that the fourteenth amendment's broad enforcement power overrides the restrictions on federal power of earlier amendments.

Later the Court created additional limitations on *Usery*. In *Hodel v. Virginia Surface Mining & Reclamation Association,*[27] the Court offered a three-pronged test for deciding tenth amendment claims:

> 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 "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure

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24. Montgomery County v. Califano, 449 F. Supp. 1230 (D. Md. 1978), *aff'd mem.*, 599 F.2d 1048 (4th Cir. 1979); Florida Dept. of Health and Rehabilitative Serv. v. Califano, 449 F. Supp. 274 (N.D. Fla.), *aff'd mem.*, 585 F.2d 150 (5th Cir. 1978), *cert. denied,* 411 U.S. 931 (1979). See Comment, *Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery,* 26 AM. U.L. REV. 726 (1977). See generally, P. HAY & R. ROTUNDA, THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE 173-8 (1982).

25. See *Bell v. New Jersey,* 103 S. Ct. 2187 (1983), a unanimous decision. *Bell* held that the federal government may recover funds advanced to a state as part of a federal grant-in-aid program but then misused by the state. The Court reasoned that collecting the money from the State does not violate the tenth amendment because

> [r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The State chose to participate in the Title I program and, *as a condition of receiving the grant,* freely gave its assurances that it would abide by the conditions of Title I.

Id. at 2197 (emphasis added).

26. 427 U.S. 445 (1976). In *Fitzpatrick,* the Court, per Rehnquist, J., determined that the eleventh amendment and the principle of state sovereignty it embodies are limited by the enforcement provision of the fourteenth amendment.

Although *Fitzpatrick* dealt with the federal government's right to infringe upon the state's rights protected by the *eleventh* amendment, its message was clear: if federal legislation is properly founded on section five of the fourteenth amendment, it may infringe on attributes of state sovereignty protected by *other* constitutional amendments which the fourteenth amendment, by its own terms, was meant to affect. Thus the Court, relying on *Fitzpatrick,* later upheld a federal court's remedial order in a school desegregation case, even though it would have a substantial impact on the state treasury, because the "*Tenth* Amendment's reservation of nondelegated powers . . . is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." Milliken v. Bradley, 433 U.S. 267, 291 (1977) (emphasis added). *See also,* Rome v. United States, 446 U.S. 156 (1980) (fifteenth amendment also overrides state sovereignty limitations).

27. 452 U.S. 264 (1981). See also the companion case, Hodel v. Indiana, 452 U.S. 314 (1981).

integral operations in areas of traditional function."[28]

The Court explained that *Usery* is therefore inapplicable to federal laws which govern directly only the activities of *private* individuals or businesses and not states *qua* states.

Significantly, the Court also cautioned that "demonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed."[29] Once a court finds that a statute satisfies all three prongs of the *Hodel* test, the court must balance the federal interest against the state's interest in retaining its sovereignty.[30]

Although facially *Hodel*'s three-prong approach offered some improvement over *Usery*'s vague criteria, it hardly presented a litmus test for deciding federalism disputes. Rehnquist's ambiguous phrases, the subjects of so much previous criticism, were adopted by Marshall verbatim.[31] Though set out more succinctly, they remained "an abstract without substance."[32]

Moreover, *Hodel*'s adoption of Blackmun's balancing test in *Usery* as a "fourth" prong has disquieting similarities with pre-1937 constitutional adjudication. Before 1937, the Court always "balanced" in theory and engaged in unprincipled policy-making in practice. "Balancing" is not a test but merely a label for *ad hoc* decision-making unless the Court explains which items go on which side of the scale, how much they weigh, and what legal principle derives from balancing.

Hodel's significance, however, is not its elaboration of the vague *Usery* tests, but rather its unmistakable symbolic message. It reaffirmed the plenary power of the federal government to regulate private entities under the commerce power and thereby preempt state decisions.

Less than a year after *Hodel,* the Supreme Court reaffirmed its restrictive interpretation of *Usery* in *United Transportation Union v. Long Island Railroad Company*.[33] The issue was whether applying federal labor legislation to a state-owned railroad violated *Usery*. A unanimous Supreme Court said no, reversing the Second Circuit.[34] The Court looked at the third prong of the *Ho-*

28. 452 U.S. at 287-88, *quoting* National League of Cities v. Usery, 426 U.S. 833, 845, 852, 854 (1976).

29. 452 U.S. at 288, n.29.

30. *Id., citing, inter alia, Usery,* 426 U.S. at 856 (Blackmun, J., concurring).

