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RCRA's State Program Provisions and the Tenth Amendment: Coercion or Cooperation?

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA)\(^1\) to provide for improved management and control of hazardous wastes. RCRA requires monitoring of hazardous wastes from point of generation to point of disposal and regulates treatment, storage, and disposal of such materials.\(^2\) The Act seeks to establish nationally uniform standards for hazardous waste control,\(^3\) while placing primary responsibility for enforcement of those standards on the states rather than the Federal Government.\(^4\) RCRA directly regulates hazardous wastes within the states\(^5\) but allows states to develop their own programs, which, if approved by the Environmental Protection Agency (EPA), will operate in lieu of federal regulation.\(^6\) To obtain EPA approval, state programs must meet certain minimum requirements contained in EPA regulations.\(^7\) RCRA also authorizes federal grants to states to encourage development of state programs.\(^8\)

EPA's primary concern in developing regulations governing state

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3. At the time of RCRA's passage, "[g]reat diversity characterize[d] the approaches being taken by the several States" in regulating hazardous waste. H.R. REP. No. 1491, 94th Cong., 2d Sess. 23, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6261 [hereinafter cited as RCRA HOUSE REPORT]. Among the purposes to be served by nationally uniform regulations, the report notes that businesses will have uniform standards to meet and that states with environmentally sound laws will not drive business into other states that choose, for economic reasons, to become waste dumping grounds. *Id.* Also, overregulation in some states would discourage hazardous waste siting in those states and thereby exacerbate the existing site shortage. *Id.* B.C. ENV'TL AFF. 463, 483-84 (1980).
6. *Id.* See also 40 C.F.R. §§ 123.1-.137 (1980).
programs was to ensure effective control of hazardous wastes.\textsuperscript{9} To this end, states are encouraged to develop programs more stringent, or with a broader scope, than the minimum required by the federal regulations.\textsuperscript{10} EPA recognized, however, that state programs that are too stringent or comprehensive could prevent importation of hazardous wastes into states enacting such programs. For this reason, the EPA regulations require state programs to be "consistent with the Federal program and State programs applicable in other States" and provide that a state program will be disapproved if it "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States."\textsuperscript{11}

RCRA may present a serious constitutional issue: the Act's attempt to encourage states to develop their own hazardous waste control programs while imposing through the EPA regulations minimum requirements for such programs may violate the sovereignty guaranteed states by the tenth amendment.\textsuperscript{12} Tenth amendment claims have been mounted against similar legislative programs, in some instances with success,\textsuperscript{13} and such a challenge could be raised against RCRA. This Development considers the constitutionality of the Act's state program provisions and the EPA regulations and concludes that they do not violate the tenth amendment.

\section*{I \hfill INTRODUCTION TO TENTH AMENDMENT ANALYSIS}

Until recently, there was little doubt regarding the scope of the tenth amendment. From 1936 until 1976, "the Tenth Amendment was considered a truism and found not to contain a specific or enforceable guarantee that might check the commerce power" of Congress.\textsuperscript{14} During this period, the Supreme Court rejected several tenth amendment

\footnote{10. 40 C.F.R. \textsection 123.1(k) (1980). RCRA provides that state programs shall not be less stringent than the federal program. RCRA, \textsection 3009, 42 U.S.C. \textsection 6929 (1976).
\footnote{11. 40 C.F.R. \textsection 123.32 (1980). The latter requirement was inspired by Philadelphia v. New Jersey, 437 U.S. 617 (1978), which held that a complete ban on importation of wastes violated the commerce clause. EPA Consolidated Permit Regulations, \textit{supra} note 9, at 33,395.
\footnote{12. The tenth amendment to the U.S. Constitution reads: "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."
\footnote{13. Challenges based on the tenth amendment have been successful against certain EPA regulations promulgated under the Clean Air Act, 42 U.S.C. \textsection 1857, see note 51 \textit{infra}, and, prior to a recent decision by the Supreme Court, against the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. \textsections 1202-1328 (Supp. III 1979), see notes 62 & 88 \textit{infra}.
\footnote{14. J. \textsc{Nowak}, R. \textsc{Rotunda} & J. \textsc{Young}, \textsc{Constitutional Law} 159 (1978). \textit{See also} L. \textsc{Tribe}, \textsc{American Constitutional Law} \textsection 5-20, at 300 (1978).}
challenges to federal legislation, and its language evinced a willingness to tolerate virtually any federal intrusion into the role of the states, as long as a valid purpose underlay the federal law.\textsuperscript{15}

One case decided during this period is particularly relevant because of the similarity between the statute there challenged and the RCRA state program provisions. In \textit{Steward Machine Co. v. Davis},\textsuperscript{16} the Supreme Court upheld Title IX of the Social Security Act, which imposed a federal tax on certain private employers but allowed a credit against the tax equal to ninety percent of contributions made by the employers to a state unemployment compensation fund.\textsuperscript{17} The credit was allowed only if the state contributed to a federal unemployment trust fund subject to repayment to the states under state requisitions.\textsuperscript{18} Like the RCRA state program provisions, Title IX does not directly command states to take any affirmative action but gives states the option of developing programs that will be funded largely by conditional federal grants. Both Title IX and RCRA were enacted in response to nationwide problems irresolvable on a state-by-state basis because of economic disadvantages that would accrue to states taking regulatory action if neighboring states left their businesses unregulated or untaxed.\textsuperscript{19}

In \textit{Steward Machine}, the plaintiff challenged Title IX on several grounds, two based on the tenth amendment. First, it argued that Title IX was void because it coerced the states to develop statutory unemployment compensation funds.\textsuperscript{20} The Court rejected this argument. Noting the national nature of the unemployment problem during the

