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Guy P. Kroesche

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## The Commerce Clause and the Balancing Approach: The Delineation of Federal and State Interests: *United Transportation Union v. Long Island Rail Road*

The answer seems to be that the Constitution of the United States establishes [that] state governments . . . in certain matters are . . . independent of the [federal] government.<sup>1</sup>

Prior to *National League of Cities v. Usery*<sup>2</sup> courts had increasingly invoked the commerce clause<sup>3</sup> to uphold the federal regulation of an expanding variety of activities, including many which were not purely interstate. In fact, the Supreme Court had begun to uphold federal regulation of entirely intrastate activities,<sup>4</sup> reasoning that even those activities often have a substantial effect on commerce.<sup>5</sup> The increased domain of federal

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1. K. WHEARE, *FEDERAL GOVERNMENT* 2 (4th ed. 1964).

2. 426 U.S. 833 (1976). The decision dealt with the application of the minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA) to state and local governmental employees. *See* 29 U.S.C. § 203 (1976) (as amended in 1974). In a five-to-four decision with Justice Blackmun concurring, the Court determined that Congress could not invoke the commerce clause to directly displace state management in areas of traditional governmental functions nor interfere with the states in their sovereign capacities. Such exercise of congressional authority could not be rationalized with the federal system of government as set forth in the Constitution. *Usery* has been the subject of numerous articles and discussions since the decision reversed a trend of an expansive reading of the commerce clause that had been developing for nearly forty years. *See, e.g.,* Maryland v. Wirtz, 392 U.S. 183 (1968); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

3. "The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

4. For example, in *United States v. Darby*, 312 U.S. 100 (1941), the court upheld the restraints of the Fair Labor Standards Act as being within the commerce power and consistent with the fifth and tenth amendments:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

*Id.* at 118.

5. "Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that

regulation caused apprehension that the reach of national power into state affairs was becoming too broad and that virtually all intrastate activity might be regulated under the commerce power of the national government.<sup>6</sup>

The concern that all intrastate commerce would eventually be subject to federal regulation was eased by *Usery*, where the Supreme Court manifested a revived sensitivity toward the potentially detrimental effect of federal regulation on the autonomy of state and local governments. In an earlier case, the Court had described federalism as a system which is committed "to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to indicate and protect . . . federal interests, always endeavors to do so in ways that *will not unduly interfere with the legitimate activities of the States.*"<sup>7</sup> Consequently, the

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commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). The Supreme Court observed that the regulatory power of Congress to remove obstructions of commerce, so far as it applied to public accommodations in eliminating racial discrimination, was subject to only one restriction, "that the means chosen by it must be reasonably adapted to the end permitted by the Constitution." *Id.* at 261-62. See also *Champion v. Ames*, 188 U.S. 321 (1903) (Lottery Case).

The difficulty remains, however, as to what extent the Constitution will serve to protect the sovereignty of the states. The tenth amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. However, whether the Court will permit the amendment to actually operate for the benefit of the states in areas of federal regulation is questionable. In *Darby*, for example, the court stated, "The [tenth] amendment states but a truism that all is retained which has not been surrendered." 312 U.S. at 124. Contrasting modern views are found in *Usery*, 426 U.S. at 842-43, and 426 U.S. at 862-63 (Brennan, J., dissenting). Consequently, a coherent and equitable rationale is needed to support reliance on the tenth amendment as a restraint upon federal interference with legitimate state interests. See e.g., *Fry v. United States*, 421 U.S. 542, 549-59 (1975) (Rehnquist, J., dissenting); *United States v. Oregon*, 366 U.S. 643 (1961).

6. As an extreme example, see *Perez v. United States*, 402 U.S. 146 (1971), which dealt with loan sharking in a local community. After discussing the commerce clause, the Court concluded that loan sharking, "though purely intrastate, may in the judgment of Congress affect interstate commerce." *Id.* at 154. Mr. Justice Stewart, dissenting, felt that the Court had overreached by allowing a conviction without any proof or facts showing that the conduct affected interstate commerce, stating, "[t]he definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments." *Id.* at 158.

7. *Younger v. Harris*, 401 U.S. 37, 44 (1971) (emphasis added). In order to determine whether the limits of the federal regulatory power have been surpassed, one commentator believes it must be shown "that the interference is undue, and that determination in turn, requires that the intrusion into the state governmental process and its effect be balanced against the need of the federal government to enact the regulation." Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 59. See also C. BLACK, PERSPEC-

"state sovereignty" doctrine of *National League of Cities v. Usery* confirmed the restraint on federal use of the commerce clause to regulate the functions of state government.

Some believed that the doctrine enunciated in *Usery* might eventually be extended to activities not previously regarded as integral or traditional state functions and applied to any activity in which the state was actively engaged.<sup>8</sup> However most circuit courts have not extended the rationale of *Usery* in subsequent cases involving conflicts between federal and state interests.<sup>9</sup> Preference has been given to the federal interest unless there has existed a state interest especially deserving of protection under the particular circumstances before the court.<sup>10</sup>

### I. INSTANT CASE

*United Transportation Union v. Long Island Rail Road*<sup>11</sup> supports the view that the federal government's power to regulate commerce should yield to the legitimate state interest in preserving the right to control certain state functions. New York State, through the Metropolitan Transportation Authority

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TIVES IN CONSTITUTIONAL LAW (1970), which suggests that the assessment of the constitutionality of an exercise of federal regulatory power should encompass state autonomy considerations, a procedure which should not lessen the supremacy of the federal government over state governments.

