THE DECLINE OF STATE SOVEREIGNTY:

An Analysis of Supreme Court Conditional Spending Cases

Deanna S. Swisher
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Dr. Gary Crawley
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Introductory Remarks

The Constitution of the United States provides for a federal system of government in the Tenth Amendment by establishing that the powers of the national and state levels of government are mutually exclusive.

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.

This formal division of powers creates a form of government which operates through two levels of government, each acting within its own sphere of powers. Such a form of government embodies the definition of a federal system.

If a government's powers constitute the parameters of its functions, then a federal system implies that the two levels of government each function within separate and distinct spheres of authority. However what is theoretically suggested by a federal system cannot be observed in the United States. Morton Grodzins (1960) acknowledged this discrepancy between the theory and practice of federalism. Grodzins proposed that an accurate image of the American federal system is a "marble cake". The inseparable mingling of ingredients found in Grodzins' marble cake symbolizes the mingling of national and state functions which occurs in the American federal system.

Daniel Elazar expanded upon an intermingled functions approach to federalism through an analysis of the historical development of the federal relationship. He found character-
istics of "dual federalism" and an intermingled, or "coop-
erative" relationship, and he developed a new theory to
explain his findings.

Within the large area of concurrent powers pro-
vided, explicitly or implicitly, by the federal
constitution, the federal and state governments
have been able to choose between division of res-
ponsibility among their separate jurisdictions,...
("dual federalism"), or to divide the works of
government cooperatively, sharing responsibility in
specific programs, with all units directed toward
common goals that extend along the entire chain
of concurrent powers ("cooperative federalism")
and generally overflow into the ostensibly "exclu-

Although the existence of cooperative or concurrent powers
appears to conflict with the Tenth Amendment's division of
powers, concurrent powers also rest upon a provision of the
United States Constitution.

The concurrent powers are based upon the principle of
national supremacy which is established in the "Supremacy
Clause" of the Constitution.

This Constitution, and the laws of the United
States which shall be made in pursuance thereof
...shall be the supreme law of the land...anything
in the Constitution or laws of any State to the
contrary notwithstanding (Art. VI, cl. 2).

Paul C. Bartholomew, a professor of government at Notre Dame
University, interpreted the Supremacy Clause to mean that
"the Congress may exercise [its] powers to the fullest
extent even though the laws and even the constitutions of
the states may thereby be interfered with (1978, p. 83)."
Concurrent powers may be said to exist when the national
government exercises its preemptory powers and steps into areas

(ii)
previously governed by the states.

All three branches of the federal government and innumerable scholars of law and political science have acknowledged the existence of both concurrent and divided powers. The existence of both powers suggests that the federal structure is not static but is changed by the extent to which the levels of government exercise their concurrent and divided powers. A dynamic view of federalism recognizes that political and economic forces influence the federal relationship.

Michael Reagan (1972) asserted that cooperative federalism, based upon the concurrent powers, and "old style" federalism do not coexist.

Federalism — old style — is dead...
Old style federalism is a legal concept, emphasizing a constitutional division of authority and functions...[whereas]...New style federalism is a political and pragmatic concept, stressing the actual interdependence and sharing of functions between Washington and the states, and focusing on the mutual leverage that each level able to exert upon on the other (1972, p. 3).

Reagan found the "best proof" for his argument "in the grant-in-aid system, which uses a fiscal relationship as a basis for policy making and programmatic cooperation.(1972, p.54)." He considered the grant-in-aid system to be the "complete embodiment" of Grodzins' "marble cake" conceptualization of federalism, but "the sharing of functions does not necessarily mean the absence of a dominate policy making role by one of the partners to the sharing (1972, p. 54)."

The grant-in-aid system is a form of intergovernmental
relations which provides for the flow of national financial resources to the state and local levels of government. Attached to federal grant-in-aids are conditions which restrict how the federal money is to be spent. The term "conditional spending" is commonly used to refer to any grantee expenditure made subject to federally imposed conditions. Through the imposition of conditions, fiscal intergovernmental relations use federal funds to gain state compliance with federal policy.

Fiscal intergovernmental relations have been the focus of the most recent movement to alter the federal structure. Central to the Reagan Administration's pursuit of a "new federalism" was a proposal to reduce the amount of federal funds flowing through the grant-in-aid system. Although not all of the reductions which President Reagan had proposed were realized, total grant outlays for FY 1982 are estimated to decline by 9.5% from the 1981 figure. A reduction in the size of the federal grant-in-aid system has never before occurred in the history of intergovernmental aid. (Walker, 1982, p. 5). Along with this reduction in total grant outlays, Congress restructured the grant-in-aid system. The Omnibus Budget Reconciliation Act of 1981 consolidated 77 grants into nine grants. The nature of the nine grants vary, but it can be generalized that the conditions imposed by the new grants are less restrictive than the conditions imposed by the original grants (Walker, 1982, p. 12).
Through the power to determine the size and structure of the grant-in-aid system, the congressional branch can bring about change in intergovernmental relations. Within a dynamic federalism, changes in intergovernmental relations are likely to affect the federal system. However the extent to which congressional action affects the functioning of America's federal system is not determined by Congress but is decided by the Supreme Court. As the arbitrator of conflicts between the national government and the states, the Supreme Court can exercise unparalleled influence upon intergovernmental relations. The Supreme Court is also responsible for the interpretation of the Constitution, and through the use of this power the Court has played a major role in shaping America's federal system.

The Supreme Court's influence on America's federal structure is the broad concern of this thesis. This thesis will advance the argument that the Supreme Court has not adequately recognized the rights and powers of the states. The diminution of states' powers in favor of extended national powers offends the Tenth Amendment and threatens the vitality of America's federal structure.

