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Travelling Down the Unsteady Path: United States v. Lopez, New York v. United States and the Tenth Amendment

Anthony B. Ching

TRAVELLING DOWN THE UNSTEADY PATH: *UNITED STATES v. LOPEZ*, *NEW YORK v. UNITED STATES*, AND THE TENTH AMENDMENT

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I. INTRODUCTION

The Supreme Court's decision in *United States v. Lopez*,[1] invalidating a federal law criminalizing the possession of a firearm by an individual in a school zone,[2] coupled with the Court's 1992 decision in *New York v. United States*,[3] has given new hope to states in their pursuit of judicial relief based on the Tenth Amendment.[4] *Lopez* and *New York*, however, are only two in a long line of decisions concerning the Tenth Amendment. Any discussion of the Tenth Amendment must be made against the backdrop of nearly 200 years of Tenth Amendment jurisprudence which is an inseparable part of our constitutional history. This Article examines the evolution of the Tenth Amendment jurisprudence of which *Lopez* and *New York* are the Court's most recent pronouncements.[5]

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1. 115 S. Ct. 1624 (1995).

2. 18 U.S.C. § 922(q)(1)(A) (Supp. V 1994).

3. 505 U.S. 144 (1992).

4. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

5. The Court in *New York* acknowledged that its recent case law interpreting the 10th Amendment "has traveled an unsteady path." 112 S. Ct. at 2420. This characterization

Since the Constitution gives Congress the power to legislate,[6] tension often arises from federal legislation that conflicts with state powers. These laws are generally enacted either under the enumerated powers in the Constitution[7] or pursuant to the Civil War Amendments.[8] The enumerated powers most frequently used by Congress, which occasion conflicts with the state powers, are the Commerce Clause[9] and the Spending Clause.[10] In addition, state laws which infringe on federal constitutional powers are invalid under the Supremacy Clause.[11]

Although most of the enumerated powers are found in Article I, Section 8 of the Constitution, congressional legislation under other provisions in the Constitution also creates conflicts with state powers. State laws and policies have been invalidated where they conflicted with congressional legislation implementing treaties,[12] when they interfered with the federal executive[13] or judicial power,[14] or intruded into areas exclusively within the federal domain.[15] The Tenth

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applies equally to the entire history of 10th Amendment jurisprudence.

6. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

7. *Id.* § 8.

8. *Id.* amends. XIII, XIV, XV.

9. *Id.* art. I, § 8, cl. 3.

10. *Id.* cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . ."). This language gives Congress the power to tax and spend the money collected from the taxes for the stated purposes.

11. *Id.* art. VI, § 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

12. Missouri v. Holland, 252 U.S. 416 (1920) (holding congressional legislation pursuant to a treaty overrides state's title to migratory birds).

13. United States v. Belmont, 301 U.S. 324 (1937) (holding that executive agreement between the President and another nation overrides state policy).

14. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 303 (1816) (holding that the Supreme Court has the constitutional power to review state court decisions). *But see* Milliken v. Bradley, 433 U.S. 267 (1977) ("[T]he federal courts in devising a remedy must take into account the interests of the state and local authorities in managing their own affairs, consistent with the Constitution.").

15. United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (invalidating state imposed term limits on the election of United States senators and representatives); Zschernig v. Miller, 389 U.S. 429 (1968) (holding that state law restricting rights of certain

Amendment is also considered inapplicable in cases where Congress exercises its Property Clause powers.[16] On a few occasions the Court has declined to reach the merits of such controversy based on the political question doctrine.[17]

In addition to a discussion of the *Lopez* decision, this Article offers a critique of the *New York* decision. In a broad review this Article will discuss Tenth Amendment jurisprudence under the Commerce Clause,[18] the Spending Clause,[19] and the Civil War Amendments.[20] This Article is intended to inform readers concerning the evolution of Tenth Amendment jurisprudence and put in context today's controversy surrounding conflicts between federal and state power. It is not intended to suggest or espouse a particular constitutional theory advancing states' rights. Tenth Amendment jurisprudence concerns the fundamental structure of our federal system of government and has evolved due to changes in the Supreme Court's political philosophy of government.[21] That philosophy, invariably, is influenced by changing political, social, and economic forces over the past two centuries.[22] Undoubtedly, these same internal and global forces will continue to shape the development of this jurisprudence.

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nonresident aliens to inherit property intruded on foreign policy power of federal government).

16. U.S. CONST. art. IV, § 3, cl. 2; *see also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 330 (1936).

17. Massachusetts v. Mellon, 262 U.S. 447, 484-85 (1923); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 54 (1867); *see also* CHRISTOPHER MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 24-25 (1989).

18. U.S. CONST. art. I, § 8, cl. 3.

19. *Id.* cl. 1.

20. *Id.* amends. XIII, XIV, XV. Congressional enactments affecting states' rights are sometimes based on the exercise of both the Commerce Clause and Spending Clause powers. Civil Rights legislation may be based on the Civil War amendments, the Commerce Clause, and the Spending Clause. Therefore, although this Article will discuss each area separately, the cases discussed may not necessarily be confined to the separate headings.

21. CHRISTOPHER TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 43-45 (1974) (1st ed. 1890).

22. *See id.* at 49-50; Stephen A. Siegal, *Historium in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1539.

II. THE TENTH AMENDMENT AND THE COMMERCE CLAUSE

A. Historical Perspective

The United States Constitution was a product of compromise between two conflicting interests: the need to join together to form a strong national government and the need to protect sovereign interests of the states which formed the national government.[23]

The compromise resulted in a Constitution which created a national government with enumerated powers. The Tenth Amendment is one of the ten amendments in the Bill of Rights proposed by the First Congress and ratified by the states.[24] The Tenth Amendment was incorporated into the Bill of Rights because of the Anti-Federalist's concern that the Constitution would make the national government too powerful and could ultimately eliminate state sovereignty.[25] The Federalists eventually conceded that such a provision was necessary and agreed that a Bill of Rights, including the version which is now the Tenth Amendment, would be proposed in the First Congress.[26] The Tenth Amendment, therefore, specified that the powers of government, except for those enumerated in the Constitution as belonging to the national government, belong to the states and the people that formed the Union.[27]

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23. *See* THE FEDERALIST NOS. 6, 17 (Alexander Hamilton), NO. 14 (James Madison).

24. Twelve amendments were originally proposed. The two amendments which were not ratified concerned the size of the House of Representatives and prohibited members of Congress from raising their own salaries. George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 687 (1992). The latter of the two amendments was finally ratified in 1992, more than 200 years later. It is now the 27th Amendment. Unlike later constitutional amendments proposed by Congress, the Bill of Rights did not contain a time period for ratification. JETHRO K. LIEBERMAN, THE EVOLVING CONSTITUTION 75-76 (1992).

25. *See generally* 1-4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. Philadelphia, J.B. Lippincott Co. 1836) (expressing concern over too strong a federal government). However, the Supreme Court has rejected the suggestion "that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns." FERC v. Mississippi, 456 U.S. 742, 761 (1982).

26. BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 505, *passim* (1971). 1 ANNALS OF CONGRESS 432-37 (Joseph Gales ed., 1789) (remarks of James Madison).

27. United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1856 (1995) (holding, by a five member majority, that the Constitution's silence on a subject does not necessarily mean that it falls within the reserved powers of the states).

The evolution of Tenth Amendment jurisprudence is intertwined with the interpretation of the constitutional provisions affecting the very fabric of the Union. It is a necessary part of the unavoidable conflicts between the states and the national government created by the Constitution. Tenth Amendment jurisprudence, therefore, developed in the course of the Supreme Court's resolution of these conflicts. Since much of the early expansion of the national government's powers dealt with the Commerce Clause, which delegated to the national government broad power to regulate commerce among the several states, the evolution of Commerce Clause jurisprudence is, in many ways, the evolution of Tenth Amendment jurisprudence.

1. *McCulloch v. Maryland*

The first confrontation between national and state power in the regulation of commerce came in *McCulloch v. Maryland*.[28] *McCulloch* concerned a tax imposed by Maryland on the operation of the Baltimore branch of the Bank of the United States.[29] In an opinion by Chief Justice Marshall, a unanimous Supreme Court declared Maryland's law unconstitutional under the Supremacy Clause.[30] The Court rejected Maryland's argument that the creation of a national bank was not among the enumerated powers in the Constitution and thus, it was beyond Congress's powers.[31] The Court held that enumerated powers in the Constitution, such as the power to "lay and collect [t]axes,"[32] "borrow money,"[33] "regulate [c]ommerce,"[34] "declare [w]ar,"[35] "raise and support [a]rmies,"[36] and "maintain a [n]avy,"[37] implied the grant of power to create a national bank.[38] The Court refused to construe the Necessary and Proper Clause[39] narrowly to mean only those measures absolutely

28. 17 U.S. (4 Wheat.) 316 (1819).
29. *Id.* at 317-21.
30. *Id.* at 424.
31. *Id.* at 421.
32. U.S. CONST. art. I, § 8, cl. 1.
33. *Id.* cl. 2.
34. *Id.* cl. 3.
35. *Id.* cl. 11.
36. *Id.* cl. 12.
37. *Id.* cl. 13.
38. *McCulloch*, 17 U.S. (4 Wheat.) at 418.
39. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing

necessary to carry out the enumerated powers. Instead, the Court broadly interpreted that language and said, "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 consistent with the letter and spirit of the constitution, are constitutional."[40] After concluding that Congress had the power to create a national bank, the Court found that Maryland's tax infringed upon that congressional power.[41]

McCulloch was a victory for the Federalists. Marshall's opinion squarely rejected Thomas Jefferson's advice to President Washington opposing the creation of the First Bank by Congress, which President Washington signed into law in 1791.[42] Jefferson, in his capacity as Secretary of State, forcefully argued that none of the enumerated powers in the Constitution authorized or required the establishment of a national bank.[43]

Five years after *McCulloch* the Court decided *Gibbons v. Ogden*,[44] another landmark case in the expansion of the national power. *Gibbons* involved New York's grant of an exclusive license to certain ships for navigation between New Jersey and New York.[45] This grant came into conflict with the federal law licensing ships to ply the coastal trade.[46] Chief Justice Marshall's opinion held that states may regulate their internal commerce, but if the state laws were in conflict with congressional legislation enacted under the Commerce Clause, federal law must govern.[47] Accordingly, congressional legislation licensing the ships governed over New York licensing laws.[48]

Marshall, however, rejected the broad argument that "power to regulate a particular subject, implies the whole power, and leaves no

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Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

40. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

41. *Id.* at 425-26.