\textsuperscript{15} See, e.g., Maryland v. Wirtz, 392 U.S. 183 (1968); United States v. California, 297 U.S. 175 (1936). \textit{United States v. California} unanimously upheld application of the Federal Safety Appliance Act (provisions currently at 45 U.S.C. §§ 2, 6 (1976 & Supp. III 1979)) to a railroad run by the State of California. Although the Court noted that the state was operating the railroad without profit and recognized that it was “acting within a power reserved to the states,” 297 U.S. at 183, it rejected the state’s argument for state immunity from federal commerce power similar to the immunity from the federal taxing power enjoyed by states: “there is no such limitation on the plenary power to regulate commerce.” \textit{Id.} at 185. \textit{Maryland v. Wirtz} upheld, by a vote of six to two, the 1966 extension of the Fair Labor Standards Act, which established minimum wage and overtime pay provisions, to state schools and hospitals. 29 U.S.C. § 203(d) (1976). The Court rejected the argument that the commerce power “must yield to state sovereignty in the performance of governmental functions.” 392 U.S. at 195. \textit{Maryland v. Wirtz} was overruled, however, by National League of Cities v. Usery, 426 U.S. 833 (1976). See also Case v. Bowles, 327 U.S. 92, 101 (1946), rejecting the argument that Congress was foreclosed from interfering with “functions . . . ‘essential’ to the state government.”

\textsuperscript{16} 301 U.S. 548 (1937).
\textsuperscript{17} \textit{Id.} at 574-76.
\textsuperscript{18} \textit{Id.} at 574-78.
\textsuperscript{20} \textit{Steward Machine Co. v. Davis}, 301 U.S. 548, 578 (1937).
Depression\(^{21}\) and the consequent inability of the states to remedy the problem on their own,\(^{22}\) the Court held that the Title IX tax and credit were not weapons of coercion impairing state autonomy but rather were "inducements" to state action.\(^{23}\) Because the economic incentive for states to comply with Title IX was considerable, the Court's holding suggests a willingness to tolerate any federal influence on the states short of a direct command to take legislative action, at least where a valid purpose underlies the federal action.

The plaintiff in *Steward Machine* also contended that Title IX was unconstitutional because it called "for a surrender by the states of powers essential to their quasi-sovereign existence," including the power to decide what laws to enact.\(^{24}\) In response to this argument, the Court noted that "[a] wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books"\(^{25}\) and that "[t]he state does not bind itself to keep the law in force."\(^{26}\) Another power allegedly intruded upon was control of the state fisc; in order to be certified, state programs had to provide for payments to the federal unemployment trust fund.\(^{27}\) The Court rejected this reasoning also, noting that states consented to the payment.\(^{28}\)

Prior to 1976, *Steward Machine* and other cases had indicated that the tenth amendment posed no affirmative limitation on the commerce power.\(^{29}\) The 1976 decision in *National League of Cities v. Usery*,\(^{30}\) however, marked a radical departure from forty years of precedent.\(^{31}\) In *Usery*, the Court struck down 1974 amendments to the Fair Labor Standards Act (FLSA)\(^{32}\) that applied the minimum wage and overtime pay provisions of the Act to the states and their subdivisions.\(^{33}\) The Court had upheld application of these provisions to state hospitals and schools only eight years earlier.\(^{34}\) Although the Court recognized that Congress could regulate wage and overtime pay rates under its com-

\(^{21}\) *Id.* at 586.
\(^{22}\) *Id.* at 588.
\(^{23}\) *Id.* at 586.
\(^{24}\) *Id.* at 593.
\(^{25}\) *Id.* For the relevance of this observation to consideration of RCRA's constitutionality, see note 57 *infra*.
\(^{26}\) 301 U.S. at 594.
\(^{27}\) *Id.* at 575 n.1.
\(^{28}\) *Id.* at 596.
\(^{29}\) See sources cited in note 14 *supra*.
\(^{30}\) 426 U.S. 833 (1976).
\(^{31}\) In dissent, Justice Brennan sharply criticized this wholesale departure from precedent. *See id.* at 861-62.
\(^{33}\) *National League of Cities v. Usery*, 426 U.S. at 836.
merce clause power, it carved out an exception to this power where its exercise would "impermissibly interfere with the integral governmental operations" of the states and their subdivisions. Justice Rehnquist's majority opinion did not precisely state the grounds on which the FLSA amendments violated the tenth amendment. The Court's holding may have been based on either or, more likely, both of two factors: that the Act impermissibly coerced the states by requiring that they take certain action, and that it impermissibly interfered with functions traditionally left to the states, such as providing police and fire protection.

Before Usery, it could have been said with some assurance that RCRA was free of tenth amendment infirmity. Following that decision, however, the constitutionality of the Act's attempt to induce state action and the regulations' state programs limitations is less certain.

II
CONSTITUTIONALITY OF RCRA

A. Commerce and Spending Powers

A state challenging RCRA's constitutionality would not have to reach the tenth amendment question if it could establish that Congress lacked the commerce or spending power to regulate hazardous wastes. Under current commerce clause doctrine, Congress may validly regulate an activity if the activity can be characterized as interstate commerce or if the activity, even if wholly intrastate, bears "a close and substantial relation" to interstate commerce. The Supreme Court recently held that transportation of wastes constitutes commerce, and because some of the wastes subject to RCRA will pass from one state to another they are interstate commerce subject to regulation by Congress under the commerce clause. The Supreme Court recently held that transportation of wastes constitutes commerce, and because some of the wastes subject to RCRA will pass from one state to another they are interstate commerce subject to regulation by Congress under the commerce clause. Furthermore, any regulation of hazardous waste activity within the states, although wholly intrastate, would probably have a substantial effect on the interstate market so as also to fall within federal regulatory power under the commerce clause.

36. Id. at 851.
37. Id. at 847-48.
38. See id. at 845-52. A third possible reading of Usery is that it recognizes an affirmative right of the public to provision by state government of certain services. See text accompanying notes 99-101 infra.
41. See EPA Consolidated Permit Regulations, supra note 9, at 33,395.
42. For a more detailed discussion of factors strongly suggesting that Congress has the commerce power to regulate intrastate hazardous waste activity, see Stewart, Pyramids of
Because Congress may validly regulate hazardous wastes under the commerce clause, it may accomplish the same regulation indirectly through the spending power, assuming such regulation is not precluded by the tenth amendment. The Supreme Court has consistently held that the spending power is at least as broad as the commerce power.