An analysis of the reasoning relied upon by the Supreme Court to decide conditional spending cases will be used to develop the argument of this thesis. Conditional spending cases are cases which seek to challenge or enforce the conditions imposed upon the recipient of federally granted funds.
Conditional spending cases were chosen for analysis because these cases, explicitly or implicitly, pose constitutional questions concerning the allocation of powers to the state and national government. The Supreme Court's response to such questions provides insight into the Court's definition of the constitutional provisions which establish America's federal structure. Therefore, the Supreme Court's decisions in conditional spending cases do not merely influence the functioning of the grant-in-aid system but also influence the legal definition of America's federal system.

Before beginning a chronological analysis of Supreme Court reasoning in selected conditional spending cases, this work will first explain the grant-in-aid system and discuss the economic conditions currently acting upon the federal system. These preliminary steps should add to the content of this introduction to provide information essential to an understanding of the central argument of this thesis: The Supreme Court has not adequately recognized that a state's sovereign functions are impaired by compliance with the conditions attached to federal grants-in-aid.
Many legal scholars and public officials have recognized the importance of Supreme Court conditional spending decisions in defining the realm of state sovereignty. It is the objective of this thesis to go beyond this recognition to consider how the Supreme Court has exercised this ability to affect state sovereignty. A chronological analysis of selected conditional spending cases will be used to establish what the Court has decided in conditional spending cases and how these decisions were reached. Preceding this analysis will be an examination of the federal grant-in-aid system which implements conditional spending so that the content of the cases and the effects of the Court’s decisions on state sovereignty may be understood. The examination of the grant-in-aid system and the case analyses to follow will provide clear support for the central argument of this thesis: The Supreme Court has not adequately recognized that state sovereignty is impaired by compliance with the conditions attached to federal grants-in-aid.

A grant is an allocation of federally collected money to a state or locality, for which the recipient must comply with federally attached conditions in the administration and implementation of grant financed programs. Three basic types of grants are relied upon in the federal grant-in-aid system: categorical grants, block grants, and general revenue sharing. The basic differences between these types of grants deserve a brief explanation.

A categorical grant is allocated to a recipient with the
mandate that the granted money is spent for a specific, federally targeted purpose. A block grant consists of money transfers which can be spent with some degree of grantee discretion within a broad, federally specified policy area. Revenue sharing is a distribution of federal funds to the states through a per capita formula. Revenue sharing allows a recipient state the greatest discretion of any type of grant, but even revenue sharing funds do not pass to the states free of federal conditions. "Pass through" requirements limit grantee discretion by mandating that the states relinquish the control of certain percentages of their revenue sharing funds to localities. More stringent "federal strings" are commonly attached to categorical or block grants, for example, requirements that the state provide matching funds or follow specific administration and accounting procedures. These "strings" are usually found in the provisions of a grant program's enacting legislation or are imposed by a federal agency.

Two reasons are repeatedly given for the implementation and hardy existence of the grant-in-aid system. "Fiscal mismatch" is cited as a major reason for the flow of federal funds to lower levels of government. Michael Reagan explained that

...we suffer from a fiscal mismatch...it is relatively much easier for the national government to increase its tax revenues each year than for state-local governments to do so. Yet the burden of increased demand (and expense) rests primarily at
the doors of the lower jurisdictions (1972, p. 34). Although the federal government reigns supreme in the field of revenue collecting, lower levels of government are closer to the needs of the people and are, therefore, more likely to respond through spending.

Another reason for the existence of the grant relationship is that through this relationship federal funds can be used to induce state recipients to pursue federally designed goals. "Grants may be a useful way of centralizing policy..." asserted Michael Reagan, if the laws authorizing the grant programs clearly state federal policy and there exists "adequate means for ensuring programmatic accountability of the recipient governments (1972, p. 63)." Mark Suben, writing for the Fordam Law Review, considered grants more than a potentially "useful way of centralizing policy." Suben concluded, "Conditions attached to federal grants are often the primary way in which policy goals are realized and necessarily intrude on the autonomy of grant recipients (1981, p. 132-33)." The ability to legislate grant programs gives the national government the ability to implement congressionally formed policy through state administered programs.

Grants, then, can be understood as a method of transferring the ability to spend from a more efficient revenue collector to a level more commonly acting as the revenue distributor. However, a transfer of funds does not involve
a commensurate transfer of decision-making authority. To the degree that the federal government relies upon grant conditions to implement national policy, state policy initiative is clearly restricted.

An obvious result of the grantor-grantee relationship is that the state level is dependent upon federal funds to meet its budgetary needs, but state officials cannot spend the funds with the autonomy necessary to ensure that state needs are efficiently met. Although recent actions to increase the use of block grants\(^2\) and forms of revenue sharing are considered by many to significantly increase state autonomy, state level decision-making continues to be impaired by the conditions accompanying federal aid.

The farreaching potential of grant conditions was of great concern to George D. Brown, a professor of law at Boston College Law School. Brown acknowledged that

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\text{...federal strings extend far beyond "how the money is spent"... Receipt of federal funds can now affect virtually all facets of state and local government, ranging from organization and personnel practices, through concern for national values such as nondiscrimination, to the very process of government itself (1981, p. 6).}
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Rather than relying solely on the narrow mandates of conditional grants, many laws "impose a broad range of peripheral, incidental, or secondary national policy goals" concerning the environment, equal access, and equal rights (Suben, 1981, p. 135). Suben recognized that these peripheral goals do not affect actual government tasks (i.e. construction of a building), yet such mandates attached to federally funded
projects "restrict the grantee's autonomy, lessening its ability to produce more cost-efficient operations (1981, p. 135)."

