NATIONAL LEAGUE OF CITIES, THE TENTH AMENDMENT, AND THE CONDITIONAL SPENDING POWER

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I. INTRODUCTION: *NATIONAL LEAGUE OF CITIES V. USERY*

In *National League of Cities v. Usery*,[1] the United States Supreme Court held that the tenth amendment[2] was an affirmative constraint[3]

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1. 426 U.S. 833 (1976).

2. "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.

3. *National League of Cities* is especially significant in that it reestablished the tenth amendment as an affirmative force in constitutional law. Since 1937, the Supreme Court traditionally had interpreted the tenth amendment as having no affirmative influence limiting the power of the federal government. In United States v. Darby, 312 U.S. 100 (1940), the Supreme Court characterized this amendment as "but a truism that all is retained that has not been surrendered." *Id.* at 124.

The Court's holding in *National League of Cities* is not, however, a complete surprise. There is language in prior cases indicating that the Court never intended to totally ignore the tenth amendment or the concept of federalism as a vital force in constitutional law. *See, e.g.*, Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (tenth amendment is not insignificant because it declares that Congress may not impair the ability of states to function effectively in the federal system); United States v. Bass, 404 U.S. 336, 349 (1971) (Congress is traditionally reluctant to legislate in ways that would upset the delicate federal-state relationship); Younger v. Harris, 401 U.S. 37, 44 (1970) (federalism represents a system protective of the legitimate interests of both the state and national governments); Maryland v. Wirtz, 392 U.S. 183, 196 (1968), *vacated*, 426 U.S. 833 (1976) (Court has ample authority to prevent destruction of the states as sovereign political entities).

on the congressional commerce power.[4] At issue was the constitutionality of the 1974 amendments[5] to the Fair Labor Standards Act (FLSA).[6] The amendments extended coverage of the Act's minimum wage and maximum hour provisions to all state and local government employees.[7] A group of state and municipal organizations and state and local governments argued that the amendments were unconstitutional, not because they exceeded the proper scope of the commerce power, but because they infringed on state sovereignty in violation of the tenth amendment. Justice Rehnquist, writing for a plurality of four,[8] agreed, holding that the 1974 FLSA amendments were unconstitutional insofar as they directly displaced the states' authority to conduct integral operations in areas of traditional state sovereignty.[9]

The tenth amendment constraints established in *National League of Cities* apply only to the commerce power. The Supreme Court specifically left open the question of whether the tenth amendment similarly constrains other enumerated powers.[10]

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4. "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

5. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 2, 88 Stat. 55 (amending 29 U.S.C. §§ 201-219 (1970)).

6. 29 U.S.C. §§ 201-219 (1970) (amended 1974).

7. The 1974 amendments expanded the definition of "employer" to include a "public agency." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 60 (amending 29 U.S.C. § 203(d) (1970)). In addition, the definition of "enterprise engaged in commerce or in the production of goods for commerce" was expanded to include "an activity of a public agency." *Id.* § 6 (amending 29 U.S.C. § 203(s) (1970)).

8. Chief Justice Burger, and Justices Powell and Stewart joined Justice Rehnquist. Justice Blackmun concurred in a brief opinion, stating that he read the plurality as creating a test that would allow a compelling federal interest to override state sovereignty limitations on Congress' power. 426 U.S. at 856 (Blackmun, J., concurring).

Justice Brennan, in a dissent joined by Justices White and Marshall, saw the political process as a sufficient restraint on the commerce power. He condenmed the plurality for repudiating the long standing precedent that the tenth amendment was not an affirmative constraint on the commerce power. *Id.* at 856-80 (Brennan, J., dissenting). Justice Stevens dissented separately, reasoning that it was inconsistent to prohibit Congress from regulating the wages of state employees when it could constitutionally regulate so many other activities of the states. *Id.* at 880-81 (Stevens, J., dissenting).

9. *Id.* at 852 (1976).

10. The Court stated: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercis-

When the Court decided *National League of Cities*, many legal commentators believed the case signalled the beginning of a major revision of traditional federalism theory.[11] They perceived a new willingness by the Court to accept a more active role as "arbiter" of the federal system.[12] Despite these predictions, federal courts generally have interpreted *National League of Cities* very narrowly,[13] refusing to extend tenth amendment protection beyond the limits it established.[14]

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ing authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." *Id.* at 852 n.17.

11. *See, e.g.*, Matsumoto, National League of Cities—*From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 76-89 (1977); Note, *Emerging Concepts of Federalism: Limitations on the Spending Power and National Health Planning*, 34 WASH. & LEE L. REV. 1133, 1147 (1977). *But see* Barber, National League of Cities v. Usery; *New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161.

12. *Id.*

13. Courts usually cite *National League of Cities* with approval only in cases involving a congressional exercise of the commerce or tax powers that invades an area of traditional state sovereignty. *See, e.g.*, Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979) (employees of municipally owned airport not covered by minimum wage and maximum hour provisions of FLSA since operation of municipal airport is an integral function of city government); United States v. Best, 573 F.2d 1095, 1102 (9th Cir. 1978) (federal government may not regulate the licensing of drivers pursuant to commerce clause; licensing of drivers is an area of traditional state sovereignty); Wentworth v. Solem, 548 F.2d 773, 775 (8th Cir. 1977) (minimum wage provisions of FLSA may not be applied to state convicts as regulation of state penal institutions is an integral state function which may not be intruded upon by Congress pursuant to commerce power); Georgia Dep't of Transp. v. United States, 430 F. Supp. 823, 825 (N.D. Ga. 1976) (absent compelling federal interest, Congress may not tax state use of aircraft when such use is in furtherance of integral state function); Association of Court Reporters v. Superior Court, 424 F. Supp. 90, 93-94 (D.D.C. 1976) (overtime provisions of FLSA not applicable to court reporters who are local government employees).