States challenging RCRA might also argue that the state program provisions constitute an invalid delegation of federal commerce power to the states. Such delegation is unconstitutional, however, only if Congress abdicates its constitutional obligation to oversee national commerce regulation. In re Rahrer early established the principle that Congress may validly authorize state regulation of interstate commerce. Similarly, Clark Distilling Co. v. Western Maryland Railway Co. recognized Congress's power "to produce cooperation between the local and national forces of government" in regulating interstate commerce. Because RCRA provides for the type of intergovernmental cooperation approved in Clark Distilling and Rahrer rather than a wholesale abdication of the legislative role by Congress, RCRA does not unconstitutionally delegate federal commerce power to the states.

B. The Tenth Amendment

Although RCRA is within Congress's general power under the commerce and spending clauses, the question remains whether it also falls within the exception to that power carved out by National League of Cities v. Usery. Usery invalidated the FLSA amendments on the ground that they "directly displaced the States' freedom to structure integral operations in areas of traditional government functions." The Usery majority did not delineate the precise contours of its holding; apparently the FLSA amendments were impermissible both because they coerced the states and because of the nature of the state operations with which they interfered. It is unclear, however, whether either of these elements—coercion or displacement of "integral" and "traditional" state functions—will alone invalidate federal


43. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 14, at 170.
44. Id.
45. 140 U.S. 545 (1891).
46. 242 U.S. 311 (1917).
47. Id. at 331. The congressional acts upheld in Rahrer and Clark Distilling authorized state regulation of liquor transported in interstate commerce by providing that liquor imported into a state would be subject to the laws of that state governing domestic liquor. In re Rahrer, 140 U.S. at 560; Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. at 321.
48. See text accompanying notes 71-72 infra.
50. Id. at 845.
legislation. *Usery* did not address this issue. Because either of these elements alone might invalidate legislation, this Development will examine them separately. The Development concludes that RCRA does not coerce the states, but that whether it impermissibly interferes with "integral operations in an area of traditional state governmental functions" is less clear.

1. Coercion of the States

RCRA's conditional grant of money to states that develop hazardous waste regulatory programs and its threat of direct federal regulation upon failure by states to develop such programs will undoubtedly prompt many states to develop their own programs. Clearly this is the result intended by Congress. *Steward Machine* suggests strongly that this attempt to prompt state action is not unconstitutional under the tenth amendment. There the Court held that Title IX of the Social Security Act did not impermissibly coerce the states, although as a practical matter economic pressure to enact a state unemployment compensation plan was considerable. *Steward Machine* indicates that federal influence or inducement of the states is permissible as long as it does not constitute an affirmative command that states take prescribed actions. Because RCRA's state program provisions, like those of Ti-

51. It seems likely that coercion alone, in the case of a direct federal mandate to states requiring them to enact a particular regulatory program, would violate the tenth amendment under current *Usery* doctrine. This point was made apparent by three circuit court cases even before *Usery*. *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), along with three other cases, considered challenges to EPA's Clean Air Act regulations, which specifically required states to enact certain regulatory programs, on the ground that they were unauthorized by the Act, or, in the alternative, that they were unconstitutional under the tenth amendment. The Courts of Appeals for the Fourth Circuit in the *Maryland* case and the Ninth Circuit in *EPA v. Brown*, 521 F.2d 827 (9th Cir. 1975), refusing to read the Act in a fashion that would make it unconstitutional, found that the regulations were not authorized by the Act. These decisions cast serious doubt on the constitutionality of federal directives requiring states to take prescribed legislative action. *District of Columbia v. Train*, 521 F.2d 971 (2d Cir. 1975), was also decided largely on statutory grounds but expressly held that the regulations were unconstitutional under the tenth amendment. *Id.* at 994. *Maryland*, *Brown*, and *Train* were vacated in *EPA v. Brown*, 431 U.S. 99 (1977), when the EPA Administrator conceded the invalidity of the regulations. *Id.* at 103. One other circuit court case, *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974), had held that the regulations were both authorized by the Act and constitutional.


55. *See id.* at 587.

56. *United States v. Butler*, 297 U.S. 1 (1936), might support a different conclusion. There the Court struck down provisions of the Agricultural Adjustment Act that authorized the Secretary of Agriculture to pay sums to farmers who agreed to limit farm production. Funds for these payments were generated by a special tax on processors of certain products. *Id.* at 55-56. One processor argued that this tax was an unconstitutional intrusion by the Federal Government into matters reserved to the states. *Id.* at 29 (plaintiff's oral argument).
tle IX, contain no such affirmative requirement, under *Steward Machine* RCRA does not unconstitutionally coerce the states.57

The *Usery* opinion does not call for a different conclusion. Justice Rehnquist stressed that the FLSA amendments spoke "directly to the States qua States"58 by requiring that they take the prescribed action of paying minimum wage and overtime compensation to state employees. The majority noted that the amendments operated "directly [to] displace the States' freedom to structure" their operations.59 Thus, the *Usery* Court found in the FLSA amendments not merely influence or inducement but direct coercion of states of the type that the *Steward Machine* Court indicated would be impermissible.60 As Professor Choper has noted, *Usery* "is specifically limited to . . . direct federal regulation of the 'States qua States'";61 because RCRA, in contrast, employs optional state program provisions, it is distinguishable from the FLSA amendments.62 Indeed, the *Usery* majority implicitly recog-

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The Government responded that the program raised revenue with which the Secretary would purchase voluntary compliance with the production limits, but the Court disagreed, characterizing the program as "coercion by economic pressure" and noting that "[t]he asserted power of choice is illusory." *Id.* at 71. The Court further held that even if the plan were purely voluntary, it would nevertheless fail because it was a "scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." *Id.* at 72.