42. Congress did not renew the Charter of the First Bank and it expired in 1811. The Second Bank was chartered in 1816.

43. 5 THE WRITINGS OF THOMAS JEFFERSON 285-89 (Paul Leicester Ford ed., 1895).

44. 22 U.S. (9 Wheat.) 1 (1824).

45. *Id.* at 186.

46. *Id.* at 210.

47. *Id.* at 211.

48. *Id.* at 212.

residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it."[49]

Justice William Johnson, the first appointee to the Court by President Jefferson and a supporter of Marshall in *McCulloch*, wrote a separate opinion expressing the view that the Commerce Clause deprived the states of any power to regulate commerce.[50] Johnson concluded that even if there had not been any congressional legislation licensing such ships in coastal trade, the states still could not interfere with the shipping activities.[51]

2. Taney's views on states' role in regulating commerce

The balance of federal power versus state power, in the context of the Commerce Clause, shifted after Roger Taney became Chief Justice in 1836. Justice William Johnson's view, that the national power to regulate commerce is absolute, was all but forgotten. In the *License Cases*,[52] sustaining state regulation of the sale of liquor brought from another state, Taney explained,

> the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come into conflict with a law of Congress.[53]

A few years later in *Cooley v. Board of Wardens*,[54] the Court distinguished *Gibbons*[55] and upheld Pennsylvania's pilotage fee for ships entering Pennsylvania ports.[56]

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49. *Id.* at 198. Justice Marshall's broad interpretation of the Commerce Clause was counterbalanced by his interpretation of the reach of the Bill of Rights. In Barron v. Mayor and City Council, 32 U.S. (7 Pet.) 243 (1833), Marshall gave short shrift to the argument that the Due Process Clause of the Fifth Amendment—unlike the First Amendment which refers specifically to lawmaking by Congress, the Fourth, Fifth, and Sixth Amendments provide generally for the protection of certain rights—applied to the States and their political subdivisions. The Court thought that the answer was so obvious that it stopped the defendants' argument. *Id.* at 247. Roger Taney, who later succeeded Marshall as Chief Justice, appeared as counsel for defendants. *Id.*

50. *Gibbons*, 22 U.S. (9 Wheat.) at 222 (Johnson, J., concurring in the result, but not in the reasoning).

51. *McCulloch*, 17 U.S. (4 Wheat.) at 237.

52. 46 U.S. (5 How.) 504 (1847).

53. *Id.* at 579.

54. 53 U.S. (12 How.) 299 (1851).

55. *Id.* at 309-10.

56. *Id.* at 320. In Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987), a case unrelated to the Commerce Clause,

3. The next seventy years

Commerce Clause jurisprudence for the next seventy years consisted of a series of seemingly inconsistent doctrinal pronouncements by the Supreme Court. The Court attempted to resolve the conflict between the need to give recognition to the Constitution's grant of power over commerce to the federal government, and the states' desire to protect their people under state police power by regulating commerce. The decisions from that era range from a declaration that national Commerce Clause power was "exclusive"[57] to cases narrowly construing commerce as to not include manufacturing[58] and insurance.[59]

On the other hand, state laws that evinced economic protectionism were struck down as burdening commerce under the "negative" or "dormant" Commerce Clause.[60]

4. *Hammer v. Dagenhart* and states' rights

The judicial philosophy in favor of states' rights, which coincided with the protection of private property rights, reached its peak in *Hammer v. Dagenhart*.[61] The Court in *Hammer* struck down a congressional enactment prohibiting the interstate transportation of goods manufactured by child labor.[62] Justice Day's majority opinion concluded that

> [t]he grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states

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Chief Justice Taney held that neither the federal court nor any other department could use any coercive means to compel the states to comply with the Extradition Clause. *Id.* at 107.

57. Hall v. DeCuir, 95 U.S. 485, 488-90 (1877) (applying the Commerce Clause to strike down Louisiana's public accommodation law as it applied to river boat passengers travelling to states whose laws required racial segregation). *But see* The Civil Rights Cases, 109 U.S. 3 (1883) (holding that Congress has no power to enact a public accommodation statute).

58. *See* Child Labor Tax Case, 259 U.S. 20 (1922) (invalidating a federal tax on the profits of businesses employing child labor); Kidd v. Pearson, 128 U.S. 1, 26 (1888) (holding the manufacture of alcoholic beverages for sale out of state is not commerce).

59. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868) (issuing a policy that insurance is not a transaction in commerce). *But see* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (holding that insurance business is within congressional power to regulate commerce under the Sherman Antitrust Act).

60. *See, e.g.*, Welton v. Missouri, 91 U.S. 275 (1875).

61. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

62. *Id.* at 276.

> in their exercise of the police power over local trade and manufacture.
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> The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.[63]

Hammer put the brake on the expansion of Congress's Commerce Clause power. In that respect it stood as the zenith of states' rights and, correspondingly, private property rights to be free from federal government regulation.

After the Great Depression of the late 1920s and early 1930s, with the election of Franklin Delano Roosevelt as President in 1932, Congress embarked on a flurry of legislation to remedy the economic and social ills of the nation. In response to challenges to these laws,[64] the Court struck down several enactments on constitutional grounds. Although some of these decisions were grounded on the Due Process Clause, a number of them were based wholly, or in part, on the Tenth Amendment. Three cases decided in that period deserve brief discussion: *Schechter Poultry Corp. v. United States*,[65] *Carter v. Carter Coal Co.*,[66] and *Railroad Retirement Board v. Alton Railroad Co.*[67]

In *Schechter* the Court struck down the minimum hour and wage provisions of the Live Poultry Code.[68] The Court held that wages and hours of the employees of a New York slaughterhouse, whose poultry came to New York in interstate commerce, and the in-state sale of the poultry, were internal concerns of a state to be regulated by the state and not the federal government.[69]

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63. *Id.* at 273-74.

64. These challenges were brought by businesses which were adversely impacted by the legislation.

65. 295 U.S. 495 (1935).

66. 298 U.S. 238 (1936).

67. 295 U.S. 330 (1935).

68. *Schechter*, 295 U.S. at 550. The Live Poultry Code was adopted pursuant to the National Industrial Recovery Act of 1933, ch. 90, § 3, 48 Stat. 195.

69. *Schechter*, 295 U.S. at 550. One year later the Court struck down New York legislation regulating minimum wages for women as a violation of the Due Process Clause of the 14th Amendment. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936). The *Morehead* decision relied on Adkins v. Children's Hospital, 261 U.S. 525 (1923), which struck down a congressional act prescribing minimum wages for women and children in the District of Columbia. *Morehead*, 298 U.S. at 603. This line of cases shows that the judicial philosophy in that era favored private property rights over federal and states' rights to regulate. The application of the Due Process Clause to minimum wage legislation

Carter Coal, decided a year after *Schechter*, concerned the Bituminous Coal Conservation Act of 1935 (Guffey Coal Act),[70] an enactment that taxed the sale of coal but permitted a tax reduction if the coal company agreed to wage and hour regulation for its workers.[71] A five-to-four majority of the Court found that the tax could not be upheld as a valid exercise of Congress's taxing power because it was not a tax but a penalty.[72] Further, the Court held that mining, like manufacturing, was not commerce.[73] Moreover, since Congress has no general power to regulate for the general welfare, the Guffey Coal Act was unconstitutional.[74]

In *Railroad Retirement Board*,[75] a case decided the same year as *Schechter*, the court was confronted with the expansion of federal regulation of an industry which is unquestionably subject to congressional regulation under the Interstate Commerce Act.[76] Nonetheless, a five-to-four majority invalidated the Railroad Retirement Act of 1934,[77] which established a compulsory pension scheme for railroad workers.[78] In response to the government's argument that an assured pension improved the morale of the employees and promoted efficiency of the railroads which were legitimate purposes within Congress's Commerce Clause power, Justice Roberts, who authored the majority opinion, answered:

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was finally discarded by the Court in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Justice Roberts's change of position from his earlier vote in *Morehead*, creating the new majority in *Parrish*, was characterized by some as "a switch in time which saved nine" in response to the "court packing plan" submitted by President Roosevelt to Congress on February 7, 1937. William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 673. However, Justice Roberts asserted that his change of position predated the court packing plan. *See* Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 314 (1955).

70. *Carter Coal*, 298 U.S. at 288-89 (invalidating Bituminous Coal Conservation Act of 1935, ch. 824, §§ 1-23, 49 Stat. 991, *repealed by* Bituminous Coal Act of 1937, ch. 127, § 20, 50 Stat. 72, 90, *repealed by* Act of Sept. 6, 1966, Pub L. No. 89-554, § 8(a), 80 Stat. 649, 651).

71. Bituminous Coal Conservation Act of 1935, § 3, 49 Stat. at 993-94.

72. *Carter Coal*, 298 U.S. at 288-89.

73. *Id.* at 310.

74. *Id.* at 292.

75. 295 U.S. 330 (1935).

76. *Id.* at 336.

77. *Railroad Retirement Bd.*, 295 U.S. at 374 (invalidating Railroad Retirement Act of 1934, ch. 868, §§ 1-14, 48 Stat. 1283).

78. Railroad Retirement Act of 1934, ch. 868, §§ 1-14, 48 Stat. 1283 (invalidated by Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935)).

> Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power.[79]

Justice Roberts's statement of congressional power would not survive long. In an about face two years later, in *NLRB v. Jones & Laughlin Steel Corp.*,[80] a new majority[81] of the Court broadly construed Congress's Commerce Clause power over conduct affecting commerce, and upheld the National Labor Relations Act[82] regulating unfair labor practices.[83] The majority reasoned,

> [a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.[84]

5. *United States v. Darby*

The invocation of the Tenth Amendment to invalidate Congress's social welfare enactments under the Commerce Clause finally ended in 1941. In *United States v. Darby*,[85] a criminal case involving the violation of the minimum wage provision of the Fair Labor Standards

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79. *Railroad Retirement Bd.*, 295 U.S. at 368.