Justice Rehnquist used the implicit federalism constraints on the tax power established in New York v. United States, 326 U.S. 572 (1946), to support his conclusion in *National League of Cities* that the Tenth Amendment may be extended to similarly constrain Congress' use of the commerce power. 426 U.S. at 843. Justice Brennan, in dissent, tried to distinguish the tax power from the commerce power. He argued the constraints on the former should not be extended to the latter. *Id.* at 869 (Brennan, J., dissenting).

14. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976) (extension of Title VII of Civil Rights Act of 1964 to states is valid since Title VII passed pursuant to § 5 of Fourteenth Amendment, which is not constrained by Tenth Amendment); Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1082-85 (5th Cir. 1979) (*National League of Cities* does not block application of Veterans Re-employment Rights Act to state and local governments as act was passed pursuant to war power); Arrit v. Grisell, 567 F.2d

Nevertheless, *National League of Cities* does raise major questions concerning the nature of the federal system generally, and the Supreme Court's proper role in deciding federalism issues. Arguably, if the tenth amendment is to be effective at all, it must protect states from *any* congressional attempts to intrude on areas of traditional state sovereignty, regardless of the enumerated power used.[15]

II. THE TENTH AMENDMENT AND THE CONDITIONAL SPENDING POWER

This note will examine instances of congressional use of the conditional spending power[16] which interfere with the ability of state and

1267, 1270 (4th Cir. 1977) (*National League of Cities* does not block application of Age Discrimination in Employment Act to state and local governments; act was passed pursuant to fifth clause of Fourteenth Amendment). *See generally* Note, *Title VII and Public Employers: Did Congress Exceed Its Powers?* 78 COLUM. L. REV. 372 (1978); Note, National League of Cities v. Usery: *Its Implications for the Equal Pay Act and The Age Discrimination in Employment Act*, 10 U. MICH. J.L. REF. 239 (1977).

The traditionally narrow scope of the tenth amendment can be in part attributed to the long standing belief that Congress, not the Court, is the institution best suited to be the "arbiter" of federalism issues. Congress consists of representatives of the states who are politically dependent upon their citizenry. Given this relationship, it is unlikely individual Congressmen will disregard their state's interests when forming legislation or seek to destroy the state's ability to function with integrity in the federal system. For the authoritative discussion of this thesis, see Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Many later commentators have criticized Wechsler's thesis on a number of grounds. *See generally* D. MATHEWS, U.S. SENATORS AND THEIR WORLD 92-242 (1960); Matsumoto, *supra* note 11 at 59-60; Note, *The Clean Air Amendments of 1970: A Threat to Federalism*, 76 COLUM. L. REV. 990, 1018 (1976); Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1885 (1976). *National League of Cities*, then, can be read as a rejection of Wechsler's thesis to the extent the Court assumed the power to review the federalism implications of a congressional statute. Justice Brennan, in his dissent, attacked the Rehnquist plurality for reversing the Court's traditional position of deference to Congress on federalism questions. 426 U.S. at 876-77 (Brennan, J., dissenting).

15. Federal courts have not adequately explained why the tenth amendment should apply to only some of the enumerated powers. Some courts simply conclude there is a difference in the scope of the enumerated powers justifying selective application of the tenth amendment. *E.g.*, Montgomery County v. Califano, 449 F. Supp. 1230, 1248 n.11 (D. Md. 1978), *aff'd* 599 F.2d 1048 (4th Cir. 1979). The arguments for not applying the constraints of the tenth amendment to statutes passed pursuant to the fifth clause of the fourteenth amendment are stronger because that amendment specifically prohibits states from taking certain actions. *See* City of Rome v. United States, 446 U.S. 156 (1980), *rehearing denied* 447 U.S. 916 (1980).

16. "Congress shall have Power . . . to pay the Debts and provide for the com-

local governments to function effectively in the federal system. When Congress creates a spending program for the benefit of the states, it often attaches conditions which the states must comply with in order to receive the offered federal funds. Often these conditions intrude greatly on state sovereignty, requiring the states to restructure their bureaucracies[17] or pass specific legislation[18] in order to receive the federal benefit.

Federal courts consistently refuse to extend the constraints of the tenth amendment to the conditional spending power[19] because of its supposedly optional nature. Theoretically, conditional spending programs are not mandatory on the states.[20] The federal program is made available to a state which then decides if it will participate. It is

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mon Defense and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Federal programs that offer a federal benefit to states provided the states comply with specified conditions are called conditional spending programs. Use of the spending power to create these programs is sometimes referred to as the conditional spending power. *See* Note, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U.L. REV. 293, 294 (1975) [hereinafter cited as *Federal Conditional Spending Power*].

17. *E.g.*, Florida Dep't of Health and Rehab. Serv. v. Califano, 449 F. Supp. 274, 283-84 (N.D. Fla. 1978) *aff'd* 585 F.2d 150 (5th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979) (Congress may require states to adopt a particular bureaucratic structure as part of a federal spending program in order to ensure federal funds are administered efficiently).

18. Many federal grant-in-aid programs require the state to supply matching funds for whatever purposes the federal funds are received. Therefore, when a state participates in a federal spending program, the state legislature must appropriate sufficient state funds to match the federal benefit received. *See* Matsumoto, *supra* note 11, at 81-82.

19. *E.g.*, Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-43 (1947) (application of Hatch Act to the states as a condition for receiving federal highway funds does not violate tenth amendment); Helvering v. Davis, 301 U.S. 619, 644-45 (1937) (special social security tax to support federal benefits for the aged does not violate tenth amendment); Steward Machine Co. v. Davis, 301 U.S. 548, 593-98 (1937) (combination of federal unemployment tax and tax credit did not coerce states into participating in federal plan in violation of tenth amendment); Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) (Federal Maternity Act, which provides federal funds to the states to combat infant mortality, does not violate tenth amendment as any state can refuse the funds at its option); Montgomery County v. Califano, 449 F. Supp. 1230, 1247 (D. Md. 1978) (National Health Planning and Resources Development Act, a spending program, does not violate tenth amendment); Vermont v. Brinegar, 379 F. Supp. 606, 617 (D. Vt. 1974) (withholding federal highway funds for failure to comply with federal Highway Beautification Act does not violate tenth amendment). *See also* notes 20-29 & 49-53 and accompanying text *infra*.

