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# Emerging Concepts Of Federalism: Limitations On The Spending Power And National Health Planning

# EMERGING CONCEPTS OF FEDERALISM: LIMITATIONS ON THE SPENDING POWER AND NATIONAL HEALTH PLANNING

With the adoption of Medicare and Medicaid in 1965,[1] the federal government accepted extensive financial responsibility for the medical care of United States citizens.[2] In addition to these programs, Congress further involved the federal government in the health care delivery system with the passage of the Heart Disease, Cancer, and Stroke Amendments of 1965[3] and the Comprehensive Health Planning and Public Health Services Amendments of 1966.[4] The 1965 amendments, ostensibly dealing with major fatal diseases, represented the initial movement toward regional, rather than state development of health facilities and personnel.[5] The 1966 amendments, although producing no dramatic results, signified the first attempt by the federal government to deal with the concept of health planning.[6]

Federal treatment of such health concerns is consistent with past actions by the federal government in the health care sector.[7] Never-

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[1] Medicare is the popular name for the program of health insurance for the aged established by the Social Security Amendments of 1965, 42 U.S.C. §§ 1395 to 1395ll (1970). Financing for these insurance benefits comes from a trust fund supported by the Social Security tax. Furthermore, protection beyond these benefits is provided by the premiums of the beneficiaries and matching governmental contributions. *See generally* Wolkstein, *Medicare 1971: Changing Attitudes and Changing Legislation*, 35 L. & CONTEMP. PROB. 697 (1970); Comment, *Medicare—The Great Society's Contribution To The Elderly*, 3 CUM.-SAM. L. REV. 298 (1972).

Medicaid, the Grants to States for Medical Assistance Programs, 42 U.S.C. §§ 1396 to 1396g (1970), was part of the same legislative package as Medicare. Medicaid, however, was not based upon specific contributions like Medicare, but instead provided medical assistance to the medically needy through federal grants-in-aid to states. *See generally* Stevens & Stevens, *Medicaid: Anatomy of a Dilemma*, 35 L. & CONTEMP. PROB. 348 (1970).

[2] Note, *Federally Imposed Self-Regulation of Medical Practice: A Critique of the Professional Standards Review Organization*, 42 GEO. WASH. L. REV. 822, 823 (1974).

[3] Pub. L. No. 89-239, 79 Stat. 926 (codified at 42 U.S.C. §§ 299 to 299i (1970)).

[4] Pub. L. No. 89-749, 80 Stat. 1180 (codified at 42 U.S.C. § 246 (1970)).

[5] *See* Chapman & Talmadge, *Historical and Political Background of Federal Health Care Legislation*, 35 L. & CONTEMP. PROB. 334, 345-46 (1970) [hereinafter cited as Chapman & Talmadge].

[6] *See id.* at 346.

[7] During the first 150 years of United States history, the only health question to achieve national prominence concerned the authority of the federal government to pass quarantine laws. *See id.* at 334-36. Chief Justice Marshall dispatched the issue, however, with a strict and far reaching dictum in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). According to Marshall, regulation of interstate and foreign commerce was specifically delegated to Congress and was a proper area for federal intervention.

theless, these measures, particularly the disregarding of state boundaries and interests by the 1965 amendments, raised questions as to whether the concept of federalism posed a possible limitation upon federal action in the health field.[8] Further questions concerning the scope of federal authority in formulating health policy are presented by provisions of the Health Maintenance Organization Act of 1973[9]

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Health matters, however, were not specifically assigned and thus were reserved to the states. *Id.* at 203. Although the federal government soon assumed quarantine authority in the face of a practical abdication of that power by the states, Marshall's dictum generally controlled federal health actions until the 1930's. *See* Chapman & Talmadge, *supra* note 5, at 337-41.

To confront the hardships of the Depression, however, the Supreme Court held that the scope of the general welfare clause, U.S. CONST. art. III, § 8, cl. 1, would include health matters and could be defined by Congress rather than by state governments. *See* Helvering v. Davis, 301 U.S. 619, 645 (1937); Chapman & Talmadge, *supra* note 5, at 342-43; text accompanying notes 53-70 *infra.* Using the general welfare clause as a foundation, federal health legislation prior to the passage of Medicare, *see* note 1 *supra,* focused primarily on improving the quality of health care facilities. The hospital construction program funded through the Hill-Burton Act, Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040 (1946)(current version at 42 U.S.C. §§ 291 to 291o-1 (1970)), is representative of these programs. Further federal involvements seemed to be a logical extension of this trend.

[8] *See* Chapman & Talmadge, *supra* note 5, at 345-46.

[9] 42 U.S.C. §§ 280c, 300e to 300e-14a (Supp. V 1975). A health maintenance organization (HMO) is a recent variation of the concept of pre-paid comprehensive medical services. An HMO is a privately organized health care delivery system which provides comprehensive medical services, including emphasis on the prevention of illness or disability, for a fixed per capita price (as opposed to a per service price) paid in advance by the individual enrollees, Medicare, Medicaid, or through employer-employee arrangements. *See* Hanson, *The Private Insurance Industry and State Insurance Regulatory Activities as Alternatives to Federally Enacted Comprehensive National Health Insurance Legislation,* 6 U. TOL. L. REV. 677, 703 (1975). The distinctive characteristic of the HMO system is that the provider of care, rather than a third-party insurer, is the risk bearer, receiving a pre-paid premium for a largely open-ended contractual undertaking to provide specified care to meet all the needs of the subscribers. *See* Havighurst, *Health Maintenance Organizations and the Market for Health Services,* 35 L. & CONTEMP. PROB. 716, 718 (1970). *See also* Note, *The Role of Prepaid Group Practice in Relieving the Medical Care Crisis,* 84 HARV. L. REV. 887 (1971).

The Health Maintenance Organization Act of 1973 offers HMO's financial support, 42 U.S.C. §§ 300e-2 to 300e-8 (Supp. V 1975), requires certain employers to make HMO coverage optional provisions of employee health benefit plans, *id.* § 300e-9, and releases HMO's from the effect of restrictive state laws, *id.* § 300e-10. *See* Rosoff, *Phase Two of the Federal HMO Development Program: New Directions After A Shaky Start,* 1 AM. J. L. & MED. 209, 215 (1975). The Act supersedes any state law requiring that a medical society approve the furnishing of services by the HMO, 42 U.S.C. § 300e-10(a)(1)(A); that physicians constitute all or a percentage of its governing body, *id.* § 300e-10(a)(1)(B); that all physicians or a percentage of physicians in the locale participate or be permitted to participate in the provisions of services for the HMO,

and the 1972 Social Security Amendments.[10]

The most recent, and potentially most expansive, federal action in the health care sector, however, is the planning and regulatory system established by the National Health Planning and Resources Development Act of 1974.[11] Concerned with the problems of unequal access to health services, inflationary costs, and misallocation of resources plaguing the health care delivery system,[12] Congress passed the Act "to facilitate the development of recommendations for a national health planning policy, to augment areawide and State planning for health service, manpower, and facilities, and to authorize

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*id.* § 300e-10(a)(1)(C); or that the HMO meet requirements for insurers of health care services doing business in that state respecting initial capitalization and establishment of financial reserves to protect against insolvency, *id.* § 300e-10(a)(1)(D). Furthermore, states are prevented from passing or enforcing any law which prevents a health maintenance organization from soliciting members through advertising its services, charges, or other non-professional aspects of its operations. *Id.* § 300e-10(b). *See* Rice, *Federal Regulation in the Ambulatory Health Care Sector,* 6 U. TOL. L. REV. 822, 831 (1975). The elimination of such state legal barriers to the HMO system impinges directly on the concept of federalism. *Id.* at 830.

[10] 42 U.S.C. §§ 1320c to 1320c-19 (Supp. V 1975). The amendments created Professional Standards Review Organizations (PSRO's), which are self-regulatory organizations of local physicians that monitor individual physicians' decisions affecting the use of health care resources under Federal health programs. *See id.* § 1320c-1; Havighurst & Blumstein, *Coping With Quality/Cost Trade-Offs in Medical Care: The Role of PSROs,* 70 NW. U. L. REV. 6, 7 (1975) [hereinafter cited as Havighurst & Blumstein]. Although the Department of Health, Education and Welfare (HEW) and some commentators have emphasized the importance of local development of norms, criteria and standards effected by the organizations, *see* Havighurst & Blumstein, *supra,* at 48-49, the PSRO concept facilitates the movement of health policy decision-making from the local levels to the federal agencies by establishing a review hierarchy with ultimate authority vested in the Secretary of HEW. *See* 42 U.S.C. §§ 1320c-1(a)&(d), 1320c-11, 1320c-12 (Supp. V 1975); Note, *Federally Imposed Self-Regulation of Medical Practice: A Critique of the Professional Standards Review Organization,* 42 GEO. WASH. L. REV. 822, 825-37 (1974). Although such supervision may be minimal, the very existence of a federal review procedure suggests that, in spite of the emphasis on local autonomy and regional standards, the activities and practices of the local organizations might be directed by the federal government. Such federal regulation could conflict with state interests protected by the concept of federalism. *See* Havighurst & Blumstein, *supra,* at 47-51.

