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Federal Grants and the Tenth Amendment: "Things as They Are" and Fiscal Federalism

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FEDERAL GRANTS AND THE TENTH AMENDMENT: "THINGS AS THEY ARE"* AND FISCAL FEDERALISM

INTRODUCTION

The inherent conflict between state sovereignty concerns of the tenth amendment and federal supremacy as exercised through the spending power has burgeoned in recent years in the forum of federal grants.[1] The tenth amendment enunciates the principle of federalism by which states function independently unless preempted by federal authority.[2] The spending power,[3] which authorizes Congress to col-

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* "They said, 'You have a blue guitar, you do not play things as they are.' " From *The Man with the Blue Guitar* by Wallace Stevens.

1. A number of scholarly works have recently examined the tenth amendment—spending power conflict in the context of federal grants. R. Cappalli, Rights and Remedies Under Federal Grants (1979); Fiscal Crisis in American Cities (L. Hubbell ed. 1979); D. Mandelkev & D. Netsch, State and Local Government in a Federal System, pt. 1 (1977); State and Local Government Law (S. Sato & A. Van Alstyne 2d ed. 1977); Brown, *Federal Regulation of Collective Bargaining by State and Local Employees: Constitutional Alternatives*, 29 S.C. L. Rev. 343 (1978); Hanus, *Authority Costs in Intergovernmental Relations*, in The Nationalization of State Government (J. Hanus ed. 1981); Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847 (1979) [hereinafter cited as Kaden I]; Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 Ariz. St. L. J. 35; Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus*, 46 Fordham L. Rev. 1115 (1978); Vitullo-Martin & Nathan, *Intergovernmental Aid*, in Setting Municipal Priorities 1981 (C. Brecher & R. Horton eds. 1980); Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 Geo. Wash. L. Rev. 159 (1978); Note, *Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery*, 26 Amer. U. L. Rev. 726 (1977) [hereinafter cited as *Toward New Safeguards*]; Note, *National League of Cities v. Usery: A New Approach to State Sovereignty?*, 48 U. Colo. L. Rev. 467 (1977) [hereinafter cited as *A New Approach to State Sovereignty*]; Advisory Commission on Intergovernmental Relations, Federal Grants: Their Effects on State-local Expenditures, Employment Levels, Wage Rates (Feb. 1977) [hereinafter cited as Federal Grants]; E. Gaffney, An Overview of the Growth of Federal Regulation by Means of Conditioned Financial Assistance (1981) (unpublished report, Notre Dame Law School); L. Kaden, Federalism in the Courts: Agenda for the 1980's (July 1980) (unpublished report, Columbia University School of Law) [hereinafter cited as Kaden II]; T. Madden, The Law of Federal Grants (Dec. 12, 1979) (unpublished report, Law Enforcement Assistance Administration, United States Dep't. of Justice, prepared for Advisory Commission on Intergovernmental Relations' Conference on Grant Law); D. Walker, Federal Judges and Federal Grants: A Dimension of Today's Dysfunctional Federalism (Dec. 12, 1979) (unpublished report, Advisory Commission on Intergovernmental Relations).

2. U.S. Const. amend. X. The parameters and judicial application of the tenth amendment have shifted from era to era. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), where the Court described the tenth amendment as follows:

lect taxes and spend for the general welfare, is an important plenary federal vehicle for implementing national policy, and is the constitu-

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"[It] was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only, that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;' thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument." *Id.* at 406. See also Massachusetts v. Mellon, 262 U.S. 447 (1923) (a case of original Supreme Court jurisdiction with a state plaintiff, joined to a case brought on appeal by a private plaintiff, challenging the constitutionality of an exercise of the federal spending power through the Maternity Act of 1921, ch. 135, 42 Stat. 224 (repealed (1927)), where the Court stated that the "exercise of the power of local self-government [is] reserved to the States by the tenth amendment." *Id.* at 479. But see United States v. Darby, 312 U.S. 100 (1941), where the Court said: "The [tenth] amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." *Id.* at 124. Note that *Darby* upheld the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979)) which, as amended, Pub. L. No. 93-259, 88 Stat. 55 (1974), was curbed by National League of Cities v. Usery, 426 U.S. 833 (1976) (revived tenth amendment analysis under commerce clause with a categorical analysis centered on traditional areas of sovereign state function). *See generally* The Federalist No. 51, at 320, 323-25 (J. Madison) (Mentor ed. 1961). "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments." *Id.* at 323; *accord* Schwartz, *supra* note 1. The limits of the revived state sovereignty are still unclear. *See* United States v. Helsley, 615 F.2d 784, 787-88 (9th Cir. 1979) (state control over wildlife not exclusive and absolute) (citing Hughes v. Oklahoma, 441 U.S. 322 (1979) and Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978)); James v. Ball, 613 F.2d 180, 190 (9th Cir. 1979) (utility services not traditionally exclusive state prerogative) (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)), *prob. juris. noted*, 101 S. Ct. 67 (1980); Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979) (traditional governmental functions and their integrally operative activities are ambiguously defined; prison regulation and operation are primarily state function).

3. U.S. Const. art. I, § 8, cl. 1. The spending power is effectuated by the necessary and proper clause, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers." *Id.* cl. 18. Chief Justice Marshall set out the limits of the necessary and proper clause in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. Only one case has ever held a spending program to have abrogated the tenth amendment. United States v. Butler, 297 U.S. 1, 68 (1936) (struck down a specific taxing and spending scheme where tax was linked and traceable to the credit, but declared the spending power a plenary one capable of supporting broad policy goals).

tional basis for the system of federal grants.[4] Conditions attached to federal grants are often the primary way in which policy goals are

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4. *See* Oklahoma v. Schweiker, No. 80-1004, slip. op. at 8 (D.C. Cir. June 18, 1981). Although this Note's argument transcends the characterization of any given grant, some background discussion of grants is appropriate. There are various types of grants, including: (1) categorical or functional grants, which the recipient agrees to spend for a specific or targeted purpose; (2) bloc grants, which are simple cash transfers that the recipient may spend with full discretion; (3) revenue sharing grants, which are commonly bloc-type, distributed according to a per capita formula; and (4) matching grants, which may be bloc-type or categorical, but which are contingent on recipient allocating a proportion of its own budgetary funds. *See* H. Groves & R. Bish, Financing Government 356-59 (1973), *reprinted in* State and Local Government Law, *supra* note 1, at 618-20; Brown, *supra* note 1, at 350-54; Wallick & Montalto, *supra* note 1, at 165. These general types and others may be combined and customized in myriad ways. They are considered to have frequently disturbing corollary effects. For example, categorical federal grants tend to promote projects to which local governments do not give high priority. *See* H. Groves & R. Bish, Financing Government 356-59 (1973), *reprinted in* State and Local Government Law, *supra* note 1, at 618-20. When such project grants are disbursed as matching funds, they have the effect of skewing local budgets away from locally-perceived needs to draw the federal monies. *See* Oklahoma v. Schweiker, No. 80-1004, slip op. at 20 (D.C. Cir. June 18, 1981); Advisory Commission on Intergovernmental Relations, Special Revenue Sharing: An Analysis of the Administration's Grant Consolidation Proposals 2 (1971), *reprinted in* State and Local Government Law, *supra* note 1, at 617. Likewise, revenue-sharing had the stated purpose of alleviating state and fiscal problems resulting from increased urbanization, limited taxing powers, increased geographic concentrations of the poor, and severe inflation. *See* Watt, *The Goals and Objectives of General Revenue Sharing*, 419 Annals 13-17 (1975), *reprinted in* State and Local Government Law, *supra* note 1, at 620-23. The effect of revenue sharing formulas, which have a ceiling on total aid, is to burden large cities for which the program was ostensibly designed. *See* Vitullo-Martin & Nathan, *supra* note 1, at 58 (project and formula grants tend to favor rural, high income, small population states); Federal Grants, *supra* note 1, at 6 (same). Underlying the problems of grant application are difficult variations in grant theory. Although the grant relationship has been characterized as a gift, trust, partnership and contract, the preferred model seems to be the contractual one. Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531, 1539 (1981); *see* Lau v. Nichols, 414 U.S. 563, 568-69 (1974); Wallick & Montalto, *supra* note 1, at 165 n.33. If a grant is a gift, its corollary effect is to create a trust relationship. *See id.* at 168 n.48 (donor who insists its funds to be used for a restricted purpose establishes a charitable trust). The notion that grants are gift-like is at the logical core of all cases which treat them as optional. *See* King v. Smith, 392 U.S. 309, 333 n.34 (1968) ("There is of course no question that the Federal Government . . . may impose the terms and conditions upon which its money allotments to the States shall be disbursed . . . ."); City of Macon v. Marshall, 439 F. Supp. 1209, 1216-18 (M.D. Ga. 1977) (*National League of Cities* leaves open congressional power to control how money from the U.S. Treasury will be spent). Although grants may use partnership terminology, *e.g.*, 49 U.S.C. § 1601(a)(1976) ("It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements."), courts have been unwilling to impose the general liability of a partner on the federal grantor. Wallick & Montalto, *supra* note 1, at 168-69; *see* United States v. Orleans, 425 U.S. 807,

realized and necessarily intrude on the autonomy of grant recipients.[5] Where recipients are states or local governments, a conflict of constitutional dimensions emerges between the spending power and the tenth amendment. That conflict is embodied in the surrender of state and local decisional power in exchange for federal grant funds.[6]

813-19 (1976) (federal government not liable in tort for grantee's negligence despite substantial federal involvement almost total federal funding); D.R. Smalley & Sons v. United States, 372 F.2d 505 (Ct. Cl.), *cert. denied*, 389 U.S. 835 (1967) (federal government could not be sued directly by a firm which contracted with the state of Ohio to construct part of the interstate highway system, despite 90% federal funding and other federal involvements). There is a strong line of authority for viewing a grant as a contract. Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531, 1539 (1981); California v. United States, 551 F.2d 843, 848 (Ct. Cl.), *cert. denied*, 434 U.S. 857 (1977); Texas v. United States, 537 F.2d 466, 468-69 (Ct. Cl. 1976); Arizona v. United States, 494 F.2d 1285, 1287-88 (Ct. Cl. 1974); Wallick & Montalto, *supra* note 1, at 165 n.33. Under contract law, an agreement in which one party's unconscionably strong bargaining position operates coercively on the other may not be enforceable against the weaker party. *See* J. Calamari & J. Perillo, Contracts § 9-44, at 337 (2d ed. 1977).