20. *See, e.g.*, Montgomery County v. Califano, 449 F. Supp. 1230, 1247 (D. Md. 1978). *See generally The Federal Conditional Spending Power, supra* note 16.

only after a state decides to participate that it must comply with the attached conditions. Courts reason that when a state decides to participate in a conditional spending program, it cannot complain that the conditions infringe on its sovereignty, as the decision to participate is in itself an exercise of sovereignty.[21]

The Supreme Court defined the broad parameters of the conditional spending power in *Oklahoma v. United States Civil Service Commission*.[22] At issue was the validity of Section 12 of the Hatch Act,[23] which prohibited employees of state and local government agencies, whose employment was connected with any activity financed by the federal government, from taking part in partisan political activities within their states.[24] A member of the Oklahoma Highway Commission simultaneously served as chairman of the Democratic State Central Committee. The Civil Service Commission ordered that the individual be removed from the state highway commission.[25] Otherwise, the federal highway grants to Oklahoma would be decreased.

Oklahoma argued that the Hatch Act intruded on its sovereignty in violation of the tenth amendment.[26] The Supreme Court rejected this argument,[27] ruling that while Congress had no independent power to control the political activities of state employees, it could control their activities as a condition to a federal grant under the spending power.[28] The Court also ruled that the Hatch Act was not coercive because Oklahoma had available the "simple expedient" of not complying with the order.[29] The only consequence of non-compliance would be its failure to receive a portion of the offered federal funds.[30]

Many commentators argue that the tenth amendment limitations established in *National League of Cities* should extend to the condi-

21. *E.g.*, Montgomery County v. Califano, 449 F. Supp. 1230, 1247 (D. Md. 1978).
22. 330 U.S. 127 (1947).
23. 5 U.S.C. § 1501 (1976).
24. *Id.* § 1502.
25. 330 U.S. at 133.
26. *Id.* at 142.
27. *Id.* at 143.
28. *Id.*
29. *Id.* at 143-44.
30. *Id.*

tional spending power.[31] They contend that states are dependent on federal revenues which comprise a large and ever increasing portion of their budgets.[32] The States simply do not have the option of refusing to participate in conditional spending programs.[33] It is inconsistent with political and economic reality, therefore, to call conditional spending programs "voluntary." The conditions attendant to the programs are actually mandatory on the states. The commentators thus conclude that the Tenth Amendment should be extended to constrain the intrusive nature of the programs.[34]

To date, federal courts have consistently rejected this argument.[35] The traditional rationale of *Oklahoma*, that state participation in conditional spending programs is voluntary, continues to prevail. This broad interpretation of the conditional spending power allows Congress an easy avenue around the restrictions established in *National League of Cities*. Congress may simply put intrusive regulations in the conditions it attaches to spending programs in which the states are politically or economically bound to participate.[36]

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31. *See* note 11 *supra*.

32. Federal aid as a percentage of funds generated by state and local governments was 11.4% in 1954, 17.3% in 1964, and 29.5% in 1976. Between 1975 and 1976, the increase was 20.3%. In the area of public assistance, federal funds comprise an even larger portion of state and local government budgets. In 1950, federal funds constituted 44% of all public assistance funds generated by state and local governments. By 1974, that percentage increased to 54.2% *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IMPROVING URBAN AMERICA: A CHALLENGE TO FEDERALISM, 85, 87 (Sept. 1976); Note, *Towards New Safeguards on Conditional Spending: Implications of* National League of Cities v. Usery, 27 AM. U.L. REV. 726, 742 n.117 (1977) [hereinafter cited as *New Safeguards*].

33. Matsumoto, *supra* note 11, at 80-88; *New Safeguards*, *supra* note 32, at 726; Note, *Constitutional Law—The Federal System—State Sovereignty as an Implied Restraint upon the Commercial Power*—National League of Cities v. Usery, 52 WASH. L. REV. 747, 764-65 (1977); Note, *Emerging Concepts of Federalism: Limitations on the Spending Power and National Health Planning*, 34 WASH. & LEE L. REV. 1133, 1154-58 (1977).

34. *See* note 11 *supra*.

35. See notes 19-21 and accompanying text *supra*. *See also* Florida Dep't of Health v. Califano, 449 F. Supp. 274, 284 (N.D. Fla. 1978) (state has option of refusing to comply with requirements of Federal Rehabilitation Act and forfeiting the funds offered as part of the program); Dupler v. City of Portland, 421 F. Supp. 1314, 1320-21 n.8 (D. Me. 1976) (requirements of Federal Food Stamp Act are not mandatory on state and local governments but are enforceable only as a condition of participation in the food stamp program; decision on whether to participate is voluntary with the states).

36. Note, *Constitutional Law—The Federal System—State Sovereignty as an Implied Restraint upon the Commerce Power*—National League of Cities v. Usery, 52

Federal courts refuse to find that dependence on federal funds coerces states into participating in federal spending programs.[37] Consequently, they refuse to extend the affirmative constraints of the tenth amendment to the conditional spending power.[38] This position may still have merit as applied to "traditional federal spending programs."[39] It arguably has no merit in reference to conditional spending programs that include sanctions[40] against non-participating states.

Sanctions change the fundamental nature of a conditional spending program.[41] The program becomes clearly coercive. States must participate to avoid imposition of the sanction. The sanction usually involves loss of a pre-existing federal benefit, the continuation of which Congress suddenly makes contingent on participation in the program.[42] The conditions attached to this type of spending program often intrude on state sovereignty. Congress, however, must include the sanction to ensure participation.

