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# Federalism as a Fundamental Value: National League of Cities in Perspective

Robert F. Nagel
*University of Colorado Law School*

ROBERT F. NAGEL

# FEDERALISM AS A FUNDAMENTAL VALUE: NATIONAL LEAGUE OF CITIES IN PERSPECTIVE

> In examining the Constitution of the United States . . . one is startled at the variety of information and the excellence of discretion which it presupposes in the people whom it is meant to govern. The government of the Union depends entirely upon legal fictions; the Union is an ideal nation which only exists in the mind, and whose limits and extent can only be discerned by the understanding. [ALEXIS DE TOCQUEVILLE*]

## A. INTRODUCTION

After almost forty years of sanctioning the growth of the congressional power to regulate commerce,[1] the Supreme Court in *National League of Cities v. Usery*[2] held that the extension of the wage and hour provisions of the Fair Labor Standards Act to most state employees was unconstitutional as a violation of the principle of federalism. Although some serious commentary had suggested that the Court's record prior to *Usery* verged on abdication of constitutional responsibilities,[3] *Usery* precipitated criticism that was ex-

Robert F. Nagel is Professor of Law, University of Colorado School of Law.

* I Democracy in America 152 (Arlington House ed. 1970).

[1] For a history, see NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 150–56 (1978).

[2] 426 U.S. 833 (1976).

[3] The basic constitutional "test" (whether the regulation "affected" commerce) was immediately understood to provide no limitation on national power. "Almost anything—



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traordinary both for its breadth and severity. Justice Brennan, a respected and unapologetic practitioner of judicial power and imaginative constitutional analysis when the issues involve individuals' rights, labeled the decision "an abstraction without substance" and a "patent usurpation."[4] Three prominant scholars reacted to the decision extremely critically. Professors Tribe and Michelman, both resourceful at constitutional interpretation, professed themselves totally unable to understand the explanation offered by the Court in *Usery* and proposed that the decision could make sense only as an inchoate statement of a right to the provision of certain state services.[5] Professor Choper reacted with a forceful argument that, even if *Usery* were constitutionally correct on the merits, the Court should have held such matters to be nonjusticiable in order to save its resources for—that phrase again—the protection of individual rights.[6] Many others also criticized *Usery*,[7] and those who were at all supportive of the decision were muted or ambivalent.[8]

The harsh reaction to *Usery* is one aspect of a widespread pattern that inverts the priorities of the framers: an obsessive concern for using the Constitution to protect individuals' rights. This fascination with rights reinforces a form of instrumentalism that is too

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marriage, birth, death—may in some fashion affect commerce." National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 99 (1937) (McReynolds, J., dissenting). By 1959 Professor Wechsler could refer to "the virtual abandonment of limits [to the federal commerce power]." *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 23–24 (1959). *Cf.* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

[4] 426 U.S. at 858, 860. (Brennan, J., dissenting).

[5] Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1066 (1977) ("I make no claims about what the Justices intended. . . . I haven't a clue what that might have been, but I doubt that the conclusion of this article was it."); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L. J. 1165, 1166 (1977) ("The only interpretation that is compatible with the decision taken as a whole, I shall argue, is a surprising one that leads in directions the Justices do not seem to have intended or anticipated.").

[6] Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L. J. 1552 (1977).

[7] *E.G.*, ELY, DEMOCRACY AND DISTRUST 224 n. 44 (1980); Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?* 1976 SUP. CT. REV. 161; Cox, *Federalism and Individual Rights under the Burger Court*, 73 NW. U. L. REV. 1 (1978); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L. J. 411, 420–421, (1981).

[8] *E.g.*, Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environment Policy*, 86 YALE L. J. 1196, 1224–25, 1271 (1977); Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979).

confining to be an adequate way to think about constitutional law. If *Usery* is viewed without these intellectual constraints, a rather plain and defensible explanation for the decision emerges. My major purpose is not to insist that *Usery* was ultimately "correct," but to suggest that the inability to understand *Usery* demonstrates the extent to which the capacity to appreciate some important constitutional principles is being lost.

## I.

Judicial decisions generally reflect a priority in favor of protecting individuals' rights over the structural principles of separation of powers and federalism. Decisions directly resting on these structural principles are rare compared with decisions involving individual rights.[9] Issues of federalism and separation of powers are usually analyzed in terms of nonconstitutional doctrines. For example, they are frequently reduced to matters of statutory construction[10] The scope of the judicial power over states is often discussed in amorphous, discretionary terms—such as equitable discretion, standing, justiciability, and comity.[11] Even when structural principles are treated as fully constitutional matters, their main influence is on the definition of individual rights.[12] Those decisions that do deal unambiguously with structural values for their own sake demonstrate less explanatory creativity than do decisions dealing with rights, a fact that suggests a relative lack of

[9] No doubt this is in part justifiable because of the special capabilities and responsibilities of the other branches of government in resolving such disputes. See Choper, note 6 *supra*, at 1560–77 (as to federalism); see Frohnmayer, *The Separation of Powers: An Essay on the Vitality of the Constitutional Idea*, 52 ORE. L. REV. 211 (1973) (as to separation of powers). Whatever the reasons, the reluctance of the Supreme Court to rule on cases involving structural values is often dramatic. See, *e.g.*, McArthur v. Clifford, 393 U.S. 1002 (1968); Holmes v. United States, 391 U.S. 936 (1968); Velvel v. Nixon, 396 U.S. 1042 (1970); Massachusetts v. Laird, 400 U.S. 886 (1970); DaCosta v. Laird, 405 U.S. 979 (1972). See also Goldwater v. Carter, 444 U.S. 996 (1979).

[10] *E.g.*, United States v. Five Gambling Devices, 346 U.S. 441 (1953); Scarborough v. United States, 431 U.S. 563 (1977); National Cable Television Association v. United States, 415 U.S. 336 (1974).

[11] As to equitable discretion, compare Milliken v. Bradley, 418 U.S. 717 (1974) with Columbus Board of Education v. Penick, 443 U.S. 449 (1979). As to standing, compare Warth v. Seldin, 422 U.S. 490 (1975) with Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59 (1978). As to comity, compare Younger v. Harris, 401 U.S. 37 (1971) with Steffel v. Thompson, 415 U.S. 452 (1974).

[12] *E.G.*, Milliken v. Bradley, 418 U.S. 717(1974); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Labine v. Vincent, 401 U.S. 532 (1971).

judicial interest in structural matters if not lower quality opinions. Missing from decisions involving structural values is any use of the doctrinal innovations used so often in decisions involving rights. There are no analyses of motive, no dissections of legislative purpose, no demands that less drastic means be used, no tiers of judicial scrutiny.[13] Instead, decisions having to do with structure frequently rest on the baldest forms of "balancing"[14] and on undeveloped references to such generalities as "undue impairment" of the states' functions.[15] Finally, cases in which rights are articulated are frequently followed by a series of decisions that are designed to "actualize" the original right, and in the process the right is often recast in even more ambitious terms.[16] Important cases that articulate structural values tend quickly to be limited and then largely abandoned.[17]

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[13] As to analyses of motive and legislative purpose, compare, *e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); or Trimble v. Gordon, 430 U.S. 762 (1977); or Craig v. Boren, 429 U.S. 190 (1976) with Hoke v. United States, 227 U.S. 308 (1913); United States v. Sullivan, 332 U.S. 689 (1948); Perez v. United States, 402 U.S. 146 (1971); United States v. Kahriger, 345 U.S. 22 (1953); Katzenbach v. McClung, 379 U.S. 294 (1964). With respect to the less drastic means requirement, see Katzenbach v. McClung and compare, *e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (states' method of protecting potential life sweeps unnecessarily broadly when protecting fetuses prior to viability) with Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (statute that provides for the storage and screening of 42 million pages of presidential documents and 880 presidential tape recordings does not unnecessarily subordinate presidential requirements of confidentiality).