5. *See generally*, Brown, *supra* note 1, at 348-51 (distinction between procurement contracts and categorical grants); Wallick & Montalto, *supra* note 1, at 163-64 (federal spending for "procurement," principle purpose of which is acquisition for the direct benefit of the federal government, distinguished from "grant-type assistance," main goal of which is transfers to accomplish a public purpose).

6. *See* Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531, 1540 n.13 (1981) (acknowledging conflict, but decided on other grounds); New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240, 245 (1st Cir. 1980) (state unemployment compensation system must conform to federal guidelines as condition of federal tax credit); Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 98-99 & n.20 (3d Cir. 1979) ("Pennsylvania has accepted federal funds and has thus consented to federally mandated standards for the treatment and habilitation of the developmentally disabled."), *rev'd on other grounds*, 101 S. Ct. 1531 (1981); Walker Field v. Adams, 606 F.2d 290, 297 (10th Cir. 1979) (conditioning federal grant on restructuring a county-city public airport funding authority was held not coercive); Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1030 (D.D.C. 1978) (requiring local governments to adopt federally designated flood plain management rules as a condition of eligibility for federal flood insurance was held not coercive), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979); North Carolina v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977) (requiring state to amend its constitution to facilitate compliance with federal conditions attached to federal health grants was held not coercive), *aff'd mem.*, 435 U.S. 962 (1978); County of Los Angeles v. Marshall, 442 F. Supp. 1186, 1191 (D.D.C. 1977) (requirement that local government enact legislation conforming to federal unemployment compensation guidelines, as a condition of federal tax credit reimbursement, was held not coercive), *aff'd per curiam*, 631 F.2d 767 (D.C. Cir.), *cert. denied*, 101 S. Ct. 113 (1980); City of Macon v. Marshall, 439 F. Supp. 1209, 1217-18 (M.D. Ga. 1977) (conditioning of federal transportation funds was held to induce but not coerce the city to bargain collectively with bus drivers and maintenance employees when the bus company was taken over by the city). For a comprehensive listing of circuit and district court decisions upholding grant conditions imposed under the spending power, see Oklahoma v. Schweiker, No. 80-1004, slip op. at 9-10 n.9 (D.C. Cir. June 18, 1981).

The pivotal concept at the point where the tenth amendment and the spending power intersect is the notion of coercion. Federal grants that merely induce or lure state compliance with their conditions are entirely appropriate; those that coerce or mandate compliance would inhibit state autonomy in contravention of the tenth amendment.[7]

The Supreme Court decision in *Steward Machine Co. v. Davis*[8] can be reduced to a syllogism, dispositive of the coercion issue,[9] the effect of which has been to shield conditions attached to federal grants from tenth amendment challenge for forty-four years. The syllogism is: grants are optional;[10] conditions are attached to grants;[11] therefore conditions attached to grants are optional.[12] Because the major premise that grants are optional has never been judicially refuted, it has come to have the force of a presumption, and this simple syllogism has created a seemingly insurmountable barrier to state parties asserting tenth amendment infringement in spending power cases. The state plaintiff therefore can never meet the threshold burden of establishing coercion.[13] Moreover, four years after *Steward Machine*, the Court

7. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 585-90 (1937); United States v. Butler, 297 U.S. 1, 73-75 (1936); *cf.* Pennhurst State School & Hosp. v. Halderman, 101 S. Ct. 1531, 1540 n.13 (1981) (acknowledging potential conflict between spending power and tenth amendment).

8. 301 U.S. 548 (1937). On the subject of coercion, the Court said: "[With respect to] the exertion of a power akin to undue influence . . . the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact." *Id.* at 590.

9. *See id.* at 586.

10. *Id.* at 595; *see* Massachusetts v. Mellon, 262 U.S. 447, 482 (1923) (grants are optional so long as they may be refused); North Carolina v. Califano, 445 F. Supp. 532, 535 (E.D.N.C. 1977) (inducements like economic pressure and seduction are not equivalent to coercion, even where loss of assistance programs can be avoided only by amendment of state constitution), *aff'd mem.*, 435 U.S. 962 (1978).

11. 301 U.S. at 578; *see* Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-44 (1947) (restriction on political activity of state employees permitted as a condition to grants); Ely v. Velde, 451 F.2d 1130, 1136-37 (4th Cir. 1971) (Law Enforcement Assistance Administration bloc grant conditions permissible even where not enumerated in enabling legislation); Oklahoma v. Harris, 480 F. Supp. 581, 584-86 (D.D.C. 1979) (conditions reasonably related to legitimate federal purpose for which funds were provided are permissible), *aff'd sub nom.* Oklahoma v. Schweiker, No. 80-1004 (D.C. Cir. June 18, 1981); North Carolina v. Califano, 445 F. Supp. 532, 534-35(E.D.N.C. 1977) (stipulated that spending power allows conditions attached to federal grants), *aff'd mem.*, 435 U.S. 962 (1978); *see also* Kaden I, *supra* note 1, at 874-81; Wallick & Montalto, *supra* note 1, at 164 n.21.

12. 301 U.S. at 592-93, 595; *see* Walker Field v. Adams, 606 F.2d 290, 297 (10th Cir. 1979) (conditions which may be avoided by recipient by declining the grant do not exceed the constitutional limits of the spending power to induce rather than coerce compliance); *see also* Oklahoma v. Harris, 480 F. Supp. 581, 587 (D.D.C. 1979), *aff'd sub nom.* Oklahoma v. Schweiker, No. 80-1004 (D.C. Cir. June 18, 1981); Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1030 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979); City of Macon v. Marshall, 439 F. Supp. 1209, 1216-17 (M.D. Ga. 1977); Stiner v. Califano, 438 F. Supp. 796, 799-800 (W.D. Okla. 1977).

13. *See* Oklahoma v. Schweiker, No. 80-1004, slip op. at 21-23, 22 n.18 (D.C. Cir. June 18, 1981).

directly discredited the tenth amendment as a limit on any federal power in *United States v. Darby*.[14] Thus, states have had no basis to challenge the presumption that grants are optional.

Modern fiscal realities, however, suggest that localities may in fact not have the option to refuse federal grants. Federal grant programs created under the spending power have intruded on local service functions as a result of dramatically increased amounts and broadened scope.[15] In addition, conditions attached to grants have changed from primary to peripheral or secondary goal effectuating,[16]

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14. 312 U.S. 100, 124 (1941).

15. Federal grant expenditures rose from approximately 160 programs dispersing $8.3 billion in 1963, to over 447 programs distributing about $82.9 billion by 1980. *See* Madden, *supra* note 1, at 31 nn.2-3. Different commentators make disparate estimates of total volume, but there is general agreement on the trend. *See* Vitullo-Martin & Nathan, *supra* note 1, at 46 (federal grants to state and local governments approximated $90 billion in fiscal 1980); D. Walker, *supra* note 1, at 5-7 (200 separate federal grants totalled $10 billion in 1964; 500 separate programs in 1979 and a 900% increase, or 322% in constant dollars, in federal aid flows between 1963 and 1979).