8. See, e.g., Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115, 1133 (1978). "The evil that may be done by raising the ghost of state sovereignty may, however, outlive the immediate decision of the Court, important though it may be," *id.* at 1134, and "the revived doctrine . . . may apply to all state activities, rather than only those which may be considered to involve essential governmental functions." *Id.* at 1125 (emphasis added). See also *National League of Cities v. Usery*, 426 U.S. at 833, 856-81 (Brennan, J., dissenting).

9. See e.g., *New Hampshire v. Marshall*, 616 F.2d 240, 244-47 (1st Cir. 1980); *United States v. Helsley*, 615 F.2d 784, 787 (9th Cir. 1979); *Vehicle Equip. Safety Comm'n v. National Highway Traffic Safety Administration*, 611 F.2d 53, 54-55 (4th Cir. 1979); *Scott v. City of Anniston*, 597 F.2d 897, 900 (5th Cir. 1979); *Pearce v. Wichita County*, 590 F.2d 128, 131-32 (5th Cir. 1979); *Jennings v. Illinois Office of Educ.*, 589 F.2d 935, 938 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979); *Public Serv. Co. v. Federal Energy Regulatory Comm'n*, 587 F.2d 716, 721 (5th Cir. 1979); *In re Scott*, 581 F.2d 589, 592 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1978); *Turpin v. Maillet*, 579 F.2d 152, 160 n.25 (2nd Cir.), *cert. denied*, 439 U.S. 988 (1978); *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978); *New York v. United States*, 574 F.2d 128, 131 n.6 (2nd Cir.), *aff'd*, 439 U.S. 920 (1978). *Arritt v. Grisell*, 567 F.2d 1267, 1269-70 (4th Cir. 1977).

10. See, e.g., *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979); *Donohoe Constr. Co. v. Montgomery County Council*, 567 F.2d 603, 609, 609 n.17 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978); *Friends of the Earth v. Carey*, 552 F.2d 25, 33, 38 (2nd Cir.), *cert. denied*, 434 U.S. 902 (1977); *Davids v. Akers*, 549 F.2d 120, 127 (9th Cir. 1977); *Wentworth v. Solem*, 548 F.2d 773, 775 (8th Cir. 1977).

11. 634 F.2d 19 (2d Cir. 1980).

(MTA),<sup>12</sup> manages the Long Island Rail Road Company (LIRR).<sup>13</sup> The LIRR is a common carrier that serves five counties in the New York City metropolitan area and is the only common carrier by rail connecting the public with industry in the surrounding counties. The primary function of the LIRR is to provide passenger service, though freight operations constitute a limited share of the business.<sup>14</sup> As one of seven collective bargaining representatives for the LIRR operating and train employees, the United Transportation Union (Union)<sup>15</sup> had proposed changes in the employment agreement regarding rates of pay, rules, and working conditions.<sup>16</sup> After extensive negotiations,<sup>17</sup> the Union was on the verge of exhausting the collective bargaining procedures provided by the Federal Railway Labor Act.<sup>18</sup> On December 7, 1979, the Union filed suit seeking a declaratory judgment that the relationship between the parties was governed by the Federal Railway Labor Act<sup>19</sup> and that the em-

12. The MTA, which still has the day-to-day responsibility for the management of the railroad, is a public benefit corporation. *Id.* at 20-21.

13. The railroad was acquired by the State of New York in January, 1966. On February 8, 1980, the railroad was converted from a private stock corporation to a public benefit corporation. *Id.*

14. The total income of the LIRR approximates \$300 million. The revenue from freight operations in 1979 was in excess of \$12.1 million, but that figure is miniscule in comparison to the overall income of the railroad. *Id.* at 20-21. The income from the freight revenues exceeded \$18 million in 1978. *United Transp. Union v. Long Island R.R.*, 509 F. Supp. 1300, 1304 (E.D.N.Y. 1980).

15. United Transportation Union is the sole representative directly involved in this suit, although the other representatives filed amicus curiae briefs. *See United Transp. Union v. Long Island R.R.*, 509 F. Supp. 1300, 1301 (E.D.N.Y. 1980).

16. Brief for Appellee at 1.

17. The negotiations continued over an eighteen-month period. *Long Island R.R. Co. v. United Transp. Union*, 484 F. Supp. 1290, 1291 (S.D.N.Y. 1980).

18. 45 U.S.C. §§ 151-188 (1976).

19. The Railway Labor Act does not explicitly allow for the parties to resort to self-help (strike). However, federal case law has indicated that employees subject to the Act may resort to self-help once the grievance procedures provided for in the collective bargaining agreement have been exhausted. *But see Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969).