[11] 42 U.S.C. §§ 300k to 300t (Supp. V 1975). *See generally* Atkisson & Grimes, *Health Planning in the United States: An Old Idea with a New Significance,* 1 J. HEALTH, POL., POL'Y & L. 295 (1976) [hereinafter cited as Atkisson & Grimes]. The constitutionality of the Act "recently was" attacked in federal district court in North Carolina by the States of North Carolina and Nebraska, the American Medical Association, and the North Carolina Medical Society. The court rejected this attack, however, and granted the defendant's motion for summary judgment. North Carolina *ex rel.* Kirk v. Califano, No. 76-0049-CIV-5 (E.D.N.C. Oct. 3, 1977), *notice of appeal to S. Ct. filed* Nov. 9, 1977.

[12] 42 U.S.C. § 300k(a)(Supp. V 1975).

financial assistance for the development of resources to further that policy."[13] To accomplish these ends, the Act has created a comprehensive regulatory framework. Although certain aspects of this system may become effective without the consent of the states,[14] most of the provisions, like other grants-in-aid generally, are inoperative until states subject themselves to these terms by negotiating agreements with the Secretary of Health, Education and Welfare (HEW).[15] Congress, however, did not intend to permit states to make a simple choice concerning participation in the program,[16] because substantial penalties were included for those states that elect not to participate.[17]

The state participation to be induced by these penalties includes legislative and administrative support to an intricate system of agencies designed to coordinate health planning policy throughout the United States. The basic component of this structure consists of a network of health systems agencies (HSA's) responsible for health planning and development throughout the country.[18] Each HSA serves a specific health service area established by the Secretary of HEW.[19] Generally, the HSA's are charged with preparing and implementing plans designed for improving the health of the health service area residents; increasing the accessibility, continuity, and quality of health services in the area; curbing cost increases in the provision of health care; and preventing unnecessary duplication of health resources.[20]

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[13] *Id.* § 300k(b). See *id.* § 300k-2 for a listing of congressional priorities for health planning goals to be achieved by federal, state, and area health planning and resources development programs.

[14] *See, e.g.,* 42 U.S.C. § 300k-1 to 300k-3 (Supp. V 1975).

[15] *See* Atkisson & Grimes, *supra* note 11, at 299. Thus, like other grants-in-aid, the Act ostensibly permits the states to adopt the "simple expedient" of refusing the federal benefits. *See* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143-44 (1947). *See also* text accompanying notes 64-68 *infra.*

[16] *See* note 15 *supra.*

[17] *See* 42 U.S.C. § 300m(d)(Supp. V 1975); text accompanying notes 25-29 *infra.*

[18] *See* 42 U.S.C. § 300l-1 (Supp. V 1975). A health systems agency is either a private, non-profit corporation or a public entity, designated by the Secretary of HEW to be responsible for health planning and development in a given health service area. *Id. See* note 19 *infra.*

[19] A health service area is a geographic region which is conducive to effective planning and development of health services and satisfies the requirements of 42 U.S.C. § 300l(a)(Supp. V 1975). Although the boundaries of each area were initially established by state governors, the Secretary of HEW has authority to extend these regions beyond state lines, *id.* § 300l(b), and, in fact, several areas presently cross state borders.

[20] *Id.* § 300l-2(a). In fulfilling these responsibilities, the HSA's are required to gather and analyze various kinds of health data from their respective areas; to develop

In addition to the local HSA's, the planning and regulatory structure of the Act consists of three other levels of new health agencies—a National Council on Health Planning and Development,[21] State Health Planning and Development Agencies (SHPDA's),[22] and Statewide Health Coordinating Councils (SHCC's).[23] The National Council is essentially an advisory organization to the Secretary of HEW. The state organizations, however, are responsible for the health planning and development functions at the state level. The SHPDA's perform essentially the same functions as the HSA's but on a statewide basis, while the SHCC's serve primarily as reviewing bodies for the SHPDA's.[24]

Since requiring state acceptance of these and other related provisions constitutes a significant intrusion upon state administrative and legislative autonomy,[25] Congress included significant financial penalties to overcome the anticipated reluctance of the states to participate. The Act provided that if a state fails to negotiate a state agency designation agreement by July, 1980,[26] then the Secretary of HEW must refrain from authorizing funding under numerous federal

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long-range health plans for each area and annual implementation plans to fulfill these long-range goals; to provide technical and financial assistance to individuals or entities seeking to implement the provisions of these plans; to coordinate these activities with Professional Standards Review Organizations and other planning and regulatory bodies; to review and approve applications for federal funds for area health programs; to assist states in resource utilization reviews; and to recommend to the states projects for modernization, construction, and conversion of medical facilities in appropriate areas. *See id.* § 300l-2(a)-(h).

[21] *Id.* § 300k-3.

[22] *Id.* § 300m.

[23] *Id.* § 300m-3.

[24] *See id.* §§ 300m-2 and 300m-3(c).

[25] *See* Atkisson & Grimes, *supra* note 11, at 299. The requirement that the SHPDA "administer a State certificate or need program which applies to new institutional health services proposed to be offered or developed within the state," 42 U.S.C. § 300m-2(4)(B)(Supp. V 1975), particularly has met with resistance. Certificate of need laws regulate entry into the health services industry and investments in health care facilities by requiring a prior administrative determination that a public need for additional facilities or services exist. *See generally* Havighurst, *Regulation of Health Facilities and Services by "Certificate of Need,"* 59 VA. L. REV. 1143 (1973).

The certificate of need requirement poses an unusually difficult problem for the State of North Carolina because certificate of need legislation has been held violative of the North Carolina Constitution as a denial of equal protection of law and an illegal monopoly and exclusive privilege. *See In re* Certificate Of Need For Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1973). This dilemma precipitated an unsuccessful attack upon the constitutionality of the National Health Resources and Development Act of 1974 by the States of North Carolina and Nebraska and two medical associations. *See* note 11 *supra*.

[26] *See* Atkisson & Grimes, *supra* note 11, at 300; text accompanying notes 14-15 *supra*.

health programs until such an agreement becomes effective.[27] The loss of such a substantial portion of federal health funding would have a crippling effect upon the delivery of health services in most states.[28] Furthermore, conditioning continued federal support for such a broad range of programs upon state compliance with federal requirements will have a serious impact upon traditional state legislative and fiscal functions.[29]

Legislation containing such conditions may be constitutionally defective as an infringement of the principles of federalism inherent in the Constitution. The tenth amendment[30] represents the clearest expression of this balance of power between state and federal governments.[31] Immediately upon the amendment's ratification, however, two distinct interpretations emerged. The Federalists considered the federal government to be supreme in its area of delegated powers, and asserted that federal action under any of the enumerated powers

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[27] 42 U.S.C. § 300m(d)(Supp. V 1975), requires the Secretary to refrain from making

> any allotment, grant, loan, or loan guarantee, or enter into any contract, under this chapter [The Public Health Service], the Community Mental Health Centers Act, or the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 for the development, expansion, or support of health resources in such State until such time as such an agreement is in effect.

This sanction would result in a loss of federal funds in almost fifty programs under the Public Health Act alone. *See id.* §§ 201 to 300t (1970 & Supp. V 1975).

[28] *See* Atkisson & Grimes, *supra* note 11, at 300. The withdrawal of benefits under these programs would undoubtedly reduce the health policies in many states to chaos. In North Carolina, for example, the revenue from these federal programs amounts to over forty-nine million dollars, a substantial portion of the state's health budget. *See* Memorandum for Plaintiff Supporting Motion for Summary Judgment at 19, North Carolina *ex rel.* Kirk v. Califano No. 76-0049-CIV-5 (E.D.N.C. Oct. 3, 1977), *notice of appeal to S. Ct. filed* Nov. 9, 1977. North Carolina alleged that the loss of these benefits would cause the state's entire health care system to break down. *Id.* at 26.

