National Cooperative Highway Research Program

RESEARCH RESULTS DIGEST

DIGEST 136 - DECEMBER 1982

Areas of Interest: 12 planning, 14 finance, 70 transportation law (1 highway transportation)

State Highway Programs Versus the Spending Powers of Congress

A report prepared under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs, for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by Walter A. McFarlane. Larry W. Thomas, TRB Counsel for Legal Research, is principal investigator, serving under the Special Technical Activities Division of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report deals with conditions and limitations in Federal-aid programs.

This paper is included in a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, and a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981. A third addendum consisting of eight new papers, seven supplements, and an expandable binder for Volume 4 will be distributed early in 1983. The text now totals more than 2,200 pages comprising 56 papers, some 30 of which have been supplemented during the past 3 years. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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INTRODUCTION

The advent of the 1960's and 1970's ushered in an unprecedented rise of federal programs in the field of transportation. This paper attempts an evaluation of those programs as they affect the relationships between the States and the Federal Government. It is important to note that Congress' use of its spending powers has been strongly defended by the Supreme Court of the United States, as will be explained in some detail later. This paper will provide a helpful tool for those who would or must defend the federal viewpoint. However, the author has also attempted to analyze the present cases and make suggestions to aid those who do not share the views of Congress. Additionally, the discussion can apply to other grant-in-aid programs outside the field of transportation. Because the subject matter to be covered is very broad, it is impracticable to discuss every issue that may arise. This paper, nevertheless, should provide a useful overview to those attorneys who are faced with problems in this particular area of the law.

FEDERAL-AID FOR HIGHWAYS

Although the federal role in highways dates back to the embryonic stages of our government, outside of the establishment of post roads, the Cumberland Road, and federal assistance for "demonstration projects," no significant or organized federal participation existed prior to 1916.[1] In that year the federal-aid program was promulgated with the enactment of the Federal-Aid Road Act of 1916.[2] One of the significant provisions of this early act was the recognition of a Federal–State relationship, whereby the construction, ownership, and maintenance of highways was to be the responsibility of the State, subject to approval of the Secretary of Agriculture.[3] But it was not until the middle 1950's that the present, extensive federal highway program was instituted.[4] In 1956, after much debate, the Federal-Aid Highway Act of 1956 was passed, creating a trust fund for financing a vastly expanded federal highway program.[5] It is from this wellspring that the program has reached its present proportions. During the period 1957–1977, more than $93 billion were obligated for the programs financed by the Highway Trust Fund, of which $83 billion were actually spent.[6] Added to the expenditures from the general fund of some $7 billion, a total of $90 billion was expended in federal-aid for highways during this period.[7]

Under the current system the Federal Government is authorized to provide the State with funding for a large number of highway programs.[8] Depending on the particular project, federal funding varies from 50 to 95 percent of the amount[9] required to implement the program, and, in certain limited situations, the Federal Highway Administration is allowed to provide 100 percent of the necessary funding.[10]

In order to receive these federal funds, States must comply with certain requirements or conditions that promote numerous federal policies and programs: for example—the control of signs along certain highways;[11] the control of junkyards along certain highways;[12] payment of the prevailing wage on all federal-aid projects under the Davis-Bacon Act;[13] weight and size limits on Interstate highways;[14]

Highway Assistance Programs: A Historical Perspective, Congressional Budget Office, pp. 1–2 (Jan. 1978).

[2] *Id.* at 2; Pub. L. No. 64–156 (July 11, 1916).

[3] *Id.* This same policy is now expressed in 23 U.S.C. § 145. "The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program." The Federal road program in 1916 was placed under the Secretary of Agriculture; however, it was consolidated in 1966, along with certain other transportation-oriented agencies, under the Secretary of Transportation and the name of the immediately responsible agency was changed from the Bureau of Public Roads to the Federal Highway Administration. Pub. L. No. 89–670, 80 Stat. 931.

[4] President Eisenhower in a speech delivered at the Governor's Conference at Lake George, New York, in July 1954, set forth his concept of an expanded highway program. In September of that year he appointed General Lucius D. Clay to his President's Advisory Committee on a National Highway Program. *Highway Assistance Programs: A Historical Perspective, supra* note 1, at 6. The Committee, referred to as the Clay Committee, issued its report, *A Ten-Year National Highway Program, A Report to the President,* in January 1955. Two general topics were the hallmarks of that report. First, the committee noted the inadequacy of then current highways and the need for their expansion and, second, it proposed specific recommendations for the financing of the envisioned program. For specific discussions see both the Committee report and *Highway Assistance Programs: A Historical Perspective, supra* note 1, at 7–10.

[5] Pub. L. No. 70–626, 70 Stat. 373.

[6] *Highway Assistance Programs: A Historical Perspective, supra* note 1, at 76.

[7] *Id.*

[8] 23 U.S.C. § 101 *et seq.*

[9] 23 U.S.C. § 120.

[10] *Id.*

[11] 23 U.S.C. § 131.

[12] 23 U.S.C. § 136.

[13] 23 U.S.C. § 113.

[14] 23 U.S.C. § 127.

provisions for local planning in urban areas (under the three "C"—continuing, comprehensive, and cooperative—process);[15] provisions for protection of the environment;[16] protection of park lands;[17] protection of air quality;[18] and inspection and approval of construction by the Federal Highway Administration on all federal-aid projects[19]—to name but a few of the federal-aid conditions.[20]

Some argue that the rules, regulations, administrative guidelines, and procedures adopted to administer these programs demonstrate that the Federal Government has as much, if not greater, control over a federal-aid project than has the State.[21]

Even those projects for which no federal funding is available, or for which the States do not choose to use federal funding, can be impacted by federal requirements. For example, some States have adopted the relocation assistance[22] standards across the board on all State highway projects rather than pay only on federal-aid projects and thereby discriminate against displaced parties on pure State projects.[23]

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[15] 23 U.S.C. § 134. Not only must the State have provisions for such local input but federal regulations, 23 C.F.R. § 450 *et seq.*, direct that Metropolitan Planning Organizations (MPO's) be established. Although these MPO's are a form of regional government, which are not permitted by certain State laws or constitutions, the D.C. Circuit Court of Appeals found they did not violate the 10th amendment because acceptance of the funds is voluntary. Los Angeles County v. Adams, 574 F.2d 607 (D.C. Cir. 1978).

[16] 42 U.S.C. § 4332(2)(c); 23 C.F.R. 771 *et seq.*

[17] 42 U.S.C. § 1653(f); 23 U.S.C. 138; 23 C.F.R. 771 *et seq.* Under these provisions, before the State can obtain federal funds, it must prove to the Secretary that all possible planning has been carried out to minimize harm to parks, recreational areas, wildlife and wildfowl refuges, and historic sites. Because other congressional enactments have given power to such agencies as the Corps of Engineers to also review these matters, the States have argued that much duplication of processes occurs and, consequently, vital projects are delayed.

[18] Clean Air Act of 1977, 42 U.S.C.A. § 7401 *et seq.*; 23 C.F.R. § 770 *et seq.*

[19] 23 C.F.R. § 637.101 *et seq.*

[20] For a more complete review see 23 U.S.C. and 23 C.F.R. generally. See also, *Highway Assistance Programs: A Historic Perspective; supra* note 1, at 83–86. It should be noted that this expansion of federal programs is not peculiar to the highway program. See Kaden, *Politics, Money, and State Sovereignty: The Judicial Role,* 79 Col. L. Rev. 847, 867–868 (1979); Madden, *The Right to Receive Federal Grants and Assistance* 37:4 Fed. Bar J. 17, 20 (Fall 1978).

[21] Congress is less likely to protect the sovereignty of the States because of the changing "structural and political factors affecting sensitivity to localism in Congress." Kaden, *Politics, Money and State Sovereignty: The Judicial Role,* 79 Col. L. Rev. 847, 860; See contra, Elagar, *The Shaping of Intergovernmental Relations in the Twentieth Century,* The Annals of the American Academy, 10, 12.

[22] Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.*; 23 C.F.R. § 740.1 *et seq.*

[23] The Commonwealth of Virginia follows such a practice. *See, e.g.,* Title 25, Ch. 6, Code of Virginia (1950, as amended).

In view of the present federal-aid programs, the role of the State needs clarification,[24] particularly with respect to the decision-making process.[25]

ALTERNATIVES FOR THE STATE THAT DOES NOT WISH TO COMPLY WITH REQUIREMENTS SET BY FEDERAL-AID PROGRAMS

Rejection of Federal Aid

The first alternative is obvious: the individual States could refuse federal-aid and, thereby, be free to maintain their own program. This is unlikely to be a realistic approach. Most States rely heavily on federal-aid, and their construction and maintenance programs would suffer greatly if such aid were refused. It is safe to say that an average of almost one-third of all State highway expenditures is reimbursed from federal-aid.[26] Some writers have said, not surprisingly, that the alternative of refusal of federal-aid is not reasonable and is, in fact, no alternative at all.[27]

Political Alternative

Another alternative might be referred to as a "political" alternative. This alternative envisions the reduction of federal controls through congressional enactments. In light of the remaining alternatives discussed below, this alternative may be the easiest to implement.

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[24] Proponents of stronger state controls can argue that there is a certain distortion or misstatement in the verbige found in 23 U.S.C. § 145, *supra,* which states that although federal-aid will be given the States, the sovereignty of the States will not be infringed and the provisions of Chapter One of 23 U.S.C. "provide for a federally assisted State program."

[25] See Ervin, *Federalism and Federal Grants-In-Aid,* 43 N.C.L. Rev. 487, 494–495 (1965) quoting from White, *The States and the Nation* 3 (1953).