A state's ability to function efficiently is of great importance at a time when many state budgets are running at or near deficit levels. Fiscal realities do not allow the states a real choice to accept or reject federally offered funds, and once the funds are obtained the states lack the autonomy to spend the money cost-efficiently. Dissatisfaction among state level officials would obviously be fostered by this "no win" situation.

The inability to spend granted money cost-efficiently is a major criticism of the grant-in-aid system, but it is not the only problem associated with federal grants. "Where the [grant] recipients are states...a conflict of constitutional dimensions emerges between the spending power and the Tenth Amendment (Suben, 1981, pp. 132-33)." This conflict is inherent in the federal grant system and is the crux of most legal challenges concerning the grant-in-aid system. An understanding of this constitutional conflict is a prerequisite for a thorough appreciation of the argument of this thesis.

The Congress enacts grant programs under its constitutional power to "provide...for the general welfare of the United States (Art. I, Sec. 8, cl. 3)." This power, commonly called the spending power, is used to further national
policy by way of the conditions attached to federal grants.
This use of the spending power has the effect of extending
national powers beyond the powers delegated to the Congress
in the Constitution. Such an extension of national powers
invades the powers of the states because "The powers not
delegated to the United States by the Constitution...are
reserved to the States...(Tenth Amendment [emphasis added])."

The preceding interpretation of the conflict between the
spending power and the states' Tenth Amendment reserved powers
is the basis for the argument set forth in this thesis, however
this conflictual interpretation of the Tenth Amendment and
the spending power is not universally accepted. The Supreme
Court's acceptance or rejection of this "conflict" is central
to any conditional spending case decision, even when it is
not explicitly addressed by the Court or the parties involved.
In the case analyses to follow, it will become obvious that
when a state has challenged the conditions of a federal grant
on the basis of Tenth Amendment powers, the Supreme Court
has seldom recognized that the state's powers have been in­
vaded.

Suben (1981) asserted that three factors had recently
brought the spending power and the Tenth Amendment into sharp
conflict where "state fiscal sovereignty" is concerned. The
first of these three factors is the radical growth of the
grant-in-aid system in the previous two decades. Suben
found a 900% increase in federal expenditures relating to
federal grant programs between 1963 and 1979, and "by 1980, more than 447 programs dispensed $82.9 billion (1981, p. 147)." This increase in the size and breadth of the grant system has caused increasing state dependence on federal funding. The 1981 Omnibus Budget Reconciliation Act decreased the number of federal grants, and the flow of federal grant dollars has also decreased. However these recent decreases are small in comparison to the total size of the grant system, and, like any legislated change, these decreases in the size of the federal grant system are not irreversible.

The changing nature of grant conditions was also of concern to Suben. He found that grant conditions have changed from "ensuring the primary focus of a grant to effectuating general policies peripheral or secondary to the purposes for which grant monies were allocated (1981, p. 149)." These secondary goals (i.e., nondiscrimination) are generally not specific to a single grant program, but "apply across-the-board to many or all federal grants (Brown, 1981, p. 7)." If a state objected to such a broad goal it would have to reject many offers of federal aid to avoid compliance.

The third factor which Suben found to affect state fiscal sovereignty was the dependence of grantees on federal money. Suben urged that the Court recognize that grants are no longer "optional" for state governments. Fiscal realities faced by the states deny the states the "option" of rejecting federal grants which impose undesirable conditions. Prior
to the states' inability to reject grants, it was common to consider a grant to be an "inducement" used to encourage the states to pursue national policy goals. Suben contended that grants can no longer be viewed as inducements because the states' inability to reject a grant causes grant conditions to become federal mandates. "When grant conditions under the spending power become interchangeable with congressional mandates under the commerce power in their capacity to implement policy goals, they are coercive, not merely inducive (Suben, 1981, p. 151)."

Suben's contention that states cannot afford to reject federal grants has received attention in the legal sector. Brown (1981) and Wynns (1977) also recognized that states no longer face the option to accept or reject federal grants, and, like Suben, have asserted that this lack of state choice must be recognized by the Supreme Court in conditional spending cases. With this most recent factor of conditional spending controversy and the previous discussion of the Tenth Amendment-spending power conflict both in mind, an examination of Supreme Court involvement in the conditional spending cases can be pursued. The remainder of this thesis will be concerned with a history of those Supreme Court cases that have been influential in defining the role of states' rights and congressional powers in the grant relationship.

The early Supreme Court cases dealing with the federal-state grant relationship did not involve transfers of money
but involved transfers of land. One such case, McGee v. Mathis was decided by the Supreme Court in 1866, and the Court's reasoning is still relevant in grant litigation. In McGee the Court reasoned:

> It is not doubted that the grant, by the United States (of...lands) to the State upon conditions, and the acceptance by the State, constituted a contract. All the elements of a contract met in the transaction — competent parties, proper subject matter, sufficient consideration, and consent of minds. This contract was binding upon the State, and could not be violated by its legislation without infringement of the constitution.

The contractual nature of the grant relationship was established in a series of land grant cases including McGee v. Mathis. The view that a grant is a contract easily withstood the transition from grants of land to grants of money. A grant then is not a gift, a trust, or a partnership, but is clearly a contractual agreement whose conditions must be met by the grantee.

In Commonwealth of Massachusetts v. Mellon the Supreme Court considered a case involving the 1921 Sheppard-Towner Act, better known as the "Maternity Act". The legislation provided annual appropriations to participating states for the purposes of reducing maternal and infant mortality and protecting the health of mothers and infants. Participating states had to appropriate equal funding for the purposes of the Act and had to report to a board created under the Act concerning their operations and expenditures.

The State of Massachusetts asserted that the funds appropriated under the Sheppard-Towner Act were
...for purposes not national, but local to the states, and together with numerous similar appropriations constitute an effective means of inducing the states to yield a portion of their sovereign rights. 9

Massachusetts further challenged that the Act usurped a power which was not granted to Congress but was reserved to the states by the Tenth Amendment.