WASH. L. REV. 747, 764 (1977) (if state sovereignty limitations announced in *National League of Cities* are not extended to the spending power, Congress could impose FLSA provisions on the states simply by making them conditions of federal grants).

37. *See, e.g.*, Steward Machine Co. v. Davis, 301 U.S. 548, 589 (1937) (combination of unemployment tax and tax credit does not coerce states into creating conforming unemployment compensation programs); Montgomery County v. Califano, 449 F. Supp. 1230, 1247 (D. Md. 1978) (threatened loss of federal funds by state that refuses to participate in National Health Planning and Resources Development Act of 1974 does not coerce state into participating in the program); Vermont v. Brinegar, 379 F. Supp. 606, 617 (D. Vt. 1974) (threat of 10% reduction in federal highway funds for failure to participate in Highway Beautification Act of 1965 does not coerce state participation). *See also* notes 18-19 *supra*.

38. *See* cases cited at note 19 *supra*.

39. For purposes of this discussion, "traditional federal spending program" means those spending programs which impose no adverse consequences for state refusal to participate, outside of the obvious consequence of not receiving the benefit attached to the rejected program.

40. In this context, "sanctions" refers to adverse consequences for non-participation in a conditional spending program beyond the obvious consequence of not receiving the benefit attached to the rejected program.

41. Traditional federal spending programs can be considered voluntary no matter how strongly a state is induced to participate because if it refuses to do so its status is left unchanged. By contrast, when a state refuses to participate in a conditional spending program with sanctions, its status is not left unchanged; it is placed in a noticeably worse condition because of the sanction. Arguments about the voluntary nature of the conditional spending power are inapplicable when the program created pursuant to that power include sanctions against non-participating states.

42. *See* notes 63-67 and 102-07 and accompanying text *infra*.

Admittedly, Congress is not required to create any conditional spending programs at all. In addition, it is clear Congress may terminate a spending program at any time simply by refusing to appropriate the necessary funds. Nevertheless, the fact remains that when Congress creates a spending program that includes sanctions for non-participation, the *practical effect* is to deny the states any real choice on whether to participate in the program.

By refusing to establish any federalism restrictions on the conditional spending power, the Supreme Court has greatly weakened the principles established in *National League of Cities*. It is anomalous to allow Congress to reach through the spending power an end prohibited pursuant to the commerce power. This is especially true when, because of sanctions, the spending program becomes as mandatory as a commerce regulation. If *National League of Cities* is to have any more than procedural significance, the Supreme Court must give Congress and lower courts guidance on the constitutional limitations of the conditional spending power.

This note will argue that the tenth amendment limitations on the commerce power established in *National League of Cities* should be extended to bring into question the constitutionality of at least those conditional spending programs which include severe sanctions against non-participating states. Two programs will be examined: the Unemployment Compensation Amendments of 1976,[43] and the Flood Disaster Insurance Program.[44] Both provide excellent illustrations of congressional intrusion into areas of traditional state sovereignty. By attaching conditions which effectively penalize non-participation, Congress deprives the states of any meaningful choice.

In examining the constitutionality of these programs, a two step analysis will be used: 1) Do the sanctions for non-participation make the program in reality mandatory on the states? and 2) if so, do the attached conditions violate the states' integral sovereignty within the meaning of *National League of Cities*? If the answers to both of these questions is yes, the tenth amendment should constrain the intrusive aspects of the program. The current narrow interpretation of the tenth amendment allows Congress an easy method around the principles established in *National League of Cities* and may alter the

43. Pub. L. No. 94-566, 90 Stat. 2670 (amending scattered sections of 26 and 42 U.S.C.) (1976).

44. 42 U.S.C. §§ 4001-4127 (1976).

traditional structure of the federal system.[45]

III. Unemployment Compensation Amendments of 1976

A. *Background*

In 1935, Congress passed the Social Security Act.[46] The Act established, among other things, an unemployment assistance program for employees in the private sector. It levied a tax on employers of three percent[47] of their employees' annual salaries. It also allowed a compensatory tax credit of up to ninety-percent[48] of that amount for employers contributing to a federally approved state unemployment compensation program.[49] In addition, the Act provided federal grants to the states to pay all of the costs of administering federally approved unemployment compensation programs.[50]

The Supreme Court affirmed the constitutionality of these provisions in *Steward Machine Co. v. Davis*.[51] The *Steward Machine* Court expressly rejected the argument that the Social Security Act

45. It is clear that Congress does not have power to legislate for the general welfare. *See Federal Constitutional Spending Power*, *supra* note 16 at 297, *citing* Burdick, *Federal Aid Legislation*, in 3 Selected Essays on Constitutional Law 628, 631 (1938). The list of enumerated powers granted to Congress, along with the safeguard of the tenth amendment, establishes the principle of a limited federal Legislature as one of the basic tenents of our federal system.

Congress does, however, have the power to spend for the general welfare. United States v. Butler, 297 U.S. 1, 65 (1936). The spending power allows Congress to reach areas outside the scope of the other enumerated powers. If Congress is allowed to coerce state participation in federal spending programs, the conditions attached to those programs become as mandatory as if they were in the form of regulatory legislation. This, in effect, allows Congress to "legislate" for the general welfare, and destroys the concept of enumerated powers. *See generally Federal Conditional Spending Power*, *supra* note 16.

46. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified in scattered sections of 26, 42 U.S.C.).

47. Pub. L. No. 94-566, § 211(b) (1974) (amending 26 U.S.C. §§ 3301(A)(1) established to current tax rate of 3.4%.

48. Because of the excise tax on employers was raised to 3.4%, the tax credit, 2.7% of the federal tax, now covers approximately 79% of the federal tax. The federal tax of .7% that is actually paid is used principally as grants to the states to finance administration of their federally approved unemployment program. *See* note 49 and accompanying text *infra*.