[26] For example, Virginia's expenditure for highways in the fiscal year July 1, 1979, through June 30, 1980, was approximately $774 million. Of that amount more than $337 million was federal-aid. Financial supplement to the *Virginia Department of Highways and Transportation Commission Seventy-Third Annual Report.* In calendar year 1976, the expenditures for highways across the nation were approximately $21.39 billion. *Highway Statistics 1976,* Federal Highway Administrative Report No. FHWA–HP–HS–76, p. 62. That same year approximately $6.22 billion was received by the States in the way of federal-aid. *Id.* This overwhelming federal expenditure is not confined to highways, however; it has caused former Senator Sam Ervin to state that the "monetary size and magnitude of the grants from the federal treasury are startling." Ervin, *Federalism and Federal Grants-In-Aid.* 43 N.C. L. Rev. 487, 492 (1965).

[27] *See* Walker Field, Colo., Public Airport v. Adams, 606 F.2d 290, 298 (10th Cir. 1979) (dissenting opinion); see also, Comment, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power,* 128 U. Penn. L. Rev. 402,415 (1979); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale, L.J. 1196, 1254, 1262 (1977).

It has been argued that the State is adequately protected by the federalist system which the United States enjoys. This is the basic thesis of Professor Herbert Wechsler—namely that "the existence of the states as governmental entities and sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception." [28] Professor Wechsler believes, as did James Madison,[29] that the Congress is sensitive to local issues and, therefore, that local opinion will prevail.[30] In fact, Professor Wechsler argues that national action has always been regarded as "exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." [31] He further notes that even when Congress has acted, it has done so interstitially, rarely occupying the field completely, and displacing State prerogatives only so far as is necessary to accomplish congressional purposes.[32]

James Monroe, in discussing the right of the Federal Government to spend money, argues that security from abuse by Congress exists at the polls; a Congressman is just as responsive to his constituents and as sensitive to their needs as is a State representative.[33] Finally, Mr. Justice Brennan, in his strong and articulate dissent in *National League of Cities v. Usery*,[34] agrees with Professor Wechsler [35] and argues that federal intervention into State affairs under the commerce clause is a decision of the States themselves because representatives to both the House and Senate are elected from the States.[36] He further adds that "the extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress." [37] In his opinion, it is "highly unlikely that those representatives will ever be motivated to disregard totally the concerns of these States." [38]

There have been overt expressions by Congress in the highway field that support this thesis. For example, local public participation is encouraged by the holding of public hearings on the location and design of proposed highways [39] and through the three "C" process.[40]

[28] See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 Col. L. Rev. 543 (1954).

[29] *The Federalist,* No. 46 at 194 (Lodge ed. 1888).

[30] See Wechsler, *supra* note 28, at 547.

[31] *Id.* at 544. Professor Wechsler made this statement in 1954. Would his opinion have been tempered had he forseen the history of the 60's and 70's? Note that Justice Brennan's opinion in National League of Cities v. Usery, 426 U.S. 833, 876–77 (1976) continues to support such a thesis.

[32] *Id.* at 545.

[33] 2 Richardson, *Messages and Papers of the Presidents* 173.

[34] 426 U.S. 833 (1976).

[35] *Id.* at 876–77.

[36] *Id.* See contra, Bogen, *Usery Limits on National Interest* 22 Ariz. L. Rev. 753, 757, 761.

[37] *Id.* at 877.

[38] *Id.*

[39] 23 U.S.C. § 128.

[40] 123 U.S.C. § 134.

On the other hand, there have been numerous congressional enactments for the last several decades that have failed to respect the individuality of the various States. A review of the rules, regulations, and directives promulgated to administer these programs illustrates the pervasive control by the Federal Government over local affairs.[41] Accordingly, the funded program is neither a local nor a State program, but remains a Federal program. Some question whether this central control is warranted in many instances because it fails to recognize the individuality of the separate States and their ethnic, geographical, and political attributes. These advocates would submit that a change in the Federal–State relationship is desirable.[42]

The Wechsler–Brennan theory to the contrary, it may be argued that, although a State can participate in the election of representatives to Congress and thereby share in national policy-making, this does not guarantee the "sovereignty" of that State. "Sovereignty is not the right to join in; it is the right to go one's own way." [43]

The increase in federal control is blamed often on the judiciary. The courts, however, are not directly responsible for the expanded federal role. The courts have in large measure deferred to Congress and the President, and it has been these latter two branches working together that have structured the present system. The ballot box can play a significant role; [44] however, if it is to play as significant a role as

[41] These provisions providing for local participation, although perhaps noteworthy, have not been enthusiastically accepted in all of the States. Some States say that problems arise because the methods established to administer the programs are inflexible. They fail to take into account the individuality of the locality or State. What may work well in New York City may prove a total disaster in Atlanta, Georgia. Should a State have difficulty with the guidelines, the Federal Government argues that the State is out of step and instead of arriving at a solution through compromise, it almost always requires the State to give way. In such a confrontation the States have found it easier to submit than fight the issue. Has this submission to the Federal Government caused it to grow hungrier? Have the States gone so far in the surrender of their programs that they cannot return to a program allowing them a stronger self-governing role? See Barber, *National League of Cities v. Usery; New Meaning for the Tenth Amendment,* 1976 Sup. Ct. Rev. 161, 181 (1976).

State supporters argue that the States should assert themselves and "aggressively assume a position of leadership." Ervin, *supra* note 25, at 498.

[42] In 1776 the colonists feared central authority. The Declaration of Independence evidences that "while the colonists were concerned with many specific abuses, their primary objection was to the exercise of arbitrary authority in London to the exclusion, wholly or in part, of popularly elected local legislatures." Cowen, *What is Left of the Tenth Amendment?,* 39 N.C. L. Rev. 154, 155 (1961); see also note 27, *supra.*

[43] Barber, *supra* note 41, at 176.

[44] Cowen, *supra* note 42, at 183.

Wechsler and Brennan suggest, it will require a concerted effort organized within the States themselves. The States will have to form a bond. All too often this solution is overlooked where a great number of States share an idea.[45] Instead, the States look to their attorneys to "work magic" with the judicial system in order to overcome the problem. This brings to discussion the last major alternative: seeking relief through litigation.[46]

Litigation Alternative—The Changing Role of the Spending Power of Congress

Federal grant-in-aid authority is premised on Art. 1 § 8 of the U.S. Constitution:

> [T]he Congress shall have the power to lay and collect taxes, duties, imports and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . .

More specifically, the authority is grounded on that portion of the section which allows Congress to provide for the general welfare.

The extent of congressional authority, however, has been the subject of great debate even before the adoption of the Constitution. Three views have dominated these debates and the acceptance of these interpretations has vacillated with the times.

First View of the General Welfare Clause

The first view argues that the phrase "provide for the common defense and general welfare" is an entirely separate clause conferring a separate and distinct power to act in unrestricted ways to provide for the common defense and general welfare.[47]

This interpretation was quickly repudiated by some authorities[48] on the basis that such a reading is ungrammatical, calling for an awkward syntax.[49] Further, such an interpretation would render superfluous the careful and specific enumeration of succeeding congressional powers found in the Constitution.[50]

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[45] Does this mean that the Wechsler-Brennan theory will work? Not necessarily, because that theory implies that a single State somehow has the power of the ballot box. What will work, however, is the formation of a coalition among State governments to put pressure on their individual representatives to act in concert.

[46] Obtaining jurisdiction may be a problem, depending on the individual case. For a discussion of this problem, see Cowen, *supra* note 42, at 174–75; Nicholson, *The Federal Spending Power,* 9 Temp. L. Q. 3, 22–23 (1934).

[47] Corwin, *The Spending Power of Congress—Apropos The Maternity Act,* 36 Harv. L. Rev. 548, 551, n. 8 (1923).

[48] *Id.* citing, 1 Story *Commentaries,* § 907, 908 and references (5th ed.).

[49] Corwin, *supra* note 47, at 551 and Collier, *Judicial Bootstraps and the General Welfare Clause,* 4 Geo. Wash. L. Rev. 211, 219 (1936).

[50] *Id.*

Madison's View

The second interpretation of the general welfare clause is one that was espoused by James Madison. According to Madison, the clause was a qualification on the taxing power and granted no separate power but restricted the power so as to provide for only those other specifically enumerated powers of Congress.[51] It has been argued that this theory is unsatisfactory, also, because it renders the general welfare clause superfluous.[52]

Hamilton's View

The third view of the general welfare clause was advocated by Alexander Hamilton. According to Hamilton, although the general welfare clause confers no separate substantive regulatory power on Congress, it amplifies the taxing power. Thus, the general welfare clause is said to extend the taxing power to purposes outside the specifically enumerated powers granted the Federal Government.[53] He believed that the phrase embraced a variety of objects that were not susceptible of specification or definition and the only qualification is that the object of the appropriation must be general and not specific and it must be for the general and not local welfare.[54] Thus, Hamilton viewed the taxing and spending powers as much broader than the regulatory powers.

Supreme Court Adopts Hamilton's View

The debate over the so-called "spending clause" lasted for 150 years.[55] In 1936, in *United States v. Butler,*[56] however, the Supreme Court "settled" the argument by adopting Hamilton's view. In that case the Court rejected Madison's position that "the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative powers committed to Congress."[57] Instead, it accepted that construction espoused by Hamilton and endorsed by Mr. Justice Story that the power of Congress to spend for public purposes was not limited by direct grants of power found in the Constitution.[58] Nonetheless, both the majority and dissenting Justices of the Court were of the opinion that a balance must be struck in order to limit such broad spending powers so as to prevent an encroachment upon prerogatives left to the States.[59] In striking this balance the majority determined that the Federal Agricultural Adjustment Act,[60] which was the object of the debate, was an unconstitutional invasion of the reserved

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[51] *Id.*

[52] Collier, *supra* note 49, at 220.