The Act provides:

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of the employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the inter-

ployees, should they engage in self-help, were not subject to the sanctions of New York's Taylor Law,<sup>20</sup> which prohibits strikes by public employees.<sup>21</sup> The Union also sought injunctive relief to protect the rights of the employees guaranteed under the federal act, including an injunction against the commencement of a state court action invoking the Taylor Law. On December 8, 1979, the Union, along with the other six unions, went on strike. A Presidential Emergency Board was established on December 14, 1979,<sup>22</sup> and the union employees returned to work.<sup>23</sup> On February 8, 1980, two months after the district court action was filed, MTA converted the LIRR from a private stock corporation to a public benefit corporation, whose employees would technically be subject to the state's Taylor Law.<sup>24</sup>

Following further litigation,<sup>25</sup> the Union moved for summary judgment. The United States District Court for the Eastern District of New York granted the motion for summary judgment, finding that the LIRR was a "carrier" engaged in interstate transportation and consequently subject to the Railway Labor Act.<sup>26</sup> The district court rejected the invitation to find that the federal regulation improperly displaces the freedom of the state to structure its integral operations in those ar-

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pretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 1512 (1976).

20. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1978).

21. "No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike." N.Y. CIV. SERV. LAWS § 210(1) (McKinney 1978).

22. 634 F.2d at 21. The statutory authorization for this function can be found in Section 10 of the Railway Labor Act, 45 U.S.C. § 160 (1976).

23. 634 F.2d at 21. The President's action authorized a "cooling off" period of sixty days. *United Transp. Union v. Long Island R.R.*, 509 F. Supp. 1300, 1302 (E.D.N.Y. 1980).

24. 634 F.2d at 21. Prior to that date, the MTA and LIRR had moved to dismiss the action. That motion was not heard before the LIRR was converted to a public benefit corporation. *Id.*

25. On February 12, the Union moved for a temporary restraining order and preliminary injunctive relief to prevent a state court action under the Taylor Law to enjoin a strike by Union members. On February 13, the LIRR commenced suit in the Supreme Court, New York County, seeking an injunction under the Taylor Law against the impending strike by the Union. On February 14, after a temporary restraining order was issued, that action was removed to the United State District Court for the Southern District of New York. On February 25, that action was then transferred and consolidated with the district court case. *United Transp. Union v. Long Island R.R.*, 509 F. Supp. 1300, 1301-02 (E.D.N.Y. 1980).

26. *Id.* at 1305.

eas which are traditionally termed "governmental functions," concluding that the federal scheme preempts the state from regulating the labor relations of the railroad's employees.<sup>27</sup> In the view of the district court, employees of the LIRR who have exhausted the bargaining and mediation procedures of the Railway Labor Act have a federally guaranteed right to strike, and that right may not be prohibited through the enforcement of the Taylor Law.<sup>28</sup> The district court then issued an injunction restraining the LIRR and the MTA from taking any action in state court based on an alleged violation of the Taylor Law. The Union, however, was enjoined from striking<sup>29</sup> pending review by the United States Court of Appeals for the Second Circuit.

The Second Circuit reversed.<sup>30</sup> In drawing the line which separates state and federal regulation, Judge Sweet,<sup>31</sup> writing for the court,<sup>32</sup> first noted that the district court had correctly determined that the LIRR was a "carrier" within the meaning of the Railway Labor Act.<sup>33</sup> Even though the Act did not specifically include local transportation systems within its coverage, the Second Circuit declined to exclude the public commuter railroad from coverage under the Act, in spite of arguments that Congress would have done so had it foreseen how the railroad would evolve.<sup>34</sup> However, the court recognized that the LIRR may be subject to the literal terms of the Act, and even though *Usery* arguably excludes railroads from the definition of what constitutes an integral part of state governmental activity,<sup>35</sup> the

27. *Id.* at 1306.

28. *Id.*

29. *Id.* at 1309. The labor dispute which gave rise to the court action was ultimately settled on April 11, 1980. 634 F.2d at 21 n.6.

30. 634 F.2d at 20.

31. United States District Judge for the Southern District of New York, sitting by designation. *Id.* at 20 n\*\*.

32. Joining in the opinion were Circuit Judge Mulligan and Judge Spears, United States District Judge for the Western District of Texas, sitting by designation. *Id.* at 20 n\*.

33. *Id.* at 22.

34. *Id.* at 23. The court did not seem bothered by the conversion of the LIRR to a public benefit corporation which made the railroad facially subject to the Taylor Law. The conversion appears to have been made solely for the purpose of avoiding the regulation of the Railway Labor Act and to prohibit the Union employees from striking after the collective bargaining process had been exhausted.

35. *Id.* at 23-26. *Usery* did not "extend the protective mantle of sovereignty to 'areas that the States have not regarded as integral parts of their governmental activities,' such as operating a railroad." Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1172 (1977) (citing 426 U.S. at 854 n.18).