49. 26 U.S.C. §§ 3301-3302 (1976).

50. 42 U.S.C. § 502(a) (1976).

51. 301 U.S. 548 (1937).

violated the tenth amendment.[52] The Court reasoned that the combination of the tax and tax credit only induced states to create federally acceptable unemployment compensation plans.[53] It concluded that the creation of such inducements was within the proper scope of the spending power.[54]

The *Steward Machine* Court concluded that states, in passing federally acceptable legislation, were at all times acting under their own free will.[55] The Act imposed no adverse consequences on states for failing to enact conforming programs. It simply denied the tax credit to private employers, as well as funds for administration of the program.[56]

It is important to note that the *Steward Machine* Court specifically stated that there were limits to the conditional spending power.[57] The Court did not define those limits, however, as it found the statutory scheme at issue to be within the power's proper scope.[58]

Unemployment legislation in the subsequent forty years did not materially change the original scheme. In 1970, the Employment Security Amendments[59] made additional federal funds available for the states to supplement pre-existing benefits during periods of high unemployment. As a prerequisite for receiving the additional funds, and to maintain federal approval of state unemployment programs, the 1970 Amendments required states to expand their unemployment compensation coverage to employees of state hospitals and institutions of higher education.[60] The amendments also required that each state give its political subdivisions the option of extending their unemployment compensation program coverage in a similar manner.[61]

In response to the worsening economic condition of the nation in

52. *Id.* at 585.

53. *Id.*

54. The Court stated that, "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties." *Id.* at 589-90.

55. *Id.* at 586-90.

56. *Id.* at 592.

57. *Id.* at 591.

58. "We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future." *Id.*

59. Pub. L. No. 91-373, 84 Stat. 697 (1970) (amending scattered sections of 26 U.S.C. §§ 3301-3310 (1970)).

60. 26 U.S.C. § 3304(a)(6)(A), (B) (1976).

61. 26 U.S.C. § 3304(a)(16)(A) (1976).

1974, Congress enacted the Special Unemployment Assistance Program[62] (SUA), as part of the Emergency Jobs and Unemployment Assistance Act of 1974.[63] Title I of the Act provided additional federal funds to meet the needs of the increased numbers of unemployed persons.[64] Title II, the SUA, established that part of the additional federal assistance would be used to pay unemployment benefits to all state and local government employees not otherwise covered by state unemployment assistance programs.[65] The SUA was a temporary measure,[66] and the federal government supplied all of the funds for the additional benefit.

B. *The 1976 Amendments*

The Unemployment Compensation Amendments of 1976[67] radically altered the nature of the original unemployment compensation provisions upheld in *Steward Machine Co. v. Davis*.[68] The amendments required states to extend their unemployment compensation benefits to almost all public employees previously covered by the SUA program.[69] If a state refused to so extend its unemployment coverage, federal certification of its unemployment compensation plan would cease.[70] Private employers within the state would then lose the federal tax credit on their federal unemployment payroll taxes.[71] Additionally, the state government would lose the federal funds for administering its unemployment program.[72]

In *County of Los Angeles v. Marshall*,[73] a group of state and local governments challenged the constitutionality of the 1976 Amend-

62. Pub. L. No. 93-567, 88 Stat. 1850 (Title II) (1974).

63. Pub. L. No. 93-567, 88 Stat. 1850 (1974).

64. *Id.* Title I.

65. *Id.* Title II.

66. The right to file an initial claim under this act ended December 31, 1977. Pub. L. No. 93-567 § 208 (1974).

67. Pub. L. No. 94-566, 90 Stat. 2667 (1976) (amending 26 U.S.C. §§ 3301-3310 (1970)).

68. 301 U.S. 548 (1937). *See* notes 43-54 and accompanying text *supra*.

69. Pub. L. No. 94-566 § 115, 26 U.S.C. § 3306 (1976).

70. Pub. L. No. 94-566 § 101, 26 U.S.C. § 3304 (1976).

71. *Id.*

72. *Id.*

73. 442 F. Supp. 1186 (D.D.C. 1977), *cert. denied*, 101 S. Ct. 113, *reh. den.* 101 S. Ct. 573 (1980).

ments. Plaintiffs alleged the cost of compliance with the amendments would impair their tenth amendment right to function as sovereign political entities within the federal system.[74]

The District Court for the District of Columbia rejected plaintiffs' claim,[75] holding that the 1976 Amendments did not fundamentally change the nature of the original Act upheld in *Steward Machine Co. v. Davis*.[76] The court affirmed the broad interpretation of the conditional spending power established in *Oklahoma v. Civil Service Commission*,[77] and found the 1976 Amendments to be within the proper scope of that power.[78] The court acknowledged the sanctions against non-participating states, but ruled they were only inducements to participation.[79] They did not change the essentially voluntary nature of the original program.[80] The court recognized the extreme financial consquences caused by compliance with the 1976 Amendments, but concluded they did not affect the constitutionality of the legislation.[81]

The District Court in *County of Los Angeles* held the amendments did not violate the tenth amendment because the states had the op-

74. Plaintiffs alleged compliance with the 1976 Amendments would cost states between $385 million and $2 billion a year. Because 42 U.S.C. § 503(a)(3) requires a due process hearing for any former employee who is denied compensation, compliance with the 1976 Amendments produces a tremendous increase in administrative and record keeping costs. Plaintiffs also alleged compliance with the amendments would severely interfere with the hiring practices and policies of state and local governments. To meet the costs of compliance, state and local governments would have to drastically reduce the number of state employees, programs, and would severely interfere with the hiring practices and policies of state and local governments. To meet the costs of compliance, state and local governments would have to drastically reduce the number of state employees, programs, and services. Particularly affected would be part-time and seasonal employees, who are often involved in programs that directly benefit large sections of the underprivileged population. *See* Brief of Joint Appellants at 24-50, County of Los Angeles v. Marshall, 442 F. Supp. 1186 (D.D.C. 1977); Brief *amicus curiae* of International Personnel Management Ass'n and National School Boards Ass'n, County of Los Angeles v. Marshall, 442 F. Supp. 1186 (D.D.C. 1977).