[53] *Id.*

[54] Corwin, *supra* note 47, at 554.

[55] Helvering v. Davis, 301 U.S. 619, 640 (1937).

[56] 297 U.S. 1 (1936); see also Collier, *supra* note 49, at 221.

[57] 297 U.S. at 65.

[58] 297 U.S. at 66.

[59] 297 U.S. at 74 and 87.

[60] 48 Stat. 31.

powers of the States because it was "a scheme for purchasing with federal funds submission to federal regulation. . . . The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action."[61] The Court said that to allow Congress to utilize such methods would allow the spending power to "'become the instrument for the complete subversion of the governmental powers reserved to the individual states."[62] The Court further added that even Hamilton did not suggest such an interpretation whereby the general welfare "might be served by obliterating the constituent members of the Union."[63]

The dissenters would have upheld the Act on the basis that the "Necessary and Proper Clause" (U. S. Const., art. 1, § 8, cl. 18), as construed in *McCulloch v. Maryland*,[64] allowed the imposition of such conditions to accomplish the aims of a permissible expenditure. Accordingly, three Justices thought the majority's opinion was inconsistent.[65] One of the dissenters, Mr. Justice Stone, said:

> [I]t is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adopted to the attainment of the end which alone would justify the expenditure. . . . If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose.[66]

Court Packing Attempt

One year later, in 1937, the Court was placed in a difficult position. Prior to the 1936 presidential election, President Roosevelt's New Deal legislation, providing for economic recovery, had not received favorable acceptance by the Court, *Butler* being an example. The Court had struck down six congressional acts, four of which were of major importance to Roosevelt's plans.[67] It had sustained only one significant New Deal measure.[68] At the time of the President's reelection in November of 1936 several of the President's most vital Acts remained before the Court. These included *inter alia* the National Labor Relations Act[69] and the Social Security Act.[70] The President interpreted his landslide victory in 1936 as an endorsement of his programs to "improve the conditions of the under-privileged in industry and agriculture through federal legislation despite the recent Supreme Court decisions which seemingly blocked his path."[71] The President was determined not to allow the Court to "flout the popular will by what he, as well as Justices Brandeis, Stone and Cardozo, felt to be a reactionary interpretation of the Constitution."[72] Accordingly, on February 5, 1937, the President proposed his plan for appointing as many as six new justices to the Court.[73]

Faced with the President's plan, the Court in *West Coast Hotel Co. v. Parrish*[74] held that a State minimum wage law did not violate the due process clause of the 14th amendment. This decision distinguished *Morehead v. New York ex rel Tipaldo*[75] and overruled *Adkins v. Childrens' Hospital*.[76] But it was two weeks later that a real change became evident when the first of the President's vital programs was approved in *National Labor Relations Board v. Jones and Laughlin Steel Corp.*[77] The opinion shows no serious effort to distinguish *Carter v. Carter Coal Co.*[78]

There had been no change in the membership of the Court, but Chief Justice Hughes and Justice Roberts had shifted their positions. What had induced this change? Possibly only those who participated in the conferences of the Court knew the answer.[79]

> [F]ew attributed the difference in results between the decisions in 1936 and those in 1937 to anything inherent in the cases themselves—their facts, the arguments presented, or the authorities cited. . . . But the consensus among the lawyers speculating on the Court's sudden reversal was that the Chief Justice and Mr. Justice Roberts believed that the continued nullification of the legislative program demanded by the people and their representatives—as manifested in the 1936 election—would lead to acceptance of the President's Court plan, and that this

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[61] 297 U.S. at 72–73.
[62] 297 U.S. at 75.
[63] 297 U.S. at 77.
[64] 4 Wheat. (17 U.S.) 316 (1819).
[65] 297 U.S. at 84–85.
[66] 297 U.S. at 85–86. See also, *The Federal Conditional Spending Power: A Search for Limits*, 70 N.W., L. Rev. 293, 300 (1975).
[67] These included the Railroad Retirement Act, Railroad Retirement Board v. Alton R.R., 295 U.S. 330 (1935); the National Industrial Recovery Act, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); the Farm Mortgage Act, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); the Agricultural Adjustment Act, United States v. Butler, 297 U.S. 1 (1936); the Bituminous Coal Conservation Act, Carter v. Carter Coal Co., 298 U.S. 238 (1936); and the Municipal Bankruptcy Act, Ashton v. Cameron County Dist., 298 U.S. 513 (1936).
[68] The Gold Clause; Norman v. Baltimore and Ohio R.R., 294 U.S. 240 (1935).
[69] Act of July 5, 1935, 49 Stat. 449.
[70] Act of August 14, 1935, 49 Stat. 620.
[71] Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 Harv. L. Rev. 645, 677 (1946).
[72] *Id.*
[73] *Id.*; for a discussion of President Roosevelt's "Court Packing" plan, see Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 Yale L.J. 791 (1952) and 1 Freund, Sutherland, Howe, and Brown, *Constitutional Law Cases and Other Problems*, 265–268 (3d ed. 1967).
[74] 300 U.S. 379 (1937).
[75] 298 U.S. 587 (1936).
[76] 261 U.S. 525 (1923).
[77] 301 U.S. 1 (1937).
[78] 298 U.S. 238 (1936); Stern, *supra* note 71, at 681.
[79] Stern, *supra* note 71, at 681.

would seriously undermine the independence and prestige of the federal judiciary, and particularly of the Supreme Court, without preventing the President from obtaining his objective." [80]

Subsequently, either rightly or wrongly, Chief Justice Hughes has been credited for his statemanship in using the cases to combat the President's plan.[81] "A few weeks later the Court sustained the constitutionality of the Social Security Act, in two of the three cases by the same votes of five to four." [82] At the end of the term Justice Van Devanter announced his retirement, thus altering the balance of the Court. Consequently, although the President continued to pursue his plan, there was no longer a need for it and it was eventually defeated.[83]

Creation of the Modern Boundaries on Spending

Steward Machine Co. v. Davis [84] was one of the cases, previously mentioned, which aided in averting the crisis.[85] Steward Machine Co. sought to recover a refund of taxes paid under Title IX of the Social Security Act,[86] contending that the tax and the related unemployment compensation program were unconstitutional. Mr. Justice Cardozo, speaking for the Court, loosened the restrictions previously placed on the spending powers under *United States v. Butler.* Although the Act provided for conditional credits and appropriations that reached into areas outside the scope of enumerated legislative authority, the Court nevertheless found the goals of the Act to be within the scope of Congress' powers. This finding allowed the Congress through the spending clause to invade areas involving local matters which Congress could not regulate directly. The Court found no coercion present as had the Court in *Butler.* Mr. Justice Cardozo stated "every rebate from a tax when conditioned upon conduct is in some measure a temptation." [87] He reasoned, however, that motive and temptation were not to be equated with coercion.[88]

Shortly following *Steward,* the Court decided *Helvering v. Davis,*[89] also involving a challenge to the Social Security Act. The Court found that, although "great statesmen" had stood for other views, *Butler* had settled the issue and, therefore, Congress could spend money in aid of the "general welfare." [90] The Court acknowledged that difficulties remained.

> The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event.[91]

The Court recognized that there was discretion "at large," but that discretion "is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." [92]

These three cases, *Butler, Steward,* and *Helvering,* have formed the basic foundations of the still-maintained Hamiltonian view of the "spending clause." Two subsequent cases, however, have also had an impact in this area and tightened the reins on States even further. The first case, *United States v. Darby,*[93] decided in 1941, for 25 years maintained a tight hold on the 10th amendment.[94] The Court determined *inter alia* that the Congress could use reasonable means to accomplish their goals even though it meant control of intrastate commerce. In response to the question concerning the impact of the 10th amendment on their reasoning, the Court held that "[o]ur conclusion is unaffected by the Tenth Amendment. . . . The amendment states but a truism that all is retained [by the States] which has not been surrendered." [95]

The second case, *Oklahoma v. United States Civil Service Commission,*[96] decided in 1947, also militates against limitations on the breadth of the spending clause. The Court held that "[w]hile the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms

[80] Stern, *supra* note 71, at 681–682. In a dissent in National League of Cities v. Usery, 426 U.S. 833, 868 (1976), Justice Brennan recognized that the abandonment of the overly restrictive construction of the commerce power spelled defeat for Roosevelt's Court-Packing plan and "preserved the integrity of this institution."

[81] Stern, *supra* note 71, at 682.

[82] *Id.*

[83] *Id.*

[84] 301 U.S. 548 (1937).

[85] National League of Cities v. Usery, 426 U.S. at 868.

[86] 49 Stat. 620.

[87] 301 U.S. at 589.

[88] 301 U.S. at 589–590.

[89] 301 U.S. 619. A shareholder of Edison Electric Illuminating Company sought an injunction to restrain the corporation from making payments and deductions called for by the Social Security Act. The United States Commissioners of Internal Revenue and the United States Collector for the District of Massachusetts intervened. The District Court held that the tax upon employers was not properly at issue and that the tax on employers was constitutional. The Court of Appeals reversed. 89 F.2d 393 (1st Cir. 1937). The Court held that the provisions of the Act did not violate the 10th amendment and the tax on employers was a valid excise.