Railway Labor Act arguably does not apply to a publicly-owned local commuter transportation system such as the LIRR merely because it engages in a minimal, yet significant, amount of interstate freight business.<sup>36</sup> The court reasoned that enforcement of the Act may impair the state's ability to shape employer-employee relationships in its role as the sole provider of an essential public service<sup>37</sup> and applied the analysis promulgated in *Usery*:

The inquiry is therefore essentially two-tiered. . . . [W]e must first consider whether the operation of the railroad qualifies as an integral or traditional government function. If it does, the federal interest in regulating the collective bargaining relations of LIRR employees under the Railway Labor Act must be weighed against the State's interest in applying the Taylor Law.<sup>38</sup>

In the first step of the analysis, the Second Circuit reasoned that "essentiality is gauged not only in terms of the nature of a public service, but also its availability in the marketplace."<sup>39</sup> The court recognized that the LIRR was predominantly a public commuter-passenger service and that the railroad as public mass transit was becoming an alternative mode of transportation in several major metropolitan areas.<sup>40</sup> The court also noted the potential economic effect on the community if the service were discontinued. Furthermore, the opinion stated that well over eighty percent of the company revenue is generated by the purely intrastate passenger service, and only four percent (\$12 million of

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36. 634 F.2d at 22-23.

37. *Id.* at 23-24.

38. *Id.* at 24.

39. *Id.* at 29. The availability of the service in the marketplace is certainly an important consideration. That is precisely one of the distinctions between the case considered here and *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The Second Circuit in *United Transportation Union* considered the impact of *Lafayette* on *Usery*, concluding that the case should be limited to its antitrust context. Though the enterprise involved there, a municipally owned electric utility, was on par with the importance of the commuter railroad as a public service, that service was not provided solely by the state. Rather, the City of Lafayette competed with private enterprise for customers. The existence of an alternative source for that service demonstrates that enforcement of the state regulation was not essential for the benefit of the public and that it was economically feasible for private enterprise to provide the needed service. 634 F.2d at 27-28.

40. 634 F.2d at 26-27. Miami will open a public mass transit system in 1982. Transit systems already exist in New York, Atlanta, Chicago, Boston, and San Francisco. *Id.* at 26 n.20.



\$300 million in total revenue) by the interstate freight service.<sup>41</sup> Therefore, since the railroad was provided solely by the state, the court reasoned that the LIRR could be characterized as an essential governmental function.<sup>42</sup> The decision was in line with reasoning that "[t]he ownership or operation of a railroad . . . may be deemed, in certain regions, as essential as the operations of bridges, street lights, or a sewage system."<sup>43</sup> The court explained that "[o]bviously, the catalog of essential state-provided services is not and cannot be static."<sup>44</sup>

The court then weighed the competing federal and state interests. The purposes of both the Railway Labor Act and the Taylor Law are to avoid the interruption of commerce, to provide an orderly method of dispute resolution, and to insure continuous service.<sup>45</sup> The court acknowledged that the right to strike free from state interference has been held essential to the federal scheme of regulation.<sup>46</sup> Nevertheless, since the service was state-provided and generated primarily intrastate revenues, the federal interest in allowing the employees to engage in self-help was not "demonstrably greater"<sup>47</sup> than the state's interest

41. *Id.* at 20-21. The remaining 16% is apparently generated by various miscellaneous sources. It is not accounted for in the instant case.

42. *Id.* at 25-27.

43. Comment, *National League of Cities and the Parker Doctrine: The Status of State Sovereignty under the Commerce Clause*, 8 *FORDHAM URB. L.J.* 301, 311 (1980). In *New York v. United States*, 326 U.S. 572 (1946), Justice Douglas stated:

A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable.

*Id.* at 591 (Douglas, J., dissenting). See also Schwartz, *supra* note 8, at 1125; Amersbach v. City of Cleveland, 598 F.2d 1033, 1036-37 (6th Cir. 1979).

44. 634 F.2d at 26.

45. *Id.* at 29. Compare 45 U.S.C. § 151a (1976) with N.Y. CIV. SERV. LAW § 211 (McKinney 1978).

46. "The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in any self-help." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969) (emphasis in original). Any effort by the state to inhibit the self-help provisions of the Railway Labor Act would frustrate the effective implementation of the Act. Justice Douglas, dissenting, disagreed with the majority's characterization of the issue as being whether "the States could prohibit the parties from engaging in any self-help." *Id.* at 397 (emphasis in original). Rather he argued that the scheme of the Act is to provide for the settlement of labor disputes under a variety of measures, not to grant the employees an unrestricted "right" to strike.

47. This was the phrase used by Justice Blackmun in *Usery*, 426 U.S. at 856 (Blackmun, J., concurring).

in preserving the unimpeded flow of commuter transportation. The court determined that the inability to prohibit strikes by public employees and the economic effect thereof would deprive the state of the right to make "fundamental employment decisions" essential to its "separate and independent existence."<sup>48</sup> The Second Circuit then proceeded to extend the state sovereignty doctrine of *Usery* to exempt the public commuter railroad with interstate connections from federal regulation, even though the operation of a railroad had not previously been regarded as an integral or traditional state function.<sup>49</sup> The court emphasized that they were guided by the ground-breaking holding of *Usery*:

States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. . . . Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.<sup>50</sup>

## II. ANALYSIS

The approach taken by the court in *United Transportation Union v. Long Island Rail Road*<sup>51</sup> was well reasoned and effec-

48. 426 U.S. at 851. See 634 F.2d at 30.