The *Steward Machine* decision, however, immediately cast doubt on the reliability of *Butler*; the *Steward Machine* Court noted that *Butler* was decided by "a divided court, a minority taking the view that the objections were untenable." *Steward Machine Co. v. Davis*, 301 U.S. at 592. As Professor Tribe has noted, the Court "has effectively ignored Butler in judging the limits of congressional spending power" since *Steward Machine*. L. TRIBE, supra note 14, at 249.

57. It might be argued that the coercive effect of RCRA is greater than that of Title IX because states failing to develop programs face not only a denial of conditional funds but also the threat of direct regulation of hazardous wastes within the state's boundaries. Similarly, it might be argued that RCRA involves a more substantial interference with state functions than did Title IX because Title IX gave "[a] wide range of judgment . . . to the several states as to the particular type of statute to be spread upon their books." *Steward Machine Co. v. Davis*, 301 U.S. at 548. The discretion left to states that choose to enact a state program pursuant to RCRA is limited by the requirement that they be consistent with federal and other state programs, 40 C.F.R. § 123.32 (1980), that they impose no unreasonable restrictions on interstate movement of hazardous wastes, *id.* § 123.32(a), and that they comply with the specific requirements of the EPA regulations, *id.* §§ 123.33-.39. Even if these observations are accurate, however, RCRA still does not involve the type of direct coercion that *Steward Machine* spoke of as impermissible. Also, the RCRA regulations leave a certain range of choice to the states regarding the exact parameters of their state programs. See *EPA Consolidated Permit Regulations*, supra note 9, at 33,377.


59. *Id.* at 852.

60. See text accompanying notes 20-23 supra.


62. In two cases involving the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1202-1228 (Supp. III 1979), relying exclusively on *Usery*, the lower
nized such a distinction: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted under other sections of the Constitution such as the spending power."\(^{63}\)

The policy concerns underlying *Steward Machine* and *Usery* also support the conclusion that RCRA does not impermissibly coerce the states. As demonstrated above, the two cases were in agreement that federal mandates to states are impermissible, at least insofar as the action to be taken is important to the states' operations.\(^{64}\) The policy reasons for this unwillingness to tolerate direct mandates are difficult to identify, however. Justice Rehnquist was particularly cryptic on this point; as Professor Barber has noted, he seems to say that "state sovereignty is an end in itself"\(^{65}\) without analyzing the reasons for this view. Nevertheless, several concerns that may underlie the disapproval of federal directives to the states can be identified, and none of these appears to call for disapproval of RCRA's attempt to encourage development of state programs.

First, the *Usery* and *Steward Machine* Courts may have taken the view that state sovereignty plays an important role in the federal system as a check upon the power of the Federal Government. While neither opinion directly advances this rationale, Justice Rehnquist's emphasis

courts refused to draw a similar distinction. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425 (W.D. Va. 1980), *rev'd*, 49 U.S.L.W. 4654 (1981); Indiana v. Andrus, 14 ERC 1769 (S.D. Ind. 1980), *rev'd*, 49 U.S.L.W. 4667 (1981). The courts in *Virginia Surface Mining* and *Indiana v. Andrus* found various provisions of SMCRA unconstitutional on tenth amendment grounds. SMCRA contains state program provisions very similar to those of RCRA; the Act gives states the option of developing their own programs to operate in lieu of the federal program. 30 U.S.C. § 1253 (Supp. III 1979). Neither court found this persuasive. Stressing that a state program, to obtain federal authorization, had to be in compliance with "mandatory standards," the *Virginia Surface Mining* court found that "[t]he choice that is purportedly given is no choice at all." Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. at 432. *See also* Indiana v. Andrus, 14 ERC at 1778. Both *Virginia Surface Mining* and *Indiana v. Andrus* based their findings of unconstitutionality also on an interference with traditional aspects of state sovereignty; this concept is considered in section II.B.2 *infra*. These two cases were reversed by the Supreme Court in recent companion opinions. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 49 U.S.L.W. 4654 (1981); Hodel v. Indiana, 49 U.S.L.W. 4667 (1981). The District Court for the Southern District of Iowa rejected a similar constitutional challenge to SMCRA. Star Coal Co. v. Andrus, 14 ERC 1325 (S.D. Iowa 1980).

\(^{63}\) National League of Cities v. Usery, 426 U.S. at 852 n.17.

\(^{64}\) The difference in the results of the two cases probably stems from two main factors. First, *Steward Machine*, unlike *Usery*, did not involve such a direct command to the states. Second, the problem addressed in *Steward Machine* was plainly national in scope and did not implicate conflicting local interests of the same variety and magnitude as those involved in *Usery*. The latter distinction is considered in notes 93-98 *infra* and accompanying text.

\(^{65}\) Barber, *National League of Cities: New Meaning for the Tenth Amendment?*, 1976 *SUP. CT. REV.* 161, 179. *See also* National League of Cities v. Usery, 426 U.S. at 872 (Brennan, J., dissenting) (criticizing "the paucity of legal reasoning or principle justifying today's result").
in Usery on the "essential role of the States in our federal system" may contemplate such a value. If limiting federal power is the rationale underlying Usery and Steward Machine, however, it is unclear why the Court did not simply find that the regulations in question were not within the constitutional grant of power under the commerce clause. If Usery has no connection with the Court's view of the proper interpretation of the commerce clause, then the rationale of that decision is probably a concern with preserving certain attributes of state power, rather than one of limiting the power of the Federal Government.