[90] 301 U.S. at 640.

[91] *Id.*

[92] *Id.*

[93] 312 U.S. 100 (1941). In *Darby,* a Georgia manufacturer challenged an indictment charging him with violating the Fair Labor Standards Act of 1938. The District Court agreed with his position and declared the Act unconstitutional because it sought to regulate wages and hours of employment in local manufacturing. The United States appealed directly to the Supreme Court.

[94] National League of Cities v. Usery, 426 U.S. 833 (1976), discussed later in this article, cut this stranglehold to an extent which is yet to be determined.

[95] *Darby, supra,* 312 U.S. at 123–124.

[96] 330 U.S. 127 (1947). In *Oklahoma,* the State challenged the Hatch Act, 53 Stat. 1147, as amended 54 Stat. 767, 18 U.S.C.A. § 61L as being an infringement on the States' prerogatives. Using this Act, the Civil Service Commission had directed the suspension from the office of a member of Oklahoma's Highway Commission or the State would suffer the loss of certain federal funds. The Commission member was alleged to be in violation of the Act because he was acting as chairman of the Oklahoma Democratic Central Committee.

upon which its money allotments to states shall be disbursed." [97] The 10th amendment, the Court held, was not a deterrent to the congressional powers at issue in the case. The Court further stated that there had been no violation of Oklahoma's sovereignty, because the State had overcome the alleged federal coercion by adopting the "simple expedient" of not yielding to the Federal Government.[98] In other words, there was no coercion because Oklahoma had the choice to either comply with congressional mandate or lose the federal funds. Oklahoma had exercised the option to relinquish federal funds and her sovereignty thereby remained intact.[99]

The *Oklahoma* case has been important in sustaining congressional policies that are said to impinge upon areas historically preserved for the States. Although in *Oklahoma* only a relatively small amount of aid was sacrificed by the State, the fact that there was very little economic impact either has been deemed to be of little significance or has been overlooked by subsequent courts. Courts have universally accepted the view that States have the option to utilize the "simple expedient" of refusing federal funds. In the case of *North Carolina, ex rel. Morrow v. Califano,*[100] North Carolina challenged the constitutionality of certain provisions of the National Health Planning Resources Development Act of 1974.[101] This statute conditioned federal-aid upon the State's acceptance of a broad range of federal controls and, in the case of North Carolina, required an amendment to the State Constitution. Congress authorized the Secretary of Health, Education and Welfare to cut off all federal-aid to some 42 federal-aid programs in case a State failed to comply. In North Carolina's case, the amount of the proposed cutoff was slightly less than $50 million.

The three-judge court reviewing the statute held that the

> Act is not compulsory on the State. . . . [I]t does not impose a mandatory requirement to enact legislation on the State; it gives the states an option to enact such legislation and, in order to induce that enactment, offers financial assistance.[102]

As to whether the Act was coercive, the Court pointed out that North Carolina's loss would be less than $50 million and in 1974 the State revenues totalled some $3.1 billion; consequently, "[t]he impact of such loss could hardly be described as 'catastrophic' or 'coercive'." [103]

In the case of *Vermont v. Brinegar,*[104] involving the right of the State to avoid complying with the Highway Beautification Act, which Congress had placed as a condition to the receipt of federal highway aid, the Court held that it was unable to say that the reduction "irresistibly compels a state under threat of economic catastrophe to embrace the federal plan." [105]

LIMITATIONS ON CONGRESS' SPENDING POWERS

Spending Must Be for the General Welfare

In view of the foregoing discussion, what arguments do the States have that there are limitations on the spending clause? As noted, congressional expenditures must be for the general welfare. Consequently, we must now determine what is meant by the term "general welfare." Hamilton recognized it as pervasive, embracing a vast variety of particulars not susceptible of specification or definition.[106] In his opinion, as previously stated, the only qualification on this generality is that the objective must be general and not local and must involve the nation and not one particular area.[107] The Court in *Butler v. United States* accepted Hamilton's view. However, it appears that no absolute definition giving more specificity to the term can be framed; rather, it must be decided on a case-by-case basis.

The Court has taken the position that general welfare is whatever Congress finds it to be.[108] Thus, it is Congress and not the Court that is

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[97] 330 U.S. at 143.

[98] 330 U.S. at 143–44.

[99] It is important to note that Oklahoma suffered very little economic loss by employing the "simple expedient." She only lost an amount equal to two years salary of the official in question.

[100] 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), *aff'd mem.*, 435 U.S. 962 (1978). *See also* Stiner v. Califano, 438 F. Supp. 796 (W.D. Okla. 1977) (three-judge court). The case concerned a federal statute and regulation relative to the staffing ratios for day-care centers receiving federal funds under the Social Security Act. The day-care centers argued that the regulation could not be for the general welfare and was therefore contrary to Butler v. United States, 297 U.S. 1 (1936). The Court, quoting Helvering v. Davis, 301 U.S. 619, 640, held that "[t]he discretion [to determine general welfare] belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." The Court also held that the conditions were not a form of economic duress. 438 F. Supp. at 800.

[101] 42 U.S.C.A. § 300k *et seq.*

[102] 445 F. Supp at 535–36. It is interesting to note that the Court appears almost to condemn North Carolina because she "by some oddity" of her Constitution cannot comply with the Act. 445 F. Supp. at 535.

[103] 445 F. Supp. at 535. It is sobering to see the force cradled in and emanating from the spending clause when the loss of $50 million can be treated as inconsequential.

[104] 379 F. Supp. 606 (D. Vt. 1974).

[105] *Id.* at 617; *see also* State of Oklahoma v. Harris, 48 F. Supp. 581 (D.C. 1979); Montgomery County, Md. v. Califano, 449 F. Supp. 1230 (D. Md. 1978). Texas Landowners Rights Association v. Harris, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd,* 598 F.2d 311, *cert. den.*, 444 U.S. 927 (1979).

[106] Corwin, *The Spending Power of Congress—Apropos the Maternity Act,* 36 Harv. L. Rev. 548, 554 (1923).

[107] *Id.* This same basic opinion was shared by James Monroe. He could see no dangers in such a liberal construction. *Id.* at 562, citing 2 Richardson, *Messages and Papers of the Presidents* at 173.

[108] "We must conclude that into the 'dread field' of money expenditure the court must not 'thrust its sickle'; that so far as this power goes, the 'general welfare' is what Congress finds it to be." Corwin, *supra* note 106, at 580. This has recently been confirmed in Buckley v. Valeo, 424

the arbiter as to the latitude given the term,[109] and the role of the Court is confined to a determination of whether there is any reasonable possibility that the spending is within the discretion granted to Congress.[110]

Some have argued that the Court has abdicated its responsibility in this area because one of the necessary roles of the Court is to umpire our federalism.[111] "Important legislation should not seek constant refuge in the judicial theory that the 'motives of Congress' are beyond the province of the court." [112] Failure of the Court to recognize and accept its role places the fate of the State in the hands of Congress.[113] Some argue that without the Courts to protect them, the States will not be free to legislate and plan their own future. Unless there is some appreciable control over congressional power, only the Courts are able to protect the concept of federalism.

Supporters of a strong centralized government argue that any fear for the safety of our federalism is an overreaction because the *Steward* [114] and *Helvering* [115] decisions, and cases following them, recognize that if Congress uses coercive efforts, the Court will intervene. Accordingly, the cases must be analyzed to determine if the term "coercion" is susceptible of definition.

Coercion Explained

The post-*Butler* [116] cases, such as *Steward* and *Helvering*, do not ignore the question of coercion which concerned the *Butler* majority. They simply found no coercion to exist.[117] In *Steward* the Court recognized that each case must be viewed on its own merits; [118] however, the majority questioned whether the concept of undue influence "can ever be applied with fitness to the relations between state and nation." [119] This statement may have been born out of a lack of foreseeability of Congress' ever increasing spending. It is questioned whether the Court would have reached the same conclusion given today's circumstances.[120] By carrying such a concept to its logical conclusion, will the inducement ever amount to coercion and, if not, does federalism exist through the teachings of the Constitution or through the goodwill of Congress? If the goodwill of Congress plays such an important role, does our federalism enjoy a constitutionally guaranteed stability?

We have seen the position taken by the Supreme Court based on *Oklahoma*,[121] but it appears that the courts have not fully accepted the *Steward* definition of undue influence and are still weighing coercion on a case-by-case basis.[122] Certain recent cases have begun to employ a test which seemingly should better define the coercion necessary to induce the court to impose its jurisdiction. Under that test, if the "simple expedient" of refusing the federal-aid threatens "economic catastrophe," the statute will be struck down.[123] Such a test bodes ill for any strength the States may seek in arguing coercion. It remains questionable "whether any showing of economic hardship, no matter how great, would be sufficient to compel a finding of coercion." [124]

It is apparent that the courts have too readily accepted the *Oklahoma* [125] concept without weighing the present day circumstances. When

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U.S. 1 (1976). There the Court recognized that the scope of general welfare was "quite expansive." It was for "Congress to decide which expenditure will promote the general welfare," and whether the means chosen "appear 'bad,' 'unwise,' or 'unworkable' " was to the Court irrelevant. 424 U.S. at 90–91. Congress through the Necessary and Proper Clause can condition the expenditures in whatever manner is necessary to achieve their general welfare goals. 424 U.S. at 91. See also Senator Sam J. Ervin, Jr.'s article, *Federalism and Federal Grants-in-Aid,* 43 N.C.L. Rev. 487 (1965), which apparently reflects the understanding of Congress. In discussing the Court's determination to place no discernible judicial limits on Congress' spending for the general welfare Ervin states: "Thus Congress alone, ultimately, has the awesome burden of reconciling every grant with constitutional federalism." *Id.* at 495.