The decision of the Court, delivered by Justice Sutherland, was to dispose of the case for want of jurisdiction. In explaining its lack of jurisdiction, the Court enunciated the view that grant participation is optional and attached conditions are therefore avoidable. Specifically, Sutherland reasoned:

...the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject. 10

Sutherland further denied the state's allegations by asserting that if Congress had an ulterior motive of usurping the state's Tenth Amendment rights, then "that purpose may be effectively frustrated by the simple expedient of not yielding." 11

The Massachusetts v. Mellon opinion influenced later Court decisions through its finding that grant acceptance is "optional". Mark Suben best described the nature of the "optional rationale" and the results of its use:

The syllogism is: grants are optional; conditions are attached to grants; therefore conditions attached to grants are optional. Because the major premise that grants are optional has never been judicially
refuted, it has come to have the force of a presumption...a seemingly insurmountable barrier to state parties asserting tenth amendment infringement in spending power cases. (1981, p. 134).

Court adherence to a doctrine which asserts that states have the option to either participate or not in grant programs denies the fiscal realities faced by states. The optional rationale may have been applicable at the time of Massachusetts v. Mellon, but the use of this doctrine today denies the obvious fiscal problems faced by the states.

In 1936 the Court recognized the economic pressure which is inherent in conditional spending. United States v. Butler dealt with the Agricultural Adjustment Act of 1933, an emergency measure which authorized the Secretary of Agriculture to enter into agreements with farmers for the reduction of acreage. The Act imposed processing taxes and floor taxes upon farmers and used the proceeds to pay "benefits" to those who had met their acreage reduction agreements. Certain provisions of the Act were challenged in Butler as unconstitutional infringements upon the reserved rights of the states.

In the majority opinion Justice Roberts considered the nature of the taxes imposed and the purpose and operation of the Act. This case was not, in Roberts' opinion, "concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. " However many aspects of the Court's reasoning do appear applicable.
to conditional spending cases, and many legal scholars have referred to Butler when discussing the validity of conditional spending programs.

Roberts went to great lengths to discuss the contractual nature of the agreements made under the Agricultural Adjustment Act and the nature of government contracts in general. The argument that a state may void federal "contracts", thereby escaping contractual conditions, was an argument which Roberts termed "fallacious". However, Roberts wrote not only of a state's inability to rescind a federal contract, but also of the inability of the federal government to make contracts outside of its constitutional powers.

The United States can make the contract only if the federal power to tax and to appropriate reaches the subject matter of the contract.14

Applying this federal inability to the facts of the case, the Court held that

Congress has no power to enforce its commands on the farmer to the ends sought by the...Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.15

Also in the Butler case was an interpretation of the optional rationale which differed significantly from case precedent. L. Pat Wynns, writing for the American University Law Review,16 asserted that the Court's reasoning in Butler recognized the optional rationale, but chose to reject it. Wynns specified that the Court observed the direct and indirect economic consequences incurred by those who did not comply with the 1933 Act. The Court's response to this
observation was that the Act's effect upon the states was "coercion by economic pressure. The asserted power of choice is illusory." The Act was determined, at best, to be "a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." 18

One year after Butler the Supreme Court considered the petition of an Alabama corporation which challenged the Social Security Act of 1935 as being in conflict with the Constitution. The Social Security Act provided that a taxpayer could receive a federal tax credit for contributions made to his state's unemployment fund. The state law which enacted the state's unemployment fund had to receive "certification" from the Social Security Board by satisfying certain minimum criteria. One of these minimum conditions specified that all contributions paid to the state must be turned over to the Secretary of the Treasury. Along with this system of collecting funds, the Act also provided for appropriations to the states for the purpose of assisting the states in their administration of unemployment compensation laws.

In Charles C. Steward Machine Company v. Davis 19 the previously described provisions of the Social Security Act were challenged as unlawfully invading the reserved powers of the states, and the plaintiff also charged that participating states "have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender." 20 The majority opinion of the Court found no merit
in the plaintiff's charge, and like the Court in Butler, con-
sidered the taxing provisions of the Act influential in its
decision.

The tax implemented through the Social Security Act
differed significantly from the tax in Butler. Taxes
collected under the Social Security Act became a part of the
general public fund, due to the mandate that all contributions
made to the states were subject to immediate transfer to the
Secretary of the Treasury. After the taxes were deposited
into the general fund they became available for federal
expenditure. The taxes collected under the Agricultural
Adjustment Act differed from this process by never becoming
a part of the general revenue. Instead these taxes were
collected from noncooperating farmers solely to fund the
benefits paid by the Secretary of Agriculture to those farmers
who had met their contractual obligations.

In Steward Machine the Court found that the Social Secur-
ity tax did not contravene the Tenth Amendment or any of the
"restrictions implied in our federal form of government."21
The excise was, therefore, not coercive, and the proceeds
were subject to appropriation. Mark Suben referred to this
finding of the Court as the "Steward Machine Test." This test
holds that where a pending program cannot be directly linked
to its revenue source, then inducement can never become
coercion. Such a test would obviously apply to any grant
emanating from the general fund (Suben, 1981, p. 152).

The Court found further basis for considering the
challenged provisions of the Social Security Act to be noncoercive by recognizing the nature of the conditions imposed by the Social Security Act.

The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.\textsuperscript{22}

The conditions of the Act were not only approved by the states which enacted an appropriate law, but they were also considered to be revokable merely through repeal of the state's statute. In finding the conditions revokable, the Court's opinion did not consider the intergovernmental relationship involved to be a binding contractual relationship.