80. 301 U.S. 1 (1937).

81. The new majority consisted of Chief Justice Hughes, Justices Cardozo, Brandeis, Stone, and Roberts who had switched sides. *See* Frankfurter, *supra* note 69, at 313.

82. *NLRB*, 301 U.S. at 48.

83. National Labor Relations Act, ch. 372, §§ 1-16, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-168 (1988 & Supp. V 1994).

84. *NLRB*, 301 U.S. at 37.

85. 312 U.S. 100 (1941).

Act of 1938,[86] the Court formally overruled *Hammer v. Dagenhart*.[87] The Court, in its Tenth Amendment discussion, said:

> The 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.[88]

A year later in *Wickard v. Filburn*,[89] the Court upheld the Agricultural Adjustment Act of 1938,[90] which penalized a farmer for growing wheat in excess of the quota established for his farm.[91] The doctrine that agriculture production was not commerce[92] was finally abandoned.[93]

Darby relegated the Tenth Amendment to the status of mere window dressing in its "but a truism" characterization,[94] and for the next thirty-five years the Tenth Amendment was moribund. However, the Court was not altogether insensitive to the states' need to regulate commerce, and continued to show deference to states' regulatory laws when challenged on federal preemption grounds. It sustained state laws unless Congress clearly intended to preempt them.[95]

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86. *Id.* at 108 (interpreting Fair Labor Standards Act of 1938, ch. 676, §§ 1-19, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (1988 & Supp. V 1994))).

87. *Id.* at 116-17 (rejecting Hammer v. Dagenhart, 247 U.S. 251 (1918)).

88. *Id.* at 124.

89. 317 U.S. 111 (1942).

90. *Id.* at 133 (upholding Agricultural Adjustment Act of 1938, ch. 30, §§ 1-578, 52 Stat. 31 (codified at 7 U.S.C. §§ 1281-1407 (1994))).

91. Agricultural Adjustment Act of 1938, § 339, 52 Stat. at 55.

92. United States v. Butler, 297 U.S. 1, 64 (1936) ("[T]he control of agriculture production [is] a purely local activity."). "[T]he supervision of agriculture and of other concerns of a similar nature, . . . can never be the desirable cares of a general [federal] jurisdiction." THE FEDERALIST NO. 17, at 370-71 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

93. *Wickard*, 317 U.S. at 128-29.

94. *Darby*, 312 U.S. at 124.

95. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

B. Modern Developments

1. *National League of Cities v. Usery*

The Supreme Court resurrected the Tenth Amendment in 1976. In *National League of Cities v. Usery*[96] the Court, in a five-to-four decision, held that the application of minimum wage and overtime provisions of the Fair Labor Standards Act[97] to state and local government employees violated the Tenth Amendment.[98] The Court stated, "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[99] In striking down Congress's attempt to subject state and local governments to its exercise of Commerce Clause powers, the Court drew a line at a point when congressional legislation regulated "States *qua* States."[100]

Although *National League of Cities* did not delimit congressional power in regulating individuals under the Commerce Clause, it returned the Tenth Amendment from "but a truism" to an affirmative prohibition on congressional exercise of power.

This resurrection of the Tenth Amendment was short-lived. The Court rejected states' subsequent efforts to declare other federal statutes invalid on Tenth Amendment grounds. The gradual erosion of the *National Leagues of Cities* holding is demonstrated in three cases. The first is *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*[101] In *Hodel* the Court rejected the Tenth Amendment challenge to the Surface Mining Control and Reclamation Act of 1977,[102] which created a federal scheme of regulating surface mining on nonfederal land, while permitting state regulation under federal conditions.[103] The Court explained that, to come under the *National League of Cities* proscription, the legislation must satisfy each of three

96. 426 U.S. 833 (1976) (rejecting Maryland v. Wirtz, 392 U.S. 183 (1968)).
97. 29 U.S.C. §§ 206-207 (1988 & Supp. V 1994).
98. *National League of Cities*, 426 U.S. at 852.
99. *Id.* at 845.
100. *Id.* at 847.
101. 452 U.S. 264 (1981).
102. *Id.* at 293 (upholding 30 U.S.C. §§ 1201-1328 (1988 & Supp. V 1994)).
103. *Id.* (upholding 30 U.S.C. §§ 1201-1328 (1988 & Supp. V 1994)).

requirements.[104] First, there must be a showing that the challenged statute regulates the "States as States."[105] Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty."[106] Third, it must be apparent that the states' compliance with the federal law would directly impair the states' ability "to structure integral operations in areas of traditional governmental functions."[107] The Court found that the challenge could not satisfy the first requirement since the statute did not regulate the "States as States"; instead, the Act only regulated private individuals and the activities on their land.[108]

Virginia's argument that the statute violated the Tenth Amendment by coercing the states into enforcing the federal law by the threat of direct federal regulation also failed because the surface mining activities affected interstate commerce, and Congress could either regulate it directly or choose to allow states a regulatory role.[109]

The second case, *FERC v. Mississippi*,[110] involved the Public Utility Regulatory Policies Act of 1978 (PURPA),[111] a federal law regulating, in part, public utilities, an area which is traditionally a state function.[112] The opinion in *FERC v. Mississippi* expanded the *Hodel* decision. The Court gave due deference to the congressional finding that utility rates affect interstate commerce and, therefore, congressional regulation was properly within the Commerce Clause powers.[113] As to the state's Tenth Amendment challenge that PURPA mandated the states to consider federal standards in rate disputes, the Court found that since the field of utility regulation is preemptible by Congress, the requirement that the state agencies consider federally created standards was only a condition to continued state involvement in an area subject to preemption.[114]

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104. *Hodel*, 452 U.S. at 287.
105. *Id.* (quoting *National League of Cities*, 426 U.S. at 854).
106. *Id.* at 287-88.
107. *Id.* at 288.
108. *Id.*
109. *Id.* at 290-91.
110. 456 U.S. 742 (1982).
111. *Id.* at 745 (interpreting the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-2645 (1994)).
112. 16 U.S.C. §§ 2601-2645.
113. *FERC*, 456 U.S. at 753-58.
114. *Id.* at 765-66.

The third case, *EEOC v. Wyoming*,[115] involved the Age Discrimination in Employment Act[116] as it applied to Wyoming's game wardens who were involuntarily retired at age fifty-five under state law.[117] Although the facts in *EEOC v. Wyoming* were virtually the same as those in *National League of Cities*, the federal act was upheld as a valid exercise of Congress's Commerce Clause powers.[118] The majority acknowledged that the Act regulated the states as states, thus satisfying the first prong of the *Hodel* test.[119] The Court found, however, that the third prong, requiring that the states' compliance directly impair their ability to structure internal operations in areas of traditional governmental functions, was not met.[120] The Court reasoned that the age limit in the Wyoming law only assured the physical preparedness of its game wardens and Wyoming still could require fitness test to determine their physical preparedness.[121]

These three cases foreshadowed the decision of *Garcia v. San Antonio Metropolitan Transit Authority*,[122] which finally overruled *National League of Cities*[123] and permitted the application of the Fair Labor Standards Act[124] requirements to state and local government employees.[125]

2. *Garcia v. San Antonio Metropolitan Transit Authority*

The majority opinion in *Garcia* reflected the frustration over the difficult task of drawing a line between what is properly the national power and what is properly the states' power.[126] The majority found *Hodel*'s three prong test, and particularly the third prong—whether the federal law impaired the states' ability "to structure integral

115. 460 U.S. 226 (1983).
116. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1994).
117. *EEOC*, 460 U.S. at 239.
118. The Court did not decide the question whether the Act was validly adopted under § 5 of the 14th Amendment. *Id.* at 243.
119. *Id.* at 237.
120. *Id.* at 239.
121. *Id.* at 240.
122. 469 U.S. 528 (1985). Justice Blackmun, whose concurrence supplied the five member majority in *National League of Cities*, 426 U.S. at 856, authored the *Garcia* majority opinion. Justice Blackmun's change of position paralleled Justice Roberts's switch in 1937. *See supra* note 69.
123. *Id.* at 557 (rejecting National League of Cities v. Usery, 426 U.S. 833 (1976)).
124. 29 U.S.C. §§ 206-207 (1988 & Supp. V 1994).
125. *Garcia*, 469 U.S. at 560.
126. *Id.*

operations in areas of traditional state functions,"—to be unworkable.[127]

The opinion concluded that instead of the Court having to wrestle with what are "integral" and "traditional" state governmental functions, the states' interests were protected by the national political process, which, in the end, is the Congress.[128] It reasoned that since Congress is composed of elected representatives from the states, states' interests were protected by their elected representatives.[129] In many ways *Garcia*, like *Darby* before it, expressed the philosophy that the Tenth Amendment was nothing more than a statement of political policy without the force of affirmative prohibition on congressional action.[130]

Three years later the Court, in *South Carolina v. Baker*,[131] reiterated that the Tenth Amendment "limits are structural, not substantive—States must find their protection from Congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[132]

Garcia's holding appeared to remove the federal judiciary from its role interpreting and enforcing the Tenth Amendment.[133] Insofar as the Tenth Amendment was concerned, *Garcia* repudiated the teaching of *Marbury v. Madison*[134] that the power to interpret the Constitution belongs to the Court and not Congress.[135] The majority in *Garcia*, again, temporarily relegated the Tenth Amendment to the status of mere window dressing.

3. *New York v. United States*

Seven years after *Garcia*, despite *Garcia*'s holding that Congress, and not the Court, should determine the extent of states' rights under the Tenth Amendment, the Court reached the merits of a Tenth

127. *Id.* at 547.
128. *Id.* at 552.
129. *Id.* at 550-54.
130. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
131. 485 U.S. 505 (1988).
132. *Id.* at 512 (reciting holding in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).
133. *Garcia*, 469 U.S. at 557 (Powell, J., dissenting).
134. 5 U.S. (1 Cranch) 49 (1803).
135. *See Garcia*, 469 U.S. at 546-47.