[29] In North Carolina's situation, such conditions present direct interference with that state's constitutional protections. *See* note 25 *supra.*

[30] U.S. CONST. amend. X, states that "[t]he 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."

[31] *See* Comment, *An Affirmative Constitutional Right: The Tenth Amendment and the Resolution of Federalism Conflicts,* 13 SAN DIEGO L. REV. 876, 877 (1976). Although the Constitution contains many implicit recognitions of the federal system, such as the method of electing the House of Representatives, U.S. CONST. art. I, § 2, absent the tenth amendment, the only express recognition of the concept is the provision in article four that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." *Id.* art. IV § 4. *See generally* Corwin, *The Passing of Dual Federalism,* 36 VA. L. REV. 1 (1950).

justified ignoring any possible interference with state activity.[32] The Madisonians, however, viewed the basic governmental organization established by the Constitution as a compact of free and independent states, the national government concerned with the external relationships of these states, while the states regulated their internal affairs.[33] From this perspective, any federal activity that interfered with the states' control over internal affairs violated the tenth amendment.[34] Both interpretations have been postulated by the Supreme Court at one time or another.[35] With a limited exception concerning the taxing power,[36] the issue appeared to have been settled, however, by the Court's declaration in *United States v. Darby*[37] that the amendment is merely a "truism" and provides no substantive limitation of federal

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[32] *See* Cowen, *What Is Left of the Tenth Amendment?*, 39 N.C. L. REV. 154, 157 (1961) [hereinafter cited as Cowen]. Chief Justice Marshall stated the classic formulation of the federalist position in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Considering the significance of the omission of the word "expressly" as a qualification of delegated powers he wrote:

> Even the 10th amendment, which was framed for purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.

*Id.* at 406.

[33] *See* Cowen, *supra* note 32, at 157. *See also* Casto, *The Doctrinal Development of the Tenth Amendment*, 51 W. VA. L.Q. 227, 228 (1949).

[34] *See* Cowen, *supra* note 32, at 157.

[35] The Court had adhered to the Madisonian interpretation by adopting the doctrine of "dual federalism," which construed the states' reserved powers under the tenth amendment to restrict the scope of national powers and to segregate state and federal legislative and regulatory spheres. *See generally* Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). The doctrine reached its zenith in Hammer v. Dagenhart, 247 U.S. 251 (1918), where the Court held that the tenth amendment precluded the exclusion of goods produced by child labor from interstate commerce as an impermissible exercise of federal power to regulate interstate commerce. The Court abandoned this approach in United States v. Darby, 312 U.S. 100 (1941), in favor of the less restrictive Federalist interpretation. Overruling *Hammer*, the *Darby* Court declared that the tenth amendment merely restates the fact that the federal government is one of delegated powers and that those powers not constitutionally allocated to the central government are retained by the states. *Id.* at 124. *See* text accompanying notes 37-38 *infra*. *See generally* Percy, National League of Cities v. Usery: *The Tenth Amendment Is Alive and Doing Well*, 51 TUL. L. REV. 95, 98-101 (1976) [hereinafter cited as Percy].

[36] *See* text accompanying notes 40-49 *infra*.

[37] 312 U.S. 100 (1941).

power.[38] Nevertheless, the Court has recently resurrected the concept of structural federalism embodied in the tenth amendment as a proscription of delegated federal authority.[39]

The exercise of federal authority to tax and spend,[40] and to regulate commerce,[41] frequently has been attacked as violative of the principle of tenth amendment federalism.[42] Until *National League of Cities v. Usery*,[43] the commerce and spending powers were virtually unchecked since the demise of the concept of dual federalism.[44] Nevertheless, the states had found protection from federal intrusion into their affairs through tenth amendment limitations on the taxing power. This was accomplished under the broad rubric of "intergovernmental immunities."[45] Although the early absolute character of the immunity eventually gave way to a more flexible approach,[46] the theory that certain state functions are immune from

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[38] *Id.* at 124. The *Darby* Court stated that the amendment merely declared the relationship between national and state governments as it had been established by the Constitution. *Id.*

[39] *See* National League of Cities v. Usery, 426 U.S. 833 (1976); text accompanying notes 86-142 *infra.*

[40] U.S. CONST. art. I, § 8, cl. 1, states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . . ."

[41] U.S. CONST. art. I, § 8, cl. 3, states that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[42] *See generally* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES 1263-71 (1973); Cowen, *supra* note 32, at 169-76.

[43] 426 U.S. 833 (1976). *See* text accompanying notes 86-142 *infra.*

[44] *See* note 35 *supra;* text accompanying notes 50-85 *infra.*

[45] Chief Justice Marshall formulated the doctrine of intergovernmental immunities in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Holding that the supremacy clause prevented state taxation of bank notes issued by a branch of the Bank of the United States, the *McCulloch* Court announced the famous maxim that the "power to tax involves the power to destroy." *Id.* at 431. Justice Marshall found that state taxation or regulation of federal instrumentalities presents a possibility of interference with substantive federal policy sufficient to raise a presumption of federal immunity from state taxation. *Id.* at 428-31. *See generally* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 HARV. L. REV. 683, 700-11 (1976). This principle later was extended on tenth amendment grounds to give the states reciprocal immunity from the federal taxing power. *See* Collector v. Day, 78 U.S. (11 Wall.) 113 (1870).

[46] Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939), *overruling* Collector v. Day, 78 U.S. (11 Wall.) 113 (1870). In *Day,* the immunity for state officials had been derived from the immunity afforded the state. This immunity was confined by *Graves,* however, to a more limited immunity protecting only state functions that were deemed to be intrinsically governmental, rather than protecting state officials. To establish the scope of this immunity, the Court emphasized that enterprises of a "proprietary"

federal taxing power has persisted.[47] In *New York v. United States*,[48] for example, although upholding the validity of a federal tax on mineral water sold by the State of New York, the Supreme Court reiterated the idea that certain state functions are exempt from federal taxation.[49]

Although states enjoy a somewhat ambiguous measure of immunity from the federal taxing power, congressional authority under the spending power has encountered no restraints in recent decades. As with the tenth amendment,[50] the spending power has been approached on two general theories, one Madisonian, the other Hamiltonian. While Madison believed that congressional spending for the general welfare should be limited to spending incidental to a delegated power, Hamilton and the Federalists interpreted the clause to be a grant of substantial power by its own terms.[51] Whatever controversy may have surrounded the power, the Court resolved the issue in *United States v. Butler*[52] by holding that the clause conferred a substantive power to appropriate independent of the enumerated powers, and limited only by the requirement that it be exercised to provide for the general welfare of the United States.[53]

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rather than "governmental" character were not exempt from taxation. *See, e.g.*, United States v. California, 297 U.S. 175 (1936)(state-operated railroads); Ohio v. Helvering, 292 U.S. 360 (1934)(state liquor monopoly). A state activity is "proprietary" when it is of an essentially private character, that is, one not traditionally limited to government action. *See* Note, *State Governmental Immunity From Federal Regulation Based On The Commerce Clause*—National League of Cities v. Usery, 26 DE PAUL L. REV. 101, 110-11 (1976) [hereinafter cited as *Commerce Clause Immunity*].

[47] *See* New York v. United States, 326 U.S. 572 (1946).

[48] *Id.*

[49] The *New York* decision marked a departure from the "proprietary" and "governmental" distinction, but to what extent is unclear because of the divergent opinions in the case. The plurality characterized such distinctions as "untenable criteria," *id.* at 583, recognizing, however, that functions completely unique to a state government might be immune from federal taxation, *id.* at 582. Four concurring justices acknowledged that even a non-discriminatory tax might "interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 587 (Stone, C. J., concurring). Thus, although the "proprietary" and "governmental" distinction may have been compromised, a sphere of immunity does exist for certain state functions. *See* Percy, *supra* note 35, at 102-03; *Commerce Clause Immunity, supra* note 46, at 111 n.52.

[50] *See* text accompanying notes 32-38 *supra.*

[51] *See* Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U. L. REV. 293, 297-98 (1975) [hereinafter cited as *Conditional Spending*]. *See also* United States v. Butler, 297 U.S. 1, 65-67 (1936).

[52] 297 U.S. 1 (1936).