In any case, RCRA does not seem to present a situation in which this "checking power" of the states need be asserted to thwart federal legislative efforts. Because RCRA gives the states the opportunity—in fact, invites them—to assume regulatory authority in an area that Congress could regulate directly, without state participation, under the commerce power, the Act cannot reasonably be viewed as a threat to state sovereignty. Although requirements for EPA authorization of state programs limit the states' regulatory options, the states have significant discretion to choose the form of their state programs. The Steward Machine Court stressed a similar observation about Title IX in upholding that program. It should not be presumed that Usery calls for a checking of federal regulatory power in situations where, unlike the situation presented in that case, there is no direct federal attempt to require particular state action.

A second concern that may have underlain Usery and Steward Machine is preservation of comity—cooperation between states and the Federal Government. RCRA's deliberate attempt to prompt state action may be resented by state and local governments. Similarly, the restrictions imposed by the regulations, particularly the provision preventing state-imposed limits on importation of hazardous wastes, 66. National League of Cities v. Usery, 426 U.S. at 844. Justice Rehnquist also quoted Metcalf & Edy v. Mitchell, 269 U.S. 514, 523 (1926), for the proposition that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." 67. That hazardous waste regulation is not within Congress's commerce power is an unlikely reading of Usery. Although the Court did state that the FLSA amendments "are not within the authority granted Congress by [the commerce clause]," National League of Cities v. Usery, 426 U.S. at 852, the rest of the opinion indicates that the FLSA amendments were not within Congress's authority not because they did not constitute interstate commerce, but rather because they violated an independent constitutional principle having to do with the nature of state governments. See id. at 841, 845. The Court's recognition that the constitutionality of a regulation may turn on whether it is directed to private business or the state, id. at 845, further indicates that the nature of the regulated activity as interstate commerce was not the basis for overturning the legislation. 68. See notes 39-42 supra and accompanying text. 69. See note 57 supra. 70. See Steward Machine Co. v. Davis, 301 U.S. at 593. 71. 40 C.F.R. § 123.32. See note 11 supra and accompanying text.
may arouse state and local hostility. Yet RCRA presents less of a threat to comity than did the FLSA amendments, again because the latter specifically required the states to take a prescribed action. More importantly, the states’ option to develop their own programs constitutes a middle road between the two extremes of direct federal regulation of industry and little or no regulation at all. In this sense, RCRA may actually further state-national comity by establishing cooperation between state and national governments in shouldering the burden of hazardous waste management.72

RCRA thus does not appear to violate the tenth amendment prescription against coercive federal legislation. As noted above, Usery invalidated the FLSA amendments not solely on the ground that they required a particular state action but also because this requirement reduced the state’s ability to render certain essential services to the public.73 The decision, then, does not establish the proposition that federal legislation directly commanding the “States qua States” is invalid per se, absent concomitant displacement of certain essential state functions.

2. Interference with “Traditional and Integral” Functions of State Governments

A second challenge that could be launched against RCRA based on the tenth amendment is that either the Act’s provision for direct federal regulation of hazardous wastes or the state program limitations imposed by the regulations displace “essential” operations of state governments.74 The Steward Machine decision appeared to recognize that some federal legislative programs might interfere with state sovereignty,75 and Usery specifically held that the FLSA amendments violated the tenth amendment by displacing “the States’ freedom to structure integral operations in areas of traditional government functions.”76 Because Usery is the sole Supreme Court decision to find a federal statute unconstitutional on this ground, this discussion will focus on the principles established by that opinion as applied to RCRA.

Justice Rehnquist’s majority opinion in Usery did not make clear

72. A third value may underlie the Usery majority’s disapproval of federal directives to the states: a concern with preserving from federal interference certain basic operational functions of state governments. See note 81 infra.
73. National League of Cities v. Usery, 426 U.S. at 851. A related observation about Title IX was offered by the Steward Machine Court, which noted that “supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a co-operative endeavor to avert a common evil.” Steward Machine Co. v. Davis, 301 U.S. at 587.
74. See National League of Cities v. Usery, 426 U.S. at 842-43, 845.
75. Steward Machine Co. v. Davis, 301 U.S. at 593-98. See text accompanying notes
24-28 supra.
what criteria are to be employed in determining whether a particular federal regulation infringes on states' essential functions, and lower courts have been confused on this point. Justice Blackmun, who supplied the majority's fifth vote, expressed his belief that the majority adopted a "balancing approach." Such an approach, or at least one giving consideration to the policy underlying the Usery decision, offers a better guideline than lower court decisions for determining whether a federal statute like RCRA violates the tenth amendment. This is so largely because subsequent lower court opinions testing legislation under the tenth amendment have tended to apply a mechanical test that asks only whether the functions of states that are displaced by federal regulation may be characterized as "traditional" and "integral" to their operations. The following sections discuss how RCRA would fare under a mechanical test, such as that adopted by the lower courts, and whether it would be upheld under a more functional approach, such as the one advocated by Justice Blackmun.

a. The lower courts' mechanical test

The majority in Usery stated that a federal program will be held unconstitutional under the tenth amendment if it acts "directly to displace the States' freedom to structure integral operations in areas of traditional governmental functions." Lower courts have focused on this language and viewed the inquiry as whether a statute supplants the

77. This imprecision may have been an attempt to discourage lower courts from applying a rigid or mechanical test in deciding tenth amendment questions. If so, the attempt failed, and the vagueness of the opinion has been severely criticized by commentators. See, e.g., Choper, supra note 61, at 1596 (lamenting the "great ambiguity with which the Court phrased the scope of its ruling"); Michelman, States' Rights and States' Roles: Permutations of Sovereignty in National League of Cities v. Usery, 86 YALE L.J. 1165, 1172 (1977) ("While the Court's opinion uses the word 'integral' in at least five places to differentiate protected from unprotected state activities or 'functions,' at no point does it undertake to give content to this vague locution"); Stewart, supra note 42, at 1234 n.144 ("[The majority opinion affords painfully inadequate guidance for determining what government functions are or are not included within the protected sphere").

78. See note 88 infra and cases discussed therein.

79. Justice Blackmun candidly noted that "I may misinterpret the Court's opinion." National League of Cities v. Usery, 426 U.S. at 856 (Blackmun, J., concurring). Justice Blackmun's vote was necessary to establish a five-vote majority.