Amendment challenge brought by the State of New York against the federal government in *New York v. United States*.[136]

New York involved the Low-Level Radioactive Waste Policy Amendments Act of 1985,[137] which amended the 1980 Low-Level Radioactive Waste Policy Act.[138] The 1980 Act permitted states to enter into regional compacts for the disposal of low-level radioactive waste and to ultimately exclude nonmember states from using the compact states' disposal sites.[139] However, the 1980 Act did not provide for any penalties for states that refused or failed to enter into compacts.[140] The 1985 amendments provided the penalties.[141] Undoubtedly, the 1985 amendments were enacted to resolve a serious national problem—the lack of disposal sites for low-level radioactive waste.[142] Their objective was to force the states that had not developed disposal sites to take action in developing adequate disposal sites by either in-state or regional compacts.[143] Instead of creating a federal program of disposal sites for such waste under its Commerce Clause powers, Congress sought to compel the states to develop these sites.[144]

Despite the facial language of the statute commanding the states to take action, the Court construed the statute as a measure to spur the states into action by providing three incentives.[145]

The first incentive was monetary, and permitted states to impose a surcharge upon low-level radioactive waste received from other states with a portion of the surcharge sent to the secretary of energy.[146] This money went to a fund used for payments to states which achieved the federal statutory goals in developing such waste disposal sites.[147] The second incentive permitted the states to impose additional surcharges and to ultimately deny access to their

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136. 112 S. Ct. 2408 (1992).
137. Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. § 2021b-j (1988)).
138. Pub. L. No. 96-573, 94 Stat. 3347 (1980) (codified as amended at 42 U.S.C. § 2021b-j (1988)).
139. *Id.* § 4(a)(2), 94 Stat. at 3348.
140. *See* 94 Stat. at 3347-49.
141. 99 Stat. at 1853-54.
142. *New York*, 112 S. Ct. at 2415.
143. 99 Stat. at 1852-54.
144. For example, see the "take title" provision. *Id.* at 1850-51.
145. *New York*, 112 S. Ct. at 2425.
146. *Id.*
147. 99 Stat. at 1849.

sites to states that had not complied with the federal goals.[148] The third and final incentive or penalty required states that did not comply with the federal requirements to take title to all the waste generated in these states and become liable as the owners of the waste.[149]

In essence, the federal law, in furthering the important national purpose of having adequate disposal sites for low-level radioactive waste in the nation, classified states as either good or bad depending on their actions in developing waste disposal sites.[150] The good states are those that develop disposal sites, either in-state or by regional compact, in accordance with congressional goals.[151] The recalcitrant states are the bad states.[152] The good states receive their share of surcharge fees.[153] The excellent ones receive the extra reward of a share of the pot collected by the secretary of energy from the states' surcharges.[154] The waste generators from the bad states pay increasingly higher surcharges for use of the sites and, eventually, will be unable to get rid of their waste.[155] The ultimate punishment is that in the end the bad states become the owners of the waste, with all the attendant liabilities of owners and with no place to dispose the waste they now own.[156]

The third incentive, the "take title" provision, was struck down as a violation of the Tenth Amendment.[157] The Court emphasized that "the framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[158]

The Court then said:

> [T]he Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers. The same

148. *New York*, 112 S. Ct. at 2425.
149. *Id.*
150. *Id.* at 2416.
151. *Id.*
152. *Id.*
153. 99 Stat. at 1849.
154. *Id.* at 1849-50.
155. *Id.* at 1852-54.
156. *Id.* at 1849-50.
157. *New York*, 112 S. Ct. at 2427-28.
158. *Id.* at 2423.

> is true of the provision requiring the States to become liable for the generators' damages.[159]

The Court found that the alternative given to the states in order to avoid the take title penalty was to comply with the federally mandated goals of developing disposal sites.[160] This alternative violated the Tenth Amendment because Congress has no power to compel states to enact and enforce a federal regulatory program.[161]

> [T]he second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this type of instruction.[162]

Therefore, "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all."[163]

On the other hand, the Court upheld the overall congressional scheme and approved the first two incentives.[164] The Court sustained the first incentive by characterizing the states' collection of the surcharges simply as "an unexceptionable exercise of Congress's power to authorize the States to burden interstate commerce."[165] It explained that the federal share of the proceeds creating a federal fund to reward good states, was "no more than a federal tax on interstate commerce."[166]

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159. *Id.* at 2428.

160. *Id.*

161. *Id.*

162. *Id.*; *cf.* Testa v. Katt, 330 U.S. 386 (1947) (holding that a state court may not refuse to entertain federally created causes of action if it can entertain similar state claims). Relying on *Testa*, *FERC*, and *Garcia*, a recent two-to-one Ninth Circuit Court decision distinguished *New York* and rejected a Tenth Amendment challenge to the federal Brady Handgun Control Act, 18 U.S.C. § 922(s)(1) (1994) which required state and local enforcement authorities to conduct background checks on prospective gun purchases. Mack v. United States, Nos. 94-16940, 95-35037, 94-17002, 94-36193, 1995 WL 527616 (9th Cir. Sept. 8, 1995).

163. *New York*, 112 S. Ct. at 2428.

164. *Id.* at 2425-27.

165. *Id.* at 2425. The Court relied principally on Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), which sustained the McCarran Act permitting states to regulate the insurance business. However, the McCarran Act, while permitting states to regulate the insurance industry, does not offer federal incentives to actively encourage states to discriminate against sister states. Additionally, no authority was cited which supports the notion that in regulating commerce, Congress could purposefully discriminate against some states and not others.

166. *New York*, 112 S.Ct. at 2426.

The Court upheld the second incentive because it was also a permissible congressionally authorized burden on interstate commerce.[167] The Court reasoned that states had the choice of not complying with the federal goals, with the resulting penalty falling only on the waste generators of these states and not the states themselves.[168] Since Congress has the power to regulate private parties under the Commerce Clause, the second incentive was simply a conditional exercise of Congress's Commerce power.[169]

New York is remarkable not only because it resurrected the Tenth Amendment and returned it to the jurisdiction of the judicial branch, but also because the Court, without any dissent, approved Congress's power to encourage states to burden commerce by discriminating against sister states. This means that Congress can pit states against states and accomplish indirectly what it could not do directly—command states to carry out congressional policies.

The approval of the second incentive in *New York* is disturbing because it opens the door to congressionally approved state laws discriminating against sister states and their citizens.[170] For example, such a doctrine could permit states to exact a fee for, or deny, entry of automobiles, boats, or machinery from states that do not comply with federally approved state regulatory standards. Conceivably, Congress could permit a state to deny entry of automobiles from other states that do not have stringent emission tests for automobiles. Such a denial resurrects the specter of discriminatory laws such as the California law criminalizing the importation of indigent persons struck down by the Court in *Edwards v. California*.[171]

The Court may still clarify this doctrine, and draw a new line of what is impermissible. Nonetheless, it is unfortunate that this serious issue escaped any meaningful discussion by the Court in *New York*.

The exercise of this power, permitting Congress to pit states against sister states, carries with it inevitable risks of creating conflicts among the states. The Court has long recognized that adopting the

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167. *Id.* at 2427.

168. *Id.*

169. *Id.*

170. *See id.* ("As a simple regulation, this provision would be within the power of Congress to authorize the States to discriminate against interstate commerce.").

171. 314 U.S. 160 (1941). Although the decision was grounded on the Equal Protection Clause of the 14th Amendment, four of the Justices believed that the holding should be based on the Privileges and Immunities Clause of the 14th Amendment. *Id.* at 179-81, 183 (Douglas, J., concurring).

Constitution and entrusting the national government with the power to regulate commerce among the states was intended to avoid conflicts which existed previously when commerce was regulated indirectly by the several states.[172]

In *Baldwin v. Seelig*[173] Justice Cardozo said: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[174]

As Madison noted, " 'want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations.' "[175] He added that at that time, " 'each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' "[176] These events " 'threaten at once the peace and safety of the Union.' "[177]

Alexander Hamilton, in urging the adoption of the Constitution, said:

> The competitions of commerce would be another fruitful source of contention . . . . Each State, or separate confederacy, would pursue a system of commercial polity peculiar to itself. This would occasion distinctions, preferences and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to those causes of discontent, than they would naturally have, independent of this circumstance . . . . The infractions of these regulations on one side, the efforts to prevent and repel them on the

172. *See* H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 533-34 (1949); Welton v. Missouri, 91 U.S. 275, 280-81 (1875); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

173. 294 U.S. 511 (1935).

174. *Id.* at 523.

175. *H. P. Hood*, 336 U.S. at 534 (quoting 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION 547 (1937)).

176. *Id.* at 533 (quoting JOSEPH STORY, THE CONSTITUTION, §§ 259-260 (1833)).

177. *Id.* (quoting STORY, *supra* note 177, §§ 259-260).

> other, would naturally lead to outrages, and these to reprisals and wars.[178]

Giving Congress the power to encourage states to burden commerce results in the same undesirable consequences described by Hamilton over two centuries ago.

The Court's answer in *New York*, that the penalty denying access to disposal sites do not implicate the Tenth Amendment because they fall on only private parties, is unsatisfactory. Unlike other measures in the regulation of commerce, these penalties do not uniformly fall on private parties throughout the United States. They fall only on a class of private parties, generators of low-level radioactive waste in certain states—those states which chose to not comply with federally desired goals. As a practical matter, *New York* empowers Congress to create federal laws encouraging states to discriminate against citizens of other states based solely on their state citizenship and the inaction of their respective state governments.

In addition to approving Congress's Commerce Clause power to encourage states to burden commerce, *New York* appears to implicitly approve congressionally sanctioned state violation of the Privileges and Immunities Clause.[179] The Court's failure to address this important question is also unfortunate.[180]

Moreover, although Congress can penalize private parties whose conduct it deems undesirable under the Commerce Clause,[181] the generators of low-level radioactive waste are not engaged in conduct that Congress deems undesirable.[182] In fact, certain waste generators, such as medical facilities and hospitals using low-level radioactive

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178. THE FEDERALIST NO. 7 (Alexander Hamilton); *see also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 151 (1978) (Blackmun, J., concurring in part and dissenting in part) (asserting the Commerce Clause prevents a state from enacting legislation favoring in-state economic interests).