16. *See* Kaden I, *supra* note 1, at 881-82; Herbers, *Chaos in Domestic Aid Programs is Laid to Congress in U.S. Study*, N.Y. Times, Aug. 25, 1980, § A, at 1, col. 1 [hereinafter cited as Herbers I]; *A.B.A. Annual Meeting*, 49 U.S.L.W. 2145, 2148 (Aug. 26, 1980). As instruments of public policy, federal grants characteristically have conditions attached to induce compliance with national policy goals. *See supra* note 5 and accompanying text. Grant conditions at one time focused on ensuring implementation of the goals of the specific programs. *See* Kaden I, *supra* note 1, at 874-81. Now over twenty laws, *see* Madden, *supra* note 1, at 2, most enacted since 1964, impose a broad range of peripheral, incidental, or secondary national policy goals—through conditions relating to the environment, equal access, and equal rights, for example—to practically all federal assistance programs. *A.B.A. Annual Meeting*, *supra*, at 2148; *see* Walker, *supra* note 1, at 8. For example, wage rates and nondiscrimination principles do not directly affect the actual construction of buildings and facilities, yet mandates attached to those kinds of federally funded projects restrict the grantee's autonomy, lessening its ability to produce more cost-efficient operations. *A.B.A. Annual Meeting*, *supra*, at 2148. Imposing such disparate policy goals hinders compliance, blurs lines of administrative accountability, and makes compliance very expensive. *See* Statement by Mayor Koch, The Mandate Millstone, (Jan. 24, 1980) (U.S. Conference of Mayors, Washington, D.C.) [hereinafter cited as Koch]. Mayor Koch cites "a maze of complex statutory and administrative directives that, over the past decade, has come to threaten both the initiative and the financial health of local governments throughout the country [and that has had a] cumulative impact on [individual cities]." *Id.* at 1; *see* Kaden I, *supra* note 1, at 847; *A.B.A. Annual Meeting*, *supra*, at 2148; Toscano, *Biting the Federal Hand That Feeds Us*, N.Y. Daily News, Oct. 12, 1980, at 75, col. 1; New York City Office of Management and Budget, Analysis of Federal and State Mandates 13 (Jan. 21, 1980) (unpublished memorandum) [hereinafter cited as OMB Memo]; *see also* Hanus, *supra* note 1, at 7 (refers to secondary conditions as "*horizontal* or *crosscutting requirements*, such as affirmative action or public participation mandates" (emphasis in original)); Office of Management and Budget, Executive Office of the President, Managing Federal Assistance in the 1980's, A Report to the Congress of the United States Pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224), at 19-20, 26-27 (March 1980) [hereinafter cited as Federal OMB Report].

and localities may no longer have the tax revenue sources to fund local service functions independently.[17] Resuscitation of the tenth amendment in *National League of Cities v. Usery*[18] and recently changed perspectives on the efficacy of centrally administered government programs[19] indicates that the stasis which has characterized state sovereignty issues in federal grant cases for over four decades is ripe for reexamination. This Note argues that the conflict between the spending power and the tenth amendment merits closer scrutiny. It then suggests an approach which admits of modern fiscal realities without endangering important federal interests.

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17. *See* Kaden I, *supra* note 1, at 882; *see also* Herbers, *Rochester Fearful of Cutbacks in Reagan's Budget*, N.Y. Times, Mar. 25, 1981, § A, at 1, col. 4, § B, at 6, col. 3 (discussing Rochester's dependence on Federal aid and inability to raise tax revenues to offset loss of such aid) [hereinafter cited as Herbers II]; Herbers, *Should Washington Share Revenue with States?*, N.Y. Times, Jan. 22, 1981, § B, at 8, col. 2 (editorial) [hereinafter cited as Herbers III]; Raines, *Reagan and States Rights. Meeting 2 Goals*, N.Y. Times, Mar. 4, 1981, § A, at 1, col. 3 (Reagan to restore state sovereignty, unconditional local control over grant funds); *cf.* President Reagan's address to National Urban League (August 1980), *quoted in* Toscano, *supra* note 16, at 75, col. 1 (ultimately, local tax sources to fund programs). Part of the legislative purpose of revenue-sharing was to alleviate problems caused by diminished local tax capabilities. *See* Watt, *supra* note 4, at 13-17, *reprinted in* State and Local Government Law, *supra* note 1, at 620-21.

18. 426 U.S. 833 (1976). Although *National League of Cities* was a commerce clause case which expressly reserved judgment on the application of the tenth amendment to the spending power, *id.* at 852 n.17 ("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. Art. I, § 8, cl. 1 . . ."), it is a widely recognized starting point for analysis of such a conflict. *See* Hanus, *supra* note 1, at 7-8; Matsumoto, *supra* note 1, at 37, 83-88; Schwartz, *supra* note 1, at 1129; Wallick & Montalto, *supra* note 1, at 171; *Toward New Safeguards*, *supra* note 1, at 726-27; *A New Approach to State Sovereignty*, *supra* note 1, at 486. *See generally* L. Tribe, American Constitutional Law 313 (1978).

19. The longevity of *Steward Machine* may reflect the shift toward preference for a strong central government over the past four decades. Each succeeding generation has confronted a new rationale for elevating and expanding the power of the central government at the expense of the states. Current topical discussion of rejuvenating "states' rights" and the "new federalism" may presage a decentralizing trend for the first time since the New Deal. The initial centralizing impetus was the Great Depression of the 1930's and the coordinated efforts needed to overcome it. *See infra* notes 26-28 and accompanying text. In the 1940's the waging of war justified extreme concentrations of power. *See* Case v. Bowles, 327 U.S. 92, 101-03 (1946) (war power justifies imposing federal price controls on states). During the civil rights struggles of the 1950's and 1960's, state governments came to symbolize political and social repression, and were often seen as avoiding their constitutional responsibilities. Victories for personal civil rights were achieved when the national government championed the cause of individuals against the proponents of "states' rights." State domination of a broad range of traditionally local activities, such as education and voting, was replaced by a federal legal presence. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Virginia's poll tax held unconstitutional); Katzenbach v. McClung,

I. CONSTITUTIONAL ANALYSIS

In *National League of Cities v. Usery*,[20] the Supreme Court endeavored "to reinvigorate the structure of federalism"[21] in the context of a congressional attempt to apply federal minimum wage and maximum hour provisions to state and municipal employees.[22] Speaking for a majority of the Court, Justice Rehnquist stated the principle, for application under the commerce clause,[23] that Congress may not "directly displace the State's freedom to structure integral operations in areas of traditional [state] governmental functions . . . ."[24] *National League of Cities* has become a watershed[25] for revived analyses of tenth amendment concerns which had lain dormant since 1937. In that year, the Roosevelt administration succeeded in reversing a line

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379 U.S. 294 (1964) (commerce clause used as basis of federal enforcement of civil rights); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (commerce clause used as vehicle to enforce civil rights); Brown v. Board of Educ., 347 U.S. 483 (1954) (separate but equal state schools held unconstitutional). In the 1970's, the radical expansion of the federal spending power further hindered the cause of state sovereignty. *See infra* pt. III. The framers argued that viable state autonomy increases in importance as the republic grows larger. *See* The Federalist No. 51, at 323, 325 (J. Madison) (Mentor ed. 1961) "[I]t is important . . . that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government. And happily for the republican cause, the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the federal principle." *Id.* (emphasis omitted). That view is currently vindicated by the palpable realization that big, centralized government and federal programs that subordinate the state role, however well-intentioned, have largely failed in their avowed goals of improving and protecting individual welfare. *See* Herbers I, *supra* note 16, § A, at col. 1 (governmental study found the federal system of domestic aid programs "unmanageable," "wasteful," "unaccountable," and "simply out of control"). As courts customarily draw on contemporary experience as well as legal logic in making judgments, *see* Bulova Watch Co. v. Hattori & Co., 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981), it is reasonable to expect modern courts to be more receptive to tenth amendment arguments.

20. 426 U.S. 833 (1976).

21. Hanus, *supra* note 1, at 7.

22. 426 U.S. at 836. The original act expressly excluded states and localities from its coverage; the 1974 amendments dissolved that exclusion. *Id.*

23. *See id.* at 852 n.17 ("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, Art. I § 8, cl. 1, or § 5 of the Fourteenth Amendment."); *supra* note 18.

24. 426 U.S. at 852.

25. The meaning of this standard and its implications for intergovernmental relations has been extensively examined in books and articles since the decision was handed down. *See* Kaden I, *supra* note 1; Matsumoto, *supra* note 1; Schwartz, *supra* note 1; *Towards New Safeguards*, *supra* note 1; *A New Approach to State Sovereignty*, *supra* note 1.

of state autonomy cases[26] and asserting a federal hegemony which seemed necessary for economic recovery from the Depression.[27] Although Roosevelt's proposal to reconstitute the Supreme Court was rejected by Congress, his efforts had substantial impact, thereby influencing the court to expand federal power at the expense of the states' established tenth amendment rights.[28]

The spending power authorizes Congress "[t]o lay and collect Taxes . . . and provide for the . . . general Welfare of the United States."[29] While the spending power may be subject to general limitations,[30] it is clearly qualified by the tenth amendment, which limits federal intrusion into matters of state sovereignty[31] by providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[32] The tenth amendment, therefore, theoretically limits congressional power to attachment of inducing rather than coercing grant conditions, but in practice it has represented no impediment.[33]

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26. *See* P. Freund, Constitutional Law 260 n.1 (4th ed. 1977), listing major cases invalidating New Deal legislation, including Ashton v. Cameron County Dist., 298 U.S. 513 (1936) (municipal bankruptcy statute); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (coal conservation statute); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (farm mortgage debt reorganization statute); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935) (railroad retirement statute); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (statute authorizing President to prohibit the interstate shipment of oil produced in excess of state-fixed quotas).

27. *See* Helvering v. Davis, 301 U.S. 619 (1937) (companion case to *Steward Machine* in framework of shareholders' derivative suit); Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (federal tax and credit scheme involving participants in state unemployment programs); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (federal regulation of industrial labor relations which affect the flow of goods in interstate commerce).