[109] Percy, *National League of Cities v. Usery: The Tenth Amendment Is Alive and Doing Well,* 51 Tul. L. Rev. 95, 106 (1976). Ervin, *Federalism and Federal Grants-in-Aid,* 43 N.C.L. Rev. 487, 495 (1965).

[110] Helvering v. Davis, 301 U.S. 619, 640 (1937); see also, Cowen, *What is Left of the Tenth Amendment?* 39 N.C.L. Rev. 154, 174 (1961); Pomeroy, *Constitutional Law,* 228–29 (10 ed.).

[111] Freund, *Umpiring the Federal System,* 54 Col. L. Rev. 561 (1964); see also, Percy, *supra* note 109, at 106–107.

[112] Nicholson, *The Federal Spending Power,* 9 Temp. L.Q. 3, 14 (1934).

[113] Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment,* 1976 Sup. Ct. Rev. 161, 175 (1976).

[114] 301 U.S. 548 (1937).

[115] 301 U.S. 619 (1937).

[116] 297 U.S. 1 (1936).

[117] *The Federal Spending Power: A Search for Limits,* 70 Nev. L. Rev. 293, 302 (1975).

[118] 301 U.S. at 590.

[119] *Id.*

[120] Walker Field, Colo. Public Airport v. Adams, 606 F.2d 290, 298–299 (D.C. Colo. 1979) (dissenting opinion) Rev. 293, 303, n. 59 (1975).

[121] 330 U.S. 127 (1947), *supra,* text accompanying note 88.

[122] *E.g.,* Stiner v. Califano, 438 F. Supp. 796 (W.D. Okla. 1977), State of North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532 (E. D. N.C. 1977) (three-judge court); Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974).

[123] *E.g.,* Vermont v. Brinegar, 379 F. Supp. 606, 617 (D. Vt. 1974) and State of North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532, 535 (E.D. N.C. 1977) (three-judge court).

[124] *National League of Cities v. Usery: A New Approach to State Sovereignty,* 48 U. Colo. L. Rev. 467, 483–84 (1977). *Note* Ohio v. United States Civil Service Comm'n, 65 F. Supp. 776 (S. D. Ohio 1946), where the Court at 780–781 distinguished coercion from inducement. Citing *Steward, supra,* they point out that while every conditional grant is a temptation, there is a wide difference between inducement and a coercion. There was no coercion in this case, the Court held, because the State was "not prevented, forbidden, enjoined, prohibited, or compelled to refrain from employing any person it may choose to employ. . . ." *Id.* at 781. Although this is an attractive argument, it is arguable that it is wrong in finding that an inducement can never be coercive. Holding enormous funds from the States can be so harmful to State programs as to give the State no alternative. If the State wishes to continue with its program it must give way to the federal conditions. When this occurs, "inducement" can amount to coercion.

[125] 330 U.S. 127 (1947) *supra.*

Oklahoma and *Steward* were decided, federal-aid to the states was miniscule compared with that aid given the states today.[126] It can be argued that, contrary to Justice Cardozo's position in *Steward*,[127] federal-aid can rise to something more than an inducement. Given the great dependence by the States on federal-aid, federal conditions could amount to coercion.[128]

THE TENTH AMENDMENT

Any discussion of the "spending clause" unavoidably requires an analysis of the 10th amendment.[129] Inasmuch as the spending clause is one of the constitutional powers to which the 10th amendment applies,[130] in order to understand the relationship of the two concepts, a short capsulation of the history of the 10th amendment is in order.[131]

1791–1837

The history of the 10th amendment can be divided into three periods. The first period covers roughly the time of its adoption in 1791, through the era of the Federalist judges, to 1837, two years after the death of Chief Justice Marshall.[132] During this period the Court was "as unanimously Hamiltonian as Marshall and the other Federalist judges could make it. . . ." [133]

It was during this period also that the 10th amendment was first reviewed by the Court in *Martin v. Hunter's Lessee*.[134] That honor went to Mr. Justice Joseph Story, "an advocate of Federalism equal almost in ardor to Chief Justice Marshall." [135] In this case the Commonwealth of Virginia had challenged the Supreme Court's appellate jurisdiction to review a case from the Virginia Court of Appeals. The Supreme Court held that the first Judiciary Act granted such jurisdiction to it. The Court said that the people had established the Constitution and if the Constitution granted a power the States had no right to object.[136]

Chief Justice Marshall later gave further support to the Hamilton theory. In *McCulloch v. Maryland* [137] he maintained that the 10th amendment had merely been "framed for the purpose of quieting excessive jealousies." [138] In this case he also noted the difference between the amendment and a similar provision found in the Articles of Confederation and pointed out that the word "expressly," which was present in the Articles,[139] was omitted from the 10th amendment; therefore, the Court held there was no restriction imposed on the implied powers inherent in the Constitution.

Subsequently, if any doubt remained as to his opinion of the amendment he settled the matter in *Gibbons v. Ogden*.[140] In that case he solidified the Hamiltonian view by holding that the 10th amendment was "no limitation" on the commerce power.

1837–1935

Two years after Marshall's death, however, the Court in *New York v. Miln* [141] determined that the States had not surrendered their "police powers." [142] Thus, this case marked the birth of the second period in which the Madison theory prevailed, and the cases following for almost 100 years thereafter sustained this theory.[143]

1935 to Present

During the years 1935 and 1936, primarily because of President Roosevelt's New Deal legislation, there was a proliferation of cases

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[126] Walker Field, Colo., Public Airport Authority v. Adams, 606 F.2d 290, 299 (10th Cir. 1979) (dissenting opinion).

[127] 301 U.S. at 590.

[128] Walker Field, Colo., Public Airport Authority v. Adams, 606 F.2d 290, 298–99 (10th Cir. 1979) (dissenting opinion).

[129] "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.

[130] There is an apparent conflict between the 10th amendment and the Supremacy Clause which states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. U.S. Const. art. VI, cl. 2.

[131] A more extensive history can be found in several excellent articles, e.g., Casto, *The Doctrinal Development of the Tenth Amendment*, 51 W. Va. L. Q. 227 (1949); Barber, *supra* note 41; Cowen, *supra* note 42.

[132] Casto, *id.* at 232; Cowan, *id.* at 157.

[133] Casto, *id.* at 232.

[134] 1 Wheat. (14 U.S.) 304 (1816).

[135] Casto, *id.* at 232.

[136] This reasoning ignores the fact that the 10th amendment had been ratified in 1791 because the "people" were fearful of too much centralization. See Casto, *id.* at 233 n. 31.

[137] 4 Wheat. (17 U.S.) 316 (1819).

[138] *Id.* at 401.

[139] "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States in Congress Assembled." (Emphasis added.)

[140] 9 Wheat. (22 U.S.) 1 (1824).

[141] 11 Pet. (36 U.S.) 102 (1837).

[142] Was it coincidence that the Court switched philosophies so shortly after Marshall's death, or was the Court merely expressing a view which, because of Marshall's dominance, they were hesitant to do while he was still Chief Justice? Casto, *supra* note 131, at 235.

[143] E.g., *License Cases*, 5 How. (46 U.S.) 564 (1847); Collector v. Day, 11 Wall. (78 U.S.) 113 (1870); *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1872); Polloch v. Farmer Loan and Trust Co., 157 U.S. 429 (1895); Kansas v. Colorado, 206 U.S. 46 (1907); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936). For a more complete discussion of this period, see Casto, *supra* note 131, at 235–244. Also note that there were certain cases during the period in which the Court appeared to waver from the solid Madisonian view. For example, *State Freight Case*, 15 Wall. (82 U.S.) 232 (1872); *Lottery Case*, 188 U.S. 321 (1903). *See also*, Missouri v. Holland, 252 U.S. 416 (1920), where Justice Holmes

involving the 10th amendment,[144] all of which sustained the Madison view which protected the reserved powers of the States. In 1937, however, three cases brought to an end the Madison century.[145] Although those cases did not in specific language overrule *Carter Coal,* and *Butler,* for example, their holdings and rationale had substantial impact [146] and ushered in the new era of Hamiltonian dominance which continues today.[147]

Thus in 1941, in *United States v. Darby;*[148] the Court held that there was nothing in the history of the 10th amendment to suggest that it was more than a declaration of the relationship between the National and State governments; accordingly, it "states but a truism that all is retained which has not been surrendered." [149]

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introduced a new restriction on the powers reserved to the States. In this case he used the Supremacy Clause in combination with the treaty powers of the Constitution to determine that the Amendment had no effect on treaty powers. Accordingly, it is arguable that Holmes created an instrument (a treaty) that could dominate the States more freely than the Commerce Clause. Casto, *supra* note 131, at 242–243. For a discussion of the Amendment and its relationship to the treaty powers, see Cowen, *supra* note 131, at 160–164.

[144] Schechter Poultry Corp. v. United States, *supra*; United States v. Constantine, 296 U.S. 287 (1935); Hopkins Federal Savings & Loan Association v. Cleary, 296 U.S. 315 (1935); Butler v. United States, 297 U.S. 1 (1936); Carter v. Carter Coal Co., *supra;* Ashton v. Cameron County District, 298 U.S. 513 (1936). See also, Casto, *supra* note 131, at 243–244, for a short summary of the issues in those cases.

[145] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

[146] In fact, the *Steward* decision, in this writer's opinion, so eviscerates *Butler* that it, for all practical purposes, left nothing but the initial theory intact.