[53] *Id.* at 65-66. *See Conditional Spending, supra* note 51, at 298-300. The *Butler* Court, however, reached the somewhat incongruous decision that the Agricultural

The *Butler* conception of the spending power was soon expanded by the decisions in *Steward Machine Co. v. Davis*[54] and *Helvering v. Davis*.[55] The premise of both decisions was that Congress may spend in aid of the general welfare,[56] and that "the concept of welfare or the opposite is shaped by Congress, not the states."[57] The Court thus made clear that Congress may use the spending power to inject itself into local matters over which the federal government has no direct regulatory power.[58]

Nevertheless, *Steward Machine* and *Helvering* recognized that the spending power does have limits, however ill-defined. *Steward Machine* confronted the problem of whether tax credits against the federal tax, granted to employers for taxes paid to states under the Social Security Act, coerced state compliance with the Act's provisions.[59] The Court noted that although the distinction between compulsion and inducement was one of degree,[60] the Social Security Act did not prevent the states from choosing whether to comply with the provisions.[61] The distinction was thus drawn between coercive and persuasive expenditures.[62] The Court's application of this distinction,

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Adjustment Act, ch. 25, 48 Stat. 31 (1933), was an unconstitutional invasion of powers reserved to the states. The majority did not believe that Congress could invoke the taxing and spending power as a means to reach a matter not within the powers delegated to the national government. 297 U.S. at 72-74. This holding effectively emasculated the determination that the spending power was an independent grant of substantive authority.

[54] 301 U.S. 548 (1937).

[55] 301 U.S. 619 (1937). Both *Steward Machine* and *Helvering* upheld various sections of the Social Security Act, ch. 531, 49 Stat. 620 (1935)(codified in scattered sections of 42 U.S.C.).

[56] *See* Helvering v. Davis, 301 U.S. at 640.

[57] *Id.* at 645. The most recent formulation of the principle that the "general welfare" is defined by Congress is found in Buckley v. Valeo, 424 U.S. 1 (1976). The Court there stated that the general welfare clause is a grant of substantive power, and that Congress shall "decide which expenditures will promote the general welfare." *Id.* at 90. The Court stated further that the spending power is not limited by the direct grants of legislative power found in the Constitution, but that other constitutional limitations upon that granted power may exist. *Id.* at 91.

[58] *Conditional Spending, supra* note 51, at 301.

[59] Steward Machine Co. v. Davis, 301 U.S. at 584.

[60] *Id.* at 590.

[61] *Id.* The Court stated that it could not say that Alabama was not acting "of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making . . . ." *Id.*

[62] The Court phrased the coercion/persuasion distinction as follows:

> It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by

however, reveals a reluctance to hold an act of Congress coercive upon the states.[63] In *Oklahoma v. United States Civil Service Commission*,[64] the Court indicated that as long as a state may adopt the "simple expedient" of not yielding to the alleged coercion, state sovereignty is not infringed.[65] Emphasizing that the tenth amendment did not deprive Congress of the authority to use all means appropriate to the exercise of a granted power, the Court held that the United States has the "power to fix the terms upon which its money allotments to the states shall be disbursed."[66] Unlike other exercises of federal power, however, the supremacy clause[67] does not demand that states accept federal funding.[68] Thus, because states are theoretically free to resist any appropriation for the general welfare, the practical effect of the coercion test as a restraint upon federal power is minimal.

The Court's discussion in *Helvering v. Davis*, however, suggests that considerations of state sovereignty may prevent this authority from being limitless.[69] Although conditional appropriations are not required to have a logical relation to any enumerated authority, they still may be required to have a reasonable relation to the purposes of the spending program itself.[70] By requiring a reasonable relation be-

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> the tax in its normal operation, or to any other end legitimately national . . . . It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line.

Stewart Machine Co. v. Davis, 301 U.S. at 591 (citations omitted).

[63] *Butler* appears to be the only Supreme Court decision that even impliedly invalidates a congressional appropriation for its coercive effect on the states. *See Conditional Spending, supra* note 51, at 307.

[64] 330 U.S. 127 (1947).

[65] *Id.* at 143-44. *Oklahoma* involved the removal of the state highway commissioner for political activities in violation of the Hatch Act, (current version at 5 U.S.C. §§ 1501-1508 (1970 & Supp. V 1975)). He had been employed in connection with an activity funded in part by federal funds, and unless Oklahoma removed him from office, federal highway grants would be withheld in an amount equal to two-year's compensation of the commissioner. 330 U.S. at 132-33. The Court held that Oklahoma could have resisted the directive and therefore was not coerced to remove the officer. *Id.* at 143-44.

[66] 330 U.S. at 143. *Accord* Lau v. Nichols, 313 U.S. 563, 569 (1974); King v. Smith, 392 U.S. 309, 333 n.34 (1968).

[67] U.S. CONST. art. VI, cl. 2.

[68] *See Conditional Spending, supra* note 51, at 303.

[69] *See* Helvering v. Davis, 301 U.S. at 640-45.

[70] *See Conditional Spending, supra* note 51, at 303. The *Helvering* Court indicated that a tenth amendment attack on an exercise of spending authority requires "a show-

tween the condition and the purpose of a spending program to protect the principles of federalism, the tenth amendment limits the exercise of congressional spending authority.[71] That the Court has never found the application of such a sanction to be necessary makes it no less a constitutional limit on the scope of the spending power.[72]

Although the tenth amendment has provided at least a theoretical restriction on the spending power, in the past few decades federal legislation under the commerce clause[73] has been virtually unlimited, resulting in a continued expansion of federal regulation into areas previously reserved to state governments.[74] Beginning with *United States v. California,*[75] the Court has consistently refused to limit otherwise valid federal commercial regulations merely because they im-

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ing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress" to determine what constitutes the general welfare. Helvering v. Davis, 301 U.S. at 641, *quoting* United States v. Butler, 297 U.S. 1, 69 (1936). In this regard, Congress' discretion is circumscribed only by the definition of a general welfare rather than a particular welfare. If an exercise of discretion is within these bounds, no attack will be successful "unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* at 640. The Court further stated that "the concept of the general welfare [is not] static" and "changes with the times." *Id.* at 641. These statements indicate that, even within the bounds of the requirement that conditions must reasonably relate to the purposes of the spending program, Congress has sufficient latitude to execute a broad range of national policies.

For further support of the reasonable relation requirement, see Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947); Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974). *See generally Conditional Spending, supra* note 51, at 303-10.

[71] *See* cases cited note 70 *supra.* More recently, the Court has recognized that the spending power has constitutional limitations without directly discussing the tenth amendment. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 91 (1976) ("any limitations upon the exercise of [the spending] power must be found elsewhere in the Constitution."); Lau v. Nichols, 414 U.S. 563, 569 (1974) ("whatever may be the limits of [the spending] power . . . they have not been reached here."). This broader treatment of spending power limitations does not suggest, however, that the tenth amendment should no longer be regarded as an effective check on congressional spending authority. The tenth amendment stands as perhaps the clearest of all constitutional limitations upon federal power and logically must be one of the limitations to which the Court alluded in these cases.

[72] *See Conditional Spending, supra* note 51, at 307.

[73] *See* note 41 *supra.*

[74] *See Commerce Clause Immunity, supra* note 46, at 108.

[75] 297 U.S. 175 (1936). *California* involved a state-owned railroad's violation of § 6 of the Federal Safety Appliance Act (current version at 45 U.S.C. § 6 (1970)), passed under commerce clause authority. Rejecting an analogy to tax immunity, the Court held that unlike restrictions on the federal taxing power, the congressional power to regulate commerce was plenary, and equated the power to control a state with the power to control an individual. 297 U.S. at 184-85.

pinged upon state interests.[76] The pronouncement in *Darby* that the tenth amendment was but a "truism"[77] effectively declared that because federal power under the commerce clause is paramount, countervailing state policies or interests warranted no consideration.[78]

Although after *Darby* the tenth amendment appeared impotent to shield the states from federal intrusion under the commerce clause, the theory still garnered adherents, with Justice Douglas being the most notable.[79] Dissenting in *Maryland v. Wirtz*,[80] Justice Douglas asserted that the concept of federalism placed affirmative limitations on the commerce power.[81] The *Wirtz* majority upheld the extension of the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938[82] to the employees of state-operated hospitals and schools as a valid exercise of commerce clause author-

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[76] Since *California*, judicial inquiry into the validity of congressional legislation under the commerce clause has been limited to determining whether such legislation effectuates a legitimate end affecting individuals engaged in interstate commerce, and whether the means chosen by Congress bears a rational relationship to that end. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); United States v. Darby, 312 U.S. 100, 118 (1940). The Court has applied this analysis when state activities were involved as well. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 190 (1968); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 527-28 (1941). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); *Commerce Clause Immunity, supra* note 46, at 108.

[77] *See* text accompanying note 38 *supra*.

