

IMPLEMENTING FEDERAL ENERGY POLICY AT THE STATE AND LOCAL LEVELS: “EVERY POWER REQUISITE”†

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I. INTRODUCTION

During the last decade Congress has taken steps toward the formulation of a comprehensive federal energy program by enacting several important pieces of energy legislation. That legislation emphasizes an implementation scheme which relies heavily upon the cooperation of state governments and their political subdivisions. The willingness of the state and local governments to engage in any concerted action to further national energy policy is by no means certain and the effectiveness of the federal program may, therefore, depend upon the extent to which states may be compelled to participate. While the commerce power of Congress might once have seemed broad enough to encompass virtually any mandate to implement federal legislation, recent decisions of the Supreme Court have found certain limits on that power. The Supreme Court has held that congressional commerce clause powers may be subject to external constraints imposed by the nature of our federal system of state-federal relations and the reserved powers of the states under the Tenth Amendment of the Constitution.¹ Those Supreme Court deci-

† A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the completed execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the people.

THE FEDERALIST No. 31, at 195 (A. Hamilton) (J. Cooke ed. 1961).

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1. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981); *Hodel v. State of Indiana*, 452 U.S. 314 (1981).

sions have at least called into question the federal government's power to require state implementation of its programs.

This article will undertake an analysis of traditional and current views of federalism with a view toward identifying the limits on the federal government's power to compel, directly or indirectly, state implementation of federal energy programs. The constitutional limits on the federal government's implementation of its policies will then be considered in the context of existing energy legislation. This examination will determine first, whether energy legislation is subject to such limits; and, second, if so, which forms of implementation meet the constitutional objections and thus, may be used to effect federal energy policy at the state level.

II. NATIONAL ENERGY POLICY

Energy as a public policy issue and federal legislation enacted as a response to public concern are, of course, outgrowths of the "Energy Crisis" in which the United States found itself in the mid-1970's. Declining domestic oil production and continued economic growth led this country to increased dependence on imported oil and left the United States vulnerable to the 1973-1974 Arab Oil Embargo.² Prior to this national emergency, the use and development of energy resources were predominantly areas of state concern.³ There were exceptions which traditionally fell under federal regulation, for example, the development of hydroelectric power, the interstate transmission of electricity, and the development and use of nuclear power.⁴ Nevertheless, licensing and construction of energy facilities and economic planning for development and use of energy resources remained for the most part within the decentralized control of the various states.⁵

After the 1973 Energy Crisis, Congress sought to centralize certain decision making functions concerning energy resource use and development. Although the initial federal legislative response to the crisis sought to deal with oil production and allocation,⁶ Congress

2. See generally ENERGY FUTURE: REPORT OF THE ENERGY PROJECT AT HARVARD BUSINESS SCHOOL (1979) [hereinafter cited as ENERGY FUTURE]; Roberts & Stewart, *Energy and the Environment*, in SETTING NATIONAL PRIORITIES 411 (H. Owens & C. Schultz, eds. 1976).

3. Fischer, *Allocating Decisionmaking in the Field of Energy Resource Development*, 22 ARIZ. L. REV. 785, 786 (1980).

4. *Id.* at 818-19, nn. 205-206.

5. *Id.* at 815-20.

6. See, e.g., Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760(h) (1976 & Supp. IV 1980); Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761-786 (1976 &

later sought to develop a multi-faceted energy plan which would decrease the need for foreign oil, promote the production of traditional and alternative domestic energy resources, and encourage conservation of finite resources. Federal efforts in this area culminated during President Carter's Administration, when Congress passed several pieces of legislation encompassing a broad range of energy issues. Federal energy legislation passed during this period includes the Department of Energy Organization Act,⁷ the National Energy Act,⁸ the Crude Oil Windfall Profit Tax Act,⁹ and the Energy Security Act.¹⁰ These statutes form the core of the nation's energy plan,¹¹ and a brief examination of them will reveal the scope of that plan.

A. The Department of Energy

Prior to establishment of the Department of Energy as a cabinet-level agency, federal energy responsibilities were handled by more than forty federal agencies and offices.¹² As part of the National

Supp. IV 1980); Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 6201-6422 (1976 & Supp. IV 1980); and Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §§ 751-760(h) (1976 & Supp. IV 1980).