31. *See* 452 U.S. at 290.

32. *Usery,* 426 U.S. at 860 (Brennan, J., dissenting).

33. 455 U.S. 678 (1982).

34. The Second Circuit had held that the operation of a railroad was an integral state

del test, which focused on *traditional* state functions.[35] The Court noted that railroads had been subject to comprehensive federal regulation of their operations and labor relations for nearly a century and that no comparable history exists of state regulation of the railroad industry.[36] Federal "regulation of state owned railroads simply does not impair a State's ability to function as a State."[37]

III. THE *FERC* CASE

If *Usery* created "islands in the stream of commerce"[38] which are the exclusive province of the states, *Hodel* and *United Transportation Union* severely eroded the banks of those islands. *Usery* may mean only that the federal government cannot eliminate the states as entities,[39] set the wages of the governor and other integral state employees who are not engaging in proprietary functions,[40] nor move the state capital.[41] In other words, the first two major Supreme Court cases in the post-*Usery* era helped demonstrate

function, and that the state's interest in running a railroad outweighed the federal interest in labor relations. United Transportation Union v. Long Island Railroad, 634 F.2d 19 (2d Cir. 1980), *rev'd*, 455 U.S. 678 (1982).

35. See *Hodel*, 452 U.S. at 288, *quoting Usery*, 426 U.S. at 852.

36. 455 U.S. at 687.

37. 455 U.S. at 686.

Several years later the Court upheld the extension of the federal Age Discrimination Act to employees of state and local governments (specifically Wyoming game and fish wardens) because it also found that the federal law did not " 'directly impair' the State's ability 'to structure integral operations in areas of traditional state functions,' " the same prong of the *Hodel* test relied on in *United Transportation Union*. Equal Employment Opportunity Commission v. Wyoming, — U.S. —, 103 S. Ct. 1054 (1983). However, this time four of the Justices were in dissent.

The state argued that it needed a mandatory retirement age of 55 to insure its game wardens' physical fitness. But Brennan for the Court replied that, under federal law, Wyoming could exclude the unfit as long as it proceeded in a more individualized manner. Alternatively, Wyoming could seek to demonstrate that age is a bona fide occupational qualification. Finally, the state law did not threaten the structure of state government by placing a severe financial burden on the state: the increased costs were speculative and might well be balanced by the fact that older workers, while they continue to work, are not paid any pension benefits and continue to contribute to the pension fund; when they do eventually retire, they receive pension benefits for fewer years. 103 S. Ct. at 1063.

Justice Stevens, in a cogent concurring opinion, urged that *Usery* be overruled.

Chief Justice Burger, joined by Powell, O'Connor, and Rehnquist, JJ., dissented and argued that there "is no hint in the body of the Constitution ratified in 1789 or in the relevant amendments that every classification based on age is outlawed." 103 S. Ct. at 1074. Powell, joined by O'Connor, also wrote a separate dissent objecting to Stevens's concurrence and reaffirming their faith in *Usery*.

38. Tribe, *Federal-State Relations*, in 4 J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-1982, at 164 (1983).

39. Maryland v. Wirtz, 392 U.S. 183, 196 (1968), *overruled in other respects*, National League of Cities v. Usery, 426 U.S. 833 (1976).

40. National League of Cities v. Usery, 426 U.S. 833 (1976).

41. Coyle v. Oklahoma, 221 U.S. 559 (1911).

that, in reality, very few aspects of state sovereign authority are, or should be, absolutely immune from federal control. The next case, *Federal Energy Regulatory Commission (FERC) v. Mississippi,*[42] created a significant new restriction on *Usery,* with its doctrine of conditional preemption. But the close five-to-four vote may portend problems.

In the *FERC* case the Court upheld the Federal Public Utility Regulatory Policies Act of 1978 (PURPA) against a *Usery* challenge. PURPA was designed to combat the then-perceived energy crisis plaguing the nation. Generally, PURPA requires state utility commissions to entertain various disputes under the federal regulations and to consider certain federal proposals in accordance with federally dictated procedures.[43]

The Court began with section 210 of the Act, which encouraged the development of cogenerators and small power facilities[44] by preempting conflicting state regulations. The majority easily upheld this type of federal regulation after *Hodel*. State authorities are required to enforce standards promulgated by the FERC under section 210. In the majority's view, this requirement placed no additional burden on the state agencies, since they already "customarily engaged" in this very type of adjudicatory activity.[45] Under the supremacy clause, states must enforce federal law. As *Testa v. Katt*[46] had made clear thirty years earlier, state courts have an obligation to hear and enforce federal claims. State administrative agencies must do the same.