[78] *See Commerce Clause Immunity, supra* note 46, at 105. Prior to the theory established in *California, Darby* and other more recent commerce clause cases, the Supreme Court considered the tenth amendment a significant limitation of the commerce clause authority. The Court regarded a certain class of activities to be of a purely local character and thus protected from federal regulation by the tenth amendment. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918). *See generally* Light, *The Federal Commerce Power*, 49 VA. L. REV. 717, 721-24 (1963). Generally, these cases dealt with individual private actions rather than state activities. The approach did not concern who the actor was, but rather whether the activity was purely local and thus immune from federal regulation under the tenth amendment. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[79] Justice Douglas first elaborated his position in his dissent in New York v. United States, 326 U.S. 572, 590 (1946), a taxing power case. *See* text accompanying notes 48-49 *supra*. Justice Douglas firmly believed that state sovereignty should not be left completely to the will of Congress. In his view, states "become subject to interference and control both in the functions which they exercise and the methods which they employ" if they are subjected to the federal taxing power. *Id.* at 595 (Douglas, J., dissenting).

[80] 392 U.S. 183, 201 (1968)(Douglas, J., dissenting). *Wirtz* was overruled by National League of Cities v. Usery, 426 U.S. 833 (1976).

[81] 392 U.S. at 204.

[82] 29 U.S.C. §§ 206-207 (1970).

ity.[83] Justice Douglas, however, believed that the disruption in state fiscal policy that would result from this extension threatened state autonomy.[84] He asserted that the tenth amendment attests to the sovereignty of the states and prevents the federal government from unduly interfering with a state's performance of its sovereign governmental functions.[85]

In the plurality opinion in *National League of Cities v. Usery*,[86] Justice Rehnquist followed an analysis similar to that of Justice Douglas. The Court there held that extending minimum wage and maximum hour coverage[87] to virtually all non-supervisory and non-elected personnel of state and local governments impermissibly operated "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions. . . ."[88] Thus, for the first time in forty years, the Supreme Court held that enforcement of a legitimate exercise of the commerce power was prohibited by the concept of state sovereignty.[89]

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[83] 392 U.S. at 188-99. *See* 29 U.S.C. § 203(d)(1970).

[84] 392 U.S. at 203. *See* Percy, *supra* note 35, at 96-97.

[85] 392 U.S. at 205.

[86] 426 U.S. 833 (1976). Four justices supported the *League of Cities* plurality. Justice Blackmun concurred in the result but asserted that the application of any tenth amendment limitations on the commerce power should be controlled by a balancing test. *Id.* at 856 (Blackmun, J., concurring). *See* text accompanying note 120 *infra*. *See generally* Beaird & Ellington, *A Commerce Power Seesaw: Balancing* National League of Cities, 11 GA. L. REV. 35 (1976) [hereinafter cited as Beaird & Ellington]; Percy, *supra* note 46; Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1871-91 (1976) [hereinafter cited as *Municipal Bankruptcy]*; Recent Decision, *Constitutional Law—Interstate Commerce—1974 Amendments to Fair Labor Standards Act Extending Coverage to Public Agencies Exceed the Commerce Power By Infringing Upon State Sovereignty Protected By the Tenth Amendment*—National League of Cities v. Usery, *96 S. Ct. 2465 (1976)*, 25 EMORY L.J. 937 (1976) [hereinafter cited as *Infringing State Sovereignty]*; Recent Decision, *Constitutional Law—Tenth Amendment—Fair Labor Standards Act—Minimum Wage Requirement Held Inapplicable to State Employees*, 60 MARQ. L. REV. 185 (1976) [hereinafter cited as *Wage Requirement]*.

[87] The provisions in question were amendments to the same section of the Fair Labor Standards Act contested in *Maryland v. Wirtz*. *See* text accompanying note 82 *supra*. Because of the similarity of issues, the *League of Cities* Court chose to overrule *Wirtz*. 426 U.S. at 854.

[88] 426 U.S. at 852.

[89] Percy, *supra* note 35, at 97. The Court's holding that state sovereignty may limit an exercise of the commerce power is consistent with Chief Justice Marshall's famous means-end analysis in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). By the terms of that analysis, the wage and hour provisions are appropriate means to a legitimate end, but they are otherwise prohibited by the constitutional concepts of federalism.

Clearly, the import of *League of Cities* is the revival of the tenth amendment as an affirmative limitation on commerce clause authority. If the issues involved had concerned merely congressional legislation exceeding the commerce power, the Court's analysis would have been framed in the context of a failure to establish a reasonable relationship to a legitimate object of interstate commerce.[90] In his plurality opinion in *League of Cities,* however, Justice Rehnquist discussed the tenth amendment[91] and concluded that the states' ability to function effectively in the federal system would be impaired by enforcement of the wage and hour requirements.[92] Such reasoning may portend a movement toward a new concept of structural federalism that will be an important factor in future consideration of state sovereignty claims.[93]

The *League of Cities* plurality premised such reasoning on two principal lines of authority. The Court emphasized the essential role of the states in our federal system by drawing an analogy to the recognized state immunity from federal taxation.[94] Perhaps more significant is the reliance in *League of Cities* upon the shift in the traditional commerce clause analysis employed by the Court in *Maryland v. Wirtz*[95] and *Fry v. United States.*[96] Although both cases upheld

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The last commerce clause enactment found to infringe powers reserved to the states was the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991 (1935), struck down by the Court in Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[90] *See* note 76 *supra;* Percy, *supra* note 35, at 105.

[91] 426 U.S. at 842-43.

[92] *Id.* at 852, *quoting* Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

[93] Structural federalism recognizes the states as vital entities in the constitutional system and seeks to enhance their autonomy. *See* Beaird & Ellington, *supra* note 86, at 47-48.

[94] *See* 426 U.S. at 843; *see also* text accompanying notes 40-49. The Court had rejected a similar analogy in United States v. California, 297 U.S. 175, 184 (1936), as Justice Brennan indicated in his *League of Cities* dissent, 426 U.S. at 866. The *League of Cities* plurality noted, however, that both the taxing power and the commerce power are delegated powers and that the tax immunity derives from state sovereignty and the barriers which it presents to otherwise plenary federal authority. *Id.* at 843 n.14. Since the practical effect of taxation is often virtually indistinguishable from that of regulation, state immunity from federal regulation may be even more vital to the preservation of the federal system than immunity from taxation, because regulation affects state policy choices as well as revenues. *See Commerce Clause Immunity, supra* note 46, at 112.

[95] 392 U.S. 183 (1968). See text accompanying notes 80-85 *supra* for a discussion of Justice Douglas' dissent to the *Wirtz* decision.

[96] 421 U.S. 542 (1975). *Fry* involved a challenge to the freeze of wages and salaries of state employees imposed by the Economic Stabilization Act of 1970, 12 U.S.C. §§ 1901-1909 (1970). Relying on Maryland v. Wirtz, 392 U.S. 183 (1968), the Court found that the federal legislation could significantly affect interstate commerce and was

commerce clause legislation, the *League of Cities* Court inferred a clear trend toward greater protection of state sovereignty from dicta in those cases. In *Wirtz,* the Court had assured the appellants that it had "ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'"[97] Furthermore, the *Wirtz* Court recognized that the commerce power does have limits.[98] The plurality in *League of Cities* contended that such statements recognized limits upon the power of Congress to override state sovereignty through the commerce power.[99] *Fry,* however, provided direct support for this principle. The Court in *Fry* established a basis for the rehabilitation of the tenth amendment by stating that:

> [w]hile the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.[100]

By relying on these dicta from *Wirtz* and *Fry,* the *League of Cities* Court found authority for the position that some congressional regulatory measures under the commerce clause might exceed limits imposed by the concept of federalism.[101] According to the standards

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therefore a valid exercise of the commerce power. 421 U.S. at 547. *See also* note 76 *supra.*

[97] 392 U.S. at 196 (footnote omitted).

[98] *Id.*

[99] *See* 426 U.S. at 842.