49. 634 F.2d at 26, 30. See *United States v. California*, 297 U.S. 175 (1936), where even though the railroad was owned by the State of California, the United States Supreme Court found the railroad subject to the provisions of the Federal Safety Act. In *California v. Taylor*, 353 U.S. 553 (1957), which involved a common carrier owned and operated by the State of California, the state civil service laws were in conflict with the provisions of the Railway Labor Act. The court reasoned that "by engaging in interstate commerce by rail, [the state] subjects itself to the commerce power so that Congress can . . . regulate its employment relationships." *Id.* at 568. Also, *Usery* states that the "activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad . . ." 426 U.S. at 854 n.18. The Second Circuit in *United Transportation Union* did not feel that the decision in *United States v. California* concluded the issue. Rather the court felt that the definition of state sovereignty in *Usery* suggested that "traditional" and "integral" must be defined to meet changing times. 634 F.2d at 26. See *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979). The railroad in *United States v. California*, even though state owned and operated intrastate like the LIRR, was a freight service, which clearly distinguishes it from the LIRR, which provides an invaluable public function of passenger transportation in a metropolitan area.

50. 634 F.2d at 30 (quoting 426 U.S. at 854-55).

51. The Second Circuit has adhered to the principle of weighing the competing interests.

In determining whether an otherwise valid exercise of the federal commerce power would impermissibly impair state sovereignty we [are] therefore re-

tive, but the decision fails to provide adequate guidelines for future federal and state regulatory conflicts<sup>52</sup> and to alleviate concerns that federal regulatory powers are being deprived of their effectiveness. A better approach would present fairly objective standards for the courts to apply in determining whether certain services which are being gathered into the expanding arena of state endeavor<sup>53</sup> are protected from federal intervention. Illusive concepts such as "integral," "traditional," and "essential" have been used in *United Transportation Union* and *Usery*, as well as other cases, without formulating an easily applicable procedure for determining which state activities fall under the meaning of those terms. The use of flexible, yet clearly defined standards would adequately delineate the federal and state interests and provide stability and direction for this area of the law.

Previously suggested guidelines for determining the sphere of protected state functions have not been sufficient for many circumstances. Such guidelines are too dependent upon political concerns and are either tailored too narrowly, fitting only the

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quired to balance the reason for the exercise against the extent of usurpation of state policy-making or invasion of integral state functions that would result, giving "appropriate recognition to the legitimate concerns of each government."

634 F.2d at 29 (quoting *Friends of the Earth v. Carey*, 552 F.2d 25, 37 (2d Cir.), cert. denied, 434 U.S. 902 (1977) (emphasis added)). Although *Friends of the Earth* dealt with a municipal entity challenging enforcement of an EPA-promulgated anti-pollution regulation, the court, in line with *Usery*, stated that "Congress is prohibited by the Tenth Amendment from using its power under the Commerce Clause to impair 'attributes of sovereignty attaching to every state government' and that these attributes extend to a state's political subdivisions, including local governmental units." 552 F.2d at 33.

52. 634 F.2d at 30. As technology develops and society expands, the standards must remain somewhat flexible and yet well-defined to deal with the variations. Just as the car eventually replaced the horse and buggy, it is reasonably foreseeable that with our rapidly increasing population and improved technology the automobile will be replaced by other, perhaps more convenient and safe modes of transportation, including mass transit. "Moreover, we cannot be blind to the sweep of the world wide events which by all indications is forcing substantial alteration of our former profligate transportation practices and undeniably will create reliance on public mass transit." *Id.* at 27. In turn, it should be recognized that state and federal regulation of the new developments is sure to follow.

53. Since several states now provide public mass transit, usually due to public demand and necessity, it is not unreasonable to assume that the state is likely to become involved in other areas which are or were solely within the domain of private enterprise. Further, even though mass transit had not been available to the public sector until recently, the Second Circuit in *United Transportation Union* determined that:

Although this is a relatively new development, there is now no reasoned basis for finding that the operation of an intrastate passenger service which transports tens of thousands to and from their jobs every day is any less a governmental function than are sanitation or public parks and recreation.

*Id.* at 27. See also *National League of Cities v. Usery*, 426 U.S. at 851.

cases from which they were formulated, or tailored too broadly, failing to provide an ascertainable standard to limit their application. One of those suggested guidelines has been the "essentiality" of the service.<sup>54</sup> One commentator who expressed reservation when *Usery* refused to extend state regulatory control to the operation of a publicly owned railroad<sup>55</sup> suggested several factors to consider in defining an essential state function. Such factors include whether the state could furnish the service more effectively than a private entity, the availability of that service to the public at large, and the support for the service within the locality.<sup>56</sup> The author believed the factors to be relatively simple to measure and apply. The factors, however, depend, to a varying degree, on the political tenor of the community, a tenor that is unlikely to remain constant. A clearer set of elements for determining whether a protected governmental function exists can be found in *Amersbach v. City of Cleveland*,<sup>57</sup> where the emphasis seemed to be upon certain economic considerations and community need. In that case, however, the elements were keyed to the "public service" rationale, which is potentially unlimited in its application since nearly every activity that affects the public interest may constitute a state function exempt from federal intervention. The determination of whether the service provided by the state is exempt from federal regulation should involve

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54. Judge Sweet, in *United Transportation Union*, focused on the essential nature of the service provided by the state in terms of the public need and the availability of the service in the marketplace. 634 F.2d at 29.