The Court added to its support of the Act's constitutionality by finding that

\textit{[t]he condition is not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully cooperate.}\textsuperscript{13}

This lawful end could be cooperatively met, and the Court did not consider such cooperation to require that the states surrender any powers essential to their "quasi sovereign" existence. As to the imposition of conditions upon the quasi sovereign states, the Court asserted, "What is basic and essential \textit{[to federal goals]} may be assured by suitable conditions."\textsuperscript{24}

What is seen in Steward Machine is a discussion of many issues commonly addressed in conditional spending cases, and all issues are succinctly resolved in favor of the federal Act. By giving no heed to the affect of federal economic
inducements on state sovereignty. **Steward Machine** marks a return to the optional rationale.

In 1968 the Supreme Court heard **King v. Smith**\(^{25}\), a suit contesting the validity of Alabama's "substitute father" regulation. Through this regulation Alabama denied "Aid to Families with Dependent Children (AFDC)" payments to the children of any mother who was cohabiting with any "able bodied" man. The AFDC program is financed by federal funds which the state must match, and the program is administered by the states. States are not required to participate in the program, but to do so they must submit an AFDC implementation plan for the approval of the Secretary of Health, Education, and Welfare. Plans must conform with several requirements of the Social Security Act and with rules and regulations put into effect by HEW.

The question of **King v. Smith** was to determine if this "substitute father" regulation of the Alabama Department of Pensions and Security (responsible for AFDC administration) was consistent with conditions of the Social Security Act and with the Equal Protection Clause of the Fourteenth Amendment. The decision reached by the Court relied solely on statutory grounds, thereby affirming the lower court's finding without deciding a constitutional question. In its decision the Court stated:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the states
shall be disbursed. 26

In light of this statement it is not surprising that the Court ruled against Alabama's regulation. The Court's acceptance of the above interpretation with "no question" as the constitutional basis for congressional action is an excellent example of the Court's tendency to extend congressional powers through the spending power. The Court did not consider the Tenth Amendment to be a "controlling constitutional prohibition" on Congress' spending power.

The Court found two conditions imposed by the Social Security Act which conflicted with Alabama's regulation. Although the state claimed that its substitute father provision was a legitimate restriction of the broader eligibility requirements imposed under the Act, the Court considered the Alabama provision invalid and the Social Security conditions enforceable. When considering the rights and remedies under grant based programs, Robert Wallick and William Montalto found significance in the "enforceability" aspect of King.

From the grantor's viewpoint, the purposes, terms, and conditions of a grant, if consonant with the enabling statute, clearly are enforceable against the grantee, at least during the period and to the extent that the grantee uses the funds. (1978, pp. 166-67).

The Court held firmly to the belief that the congressionally imposed conditions were enforceable and the state's condition invalid. The state's claim that its condition was "a legitimate way of allocating its limited resources available
for AFDC assistance" fell upon deaf ears. The congressional spending power was supported in *King v. Smith* while totally ignoring the possibility of an infringement of rights reserved to the states.

The scope of the commerce power came to the attention of the Supreme Court in 1976 when a group of cities, states, and intergovernmental organizations questioned the validity of the 1974 Amendments to the Fair Labor Standards Act. Although the decision in this case examined congressional power under the Commerce Clause, *National League of Cities v. Usery* has potential implications for future spending power cases. A thorough understanding of the *Usery* decision will not provide any degree of certainty that the reasoning applied in *Usery* will be projected by the Court into conditional spending cases. However, the attention that *Usery* has received from the legal sector suggests that a movement exists which advocates the application of *Usery* principles to the spending power.

The challenges brought forth in *National League of Cities v. Usery* questioned the ability of Congress to regulate the conditions of employment for employees of the states. Specifically, the Amendments to the Fair Labor Standards Act extended the Act's minimum wage and maximum hours provisions to almost all employees of the states and their political subdivisions.

The appellants asserted that...when Congress sought to apply the Fair Labor Standards Act provisions...
Justice Rehnquist approached this challenge as a complaint that employment conditions of state and municipal employees were beyond the scope of the commerce power. His initial response to this challenge was that "The established constitutional doctrine of intergovernmental immunity...affirmatively prevented the exercise of this authority in the manner which Congress chose in the 1974 amendments."30

As he wrote for the majority, Rehnquist asserted that "this Court has never doubted that there are limits upon the power of Congress to override state sovereignty..."; limits which could even affect congressional exercise of taxation and commerce powers.31 Not only did Rehnquist recognize the existence of such limits, he also proceeded to use the Tenth Amendment as an example. In quoting Fry v. United States,32 Rehnquist contended that

"The Tenth 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.33"

This statement is indeed unique, as it foreshadows the only Court holding that has supported a major Tenth Amendment challenge to Congress' Article I, Section 8 powers.34

The issue of state sovereignty was given great emphasis in the Usery decision. The Court recognized that "attributes of sovereignty" were attached to every state government, and such attributes may not be impaired by Congress. The
imposition of this restraint on Congress was not due to a lack of legislative authority, "but because the Constitution prohibits [Congress] from exercising authority in that manner." Congressional action was "limited" from impairing the attributes of state sovereignty, and the Court considered one such attribute to be the power to set the wages and hours for state employees.

Renquist's opinion also found it necessary to consider if the state functions at issue here were "functions essential to separate and independent existence,... so that Congress may not abrogate the States' otherwise plenary authority to make them." The Court found that the functions concerned were "essential" to independent state existence for two reasons. When the Congress intervened through the amendments the states incurred increased cost, which had a significant impact of the functioning of the governmental units involved. Further, Rehnquist assessed the Act to displace "state policies regarding the manner in which they will structure delivery of those government services which their citizens require."