[100] 421 U.S. at 547 n.7. *Fry* is also instructive as to the reasoning employed in *League of Cities* because Justice Rehnquist, the author of the *League of Cities* decision, revealed his basic understanding of the concept of federalism in his *Fry* dissent. Justice Rehnquist contended that the state's claim was not based simply on the absence of congressional legislative authority, but rather on "an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority." *Id.* at 553 (Rehnquist, J., dissenting). Believing that the tenth amendment protects traditional state functions from federal regulation, he emphasized that "there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments." *Id.* at 559. The analysis employed in Justice Rehnquist's *Fry* dissent therefore closely parallels that used in his majority opinion in *League of Cities.*

[101] *See Commerce Clause Immunity, supra* note 46, at 114. The *League of Cities* Court also emphasized the degree to which the wage and hour requirements would interfere with traditional aspects of state sovereignty. Concluding that the power to determine wages and hours of those employed to carry out governmental functions is

established in *League of Cities,* the tenth amendment thus guarantees to the states "freedom to structure integral operations in areas of traditional governmental functions" without federal regulation under commerce clause authority.[102]

Nevertheless, the scope of the immunity provided these essential governmental functions by the *League of Cities* endorsement of the implicit structural limitations of the federal system remains unclear.[103] Justice Rehnquist framed at least two possible interpretations regarding the appropriate application of such a defense by a state. The protection of functions essential to a state's separate and independent existence is a theme running throughout the Court's decision.[104] Under this theory, congressional displacement of any function which, if allowed, "may substantially restructure traditional ways in which the local governments have arranged their affairs,"[105] would be prohibited as beyond the authority granted Congress by the commerce clause.[106] The Court's failure to evaluate the federal inter-

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an unquestionable aspect of state sovereignty, 426 U.S. at 845, the Court found that the requirements significantly would affect governmental functions by increasing costs in providing essential police and fire protection, without an increase in service, by forcing relinquishment of important governmental activities, and by displacing state policies and choices regarding the manner in which it will structure delivery of governmental services which its citizens require. *Id.* at 846-48. Thus, the dilemma faced by the states was either to attempt to increase revenue to meet the increased financial burden imposed by the restrictions, or restructure their governmental policies to accommodate the reallocation of available resources. *Id.* at 848. *See Wage Requirement, supra* note 86, at 192-93.

[102] 426 U.S. at 852. The dissent in *League of Cities* implied that the majority holding represented a return to the application of the tenth amendment employed before the Depression. *Id.* at 867-68 (Brennan, J., dissenting). That approach, however, focused on whether the subject matter of the commerce clause legislation was local in character and thus immune from federal regulation, or was appropriately under federal authority as a national concern. *See* note 78 *supra.* The thrust of the majority's decision is directed not toward the subject matter of the regulation, but toward the entity affected by the regulation. As the Court noted, the Act speaks "directly to the State qua States." 426 U.S. at 847. Since the majority holding is reaching a "power" inherent in a state as a governmental entity rather than a traditionally local "activity," the standard seems more in line with the language of the tenth amendment, *see* note 1 *supra,* and thus inapposite to the pre-Depression application of the tenth amendment. Justice Brennan's criticism therefore seems misplaced in this respect. *See Commerce Clause Immunity, supra* note 46, at 105 n.22.

[103] *See Commerce Clause Immunity, supra* note 46, at 114.

[104] *See* 426 U.S. at 843, 845, 851, 852. The Court cited Coyle v. Oklahoma, 221 U.S. 559 (1911), as exemplifying this principle. In *Coyle,* the Court prevented Congress from determining the location of Oklahoma's seat of government, reasoning that such a determination would be an invasion of essential state powers. *Id.* at 565.

[105] 426 U.S. at 849.

[106] *Id.* at 852 Justice Rehnquist specified ways in which the wage and hour restric-

est in applying the wage and hour provisions to the states supports the recognition of an inflexible category of essential governmental functions completely immune from federal regulation.[107] This broad immunity could be construed to exclude entirely the national government from even minimal interference in the area of internal state governmental operations.[108] As Justice Brennan indicated in his *League of Cities* dissent, such a construction could have a startling effect on commerce clause regulation and the structure of the federal system.[109]

The plurality opinion, however, posits an alternative proposition to the absolute immunity prescribed by the essential function theory. The Court's overruling of *Maryland v. Wirtz*[110] would seem to suggest that *Fry v. United States,*[111] which relied principally on *Wirtz,* should be overruled as well. Declaring that the dictum in *United States v. California*[112] equating states with individuals under the commerce clause was "simply wrong,"[113] the *League of Cities* plurality justified

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tions had an impermissible effect on functions or policy decisions reserved to the states. *See* note 101 *supra.* He indicated, however, that he did not believe that such particularized assessments of actual impact were crucial to the decision. 426 U.S. at 851. The dispositive factor was that Congress had "attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments." *Id.* at 852. *See* Beaird & Ellington, *supra* note 86, at 62-63; *Commerce Clause Immunity, supra* note 66, at 114-15; *Wage Requirement, supra* note 86, at 191-93.

[107] *See* Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism?,* 76 COLUM. L. REV. 990, 1015 (1976) [hereinafter cited as *Federalism Threat].*

[108] *See Commerce Clause Immunity, supra* note 46, at 114-15.

[109] *See* 426 U.S. at 875-76. (Brennan, J., dissenting). Justice Brennan asserted that the political structure of the federal government sufficiently protected the interests of the states. He argued that because representatives elected from the states dominate the federal political system, those representatives are unlikely to disregard totally the state concerns. *See id.* at 876-77; *Infringing State Sovereignty, supra* note 86, at 951-52. *See generally,* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 COLUM. L. REV. 543 (1954). This total identification of the states with their elected representatives is likely to be inaccurate. The interest of the state is generally only one of a number of conflicting pressures determining a representative's vote on any given issue. *See Municipal Bankruptcy, supra* note 86, at 1855. *See generally* D. MATHEWS, U.S. SENATORS AND THEIR WORLD 92-242 (Vantage Books, 1960). When controlling state conduct may weaken the ability of the states to govern effectively, courts should not abdicate their responsibility to scrutinize federal regulations which may interfere with state sovereignty. *See Federalism Threat, supra* note 107, at 1018; *Municipal Bankruptcy, supra* note 86, at 1885.

[110] 426 U.S. at 855. *See* text accompanying notes 80-85 and 95-99 *supra.*

[111] 421 U.S. 542 (1975). *See* text accompanying notes 96-101 *supra.*

[112] United States v. California, 297 U.S. 175, 198 (1936).

[113] 426 U.S. at 854-55.

overruling *Wirtz* because that decision relied on this dictum and thus contradicted the Court's conclusion that states stand on a different footing than individuals in regard to integral governmental functions.[114] The plurality, however, distinguished *Fry* from *League of Cities* and *Wirtz* by emphasizing the national economic emergency which the legislation challenged in *Fry* addressed, the less intrusive nature of that legislation's financial impact and the short period of effectiveness.[115] The Court therefore refrained from overruling *Fry*.[116] If the tenth amendment serves to bar any federal intrusion under the commerce clause into essential state functions, however, the national significance, low cost, or short duration of such an action cannot supply a power beyond the scope of the Constitution.[117] Consideration of such factors is incongruous with any theory of absolute immunity.[118] Thus, the Court's treatment of these considerations suggests that a more flexible balancing approach is being applied.[119] Indeed,

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[114] *Id.*

[115] *Id.* at 852-53. *See Federalism Threat, supra* note 107, at 1014; *Commerce Clause Immunity, supra* note 46, at 115.

[116] 426 U.S. at 852-53.

[117] *See Commerce Clause Immunity, supra* note 46, at 116.

[118] *Id.* at 115. A review of recent eleventh amendment decisions written by Justice Rehnquist further indicates that, although the protection of state fiscal integrity is a strong consideration when evaluating federal regulations, state monetary policies are not absolutely immune from federal intrusion. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Fry v. United States, 421 U.S. 542, 549 (1975)(Rehnquist, J., dissenting); Edelman v. Jordan, 415 U.S. 651 (1974).

Dissenting in *Fry*, Justice Rehnquist indicated that the tenth and eleventh amendments were linked conceptually by the overriding principle of state sovereignty. 421 U.S. at 557. In *Edelman*, he had demonstrated that the eleventh amendment stands as an affirmative protection of state fiscal integrity. 415 U.S. at 663. Nevertheless, Justice Rehnquist's majority opinion in *Fitzpatrick* held that the eleventh amendment, and the principle of state sovereignty which it embodies, are limited by the enforcement clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 5. 427 U.S. at 356. The language of the fourteenth amendment is directed specifically at the states and therefore gives Congress plenary authority, *id.*, making the use of a balancing approach unnecessary in *Fitzpatrick*. These decisions clearly indicate that the protection afforded state fiscal policies by the eleventh amendment is not absolute. Since Justice Rehnquist believes that both the eleventh and tenth amendments represent a desire to protect the structure of federalism as embodied in the Constitution, he may believe that the protection afforded state fiscal policies by the tenth amendment is likewise not absolute. *See generally* Beaird & Ellington, *supra* note 86.