179. U.S. CONST. art. IV, § 2, cl. 1; *see* Toomer v. Witsell, 334 U.S. 385 (1948) (holding that South Carolina's discriminatory fee on nonresidents' shrimp boats violated the Privileges and Immunities Clause).

180. It is inconceivable that the Commerce Clause could provide Congress with the power to encourage states to violate the Privileges and Immunities Clause, which is a part of the same Constitution. Although Congress has broad powers under § 5 of the 14th Amendment, it is unlikely that encouraging the violation of the Privileges and Immunities Clause, which is a part of the 14th Amendment, could be considered the appropriate enforcement of the 14th Amendment.

181. For example, the use of child labor in the manufacture of goods. Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100, 116 (1941).

182. *New York*, 112 S. Ct. at 2414.

products to treat the sick, are obviously engaged in socially desirable conduct.

By finding the take title provision unconstitutional while retaining the rest of the Act, the Court altered Congress's objective of penalizing recalcitrant states and, instead, subjected the waste generators of these states to penalties. By placing the penalty on those who are otherwise blameless, and making them the ultimate object of the penalty, the Court changed the statutory scheme and substituted a scheme which, in the long run, could be just as injurious to the Union as the Tenth Amendment violation it found in the take title provision.

Instead of striking down the federal legislation in toto and thus forcing Congress to directly regulate the area and to develop federally created low-level radioactive waste disposal sites,[183] the *New York* Court approved the scheme of divide and conquer with the potential result of disunity and discord among the states. In doing so, the Court ignored the historical understanding that the Commerce Clause was enacted to preserve the Union by eliminating discrimination by states against one another. Against this background, the Constitution should be interpreted to strengthen the Union and not to weaken it. With the Civil War as a painful part of our history, the Court should have been mindful that the national government should not engage in the fostering of discord among the states.

4. *United States v. Lopez*

Three years after *New York v. United States*, the Court decided *United States v. Lopez*,[184] another five-to-four decision. *Lopez* was a criminal case concerning the violation of a federal statute which penalized the possession of a firearm in a congressionally defined school zone.[185] The Court concluded that the statute was invalid because its connection with commerce was insubstantial, stating that "the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[186]

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183. For example, in the Nuclear Waste Policy Act, Congress authorized the federal government to select sites for the disposal of high-level nuclear wastes. 42 U.S.C. § 10132(a) (1988 & Supp. V 1993). Congress has conditionally validated the selection of Yucca Mountain, Nevada, as the site. *See id.* § 10134(f)(3)(1988).

184. 115 S. Ct. 1624 (1995).

185. *Id.* at 1626.

186. *Id.* at 1634.

Acknowledging that its prior decisions could support this congressional exercise of power, the Court stated:

> The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local . . . . This we are unwilling to do.[187]

Although *Lopez* marks the first invalidation since the 1930s of a congressional Commerce Clause enactment that regulated private conduct,[188] the majority opinion simply reflected the need to curb the erosion of states' powers by halting decades of unchecked expansion of Congress's Commerce Clause powers. In this context the *Lopez* decision is a small step to preserve " 'a healthy balance of power between the States and the Federal Government [which] will reduce the risk of tyranny and abuse from either front.' "[189] On the other hand, the majority opinion reaffirmed Congress's power to regulate under the Commerce Clause in three areas: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those activities having a "substantial relation" to interstate commerce.[190]

The Court rejected the use of the word "affect" and reiterated that the regulated activity must "substantially affect" interstate commerce.[191] The Court concluded that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[192] The legislation in question, which did not contain any congressional findings as to the effect of the prohibited conduct on interstate commerce,[193] was invalid.

The change in standard from affect to substantially affect undoubtedly shifted the balance between state and federal power in favor of the states. However, that determination requires a case-by-case analysis as to what substantially affects interstate commerce. In

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187. *Id.* (citations omitted).
188. *Id.* at 1636-37.
189. *Id.* at 1626 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
190. *Id.* at 1629-30.
191. *Id.* at 1630.
192. *Id.*
193. *Id.* at 1630-31.

that process, congressional findings regarding the effect on interstate commerce are considered by the court.[194] Moreover, the legislation in *Lopez* concerned two areas: "criminal law enforcement [and] education where States historically have been sovereign."[195] In areas that are not historically or traditionally considered to be within the states' internal police power,[196] congressional legislation may be given greater sweep.

Lopez, therefore, signaled the Court's attempt to arrest the expansion of federal Commerce Clause power and to draw a line of defense protecting states' rights because of its concern that the expansion of federal Commerce Clause power would obscure the line "between what is truly national and what is truly local."[197]

More tellingly Justice Thomas's desire to revisit the jurisprudence of the past sixty years[198] did not draw any support from the other Justices who formed the majority. In referring to past cases affirming the congressional legislation, Justice Kennedy, joined by Justice O'Connor, stated, "These and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today."[199] In light of the narrow five-to-four majority in *Lopez*, and the strong policy of stare decisis, there is little likelihood that Justice Thomas's desire will be realized. However, the *Lopez* decision will undoubtedly call into question existing congressional legislation which is not conditioned on the receipt of federal funds and which directly regulate public safety, health, and welfare as to their "substantial relation" to commerce.[200]

III. THE TENTH AMENDMENT AND THE SPENDING CLAUSE

The federal government's ability to tax on a national level, and the attendant ability to spend for the general welfare, is a major

194. *Id.* at 1631.

195. *Id.* at 1632.

196. *See* Escanaba Co. v. Chicago, 107 U.S. 678, 683 (1883). The Court stated that "the states have full power to regulate within their limits matters of internal policy, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people." *Id.*

197. *Lopez*, 115 S. Ct. at 1634 (citations omitted).

198. *Id.* at 1642 (Thomas, J., concurring).

199. *Id.* at 1637 (Kennedy & O'Connor, JJ., concurring).

200. *E.g.*, Safe Drinking Water Act, 42 U.S.C. § 300f-j (1988 & Supp. V 1994) (regulating contaminant levels in drinking water); *cf.* Clean Water Act, 33 U.S.C. § 1251(a) (1988) (regulating the discharge of pollutants into the navigable waters of the United States).

source of federal power. In recent years, congressional use of its Spending Clause power, alone or together with its Commerce Clause power, has been the foremost factor in the expansion of federal powers and the attendant surrender of states' rights. This extensive use of the spending power, however, is of recent origin.

A. Early Understanding of the Spending Clause

In the early days of the Union, there was considerable debate over the meaning of the Spending Clause language "To . . . provide for the . . . general Welfare of the United States."[201] In 1817, two years before *McCulloch v. Maryland*[202] was decided, President James Madison vetoed the Internal Improvement Bill[203] on the ground that the building of roads and canals was not among the enumerated powers of Congress.[204]

More significantly, Madison also rejected the notion that the General Welfare Clause authorized such congressional legislation.[205] Madison believed that giving Congress such broad power, as the language appears to provide, would give Congress a general legislative power totally contrary to the specific enumeration of powers in the Constitution.[206] He also expressed the opinion that interpreting the Spending Clause to encompass only the expenditure of federal money with the states' consent would still violate the Constitution.[207] Madison said:

> A restriction of the power "to provide for the common defense and general welfare," to cases which are to be provided for by the expenditure of money, would still leave within the legislative power of Congress all the great and most important measures of Government money being the ordinary and necessary means of carrying them into execution . . . . If a general power to construct roads and canals, and to improve the navigation of water courses, with the train of powers incident thereto, be not possessed by Congress, the assent of the States in the mode provided in

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201. U.S. CONST. art. I, § 8, cl. 1 (the General Welfare Clause).
202. 17 U.S. (4 Wheat.) 316 (1819).
203. Also known as Calhoun's Bonus Bill, a bill providing federal funds for the building of roads and canals. 30 ANNALS OF CONGRESS 1059-62 (1817) (Madison Veto Message).
204. *See* U.S. CONST. art. I, § 8.
205. 30 ANNALS, *supra* note 203, at 1060-61 (Madison veto message).
206. *Id.*
207. *Id.*

> the bill cannot confer the power. The only cases in which the consent and cession of particular States can extend the power of Congress, are those specified and provided for in the Constitution.[208]

B. The Early Cases

The Supreme Court did not agree with Madison's narrow interpretation of the scope of the enumerated powers. In connection with the Commerce Clause power, *McCulloch v. Maryland*[209] firmly established the doctrine that Congress possesses powers not enumerated in the Constitution, including those Congress determines necessary and proper to carry out the enumerated powers.[210] A century later, in *Massachusetts v. Mellon*,[211] Massachusetts challenged a congressional enactment conditioning federal funding, for the protection of the health of mothers and infants, on the states' consent to federal provisions.[212] The Court, in dictum, said, "Probably, it would 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."[213] The Court went on to say that

> [i]n the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent. It is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.[214]

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208. *Id.;* 2 MESSAGES AND PAPERS OF THE PRESIDENTS 569-70 (1897).
209. 17 U.S. (4 Wheat.) 316 (1819).
210. *Id.* at 427.
211. 262 U.S. 447 (1923) (also known as *Frothingham v. Mellon*).
212. *Id.* at 479.
213. *Id.* at 480.
214. *Id.* at 483. This broad statement on the political question doctrine has not been invoked by the Court in subsequent Tenth Amendment challenges brought by the states against the United States. In Florida v. Mellon, 273 U.S. 12 (1927), the Court, without mentioning the political question doctrine, disapproved Florida's right to bring a *parens patriae* action, *id.* at 18, and denied Florida's petition for leave to file an original jurisdiction complaint against the Secretary of the Treasury, *id.* However, the Court's opinion in *Florida* clearly rejected the State's Tenth Amendment challenge against the federal inheritance tax. *Id.* at 17. In Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947), the Court rejected the federal government's argument that the

Mellon is notable for two reasons. First, just a year before, in a lawsuit involving a private party, the Court had invalidated the Child Labor Tax Act[215] in a decision based, in part, on the Tenth Amendment.[216] In *Mellon*, however, the Court refused to entertain the States' Tenth Amendment challenge.[217] Second, without the citation of any authority, the Court, in dictum, approved the now universal practice of providing federal funding with conditions attached.[218]

In *United States v. Butler*[219] the Court finally rejected Madison's view that the Spending Clause's general welfare language was limited to expenditures under the enumerated powers in the Constitution. The Court said, "It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[220]

Although concluding that the Spending Clause power is not limited by the enumerated powers in other parts of the Constitution, the *Butler* Court found another constitutional limitation to the Spending Clause power, the Tenth Amendment, and struck down the Agricultural Adjustment Act.[221] This Act imposed a processing tax on cotton and used the revenue to compensate farmers in acreage reduction agreements with the government.[222] The Court said:

> From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. No power

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constitutionality of the Hatch Act, 7 U.S.C. § 361 (repealed 1955), is a political question by pointing out the statutory provision providing for judicial review. *Oklahoma*, 330 U.S. at 134-35.