75. 442 F. Supp. at 1192.

76. 301 U.S. 548 (1937). *See* notes 43-54 and accompanying text *supra*.

77. 330 U.S. 127 (1947). *See* notes 22-25 and accompanying text *supra*.

78. 442 F. Supp. at 1190.

79. *Id.* at 1191.

80. *Id.* at 1190-91.

81. *Id.* at 1192 n.5.

tion of not participating in the program.[82] The court failed to acknowledge, however, that the consequences of non-participation would also infringe on state sovereignty. If a state chooses not to comply with the 1976 Amendments, its private employers lose the federal unemployment tax credit they have enjoyed since 1935.[83] The non-complying state must then choose between dismantling its unemployment compensation program or subjecting its private sector employers to double taxation. The former alternative clearly infringes on state autonomy by interfering with a state's power to provide for the welfare of its citizens. The state would not have to dismantle its own program but for the presence of the 1976 Amendments.

If a non-complying state maintains its own unemployment program, it subjects its private employers to the heavy burden of having to pay full federal and state unemployment compensation taxes. This would inevitably result in an exodus of private investment from the non-complying state. This exodus would decrease the state's tax base, thereby reducing its ability to provide essential services.[84] In view of these consequences, the 1976 Amendments clearly impair the ability of states to function effectively in the federal system whether or not the state complies with the amendments. The severe sanctions for non-compliance show that Congress intended the amendments to be mandatory.[85] Congress should not be allowed to hold a state's

82. *Id.* at 1191. See notes 75-81 and accompanying text *supra*.

83. Joint Brief of Appellants at 20-21, County of Los Angeles v. Marshall, 442 F. Supp. 1186 (D.D.C. 1977).

> Federal sanctions operate on all private employers within a non-conforming State. The Sanction is triggered not by the nonconformance of the Federal taxpayer private employer, but by the nonconformance of the taxpayer's State selected officials. Federal sanctions operate against private employer Federal taxpayers even if the only non-conformity of the unemployment law of a particular state involves only the failure to tax (or provide benefits for former employees of) State and local governments.

Id. *See* notes 67-72 and accompanying text *supra*.

84. If a state were to refuse to comply with the 1976 Amendments, the resulting sanctions would result in the immediate migration of private employers to complying states and the subsequent erosion of the tax base on the non-complying state. States are in competition to attract private investment. A non-complying state would be in an extreme disadvantage in this area. Brief *amicus curiae* of International Personnel Management Ass'n and National School Bd. Ass'n at 15-24, County of Los Angeles v. Marshall, 442 F. Supp. 1186 (D.D.C. 1977).

85. *See* Legislative History, S. REP. No. 94-1265, 94th Cong., 2d Sess. (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5997, 6003. *See also* H.R. CONF.

private employers hostage in order to force the state to extend unemployment compensation coverage to its own employees.

The 1976 Amendments are wholly unrelated to the pre-existing unemployment compensation program. Congress should be prohibited from making continuation of the pre-existing tax credit contingent upon compliance with the amendments. The Social Security Act of 1935 encouraged states to create federally acceptable unemployment programs for their private sector employees.[86] The temporary SUA program extended federal unemployment benefits to state and local government employees not otherwise covered by state or local unemployment programs.[87] The 1976 Amendments transfer this burden to the states by requiring them to extend unemployment compensation coverage to their own employees at their own expense.[88] Certainly the Court's rationale in *Steward Machine Co. v. Davis* for upholding the original act[89] should not control the validity of these totally unrelated amendments.

Congress put the 1976 Amendments in the form of a conditional spending program because it realized if it tried to achieve the same end through the commerce power the statute would be subject to constitutional challenge.[90] The power to structure employee-employer relationships is clearly within the traditional scope of state sovereignty.[91] In *National League of Cities*, the Supreme Court invalidated the 1974 FLSA Amendments because they directly displaced state autonomy in this area.[92] The amendments upheld in *County of Los Angeles v. Marshall* intrude no less directly on this attribute of state sovereignty.[93] The tremendous costs to the states of complying

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REP. NO. 1745, 94th Cong., 2d Sess. 9, 11 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6033-35. (States would be *required* to extend coverage in the federally prescribed manner to maintain federal approval of their unemployment compensation plan).

86. *See* notes 46-50 and accompanying text *supra*.

87. *See* notes 62-66 and accompanying text *supra*.

88. *See* notes 67-72 and accompanying text *supra*.

89. *See* notes 51-58 and accompanying text *supra*.

90. *See* S. REP. NO. 94-1265, 94th Cong., 2d Sess. 8 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5997, 6004-05 (Congress considered whether *National League of Cities* affected constitutionality of the 1976 Amendments and concluded it did not because of the form of the legislation).

91. National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

92. *Id.* at 852. *See* notes 1-10 and accompanying text *supra*.

93. *See* notes 82-85 and accompanying text *supra*.

with these amendments will drastically affect their ability to structure their employment policies as they see fit.[94] The 1976 Amendments should be invalidated under the rationale of *National League of Cities*.[95]

IV. THE NATIONAL FLOOD INSURANCE PROGRAM

The evolution of the National Flood Insurance Program[96] is another example of congressional coercion to compel state participation in conditional spending programs by attaching penalties for non-participation. In 1968, Congress passed the National Flood Insurance Act (1968 Act).[97] This Act gave state and local governments within federally designated flood zones the opportunity to allow their residents to purchase federally subsidized flood insurance.[98] It required communities, as a condition of participation, however, to adopt federal land use and construction regulations.[99]

The 1968 Act was a 'traditional' spending program in that the only consequence of non-participation was the denial of the opportunity to purchase the offered flood insurance. The vast majority of state and local governments within federally designated flood zones refused to participate because they objected to giving up local regula-

94. *See* note 74 *supra*.