The Court's reasoning in Usery was summarized by L. Pat Wynns in a "three step process (1977, p. 731)." Initially, the Court sought to determine whether the state activities concerned were the sovereign attributes of state of local government control. The second step involved an examination of the adverse effects on the lower levels of government caused by federally imposed standards. The final step considered
national interests as well as state interests, accomplished by weighing the adverse effects found in the first two steps against the federal interest involved. This third step was found to balance in favor of the states, and the 1974 amendments were held to be unconstitutional.

The implications of Usery are many, potentially, but few have yet to be realized. It must be recognized that Usery was unprecedented in holding a congressional enactment under the commerce clause to unconstitutionally impair the ability of states and localities in their performance of sovereign functions. However the application of Usery to other legislated standards has yet to benefit the states. Two statements in the Usery decision suggest that future courts may not desire to use Usery as precedent.

The final step of what Wynns considered to be a three step process allows for greater court discretion by taking national interests into account. Rehnquist's writing explicitly leaves room for court discretion in this final step.

The limits imposed upon the commerce power when Congress seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency. A court's definition of "national emergency" would then determine the balance struck between national interests and adverse effects on the states.

When an action taken under the spending power is challenged, the Court again provided a basis for deviating from the findings in Usery. A widely quoted footnote admits the
Court's choice to leave unanswered the question of Usery's application to other congressional actions.

We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power...\(^39\)

To date Usery criteria has not been effectively applied in lower court spending power cases,\(^40\) and the Supreme Court has already reached the "different results" suggested in the above quote in *Fullilove v. Klutznick*.\(^41\)

*Fullilove v. Klutznick* came before the Court in 1980 when associations of construction contractors, subcontractors and others, brought action against a provision of the Public Works Employment Act of 1977. The petitioners sought a preliminary injunction to prevent enforcement of the "minority business enterprise (MBE)" provision, alledging that enforcement of the provision caused them economic injury. The MBE provision was also challenged as a violation of the Equal Protection Clause of the Fourteenth Amendment and the Equal Protection component of the Due Process Clause of the Fifth Amendment.

The minority business enterprise provision requires that at least ten percent of the federal funds granted for local public works projects be used by the state or local grantee to procure services and supplies from businesses owned by minority group members. Grantees must meet this requirement to the "extent feasible" or obtain an administrative waiver. The provision is to provide work for minority
group members who are unable to offer competitive bids because their bids are inflated by the costs of prior discrimination. Its effect then is to mandate use of minority businesses which are acknowledged as charging higher fees.

Chief Justice Burger primarily considered the powers that Congress had employed in enacting the MBE provision. In his opinion, and that of the Court, the 1977 Act was found to be an exercise of the Constitution's Article I, Section 8, clause 1 directive "to provide for the...general Welfare." As an exercise of the spending power, the Act conditioned the receipt of federal funds upon the recipient's compliance with federal directives.

Since the reach of the spending power is at least as broad as Congress' regulatory powers, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, then it may do so under the spending power. Burger completes his argument by finding sufficient powers under the Commerce Clause for the regulation of "private prime contractors," and, as to the provision's application to the actions of state and local grantees, Congress was granted powers to reach its objectives under Section 5 of the Fourteenth Amendment. By reaching the decision that the Public Works Employment Act is constitutional because its objectives are within the spending and Fourteenth Amendment powers, Burger easily avoided the limitations imposed by Usery upon the Commerce Clause powers.

The most recent major decision on a spending power case did not base its decision upon an interpretation ofconsti-
stitutional powers. Instead, Pennhurst State School and Hos­
pital v. Halderman\textsuperscript{44} emphasized the contractual nature of the grant relationship. In this 1981 case Halderman, a retarded resident of Pennhurst State Hospital, brought suit challeng­ing the conditions of confinement imposed in the hospital. The State of Pennsylvannia was owning and operating the hospital while receiving federal financial assistance under the Developmentally Disabled Assistance and Bill of Rights Act.

The Developmentally Disabled Assistance and Bill of Rights Act established a grant program whereby states choosing to participate received federal funds to aid them in creating programs to care for and treat the developmentally disabled. As a voluntary participant, the state must either accept the grant's conditions or forego the financial aid. In part, the Act contained a "bill of rights" provision which stated that mentally retarded persons "have a right to appropriate treatment, services, and habilitation...[i]n...the setting that is least restrictive of...personal liberty."\textsuperscript{45}

Halderman alleged that the conditions at Pennhurst denied he and like residents (a class action) various constitu­tional and statutory rights, including rights under the Act. Injunctive and monetary relief \textit{were} sought, and it was urged that the hospital be closed. The Court's response to these challenges centered around the question of whether the bill of rights provision, as a part of the statute, imposed conditions upon the recipient state and therefore validated
In the Court's opinion, delivered by Justice Rehnquist, the reasoning behind the decision concentrated on statutory construction to discern whether Congress intended the bill of rights to be a condition of aid. A regression from the intent of the statute to the basis of congressional authority for its enactment caused Rehnquist to develop a reliance upon the contractual nature of grant legislation. Rehnquist thought that

...legislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. Rehnquist used this contractual nature of legislation to impose an unprecedented focus on the intent and knowledge of the parties to the grant "contract".

Rehnquist contended that the legitimacy of congressional action taken under the spending power "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'." Since there cannot be a "knowing acceptance" of the contractual terms if the state is unaware of the conditions or is unable to ascertain what the conditions are, then enforceable legislation must clearly convey the terms of the contract. And so the Pennhurst "Clear Statement Rule" was developed; "if Congress intended to impose a condition on the grant of federal moneys, it must do so unambiguously."

When this reasoning was applied to the case it was held that the bill of rights was not intended by Congress to con-
stitute a condition of federal funding. The Court was unwilling to conclude that the Act revealed any intent to require the states to fund new, substantive rights. The bill of rights was not interpreted as an absolute obligation upon the states, but was merely included in the Act as justification and support of Congress' appropriation and to guide the review of state applications for these federal funds.