28. *See* P. Freund, *supra* note 26, at 260-62 nn.2-3. The effort has been popularly called the "court-packing" plan of 1937. *See* Hanus, *supra* note 1, at 7; *see generally* R. Jackson, The Struggle for Judicial Supremacy (1941) (history and analysis of relationship between the judiciary and other branches of the federal government).

29. U.S. Const. art. I, § 8, cl. 1; *see supra* note 3.

30. *See* United States v. Butler, 297 U.S. 1, 66-67 (1936).

31. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937); United States v. Butler, 297 U.S. 1, 63-68 (1936). *But see* United States v. Darby, 312 U.S. 100, 124 (1941).

32. U.S. Const. amend. X. *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Because Chief Justice Marshall was constructing early federal supremacy arguments and was thus very carefully respectful of state sovereignty concerns, this case can be read as a legislative history of the tenth amendment, *id.* at 400-37, and the arguments of the parties may be read as summaries of the two opposing views of federalism. *Id.* at 322-400.

33. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 591 (1937) (With respect to spending power "inducement or persuasion [of states] does not go beyond the bounds of power. We do not fix the outermost line. . . . Definition more precise must abide

The Supreme Court, in its first major grant case, *Massachusetts v. Mellon*,[34] disposed of the conflict on jurisdictional grounds and did not reach the constitutional question.[35] At issue was the Maternity Act of 1921, which disbursed federal grant funds to states on condition they comply with federal standards aimed at reducing maternal and infant mortality.[36] Although public health was traditionally an area of state domain,[37] the Court said it would probably "be sufficient to point out that 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."[38] Finding no coercion and therefore no injury in fact, the Court denied the state standing to sue.[39]

The Court in *United States v. Butler*[40] addressed the constitutional question in the context of the Agricultural Adjustment Act of 1933.[41] To regulate supply and demand in the area of agricultural production, the Act gave cash payments to farmers who agreed to reduce acreage planted. The funds were raised through a tax on food processors. Through a special fund, the tax and credit were linked and traceable one to the other. The tax could be readjusted to meet payment needs and would terminate when benefits ended.[42] Although the Court held that the spending power is a plenary one, capable of supporting broad policy goals,[43] it struck down the scheme as operating coercively as against the states' sovereignty.[44]

Butler offered a rationale, through the tax-credit linkage, for limiting federal spending power by the tenth amendment interests of the states, and was among the last in a line of cases that defended state

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the wisdom of the future."); Walker Field v. Adams, 606 F.2d 290, 297-98 (10th Cir. 1979) ("It may be that some conditions imposed under the spending power of Congress would exceed constitutional limits, but we see no such violation here."); Brown, *supra* note 1, at 376 ("Because the law permitting federal conditions in the disbursement of federal monies is apparently well settled, relatively few recent cases exist which challenge that premise.").

34. 262 U.S. 447 (1923). The grants were challenged on tenth amendment grounds. *Id.* at 479; *see supra* note 2.

35. 262 U.S. at 485-88. The State of Massachusetts presented no justiciable controversy, and the private plaintiff had no standing. *Id.*

36. Ch. 135, 42 Stat. 224 (repealed (1927)).

37. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205 (1824) (an "acknowledged power of a state [is] to provide for the health of its citizens").

38. 262 U.S. at 480.

39. *Id.* at 485. The discussion of the coercion issue as dictum in *Mellon* presaged the opinion of Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937), which reached the same result on the merits.

40. 297 U.S. 1 (1936).

41. Ch. 23, 48 Stat. 31 (1933) (current version at 7 U.S.C. §§ 601-624 (1976 & Supp. III 1979)).

42. 297 U.S. at 55-56.

43. *Id.* at 66; *see* Kaden I, *supra* note 1, at 872.

44. 297 U.S. at 68-71.

sovereignty.[45] One year after *Butler*, a series of landmark decisions by the Court facilitated a greater concentration of national power.[46] The leading case on the spending power as it conflicts with the tenth amendment is *Steward Machine Co. v. Davis*.[47] In *Steward Machine*, the Court upheld the Social Security Act of 1935,[48] which established a tax and credit system to induce states to set up unemployment compensation programs in accordance with federal guidelines.[49] Unlike the Agricultural Adjustment Act in *Butler*, the Social Security Act allocated the tax revenues to the general fund rather than to a special fund.[50] Because *Steward Machine* acknowledged that a spending condition could in principle be coercive and therefore violative of the tenth amendment, yet refused to find the condition at issue coercive, it distinguished but did not reject *Butler*.[51] The Court discussed three separate elements dispositive in upholding the tax-credit scheme: (1) the arrangement was not coercive in its operation on the states;[52] (2) the optional condition was related to a legitimately national goal;[53] and (3) it operated in the context of extreme national crisis.[54] Although the Court discussed relatedness to a legitimate

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45. *See supra* note 26 and accompanying text.

46. *See* P. Freund, *supra* note 26, at 260-62; cases cited *supra* note 27.

47. 301 U.S. 548 (1937). It should be noted that the plaintiff in *Steward Machine* was a private party. The thrust of this Note is the need of state and local political subdivisions for greater tenth amendment protection, and thus the argument could be raised that *Steward Machine* is distinguishable from any case involving a state or city plaintiff. Two recent cases with fact patterns virtually identical to *Steward Machine* adopt its rationale completely. New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240, 246 (1st Cir. 1980); County of Los Angeles v. Marshall, 442 F. Supp. 1186, 1190 (D.D.C. 1977), *aff'd per curiam*, 631 F.2d 767 (D.C. Cir.), *cert. denied*, 101 S. Ct. 113 (1980). Other recent cases not directly on point still reaffirm *Steward Machine*'s preeminence on the issue of coercion. *See* Walker Field v. Adams, 606 F.2d 290, 297 (10th Cir. 1979); Virginia Surface Mining and Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 432 n.6 (W.D. Va. 1980), *aff'd in part, rev'd in part sub nom.* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 101 S. Ct. 2352 (1981); Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1030 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979); North Carolina v. Califano, 445 F. Supp. 532, 534-35 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978).

48. Ch. 531, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 301-1397 (1976 & Supp. III 1979)).

49. 301 U.S. at 574-76, 588-89.

50. *Id.* at 592.

51. *Id.* at 585, 590-93; *see* Kaden I, *supra* note 1, at 884.

52. 301 U.S. at 585-91. "The excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Id.* at 585.

53. *Id.* at 591.

54. *Id.* at 586. The Court detailed the monumental proportions which unemployment had reached and which states alone were unable to abate. Relevant statistics were marshalled to demonstrate the extreme crisis which justified federal relief under the general welfare power. *Id.* at 586-87.

national purpose and the crisis proportions of national unemployment, it declared that the "excise is not void as involving the coercion of the States in contravention of the Tenth Amendment."[55] Coercion is therefore the threshold question.

A finding of coercion implicates the tenth amendment. At that point the application of such standards as reasonable relation to a legitimate national purpose,[56] overriding national crisis,[57] a balancing of interests approach,[58] or a categorical analysis[59] may, when appro-

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55. *Id.* at 585. Justice Cardozo's opinion goes on to examine the concepts of duress versus inducement, in the context of which the crisis porportions of unemployment are mentioned. *Id.* at 586. The relationship of the tax to a legitimate national goal—abatement of national crisis—is stressed. *Id.* at 591.

56. *See* Massachusetts v. United States, 435 U.S. 444, 461 (1978); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947). *Oklahoma* addressed the application of a federal statute proscribing political activities to state government employees. The court held that, while Congress had no independent power to regulate the political activities of state officials, it could impose limits as a condition of a federal grant if the limits were related to a legitimate objective of the federal government. *Id.*

57. *See* Fry v. United States, 421 U.S. 542, 548 (1975) (commerce clause case; upheld application of federal wage and price controls to state employees), *distinguished in* National League of Cities v. Usery, 426 U.S. 833, 852-53 (1976) (temporary federal measures such as the wage-price freeze may burden even traditionally state prerogatives during temporary periods of national crisis). It was a footnote in *Fry*, 421 U.S. at 547 n.7, which recognized a tenth amendment limit on federal power for the first time since the 1930's, and presaged by one year the holding in *National League of Cities*. *See* Matsumoto, *supra* note 1, at 36.

58. The balancing approach has been raised by jurists and commentators alike, and is clearly an important conceptual tool once the threshold burden of showing coercion has been met. *See* National League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring) (concurrence assumes a balancing process which is nowhere mentioned in Rehnquist's majority opinion). Perhaps because of that burden the balancing approach has not been elevated to the status of a legal standard in this context. *See* Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1084-85 (5th Cir. 1979); *A New Approach to State Sovereignty*, *supra* note 1, at 473-74; *see also Toward New Safeguards*, *supra* note 1, at 747-63 (extensively analyzed federal flood insurance scheme, in the context of the balancing approach; argued the conditions effectively not optional, the subject matter undeniably a traditional attribute of state and local authority, and compliance with the conditions burdensome on local autonomy). *But see* Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1030 (D.D.C. 1978) (upheld similar scheme, apparently in the face of a similar argument, saying that the "suggestion of testing federal coercion upon the States through a balancing process has long been rejected"), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979).