[147] Casto, *supra* note 131, at 245. The effect of National League of Cities v. Usery, 426 U.S. 833 (1976), will be discussed *infra.*

[148] 312 U.S. 100 (1941), discussed *supra;* see discussion in text accompanying note 93. This opinion prevailed until National League of Cities v. Usery, 426 U.S. 833 (1976), which is discussed *infra.*

[149] 312 U.S. at 124. Note the unanimity of the Court. Of the five justices who joined the *Carter Coal Co.* opinion, only Justice Roberts remained; but his views had changed considerably since the earlier decision. Lockhart, Kamisar, Chopes, *Constitutional Law* 221 (3d ed. 1970). Note also that this was not the first time such a precept found acceptance by a Court. See Casto, *supra* note 131, at 233, 246 *citing* United States v. The William, Fed. Cas. No. 16700 at 622 (D. Mass. 1808).

It is interesting that the Court only 5 years previously in Carter v. Carter Coal Co., 298 U.S. 238 (1936), took quite the opposite view of the Constitution's history. In *Carter,* the Court states: "those who framed and those who adopted that instrument meant to carve from the general mass of legislative power, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; . . . The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerges from the history of their deliberations." 298 U.S. at 294, 295. Mr. George Mason of Virginia also expressd fear of the States' future without language such as that set out in the Amendment. During the Virginia Debates he advised that he desired "a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power providing for the general welfare may be perverted to its destruction." 3 *Elliotts Debates* 422 (2d ed., 1836) (1937 reprint). Finally, Senator Sam Ervin states in Ervin, *Federalism and Federal-Grants-in-Aid* 43 N.C.L. Rev. 487 (1965): "From their observations of the monarchies of Europe, the members of the Constitutional Convention were well aware of the despotic propensities that exist in every unitary system of government. They fully comprehended the everlasting political truth that no man or set of men can be safely trusted with unlimited governmental power. Accordingly, they divided the functions of the states and federal government not only to protect their local political and economic interests, but also more wisely to protect the future generations of Americans from a totalitarian government." *Id.* at 488.

The *Darby* rationale prevailed from 1941 to 1976 when the Court decided *National League of Cities v. Usery,*[150] a case which limited the Federal Government's domination in the field of commerce.[151] Although the issues in that case concerned the relationship of the Commerce Clause to the 10th amendment, the rationale may be applied to the spending clause.[152]

NATIONAL LEAGUE OF CITIES

In *National League of Cities* the Court confined its decision concerning restraints on congressional power vis-a-vis the States to those where Congress attempts to regulate "States as States." [153] The Court held

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[150] 426 U.S. 833 (1976).

[151] For several years prior to *National League of Cities* the Court had shown a special sensitivity to the States' interest in "retaining control over its internal governmental arrangements." Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty,"* in National League of Cities v. Usery, 86 Yale L. Rev. 1165 at 1166. Professor Michelman lists the following cases *inter alia:* Milliken v. Bradley, 418 U.S. 717 (1974); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).

[152] Percy, *National League of Cities v. Usery: The Tenth Amendment is Alive and Doing Well,* 51 Tul. L. Rev. 95, 104–106 (1976). *Contra,* State of North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532 (E.D. N.C. 1977) (three-judge court), and Stiner v. Califano, 438 F. Supp. 796 (W.D. Okla. 1977) (three-judge court). Note also that the Court in *National League of Cities* states in a footnote that it "expresses no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, art. 1, § 8, cl. 1. . . ." 426 U.S. at 852, n. 17. Justice Brennan in his dissent further suggests that Congress can get around the majority opinion by conditioning their grants in accordance with the spending clause. 426 U.S. at 880.

[153] 426 U.S. at 845. The question before the Court was whether the Fair Labor Standards Act could be applied to State employees. In reaching its decision, the Court reviewed and discussed two cases which had preceded *National League of Cities.* One of these cases was sustained by the Court and the other was overruled. The first case, Maryland v. Wirtz, 392 U.S. 183 (1968), was the high water mark in the Court's recognition of Congress' power to regulate state activities under the Commerce Clause. In *Wirtz,* the Court extended the minimum wage and maximum hour provisions of the Fair Labor Standards Act to employees of State institutions and schools. The Court overruled this case because minimum wage laws displaced a State's ability to structure employment practices and thereby impaired a State's ability to function effectively in a Federal system. The Court sustained the second case, however.

that Congress cannot regulate those functions of a State that are "essential to separate and independent existence." [154] The Court distinguished those congressional powers which may preempt State control over "areas of private endeavor." [155] Thus the decision did not limit congressional power over the private arena.

It is not clear what the Court meant by the phrase "States as States," or by the term "essential" as it relates to State functions. These expressions have created much discussion.[156] For example, the argument is advanced that the definition of one term carries with it most of the descriptional attributes of the other, although they are not synonomous. Another term the Court employed in establishing what powers of the States will be protected—namely those functions which provide "services . . . the States have traditionally afforded their citizens" [157]—

In that case, Fry v. United States, 421 U.S. 542 (1975), the Court had held that employees were subject to wage and salary controls imposed by the Economic Stabilization Act of 1970. The Court in *National League of Cities* distinguished *Fry* from *Wirtz* by balancing the serious inflation problem which the Economic Stabilization Act treated against the federal intrusion. Because the intrusion was temporary, the Court found that no State policy choices were displaced. Accordingly, Congress did have the power to regulate public employees' wages, but those powers were limited to emergency situations which were temporary in nature.

[154] *Id.*, quoting from Lane County v. Oregon, 7 Wall. (74 U.S.) 71 (1869). The Court also quotes *Lane* to establish its recognition of the independent existence of the States. "[I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized." 426 U.S. at 844, quoting from 7 Wall. (74 U.S.) at 76. Thus, the Court recognizes that the States have areas of autonomous power which cannot be infringed by congressional mandates even where those powers are exercised by Congress pursuant to expressly delegated powers. See also, Note, 18 B.C. Indus. & Com. L. Rev. 736, 739 (1976). The Court further recognized that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." 426 U.S. at 844, quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926). Finally, the Court quoted Texas v. White, 7 Wall. (74 U.S.) 700, 725 (1869), for the proposition that "[t]he Constitution, in all its provisions, looks to an indestructible union, composed of indestructible States."

[155] 426 U.S. at 840.

[156] For a more in-depth review *see* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty"* in National League of Cities v. Usery, 86 Yale L. J. 1165 (1977); Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus,* 46 Fordham L. Rev. 1115 (1978); Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment,* 1976 Sup. Ct. Rev. 161 (1976); Percy, *National League of Cities v. Usery: The Tenth Amendment Is Alive and Doing Well,* 51 Tul. L. Rev. 95 (1976). Note also, *National League of Cities v. Usery: A New Approach to State Sovereignty,* 48 U. Colo. L. Rev. 467 (1977); Bogen, *Usery Limits on National Interest,* 22 Ariz. L. Rev. 753 (1980); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services,* 90 Harv. L. Rev. 1065 (1977).

[157] 426 U.S. at 851. A list of services that qualify is listed *id.*

also aids in their interpretation. In other words, the role of "States as States" and what is "essential" to the States may be viewed from an historical perspective and a determination will be made whether the questioned service is one which history demonstrates the States have traditionally provided.[158] Certainly there are services that the States may provide which qualify as "traditional" services but which can also be provided by private citizens.[159] For example, it is recognized that there are both private and public schools, private and public refuse collectors, and private and public police (guards). Traditionally, however, most of these services are now and have been provided by the States. As an example of a service that is not traditional, the Court pointed to the operation of railroads. The States have not regarded such an operation as falling within an area that is an "integral" part of the services they provide as a State.[160] The bulk of the nation's railroads are operated by private or quasi-public entities, not by the States.

Mr. Justice Brennan criticized the essential versus nonessential test as "unworkable." [161] He further criticized the majority opinion *inter alia* because it would allow the States to determine what is essential [162] and, in addition, by distinguishing and not overruling *Fry v. United States,*[163] he believed the majority applied its standard inconsistently within its opinion.[164]

NATIONAL LEAGUE OF CITIES AND THE SPENDING CLAUSE

It is submitted that the theory underlying *National League of Cities* is as applicable to the indirect controls in federal-aid programs for highways as it is to controls based on the delegated powers of the Commerce Clause.[165] The power to spend for the general welfare may impinge upon, even invade, the traditional services provided by the

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[158] It will be left to the Courts to determine what is a "traditional" function of the States. Michelman, *supra* note 156, at 1187-1188. See also Bogen, *supra* note 156, at 778; *Cf.* Tribe, *supra* note 156.

[159] For a more in-depth discussion and a review of the inherent problems *see* Michelman, *supra* note 156, at 1173-1180.

[160] 426 U.S. at 854 n. 18.

[161] 426 U.S. at 865.

[162] 426 U.S. at 871.

[163] 421 U.S. 542 (1975).

[164] 426 U.S. at 872.

[165] See, *Toward New Safeguards on Conditional Spending: Implication of National League of Cities v. Usery,* 26 American U. L. Rev. 726, 742 (1977); Ripple and Kenyen, *State Sovereignty—A Polished But Slippery Crown,* 54 Notre Dame Lawyer 745, 757 (1979): "[I]f under *National League of Cities,* the federal Commerce Power may not intrude into the area of 'integral government functions' [426 U.S. at 851] of the state, ought a similar prohibition ever govern attempts by the Congress to condition monetary grants on stipulations which operate directly upon the structure or functions of state government itself?"