95. In New Hampshire v. Marshall, 616 F.2d 240, 246-49 (1st Cir. 1980), *cert. denied*, 101 S. Ct. 53 (1980), the First Circuit expressly rejected the argument that the tenth amendment should be applied to the 1976 Amendments. The court adhered to the traditional view that all conditional spending programs are optional. *Id.* at 245. Therefore, the tenth amendment constraints established in *National League* do not apply to the 1976 Amendments. *Id.* at 245-46. In rejecting the argument that the sanctions for non-compliance with the 1976 Amendments coerces states into participating in the program in contravention of the tenth amendment, the court stated: "We do not agree that the carrot has become a club because the rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game. The basic design and mechanisms of the Act have not changed since 1935." *Id.* at 246. This result, as well as that in *County of Los Angeles v. Marshall*, firmly entrenches the traditionally broad interpretation of the spending power.

96. The National Flood Insurance Program is composed of the National Flood Insurance Act of 1968, Pub. L. No. 90-448, Title VIII, 1968; Title IV of H.U.D. Act of 1969, Pub. L. No. 91-152 (1969); The Flood Disaster Protection Act of 1973, Pub. L. No. 93-234 (1973); Section 816 of the Housing and Community Development Act of 1974, Pub. L. No. 93-383 (1974); Pub. L. No. 94-375, Title VII of Pub. L. No. 95-128; *codified at* 42 U.S.C. §§ 4001-4128 (1976).

97. 42 U.S.C. §§ 4001-4128 (1976).

98. National Flood Insurance Act, §§ 1305-1307, 42 U.S.C. § 4011 (1976).

99. *Id.* § 1315, 42 U.S.C. § 4022 (1976).

tory control over land use and construction.[100] Landowners and local governments within flood zones realized that the decision to participate would be their last locally controlled decision with respect to their land. In addition, the federally mandated regulations would substantially increase construction costs within a participating community. The increased costs would impede development and lower property values.[101]

In 1973, Congress passed the Flood Disaster Protection Act (1973 Act).[102] The express purpose of the 1973 Act was to eliminate the voluntary nature of the 1968 Act and force participation by federally designated flood areas in the federal insurance program.[103] The 1973 Act accomplishes this by imposing severe sanctions against both non-participating communities and private property owners not covered by the offered flood insurance. Section 102 of the 1973 Act[104] penalizes property owners in federally designated flood zones who do not purchase the offered flood insurance by 1) cutting off all federal financial assistance for acquisition or construction purposes regarding flood prone property, and 2) prohibiting federally regulated private lending institutions from making loans secured by the flood prone property.[105] Section 202 of the 1973 Act[106] denies non-participating communities federal financial assistance for acquisition and construction purposes, as well as disaster relief in the event of a flood.[107]

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100. In January 1973, only 2,000 communities participated under the 1968 Act, and only 200,000 private landowners were insured. *Oversight of the National Flood Insurance Program: Hearings Before the Subcomm. on Housing and Comm. Development of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 404 (1977) (Ruth Prohop, General Counsel, Dept. of HUD).

101. *See* notes 123-27 and accompanying text *infra*.

102. Pub. L. No. 93-234 (1973), *codified in* 42 U.S.C. §§ 4001-4128 (1976).

103. *See* S. REP. No. 93-583, 93d Cong., 1st Sess., reprinted in [1973] U.S. CODE CONG. & AD. NEWS p. 3217 (Senate Report). *See also HUD Space-Science-Veteran's Appropriations for 1974, Hearings Before a Subcomm. of House Comm. on Appropriations*, 93d Cong., 1st Sess. 785 (1973) (statement of George Bernstein, Admin. of FIA) (the flood insurance program will never work as long as entry into it is voluntary).

104. Pub. L. No. 93-234 at § 102 (1973), 42 U.S.C. § 4012(a) (1976).

105. *Id.*

106. *Id.* at § 202 (1973), 42 U.S.C. § 4106 (1976).

107. *Id.* Congress amended this section in § 703 of the Housing and Community Development Act of 1977, Pub. L. No. 95-128 § 703, 42 U.S.C. § 106(b) *as amended* (1977). As amended, § 202 is merely a notice provision to require lenders to inform potential borrowers if their property will not be eligible for federal disaster relief in the event of a flood. The 1977 amendment, however, left standing the direct federal

In essence, the 1973 Act requires commodities in federally designated flood zones to participate in the flood insurance program in order to receive any futher federal assistance. Moreover, private property owners within these areas must purchase the offered flood insurance, not only to be eligible for direct federal assistance, but also to be eligible for loans from any federally supervised private lending institution. Without loans and mortgages from these institutions, construction is impossible. Non-participation then, essentially destroys property values within the community.[108]

In *Texas Landowners Rights Association v. Harris*,[109] a group of municipalities and private landowners within federally designated flood areas brought an action for declaratory and injunctive relief challenging the constitutionality of the National Flood Insurance Program as amended by the 1973 Act. Plaintiffs alleged that the sanctions against non-participating communities coerced entry into the program, and that the applicable federal regulations violated the tenth amendment.[110] Since, therefore, the regulations were in effect mandatory on the states, they contended that the theory of *National League of Cities* should be extended to limit the intrusive aspects of the program.[111]

The district court, following the rationale established in *County of Los Angeles v. Marshall*,[112] held that the 1973 Act, as a conditional spending program, was not subject to the limitations established in *National League of Cities*.[113] Accordingly, it granted defendant's motion for summary judgment.[114]

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assistance sanction, which blocks direct federal grant aid and FHA and VA mortgages for flood zoned property in non-participating communities. So even after this amendment, the sanctions against non-participating communities are still very severe.