[14] On balancing, see South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177 (1938); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978); Kassel v. Consolidated Freightways Corp., 101 S.Ct. 1309 (1981); Minn. v. Clover Leaf Creamery Co., 101 S.Ct. 715 (1981); National League of Cities v. Usery, 426 U.S. at 856 (Blackmun, J., concurring). See also Nixon v. Administrator of General Services, note 13 *supra*, at 425.

[15] New York v. United States, 326 U.S. 572, 587 (1946) (Stone, concurring). Similarly, the Court has said that "Congress may not exercise power in a fashion that impairs the States' integrity. . . ." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). "[N]either government *may destroy* the other nor curtail *in any substantial manner* the exercise of its powers." Metcalf and Eddy v. Mitchell, 269 U.S. 514, 523 (1926) (emphasis added).

[16] *E.g.*, compare Brown v. Board of Education, 347 U.S. 483 (1954) with Keyes v. School District No. 1, 413 U.S. 189 (1973); and Swann v. Charlotte-Meckleburg Board of Education, 402 U.S. 1 (1971); and Green v. County School Board, 391 U.S. 430 (1968). Or compare Roe v. Wade, note 13 *supra*, with Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); and Bellotti v. Baird, 443 U.S. 622 (1979); and Colautti v. Franklin, 439 U.S. 379 (1979).

[17] Compare United States v. Nixon, 418 U.S. 683 (1974) with Nixon v. Administrator of General Services, note 13 *supra*. Compare National League of Cities v. Usery, 426 U.S. at 833, with City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); City of Los Angeles v. Manhart, 435 U.S. 702 (1978); Massachusetts v. United States, 435 U.S. 444 (1978); North Carolina v. Califano, 435 U.S. 962 (1978); Hodel v. Virginia Surface Min. & Reclam. Association, 101 S.Ct. 2352, 2360, 2365–67 (1981).

Modern judges work diligently at redesigning local educational programs and at defining the acceptable number of square feet in a prison cell. They void a multiplicity of laws relating to hair length, sexual preference, and abortion. But they deal rarely and, for the most part, gingerly with the great issues of power distribution that were faced so ambitiously and successfully by the framers.

Academic writing generally reflects the same priority. Scholarly discussion of constitutional structure often falls back on the more familiar issues of individual rights. For example, Professor Black's *Structure and Relationship in Constitutional Law* illuminates the possibilities of argument based on structure only to apply quickly that potential to the definition of individual rights.[18] Professor Ely's *Democracy and Distrust* emphasizes the central importance of democratic self-government in the constitutional design, but this insight is enlisted chiefly in support of rationalizing the Warren Court's creative definition of individual rights.[19] (The book is then criticized, not for overemphasizing the dependence of democratic processes on individual rights, but for attempting to define rights by reference to considerations other than the needs of individuals.)[20] Many books and articles appear on the injunctive devices that lower federal courts are using against states in an effort to implement individuals' constitutional rights. Much of this commentary seeks to conceptualize individuals' rights and the judicial function in ways that permit significant aspects of self-government to be assumed by the courts for the sake of remaking the world to suit some ideal suggested by values implicit in certain rights.[21] Much of the rest of the commentary emphasizes the practicalities of judicial enforcement and largely assumes that, if courts are able to implement individual rights effectively, implementation must have prior-

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[18] BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[19] ELY, DEMOCRACY AND DISTRUST (1980).

[20] Tribe, *The Puzzling Persistence of Process-based Constitutional Theories*, 89 YALE L. J. 1063 (1980). See also Benedict, *To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage*, 42 OHIO ST. L. J. 69 (1981); Grano, *Ely's Theory of Judicial Review: Preserving the Significance of the Political Process*, *id.* at 167; Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, *id.* at 319. But see Maltz, *Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust*, *id.* at 209.

[21] *E.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

ity over other values.[22] Those that examine the remedial role of the federal courts as an aspect of constitutional structure are quickly urged to return to the proper business of legal scholars, which is expressly defined as arguing about rights.[23]

Scholarly preoccupation with rights is also evident in the tolerant and highly imaginative approaches frequently taken in the definition of rights. Scholars commonly argue that it ought to be no bar to a constitutional claim that there is ambiguity about whether the framers intended a certain interpretation or that they did not consider a possible interpretation of a constitutional right.[24] The argument is extended in such important areas as school desegregation to include definitions of rights that are rather clearly in conflict with historical intent.[25] It is not uncommon for sophisticated scholars to make unembarrassed arguments for an interpretation of a right based largely on the personal values of the proponent of the right.[26] What more than this can be meant by assertions about "goodness"[27] or "minimal standards of human dignity"[28] or "personhood"?[29] Such argumentation, even if it involves more than private values, demonstrates how wide and free the scope of acceptable constitutional argument about rights is. Indeed, scholarship indulges almost any amount of philosophical or psychological vagueness and complexity when the goal is defining rights. We ponder how "just wants"[30] or the "mediation of liberal conversation"[31] or "equal

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[22] *E.g.*, Chayes, note 21 *supra*. Diver, *The Judge as Political Power Broker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

[23] Eisenberg & Yeazell, note 21 *supra*, at 467. *Cf.* Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV 5, 18 n.62 (1978); Fiss, note 21 *supra*, at 53.

[24] *E.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. REV. 204 (1980); Cover, *Book Review*, NEW REP. Jan. 14, 1978 at 26, 27; Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 COLUM. L. REV. 1029 (1977). See also TRIBE, AMERICAN CONSTITUTIONAL LAW 816 (1978).

[25] *E.g.*, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

[26] For a general discussion, see Ely, note 23 *supra*, at 16–22.

[27] Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 797 (1971).

[28] Eisenberg & Yeazell, note 21 *supra*, at 517.

[29] TRIBE, AMERICAN CONSTITUTIONAL LAW 914.

[30] Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[31] ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 311 (1980).

respect and concern"[32] or the ideas of Roberto Unger[33] might bear on the definition of rights.

In contrast, scholars often exhibit a kind of intellectual crabbedness when structural claims are made. Consider the scholars who were content to rest a defense of expanded institutional rights on an assertion about "fostering minimal standards of dignity." They had just tested federalism and separation of power claims about institutional injunctions by demanding to see evidence that the framers actually foresaw and opposed judicial operation of public institutions.[34] Almost any slight ambiguity about historical intent is urged to help defeat structural claims.[35] Similarly, arguments based on concepts such as separation of powers[36] or democratic accountability[37] are termed hopelessly indeterminate. The same scholar who demands specificity in the concept of "state sovereignty" would ground interpretations of individual rights on values such as "a meaningful opportunity [for individuals] to realize their humanity."[38]

In short, the hostile reaction to *Usery* is part of a broader pattern: Many jurists and scholars tend to envision constitutional values mainly in terms of individuals' rights and to undervalue judicial protection of principles that allocate decision-making responsibility among governmental units. This tendency may be largely a consequence of the influence of the lawsuit in shaping views of the Constitution. Lawsuits, of course, are discrete arguments, usually in-

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[32] DWORKIN, TAKING RIGHTS SERIOUSLY 149, 227 (1977). For other elaborate efforts to conceptualize equal protection, see Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L. J. 3 (1981); Simson, *A Method for Analyzing Discriminatory Effects under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977).