215. Child Labor Tax Act, ch. 18, §§ 1200-07, 40 Stat. 1138 (1919) (*repealed and superceded by* ch. 136, § 1400, 42 Stat. 321 (1921)).

216. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (Child Labor Tax Case); *see also* WILLIAM ROSS, A MUTED FURY: POPULIST, PROGRESSIVES AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937, at 187-90 (1988).

217. *Mellon*, 262 U.S. at 480.

218. *See id.* at 460.

219. 297 U.S. 1 (1936).

220. *Id.* at 66.

221. *Id.* at 68.

222. Agricultural Adjustment Act of 1933, ch. 25, §§ 1-46, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-624 (1994)).

> is given to regulate agricultural production and therefore legislation by Congress for that purpose is forbidden.[223]

The Court, therefore, narrowed the scope of the Spending Clause by broadly interpreting the Tenth Amendment.[224]

Butler also rejected the notion that payment with consent of the payee is necessarily voluntary:

> The Government asserts that whatever might be said against the validity of the plan, if compulsory, it is constitutionally sound because the end is accomplished by voluntary co-operation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin.[225]

The Court then explained, "but if the plan were one for purely voluntary co-operation it would stand no better so far as federal power is concerned. At best it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states."[226]

C. Steward Machinery Co. v. Davis *(The Unemployment Compensation Case)*

The *Butler* Court's interpretation of the Tenth Amendment did not last long.[227] The next year, in *Steward Machine Co. v. Davis*

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223. *Butler*, 297 U.S. at 68.

224. The result reached in *Butler* validated national spending programs for the general welfare, such as public works programs, as long as states' interests, such as the regulation of businesses, were not involved. *Id.* at 70.

225. *Id.* at 71.

226. *Id.* at 72.

227. The *Butler* decision precipitated the controversial "court-packing" plan submitted by President Roosevelt to Congress on February 7, 1937. *See* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347; *see also supra* note 42.

(The Unemployment Compensation Case),[228] the Court removed *Butler*'s Tenth Amendment limitation on Congress's Spending Clause powers and upheld the constitutionality of the Social Security Act's provisions assessing a payroll tax on employers and granting federal funds to the states to assist them in the administration of their unemployment insurance laws.[229] The Court reasoned that the unemployment crisis, affecting millions of people, justified congressional legislation:

> The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.[230]

The Court also rejected the argument that federal law coerced the states into adopting unemployment compensation law in accordance with federal requirements by pointing out that it was voluntary and that the states can, at their pleasure, repeal such state laws.[231] The Court, however, recognized that in some circumstances, the financial inducement offered by Congress might be so coercive so that "pressure turns into compulsion."[232]

On the same day, the Court upheld the old-age benefit provisions of the Social Security Act in *Helvering v. Davis*.[233] In answer to the contention that paying old-age benefits is not authorized by the General Welfare Clause, Justice Cardozo's majority opinion stated, "Whether wisdom or unwisdom resides in the scheme of benefits . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."[234]

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228. 301 U.S. 548 (1937).
229. *Id.* at 585.
230. *Id.* at 586-87.
231. *Id.* at 592-93. *But see* Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41 (1986) (holding that Congress can prohibit states from withdrawing from the Social Security system).
232. *Steward*, 301 U.S. at 590.
233. 301 U.S. 619, 645-46 (1937).
234. *Id.* at 644.

D. Validity and Limitations on Congressional Conditions Attached to Federal Funding Schemes

With the power to tax and spend federal funds for the general welfare, Congress often attaches conditions to federal funding schemes to ensure that federal funds are spent in accordance with its wishes. When states or their political subdivisions are the recipients of the federal funds, these conditions often conflict with the states' right to determine public policy.

In *Oklahoma v. United States Civil Service Commission*,[235] the Court sustained the Hatch Act provision requiring state officers and employees who were paid with federal funds to refrain from partisan political activities.[236] Although the United States Civil Service Commission's sanction ordered the removal of a Highway Commission member, it also required the withholding of highway funds to Oklahoma in "an amount equal to two years' compensation" of the officer if the offending officer was not removed.[237] The opinion noted that Oklahoma did not suspend the officer:

> As nothing in this record shows any attempt to suspend Mr. Paris from his duties as a member of the State Highway Commission, we are not called upon to deal with the assertion of Oklahoma that a state officer may be suspended by a federal court if § 12 is valid. There is an adequate separability clause. No penalty was imposed upon the state .... Oklahoma chose not to remove him. We do not see any violation of the state's sovereignty in the hearing or order. Oklahoma adopted the "simple expedient" of not yielding to what she urges is federal coercion .... The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.[238]

Oklahoma entrenched the principle that Congress may attach conditions to federal funds as long as the states have the choice of refusing the federal funds.

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235. 330 U.S. 127 (1947).
236. *Id.* at 142-43.
237. *Id.* at 129-30 n.1 (citation omitted).
238. *Id.* at 143-44.

However, congressional power to attach conditions to the receipt of federal funds by the states is not limitless. In *South Dakota v. Dole*[239] the Court upheld a congressional enactment requiring each state to adopt a twenty-one-year-old drinking age, or suffer the loss of five percent of its receipt of federal highway funds.[240] The Court made clear that "[t]he Spending power is of course not unlimited,"[241] and articulated four restrictions on the exercise of Congress's Spending Clause power:[242]

(1) The exercise of the spending power must be in pursuit of the general welfare in accordance with the Constitution. Due deference is to be given to congressional judgment in this regard.[243]

(2) If Congress wants to attach conditions to the grant of federal funds, it must do so unambiguously so that the states may "exercise their choice knowingly, cognizant of the consequences of their participation."[244]

(3) Conditions placed upon federal grants may be illegitimate if "they are unrelated 'to the federal interest in particular national projects or programs.' "[245]

(4) "Other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[246]

Since the decisions in *Steward Machine Co. v. Davis*[247] and *Helvering v. Davis*,[248] the spending of federal money in areas deemed by Congress to be in the interest of the nation's general welfare has grown to cover virtually every aspect of state and local

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239. 483 U.S. 203 (1987).

240. *Id.* at 212.

241. *Id.* at 207 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981)).

242. *Id.* at 207-08.

243. *Id.* (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 65 (1936)). The level of deference was left unanswered. However, the Court questioned whether general welfare is a judicially enforceable restriction at all. *Id.* at 207 n.2.

244. *Id.* at 207 (citing *Pennhurst*, 451 U.S. at 17).

245. *Id.* at 207-08 (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

246. *Id.* at 208 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976); King v. Smith, 392 U.S. 309, 333 n.34 (1968)). However, the majority in *Dole* rejected the argument that the Twenty-first Amendment is an independent bar to the federal condition, noting that the result desired by Congress—the 21-year-old drinking age—is not unconstitutional. *Id.* at 209-12.

247. 301 U.S. 548 (1937).

248. 301 U.S. 619 (1937).

government operations.[249] They range from street and highway construction and repair,[250] health,[251] welfare,[252] housing,[253] education,[254] recreation,[255] and law enforcement,[256] to sanitation and waste disposal.[257] Typically, federal payments made to the states and local governments contain federally mandated conditions with the loss or reduction of federal funds as sanctions for noncompliance.[258]

In virtually all federal funding schemes, states and their political subdivisions may choose not to apply for the funds. However, as the Court in *Butler v. United States*[259] recognized, a choice not to apply for the federal funds results in that state losing its share of the money, placing the state at an economic disadvantage vis-a-vis the other states.[260] For example, a state's decision to forego federal funds for welfare payments would result in the need to either raise the lost dollars from new taxes, or reduce levels of benefits to its welfare recipients. Either alternative would result in serious economic consequences to the state and its citizens. Additionally, the state's taxpayers, who contribute to the federal funds, would receive less in

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249. *See infra* notes 251-58.

250. *See, e.g.*, 23 U.S.C. §§ 101-158 (1988 & Supp. V 1993).

251. *See, e.g.*, 42 U.S.C. § 300u-2(b) (1988) (providing grants to states and other entities for health information and health promotion).

252. *See, e.g., id.* §§ 601-602 (providing aid to families with dependent children).

253. *See, e.g.*, 42 U.S.C.A. 1437-1440 (West 1994 & Supp. 1995) (assisting states in funding low-income housing).

254. *See, e.g.*, Improving America's Schools Act of 1994, 20 U.S.C.A. § 6301-8962 (West Supp. 1995). Although education is not an enumerated power in the Constitution and has always been considered to be a state sovereign function, Lopez v. United States, 115 S. Ct. 1624, 1632 (1995), recent congressional legislation in the education area does not appear to rely on the Spending Clause but broadly pronounced goals, standards, and mandates. *See, e.g.*, Goals 2000: Educate America Act, 20 U.S.C. §§ 5801-6084 (West Supp. 1995), particularly §§ 5821, 5842, 5881. *But see* 20 U.S.C. § 8904 (providing that no state is required to participate in any program under Goals 2000).

255. *See, e.g.*, 16 U.S.C. § 1261 (1994) (authorizing National Recreation Trails Fund).

256. *See, e.g.*, 42 U.S.C. §§ 3793, 3796dd (1988 & Supp. V 1993) (providing for grants to states for public safety and community policing).

257. *See, e.g.*, 42 U.S.C. §§ 3101-3108 (1988) (providing federal assistance for construction of water and sewage facilities).