[119] The Court's recognition that Case v. Bowles, 327 U.S. 92 (1946), was not overruled may further support the proposition that the *League of Cities* holding defines a balancing of state and national interests. *See* 426 U.S. at 854 n.18. *Case* involved a tenth amendment challenge to wartime economic regulations. The logical explanation for the *League of Cities* Court's position is that the plurality believed that the national

Justice Blackmun specifically adhered to that approach in his concurring opinion.[120]

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interest in maintaining economic stability during a time of war outweighs a state's interest in having its sales activity free of federal controls. *See Federalism Threat, supra* note 107, at 1016.

The Court has applied a similar balancing test in considering individual and government interests in first amendment cases. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (state's interest in universal education could not subordinate significant interest that Amish parents demonstrated with respect to religious upbringing of their children); United States v. O'Brien, 391 U.S. 367 (1968)(sufficiently important governmental interest in regulating the non-speech element in "symbolic speech" can justify limitations on first amendment freedom of speech). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

For further discussion supporting the application of a balancing approach in tenth amendment cases see Beaird & Ellington, *supra* note 86, at 61-72; *Commerce Clause Immunity, supra* note 46, at 114-17.

[120] Justice Blackmun stated that the Court's opinion "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." 426 U.S. at 856 (Blackmun, J., concurring).

Three federal courts recently have indicated that when federal environmental protection laws conflict with state reserved powers the state sovereignty interests should prevail. *See* Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975). These cases involved a challenge to the attempted compulsion of state officials to implement the comprehensive anti-pollution program established by the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857 to 1857l (1970). The amendments authorized the EPA administrator to promulgate his own air pollution control plan for any state that failed to submit a plan which complied with the statutory criteria for such regulations. *Id.* § 1857(c)(1). The air pollution standards, however, were directed primarily at pollutants emitted by automobiles, and compliance required extensive use of transportation control programs. Many states were either unable or unwilling to impose such controls, so the EPA issued federal controls which directly regulated governmental activities of the states. *See Federalism Threat, supra* note 107, at 996-97. A refusal to satisfy these requirements could subject state officials to both civil and criminal penalties. 42 U.S.C. § 1857c-8 (1970). All three circuits indicated that the dictation of legislation to a state legislature by a federal agency acting under authority of the commerce clause violates a fundamental attribute of state sovereignty protected by the tenth amendment. *See* 530 F.2d at 225-28; 521 F.2d at 989-94; *id.* at 840-42. *But see* Pennsylvania v. Environmental Protection Agency, 500 F.2d 246 (3rd Cir. 1974). The Supreme Court considered these cases but declined to decide the issue because the EPA acknowledged that the programs were invalid unless modified, and therefore the Court remanded the cases as moot. *See* Environmental Protection Agency v. Brown, 431 U.S. 99 (1977). *See generally* Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 COLUM. J. ENVT'L L. 290 (1976); *Federalism Threat, supra* note 107; Comment, *The Clean Air Amendments of*

The lower federal courts applying *League of Cities* have adopted such an analysis in cases presenting questions under the Equal Pay Act[121] and the Age Discrimination in Employment Act (ADEA),[122] both passed upon commerce clause authority.[123] In *Usery v. Dallas Independent School District,*[124] a Texas district court ruled that *League of Cities* should be applied "very conservatively," and held that the Equal Pay Act could be sustained under the fourteenth amendment.[125] The court held that any limitation imposed by the tenth amendment upon the commerce power was itself limited by three factors: the essential functions protected must be of an internal, administrative, management, or housekeeping character; the exercise of the commerce power must substantially disrupt state operations; and the state interest must not be outweighed by a national policy.[126] In the court's opinion, *League of Cities* could be harmonized with traditional commerce clause thinking only by such an "ad hoc balancing."[127]

The Utah district court in *Usery v. Board of Education*[128] followed a similar approach in upholding the ADEA against a tenth amendment attack. Construing *League of Cities* "to require balancing of state and federal interests . . . even where integral state governmental functions may be affected,"[129] the court held that the commerce clause permitted Congress to regulate discriminatory state employment practices "where the national interest in employment significantly outweighs the state's interest in discriminatory employment policies and practices."[130] Thus, both the *Dallas* and *Board of*

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*1970: Can Congress Compel State Cooperation in Achieving National Environmental Standards?*, 11 HARV. C.R.-C.L. L. REV. 701 (1976) [hereinafter cited as *Environmental Standards*].

[121] 29 U.S.C. § 206(d)(1970). The Equal Pay Act was enacted in 1963 as an amendment to the Fair Labor Standards Act, the minimum wage and maximum hours provisions of which were held inapplicable against the states in *League of Cities*. *See* text accompanying notes 86-102 *supra*.

[122] 29 U.S.C. §§ 621-624 (1970).

[123] *See* Beaird & Ellington, *supra* note 86, at 69-72; *Wage Requirements*, *supra* note 86, at 197-98.

[124] 421 F. Supp. 111 (N.D. Texas 1976).

[125] *Id.* at 114. *Accord,* Usery v. Bettendorf Community School Dist., 423 F. Supp. 637 (S.D. Iowa 1976); Christenson v. Iowa, 417 F. Supp. 423 (N.D. Iowa 1976).

[126] 421 F. Supp. at 115-16.

[127] *Id.* at 116.

[128] 421 F. Supp. 718 (D. Utah 1976).

[129] *Id.* at 720.

[130] *Id.* The court also postulated two alternative rationales. Stating that the ADEA required only that the states refrain from discriminating, the court held that the Act constituted only a limited intrusion that did not "*directly* displace the State's freedom

*Education* decisions emphasize the balancing test suggested in the opinions of Justice Rehnquist.[131]

By balancing the federal and state interests involved in these commerce clause enactments, the Supreme Court, and these district courts, gave new life to the tenth amendment and the concepts of federalism implied in the Constitution. Although the *League of Cities* Court expressly refrained from deciding whether these principles limit other federal powers,[132] the tenth amendment may restrict the methods chosen by Congress to implement legislation under those powers.[133] The spending power[134] seems particularly susceptible to such an analysis. In recent years, conditional grants-in-aid[135] have given Congress increased power over the states by permitting federal regulatory power to reach areas over which the Constitution does not explicitly authorize direct federal control.[136] Federal funding of state activities has become so pervasive[137] that even if the most extreme conditions were attached to the grants, state governments would often be too fiscally dependent to choose the "simple expedient"[138] of refusing.[139]

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to structure integral operations." [emphasis added by the district court to *League of Cities* quotation]. *Id.* at 719. Furthermore, the court emphasized that the ADEA has a basis in the fourteenth amendment as well as the commerce clause which, under the *Fitzpatrick* analysis, justified impinging state sovereignty to protect civil liberties. *Id.* at 721. *See also Commerce Clause Immunity, supra* note 46, at 117-18.

[131] *See* text accompanying notes 110-130 *supra.*

[132] The *League of Cities* Court expressed no view as to whether the tenth amendment will limit congressional attempts to affect integral operations of state governments by exercising authority granted Congress under the spending power, the enforcement clause of the fourteenth amendment, or other such sections. *See* 426 U.S. at 852 n.17.

[133] *See Environmental Standards, supra* note 120, at 725.

[134] *See* note 40 and text accompanying notes 50-72 *supra.*

[135] *See generally,* Tomlinson & Marshaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement,* 58 VA. L. REV. 600 (1972).

[136] *See Environmental Standards, supra* note 120, at 727; *Conditional Spending, supra* note 51, at 293-96.

[137] The Congressional Budget Office has estimated that federal grants to state and local governments in fiscal year 1977 will amount to 48 billion dollars, or 11.6 percent of the national budget. CONGRESSIONAL BUDGET OFFICE, BUDGET OPTIONS FOR FISCAL YEAR 1978 10-11 (1977).