In the words of Congressman Taylor, sponsor of the 1977 Amendment: "My amendment leaves untouched section 202(a), the Federal assistance sanctions, which is more than enough incentive to get communities to participate. This sanction applies to direct Federal grant aid as well as to FHA and VA mortgages, and to subsidized housing." 123 Cong. Rec. 14382 (1977) (remarks of Rep. Taylor).

108. *See New Safeguards*, *supra* note 32, at 749.

109. 453 F. Supp. 1025 (D.D.C. 1978), *aff'd*, 598 F.2d 311 (1979), *cert. denied*, 444 U.S. 927 (1980).

110. *Id.* at 1028.

111. *Id.* at 1028-29.

112. 442 F. Supp. 1186 (D.D.C. 1977). *See* notes 73-81 and accompanying text *supra*.

113. 453 F. Supp. at 1033.

114. *Id.*

The court considered the 1973 Act to be within the traditionally broad scope of the conditional spending power.[115] It acknowledged that the severe sanctions for noncompliance strongly induced state participation.[116] Nonetheless, it rejected the argument that the sanctions coerced participation and made the program mandatory within the meaning of *National League of Cities*.[117] Accordingly, the court held that the National Flood Insurance Program did not violate the tenth amendment.[118]

The *Texas Landowners* court refused to acknowledge the coercive nature of the 1973 Act because it did want to assume the task of determining the boundary line between inducement and coercion.[119] The express intent of the 1973 Act was to make the insurance program mandatory on affected communities and property owners.[120] It accomplished this by making the sanctions for non-participation so great that affected communities had no choice but to participate.[121]

In upholding the constitutionality of the 1973 Act as a valid exercise of the conditional spending power, the *Texas Landowners* court put form over reality. Clearly, the *choice* to participate in the insurance program, in light of the penalties for non-participation, is really no choice at all.[122] The 1973 Act effectively made the National Flood Insurance Program mandatory. The court should have conducted a *National League of Cities* type of inquiry to see if the conditions involved violated the principles of the tenth amendment.

It is well settled that jurisdiction over land use and construction regulations is within the traditional scope of state sovereignty.[123] Under the program at issue, every participating community must adopt detailed zoning and building regulations established for it by the federal Department of Housing and Urban Development (HUD).[124] It is hard to imagine how Congress could more effectively

115. *Id.* at 1030.

116. *Id.* at 1030-31.

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* notes 102-08 and accompanying text *supra*.

121. *Id.*

122. *See New Safeguards*, *supra* note 32, at 751.

123. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 373 (1926). *See also New Safeguards*, *supra* note 32, at 752 n.163.

124. *See* notes 96-101 and accompanying text *supra*.

displace state autonomy in this area. The rationale of *National League of Cities* should extend to this program to prevent Congress from usurping this attribute of state sovereignty.

Participation in the flood insurance program is also very costly for the affected communities and property owners.[125] Plaintiffs argued the HUD regulations significantly increased the cost of development in the designated communities.[126] These increased costs lower property values, which decreases the tax base, impairing the ability of the affected community to function effectively.[127] In addition, the increased costs of property development may result in marginal property not being developed at all. This may impair a community's efforts to provide adequate low income housing in urban areas.[128]

Clearly, Congress has a legitimate interest in limiting the amount of federal money spent for flood disaster relief. In accomplishing this goal, however, Congress should not be allowed to impair the ability of state and local governments to function as sovereign political entities in the federal system.[129] In addition, Congress should not be allowed to hold private landowners hostage in order to force communities within designated flood areas to participate in the program. The *Texas Landowners* court should have extended the tenth amendment principles enunciated in *National League of Cities* to limit the intrusive nature of the 1973 Act.

CONCLUSION

The Supreme Court should reconsider the current broad interpretation of the conditional spending power in light of present economic realities and the principles established in *National League of Cities*. Clearly, when Congress creates a conditional spending program that includes severe sanctions for non-participation, it intends to make the program mandatory on the states. Theories on the voluntary nature of the spending power are inapplicable to these programs. A result that is prohibited by the tenth amendment pursuant to one enumerated power should not be found constitutional through exercise of

125. *See* notes 126-27 and accompanying text *infra*. *See also New Safeguards*, *supra* note 32, at 753-57.

126. Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 9, Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978).

127. *Id.* at 8, 12.

128. *See New Safeguards*, *supra* note 32, at 756-57.

129. *See* note 45 *supra*.

another.[130]

The ramifications of the current limited construction of the tenth amendment are enormous. Through the conditional spending power, Congress possesses the potential to usurp the most vital attributes of state sovereignty. State and local governments may someday become little more than sub-agencies of the federal government, forced to carry out intrusive federal regulations as part of coercive spending programs.

The Supreme Court evidently still relies on the political process to limit federal intrusions on state sovereignty.[131] It is clear, however, political restraints are not always sufficient. The Court must take a more active role in limiting federal intrusions on states pursuant to the conditional spending power.

One reason for the current broad interpretation of the conditional spending power may be the difficulty that exists in establishing constitutional guidelines for conditional spending programs. While the sanction-incentive distinction presented here may be of limited utility, it constitutes a basis from which the Court could develop a functional set of federalism constraints for these programs.[132] The Supreme Court's failure to even acknowledge that the tenth amendment is applicable to the conditional spending power perverts the fundamental nature of that power and perpetuates a very dangerous fiction that may undermine the federal system.

130. *See* note 15 *supra*.

131. *See* note 14 *supra*.

132. Clearly, a state may be coerced into participating in a conditional spending program as strongly by its need for offered federal funds as by its need for the continuation of an existing federal benefit. Because of this, the Court may deem it necessary to extend the restrictions of the tenth amendment to all spending programs, not only those that threaten the discontinuation of an existing federal benefit upon non-compliance.

COMMENTS