81. National League of Cities v. Usery, 426 U.S. at 852. Although the Court used the term "integral" to modify "operations" rather than "functions," this distinction has been blurred by lower courts interpreting Usery. See, e.g., Amersbach v. City of Cleveland, 598 F.2d 1033, 1035-36 (6th Cir. 1979); Indiana v. Andrus, 14 ERC 1769, 1776 (S.D. Ind. 1980), rev'd, 49 U.S.L.W. 4667 (1981); Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 432 (W.D. Va. 1980), rev'd, 49 U.S.L.W. 4654 (1981). This Development will therefore consider the term "integral" as applied both to the operations and to the functions affected by RCRA.
role of the states in an area that is integral to the states' governmental operations and traditionally within the scope of state governmental power.\textsuperscript{82}

It is difficult to determine whether legislating to protect the environment or, more narrowly, to control hazardous wastes is an "integral" governmental function. The \textit{Usery} Court did not attempt to clarify the meaning of the term "integral" beyond stating its conclusion that state employment decisions "in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation" are integral operations of state governments.\textsuperscript{83} The term is not subject to a definition that would yield a clear result upon application to particular facts.

Arguably control of hazardous wastes is less integral to state governments' operations than provision of services such as fire and police protection. Presumably the importance ascribed by the Court to these latter services stems from the fact that they protect the community from serious harm, such as death, injury, or loss of property. While environmental regulation also protects health and safety, its effects are not as critical to a community's welfare, or at least they are not considered as critical by the states themselves. That prior to the passage of RCRA only seven states had enacted comprehensive hazardous waste regulations\textsuperscript{84} supports this conclusion. Only a very liberal definition of the term "integral" would include a governmental power that the great majority of states have not chosen to exercise.

Whether a state function is "traditional" is a question subject to more concrete analysis; a function is "traditional" if the states have regularly sought to regulate the activity at issue.\textsuperscript{85} Before determining whether the function displaced by RCRA is traditional, however, it is necessary to define the function. If the function displaced by RCRA is defined narrowly as comprehensive regulation of hazardous wastes, the fact that only seven states have enacted such regulation\textsuperscript{86} suggests that

\textsuperscript{82} The court in \textit{Indiana v. Andrus} applied a test in which a finding of unconstitutionality was warranted if the displaced function was either traditional or integral to a state's operations. \textit{See} 14 ERC at 1776. The ramifications of requiring only that the function be either integral or traditional are considerable. Because \textit{Usery} stated explicitly that the displaced governmental operations were integral to traditional state functions, however, \textit{National League of Cities v. Usery}, 426 U.S. at 852, reading the case to require that only one of these elements be present is a questionable interpretation.

\textsuperscript{83} \textit{National League of Cities v. Usery}, 426 U.S. at 851.


\textsuperscript{85} The \textit{Usery} court apparently meant the term "traditional" to refer to established state practices. \textit{See}, e.g., \textit{National League of Cities v. Usery}, 426 U.S. at 850 (noting that the FLSA amendments would disrupt "practices which have long been commonly accepted among local governments of this Nation").

such regulation is not within the states' traditional functions. Alternatively, however, it might be argued that the decision by forty-three states not to regulate hazardous waste itself constitutes an exercise of decisionmaking power traditionally left open to the states. Moreover, if the function is defined more broadly as any regulation of environmental concerns, or even as regulation of health and safety, then the conclusion that such functions traditionally have been regulated by states, under their police powers, is more compelling.

The narrower definition of the state function displaced by RCRA is preferable. A broad definition, such as "health and safety," would invite wholesale invalidation of federal health and safety programs,

87. Although few states have enacted the type of comprehensive controls present in RCRA, nearly all have exercised some control over hazardous wastes. It could be argued that this limited action, or even the decision not to regulate more comprehensively, negates the conclusion that environmental regulation is not an integral state activity. While this argument is not a strong one, the uncertainty concerning the precise boundaries of the "integral" requirement might allow a court, without obvious disingenuity, to characterize the environmental regulation displaced by RCRA as an integral state function.

88. The district courts in Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 435 (W.D. Va. 1980), rev'd on other grounds, 49 U.S.L.W. 4654 (1981), and Indiana v. Andrus, 14 ERC 1769, 1781 (S.D. Ind. 1980), rev'd on other grounds, 49 U.S.L.W. 4667 (1981), however, found that the regulation of similar environmental concerns does constitute a traditional and integral governmental function within the meaning of Usery. At issue in these cases was the constitutionality of various provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1202-1328 (Supp. III 1979), a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Id. § 1202(a).

The Virginia Surface Mining court found that "[t]he power to adopt and enforce laws affecting the use of private, nonfederal land has traditionally and historically been within the police powers of the respective states," 483 F. Supp. at 433, and that "[s]tate regulation of land use . . . 'provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens,'" ibid. (quoting National League of Cities v. Usery, 426 U.S. at 855). (For a description of the particular aspects of the Act that were challenged, see Indiana v. Andrus, 14 ERC at 1779.) The Indiana v. Andrus court made the similar finding that "[l]and use control and planning is a traditional or integral governmental function or area of State sovereignty." 14 ERC at 1779.

These findings are faulty. First, the courts in these cases relied on decisions involving zoning laws in particular and not land use regulations generally. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. at 433 (citing Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) and Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)); Indiana v. Andrus, 14 ERC at 1779, (citing Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975)). This reliance on zoning principles is inappropriate, unless based on a broad definition of the state function involved in land use regulation. See note 89 infra and accompanying text for the proposition that such a broad definition is unwarranted. Moreover, since none of the cited cases involved a tenth amendment question, there is no reason to conclude that those cases stood for the proposition even that zoning is traditional and integral within the meaning of Usery.