55. Michelman, *supra* note 35, at 1172.

56. "Essentiality" would reside in just this fact of actual political acceptance of some view as (i) the service is a "public good" in the microeconomic sense, collective provision of which tends towards better satisfaction of private preferences than the private market could achieve; or (ii) the service is something that must be made freely available to everyone as a condition of some other social-justice conception that the electorate has accepted; or (iii) it is in the community's interest that the rules of legitimate political struggle should be honored, and the service is one for which there is prevailing local support under those rules.

*Id.* at 1177 (footnotes omitted).

57. 598 F.2d 1033 (6th Cir. 1979). Other factors the court in *Amersbach* postulated were:

(1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community wide need for the service or activity.

*Id.* at 1037.

factors relevant to the immediate controversy. Such an approach would allow the expansion of state interests to be dealt with in a predictable manner,<sup>58</sup> with attention given to the pertinent circumstances of each case.<sup>59</sup>

Guidelines that define those state activities that should be exempt from federal regulation need to be designed to fairly justify state autonomy from the federal interest. Therefore, the disputed activity or service should not be exempt from federal regulation unless (1) the service is provided by the state; (2) the service, if revenue generating, derives its revenues primarily from intrastate commerce; (3) no alternative service is available in the private sector; (4) the service is necessary to the public and no alternative service can be provided by the state without substantial adjustment in the community; and (5) the federal interest, with particular emphasis on public policy considerations, does not otherwise outweigh the state interest.

First, the disputed service must be provided by the state in order to justify displacement of the federal regulation. The requirement of state involvement insures a direct state interest in the service. Unless the service is state provided, there would be no justification for a claim that the federal regulation infringes upon any "state" function.<sup>60</sup> It is not sufficient that the state be

58. The approach, by necessity, should not be haphazard since

[A] stoppage in utility service so clearly involves the needs of a community as to invoke instinctively the power of government. This Court *should not ignore history and economic facts in construing federal legislation that comes within the area of interacting State and federal control*. To derive from the general language of the federal act a "right" to strike in violation of a State law regulating public utilities is to strip from words the limits inherent in their context.

*Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 405 (1951) (Frankfurter J., dissenting) (emphasis added). The case dealt with the constitutionality of Wisconsin's labor legislation known as the Public Utility Anti-Strike Law.

59. "The adjustment thus called for between State and National interests is not attained by reliance on uncritical generalities or rhetorical phrases unnourished by the particularities of specific situations." *Id.* at 403.

60. In *Usery*, the Supreme Court found that Congress may not exercise its power over interstate commerce to regulate state functions in the same manner it is allowed to control private enterprise.

It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

426 U.S. at 845. The fact that a state function is involved, however, does not end the analysis. That function must comply with additional requirements to escape federal

merely associated with the disputed function; limits must be placed upon the reach of alleged state interests. To allow the "state interest" to reach those activities not furnished by the state merely because they affect certain state functions would, like the "public service" analysis, be potentially limitless in application.<sup>61</sup> However, if the service is furnished by the state and would not have been available to the community unless it was state supported, *i.e.*, it is not economically feasible or the private sector is unwilling to undertake the business, then the argument for enforcing the state statute is heightened. In *United Transportation Union*, the LIRR was a state owned and operated public commuter railroad. Therefore, the first requirement would have been satisfied.

Second, where the state-provided service is revenue generating, such revenues must be derived primarily from intrastate commerce to exempt the function from federal regulation. In *United Transportation Union*, well over eighty percent of the revenues derived from the LIRR were generated by intrastate activities. Therefore, this factor weighed in favor of prohibiting federal regulation of the state service. The entity having the

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preemption.

61. Due to apprehension that *Usery* will lead to a greater expansion of essential state functions, the court in *United Transportation Union* and most commentators have shied away from allowing an activity considered a "public service" to escape federal regulation for that reason alone. "Thus, it is in the area of federal regulatory power in which an extension of the . . . [*Usery*] decision has the greatest potential for future application." Matsumoto, *supra* note 7, at 80. An "essential public service" test was rejected in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974), which determined that since the "supplying of a utility service is not traditionally the exclusive prerogative of the State," there was not the requisite state action, even though the privately owned and operated utility was subject to extensive state regulation. Only those activities which are or may become a state function, subject to the clarifications mentioned above, should be protected from federal intervention. This does not include those enterprises in which the state is only provisionally involved.