258. *See, e.g.*, 20 U.S.C.A § 6232 (West Supp. 1993). On the other hand, 20 U.S.C.A. § 7709, particularly subsections (a), (d)(2), and (e), appears to prohibit state conduct outright without the penalty of the loss or reduction of federal funds. *See also* 20 U.S.C.A. § 8892. *But see* 20 U.S.C.A. § 8902 (prohibiting federal mandates, direction, and control of state educational policies and state and local resource allocations). An outright prohibition would conflict with *South Dakota v. Dole*, 483 U.S. 203 (1987).

259. United States v. Butler, 297 U.S. 1 (1936).

260. *Id.* at 70-71.

return for their contributions. Accordingly, although there is a theoretical choice, as a practical matter it is often illusory.

Moreover, as more federal funds are available for state and local programs, greater dependency on such funds results. The choice to reject the funds then becomes more and more infeasible. In this context the statement in *Butler* that "the power to confer or withhold unlimited benefits is the power to coerce or destroy"[261] is accurate. The conditions attached to such funds are, in a true sense, coercive because the states that have become dependent on federal funding for their governmental operations cannot survive without them.

On the other hand, accepting Justice Cardozo's view in *Steward* that the national government has a legitimate role in solving the nation's social and economic ills,[262] Congress's only means of ensuring the proper use of federal funds is to attach federal conditions to the provision of funds to the states. This is particularly necessary in areas where Congress does not have the power to directly regulate the state.[263] The question then becomes how reasonable are the conditions, and what limitation does the Tenth Amendment place on this congressional power.

Despite the pervasive federal power, states' interests are protected, to a large extent, by the restrictions articulated in *Dole*.[264] Applying the *Dole* test, a states' Tenth Amendment challenge in a Spending Clause case will most likely depend on the question of whether the federal conditions are rationally related to legitimate federal interests in the particular federal funding program. Defining a legitimate federal interest, in these situations, awaits future Supreme Court decisions. It is possible that the Court may conclude that outside the sphere of Congress's enumerated powers, federal interest extends only to the proper accounting of the funds. Therefore, conditions which usurp the states' role to make policy choices may be unconstitutional as violative of the Tenth Amendment.[265] Addition-

261. *Id.* at 71.

262. Steward Machine Co. v. Davis, 301 U.S. 548, 587-91 (1937).

263. If Congress has the power to directly regulate the area, for example, under its Commerce Clause power, Congress could elect to permit states to regulate that area under federally mandated conditions. Such a scheme has long been held to be a proper exercise of Congress's Commerce Clause powers. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

264. 483 U.S. 203 (1987).

265. Although line-drawing in this area is virtually impossible, the following hypothetical may be illustrative. In providing funds to rebuild public school buildings destroyed by the flooding of the Mississippi River, it is proper to condition federal funding

ally, federal conditions may violate other constitutional provisions concerning the relationship of the national government to the states.[266]

IV. THE TENTH AMENDMENT AND THE CIVIL WAR AMENDMENTS

The Civil War and the subsequent adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments dramatically changed the balance of power between the national and state governments. These constitutional amendments gave Congress sweeping power to protect the rights of all persons within the United States. This expansion of federal power resulted in the corresponding diminution of states' power.

A. Early Cases

Shortly after the adoption of the Thirteenth Amendment in 1865,[267] Congress enacted the Civil Rights Act of 1866.[268] Section 1 of the Act broadly mandates that "all persons born in the United States and not subject to any foreign power . . . are declared to be citizens of the United States" and entitled them to have the same rights as those enjoyed by white citizens.[269] Section 2 prescribes

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on the building of the new schools above the flood plain. Such a condition is within Congress's Property Clause power to insure that federal money is not wasted by subsequent flooding and its Commerce Clause power to regulate a navigable river. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940). It is also unquestioned that the expenditure of the funds must comply with civil rights laws and be properly accounted for. On the other hand, it would be improper for Congress to condition the granting of federal money on the states' acquiescence to federally desired curriculum requirements since education is neither a constitutionally enumerated area of federal power nor is it a federal constitutional right. United States v. Lopez, 115 S. Ct. 1624, 1633 (1995); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

266. *See* U.S. CONST. art. IV, § 4 (directing the United States to "guarantee to every State in this Union a Republican Form of Government"); New York v. United States, 112 S. Ct. 2408, 2433 (1992) (declining to reach the Guarantee Clause challenge as to the take title provision but rejecting the challenges to the other two provisions).

267. The Thirteenth Amendment provides:

> Section 1. Neither Slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

268. Ch. 31, §§ 1-10, 14 Stat. 27 (1866).

269. *Id.* § 1, 14 Stat. at 27.

criminal penalties against persons who under color of any law, statute, ordinance, regulation, or custom, deprive any inhabitant of any state or territory of rights secured by the Act.[270] Since the Thirteenth Amendment does not, on its face, refer to the states, doubts arose as to the constitutionality of the Act as applied to the states.[271]

The Fourteenth Amendment was then adopted in 1868. Section 1 of the Fourteenth Amendment provides that

> "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[272]

In 1870 Congress reenacted The Civil Rights Act.[273] Congress enacted additional civil rights legislation in 1875.[274] In *Ex parte Virginia*[275] the Court upheld the criminal prosecution of a Virginia state court judge for the violation of a provision of the Civil Rights Act of 1875.[276] The Court rejected Virginia's argument that the selection of jurors and the administration of law belong to the State and cannot be dictated by Congress. The Court stated:

> Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power .... It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted.

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270. *Id.* § 2, 14 Stat. at 27.
271. *See* Hurd v. Hodge, 334 U.S. 24, 32-33 (1948).
272. U.S. CONST. amend XIV, § 1.
273. Ch. 114, §§ 1-23, 16 Stat. 140 (1870).
274. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336 (current version at 18 U.S.C. § 243 (1988)).
275. 100 U.S. 339 (1880).
276. *Id.* at 349 (upholding prosecution under ch. 114, §§ 3-5, 18 Stat. at 336).

> Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.[277]

Three years later in the *Civil Rights Cases*,[278] the Court struck down the public accommodation provisions of the Civil Rights Act of 1875.[279] Although the Court recognized the full sweep of the Civil War Amendment, the Court held that Section 1 of the Fourteenth Amendment did not reach private action.[280] The Court also found that the Thirteenth Amendment, which abolished slavery and involuntary servitude and gave Congress the power to enforce its provisions, did not concern "mere discrimination[] on account of race or color [which] were not . . . badges of slavery."[281] The Court reasoned that the Civil War Amendments merely freed the slaves and gave them the same status as free blacks in nonslave states.[282] Since blacks were socially discriminated against in nonslave states, the Thirteenth Amendment did not apply to social discriminations.[283] In reaching its conclusions the Court rejected the notion that the Civil War Amendments gave Congress general power to legislate in all matters touching on civil rights, stating,

> why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United

277. *Id.* at 346.
278. 109 U.S. 3 (1883).
279. *Id.* at 25-26.
280. *Id.* at 24-25.
281. *Id.* at 25.
282. *Id.*
283. *Id.*

> States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.[284]

The *Civil Rights Cases*, and the decision of *Plessy v. Ferguson*[285] thirteen years later, ended any advancement in civil rights and their enforcement lay dormant for nearly half a century. In arriving at its "separate but equal" doctrine, *Plessy* relied on the rationale of the *Civil Rights Cases* that the Civil War Amendments did not confer any greater rights upon freed blacks than free blacks enjoyed in nonslave states.[286]

The holding in the *Civil Rights Cases* has not been formally overruled despite criticism of its narrow interpretation of the Civil War Amendments.[287] Despite the limitations created by the *Civil Rights Cases*, and the Court's reluctance to apply the Fourteenth Amendment to nonracial discriminations,[288] the Court's expansion of Congress's Commerce Clause powers materially facilitated the enactment of new civil rights legislation.

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284. *Id.* at 14-15. In his dissent in the *Civil Rights Cases*, Justice Harlan reminded the Court that in Hall v. De Cuir, 95 U.S. 485, 488-89 (1878), the Court, in striking down Louisiana's public accommodation law, had opined that Congress had the exclusive right under its Commerce Clause powers to legislate in this area. *Civil Rights Cases*, 109 U.S. at 61 (Harlan, J., dissenting).

285. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

286. *Plessy*, 163 U.S. at 544. In support the Court cited Roberts v. City of Boston, 5 Mass. (5 Cush.) 198 (1849) which approved separate schools for colored children.

287. In the "notorious *Civil Right Cases*. . . the Court strangled Congress' efforts to use its power to promote racial equality." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 391 (1978) (Marshall, J., dissenting) (citations omitted).

288. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (upholding the creation of a state monopoly by distinguishing between the privileges and immunities of the citizens of the United States and those of the citizens of the states, concluding that the Civil War Amendments did not remove the states' power to regulate the personal and property rights of their citizens); *see also* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (holding that women citizens cannot vote, which lead to the adoption of the Nineteenth Amendment).

B. Civil Rights Enforcement and the Commerce Clause

In the first major civil rights legislation since the Reconstruction days, Congress enacted the Civil Rights Act of 1964[289] pursuant to both its Fourteenth Amendment and Commerce Clause powers.

In *Heart of Atlanta Motel v. United States*[290] the Court sustained Title II of the Civil Rights Act of 1964, which prohibited private racial discrimination in public accommodations.[291] In distinguishing the *Civil Rights Cases*, the Court said:

> Unlike Title II [the provision banning discrimination] of the present legislation, the 1875 Act broadly proscribed discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved.[292]

In addition, the Court pointed out that although the *Civil Rights Cases* observed that "no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments (Thirteenth, Fourteenth and Fifteenth [Amendments])," the government did not rely on the Commerce Clause power and, accordingly, the Court in the *Civil Rights Cases* excluded the Commerce Clause as a possible source of power.[293]

In *Katzenbach v. McClung*[294] the companion case to *Heart of Atlanta*, the Court upheld the 1964 Civil Rights Act's ban on racial

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289. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of titles 28 and 42 U.S.C.). A modest civil rights act which included the creation of a Commission on Civil Rights was enacted in 1957. Pub. L. No. 83-315, 71 Stat. 634 (codified at 28 U.S.C. §§ 1343, 1861; 42 U.S.C. §§ 1971, 1975a-e, 1995 (1988 & Supp. V 1988)).