59. *See* National League of Cities v. Usery, 426 U.S. 833, 852 (1976). This landmark case, which revivified the tenth amendment in the modern era, established a "categorical" analysis with which to test the need for federal preemption in commerce clause cases. It held "that insofar as [acts passed by Congress operate] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Con-

priate, result in the subordination of state sovereignty. They must, however, be kept analytically separate from the threshold issue of coercion.[60] Under present legal analysis, municipalities that challenge grant conditions never win.[61] By holding state and local participation in federal spending programs optional under the analytical framework of *Steward Machine*,[62] courts are permitting Congress to condition federal grants virtually without limitation.

II. Current Test

A. *Concept of Linkage*

The conceptual cornerstone of *Butler* and *Steward Machine* is the linkage between taxing and spending programs, or the lack thereof.[63]

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gress by [the commerce clause]." *Id.* at 852. *See supra* notes 20-25 and accompanying text. Coercion is self-evident in a commerce clause case because commerce regulations are categorically binding for any activity within their purview; the threshold question is whether a power reserved to the states has entered the domain of interstate commerce and thus comes within that purview. Such categorical analysis is appropriate in commerce clause cases and in spending power cases to effectuate tenth amendment concerns. It is not relevant to the question of whether there is coercion. Coercion analysis is appropriate for spending power cases, where the impact of conditions and regulations are not conceded to be legally binding per se. *See* Matsumoto, *supra* note 1, at 84-86. Once that coercion threshold has been reached, courts may find a categorical analysis useful. Prior to *National League of Cities*, Justice Rehnquist and a majority of the Court expressed sensitivity to state sovereignty concerns in an eleventh amendment grant-in-aid case. Edelman v. Jordan, 415 U.S. 651, 673-74 (1974) (states do not waive their eleventh amendment immunity to federal suit when they accept a federal grant). As judicial recognition of a federalism-based limit on congressional power to condition federal grants, *see* Matsumoto, *supra* note 1, at 86 n.267, *Edelman* may be even stronger authority than *National League of Cities*, standing for the proposition that a state that accepts a grant does not thereby waive all of its legal rights nor all of its sovereignty. Because Fitzpatrick v. Bitzer, 427 U.S. 445, 456-57 (1976), held *Edelman* to have been decided on grounds of statutory interpretation, however, it has not become a major case.

60. The elements of "relation to legitimate national purpose" and overriding "national crisis" are logically components of a balancing process which would tend to favor dominance of the federal interest. The balancing approach should not, however, be a modifier of coercion. *See supra* notes 52-55 and accompanying text. The application of categorical analysis to the spending power has been expressly reserved. *See* National League of Cities v. Usery, 426 U.S. at 852 n.17 (1976).

61. *See* cases cited *supra* note 6.

62. 301 U.S. at 585-91; *see* Kaden I, *supra* note 1, at 883-85.

63. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 589-90 (1937); *supra* notes 40-55 and accompanying text. The Court in United States v. Butler, 297 U.S. 1, 54-55 (1936), invalidated a grant because it was formally, legally linked to an earmarked tax. One year later *Steward Machine* distinguished *Butler* on grounds that there was technically no linkage between the tax and the grant. 301 U.S. at 592. The term "linkage" is defined for purposes of this Note as the significant relationship between expenditures and revenues.

Modern courts, however, do not investigate the implications of such linkage when they consistently hold with *Steward Machine* or its progeny that federal grants are optional.[64] When tax monies go into the general treasury, grants are not traceable to specific tax revenues,[65] and one may say they are not "linked." In *Steward Machine*, a state's refusal to establish a state unemployment system along federal guidelines would have caused employers in that state to lose the benefit of a tax credit, but not be relieved of the burden of a federal tax.[66] The technical separation of the tax and credit by filtering them through the general fund supported a bifurcated analysis of coercion.[67] The burden of the tax was mandatory; the grants benefits were technically optional,[68] however, because the funds could not be traced back to the local level.

As a practical matter, the coercion analysis of *Steward Machine* may be reasonable where there is a tax-credit device,[69] yet increasingly inadequate for situations where outright federal grants have been substitutive of state and local budgetary appropriations.[70] The notion that federal grant programs are always optional is of questionable empirical validity.[71] The practical linkage between taxes and spending, rather than the technical one, must be determinative of coercion. No technical linkage between taxes and grants may ever be established so long as taxes go into and grants come out of the general treasury.[72] Nor should such linkage be technically imposed as a policy matter.[73] That is, if grants were deemed linked to tax sources notwithstanding the general fund, they would be coercive per se, *Steward Machine* would have to be overruled, and federal power to condition grants for any reason would be destroyed. That result would clearly be an intolerable invasion of federal supremacy.[74] It is contended that the tenth amendment has remained dormant in rela-

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64. *See* cases cited *supra* note 6. As indicated, these cases signal a new judicial awareness of modern fiscal realities. Nevertheless, their holdings perfunctorily ratify the premise that grants are optional. *See* pt. II.B *infra*.

65. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 592-93 (1937).

66. *Id.* at 574, 592; *see* Kaden I, *supra* note 1, at 883-84.

67. 301 U.S. at 585-86.

68. *Id.* at 574-75.

69. *See supra* notes 40-55 and accompanying text.

70. *See* Vitullo-Martin & Nathan, *supra* note 1, at 55; *infra* notes 92-113 and accompanying text.

71. *See infra* notes 92-113 and accompanying text.

72. *See* 301 U.S. at 592-93; cases cited *supra* note 6.

73. *See* Kaden I, *supra* note 1, at 894.

74. From this perspective, and as a matter of pure logic, no other holding in *Steward Machine* could have been reconciled with that federal supremacy which is the lodestone of our constitutional system. *See* Kaden I, *supra* note 1, at 889. States often have to subordinate their interests to federal priorities. *Id.*

tion to the spending power for these very reasons—that there has seemed no way to limit the sweep of its implications.

B. *Current Applications*

Some courts have strictly interpreted the "grants-are-optional" premise of *Steward Machine.*[75] These courts enunciate a rule that, as a matter of law, grant conditions are never coercive and eschew investigation of factual circumstances. Others have begun to formulate the coercion issue in quantitative terms by assessing actual impact on the state fisc.[76]

A First Circuit district court[77] defined coercion as the "threat of economic catastrophe," and concluded that a ten percent penalty on all federal highway funds did not represent such a threat.[78] One district court in the Fifth Circuit, addressing the question of what might constitute coercion in quantitative terms, similarly associated coercion with catastrophe.[79] The Fifth Circuit recently implied[80]

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75. Oklahoma v. Schweiker, No. 80-1004, slip op. at 25-27 (D.C. Cir. June 18, 1981); *see* City of Macon v. Marshall, 439 F. Supp. 1209, 1217 (M.D. Ga. 1977) (*Steward Machine* is not cited, but the proposition for which it stands is adopted completely—namely, that everything is optional which is not a direct and naked mandate); Stiner v. Califano, 438 F. Supp. 796, 800 (W.D. Okla. 1977) (citing *Steward Machine*).

76. These formulations are described below. *See infra* notes 77-91 and accompanying text.

77. Vermont v. Brinegar, 379 F. Supp. 606 (D. Vt. 1974). The court upheld a federal statute which reduced state highway grants 10% if the state refused to comply with a mandate to compensate those who lost their highway billboards as a result of the statute. The state was to be reimbursed by the federal government 75% of the cost of such compensation. *Id.* at 615-17.

78. *Id.* at 617. The court acknowledged that choice did not necessarily accompany grant conditions, but upheld the statute involved because it was unable to determine that the 10% reduction in highway funds "irresistably compels a state under threat of economic catastrophe to embrace the federal plan." *Id.*; *see Toward New Safeguards, supra* note 1, at 741-42; *A New Approach to State Sovereignty, supra* note 1, at 484.

79. North Carolina v. Califano, 445 F. Supp. 532, 535 (E.D.N.C. 1977) (upheld statutory requirement that the state establish a health planning and development agency as a condition to receiving federal health grants, despite fact that compliance required state to amend its constitution), *aff'd mem.*, 435 U.S. 962 (1978). The court said that if need to amend a state constitution in order to satisfy a grant condition could establish coercion per se, a state could then avoid any unpopular federal grant condition simply by rigging or construing its state constitution. "[T]he power of the federal government . . . to impose a condition on federal grants made under a proper Constitutional power does not exist at the mercy of the State Constitutions or decisions of State Courts." *Id.* at 535. On the issue of coercion, the court said "the 'coercive' effect of a termination of federal assistance [is not established where] [t]he actual loss . . . would be less than fifty million dollars [out of 1974 state revenues which] totalled some 3.1 billion dollars. The impact of such loss could hardly be described as 'catastrophic' or 'coercive'." *Id.*

80. Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1084 (5th Cir. 1979) (held that state could not fire full-time state employee for his absence while attending

that, had the state or locality suffered "serious financial strains," that would have constituted a "forced relinquishment of important governmental activities" sufficient to trigger *National League of Cities*.[81] The First Circuit[82] recently indicated that it might be amenable to a well-fashioned argument based on quantitative data, but held that the data argument before it was ineffectively made.[83]

Some courts in the Tenth Circuit have avoided the issue of coercion by disposing of cases on procedural grounds. For example, *County of Los Angeles v. Marshall*[84] was decided on a threshold statutory jurisdictional issue.[85] The court's failure to reach the substantive issue of coercion was significant. Compliance with the federal requirement that the county finance unemployment benefits for its employees,[86] in light of a state constitutional and statutory debt and tax revenue limit, would have forced the firing of 100,000 government employees and compelled concomitant service cuts.[87] By sidestepping the constitutional issue and the showing of quantitatively coercive burdens, the court avoided a meaningful investigation of the actual impact of grant conditions in the context of modern urban fiscal realities. Further, because the holding was procedural, the plaintiff had no opportunity to challenge the constitutionality of the conditions on appeal.