[33] Tushnet, *Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L. J. 1037, 1057–62 (1980).

[34] Eisenberg & Yeazell, note 21 *supra*, at 497 ("Nor do the records of the constitutional convention or the debate surrounding consideration of the Constitution counsel specifically against judicial decisions affecting institutions traditionally regulated by executive officials.").

[35] *E.g.*, Choper, note 6 *supra*, at 1588–90 (arguing that the intent of the framers with regard to judicial enforcement of federalism limitations was ambiguous because, despite some clear statements supporting such judicial responsibility, Federalists at times pointed to other protections for the principle as well).

[36] Diver, note 22 *supra*, at 91–92; Chayes, note 21 *supra*, at 1307. See generally the discussion in Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 686–88 (1978).

[37] Tribe, note 20 *supra*, at 1063, 1069–79; Tushnet, note 33 *supra*, at 1037, 1045–57.

[38] Tribe, note 20 *supra*, at 1077.

volving an individual, and they are often resolved by labeling the interests of one side as "rights"; thus, the lawsuit itself tends to convert even organizational matters into individual concerns. But to see the purposes of judicial review almost entirely in terms of securing individual rights is to invert the priorities of the framers and ultimately to trivialize the Constitution. The framers' political theory was immediately concerned with organization, not individuals. Their most important contributions had to do with principles of power allocation—with the blending and separation of power among the branches of government and with the bold effort to create a strong national government while maintaining strong state governments. This structure itself was to be the great protection of the individual, not the "parchment barriers" that were later (and with modest expectations) added to the document.[39] Even the danger of local majoritarian excess—so frequently cited today as a justification for vigorous protection of individual rights—cannot reconcile the modern emphasis on rights with the priorities of the framers. Although aware of the threat posed by "faction," the Federalists proposed social heterogeneity and layered government as the protection,[40] not the Bill of Rights, which, after all, was originally thought to restrain only the national government.

The modern priority on individuals' rights is striking in light of the common assumption that judicial review allows for some con-

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[39] Apparently the idea of a bill of rights "never entered the mind of many of [the framers]" until three days before adjournment of the Constitutional Convention. SCHWARTZ, A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS (1971) 627. A common argument for the exclusion of a bill of rights was that specific protections were unnecessary, since the federal government had been granted only enumerated powers. *Id.* at 634. When Madison proposed the Bill of Rights to Congress, its importance for preserving freedom was not emphasized. He argued that it would be "neither improper nor altogether useless." *Id.* at 1028. See, generally, Rumble, *James Madison on the Value of the Bill of Rights*, in NOMOS XX: CONSTITUTIONALISM 122 (Pennock & Chapman, eds., 1979). The general defense of the proposed Constitution offered in THE FEDERALIST PAPERS continually emphasizes governmental structure as the basic source of protection against tyranny: "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 FEDERALIST PAPERS, No. 51 at 323 (Mentor, ed., 1961). See, generally, Diamond, *The Federalist's View of Federalism*, in ESSAYS IN FEDERALISM 21, 53, 61 (Institute for Studies in Federalism, 1961). It is true, of course, that the Bill of Rights was eventually adopted, and its importance in the constitutional scheme may have been magnified both by the adoption of the Fourteenth Amendment and by modern experience with judicial enforcement of rights. But neither consideration justifies losing sight of the framers' original scheme.

[40] On the importance of size and heterogeneity, see Diamond, note 39 *supra*, at 55–59. See also Choper, note 6 *supra*, at 1617.

tinuity in the articulation of our most basic principles. In adopting a viewpoint and a vocabulary that focuses on individuals, modern judges and scholars have tended to shut themselves off from full participation in the great debates about governmental theory begun by the framers. The writings of Professor Choper, the bluntest and most extreme critic of judicial enforcement of structural values, provide a more specific understanding of how this participation has been limited.

## II.

Although the priority in favor of judicial protection of rights rather than structure is widespread, it is often muted or qualified.[41] In Choper's writings, it is forthright. He argues that the two basic structural principles—the enumeration of a limited number of subjects as proper for congressional legislation and the separation of the national government into three distinct branches—ought to be left to the accommodations made in the political process.[42] Courts should preserve their political "capital" for the protection of individual rights.[43]

Choper argues that a court misallocates its efforts when it attempts to enforce constitutional limitations on congressional power, because the judiciary has no special competence to decide such issues. "The functional, borderline question posed by federalism disputes is one of comparative skill and effectiveness of governmental levels: in a word, an issue of practicability."[44] Judicial attempts to influence such practical decisions are often futile and make the courts unpopular politically—all for no important pur-

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[41] Professor Wechsler, for example, was careful not to exclude altogether a role for judicial review in enforcing limitations on Congress (*The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, in FEDERALISM, MATURE AND EMERGENT 97, 108–09 [MacMahon, ed., 1955]). See also Freund, *Umpiring the Federal System*, *id.*, 159. See also text accompanying notes 9–38 *supra*.

[42] Both arguments are contained in CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). The argument with respect to separation of powers is discussed in Monaghan, *Book Review*, 94 HARV. L. REV. 296 (1980). Here I shall deal only with Choper's argument with respect to federalism, and references will be to the article on which this aspect of the book was based. Choper, note 6 *supra*, at 1552.

[43] Choper, note 6 *supra*, at 1556, 1581, 1583.

[44] *Id.* at 1556.

pose, since the political branches are able and inclined to preserve an adequate level of power at the state level.[45]

On the other hand, Choper argues that questions of individual substantive rights are matters of "principle"—a term that is not fully explained[46]—on which the courts do have special competence.[47] These matters of principle cannot be entrusted to the majorities in the political process, apparently because it takes judicial skills to determine what they are.[48] Furthermore, federalistic disputes cannot be squeezed into this substantive-rights mold by focusing on the individuals' rights that might be served by decentralization. There is "no solid historical or logical basis" for the "assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms."[49] Federalism, Choper asserts, was designed to protect states, not individuals, for the purpose of achieving governmental efficiency in a large heterogenous land.[50] Insofar as the existence of state power was designed to protect individuals from governmental restrictions on their liberty (in a general sense), such protections are less important than substantive constitutional freedoms because the right "to choose in smaller political units whether and how some activities would be regulated," is "not for the ultimate security of defined liberties."[51] In contrast, "the essence of the individual rights claim is that no

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[45] *Id.* at 1560, *et seq.*

[46] Choper contrasts federalism to matters of principle by suggesting that principles are enforced without regard to immediate social costs because enforcement protects "the dignity of the individual." Choper, note 6 *supra*, at 1555. But it seems unlikely that he means by this that the definition of rights or their protection is never compromised because of practical trade-offs. Nor is it clear why federalism, as a constitutional requirement, might not have content independent of "practical" considerations and sometimes be enforced despite immediate costs. He denies that principles exclude policy considerations that require complex factual determinations (*ibid.*). Much of his discussion implies that principles have independent intellectual content which involves "technical considerations" and judicial expertise (*id.* at 1574). In contrast, federalism is often treated as meaning little more than that States must exist (see note 62 *infra*). However, in places Choper acknowledges that federalism might involve content independent of the practical accommodations made in the political process. *Id.* at 1599–1600. *E.g.*, he concedes that Congress might make constitutional errors with regard to what federalism requires. *Id.* at 1574.

[47] *Id.* at 1554. *cf. id.* at 1556.