Titles I and III of PURPA required the states to "consider" federal standards dealing with rate structuring and other matters relating to the operation of electrical service. The Court observed that PURPA did not compel the states to enact regulations, nor did it mandate a strict agenda for state agencies. Rather, federal law simply conditioned "continued state involvement in a *preemptible* area" on the consideration of federal proposals.[47] As in *Hodel,* Congress allowed the states to continue regulation in this

42. 456 U.S. 742 (1982).

43. Because of the national dimensions of the energy problem, the Court had no problem in finding that the legislation was within the commerce power. 456 U.S. at 753-758.

44. "A 'cogeneration facility' is one that produces both electric energy and steam or some other form of useful energy, such as heat." *Id.* at 750, n.11. "A 'small power production facility' is one that has a production capacity of no more than 80 megawatts and uses biomass, waste or renewable resources (such as wind, water, or solar energy) to produce electric power." *Id.*

45. *Id.* at 760.

46. 330 U.S. 386 (1947).

47. 456 U.S. at 765 (emphasis added).

area *"on the condition"*[48] that the states *"consider* proposed [federal] regulations. . . ."[49] Congress, in short, "may impose conditions on the State's regulation of private conduct in a pre-emptible area."[50]

Finally, the Court sustained those portions of PURPA that require state commissions to follow certain notice and comment procedures when acting on the proposed federal regulations. Although noting these procedural requirements simply establish minimum due process guarantees and might be upheld as an exercise of congressional power under section five of the fourteenth amendment, the Court instead opted to build on the analysis that it had used to uphold section 210. The majority explained:

> [I]f 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.[51]

What is problematic about *FERC* is that only a bare majority sustained the validity of PURPA, in the face of strong opposition by four Justices. Even more troubling are the grounds on which the four Justices dissented. The dissenting opinions include theories and ideas which, if accepted, would uproot much present law and return to much of the pre-1937 approach to judicial review.

Justice Powell's dissent applauded "the appeal—and indeed wisdom—of Justice O'Connor's evocation of the principles of federalism,"[52] but concluded that the arguments against the *substantive* provisions of PURPA were foreclosed by precedent. Nevertheless, Powell dissented on the procedural requirements of Titles I and II. He rejected what he termed the majority's "threat of preemption" reasoning and warned that "if Congress may do this, presumably it has the power to pre-empt state court rules of civil procedure and judicial review in classes of cases found to affect commerce."[53]

Powell inexplicably ignored the enabling provision of the fourteenth amendment. The notice and comment procedures described in the Act only established minimum due process requirements for state utility commission hearings. As such, the procedural requirements should at least be a valid exercise of

48. *Id.* (emphasis added).
49. *Id.* at 771 (emphasis added).
50. *Id.* at 769 n. 32.
51. *Id.* at 771.
52. *Id.* at 771 (Powell, J., concurring in part and dissenting in part).
53. *Id.* at 775.

Congress' power to enforce the due process guarantee of the fourteenth amendment.

Powell cited Professor Henry Hart for the proposition that "federal law takes state courts as it finds them."[54] However, when Hart made this statement in 1954, he noted that state rules must "not [be] so rigorous as, in effect, to nullify the asserted rights"[55]—the very reason why Congress imposed basic procedural protections in *FERC*. The federal government has every right to expect that the states will consider fairly its proposals.

A long line of cases under the Federal Employers' Liability Act (FELA) unequivocally demonstrates that Congress does indeed have authority to regulate state procedure in order to protect federal interests. Under the FELA Congress can decide in a federal civil case brought in *state* court what issues must go to the jury.[56] If Congress can mandate such procedures in order to affect the substantive outcome of a case brought in a state trial court, it ought to be able to mandate similar procedures in proceedings brought before state agencies, particularly since PURPA allows the states to avoid using the procedures by abandoning the area altogether. Justice Powell failed to mention the FELA precedents and the role of conditional preemption, just as he had ignored the implications of section five of the fourteenth amendment.

Unlike Justice Powell, Justice O'Connor's dissent concentrates on the Court's substantive holdings. Her dissent's conclusory statements are reminiscent of the Court's pre-1937 approach and fail to provide any tests or guidance for future constitutional analysis. The crux of the dissent is her rejection of the concept of conditional preemption. Her argument, if accepted, would greatly expand the scope of *Usery*. Her argument is also inconsistent with the reasoning of the precedents in the spending clause cases, including one opinion by Justice O'Conner herself.[57] Justice O'Connor likened the statutory provisions in *FERC* to those in *Usery*,[58] but her analogy ignores a crucial distinction.