7. Pub. L. No. 95-91, Stat. 565 (1977) (codified in scattered sections of 3, 5, 7, 12, 15, 42 U.S.C.).

8. The National Energy Act is actually a package consisting of five separate acts. These are: Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. II 1978); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8301-8483 (Supp. II 1978); Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42, 43 U.S.C.); National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978) (codified in scattered sections of 12, 15, 42 U.S.C.); Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (codified in scattered sections of 26 U.S.C.).

9. Pub. L. No. 96-223, 94 Stat. 229 (1980) (to be codified in scattered sections of 7, 15, 26, 31, 42, 43 U.S.C.).

10. Pub. L. No. 96-294, 94 Stat. 611 (1980) (to be codified in scattered sections of 2, 5, 42, 50 U.S.C.).

11. One portion of the Carter National Energy Plan which was not passed by Congress was the Priority Energy Project Act (PEPA), S. 1308, 96th Cong. 2d Sess. 17 (1980), which would have created an Energy Mobilization Board (EMB) to oversee an expedited process for federal, state and local decisionmaking, permitting and licensing regarding certain designated energy development projects. Seen by many as the cornerstone of Carter's energy policy, it was rejected by a coalition of congressmen consisting of environmentalists, who feared its power to override certain environmental regulations; states' righters, who were concerned with the EMB's power to bypass state and local laws; and those who feared the Board might become yet another bureaucratic layer impeding the new energy projects. For discussion of PEPA, the EMB, and anticipated problems with that legislation, see Fischer, *supra* note 3. See also 124 CONG. REC. (1981) proposal by Senator Jackson, S. 668, 97th Cong., 1st Sess. (1981) also entitled "The Priority Energy Project Act."

12. For a listing of the federal agencies and their energy responsibilities at the time of the Arab oil embargo, see FEDERAL ENERGY REGULATION STUDY TEAM, FEDERAL ENERGY REGULA-

Energy Plan, President Carter proposed a single agency, the Department of Energy, with responsibility for both existing energy programs and planning. Congress quickly approved that proposal through legislation, the Department of Energy Organizational Act.¹³ The Department of Energy replaced the principal energy planning agencies: The Federal Energy Administration;¹⁴ the Federal Power Commission;¹⁵ and the Energy Research and Development Administration.¹⁶ In addition, the Department of Energy assumed energy responsibilities previously exercised by other agencies and cabinet departments under a broad mandate: to implement a coordinated national energy policy, to create and implement a comprehensive energy conservation scheme, to develop alternative renewable energy resources, and to assure an adequate and reliable supply of energy at the lowest reasonable cost.¹⁷

B. The National Energy Act

The Department of Energy's substantive mandate, the National Energy Act, was not enacted until almost a year after the department's organizational act.¹⁸ As introduced, the Act was a single comprehensive bill, and it passed the House of Representatives in that form. The Senate, after major revisions, divided the Act into five separate bills and it was finally enacted in that form. Together, these laws, which are briefly set out in the following sections, reflect a determination to create a coherent long-term federal energy policy.

TION: AN ORGANIZATIONAL STUDY Apr. 21, 1974 (FERC).

13. Pub. L. No. 95-91 Stat. 565 (1977) (codified in scattered sections of 3, 5, 7, 12, 15, 42 U.S.C.).

14. Established by the Federal Administration Act of 1974, 15 U.S.C. §§ 761-786 (1976 & Supp. IV 1980).

15. Established in 1930 and granted broad jurisdiction under both the Natural Gas Act, 15 U.S.C. §§ 717-771(w) (1976 & Supp. IV 1980) and the Federal Power Act, 16 U.S.C. §§ 791-828(c) (1976 & Supp. IV 1980).

16. Established by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (1976 & Supp. IV 1980).

17. Department of Energy Organization Act, Pub. L. No. 95-91, §§ 101, 102, 91 Stat. 567. Although DOE was given responsibility for most energy functions, Congress left some important tasks to other agencies. Agencies which continue to have significant energy responsibilities include the Departments of Interior, Transportation, and Agriculture, the Environmental Protection Agency and the Nuclear Regulatory Commission. For a comprehensive discussion of DOE, see Graine, *Recent Federal Energy Legislation: Toward a National Energy Policy At Last?*, 12 ENVTL L. 29, 32-41 (1981).