[48] Choper, note 6 *supra*, at 1555, 1556.

[49] *Id.* at 1611.

[50] *Id.* at 1614.

[51] *Id.* at 1616.

organ of government, national or state, may undertake the challenged activity."[52]

Choper is right, of course, that the principle of federalism determines only the level of government that may restrict a liberty. But to the extent that decentralized government permits decisions to be made by local officials who might differ from national decision makers in their accessibility or sensitivity, the principle does serve "the ultimate security of a defined liberty" and is not on this ground inferior to constitutional rights. Choper appears to acknowledge this, although—true to the intellectual habits of the time—he insists on referring to self-determination as a "freedom," as if a principle cannot be taken seriously unless conceived of as attached to individuals.[53] Choper explains the inferior status of the most basic interest served by the principle of federalism with this remark:[54]

> [It is] equally likely that the withdrawal of judicial review will result in more fastidious concern for states' rights by the federal political branches [and] [m]ore important, continuing jurisdiction over states' rights claims can . . . undermine [the Court's] ability to perform the critical task of protecting all individual liberties.

In the end, Choper's argument largely begs the question. Individual rights should be protected in preference to the interest in self-determination because judicial efforts to protect this interest might be unnecessary and might conflict with the "critical" task of protecting individuals' rights. But as Choper acknowledges,[55] judicial protection of any right might reduce congressional concern over

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[52] *Id.* at 1555.

[53] His acknowledgment is somewhat ambivalent (*id.* at 1620). It is a further sign of the widespread preoccupation with rights that Choper was criticized for not analogizing states' rights sufficiently to individuals' right and for underestimating how far the latter depends on the former. Benedict, note 20 *supra*, at 75–76. Compare note 20 and accompanying text.

[54] *Id.* at 1620–21. The discussion of this issue in the book is fuller but not significantly different. There Choper adds, but does not rely on, the argument that "the federalism principle has simply outlived its usefulness." CHOPER, note 42 *supra*, at 255–56. He also drops the adjective "critical," thus emphasizing the quantitative aspect of his argument that judicial protection of federalism threatens the capacity to protect a wide array of individual rights. But the protection of any single principle or right will naturally seem to be less weighty than the protection of all others, so in this respect the argument proves nothing that is specific to federalism. In short, the book, like the article, does not successfully escape the need to show why self-determination (while difficult to protect) is not worth protecting. See text accompanying notes 55–56 *infra*.

[55] Choper, note 6 *supra*, at 1604.

the subject. And Choper does not mean that judicial protection of substantive, individual rights—the right to work more than a ten-hour day comes to mind—at times has not significantly reduced the court's prestige and political power. Nor is an answer to the question supplied by the adjective "critical." Why the protection of rights is more critical than the protection of the principle of federalism was the question at the outset.

Although Choper's specific treatment of the interest is self-determination does not explain the inferior status of structural values, the direction and emphasis throughout his argument is suggestive of an explanation. Consider again Choper's striking and repeated assertion that the interests protected by federalism are "not for the ultimate security of defined liberties."[56] This assertion is not strictly relevant to self-determination because local control is "ultimate" in the sense that no decision maker would be permitted to remove certain decisions from the local level. Nevertheless, requirements as to decision-making processes do not provide any ultimate security with respect to outcomes. Indeed, local decision making can be used to achieve very unfair outcomes—a realization that was of constant concern to framers.[57] The interest in local decision making might be thought less significant than individuals' constitutional rights to the extent that the protection of rights requires the realization of some substantive vision of a moral world. While it may be a moral good to have some decisions made locally, that value might not seem as important as an absolute constitutional protection that restricts and prescribes outcomes, at least to the extent that the values implicit in such rights are morally compelling.[58] And Choper, of course, does assume that these values are compelling and asserts that their realization serves "the dignity of the individual."[59]

It might be objected that it is possible (if not likely) to approve morally of the decentralization of power to the same extent as one might approve of a world where the values implicit in individual constitutional rights are realized. But can a world of decentralized authority be morally compelling to this degree if no specific version

[56] *E.g.*, *id.* at 1555, 1560, 1616, 1617.

[57] See, generally, WOOD, THE CREATION OF THE AMERICAN REPUBLIC 608–609 (1969).

[58] On Choper's concern about outcomes, see Choper, note 6 *supra*, at 1555, 1617–18.

[59] *Id.* at 1555.

of decision-making allocation is constitutionally mandated? Choper suggests throughout his argument that questions of individual rights have specific, intellectual content.[60] Matters of federalism are said not to be matters of principle and, thus, are not subject to specific intellectual elaboration. Federalism is a process that is elaborated by self-interest.[61] The only certainty provided by the Tenth Amendment is that states must not be totally destroyed or rendered ineffective.[62] An enormous range of power allocations is consistent with the abstract requirement that some degree of state sovereignty be maintained. Hence, Choper and others can argue that the principle is sufficiently devoid of content that it can safely be entrusted to the political process.

Aspects of Choper's argument, then, suggest that the priority of rights over structure rests on a preference for constitutional values that can be concretely implemented.[63] To be implemented, a value must be measurable. To be measurable, it must be determinate and specific. To the extent they are more concrete (a matter I will return to shortly), rights may generally seem more important than processes. Any specific, morally compelling outcomes that are required by rights can easily seem more important than vague processes. Indeed, the basic premise of Choper's argument—that the courts should allocate their efforts to the areas where they can achieve the greatest payoff—attests to the profoundly instrumentalist[64] view that accompanies the preference for rights. Under this view, a major criterion for assessing legal rules is their capacity to produce measurable changes in the real world.

While the other major criticisms of *Usery* are different from Choper's, they generally share this same basic orientation.[65] Tribe

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[60] See note 46 *supra*.

[61] Choper, note 6 *supra*, at 1560–67, 1571, 1574, 1576, 1620.

[62] Or "trampled" as Choper puts it (*id.* at 1560). Or "swallow the states whole" (*id.* at 1594). See also *id.* at 1563–68, 1570. See also text accompanying note 149 *infra*.

[63] Choper does briefly recognize that judicial review serves such nonspecific purposes as "nourishment of constitutional understanding" (*id.* at 1605). In suggesting that his federalism proposal would not damage public understanding and the court's role in sustaining that understanding, Choper is at his least convincing. See Monaghan, note 42 *supra*, at 306–7.

[64] The term "instrumentalism" has various meanings. Here I use it to denote those intellectual habits and inclinations described in Summers, *Naive Instrumentalism and the Law* in LAW MORALITY AND SOCIETY, ESSAYS IN HONOUR OF H.L.A. HART (Hacker & Raz, eds., 1977).

[65] A different sort of attack was also made: that *Usery* violated *stare decisis*. For example, Professor Cox summarized his criticism this way: "The short of the matter, therefore, is that

and Michelman convert a decision that is apparently aimed at protecting the organizational principle of state sovereignty into a decision that would establish an individual right to some level of state services. The daring of this reformulation itself attests to how strong is the instrumentalist urge to speak the language of rights rather than the more abstract language of organization. And, although they deny that their interpretations of *Usery* would justify a court to require some specific level of state services,[66] both arguments depend on a judicial determination at some point of an acceptable level of concrete state services. The instrumentalist inclination to use law to achieve tangible changes in the world is reflected in these efforts to define structural values by reference to some level of individual welfare.