The decision in Pennhurst suggests additional arguments which the states may use in future grant litigation to derive relief from grant conditions. George Brown considered the possibility that the Pennhurst decision may be used to invalidate burdensome conditions, but he thought it more likely that "the clear statement rule will be used as a canon of statutory construction (1981, p. 8)." If this tendency does prove to be the case, then the Pennhurst decision could have little positive effect on state sovereignty by merely encouraging Congress to state grant conditions explicitly.

Thomas J. Madden, an attorney writing for Grants and Assistance News, expected the Pennhurst ruling to have greater implications than those suggested by Brown. Madden (1981) asserted that numerous conditions have been imposed in recent years to bring about substantive changes in state laws and practices. The economic obligations imposed by many of these conditions outweigh existing grant funds, facing grant administrators with difficult decisions.

The decisions faced by grant administrators will be
affected by the Pennhurst Clear Statement Rule, in Madden's opinion,

Because of the controversial nature of many of these conditions, it is not always possible to find language which expresses Congressional intent any more clearly than the Developmentally Disabled Act (1981, p. 13).

Although in one sense the Pennhurst ruling suggests that states are not bound by unclearly stated conditions, the ruling does not provide adequate basis for an administrator to anticipate what a "clear" condition is. Especially in light of the fact that three justices dissented from the holding in Pennhurst, assuming that a condition is unenforceably vague would be a very risky presumption.

The effect of the Clear Statement precedent set in Pennhurst is yet to be determined, but this decision may be considered part of an obvious trend in Supreme Court response to state's rights. By relying upon the option rationale, statutory construction, and the contractual nature of grants, conditional spending cases decided after Butler v. United States have not fully examined whether a federally imposed regulation has infringed an attribute of state sovereignty. Since Butler's finding of federal encroachment of rights reserved to the states, the Supreme Court has not adequately recognized the constitutionally based rights of the states. Although National League of Cities v. Usery made such a recognition, the Court has continued to interpret the spending power as giving Congress reach into areas not within the
scope of other congressional powers.

Recently the Supreme Court has refused to find merit in two cases whose challenges were based on Usery criteria. In *Hodel v. Virginia Surface Mining and Reclamation Association* the Court dismissed a Tenth Amendment challenge of the Surface Mining Control and Reclamation Act of 1977. The Court refused to review *Los Angeles County v. Marshall*, in which a circuit court had upheld amendments to the unemployment insurance program — which extends coverage to all state and local employees. These amendments forced the states to conform and tax themselves for the cost of the unemployment benefits or "fail to conform and accept the utter demise of the state's existing unemployment compensation program (Walker, 1982, p. 19)." Such Court denial of Tenth Amendment challenges and other assertions of state sovereignty will be increasingly more costly to the states as their own fiscal situations worsen and the amount of federal revenue flowing through the grant system declines.

The problem discussed in this thesis has been approached by many, but few have offered solutions. Instigating a change in judicial reasoning is not an easy task for someone who is not in a position of judicial power. A palatable solution was proposed by Mark Suben to educate the judiciary without offending case precedent.

Suben's solution to judicial reluctance to support state's rights begins by suggesting that a "modern linkage concept" be constructed. This concept would utilize "an
experimental test that recognizes the impact to states and municipalities of federal spending programs, rather than the formal linkage test derived from Butler and Steward Machine. This test would take into account that the circumstances under which Steward Machine was decided are no longer true; modern realities of federal and state finances would be recognized in a new linkage test.

To implement such a test would be difficult, because modern courts have demonstrated a desire to rely upon outdated court precedent. To avoid, without discarding, the Steward Machine precedent, Suben encouraged "an expansive application of the doctrine of judicial notice to acknowledge the actual reliance of states and municipalities on federal grants (1981, p. 78)." Suben appropriately referred to a district court decision on an analogous matter to explain the need to apply the doctrine of judicial notice.

"... We cannot apply the law in a way that has any hope of making sense unless we attempt to visualize the actual world with which it interacts — and this effort requires judicial notice to educate the court." (1981, p. 153).

Judicial acceptance of a practical linkage notion, the existing relationship between grant funds and the tax revenue sources which create them, would merely admit that the optional rational is no longer applicable.

If Suben's solution were successfully employed, then courts could use the practical notion of linkage to benefit both parties. The practical notion of linkage would not
eliminate federal authority to condition funding as an instrument of public policy, and would "restore states an equitable way to defend themselves against federal overreaching (1981, p. 154)." This would, in Suben's opinion, "reactivate a concept of a genuinely federal republic (1981, p. 154)."

The desire for judicial preservation of the nation's federal system was also the basis for another directive to change judicial reasoning in conditional spending cases. The "Note" in The Yale Law Journal sought to impose a rigorous application of constitutional safeguards to prohibit federal and state levels from encroaching upon the other's sphere of authority. The Note reasoned that because federalism is a system of allocating power between state and national governments, the system's vitality depends upon the policing of the two distinct spheres of authority.

The policing necessary for the vitality of federalism was considered in the Note to be inadequately performed by the Court. Constitutional safeguards prevent the state from invading national authority, but the same cannot be said for protection of state authority.

The Supreme Court...has permitted erosion of corresponding safeguards of state authority. The Court has removed virtually all internal limits on national power by abandoning the practice of strictly construing the powers delegated to the national government (1981, p. 1694).

In order to fully understand this charge against the Court, "internal limits" must be defined as restrictions on the extent, or reach, of delegated powers. "External limits",

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on the other hand, create "zones" into which power cannot reach. An example of an external limit was provided in National League of Cities v. Usery when the Court disallowed the congressional commerce power from reaching into "attributes of state sovereignty".53

The Yale Law Journal Note argued that current internal and external limits on national power do not "check" the conditions placed on conditional grants. The Note proposed a new doctrine which would establish new limits and thereby preserve the interests of the states. Specifically, the doctrine would establish

a zone of power belonging to the states and a constitutional requirement that the states make all policy decisions on matters within this zone free from the influence of the national government (1981, p. 1695).