54. *Id.* at 773, *quoting* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 508 (1954).

55. Hart, *supra* note 54, at 508. *Cf.* Williams v. Georgia, 349 U.S. 375, 399 (1955) (Clark, J., dissenting). *See also* Hart, *The Time Chart of the Justices,* 73 HARV. L. REV. 84, 116 (1959).

56. For example, a state court hearing an FELA case cannot circumvent a litigant's right to a jury trial by refusing to submit to the jury one phase of the question of fraudulent releases, even though under state law that issue would not have gone to the jury. Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 363-69 (1952). *See also* Rogers v. Missouri Pacific R.R., 352 U.S. 500, 510 (1957).

57. Bell v. New Jersey, — U.S. —, 103 S. Ct. 2187 (1983) (states must honor obligations freely assumed when agreeing to participate in a federal grant-in-aid program).

58. 456 U.S. at 775 (O'Connor, J., dissenting). See note 25 *supra*.

The federal law in *Usery* gave the states no options. It did not allow the states to avoid paying the minimum wage by having the federal government take over the activity (e.g., hospitals) and pay the minimum wage. The *Usery* Court in effect held that such a cost-free arrangement in favor of the federal government would impermissibly interfere with the functioning of state governmental bodies; that same Court implied that the arrangement prevalent in the spending clause cases, analogous to conditional preemption, would yield a different result.[59]

In *FERC,* as in the spending clause cases, Congress gave the states an option: they could regulate public utilities in conformity with federal requirements *or* they could elect not to enforce the federal mandate. In that case the federal government would totally preempt the field and assume all the costs of the program. In *Usery,* although the federal government wanted the states to pay its hospital workers above a certain wage, it was not willing to take over the hospitals to assure that the workers were well paid. Phrased another way, in *Usery* the federal government told the states: "You pay the piper, but we'll call the tunes." In *FERC* the federal government said to the states: "You pay the piper and you call the tunes. We would like you to call certain tunes. If you refuse, then we will pay the piper and we will call the tunes."

The fact that the federal government is willing to assume the full burden of direct regulation provides an inner political check. That is, forces within the political decision-making structure help assure that decisions are carefully thought out and that federal control is not lightly exercised. As Justice Stone said in a slightly different context:

> [T]he thought, often expressed in judicial opinion, [is] that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the State.[60]

Conditional preemption provides a similar political check.

59. *Usery,* 426 U.S. at 852, n.17. Under the tenth amendment, Congress might not be able to take over the state police. However, assuming that such is the case, the argument in the text would apply to many other state activities such as hospitals. Even as to state police, *Usery* left open the possibility of reaching such activities under the spending clause. For example, Congress should be able to provide that state police paid in part with federal funds must be paid the minimum wage. *See, e.g.,* Oklahoma v. U.S. Civil Service Commission, 330 U.S. 127 (1947). *See generally,* P. HAY & R. ROTUNDA, THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE 169-84 (1982).

60. South Carolina State Highway Department v. Barnwell Bros., Inc., 303 U.S. 177, 185, n. 2 (1938). *Cf.* United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4 (1938) (Stone, J.).

Justice O'Connor's objection that such conditional preemption "blurs the lines of political accountability" is similarly unpersuasive. This "blurring" has not been regarded as justification to overturn the spending clause cases, to which O'Connor has never voiced any objection.[61]

Finally, Justice O'Connor's discussion of the application of *Hodel* to the *FERC* case exemplifies her use of *ipse dixits* and conclusory statements in place of useful tests or explanations. As to the first prong of the *Hodel* test, Titles I and III of PURPA apparently regulate the "states as states." But the other prongs are more problematic. To satisfy the second prong concerning "attributes of state sovereignty," O'Connor analogizes the situation in *FERC* to Congress requiring "state *legislatures* to debate bills drafted by congressional committees."[62] The analogy is weak: while Congress could not outlaw state legislatures, it could in effect outlaw a state utility agency by completely preempting the field. O'Connor then disposes of the third prong by announcing that "utility regulation is a traditional function of state government."[63] No authority is cited for this proposition, and in fact there is also a long history of *federal* regulation of utilities.[64] Finally, O'Connor does not address the exception, mentioned in *Hodel*,[65] of a federal interest so strong that it requires state submission despite satisfaction of all three prongs of the *Hodel* test. Given O'Connor's conclusion, she should explain why this exception was inapplicable to *FERC*. Is her silence intended to indicate a belief that there is no strong federal interest in energy policy? Like the pre-1937 justices, O'Connor is apparently willing to immunize certain areas from federal regulation based on her own unarticulated views of desirable social policy.