The sorts of justifications that Tribe and Michelman offer for rushing past[67] organizational matters to settle on their more farfetched interpretations[68] are also consistent with the instrumentalist orientation underlying Choper's arguments. For example, *Usery* is criticized for not relying on specific evidence as to the effect of the wage and hour provisions on state governments—for not looking to the "actual impact of the regulations."[69] The opinion is criticized for protecting the state as a private agent but not as sovereign lawgiver and enforcer.[70] It is criticized for protecting the government's apparatus but not its policy-making prerogatives.[71] And it is criticized for protecting the exercise of its traditional functions but not the sovereign prerogative to decide what new

although the decision in *National League of Cities* is almost surely consistent with the original conception of the federal union and might not have surprised any constitutional scholar prior to the 1930s, it is thoroughly inconsistent with the constitutional trends and decisions of the past forty years." Cox, *Federalism and Individual Rights under the Burger Court*, 73 NW. U. L. REV. 1, 22 (1978). In this essay I do not dispute the accuracy of Cox's revealingly complacent assessment, but I do inquire into how the modern decisional law (as well as the concerns of scholars) could have come to depart so significantly from the constitutional design.

[66] Michelman, note 5 *supra*, at 1190; Tribe, note 5 *supra*, at 1088–90.

[67] Both authors deal briefly with the issue of local self-determination. Michelman, note 5 *supra*, at 1191 n.86 ("Further investigation of this sensitivity to community self-determination, its role in the cited decisions, its theoretical significance, and its relationship to the issues in *NLC*, must await another article."). Tribe, note 5 *supra*, at 1093 n.109 ("Political accountability . . . poses a problem not only for state and local governments, but also for Congress.").

[68] See note 5 *supra*.

[69] Tribe, note 5 *supra*, at 1072.

[70] Michelman, note 5 *supra*, at 1168. Tribe, note 5 *supra*, at 1074.

[71] Michelman, note 5 *supra*, at 1168. Tribe, note 5 *supra*, at 1074–75.

functions ought to be assumed by the state.[72] In short, as Justice Brennan complained, *Usery* created an "abstraction without substance."[73] Or, as Michelman put it with understated relish, it is "no easy matter to ascribe operational content to that notion [of sovereignty]."[74]

In focusing on the difficulties of making the abstract concept of federalism operational, the major criticisms of *Usery* are all strongly instrumentalist. The belief that judicial protection of rights is more valuable than judicial protection of structural principles may, then, have become widespread because structural values are not easily assimilated into the instrumentalist assumptions that underlie so much of modern legal thought.[75] However, the precise relationship between this operationalism and the critics' common emphasis on individuals' rights remains somewhat mysterious. Their lack of enthusiasm for structural values is more understandable than their vigorous commitment to judicial protection of constitutional rights. Why is it, after all, that the values implicit in constitutional rights are thought of as being sufficiently specific to fit comfortably with the instrumentalist demands of the major critics of *Usery*? If it is difficult to identify when a federal statute interferes with some "essential" level of state functioning, it is difficult to identify when the provision of state services has dropped below some "minimally adequate level."[76] If a state's "sovereignty" is an abstract idea, so is an individual's "humanity."[77]

A principle like state sovereignty might, however, be thought to be different from a principle such as free speech in that almost no conceivable statute could impair the value behind the existence of state governments. In contrast, it has become easy and customary to think that specific statutes impair the values behind, for example, the First Amendment. And it is possible to define the value protected by the Tenth Amendment in such a way that its impairment

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[72] Tribe, note 5 *supra*, at 1074. Michelman, note 5 *supra*, at 1172.

[73] 426 U.S. at 860.

[74] Michelman, note 5 *supra*, at 1166.

[75] See Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978).

[76] A matter that is acknowledged by both Tribe and Michelman (see note 66 *supra*).

[77] Tribe, note 20 *supra*, at 1077 ("The crux of any determination that a law unjustly discriminates against a group . . . [is] that the law is part of a pattern that denies those subject to it a meaningful opportunity to realize their humanity.").

by any one statute is improbable. The Court, for instance, has said that the commerce power may not be used in a way that centralizes all power in the national government.[78] No statute other than one that abolished the states could do that. But no conceivable statute threatens the larger purposes behind the First Amendment either. Whether these purposes are defined systemically ("the maintenance of open public debate for the sake of democratic decision making") or personally ("the protection of access to and use of information for the sake of autonomous individuals"), these large values are not threatened by any discrete act. A statute that prohibits the reading of pornographic books in one's home will not destroy autonomy unless accompanied by a wide array of other restrictions that destroy other sources of personal autonomy.[79] Even a major instance of prior restraint over the publication of political news could not by itself destroy the level of debate generally necessary for the democratic system to operate.[80] Discrete governmental restrictions do threaten these larger values cumulatively and in the long run. Rights *can be* made operational, then, not so much because the values they serve are specific or concrete, but because they *must be.* Rights must be made operational precisely because their purposes are remote and general and can be undercut only gradually and insensibly. But that, of course, is also true of the exercise of federal power as it gradually diminishes state sovereignty.

Although rights are not innately more concrete or measurable than structural values, concentration on rights does lead to instrumentalist habits of thought. This is because noninstrumentalist justifications for decisions that protect rights are never fully satisfactory. Even Judge Hans Linde's well-known effort to emphasize noninstrumental justifications for major Warren era cases demonstrates the difficulty of severing rights from instrumentalism. He asked, "What would be the implications for the Constitution, in its role as primary national symbol, of a decision saying that a bit of organized public prayer never hurt anyone?"[81] This question was designed to suggest that compliance with judicial decrees—concrete alterations of actual behavior—is less important than the

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[78] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. at 37.

[79] *Cf.* Stanley v. Georgia, 394 U.S. 557 (1969).

[80] *Cf.* New York Times Co. v. United States, 403 U.S. 713 (1971).

[81] Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L. J. 227, 238 (1972).

sense of understanding and reassurance that the Court's statement of principle creates.[82] As important as this argument is in supplementing the instrumentalists' narrower understanding, emphasizing as it does the immediate and tangible consequences of decisions,[83] it is not fully satisfying. To the extent that a court can make compelling the normative premise in its decision regarding an individual right, the court has stated reasons for realizing that right in actual situations. Parties who have convincingly been labeled "wronged" may be reassured by their abstract vindication, but they will also want the matter righted. And what is good for one individual is morally compelling for others in analogous situations. Thus, the vindication of a constitutional "right" localizes the moral claim in an individual and thereby creates an inevitable insistence on "actualization."[84] In short, the constant impulse to define rights in measurable ways derives from the fact that, as Choper emphasized, constitutional rights are individuals' rights. Rights are specified—the percentage of each race that should attend public schools, the extent of acceptable governmental participation in parochial education, the number of square feet required in prison cells—to give some assurance that each individual can receive whatever moral benefit is inherent in the right.

Because structural values need not be immediately localized in individuals, noninstrumental justifications may be more fully satisfying when applied to matters of governmental organization than when applied to matters of right. Such justifications, because not linked to concrete alterations of the world, would not be credited or even noticed by those absorbed in matters of individual rights. Such justifications satisfactorally explain *Usery*.

## III.

The Court's decision in *National League of Cities v. Usery* is understandable and admirable once the intellectual habits associated with thinking about constitutional rights are set aside. The Court did not attempt to limit congressional power by a restrictive definition of "commerce among the States." Such a tactic was

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[82] *Id.* at 232, 237, 238, 239.

[83] See Summers, note 64 *supra*, and Linde, note 81 *supra*, at 229–30.