States.[166] It cannot now be said just how far the Court will extend the rationale established in *National League of Cities*. Should the Congress be allowed to invade traditional and essential State functions through the use of the spending power but not through the Commerce Clause? Is the construction and maintenance of highways an "essential" or "traditional" State function? Can the employment of the spending clause abrogate traditional State functions just as extensively as can a congressional enactment under the Commerce Clause? Does the right of the State to refuse federal-aid distinguish the two? In other words, does the fact that the State has such an option distinguish the two powers so that an invasion through spending does not constitute a prohibited invasion?

MAY SPENDING POWERS INVADE A TRADITIONAL STATE FUNCTION?

It is necessary first to determine whether the construction and maintenance of highways is a traditional State function. Historically, highways have been constructed, maintained, and regulated by State governments. As previously discussed, not only has Congress recognized this fact in the promulgation of federal-aid to highway programs by stating that the program remains a federally assisted State program,[167] but the Supreme Court has recognized this principle in a number of cases involving the Commerce Clause. The most prominent of those cases is *South Carolina State Highway v. Barnwell Bros., Inc.*[168] wherein the Court stated:

> Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned, and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration.[169]

The Court in *Bibb v. Navajo Freight Lines, Inc.*,[170] 20 years later, recognized that "[t]he power of the state to regulate the use of its highways is broad and pervasive." [171]

[166] See discussion in text accompanying footnotes 11–20. See also Barber, *supra* note 41, at 171. Professor Barber points out that "[n]o observer without a political or litigious stake could classify the Mann Act as economically motivated, or the Lindbergh Act, or the Civil Rights Act of 1964. Congress has used the taxing power for purposes of regulating sales of sawed-off shotguns, sales of marijuana, and gambling. Congress uses its spending power to improve recreational facilities in the states, for police and fire protection, to promote the arts, and even, through revenue sharing, to improve the political positions of state and local governments. Such uses of federal power were either not justified in themselves or not rationalized by the Court in terms of the great national objectives of national defense, prosperity, racial justice, and fundamental civil liberties—as broad as these categories are." (Citations omitted.)

[167] 23 U.S.C. § 145.

[168] 303 U.S. 177 (1938).

[169] 303 U.S. at 187.

[170] 359 U.S. 520 (1959).

[171] 359 U.S. at 523.

More recently in the case of *Raymond Motor Transportation, Inc., et al. v. Rice, et al.*,[172] a case involving Wisconsin's regulation of twin trailers upon its highways, the Court stated that the special deference given to State highway regulations is derived from "a recognition that the States shoulder primary responsibility for the construction, maintenance, and policing of their highways, and that highway conditions may vary widely from State to State." (Cities omitted) [173]

The question arises whether the Court, based on *National League of Cities*, might apply this concept in the highway area. In the case of *State of North Carolina ex rel. Morrow v. Califano*, a three-judge District Court rejected such an argument in a footnote.[174] The District Court held that there was no direct regulation in the case and that the constitutional basis for the condition was not the Commerce Clause. The Court determined that the constitutional authorization in this case was the spending power.[175] The Court cited *Usery v. Charleston County School District* [176] in support of its view that *National League of Cities* was limited to the Commerce Power.

It should be noted, however, that the *Charleston County School District* case dealt with the Equal Pay Act which they noted was an anti-discrimination measure and was viewed as an exercise of Congress' power to adopt legislation enforcing the 14th amendment's guarantee of equal protection of the law. The 14th amendment stands on a much different basis than does the 10th amendment. As the Supreme Court held unanimously in *Fitzpatrick v. Bitzer*,[177] a case decided four days after *National League of Cities*, the expansion of congressional power under the enforcement provisions of the 13th, 14th, and 15th amend-

[172] 434 U.S. 429 (1978).

[173] 434 U.S. at 444, n. 18. This case was followed by Kassel v. Consolidated Freight ways Corp., 101 S.Ct. 1309 (1981), which affirmed the 8th Circuit's decision that 65-foot double trailers were as safe as shorter truck units. The Court enforced the concept of negative implication by finding once again that the Commerce Clause itself is "a limitation upon state power even without congressional implementation." 101 S.Ct. at 1315, citing Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 350 (1977). The Commerce Clause does not specifically state that the courts have the power to prevent interference with interstate commerce where the Congress has failed to act. Nevertheless, in the early history of the Constitution the Court established that even those instances where Congress has failed to exercise its power that the Commerce Clause still prevents the State from inhibiting the flow of interstate commerce. *See* Cooley v. Board of Wardens, 12 How. (53 U.S.) 299 (1851). For other cases concerning the states role in highways, *see*, Southern Pacific Co. v. Arizona, 325 U.S. 761, 783 (1945); Maurer v. Hamilton, 309 U.S. 598, 604–05 (1940), and Morris v. Duby, 274 U.S. 135, 143 (1927).

[174] 445 F. Supp. 532, 536 n. 10 (E.D. N.C. 1977) (three-judge court), *aff'd mem.*, 435 U.S. 962 (1978).

[175] *Id.*

[176] 558 F.2d 1169 (4th Cir. 1977).

[177] 427 U.S. 445 (1976).

ments resulted in a diminution of State sovereignty. *Fitzpatrick* reaffirmed the Court's position in *Ex parte Virginia* [178] that the "prohibitions of the Fourteenth Amendment are *directed to the States,* and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce. . . . [S]uch enforcement is no invasion of State sovereignty." [179] In contrast, the spending power is not directed specifically at the States. Accordingly, *Morrow* is not dispositive of the issue as it concerns the spending power and the *Charleston County School District* case did not reach that issue. Apparently the *Morrow* court was of the opinion that it was significant that the conditions based on the spending power are not compulsory unless such conditions amount to a coercion.

In the case of *Stiner v. Califano* [180] the Court, likewise, rejected *National League of Cities* as being applicable to the spending clause. The Court in that case could not agree that the challenged statute and regulation would directly displace the States' freedom to "structure integral operations in areas of traditional governmental functions. . . ." [181] The Court further noted that *National League of Cities* had expressed no view as to the impact of that decision on the spending power.[182] Once again no rationale is offered by the Court from which one can adequately determine why it rejected the theory underlying *National League of Cities.* The Court was of the opinion, however, that the conditions, imposed under the spending power, did not reach a form of economic duress.

In *State of Oklahoma v. Harris,*[183] 13 States challenged the constitutionality of a provision under the Social Security Act which required the States, as a condition to receiving Medicaid funds, to maintain certain levels of state payments to the Supplemental Security Income program.[184] The States argued that the conditions violated the 10th amendment and exceeded the constitutional authority of Congress. The Court held that the conditions were closely related to a legitimate federal purpose and in furtherance of the general welfare provision of the Constitution.[185] The Court also held that the conditions did not violate the 10th amendment because acceptance was voluntary: "The state is free to make its own decision as to the way its financial resources are allocated. It may avoid the requirements of the Section by choosing to withdraw from the Medicaid program." [186]

[178] 100 U.S. 339 (1879).
[179] 100 U.S. at 346 (emphasis added).
[180] 438 F. Supp. 796 (W.D. Okla. 1977) (three-judge court).
[181] 438 F. Supp. at 800 n. 4, citing *National League of Cities,* 426 U.S. at 852.
[182] 438 F. Supp. at 800 n. 4.
[183] 480 F. Supp. 581 (D. D.C. 1979).
[184] 42 U.S.C. § 1382g.
[185] 480 F. Supp. at 586.
[186] *Id.* at 586.

In *Montgomery County, Maryland v. Califano* [187] the County argued that the National Health Planning and Resource Development Act of 1974 [188] was contrary to the 10th amendment. The Court found that the County's participation was voluntary, was not coercive, and did not violate the 10th amendment. In fact, the Court stated that it had found no cases where the courts had struck down an Act of Congress based on the 10th amendment.

In *Texas Landowner Rights Association v. Harris* [189] the State of Missouri and political subdivisions of 12 states and a number of landowners brought an action against the Secretary of Housing and Urban Development challenging the National Flood Insurance Program as unconstitutional, *inter alia,* because it abrogated the concept of federalism and violated the 10th amendment by invading the traditional local government function of land-use regulation. The Court did not agree because it found the program was voluntary. Furthermore, in answer to the plaintiffs' request to balance the severity of the sanctions against the discretion left to the States, the Court said: "[t]he suggestion of testing federal coercion upon the States through a balancing process has long been rejected." [190]

In *Walker Field, Colorado Public Airport Authority v. Adams,*[191] an airport authority sued the Secretary of Transportation and others challenging conditions placed on federal-aid. The Tenth Circuit Court of Appeals held that the conditions imposed did not " 'operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions.' " [192] Although the Court found that the State in this instance had a choice, the Court did say: "It may be that some conditions imposed under the spending power of congress would exceed constitutional limits, but we see no such violation here." [193] Judge McKay wrote a strong dissent in which he concluded that he could no longer accept the import of previous cases on the matter.[194] He found that:

> [T]hose cases stand today in essentially the same posture as the Commerce Clause cases before *National League of Cities* was decided. . . . Since it is clear that the federally mandated alteration of state government function in this case is precisely the kind condemned in *National League of Cities,* the principal logical distinction between the cases, if any, must be bottomed on the fiction that the spending power cases involve a freedom of choice which is not available under the mandated

[187] 449 F. Supp. 1230 (D. Md. 1978), *aff'd mem.,* 599 F.2d 1048 (4th Cir. 1979).
[188] 42 U.S.C. §§ 300k *et seq.*
[189] 453 F. Supp. 1025 (1978), *aff'd mem.,* 598 F.2d 311 (D.C. Cir.), *cert. den.,* 444 U.S. 927 (1979).
[190] 453 F Supp. at 1030.
[191] 606 F.2d 290 (10th Cir. 1979).
[192] *Id.* at 297 (quoting *National League of Cities,* 426 U.S. at 852).
[193] *Id.* at 297–298.
[194] 606 F.2d at 298.