Such a doctrine would impose an external limit upon Congress, and would also limit state acceptance of conditional grants.

If a state's acceptance of a grant allowed national influence (by way of grant conditions) on the state's decision-making functions within the spheres of exclusive state powers, then the state is no longer responsible for all policy decisions within its zone. A state's action which allowed national influence over the states "exclusive" sphere of powers would violate the doctrine described above. The state which allows the national level to invade its exclusive sphere (ie. through grant acceptance) is as guilty of a violation of this doctrine as the invading national level.

A doctrine which imposes an external limit on national
power through an assertion of some area of state responsibility is not a new concept. This concept was the basis of the Usery decision, but it has not been successfully applied in conditional spending cases. Restricting the states' ability to cede authority over its functions was an issue in Steward Machine, where the plaintiff charged that states participating in the Social Security Act "have abandoned governmental functions which they are not permitted to surrender." The Court did not support this view, as it held that the Act did not contravene any Tenth Amendment right.

The Note admitted that its proposed "zone" was more rigorous than constitutional divisions of power.

While the Constitution does not explicitly require the states to exercise their exclusive powers so independently, ... the Framers could not have foreseen the present financial dependence of the states on the national government. (1981, p. 1713).

Implicit then in this "zone" of state power proposal is judicial notice, or some form of recognition of the economic circumstances surrounding the grant relationship. The Note's author argued, as has this thesis, that the states' financial dependence upon federal funds seriously restricts exercise of state sovereign powers. States no longer have an option to deny federal grants of money, therefore the national level is able to impair state sovereignty by the use of grant conditions. Weakening state sovereignty threatens the federal structure by a practical elimination of the two separate and distinct spheres of power provided for in the Tenth Amendment.
The Tenth Amendment of the United States Constitution provides for a federal form of government — a government which operates through two levels of government where each level operates within separate and distinct spheres of power. If federalism is to survive in America, then the separate and distinct spheres of power established in the Tenth Amendment must be preserved. Modern realities of state finances threaten the preservation of the state sphere of sovereign powers by forcing the states to become dependent upon the national government. It is imperative that the Supreme Court recognize this dependency and react to it in such a way as to preserve, not diminish, state sovereignty.

The conditional spending cases analyzed in this thesis have made it clear that the Supreme Court is not giving adequate recognition to the states' financial dependency on the federal grant-in-aid system. Court decisions to date have allowed the congressional spending power to expand the national government's powers through the federal conditions attached to grants-in-aid. As long as the Supreme Court allows the federal conditions of the grant-in-aid system to diminish state sovereignty, the federal structure will suffer. The Supreme Court must recognize and protect the reserved powers of the states if America is to be governed by a federal system.


4 For a detailed analysis of the real versus monetary changes in the federal grant-in-aid system see David Walker, "The First Ten Months...", pp. 5-22.

5 McGee v. Mathis 71 U.S.(4 Wall) 143 (1866)

6 Ibid.

7 Wallick and Montalto examined the grant relationship after the Comptroller General found trust principles applicable to federal grants used for state and local purposes. They considered the Comptroller's finding "inaccurate and undesirable." "The theory that a grant imposes a trust is a natural corollary to the perception of a grant as a gift... We are unaware of any judicial grants decisions based on trust principles or fiduciary responsibilities." Robert D. Wallick and William B. Montalto, "Symbiosis or Domination: Rights and Remedies Under Grant Type Assistance Programs," George Washington Law Review, 46, No. 2, Jan. (1978), p. 168.


9 Ibid., p. 598.

10 Ibid.

11 Ibid., p. 599.
12 United States v. Butler 297 U.S. 1 (1936)
13 Ibid., p. 322.
14 Ibid., p. 323.
15 Ibid.
17 Butler, p. 322.
18 Ibid.
20 Ibid., p. 887.
21 Ibid., p. 890.
22 Steward Machine, p. 893.
23 Ibid.
24 Ibid., p. 893-94.
26 Ibid., p. 333 n. 4.
27 Ibid., p. 2133.
29 Ibid., p. 2467.
30 Ibid.
31 Ibid., p. 2470.
The Constitution grants Congress numerous powers under Art. I, Sec. 8. Of relevance here are the powers to tax, regulate commerce among the states, and provide for the general welfare.

Ibid., p. 2471.

Ibid.

Ibid.

Ibid., p. 2475.

Ibid., p. 2474.


Ibid., p. 2760.

Section 5 of the Fourteenth Amendment, referred to as that amendment's Equal Protection guarantee, reads: "...to enforce by appropriate legislation...".


42 U.S.C. Sec. 6010 (1) and (2).

Pennhurst, p. 1539.

Ibid.

Ibid., p. 1540.

Hodel v. Virginia Surface Mining and Reclamation Association 49 LW 4654.
Los Angeles County v. Marshall 631 F. 2nd. 767 (D.C. Cir.).

Suben, p. 152, and an informational note: the Steward Machine "Linkage Test" holds that where a pending program cannot be directly linked to its revenue sources inducement can never become coercion.

Judicial notice is "The act by which a court, in ... framing its decision, will, of its own motion, and without the production of evidence, recognize the existence and truth of certain facts, having a bearing on the controversy at bar ...". Henry Cambell Black, M.A., Black's Law Dictionary, 5 ed. (St. Paul, Minnesota: West Publishing Co., 1979), p. 761.


Steward Machine, p. 887.
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Selected Supreme Court Cases