[84] See Fiss, note 21 *supra*.

employed by the Court prior to 1937 when, for example, it attempted to distinguish such local matters as "manufacture" from the national concern, "commerce."[85] This approach, like present-day efforts to actualize rights, involved the Court in efforts to create and maintain a concrete, identifiable "constitutional" condition—a condition that then consisted of a "proper" division of substantive areas of regulation between the state and nation. The effort, of course, is now discredited. The *Usery* Court, instead, emphasized the abstract concept behind the principle of federalism; it spoke of states as being "coordinate elements" and as needing "separate and independent existence."[86] This language does not require some tangible, static system of power allocation, a fact that was emphasized by the unwillingness of the Court to rest its decision on any specific measurement of the burden imposed on the states by the Fair Labor Standards Act (FLSA).[87] The Court's language is true to the idea of federalism, in that it describes a process rather than an edifice.[88]

In applying these abstractions to the facts of *Usery*, the Court first distinguished those cases that involved the exercise of federal authority over individuals from those over states "as states."[89] It emphasized the importance of the employment relationship for the effective exercise of state functions[90] and (in general terms) the sorts of burdens created by the FLSA for important programs carried on by state and local governments.[91] It described the burdens as affecting broad areas of governmental activity,[92] including areas where states have traditionally delivered services.[93] These factors, I believe, can be shown to define state sovereignty in a way that is entirely consistent with the Federalists' political theory. Although the Court in *Usery* did not specifically refer to this theory, the main

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[85] *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[86] 426 U.S. at 849, 851.

[87] *Id.* at 851.

[88] See Wechsler, note 41 *supra*, passim. See also Freund, note 41 *supra*, at 159–61; FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE 3–11 (1968).

[89] 426 U.S. at 845.

[90] *Id.* at 845, 847–48, 851.

[91] *Id.* at 846–51.

[92] *Id.* at 847, 848, 850.

[93] *Id.* at 851.

elements of the opinion are protective of the purposes that the framers intended the states to serve in the "federal" system.[94]

Those purposes, although not reducible to anything concrete or measurable, are well known and important. Proponents of the proposed constitution who, like Madison and Hamilton, argued for a strong national government had to answer the fears of those who thought that the new national government would consolidate all power at the national level.[95] The reasons that the anti-Federalists feared this possibility were varied. They feared that regional interests would be undervalued in a legislature so small and so physically remote[96] and, more generally, that the quality of political accountability would suffer because the national leadership would become culturally and psychologically alienated from localities.[97] They argued that national authority would not be sufficiently responsive to elicit voluntary compliance, so that force would become the mechanism of government.[98] They were concerned that the opportunity for participation and identification with government would be too limited, ultimately threatening devotion to liberty itself.[99] Such fears were sufficient to threaten the adoption of the proposed constitution and to force not only the adoption of the first ten amendments, but also the creation of a theory of federalism that explained and justified the proposed system of power allocation.[100]

This theory turned the anti-Federalists' emphasis on the size and heterogeneity of the country into a powerful argument for adopting the Constitution. It was, the Federalists argued, the size and variety

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[94] I am using the modern nomenclature which nearly reverses framers' usage. See Diamond, note 39 *supra*.

[95] Apparently there was at least some basis for the anti-Federalist fear that some Federalists wished literally to abolish the states. See MAIN, THE ANTI-FEDERALISTS, CRITICS OF THE CONSTITUTION 121 (1961); SCHWARTZ, note 39 *supra*, at 597. More generally, however, the anti-Federalists feared that the proposed constitution provided inadequate safeguards against the enlargement of federal power beyond the enumerated powers. See, *e.g.*, SCHWARTZ, note 39 *supra*, at 572, 592–93, 653, 526.

[96] See MAIN, note 95 *supra*, at 129; KENYON, THE ANTI-FEDERALISTS xli (1966).

[97] KENYON, note 96 *supra*, at xl, li, liii.

[98] *Id.* at 210, xl.

[99] *Id.* at 388. Subsequent writings attest to the importance of such arguments. See, *e.g.*, DAHL & TUFTE, SIZE AND DEMOCRACY (1973); MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 190 (1966); TOCQUEVILLE, II DEMOCRACY IN AMERICA 79, 148, 307–11 (1970) (Arlington House).

[100] See, *e.g.*, LEWIS, ANTI-FEDERALIST V. FEDERALIST 28 (1967).

within the nation that would reduce the likelihood of overreaching by the national government.[101] Because state governments would remain alternative power centers, the national government would be in constant competition with state governments.[102] This would curtail the tendency of the national government toward unresponsiveness and would prevent excessive centralization of power. Thus, the anti-Federalists' argument that state governments were more responsive was turned on its head: The very efficiency and responsiveness of local governments would enable them to act as a "counterpoise"[103] to national authority. The existence of states could, then, make practical what at the time seemed a contradiction in terms—a large country with a strong national government that would not degenerate into a "tyranny."[104]

The theory of the proponents of the new national government, in short, depended on assurances that effective state governments could continue to exist. As modern writers also argue,[105] the states' influence on the national political process was identified as a major protection for state sovereignty, and this influence was thought to depend in part on how the electoral process was organized.[106] However, unlike the modern writers, the Federalists understood and emphasized that influence through electoral politics presupposes that state governments would exist as alternative objects of loyalty to the national government.[107] Unless the residents of the states and their political representatives understand that states are entitled to claim governmental prerogatives and unless they perceive states as legitimate, separate governments, there will be no impulse to use political influence to protect the interests of states as governmental entities. It is, as Madison put it, "the existence of subordinate governments *to which the people are attached* [that] forms a barrier against the enterprises of ambition. . . . "[108]

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[101] THE FEDERALIST PAPERS, Nos. 10, 51.

[102] See text accompanying notes 108, 117–24, 133 *infra*.

[103] THE FEDERALIST PAPERS, No. 17 at 9, 20.

[104] See MAIN, note 95 *supra*, at 130; DAHL & TUFTE, note 99 *supra*, at 4–11; THE FEDERALIST PAPERS, Nos. 9, 10.

[105] See WECHSLER, note 41 *supra*; CHOPER, note 6 *supra*, at 1560–65.

[106] THE FEDERALIST PAPERS, No. 45.

[107] See text accompanying notes 117–24 *infra*. See generally DIAMOND, note 94 *supra*, at 46.

[108] THE FEDERALIST PAPERS, No. 46 at 299 (emphasis added).

The justifications offered in *Usery* for limiting congressional power over commerce are directly relevant to preserving those preconditions necessary for the states to act as a counterpoise to national authority. The factors emphasized by the Court all define state sovereignty in the sense relevant to the Federalists' theory, because they all preserve the capacity of state governments to elicit enough respect and loyalty to act as legitimate competitors to the central government. These sources of legitimacy[109] can be grouped into four categories: symbolic, regulatory, communicative, and organizational. All can be shown to be inherent in the Federalists' theory and all connect *Usery* to existing case law.