More importantly, even if the zoning law cases support a finding that SMCRA usurps the traditional and integral functions of state governments, these cases are inapplicable to RCRA. Hazardous waste controls are distinguishable from simple zoning regulation and surface mining controls, both of which directly control use of land. Unlike the latter types of controls, hazardous waste regulations directly control the products of industry and only indirectly affect land.
since nearly all such programs affect the ability of states to meet health and safety goals. Further, *Usery* itself characterized the state functions displaced by the FLSA amendments very narrowly,\(^8\) and thus a broad definition of state function would be unwarranted by that decision.

b. A more functional approach

The above application of the lower courts' traditional-and-integral-functions test leads to the conclusion that RCRA does not violate the tenth amendment. As noted above, however, this test is unsatisfactory because its parameters are imprecise and, more significantly, because it focuses on the language of *Usery* and overlooks the policy considerations underlying the decision. An approach like that suggested by Justice Blackmun, which is more cognizant of the policies the Court sought to implement, is a more rational method of determining whether RCRA impermissibly intrudes on the role of the states in our federal system. Although Justice Blackmun did not explain in detail how the balancing approach he recommended should be applied, its operation seems clear enough: a federal regulation is unconstitutional under the tenth amendment only if the states' interest in freedom from that regulation is found to outweigh the national interest served by it.

It is easy to identify the federal interests served by RCRA. Before RCRA, efforts of the individual states comprehensively to control the treatment, storage, and disposal of hazardous wastes were sparse and largely ineffectual.\(^9\) Because states were unwilling to impose strict regulatory measures for fear that doing so would drive needed industry into states with less stringent controls, a nationally uniform system of regulation was necessary.\(^9\) At the same time, as Professor Stewart has noted, "because of the nation's size and geographical diversity, the close interrelation between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources," the Federal Government "is dependent upon state and local authorities to implement" national environmental policies.\(^9\)

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89. After describing with great particularity the curtailments in services necessitated by the FLSA amendments, *see* National League of Cities v. *Usery*, 426 U.S. at 846-47, the Court stated that the amendments would

significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.

*Id.* at 851.


The national interest served by RCRA is thus a combination of two factors: the need for some type of hazardous waste regulation and the disparity in probable effectiveness between a nationally uniform system and the systems that had developed, or could be expected to develop, from the individual efforts of the states. Under this test, the federal interest justifying RCRA is considerable.

Identifying states' interests is more difficult. Examination of Usery discloses several policy considerations that may have motivated the Court to conclude that state interests were paramount in that case. One interpretation of Usery posits that the tenth amendment is concerned with the relative effectiveness of different levels of government—state and national—in particular areas of legislative concern. Professor Choper has argued that "[t]he functional, borderline question posed by federalism disputes is one of comparative skill and effectiveness of governmental levels: in a word, an issue of practicability."93 The states' interest that must be weighed against national concerns, then, is that of achieving efficient regulation at the state level. Thus, in areas where national uniformity is necessary for effective regulation federal controls are valid, but federal regulation in areas that do not require uniformity or otherwise depend for their effective regulation on national control is invalid under the tenth amendment.94

The facts in Usery called for a difficult application of the above test, because regulation of the wages of state employees involved concerns of national dimension—assuring equal treatment of government and private employees—and a conflicting local concern—ensuring provision of governmental services. Many cases would be resolved more easily under this test of relative governmental efficiency, however, and RCRA presents one such case. As noted above, the hazardous waste problem is of national dimension and cannot be solved effectively without a nationally uniform regulatory scheme.95 While the states are undoubtedly concerned about the quality of their environments, national legislation furthers rather than frustrates their objective of protecting the environment. Indeed, when Justice Blackmun suggested in Usery that a balancing approach be employed to test the constitutionality of

93. Choper, supra note 61, at 1556. See also id. at 1614.
94. A similar test was employed in several pre-1945 commerce clause cases presenting the issue whether state statutes, in the absence of a federal law preempting state legislation, intruded unconstitutionally on the commerce powers of Congress. See, e.g., Leisy v. Hardin, 135 U.S. 100 (1890); Cooley v. Board of Wardens, 53 U.S. (12 How.) 229 (1851). These cases held that states may constitutionally regulate activities of local, as opposed to national, concern. Usery takes this principle a step further, concluding that where the local concern rises to some threshold level of importance, the states' power to regulate cannot constitutionally be preempted by federal legislation.
federal regulation under the tenth amendment, he specifically indicated his belief that the majority "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."96

At first glance, the cost states must bear in establishing and enforcing state programs for hazardous waste regulation under RCRA might be seen as a local concern that conflicts with the national interest in uniformity. This factor is mitigated, however, by RCRA's provision for federal reimbursement of states for the costs of approved state programs.97 States might also be concerned with the costs industries must bear in complying with RCRA, which presumably will be passed on to the states themselves through a decrease in taxable revenues, and to the states' citizens through higher prices. This economic interest is not of the type or magnitude that *Usery* sought to shield from federal interference. In *Usery*, the Court explicitly acknowledged Congress's broad power to regulate economic concerns and distinguished the FLSA amendments from statutes whose economic impact falls on private industry.98

A second interpretation of *Usery*, suggested by Professor Tribe, is that the Court was concerned not with the rights of states as political entities *per se*, but rather the rights of citizens "to decent levels of affirmative governmental protection" by their state governments.99 Under this interpretation, certain services, such as police and fire protection, are so identified with state governments that federal interference with provision of these services is an unconstitutional denial of citizens' rights. While Professor Tribe acknowledges that this is not a likely reading of *Usery*,100 his viewpoint is not without support, for Justice Rehnquist repeatedly referred to the impact of the FLSA amendments on the provision of such services.101

RCRA does not pose a significant threat to this sort of interest. First, the provision of environmental regulation is not a governmental service as such and thus arguably is not within the ambit of activity protected in *Usery*.102 Even if the notion of governmental provided

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102. Even the district court in *Virginia Surface Mining*, which found land use regulation to be a traditional and integral governmental function within the meaning of *Usery*, see note 88 *supra*, acknowledged that "[s]tate regulation of land use is in a different category" than
services is viewed broadly as encompassing environmental regulation, RCRA does not interfere with the provision of that service. The only governmental service directly displaced by the operation of RCRA is the legislative provision of hazardous waste regulations. Unlike the FLSA amendments in Usery, however, RCRA does not interfere with this service but rather transfers responsibility for its provision to the national government. Moreover, the transfer is only partial, since state legislatures may continue to participate in hazardous waste regulation through development and adoption of state programs. Because RCRA will result in increased hazardous waste regulation, it would seem to further rather than hinder the public's interest in governmental services.