Walker Field v. Adams[88] was also decided on procedural grounds. The Tenth Circuit did, however, consider the constitutional question.

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mandatory National Guard training because state sovereignty under the tenth amendment and eleventh amendment was abrogated by the war powers).

81. *Id.* at 1083 (quoting National League of Cities v. Usery, 426 U.S. 833, 847 (1976)). It should be noted that *National League of Cities* devoted considerable attention to quantitative data analysis before declaring that such preoccupation lay outside its focus. 426 U.S. at 851.

82. New Hampshire v. Marshall, 616 F.2d 240 (1st Cir.), *cert. denied*, 101 S. Ct. 53 (1980). The facts and holding of this case closely paralleled those of *Steward Machine*—the state unemployment compensation law must conform to the federal statute or state disbursements would not be reimbursed in the form of a tax credit. The court apparently felt that it could not hold otherwise without directly overruling *Steward Machine*.

83. *Id.* at 248.

84. 442 F. Supp. 1186 (D.D.C. 1977), *aff'd*, 631 F.2d 767 (D.C. Cir.), *cert. denied*, 101 S. Ct. 113 (1980). As in New Hampshire v. Marshall, 616 F.2d 240 (1st Cir.), *cert. denied*, 101 S. Ct. 53 (1980), the facts parallel those of *Steward Machine*, so that the district court holding was predetermined.

85. 442 F. Supp. at 1187. The question before the court was whether to issue a preliminary injunction against application of federal unemployment laws to the state and local government. The court held that it lacked jurisdiction, but after discussing the procedural factors affecting jurisdiction, discussed substantively the extent to which *Steward Machine* governed the instant fact pattern. *Id.* at 1190-91.

86. *See* 26 U.S.C. §§ 3301-3311 (1976).

87. 442 F. Supp. at 1187-88, *aff'd*, 631 F.2d 767 (D.C. Cir.), *cert. denied*, 101 S. Ct. 113 (1980); *see* Herbers II, *supra* note 17.

88. 606 F.2d 290 (10th Cir. 1979) (district court dismissal upheld). The court held that a state damages action for delayed reimbursement for the federal share of

The majority relied on the well-settled proposition that only direct mandates are coercive;[89] conditions attached to grants are not. In an eloquent dissent, Judge McKay asserted that the logical distinction between the commerce power and the spending power is now chimerical:[90]

> [P]ractical financial needs of present day state governments . . . may well have ended the freedom of choice once inherent in such conditional grants. Few . . . states . . . can now supply adequate services without the benefit of federal largesse. . . . When grants have risen to this level of necessity, attached conditions must withstand close constitutional scrutiny similar to that applied in *National League of Cities* to direct regulation of state governmental structure.[91]

Because courts have refused to entertain seriously the notion that conditions attached to grants may be coercive, this Note examines the nature of modern grants and conditions, and profiles modern municipal finances, in order to construct a more compelling argument which courts must not ignore.

III. Grants and State Sovereignty—Need for Reexamination

Three factors have recently brought the spending power and the tenth amendment so sharply into conflict as to render present legal analysis, which strictly applies the inducement/coercion test of *Steward Machine*, inadequate to the needs of the municipal plaintiff and incompatible with a notion of state fiscal sovereignty.

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costs of airport improvements was properly the exclusive jurisdiction of the Court of Claims. It held also that a federal requirement that a county and city which had jointly created a public airport financing authority must, additionally, jointly underwrite that financing authority, did not violate the tenth amendment when no direct mandatory terms or conditions were imposed and where the localities could avoid restructuring their relationships or assuming the financial risk simply by declining the grant. *Id.* at 297-98.

89. *Id.* at 297. The court cited City of Macon v. Marshall, 439 F. Supp. 1209, 1216-17 (M.D. Ga. 1977) and Stiner v. Califano, 438 F. Supp. 796, 800 n.4 (W.D. Okla. 1977), for the proposition that grant conditions are optional, not coercive. 606 F.2d at 297.

90. 606 F.2d at 298-99 (McKay, J., dissenting). The principal logical distinction between commerce clause and spending power cases, said Judge McKay, "must be bottomed on the fiction that the spending power cases involve a freedom of choice which is not available under the mandated programs condemned in *National League of Cities.*" *Id.* at 298; *cf.* National League of Cities v. Usery, 426 U.S. 833, 880 (1976) (Brennan, J., dissenting) (suggesting substitution of grant conditions for mandates under the commerce clause).

91. 606 F.2d at 298-99 (McKay, J., dissenting) (footnotes omitted).

A. *The Nature of Grants*

Grant programs have grown radically over the past fifteen years in quantity and in scope.[92] Federal expenditures relating to federal grant programs increased nearly 900% between 1963 and 1979.[93] In 1963, 160 programs dispensed $8.3 billion;[94] by 1980, more than 447 programs dispensed $82.9 billion.[95] The size and breadth of programs has caused increasing state and local dependence on federal funding.[96] Grants increasingly finance essential, traditionally local services such as education, social services, health care, income security, transportation and environmental protection.[97] As a result of these trends, federal aid represents an increasingly critical percentage of municipal budgets.[98] It is contended that, were the traditionally local service functions now increasingly funded by the federal government to be thrown back onto local fiscal shoulders, local taxes could

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92. *See* Kaden I, *supra* note 1, at 871 (intergovernmental transfers: $1.581 billion in 1948; over $84 billion in 1978); Herbers, *Liberals Back Federal Reforms, but on Their Terms*, N.Y. Times, Feb. 2, 1981, § A, at 14, col.1 [hereinafter cited as Herbers IV] (grant-in-aid programs: $3.2 billion in 1955; $91.5 billion in 1980). Stated differences in raw results reflect the newness of statistical compilations in this area and consequential divergent methodologies. Such discrepancies should not obscure the broad agreement among the commentators on the dramatic growth of federal grants and their impact on local governments. *See* Kaden II, *supra* note 1, at 29-37; D. Walker, *supra* note 1, at 6-8. Walker theorizes that modern fiscal federalism is not collaboration with, but rather federal domination of, states and localities. *Id.* at 9. *See generally* Walker Field v. Adams, 606 F.2d 290 (10th Cir. 1979) (federal funding of local airport jeopardized by noncompliance); Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978) (federal flood plain insurance jeopardized), *aff'd*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979); North Carolina v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977) (federal health grants jeopardized), *aff'd mem.*, 435 U.S. 962 (1978); City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977) (federal transportation grants jeopardized).

93. D. Walker, *supra* note 1, at 5-7.

94. T. Madden, *supra* note 1, at 31 nn.2-3.

95. *Id.* at n.3.

96. *See* Bahl, Jump, & Schroeder, *Federal Policy and the Fiscal Outlook for Cities*, in Fiscal Crisis in American Cities, *supra* note 1, at 13 (ratio of direct federal aid as percentage of own-source revenue averages, 1978 estimates: "57.3 percent for St. Louis, Newark, Buffalo, Cleveland and Boston; 51.8 percent for Baltimore, Philadelphia, Detroit, Chicago and Atlanta"). "Such data leave little doubt about the critical importance of these programs to the basic financial health of large city governments. To say that they are being relied on to finance current operations is a gross understatement. Their curtailment, in money or real terms, would seriously compromise the financial position of these governments." *Id.*; *see* Gustely, *Measuring the Regional Economic Impact on Federal Grant Programs*, in Fiscal Crisis in American Cities, *supra* note 1, at 61-64 tables 3-1 through 3-4; Walker, *Localities Under the New Intergovernmental System*, in Fiscal Crisis in American Cities, *supra* note 1, at 32 table 2-2.

97. *See* Vitullo-Martin & Nathan, *supra* note 1, at 45, 50.

98. Bureau of Financial Analysis, City of New York, Office of the Comptroller, Comparative Analysis of New York City's Financial and Economic Indicators, Quar-

not support them and could not realistically be raised.[99] New York City is a dramatic case in point. Federal aid was $200 million, or 6.2% of city revenues, in 1965, and was $2.9 billion, or 23.1%, in 1977.[100] For fiscal years 1981-1984 it is estimated that federal aid will be $3.5 billion per year, or 24.3% of total city revenues.[101]

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terly Update 14-16 & table VI (Mar. 1981) (ranking the major U.S. cities by percentage of general revenues derived from federal and state sources in 1979) [hereinafter cited as Comptroller's Report]. *See generally* Advisory Commission on Intergovernmental Relations, Regional Growth: Historic Perspective 82 (June 1980) (regional analysis); Federal Grants, *supra* note 1, at 8-9 (impact on states of federal grants); D. Walker, *supra* note 1, at 8 (direct aid for cities of over 500,000 population has grown from 28% of their budgets in 1976 to over 50% in 1978). The percentage of federal aid may be underreported if the funds to metropolitan areas are classified according to who writes the check to the local government unit. This would fail to account for the large amounts of state aid derived directly from federal sources and passed through to localities.