It is clear that there is no closed class or category of businesses "affected" with a public interest . . . . The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test

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*Nebbia v. New York*, 291 U.S. 502, 536 (1934). This in itself indicates the numerous functions the "public service" test could encompass. The court in *United Transportation Union* did, in fact, discuss the "public service" analysis when considering the "essentiality" of the state function—its need by the public and availability in the marketplace. See 634 F.2d at 29.

dominant economic interest in the activity will certainly have adequate justification for the furtherance and protection of its interests.

Third, the state service should not be exempt from federal regulation where a comparable service is available within the private sector. If a similar service is furnished by private enterprise and is readily available to the public sector, then the state function is unlikely to be characterized as essential. The state should not be allowed undue advantages when in direct competition with private enterprise. If a state were allowed to restrict the activities of public employees, and similarly situated private businesses could not regulate the activities of their employees in the same manner, the resulting benefit to the state and disparate treatment of public and private employees is obvious. In *United Transportation Union*, the LIRR was the only service of its kind available. The service was provided solely by the state. Additionally, the LIRR was converted to a public corporation, indicating that it was no longer practical for the private sector (or they were unwilling) to provide a similar service.

Fourth, if the public service were discontinued, the adjustments necessary for the state to furnish an alternative service must be impractical or costly, and the economic and social impact on the community extensive. This factor requires an examination of the physical and economic, as well as the less tangible, effects upon the public and private entities involved with or connected to the service. If the physical modifications necessary to provide a substitute for the public service are impractical and costly, then continuation of the public service, regulated by the state, may be the most viable choice.<sup>62</sup> The economic considerations and societal involvement with the public service and its operation often directly influence or determine the public support for and use of the facility. Consideration, then, should be given to whether the economic loss to the state and community would be substantial should the federal regulation be enforced.<sup>63</sup>

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62. William J. Ronan, then Chairman of the New York State Metropolitan Commuter Transit Authority, indicated that without the LIRR, ten blocks in the center of New York City would be necessary just for parking and that it would necessitate twenty-six lanes of expressway, each way, to handle traffic. See *Effect of Railroad Mergers on Commuter Transportation: Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 1138 (1970).

63. Due to an eleven day transit strike in April of 1980, New York City lost an estimated \$1.1 billion, and private business lost \$100 million per day. Cirrillo, *New*

Where the economic prosperity of the private and public segments of the state are materially enhanced through state regulation, or would suffer substantial setbacks through assertion of the federal interest, then the state interest should prevail. Moreover, special consideration should be given to those benefits not easily measured in economic terms that are derived from the respective interests. Those benefits might include the convenience that the presence of the service furnishes to the public sector, the ease of administration over the service as opposed to possible alternatives, and other beneficial aspects, if any, gained from the service. If the use by the public is not substantial, then the effect on the community if the service were discontinued, at least temporarily, would probably not be prohibitive. In that circumstance, the public service should potentially be subject to federal regulation. Indeed, the amount of use is an excellent indication of the community support for the service in weighing the need for state, as opposed to federal, regulation thereof. As indicated previously, in *United Transportation Union* the impact on the metropolitan area would have been material had the LIRR ceased operation even temporarily.

Fifth, if the state interest best serves the public welfare, in recognition of the requirements of public policy, then the federal regulation should give deference to the state interest. In *United Transportation Union*, the purposes behind the federal and state regulations were similar; so this factor was not determinative. However, in other cases involving federal and state legislation, the purposes of the respective regulations may differ substantially. In those instances, examination of the legislative background is important because legislation usually represents an effort to implement public policy.<sup>64</sup> Public policy requires that the basic needs of the populace be provided for and that the "essential" services which connect the metropolitan area continue uninterrupted. This is true even though that policy is in derogation of the interests of a certain group, such as the railroad employees in the instant case. Further, the mere existence

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*Yorkers Ride Again*, ASSOCIATED PRESS, April 12, 1980. Also, the impact of the transit strike on New York City in 1966 caused substantial business losses, traffic congestion, and disruption of the public sector. N.Y. Times, Jan. 16, 1966, § 1, at 1, col. 1.

64. "Because integral operations represent policy choices about 'the manner in which [states] deliver . . . governmental services which their citizens require,' . . . [Congressional legislation] which necessarily affects policy choices, is integral to the operation of state and local governments." Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 U.C.L.A. L. REV. 1301, 1338 (1978) (footnote omitted).



of a federal regulation should not conclude the issue; rather the state interest must be considered as part of the analysis.<sup>65</sup> The regulation should be related to a legitimate state interest,<sup>66</sup> and the means chosen to effectuate that interest should be considered.<sup>67</sup>

Finally, the result sought through implementation of the federal regulatory scheme should be taken into consideration. When enforcement of the state regulation will necessarily circumvent some federal act, a determination should be made as to whether that displacement is warranted or whether there has been an undue interference with the federal regulatory scheme.<sup>68</sup> This fifth factor should serve to gather the determinations made under the previous factors and ensure that each of the pertinent elements is fairly considered. Therefore, if the federal government's interest in preserving the rights of those involved with the public service can be served through alternative means, such as the collective bargaining procedures available in *United Transportation Union*, then the federal scheme of regulation would not be improperly displaced by the enforcement of the state statute.