1. *Symbolism as a source of legitimacy.* The framers of the Constitution were acutely aware of the emotional underpinnings of governmental authority. Madison referred to "that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."[110] Similarly, Hamilton spoke of "impressing upon the minds of the people affection, esteem, and reverence towards the government."[111] Supreme Court decisions have reflected the same sensitivity, holding that the national government could not control the location of a state capital,[112] suggesting that the statehouse would be exempt from federal taxation,[113] and, after some hesitation, protecting state court proceedings from interruptions by federal courts.[114] None of these decisions can be explained on the basis of actual impact on the functioning of states. The business of state government can go on once the capital city has been located, a tax on a state operation might be greater in amount and consequence than a tax on the statehouse, and state courts would not dry up because of occasional interruptions by federal injunctions. All these decisions are explicable only as efforts to protect the symbolism of

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[109] "Legitimacy" has been defined as the capacity to engender and maintain the belief that the existing political institutions are "appropriate," (see LIPSET, POLITICAL MAN 64 [Anchor ed. 1963]), "rightful," or "entitled to rule" (FRIEDRICH, TRADITION AND AUTHORITY 89 [1972]). I treat the effectiveness of a government in meeting the needs of its citizens as one source of legitimacy. Compare Lipset, *supra*, ch. 3, with Friedrich, *supra*, at 89.

[110] THE FEDERALIST PAPERS, No. 49 at 314.

[111] *Id.*, No. 17, at 120.

[112] Coyle v. Oklahoma, 221 U.S. 559 (1911).

[113] New York v. United States, note 15 *supra*, at 582.

[114] Younger v. Harris, note 11 *supra*.

the states as sovereign governments and, therefore, their capacity to sustain emotional attachments.

The symbolism of a state that is unable to control the wages and hours of its own employees is stark. The *Usery* Court's repeated emphasis on the effect of the federal rules on the states, as states, can be understood in this light. The apparatus of government may not be a special aspect of sovereignty in some exalted philosophical sense,[115] but psychologically the apparatus does represent the government's authority to the people. The Court's reliance on the impact of the FLSA on such traditional areas of state control as police and fire protection is also responsive to the requirements of symbolic authority. Again, as *Usery's* critics maintain, "sovereignty" might be equally involved in innovative functions as in traditional ones, but the longer an area has been subject to state control the more symbolic of state authority that area becomes. Psychologically, a federal burden on a state water bottling operation, for example, simply does not threaten the legitimacy of a state government in the same way as would federal burdens on public education or police protection.[116]

2. *Regulatory authority as a source of legitimacy.* The Federalists understood that any government "must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart."[117] They argued repeatedly that states would have a natural advantage over the national government because of "the nature of the objects" of state regulation.[118] States, Hamilton thought, would control the "variety of more minute interests . . . which will form . . . many rivulents of influence running through every part of the society. . . ."[119] Not only would state control be pervasive but it would also involve[120]

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[115] See note 71 *supra*.

[116] *Cf.* New York v. United States, note 113 *supra*. In many other cases, the Supreme Court has shown an inclination to protect "traditional" areas of state governmental activity from federal encroachment. See, *eg.*, Rizzo v. Goode, 423 U.S. 362 (1976); Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Independent School District v. Rodriguez, note 12 *supra;* Labine v. Vincent, note 12 *supra*.

[117] THE FEDERALIST PAPERS, No. 16 at 116.

[118] *Id.*, No. 17, at 119.

[119] *Id.* at 119–20.

[120] *Id.* at 120.

> all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake . . . impressing upon the minds of the people affection, esteem, and reverence towards the government.

Madison echoed these arguments[121] and added to them by appealing to a widely held assumption that states could be expected to deliver services effectively.[122] In contrast to all these resources available to state governments, the powers granted the national government were "few and defined."[123] That is,[124]

> [R]elating to more general interests, they will be less apt to come home to the feelings of the people; and, in proportion, less likely to inspire an habitual sense of obligation and active sentiment of attachment.

Many of the Federalists' arguments regarding the natural advantages of state power sound quaint today and might have been somewhat disingenuous at the time.[125] Certainly, the Federalists cannot be read as predicting or guaranteeing the primary of state power.[126] But the underlying idea in these reassurances cannot be dismissed lightly because it is a necessary part of the Federalists' larger theory: to be able to protect themselves in the political process states would need (and were assured under the proposed Constitution) the capacity to elicit loyalty by providing for the needs of their residents. Consequently, there is nothing improper or unusual in judicial sensitivity to the need to preserve traditional areas of

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[121] "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state." THE FEDERALIST PAPERS, No. 45, at 292–93; see also No. 46 at 294–95.

[122] ". . . [I]t is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered." THE FEDERALIST PAPERS, No. 46, at 295.

[123] *Id.*, No. 45, at 292.

[124] *Id.*, No. 17, at 120; see also Nos. 45 at 292, 46 at 295.

[125] See Diamond, note 94 *supra*.

[126] *Ibid.*

primary control for state authority. Such sensitivity is commonplace in areas like education[127] or family law.[128]

Nevertheless, a fundamental fear of *Usery*'s critics was that the principle of the case could not be restricted to protecting the states' governing apparatus but would necessarily be extended to protect state control over policies regarding private citizens as well.[129] Why, they asked, is state control over employees more a sovereign matter than state control over citizens? But *Usery* does not require that any particular area of policy necessarily be reserved for state control. The Federalists' reassurances make clear that the basic idea behind enumerating federal powers was to reserve to the states the capacity for a pervasive relationship with their citizenry—to require that federal control over citizens be exceptional and specially justified.[130] The extension of the FLSA to state employees would have insinuated a federal presence into nearly every activity carried on by the state, which would have seriously undermined the role of the states as the governments with broad primary contact with the citizenry.[131]

Moreover, the Court's emphasis on the importance of the services affected by the FLSA extension—"fire prevention, police protection, sanitation, public health . . ."[132]—tracks the framers' assumption that states would control most policies of personal importance to people. And Madison's acknowledgement of the importance to state sovereignty of effective delivery of such services is echoed in the Court's concern that the wage and hour provisions would disrupt what the states had regarded as useful methods of administration. In short, the FLSA was threatening to *all* the ele-

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[127] *E.g.*, San Antonio Independent School District v. Rodriguez, note 12 *supra;* Brown v. Board of Education (II), 349 U.S. 294 (1955).

[128] *E.g.*, Labine v. Vincent, note 12 *supra*. I do not mean to imply, of course, that the Court consistently honors the tradition of state control over such matters. See, *e.g.*, Carey v. Population Services, 431 U.S. 678 (1977); Zablocki v. Redhail, 434 U.S. 374 (1978). But such intrusions are made against a backdrop of the acknowledged propriety of general state authority over such matters. See, *e.g.*, Griswold v. Connecticut, 381 U.S. 479, 499 (Harlan, concurring) (1965).

[129] *E.g.*, 426 U.S. at 833, 875 (Brennan, J., dissenting).

[130] See notes 121, 122 *supra*. See also Wechsler, note 41 *supra*, at 98: "National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case."

[131] Federal control over state employees who perform general functions, then, is analogous to general federal common law in that both, almost by definition, are at odds with the concept of enumerated powers. *Cf.* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[132] 426 U.S. at 851.

ments of what the framers thought were the special characteristics of state regulatory authority. When a single federal statute compromises the states' authority to respond effectively and pervasively to the ordinary concerns of personal importance to the people, the Court is justified in sensing an incompatibility with the assumptions behind the constitutional design.

3. *Communication as a source of legitimacy.* How did the Federalists think that states might resist encroachments of federal power? One answer was that the states would provide a constant method of measuring whether federal policy had strayed too far from the popular will:[133]

> Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.

A second sort of answer was that the states would organize resistance both within their respective borders and among the other states.[134] The states would "sound the alarm."[135] The national government might then be faced with "the disquietude of the people; . . . the frowns of the executive magistracy of the State; the embarrassments created by legislative devices. . . ."[136] In the first of these roles, states require a formal capacity to articulate possible alternates to federal policy. In the second, states require the capacity to express dissatisfaction with federal policies officially. Such considerations must underlie judicial reluctance to expose official state legislative acts to federal injunctions[137] or to supplant the state appointment process.[138]

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[133] THE FEDERALIST PAPERS, No. 46 at 300.