290. 379 U.S. 241 (1964).

291. *Id.* at 257-62.

292. *Id.* at 250-51.

293. *Id.* at 251-52. The Court's reasoning was strained. In the late nineteenth century, the Court's Commerce Clause jurisprudence narrowly construed congressional power in the regulation of commerce. For example, in United States v. E. C. Knight Co., 156 U.S. 1 (1895), the Court refused to apply the Sherman Antitrust Act to the establishment of a near monopoly in the sugar industry. Justice Harlan, who dissented in the *Civil Rights Cases*, also dissented in *E. C. Knight*. *Id.* at 18 (Harlan, J., dissenting).

294. 379 U.S. 294 (1964).

discrimination by restaurants, citing, in support, the broad range of Commerce Clause powers recognized in *United States v. Darby* and *Wickard v. Filburn*.[295]

The *Civil Rights Cases*' narrow reading of the Thirteenth Amendment was implicitly repudiated by the Supreme Court in *Jones v. Mayer Co.*[296] The *Jones* Court upheld the validity of Section 1 of the Civil Rights Act of 1866,[297] which granted to all citizens the right to own and lease real property.[298] In discussing the *Civil Rights Cases*, the Court said that, "whatever the present validity of the position taken by the majority on that issue—[this] question [is] rendered largely academic by Title II of the Civil Rights Act of 1964."[299]

Following the discussion of the *Civil Rights Cases*, the *Jones* Court overruled the restrictive holding in *Hodges v. United States*,[300] that only conduct which actually enslaved a person could be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment.[301]

C. *Modern Jurisprudence*

Recent precedents emphasize that the Tenth Amendment places no restriction on congressional power "to enforce the Civil War Amendments by 'appropriate legislation.'"[302] In *Fitzpatrick v. Bitzer*[303] the Court explained that, since the Fourteenth Amendment was adopted with the specific purpose of limiting state autonomy, constitutional principles of federalism do not restrict congressional power to invade state autonomy when Congress legislates under Section 5 of the Fourteenth Amendment.[304] The Court explicitly rejected the Tenth Amendment argument by holding that congressional power under Section 5 of the Fourteenth Amendment is

295. *Id.* at 302-03 (citing Wickard v. Filburn, 317 U.S. 111, 125 (1942); United States v. Darby, 312 U.S. 100, 120-21 (1941)).
296. 392 U.S. 409 (1968).
297. Ch. 31, §§ 1-10, 14 Stat. 27 (1866).
298. *Jones*, 392 U.S. at 443.
299. *Id.* at 441 n.78.
300. 203 U.S. 1 (1906).
301. *Jones*, 392 U.S. at 443 n.78.
302. City of Rome v. United States, 446 U.S. 156, 179 (1980) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).
303. 427 U.S. 445 (1976).
304. *Id.* at 453-56.

broad.[305] Moreover, in *Katzenbach v. Morgan*,[306] the Court held that Congress's enforcement power extends to the prohibition of state action otherwise found constitutional by the Supreme Court.[307] In determining whether the congressional legislation was appropriate under Congress's grant of power by the Constitution, the Court employed the Commerce Clause test first announced in *McCulloch v. Maryland*: "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 consistent with the letter and spirit of the constitution, are constitutional."[308]

By using an analogy to the application of the Necessary and Proper Clause in the Commerce Clause jurisprudence, the *Morgan* Court gave broad powers to Congress to enact laws under Section 5 of the Fourteenth Amendment.[309] *Morgan* upheld Section 4(e) of the Voting Rights Act of 1965 banning the use of a literacy test in qualifying voters,[310] even though the Court previously upheld the constitutionality of another literacy test.[311] The Court used the same reasoning in determining the validity of congressional legislation enacted under Section 2 of the Fifteenth Amendment in *South Carolina v. Katzenbach*.[312]

The Tenth Amendment, however, "was not . . . repealed when the Fourteenth Amendment was ratified; it was merely limited."[313] Congressional legislation under the Civil War Amendments, regulating the election of state officials, was struck down by the Court in *Oregon v. Mitchell*[314] as violative of the Tenth Amendment.[315] Justice Black, in his opinion,[316] after concluding that Congress has the power to set the qualification for federal elections, said:

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305. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67 (1980).
306. 384 U.S. 641 (1966).
307. *Id.* at 648.
308. *Id.* at 650 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).
309. *Id.* at 650-51.
310. *Id.* at 646-47.
311. *Id.* at 649 (citing Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959)).
312. 383 U.S. 301, 308 (1966).
313. EEOC v. Wyoming, 460 U.S. 226, 259 (1983) (Burger, C.J., dissenting).
314. 400 U.S. 112 (1970).
315. *Id.* at 124-25.
316. Justice Black's holding on the invalidity of the 18-year-old voting age requirement for state elections was joined by the Chief Justice and three other Justices, constituting a majority of the Court. *Id.* at 117.

> On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections .... No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. ... And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.[317]

Mitchell invalidated the eighteen-year-old voting age eligibility requirement of the Voting Rights Act of 1965 as to state and local elections.[318] One year later, the Twenty-sixth Amendment was adopted giving eighteen-year-olds the right to vote.[319]

V. CONCLUSION

The United States Constitution was drafted by people of diverse beliefs. Its text, particularly the General Welfare language in the Spending Clause, is susceptible to different interpretations. The Tenth Amendment which was thought to ensure the protection of the states' rights, is itself dependent on the interpretation of the original Constitution because it refers to "[t]he powers not delegated to the United States by the Constitution."[320]

Since the determination as to the powers delegated by the Constitution to the United States is in the hands of the Supreme Court, the Court has charted the path of the Tenth Amendment. With the change in social and political landscape over the past two

317. *Mitchell*, 400 U.S. at 124-26.
318. *Id.* at 123-26.
319. U.S. CONST. amend. XXVI.
320. *Id.* amend. X.

centuries, and the change of personalities on the Court, the path of the Tenth Amendment has been unsteady and inconsistent.

The Commerce Clause of the Constitution, as it has been interpreted by the Supreme Court over the years, unquestionably established a strong national government. Today, congressional legislation under the Commerce Clause power extends to virtually every activity which affects commerce.

Under its Spending Clause power to provide for the general welfare, with the grant of large sums of federal funds, Congress has mandated states' compliance with its conditions in areas far removed from its enumerated powers. Although congressional legislation under this power was initially upheld because of the social and economic emergencies occasioned by the Great Depression, the Court's deference to congressional wisdom has resulted in pervasive congressional regulation, through its Spending Clause powers, of areas traditionally thought to be within the exclusive domain of state and local governments.

The persecution of black citizens in the post-Reconstruction period necessitated the enactment of vigorous national legislation, which consequently infringed upon areas of states' rights.

The decline of states' rights and the corresponding growth of national power is not only due to Supreme Court decisions, but is also influenced by the attitudinal changes of the people caused by changes in the social, economic, and political circumstances of the nation.

Over the years, demographic factors have reshaped the nation. The industrialization of the nation and the mobility of the population blurred and dulled the identity of state citizenship, making state citizenship less important.[321]

Among the many changes, two cataclysmic events left their indelible marks on the nation and the Constitution. The first was the Civil War. Although the constitutionality of the Civil War was not decided until it was over,[322] the Civil War removed from the states

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321. In the case of long-time overseas citizens, except for voting purposes, attachment to a state is usually meaningless since only the national government can provide these citizens with the benefits and protection of citizenship. *See* Slaughter-House Cases, 83 U.S. 36 (1872). "[A]ll rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States and not citizenship of a state." *Id.* at 79-80.

322. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) (stating that the union is indissoluble because the Articles of Confederation declared it to be perpetual and "the Constitution was ordained 'to form a more perfect Union' ").

the ultimate right of sovereignty—the choice to leave the Union and become independent. The second event was the Great Depression, which found the states incapable of solving the enormous social and economic chaos it created.

Understandably, the states' inability to cope with the major social and economic upheavals was the natural consequence of the adoption of the Constitution, which removed certain basic attributes of sovereignty from the states. For example, with freedom of travel, a fundamental constitutional right of every citizen,[323] and with the federal government's plenary power over the immigration of aliens,[324] states are powerless to prevent the influx of people from other states and foreign nations. Also, the Commerce Clause and the prohibition against states laying imposts or duties severely restricted the states' ability to regulate trade and commerce from within and without the United States.[325] Accordingly, their facilities and resources often become overburdened. In such situations the affected states and their people must look to the national government, with its vast resources, to solve these problems.[326]

Although the evolution towards a strong national government was inevitable,[327] and the stronger national government has brought prosperity and security to the people, the expansion of congressional power, particularly in the spending area, has brought upon the nation and its people the threat of a serious fiscal crisis and a large national debt.[328]

The people created the United States "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the

323. Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969).

324. *See* Mathews v. Diaz, 426 U.S. 67 (1976); Hines v. Davidowitz, 312 U.S. 52 (1941).

325. U.S. CONST. art. I, § 10, cl. 2.

326. The benefit of having a union of states is evident in times of great natural disasters such as earthquakes, hurricanes, and floods. The use of federal disaster relief funds under congressional Spending Clause power demonstrates the "sink or swim together" nature of the union expounded by Justice Cardozo in Baldwin v. G.A.F. Seelig, Inc., 499 U.S. 511, 523 (1935).

327. The Supremacy Clause gives the federal government "a decided advantage in th[e] delicate balance the Constitution strikes between State and Federal power." New York v. United States, 112 S. Ct. 2408, 2419 (1992) (internal quotation marks and citation omitted).

328. The national debt is close to five trillion dollars. *See* 31 U.S.C. § 3101 (Supp. V 1994).

Blessings of Liberty to ourselves and our Posterity."[329] The debate over the Tenth Amendment brings into focus the fundamental question concerning the future direction of the nation. Will the continued growth of national power and corresponding erosion of states' rights further these objectives? In deciding the validity of congressional legislation against a Tenth Amendment challenge, this question undoubtedly will weigh heavily on the minds of the Justices.

329. U.S. CONST. pmbl.