### III. CONCLUSION

In a government such as ours, the size and reach of the federal interest should not obscure the limited, though consequential, state interest.<sup>69</sup> In determining whether state activities are exempt from federal regulation, the courts should weigh the advantages of allowing diverse responses to local needs against the

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65. "[A] State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy, . . . but is itself a coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities v. Usery*, 426 U.S. at 849 (citations omitted).

66. See, e.g., *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186 (1950); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 770 (1945).

67. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 341 (1978).

68. "States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status." *Fry v. United States*, 421 U.S. 542, 548 (1975) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196-97 (1968)) (emphasis added).

69. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 351 (1943). The decision in *Parker* was firmly grounded on principles of federalism. See also *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 398, 438 (1978) (Stewart, J., dissenting).

federal interest in the unimpeded flow of interstate commerce.<sup>70</sup> It is necessary that the courts closely guard state sovereignty; "federal regulation[s] . . . should not be instruments for keeping individual states from moving ahead to meet social needs by local action."<sup>71</sup> However, while attention is given to the fulfillment of individual needs through state regulation, those needs must be fulfilled carefully in order not to inhibit Congress in its attempt to solve national problems.<sup>72</sup> The use of flexible yet clearly defined standards should simplify the analysis and enable the courts to accomplish that result.

The standards outlined above should aid courts as they attempt to determine the validity of competing state and federal interests and solve issues similar to those presented in *United Transportation Union*. The first four factors should define those activities that may be properly exempt from federal intervention. The final factor serves to balance the federal and state interests and ensure that fair consideration is given to the particular facts of the case before a decision is rendered. Therefore, even though a material segment of a public service may affect interstate commerce, if that portion does not constitute a predominant part of the overall enterprise, and the state interest in preserving the intrastate function outweighs the federal interest in regulating interstate commerce, the federal regulation should not be permitted to interfere with the state service.

Federal intervention that increases state costs, reduces state programs, causes displacement of state policies, and impairs the state's ability to structure employer-employee relationships,

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70. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318-321 (1851).

71. Linde, *Justice Douglas on Freedom in the Welfare State, Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4, 28 (1964).

72. See Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1092 (1977). The article also discusses factors which might be considered to allow a federal regulation to prevail over state interests. "A number of justifications may be available to overcome such state challenges . . . . [Where] the federal regulation clearly does not jeopardize state provision of essential services . . . [or where] the federal government is bearing any increased cost or providing an adequate substitute for the state service it is regulating," the federal interest might be determinative. *Id.* at 1096-97. This factor seems closely akin to the availability of the state provided service in the marketplace. If an alternative source for the service exists, then there is no reason to restrict the federal regulation of the state controlled public function. However, the fact that the federal government furnishes financial support should not be determinative, as such assistance exists in other areas of integral state government functions. See *National League of Cities v. Usery*, 426 U.S. at 878 (Brennan, J., dissenting).

might be impermissible interferences of state functions,<sup>73</sup> depending on the situation. Federal intervention in those cases should be regarded as the exception rather than the rule.<sup>74</sup> However, where the circumstances before the court favor the implementation of the federal regulation or some particular federal interest requires protection,<sup>75</sup> the state interest should conform to federal legislation. Therefore, if enforcement of the federal regulation would not jeopardize the state provision of "essential" services, then there would be sufficient grounds for upholding the federal interest.

The constant balancing of the competing state and federal interests enables the law to remain an important force in the development and structuring of society.<sup>76</sup> In addition, that balancing provides the courts with enough flexibility to react to historical, empirical, and social developments. Use of the suggested guidelines should complement the existing procedure by di-

73. See Horowitz, *The Autonomy of The University of California Under The State Constitution*, 25 U.C.L.A. L. REV. 23, 33 (1978).

74. See 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, 544-45 (1954). In addition, the tenth amendment, by its terms, does not prohibit certain congressional action. Rather, it is simply an example

of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.

*Fry v. United States*, 421 U.S. 542, 557 (1975) (Rehnquist, J., dissenting). Mr. Justice Rehnquist wrote the Court's opinion in *Usery*.

75. *State Dep't of Transp. v. United States*, 430 F. Supp. 823 (N.D. Ga. 1976). The federally guaranteed right of certain employees to strike in *United Transportation Union*, however, does not override the state interest in preserving the smooth operation of its mass transit system.

76. For additional insight into the support and handling of the balancing approach, see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976), and Tushnet, *supra* note 64, at 1301. Mr. Tushnet perceived the effect of *Usery* as reasserting a judicial role in protecting state and local interests against congressional intrusion.

States provide a haven for individual activity safe from overreaching by the national government. Local citizens are able to control state government more easily than national citizens can control a national government. Further, even if a local minority is oppressed, the opportunity for migration without breaking all ties to one's homeland exists where the oppressor is a local government: [but] it does not where the oppressor is the national government.

*Id.* at 1346.

recting the courts' attention to the relevant factors in each case and enabling the judiciary to reach fairly considered solutions.

*Guy P. Kroesche*