IV. CONCLUSION

Does *FERC* portend continued a narrowing of *Usery*? If only one Justice changes his mind, will a future Court later use the tenth amendment analysis of *Usery* to substitute its economic judgments for those of Congress? Four justices thought that

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61. See notes 24 and 25, *supra*.

62. 456 U.S. at 780 (O'Connor, J. dissenting) (emphasis added).

63. *Id.*

64. Such regulation takes the form of tax subsidies, regulation on entry and antitrust policy, direct regulation of oil and gas prices, tariff and import and export restrictions, energy allocation regulations, and so on. *See generally,* T. MORGAN, ECONOMIC REGULATION OF BUSINESS (1976); W. RODGERS, ENERGY AND NATURAL RESOURCES LAW (1979); H. WILLIAMS, R. MAXWELL, & C. MEYERS, THE LAW OF OIL AND GAS (1974); Posner, *Natural Monopoly and Its Regulation,* 21 STAN. L. REV. 548 (1969).

65. 452 U.S. at 288, n. 29.

FERC was akin to *Usery* and regarded the federal regulation as invalid.[66] Four Justices upheld the federal regulation but also thought that *Usery* had been wrongly decided.[67] Only Justice Blackmun thought that both *Usery* and *FERC* were correct.

The judicial technique of balancing interests is quite proper when balancing leads to some definable rule or test. But when that purported balancing fails to yield some ascertainable principle, we simply have *ipse dixits* by judicial Caliphs. In the end, as noted by Henry Hart long ago:

> [I]pse dixits are futile as instruments for the exercise of "the judicial power of the United States." As such they settle little or nothing more than the case in hand, and attempted rationalizations of them serve more often to create, than to relieve doubts in other cases. Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do [because the Court does not] have the power either in theory or in practice to ram its own personal preferences down other people's throats.[68]

After *Usery,* lower courts and commentators could not decipher the message of the High Court. Confusion reigned until the Court provided some clarification in *Hodel* and *LIRR*. After *FERC,* however, given the frail majority and the fact that parts of the opinion of the Court were written quite narrowly, the possibility exists that one of the justices may simply change his mind on slightly different facts.[69]

FERC should be read to hold that Congress may impose conditions upon continuation of state regulation in any field that is federally preemptible.[70] As such, *FERC* usefully limits *Usery*. Basically, *Usery* should only mean that federal law cannot eliminate the states, set the salary of the state governor and other some-

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66. Powell, O'Connor, and Rehnquist, J.J., and Burger, C.J.

67. Brennan, White, Marshall, Stevens.

68. Hart, *supra* note 55, at 99.

69. *See* 456 U.S. at 746-50. If the statute provided penalties or *required* the state to adopt federal standards, would the case come out differently for Blackmun? Surely Congress ought to be able to say: adopt these federal standards or the federal government will preempt the area. As Justice Blackmun did state in one portion of his opinion, "[s]o long as the field is preemptible — the nature of the condition is [ir]relevant." *Id.* at 768 n.30.

70. Professor Tribe has argued that such an interpretation of *FERC* would be "misleading." He offers instead a strained attempt to narrow the result in *FERC* while giving a broad reading to *Usery*. See Tribe, *Supreme Court Review and Constitutional Law Symposium*, 51 U.S.L.W. 2248 (1982). *See also* Tribe, *Federal-State Relations,* in 4 J. CHOPER, Y. KAMISAR, & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-1982 (1983), at 167:

> State agencies may be required to settle disputes about federal regulations that are analogous to those state disputes they already handle and to *consider* (not adopt) federal proposals in accord with federal procedures that simply broaden participation a bit beyond that prescribed by state procedures, because such conditions are both minimally intrusive and fully consistent with federalism's underlying value of broader local participation in government.

what similar state workers, or move the state capital. But if Congress can preempt an area of regulation, the proper reading of *FERC* allows it instead to condition the state's continued involvement in a pre-emptible area on the state's acceptance of the federal requirements.[71] The alternative view, that of the dissenting opinions in *FERC*, would invite the Court to return to its pre-1937 legacy and make economic policy in the guise of constitutional analysis.

71. See text accompanying notes 43-45, *supra*. This interpretation would not drain *Usery* of all meaning. The tenth amendment, upon which *Usery* is based, indicates that some powers are reserved to the state and therefore cannot be preempted by Congress. When exercising these powers, the states would be protected by *Usery*.

For further analysis of these issues, see Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PENN. L. REV. — (1984).