There are two responses to the view that RCRA impedes no interest of citizens in state-provided services. First, it may be argued that RCRA infringes the interests of some state citizens in having their state governments enact no hazardous waste regulations. Citizens concerned more with the costs of such regulation than with its benefits might assert such an interest, as would affected industry. While this response refutes an assumption apparently made by Professor Tribe—that the public is uniformly interested in receiving certain governmental services—it does not negate the conclusion that RCRA furthers the interest of state residents in hazardous waste regulation, because a majority of state residents have an interest in such regulation.103

Second, it could be argued that RCRA will indirectly effect a reduction in the provision of other governmental services, due to the costs of maintaining a state program. Although this argument has received some judicial recognition,104 it is weak. The argument overlooks the fact that these costs were incurred voluntarily by the states and that federal grants under RCRA will largely offset the costs of developing and administering state programs. Moreover, the argument proves too much; virtually any federal statute imposes costs on the states, and a great body of federal laws could be invalidated if the indirect effect of such costs on the provision of governmental services were found to violate the tenth amendment.105 Because Usery involved a federal pro-

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103. Because few states have enacted such regulations, it might be argued that a majority of state citizens, or at least a majority of their representatives in state legislatures, are not interested in such regulation. This view, however, overlooks two important facts: economic concerns stifled attempts by individual states to regulate hazardous wastes, see note 3 supra, and the national representatives of the public did approve such regulation by enacting RCRA.

104. The district court's findings Indiana v. Andrus, 14 ERC at 1777, strongly indicated that a reduction in the type of essential governmental services in Usery, such as fire and police protection, was likely to result from the loss of tax revenues effected by SMCRA.

105. Considering this point, Professor Tribe noted that "almost every act of the Execu-
gram that directly and deliberately increased the costs of state services, it seems unwarranted to extend that decision to cover a case of indirect cost increase.

CONCLUSION

RCRA does not appear to violate tenth amendment proscriptions against national coercion of the states or national interference with essential functions of the state governments. A finding that RCRA is within the proper scope of Congress' commerce and spending powers would also be consistent with the legitimate and important policy objective of protecting the environment. Given the confines on federal commerce power imposed by *Usery*, the joint state and national program provision of RCRA offers our best hope of providing for effective environmental regulation. Because Congress is forbidden by current tenth amendment doctrine from mandating that states take regulatory action and lacks the practical ability effectively to implement and enforce environmental controls itself, it may have no real alternatives to a RCRA-type program. It seems unlikely that the authors of the tenth amendment would have intended to preclude our best hope for solving environmental problems of such a serious nature and national scope.

ADDENDUM

On June 15, 1981, while this Development was being printed, the Supreme Court handed down decisions in *Hodel v. Virginia Surface Mining & Reclamation Association* and *Hodel v. Indiana*. These companion opinions reversed two district court cases discussed above, which had held portions of the Surface Mining Control and Reclamation Act unconstitutional under the tenth amendment. The Court's decisions in these two cases makes more likely the conclusion of Congress may have some indirect impact on the economic well-being of state citizens and local industries, and therefore on the revenues available to the states and cities to provide basic services. Tribe, supra note 99, at 1092. He suggested, therefore, that *Usery* should extend only to enactments specifically "directed to, and directly increasing the costs of, essential service provision." *Id.* at 1094.

109. See notes 62 & 88 supra.
111. The Court also considered the district court findings that SMCRA violated the commerce clause and fifth amendment. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 49 U.S.L.W. at 4654.
112. *Hodel v. Indiana* incorporates the reasoning of the *Hodel v. Virginia Surface Mining* opinion on the tenth amendment issue, 49 U.S.L.W. at 4671, and reference will thus be made here to the latter decision.
clusion reached above that RCRA does not impermissibly coerce state action and thus does not violate the tenth amendment.

In *Hodel v. Virginia Surface Mining* the Court held that, under *Usery*, a federal statute violates the tenth amendment only if each of three conditions is met: the statute must regulate the "'States as States'"; it "must address matters that are indisputably 'attributes of state sovereignty'"; and it must threaten the ability of states "'to structure integral operations in areas of traditional functions.'" In considering a challenge to SMCRA's state program provisions—which is very similar to that employed by RCRA—the Court addressed only the first of these requirements. The Court found that the state program provisions did not regulate the states as states because the Act regulates the activities of private individuals rather than state governments and because states "are not compelled" to participate.

Rather than coercing states to act, the Court found, the Act "establishes a program of cooperative federalism" in addressing environmental concerns.

Because of the close similarity of the state program provisions of SMCRA and RCRA, the Court's approval of SMCRA's program in *Hodel v. Virginia Surface Mining* and *Hodel v. Indiana* strongly suggests that RCRA also does not impermissibly coerce the states. Under the opinions' holding that a finding of coercion is necessary to hold a statute unconstitutional under the tenth amendment, it follows that RCRA should not be found to violate that constitutional provision.

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113. See Sections II.B.1 & .2 *supra*.
115. *Id.*, quoting *Usery*, 426 U.S. at 845.
117. See note 88 *supra*.
118. 49 U.S.L.W. at 4661.
119. *Id.* at 4660.
120. *Id*.
121. See note 112 *supra*. 