99. *See* Herbers II, *supra* note 17 (federal aid to Rochester, N.Y. nearly quadrupled to $26.3 million between 1973-1978 and 1978 federal operating grants amounted to 36.8% of city's tax revenues; when the city tried to raise its property taxes to compensate for a declining tax base, inflation and federal aid cutbacks, courts ruled that the increase would violate a state constitutional tax ceiling); *see also supra* note 96 and accompanying text. It should be noted that cities, especially in large urban areas in the Northeast and Midwest, tend to spend more to provide services to their residents, *see Say Big Cities Spend More Per Resident*, N.Y. Daily News, Feb. 15, 1981, at 62, col. 1 (the nation's six largest cities spend more than twice the national average to provide services to each resident), and to receive less in federal outlays than their citizens pay in federal taxes. *See Federal Spending: The North's Loss is the Sunbelt's Gain*, 1976 Nat'l J. 878, 878-84 (federal anti-northeast bias claimed); Moynihan, *What Will They Do For New York?*, N.Y. Times, Jan. 27, 1980 (Magazine), at 30, 32-35 (New York pays 12% of all federal taxes and receives 8% of federal aid); Federal Grants, *supra* note 1, at 6 (project formula grants tend to favor rural, high income, small population states); D. Walker, *supra* note 1, at 8 (growing dependence of cities on federal funds). Grants are increasingly allocated by needs formulas—the percentage of grants disbursed by formulas rose from 66% in the mid-1960's to 75% in the later 1970's—but because of formula ceilings on total aid they discriminate against high-need, eroding tax-base areas in the urban Northeast and Midwest. *See* Vitullo-Martin & Nathan, *supra* note 1, at 45-64. As a general matter, raising local taxes to offset federal aid losses may be a counter-productive policy. Assuming such increases are not prohibited by state or local tax ceilings, they tend to raise costs of living and doing business, which prompts local businesses to relocate, and which may culminate in a net reduction in local tax revenues. *See* Moynihan, *supra* at 30.

100. Vitullo-Martin & Nathan, *supra* note 1, at 51.

101. *Id.* at 56. It has been contended that of the $14 billion in estimated federal aid for New York City in fiscal years 1981-1984, the cost of compliance with 47 different federal and state mandates uses up $8.9 billion; only a net $5.1 billion will be spent to further the specific goals for which the grants were sought. Toscano, *supra* note 16, at 75. For comparable data on other cities, see sources cited *supra* note 96.

B. *The Nature of Conditions*

The nature of conditions attached to grants has changed from ensuring the primary focus of the grant to effectuating general policies peripheral or secondary to the purpose for which grant monies were allocated.[102] Two examples from the experience of New York City illustrate the dimensions of the problem. In these cases, funds targeted for transit or education programs may be diverted by mandated applications which are ancillary to the programs' primary goals.

First, section 504 of the Rehabilitation Act of 1973[103] requires that the handicapped have access to transit systems. The estimated cost of compliance is $1.4 billion, and the failure to comply jeopardizes $435 million in federal transit subsidies.[104] Serving a handicapped population of approximately 135,000 will divert funds from maintaining a crumbling transit system that serves 5.3 million riders per weekday,[105] and that requires renovation[106] at an estimated cost of $1.4 billion over the next ten years.[107]

Second, the Education for All Handicapped Children Act of 1975[108] mandates special education that will cost New York City $565 million

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102. *See* North Carolina v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977) (federal health funds conditioned not on whether functional standards are met, but on whether a particular agency is separately created), *aff'd mem.*, 435 U.S. 962 (1978); City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977) (federal mass transit funds conditioned on whether the city permits collective bargaining for transit employees); *supra* note 16.

103. Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified at 29 U.S.C. § 794 (1976)).

104. Toscano, *supra* note 16, at 75, col. 1; *see New York City Sees Costs Savings in Transit Bill Involving Disabled*, N.Y. Times, Dec. 5, 1980, § B, at 10, col. 1 (estimated cost $1.5 to $3.0 billion to put elevators in subways and wheelchair lifts on buses; noncompliance puts $267 million in federal transit subsidy at risk).

105. *See* Koch, *supra* note 16, at 5-8.

106. *See* Holsendolph, *Transit Officials to Resist U.S. Cuts*, N.Y. Times, Oct. 11, 1981, § A, at 35, col. 1 (postponing capital projects not feasible); *Buses, Subways Close to Collapse*, N.Y. Post, Feb. 27, 1981, at 3, col. 1 (thousands of riders abandoning subways because of state of collapse, not because of high fares).

107. *See Still No Light At The End Of The Tunnel*, N.Y. Post, Mar. 3, 1981, at 3, col. 3 (editorial). Section 504 does not permit alternate and less expensive means of insuring that the handicapped have mobility, such as special vans. In a suit brought by the Association of Mass Transit Authorities, the District of Columbia District Court upheld the validity of regulations promulgated pursuant to the Act. American Pub. Transit Ass'n v. Goldschmidt, 485 F. Supp. 811, 836 (D.D.C. 1980); *see* Koch, *supra* note 16, at 5-8.

108. 20 U.S.C. §§ 1401-1461 (1976). *See* Kaden I, *supra* note 1, at 880-81. This is an example of the use of federal grants to mold state administrative structures. The Act seems clearly optional, but offers such great inducements that states are strongly drawn to comply with the federal guidelines. The penalty for not meeting the needs of the handicapped is grounded in the fourteenth amendment rights of handicapped children to equal educational opportunities. *See* Mills v. Board of Educ., 348 F. Supp. 866, 874-75 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972). Using this sort of decisional authority, handicapped persons could petition the Secretary of Education to tie-up the general funds of jurisdictions which do not provide special educational facilities.

in fiscal year 1981, of which the federal government subsidizes only six percent ($34 million).[109] It has been argued that states and local school districts cannot afford to make such expenditures and still provide adequate education for the balance of the school population.[110]

C. *The Dependence of Local Governments*

Local governments have developed a dependency on federal grants as a result of grants' expansion in scope and amount into traditionally local activities[111] and the concomitant gradual decline of independent local tax revenue resources.[112] The growing significance of grant programs to localities is reflected in the radical expansion of litigation in that area since 1975.[113] Justice Brennan, in his dissent in *National League of Cities*,[114] implicitly acknowledged that grants are no longer optional for local governments. He noted that those powers which Congress could no longer exercise under the commerce clause might be reacquired by simply conditioning federal grants; in other words,

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109. Lieberman, *Special Ed. Could Be Ed's Special Nemesis:* Panel, N.Y. Daily News, Oct. 19, 1980, at 5, col. 3; *see Let's Strengthen Our Voice in Washington*, J. of N.Y. St. Sch. Boards A., June-Apr. 1979, at 7. The estimated average cost to New York City to educate a handicapped child is $5500 per year; in 1979 the federal government gave $125 per pupil to the local district toward that effort. *Id.*

110. *See Let's Strengthen Our Voice in Washington*, *supra* note 109, at 7; Koch, *supra* note 16, at 8-10. Moreover, "the absolute terms of the mandate discourage any efforts at the local level to develop alternative approaches to the statutory objective." Koch, *supra* note 16, at 10.

111. Grants increasingly finance essential and traditionally local services such as education, social services, health care, income security, transportation and environmental protection. *See* Vitullo-Martin & Nathan, *supra* note 1, at 45, 50; D. Walker, *supra* note 1, at 7. Various activities, historically local, are now federally funded to some degree: "rural fire protection, libraries, jelly fish control, police, historical preservation, urban gardening, training for use of metric system, arson, home insulation, meals-on-wheels, snow removal, aquaculture, displaced home-makers, education of gifted children, development of bikeways, aid to museums, pothole repair, runaway youth, school security, and art education." *Id.*; *see* Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment.") (citing United States v. Best, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (licensing drivers is an integral state function)). *But cf.* Friends of the Earth v. Carey, 552 F.2d 25, 38-39 (2d Cir.) (held regulation of traffic to control air pollution is a joint federal-state-local responsibility, thus not an integral state governmental function), *cert. denied*, 434 U.S. 902 (1977).

112. *See supra* notes 96-98 and accompanying text. Moreover, the funding of compliance costs by the federal grantor has markedly diminished as a result of general fiscal scarcity and the greater costs of complying with secondary conditions. Vitullo-Martin & Nathan, *supra* note 1, at 51-55.

113. *See* T. Madden, *supra* note 1, at 2 (nearly 500 federal cases deal with grants, 80% issued since 1975); *supra* note 6.

114. 426 U.S. 833, 856 (1976) (Brennan, J., dissenting).

the result in *National League of Cities* could be avoided by an arbitrary and cynical use of the spending power.[115] 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. For these reasons the municipal grantee which seldom challenged the grant conditions of the 1960's[116] may have no recourse but to challenge those of the 1970's and 1980's.[117] Federal courts must begin to mediate this growing intergovernmental conflict.[118] The burden of

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115. *Id.* at 880. It should be noted that the majority opinion expressly avoids application of its analysis to the spending power. *Id.* at 852 n.17.