[134] *Id.* at 296–99.

[135] *Id.* Nos. 44–46.

[136] *Id.*, No. 46 at 297.

[137] For example, typically courts threaten to raise funds themselves but do not directly order state legislatures to raise taxes. *E.g.*, Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[138] *Cf.* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974); Carter v. Jury Comm'n., 396 U.S. 320 (1970); Lance v. Plummer, 384 U.S. 929 (1966) (Black, J., dissenting from denial of certiorari).

*Usery* is responsive to the need to protect the capacity of state governments to represent and articulate opposition to federal power. The Court properly noted the special and fundamental character of the power to set wages and hours,[139] for federal control over basic working conditions would be a major way of shifting the loyalty of state employees to the national government. To the extent that opposition to federal policies must be expressed through the state employees who have daily and immediate contact with the citizenry, the capacity for opposition would be compromised. Moreover, the Court's emphasis on the impact of the FLSA on the states, as states, has widely been understood to insulate from congressional control such formal elements of governance as the adoption of legislation or the promulgation of regulations.[140] To the extent that *Usery*'s principles protect these formal elements of policy articulation, the decision protects the capacity of states—governments rather than individual leaders—to endorse (if not implement) policies that can stand as potential alternatives to national policy.

4. *Organizational authority as a source of legitimacy.* The Federalists thought that the states would draw loyalty from the people on the same principle that "a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large. . . ."[141] Physical proximity would be reinforced by immediate opportunities for participation in local government:[142]

> Into the administration of [the governments of the states] a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these will a greater proportion of the people have ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

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[139] 426 U.S. at 845, 851.

[140] EPA v. Brown, 431 U.S. 99 (1977).

[141] THE FEDERALIST PAPERS, No. 17 at 119.

[142] *Id.*, No. 46, at 294–95.

The capacity of states to elicit participation in government depends in large part on their authority to organize and control the units of local government.[143] It is by determining the appropriate amount of decentralization over such matters as taxation or public education that states can attempt to match local control to local interest, and the resulting political participation serves to give people a stake in public decisions and a sense of identification with their government. The Court has repeatedly recognized the special importance to state governments of control over such organizational decisions.[144]

The Court in *Usery* was sensitive to the impact of the wage and hour provisions on local participation. It noted, for example, that the provisions would lead to "a significant reduction of traditional volunteer assistance which has been in the past drawn on to complement the operation of many local governmental functions."[145] The decision insulated political subdivisions from the wage and hour provisions on the ground that these "derive their authority and power from their respective States."[146] At least one critic somehow found this protection of state authority proof that *Usery* was not aimed at protecting "the state as object of political loyalty."[147] The framers understood the sources of loyalty more realistically. In their scheme, it is important that the emotional referent of local governments continue to match their legal referent, so that the states derive full advantage from self-government at the local level. Federal control over wages and hours of employees of political subdivisions would begin to displace to the national government the allegiance and identification of those who are part of local government.

In summary, the Court in *Usery* displayed a sure feel for protecting the "essential role of the States in our federal system of government" as the framers defined that role. Despite the Court's

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[143] Evidence suggests that the sense of identification and participation is possible to a far greater extent in very small units of government. See DAHL & TUFTE, note 99 *supra*, at 60, 63, 84. On the relationship between state authority and local authority, see TOCQUEVILLE, I. 45, 51, 52, 79, 148; II, 109. For a detailed account of the advantages of localism and of the legal status of cities, see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

[144] *E.g.*, San Antonio Independent School District v. Rodriguez, note 12 *supra;* Milliken v. Bradley, 418 U.S. 717 (1974).

[145] 426 U.S. at 850–51.

[146] *Id.* at 855–56.

[147] Michelman, note 5 *supra*, at 1169.

failure to refer specifically to the role of the states as political competitors to the national government, the tracking of the Federalists' theory was not coincidental. The case law that informed and shaped the Court's assumptions about federalism was no doubt influenced by the framers' ideas, and, in any event, the *Usery* Court, like the framers, focused on what is necessary for the states' "separate and independent existence."[148]

*Usery*, then, was not incomprehensible to its critics because its holding and explanation were unrelated to the Constitution. It was incomprehensible because of the critics' intellectual habits which had developed out of long concern for questions of individuals' rights.

Decisions like *Usery* that protect constitutional structure are different from the more familiar efforts of courts to protect rights. Structural principles such as federalism are intended to maintain a rough system of power allocation over long periods of time. There is no analogy to the adjudication of rights where, at some point in time, desegregation must be achieved or enough services must be provided. Structure is a process that is maintained, not achieved. The courts' function in matters of structure is largely to sustain (or at least not undercut) the understandings, the attitudes, and the emotional ties that underlie the system of power allocation. These objectives may be intangible, but they are directly relevant to preserving the constitutional system, since that system presupposes divided loyalties and complex attitudes toward authority. Structural decisions are not necessarily based on the injustice of depriving a single individual of a particular allocation of authority. Hence, the assertion of structural values is not essential in every case where they are potentially implicated; nevertheless, their assertion in especially appropriate cases like *Usery* is important because of the indirect, long-run consequences to the whole political system of ignoring the underpinnings of constitutional structure. These consequences are not adequately described by images of states as "empty vessels" or "gutted shells."[149] Such metaphors are more expressive of the critics' urge to render the issues tangible (and therefore more familiar) than of the values at stake in a dispute

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[148] 426 U.S. at 845 (quoting from Lane County v. Oregon, 74 U.S. [7 Wall.] 71 [1869]).

[149] *E.g.*, Tribe, note 5 *supra*, at 1072 ("empty vessels"), 1071 ("gutted shell"); Choper, note 62 *supra*.

about federalism. In the Federalists' scheme, the states were to be maintained partly for their own sakes and partly as a tool for assuring adequate levels of political responsiveness, competition, and participation.[150]

Much of the scholarly and judicial attention to the definition of individual rights is aimed at achieving these same goals by more direct means. Definitions of free speech, equal protection, procedural due process, privacy, and other rights are grounded on the belief that such protections will produce the kind of independent individuals who can participate vigorously in the political process. And it may be that these rights are ultimately important to the potential for self-government. But, quite aside from the familiar charge that enforcement of such rights centralizes too much power at the national level, excessive attention to rights can be a threat to self-government. A subtle conflict exists between rights, taken too seriously, and structure. The frame of mind that is created by concentration on the direct, tangible protection of individuals does not easily appreciate the less determinate requirements of constitutional structure. A judicial system deeply engaged in achieving immediate justice for all individuals will not be sensitive to, or much interested in, the intellectual and emotional preconditions for political competition between sovereigns. The "constitutional law" that develops in such a system will be more attuned to the demands of measurement and the excitement of accomplishment than to the full range of the framers' concerns.

Suppose for a moment that divided and limited loyalties are not as important as the right to contraceptives for preserving the capacity for self-government in the modern world. At least, a decision like *Usery* that presumed there might be some small usefulness in promoting the framers' organizational theory ought not to have been dismissed as *constitutionally* incomprehensible. That the decision was so widely unappreciated ought to be unsettling to anyone who is not certain that the framers' structural principles are worthless today.

[150] THE FEDERALIST PAPERS, No. 45 at 289. See also text at notes 94–104 *supra*.