[138] In Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947), the Supreme Court suggested that the states' ability simply to refuse the federal aid sufficiently protected their sovereignty. *Id.* at 143-44. *See* text accompanying notes 64-68 *supra.*

[139] *See Environmental Standards, supra* note 120, at 728. Conditioning the receipt of federal funds under numerous health programs upon compliance with the provisions

If Congress may condition appropriations for the general welfare upon any terms it chooses, the spending power presents "an effective tool for eroding the concept of federalism inherent in the tenth amendment."[140] Such an exercise of this power poses as great a threat to traditional state governmental functions as the commerce clause actions held invalid in *League of Cities.*[141] No valid constitutional argument exists for restraining the direct use of the commerce power against the states while conditions unrelated to the legislative goal are attached to spending power enactments to "induce" states to comply with federal proposals.[142] Since the concept of sovereignty inherent in the tenth amendment is a recognized limitation on the spending power,[143] the balancing test that has emerged from *League of Cities* as a limitation on the commerce power[144] would likewise appear to be an appropriate mechanism for weighing tenth amendment attacks on the spending power.[145]

A balancing of federal and state interests would be particularly helpful in resolving challenges to the use of the spending power in the National Health Planning and Resources Development Act of 1974.[146] Although questions of health policy arguably are purely local matters and not appropriate national concerns to justify federal expenditures under the general welfare clause,[147] the nature of the problems facing

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of the National Health Planning and Resources Development Act of 1974, *see* text accompanying notes 14-29 *supra,* arguably preempts any possibility of a state choosing not to participate in the program. The fiscal dependence of the health policy of many states upon receipt of these funds effectively reduces the choice either to accept the conditions or have no state health policy at all. *See* text accompanying notes 28-29 *supra. See also Conditional Spending, supra* note 51; *Environmental Standards, supra* note 120, at 728.

[140] *Conditional Spending, supra* note 51, at 297.

[141] *See* text accompanying notes 86-102 *supra.*

[142] *See Environmental Standards, supra* note 120, at 729.

[143] *See* text accompanying notes 50-72 *supra.*

[144] *See* text accompanying notes 103-120 *supra.*

[145] The structural integrity of the federal system undoubtedly would receive less than adequate protection if congressional discretion under the spending power remains unchecked. As Justice Douglas remarked in his dissent in New York v. United States, 326 U.S. 572, 594 (1946)(Douglas, J., dissenting), "[t]he notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system."

[146] 42 U.S.C. §§ 300k to 300t (Supp. V 1975). *See* text accompanying notes 11-29 *supra.*

[147] *See* Memorandum for Plaintiff Supporting Motion for Summary Judgment at 15-19, North Carolina *ex rel.* Kirk v. Califano, No. 76-0049-CIV-5 (E.D.N.C. Oct. 3, 1977), *notice of appeal to S. Ct. filed* Nov. 9, 1977. *Cf.* Barsky v. Board of Regents, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish

the present health care delivery system suggests that Congress justifiably could conclude that the situation is of such a national scope that action under the general welfare clause is warranted.[148] Nevertheless, the serious impact of the Act's penalty provisions upon traditional state legislative and fiscal functions requires that an accommodation be reached between the state and federal interests involved. Balancing the strength of the national interests concerned against the effect the legislation has upon essential state functions provides an adequate mechanism for resolving the conflict.

The principal goal of the National Health Planning and Resources Development Act is to induce state legislatures to enact the comprehensive health planning system established by the Act.[149] The legislative function is, however, perhaps the most basic of all functions exercised by a state. As the Fourth Circuit stated in *Maryland v. Environmental Protection Agency*,[150] "if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws."[151] The power of the states to pass laws and

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and enforce standards of conduct within its borders relative to the health of everyone there.") *But cf.* Hospital Bldg. Co. v. Rex Hosp., 425 U.S. 738 (1976) (provision of hospital services sufficiently affects interstate commerce to support antitrust action).

[148] The health care industry operates outside the influence of the traditional market system. In contrast to consumers of other services, the patient-consumer of health care does not make the purchasing decisions as to the kind and quality of care, but entrusts such decisions to his physician, the provider of the services. Furthermore, the proliferation of third-party reimbursement mechanisms, such as private health insurance or government assistance programs, greatly has attenuated the economic deterrents to the utilization of health care services which would exist in the normal market system. Factors such as these have produced an inadequate assessment of the costs and benefits of such services and consequently, a misallocation of resources. *See* Kennedy, *Preface: Public Concern and Federal Intervention in the Health Care Industry*, 70 NW. U. L. REV. 1, 2-3 (1975). In recent years, the rising public expectation that the highest quality health care must be made available, and the unacceptability of higher costs, have coalesced to give these health policy questions national scope and have increased public pressure for federal intervention in the health care industry to ensure equitable access to health care services. *Id.* at 1-2.

[149] *See* text accompanying notes 12-29 *supra*.

[150] 530 F.2d 215 (4th Cir. 1975), *remanded as moot* 431 U.S. 99 (1977). *See* note 120 *supra*.

[151] 530 F.2d at 225. The Court in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), recognized that the Constitution preserves the autonomy of both state legislative and judicial departments, and any interference with either, except as to a matter specifically delegated to the United States, invades the authority of the states and denies their independence. *Id.* at 78. *Cf. In re* Duncan, 139 U.S. 449, 461 (1891)(right of the people to choose their own administrative officers and pass their own laws inheres in legislative powers reposed in representative government). Although the authority to spend for the general welfare is a delegated power, *see* Buckley v. Valeo, 424 U.S. 1,

amend their constitutions is at the heart of the concept of powers reserved to the states under the tenth amendment.[152] The National Health Planning and Resources Development Act intrudes upon these powers, however, by demanding that the states enact specific legislation[153] or face withdrawal of funds in a broad range of federal programs, with a consequent disruption, or perhaps destruction, of state health policy.[154] In such circumstances, whatever freedom of choice the states possess in theory[155] is compromised in practice.[156] Faced with balancing federal interests in an integrated health policy against preserving the integrity of state fiscal and legislative functions, the restrictions inherent in the structure of federalism suggest the conclusion that the use of the spending power in this manner operates "to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions."[157]

Such a conclusion does not suggest a substantial contraction of congressional authority under the spending power.[158] Applying the tenth amendment balancing test requires only that Congress refrain from large-scale intrusions into essential state functions.[159] The traditional congressional power to attach terms and conditions reasonably

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90 (1976); note 57 *supra*, the congressional exercises of the spending power, unlike other powers of Congress, has not been forced upon the states under the supremacy clause. *See* text accompanying notes 67-68 *supra*.

[152] *See* South Carolina v. Katzenbach, 383 U.S. 301, 359 (1966) (Black, J., dissenting).

[153] Certificates of need laws exemplify the mandatory legislation required by the Act. *See* note 25 *supra*. The Act also intrudes upon state administrative functions by imposing duties upon the governor, *see* 42 U.S.C. § 300l(b)(Supp. V 1975), and reviewing the execution of administrative functions relating to health policy, *see id.* § 300m-1. The state agencies which it creates further infringe upon the administrative functions of the state governments. Such interference "impermissibly displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." National League of Cities v. Usery, 426 U.S. 833, 849 (1976).

[154] *See* 42 U.S.C. § 300m(d)(Supp. V 1975). In particular, North Carolina alleges that the withdrawal of these funds from the states' health budget would destroy the states' health care system. *See* note 28 *supra*.

[155] *See* text accompanying notes 64-68 *supra*.

[156] *See* text accompanying notes 135-139 *supra*.

[157] National League of Cities v. Usery, 426 U.S. 833, 852 (1976).

[158] The balancing test serves simply to clarify the reasonable relation standard. *See* text accompanying notes 69-72 *supra*. Requiring the existence of a reasonable relation between the condition and the purpose of a spending program in effect recognizes that countervailing interests do exist. The balancing test focuses on these interests rather than exclusively on the relationship. The test does not introduce a new element into the analysis, but merely adds greater emphasis to an existing one.

[159] *See* text accompanying notes 110-145 *supra*.

related to the purposes of a spending program need not be impaired.[160] The balancing test is sufficiently flexible to protect these federal interests. As with the less drastic means test in the first amendment context,[161] if a less intrusive method of accomplishing the federal goal is available, balancing the competing interests involved in tenth amendment cases serves to affirm the federal policy underlying an enactment while protecting the states from the legislation's intrusive means.[162]

The protection accorded traditional state interests by the *League of Cities* Court brings new meaning to the concept of federalism. Although the contours of this protection are as yet ill-defined, the constitutional balance between federal and state interests clearly is undergoing a reappraisal. Whatever character the new balance assumes, the legislative process is unquestionably an essential state function that should be protected under the tenth amendment. Because this interest is as susceptible to intrusion under the conditional spending power as under the commerce power, the inherent protections of the federal system that have been found to limit the commerce power should likewise be applied to the spending power. Balancing the relevant state and federal interests involved will effectively protect state sovereignty while furthering the goals of legislation like the National Health Planning and Resources Development Act of 1974.

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[160] *See* text accompanying notes 69-72 *supra.*

[161] *See generally* Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969).

[162] *See Municipal Bankruptcy, supra* note 86, at 1888-91.