116. There was little motivation to challenge conditions which had scant impact beyond the terms of the grant, whose mandates tended to be fully funded by the federal grantor, and which involved comparatively small sums of money in any event. *Cf.* T. Madden, *supra* note 1, at 2 (nearly 500 federal cases deal with grants, 80% issued since 1975).

117. *See* T. Madden, *supra* note 1, at 2. Localities are placed in an untenable position. They cannot afford to accept grants for which compliance cost exceeds or approaches the value of the grant. *See* Koch, *supra* note 16, at 3. Neither can localities refuse federal aid which has become a substitutive revenue source, *see* Vitullo-Martin & Nathan, *supra* note 1, at 55-58; Herbers II, *supra* note 17, for integral local public services like transportation, education and sewage treatment, *see* Kaden I, *supra* note 1, at 847, and which have disrupted local budgetary processes to the point where large amounts of local monies are now committed to ongoing federal programs. *See* Vitullo-Martin & Nathan, *supra* note 1, at 54 (federal aid frequently requires large local matching funds; the critical issue is not how much aid has been received but how much local funds must be committed to get the aid); Toscano, *supra* note 16, at 75 (grant conditions too burdensome); Koch, *supra* note 16, at 1 (47 federal and state mandates will cost $711 million in capital expenditures, $6.25 billion in operating expenditures, and $1.66 billion in lost revenue over a four-year period). "[P]articularly after a state has poured significant funding into a program or facility . . . and attendant local expectations have grown, the state can hardly decline the federal aid necessary to maintain and improve that facility." Walker Field v. Adams, 606 F.2d 290, 299 (10th Cir. 1979) (McKay, J., dissenting).

118. While some commentators have suggested that the concerns implicated by the tenth amendment may be political questions, and thus in their essence beyond the purview of judicial power, they conclude that the political mechanisms conceived to resolve political matters have largely failed to do so in the area of the spending power, and that mounting pressures on our system must be relieved, if at all, by the courts. *See* Kaden I, *supra* note 1, at 885-89. *See generally* Baker v. Carr, 369 U.S. 186, 208-18 (1962) (civil action charging a Tennessee apportionment statute diluted voting rights in violation of the fourteenth amendment, listing elements of political questions which might render such questions nonjusticiable as a function of the principle of separation of powers); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948) (whether the statutory standards governing the grant or denial of applications to engage in overseas air transportation were followed in a decision of the Civil Aeronautics Board, reviewed by the President, held political question); Coleman v. Miller, 307 U.S. 433, 450 (1939) (whether a proposed constitutional amendment is still open to state ratification held political); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) (question of whether initiative and referendum are consistent with a "republican" form of government held to be politi-

proving coercion will logically continue to fall to the plaintiff locality as long as grants are legally deemed optional. Challenges to grant conditions to date have been litigated individually.[119] Consequently, it is nearly impossible to argue that the plaintiff locality's potential loss of a single grant program establishes coercion, whether it be "threat of economic catastrophe"[120] or any other standard of proof.[121]

IV. Proposed Solution

The situation demands a notion which allows investigation of the merits of each case. It is necessary to construct a modern linkage concept utilizing an experiential test that recognizes the impact on municipalities of federal spending programs, rather than the formal linkage test derived from *Butler* and *Steward Machine*. The *Steward Machine* test holds that where a pending program cannot be directly linked to its revenue sources—as is the case with any grant emanating from the general fund—inducement can never become coercion.[122] That test should be deemed inapposite by showing that the circumstances under which *Steward Machine* was decided bear no resemblance to modern realities of federal and state finances. Research discloses, however, that modern courts feel constrained to eschew such demonstrations of actual reliance and cleave to the traditional approach.[123]

In light of such judicial reluctance, a way must be discovered to avoid, without discarding, *Steward Machine*. One such way may be through an expansive application of the doctrine of judicial notice to acknowledge the actual reliance of states and municipalities on federal grants. In an analogous context regarding business relationships, Chief Judge Weinstein of the Eastern District of New York[124] recently noted:

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cal and nonjusticiable by courts); Sawer, *Political Questions*, 15 U. Toronto L.J. 49 (1963); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517 (1966); Weston, *Political Questions*, 38 Harv. L. Rev. 296 (1925). The essentially political nature of tenth amendment issues may account partially for its disuse and avoidance by courts. It was among the first concerns of the framers, however, as indicated by its place among the first ten amendments, and thus raises the presumption that some political matters were contemplated as within the competency of the judiciary. *See* Kaden I, *supra* note 1, at 889-97; Matsumoto, *supra* note 1, at 37-39; E. Gaffney, *supra* note 1, at 14-16; Kaden II, *supra* note 1, at 1-3.

119. *See* cases cited *supra* note 6; *cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (plaintiff was an association of cities and states).

120. Vermont v. Brinegar, 379 F. Supp. 606, 617 (D. Vt. 1974).

121. *See supra* note 80 and accompanying text.

122. *See supra* notes 47-62 and accompanying text; *see also* R. Cappelli, *supra* note 1, at 31.

123. *See supra* notes 75-91 and accompanying text. Presumably, this is because of the possible threat to federal supremacy inherent in tampering with *Steward Machine*. *See supra* notes 73-74 and accompanying text.

124. Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322 (E.D.N.Y. 1981) (granting personal jurisdiction over Japanese multinational company through the

> We tend to come closer to the mark when we examine a business relationship from the practical viewpoint of businessmen rather than through the distorting lens of a legal conceptual framework established in an earlier era. . . . [A court] must make use of so much of judicial notice as is required to understand general commercial settings and the particular relationships of the parties. . . .
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> . . . .
>
> The information that may be noticed . . . is much broader than the narrow form of "adjudicative" fact either "generally known within the territorial jurisdiction" or capable of "determination by resort to sources whose accuracy cannot reasonably be questioned". . . .
>
> . . . [W]e 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.[125]

Such real world analysis in the grants area would recognize that, even though taxes and grants are not technically linked, they may be significantly related.[126]

Initially, judicial acceptance of a practical linkage notion—the significant relationship between grant funds and the tax revenue sources which feed them[127]—would merely admit the realistic premise that grants are not necessarily optional. Courts could then entertain the merits of local challenges to federal grant conditions on a case by

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activities of its American subsidiary despite precedent under which formal corporate separateness shielded the parent corporation). Despite the obvious differences between *Bulova Watch* and the cases which are the focus of this Note, the creative procedural notion enunciated by Judge Weinstein has application far beyond the limits of that case's subject matter. *Id.* at 1327.

125. *Id.* at 1327-28 (citations omitted).

126. Judge Weinstein's dynamic analysis has application to the issue of federal grants: "Multinational activities such as those before us present a factual pattern that sometimes does not quite fit into either of the two tidy conceptual categories reflected in [New York law]. . . . We do not . . . ignore traditional indicia utilized to measure parent-subsidiary control for jurisdictional purposes. Rather, we note that in this as in so many other areas of the law, stuffing new and complex factual patterns into absolutely rigid legal cubbyholes often results in distortion of the facts. Some give in the categories is desirable lest the law lose touch with the real world. . . . The law ignores the common sense of a situation at the peril of becoming irrelevant as an institution. . . . [P]laintiffs . . . may be denied a natural forum unless the court carefully analyzes the [significant] economic and social realities . . . ." *Id.* at 1327. The gravamen of this Note is the failure of modern courts to expand "tiny conceptual" definitions of coercion to admit the "new and complex factual patterns" of actual state and local reliance on federal revenues. It is contended that the law must apprehend such realities or risk "becoming irrelevant as an institution." *Id.*

127. *See generally* Raines, *supra* note 17, § A, at 24, col. 6 (suggests the significance of the relationship of grants to revenues). The term "linkage", as indicated above, is offered by this Note to encapsulate varying analyses of that relationship. *See supra* note 63 and accompanying text.

case basis.[128] Judges might examine the linkage effect inherent in specific local service programs; that is, to what extent is a municipality dependent on federal grants in a functional area like transportation or education, so that, were the aid withdrawn, the locality would no longer have sufficient tax revenue sources to assume full fiscal responsibility for the programs without seriously overburdening its tax base or dangerously reducing its service delivery.[129] Such "forced relinquishment"[130] of local autonomy would duplicate the one found to violate the tenth amendment in *National League of Cities*, and bring the force of the Court's categorical analysis to bear on the spending power.[131]

CONCLUSION

Judicial acceptance of a flexible notion of linkage between grant programs and tax sources would at once preserve federal authority to condition funding as an instrument of public policy, and restore to the states an equitable way to defend themselves against federal overreaching. It would reactivate a concept of a genuinely federal republic.

Mark Suben

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128. *See* Kaden I, *supra* note 1, at 889 ("standards that federal courts can use" to make federalism-based determinations, once courts acknowledge the constitutional conflict). Counsel for the state or local plaintiff would bear the burden of fashioning a quantitatively-based argument. In building a foundation he could draw on governmental and scholarly data analyses which are increasingly available. *See supra* pt. III.

129. *See* Herbers II, *supra* note 17; *supra* note 99.

130. 426 U.S. 833, 847 (1976).

131. *Id.* at 852; *see supra* note 59.