> programs condemned in *National League of Cities*. The time has long since passed when the mere formality of choice should satisfy constitutional requirements. . . . This court should not ignore the practical financial needs of present day state governments. Those needs may well have ended the freedom of choice once inherent in such conditional grants.[195]

Finally, in *State of New Hampshire Dept. of Employment Security v. Marshall*[196] the First Circuit Court of Appeals was asked to review a decision by the Secretary of Labor that the New Hampshire Unemployment Compensation Law failed to conform in a number of respects to the requirements of the Federal Unemployment Tax Act (FUTA).[197] The issue was whether the 1976 amendments to FUTA "violate[d] the sovereign integrity of the states" and "impair[ed] their ability to function effectively under the federal system as guaranteed by the tenth amendment."[198]

The court stated that the narrow question was "whether this case falls within the new furrow ploughed by *National League of Cities v. Usery*, . . . or follows in the wake of *Steward Machine Co. v. Davis*. . . ."[199] New Hampshire argued that the "option of the state to refuse to participate in the program is illusory, since the severe financial consequences that would follow such refusal negate any real choice."[200] The expert evidence demonstrated that at most it would cost New Hampshire $1,100,000 annually to comply with the program. The Labor Department's estimate was much less. The Court held that there, unlike in the *National League of Cities* case, the evidence established that extending coverage to the employees of New Hampshire and its political subdivisions would not " 'significantly alter or displace' the ability of New Hampshire 'to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health and parks and recreation.' "[201]

It is important to note that in this case the Court did not give passing treatment to the money involved. The opinion indicates that the Court spent time in determining the fiscal impact on New Hampshire—the implication being that a significant fiscal impact may have dictated a different result.

These cases emphasize the premise that, not only does coercion still play a role in the decision-making of these cases but, with the exception of the courts in *Walker Field*[202] and *State, Etc. v. Marshall,*[203] the test for coercion is extremely rigid. A state's chance of successfully attacking federal control appears very slim at present. The state will only be successful if it can prove that the coercion rises to a level that would prove "catastrophic" to the state's function if it were to refuse the federal-aid or that coercion must emanate from a source other than the "inducement" of federal-aid.

If coercion must rise to this level, it is arguable that the rationale and opinion found in *National League of Cities* is of little significance and is limited to the Commerce Clause.[204] This would lend credence to Justice Brennan's position that Congress could get around the barriers posed by the majority opinion in *National League of Cities* by merely attaching conditions under the spending clause.[205]

It is submitted that interference by Congress through the spending power is just as significant as interference through the Commerce Clause.[206] If the Court truly wants to leave some degree of integrity in the state government, an integrity that is not subject to the control of Congress, is it not logical that if the fiscal aid would displace a free choice of the state that it must in some way limit Congress' power under the spending clause in the same manner as it has limited Congress' power under the Commerce Clause?

The Court in *Sherbert v. Verner*[207] found that the availability of benefits could not be conditioned upon giving up a constitutional right.

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[195] *Id.* (footnote omitted).

[196] 616 F.2d 240 (1st Cir. 1980), *cert. den.*, 449 U.S. 806 (1980).

[197] 26 U.S.C. §§ 3301–3311. It should be noted that one of those nonconformities was New Hampshire's failure to extend unemployment coverage to State employees who were either temporary, seasonal, or nonclassified.

[198] 616 F.2d at 244.

[199] *Id.* (citations omitted).

[200] *Id.* at 246.

[201] *Id.* at 248 (quoting *National League of Cities*, 426 U.S. at 851).

[202] *Supra* note 191.

[203] *Supra* note 197.

[204] Schwartz, *supra* note 156, at 1132.

[205] 426 U.S. at 880. Also note that in EPA v. Brown, 431 U.S. 99 (1977), a consolidated case affecting California, Arizona, Virginia, Maryland, and the District of Columbia, the central issue concerned the authority of Congress to force States to legislate to carry out one of their programs. (This author was Counsel for Virginia in the case). The Environmental Protection Agency had promulgated regulations under the Clean Air Act of 1970, 42 U.S.C. §§ 7401–7642 (Supp. I 1977), to regulate air quality standards for both direct and indirect sources. The scope of the transportation control plan was pervasive, concerning such matters as the maintenance of auto emission equipment and use of mass transit. The obligation to carry out the plan was passed on to the States. Failure of the States to implement the plan could result in civil and criminal penalties against State officials under EPA's initial interpretation. At the Supreme Court level EPA conceded that it could not compel the States to legislate, which was necessary in order to carry out the plan. Counsel for the States and D.C. had recognized early in the preparation of the case before the Supreme Court that Congress had an "ace in the hole" because if they lost the case they could accomplish their purpose by tacking on other requirements as a condition to federal-aid. This anticipation was confirmed with the 1977 amendments to the Clean Air Act. For further discussion, see Note, *The Implementation of Transportation Controls Under the 1977 Clean Air Act Amendments*, 50 U. Colo. L. Rev. 247 (1979).

[206] *See* Ripple and Kenyen, *supra* note 165.

[207] 374 U.S. 398 (1963). For a thorough discussion of this case, see Note, *Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery*, 26 American U.L. Rev. 726 (1977).

The Court apparently has distinguished this case, however, because it involved a private individual and not a state. In this case the South Carolina Employment Security Commission denied unemployment compensation to the appellant, a member of the Seventh Day Adventist Church, because it had viewed as without good cause the appellant's refusal to accept employment on Saturday, the day that her faith celebrated the Sabbath. The Court found the Commission's decision unconstitutional reasoning that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." [208] Should the fact that *Sherbert* involved individual constitutional privileges distinguish it from application to the spending clause?

There is a way that Congress could satisfy those who oppose extensive use of the spending powers to invade what they believe to be "traditional" functions of the States. Either Congress or the Court could decide that the limitation recognized in *National League of Cities* applies as well to the spending clause and that Congress will not place a condition on fiscal aid that extends into an area traditionally within the control of the States if the fiscal aid involved was large enough that it would displace a state's freedom of choice to accept or reject. In order to preserve the right of Congress at times to override the States in those instances where unified national response is necessary, if the Congress or the Court determined that the federal program invaded an area traditionally left to the States, this would balance [209] the adverse impact on the integrity of the affected traditional function of the States against the federal interest in the nationwide application of the condition.[210] This would still allow the concept espoused in *Oklahoma* to remain viable as to those functions of the State which States exercise concurrently with Congress, or which are not viewed as "traditional" State functions, or where the aid was not large. Such nontraditional functions would continue to remain subject to Congress' indirect regulation through conditional spending. At the same time, the States would retain their integrity in certain areas.

In order to accomplish this, however, either Congress or the Court must recognize that today's federal-aid to the States is indeed overwhelming when compared to that offered when *Steward Machine Co.* was decided in 1937.

IS THERE SOUND REASONING IN FEDERALISM?

Without checks, the spending powers of Congress may undermine federalism. It has been said that the individuality of the States counteracts stagnation and deadening uniformity.[211] Justice Brandeis said:

> It is one of the happy incidents of the federal system that a courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[212]

According to Judge McKay,

> [T]he concept of diversified power, as a check on the loss of individual liberty that would be inherent in one central government of unlimited power, remains vigorous. . . . These constitutional concerns about restraints on governmental power through institutional structure are grounded not only in the Tenth Amendment but also in the structural assumptions of the Constitution as a whole.[213]

Professor Wechsler points out that federalism was the

> . . . means and price of the formation of the Union. . . . In a far flung, free society, the federalist values are enduring. They call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without undue sacrifice of their diversities and the creative energies to which diversity gives rise. They call for government responsive to the will of the full national constituency, without loss of a responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern.[214]

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[208] *Id.* at 406.

[209] Balancing by the Courts is not unusual. In fact, Justice Blackmun suggested in *National League of Cities* that the Courts will have to employ balancing to determine the margins of "traditional" functions of the States. 426 U.S. at 856.

[210] Walker Field, Colo., Public Airport Authority v. Adams, 606 F.2d 290, 298 (10th Cir. 1979) (dissenting opinion). For further discussion of balancing, see Bogen, *Usery Limits on National Interest,* 22 Ariz. L. Rev. 753, 766–768 (1980); Comment, *Federal Interference with Checks and Balances In State Government: A Constitutional Limit on the Spending Power,* 128 U. Penn. L. Rev. 402, 423–425 (1979); Kaden, *Politics, Money and State Sovereignty: The Judicial Role,* 79 Col. L. Rev. 847, 896–897 (1979).

[211] See Wilkinson, *Justice John M. Harlan and the Values of Federalism,* 57 Va. L. Rev. 1185, 1193–1194 (1971); Comment, *Federal Interference with Checks and Balances, supra* note 211, at 418.

[212] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931); *see also* Justice Harlan's comments in Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (dissenting opinion).

[213] Walker Field Colo., Public Airport Authority v. Adams, 606 F.2d 290, 299 (10th Cir. 1979) (dissenting opinion) quoting Tribe, *American Constitutional Law* 301 (1978); *Cf.* Choper, *The Scope of National Power Vis-a-vis the States: The Dispensability of Judicial Review,* 86 Yale. L. J. 1552 (1977).

[214] Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 Col. L. Rev. 543 (1954).

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators and their legal counsel. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document.

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