18. There is reason to believe that some of the organizational difficulties which DOE has encountered may be attributable to the delay in enactment of the National Energy Act. See Graine, *supra* note 17 at 39.

1. The Natural Gas Policy Act of 1978¹⁹

As a part of a national energy plan, the Carter administration proposed the gradual decontrol of domestic natural gas prices in order to allow those prices to rise to a level competitive with foreign sources of natural gas.²⁰ The Natural Gas Policy Act, as finally enacted, sets up a complicated pricing scheme whereby the price ceiling for natural gas is tied to various escalator clauses corresponding to a number of different categories of natural gas.²¹ New natural gas—gas produced from new reservoirs after April 20, 1977—may be sold at the highest price level and, as of January 1, 1985, will not be subject to price controls.²² As of January 1, 1985, existing gas previously sold only intrastate will also be decontrolled, but existing interstate gas will remain subject to price controls.²³ In its original form the National Energy Act also proposed a similar pricing scheme for oil,²⁴ but the provision was omitted entirely from the final legislation passed by the Congress.

2. The Powerplant and Industrial Fuel Use Act of 1978²⁵

The stated purposes of the Powerplant and Industrial Fuel Use Act are: (1) to reduce the importation of petroleum and increase the nation's capability to use indigenous energy resources; (2) to conserve natural gas and petroleum; and (3) to encourage the greater use of coal and other alternate fuels as a primary energy source. All these objectives are directed toward attaining the ultimate goal of reducing "the vulnerability of the United States to energy supply interruptions."²⁶ The Act attempts to further these goals by prohibiting the use of oil or natural gas in new electric generating stations²⁷ and industrial installations²⁸ unless the Secretary of Energy grants an exemption.²⁹ The Act also prohibits the use of oil and natural gas by existing plants and installations after January 1,

19. 15 U.S.C. §§ 3301-3432 (Supp. II 1978).

20. *Id.* §§ 3331-3333.

21. *Id.* §§ 3311-3320.

22. *Id.* §§ 3313, 3331.

23. *Id.* § 3319.

24. The National Energy Plan, 13 WEEKLY COMP. OF PRES. DOC. 620, 621 (May 2, 1977).

25. 42 U.S.C. §§ 8301-8483 (Supp. II 1978).

26. *Id.* § 8301(a).

27. *Id.* § 8311.

28. *Id.* § 8312.

29. *Id.* § 8321(a).

1990, subject to specified exemptions,³⁰ and limits the use of natural gas in outdoor decorative lighting, again subject to specified exemptions.³¹ All such exemptions must be granted on a case-by-case basis.³²

Subchapter VI of the Act provides for financial assistance from the federal government to an area within a state which has experienced rapid growth due to coal or uranium production development.³³ The governor of the state must advise the federal government when such increased development has caused an increased need for housing or public services for which the state and local governments serving the area lack the financial resources.³⁴ This federal assistance may take the form of planning grants³⁵ or land acquisition and development grants.³⁶ In addition to such assistance to areas impacted by increased coal or uranium production, Subchapter VI authorizes the Secretary of Energy to make a loan to the owner or operator of any existing electric powerplant which is converting to coal or other alternative fuel designated under the Act. The purpose of such a loan is to finance the purchase and installation of any air pollution control equipment required as a result of the conversion.³⁷

3. The Public Utility Regulatory Policies Act of 1978³⁸

The Public Utility Regulatory Policies Act (PURPA) principally seeks to encourage conservation of energy supplied by electric and natural gas utilities.³⁹ Congress determined that conservation of oil and natural gas by electricity utilities is essential to the success of any effort to decrease dependence on foreign oil, avoid shortages, and control consumer costs. In making this determination, Congress took into account that the generation of electricity consumed more than 25 percent of all energy resources used in the United States,⁴⁰ and that electric utilities relied heavily upon the use of oil and natural gas.⁴¹

30. *Id.* §§ 8341, 8342, 8352.

31. *Id.* § 8372(a), (c).

32. *Id.* § 8321(a).

33. *Id.* § 8401(a).

34. *Id.*

35. *Id.* § 8401(b).

36. *Id.* § 8401(c).

37. *Id.* § 8402(a).

38. Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42, 43 U.S.C.).

39. *Id.* §§ 101, 301.

40. S. REP. NO. 442, 95th Cong., 2d Sess. 7 (1977).

41. *Id.* at 9.

Titles I and III of PURPA, which relate to the regulation of electricity and gas utilities respectively, share three goals: (1) to encourage conservation of energy supplied by utilities; (2) to encourage the efficient use of facilities and resources by utilities; and (3) to encourage equitable rates to consumers.⁴² In order to achieve these goals, Titles I and III direct state utility regulatory commissions and nonregulated utilities to "consider" certain specified federal standards and to make a determination whether to implement each standard.⁴³ These federal standards include five different approaches to structuring rates which can be used by states. Under the PURPA scheme, energy rates can be set: (1) by reflecting in those rates the costs of providing electric service to each class of consumers; (2) by eliminating declining block rates; (3) by adopting time-of-day rates; (4) by using seasonal and interruptible rates; and (5) by using load management techniques.⁴⁴ PURPA also requires each state regulatory authority and nonregulated utility to consider adoption of a set of standards governing the terms and conditions of electricity service.⁴⁵ For example, those standards would prohibit master-metering in new buildings and result in promulgation of procedural requirements relating to termination of service.⁴⁶

In addition to the requirement that states take into account these federal standards, PURPA's Titles I and III also prescribe certain procedures to be followed by the state regulatory authority when considering the proposed standards. These procedures require that each federal standard be examined at a public hearing after notice and that a written statement be made available to the public regarding any reasons why a standard is not adopted by the state.⁴⁷ The Secretary of Energy has the right to intervene and participate in any rate-related proceeding considering the Title I or III standards.⁴⁸

42. Pub. L. No. 95-617, §§ 101 & 301, 92 Stat. 3120 & 3149, 16 U.S.C. § 2611 (1976 & Supp. IV 1980), 15 U.S.C. § 3201 (1976 & Supp. IV 1980).

43. *Id.* §§ 111, 303, 304, 306, 92 Stat. 3121, 3150-52.

44. *Id.* § 111, 92 Stat. 3121. Declining block rates represent a traditional ratemaking approach which sets the highest unit rate for basic electrical consumption, with declining rates for each block of additional consumption. Time-of-day and seasonal rates operate to reduce peak load by imposing higher rates during periods of highest demand. Interruptible rates charge less for service which the utility can stop during peak demand periods. Load management techniques are methods used to reduce the demand for electricity at certain peak times.

45. *Id.* § 113, 16 U.S.C. § 2623 & § 303, 15 U.S.C. § 3203.

46. *Id.*

47. *Id.* § 111, 92 Stat. 3121.

48. *Id.* §§ 121 & 305, 92 Stat. 3128 & 3152.

PURPA also sets forth certain reporting requirements⁴⁹ for state regulatory authorities and nonregulated utilities.

Despite the extent and detail of the above mentioned federal standards, the Act makes it clear that there is no requirement that a state regulatory authority or nonregulated utility adopt any or all of the federal standards. As expressed in the Act, "[n]othing . . . prohibits any state regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable state law."⁵⁰

Section 210 of PURPA's Title II seeks to encourage the further development of cogeneration and small power production facilities,⁵¹ with the aim of reducing the demand for traditional fossil fuels. To accomplish that aim section 210(a) directs the Federal Energy Regulatory Commission (FERC),⁵² in consultation with state regulatory authorities, to "promulgate such rules as it determines necessary to encourage cogeneration and small power production."⁵³ Section 210(f) requires each state regulatory authority and nonregulated utility to implement FERC rules.⁵⁴ FERC is also given authority to prescribe rules exempting cogeneration and small power facilities from certain state and federal laws which govern electricity utilities.⁵⁵

As the foregoing discussion suggests, the PURPA regulatory scheme which Congress enacted is arguably the most intrusive of the recent energy proposals in terms of requiring state compliance and implementation and was subjected to a constitutional challenge almost immediately.⁵⁶

49. *Id.* 16 U.S.C. § 2626(a); 15 U.S.C. § 3209(a).

50. *Id.* § 111, 92 Stat. 3121.

51. 92 Stat. 3144, 16 U.S.C. § 824a-3. A cogeneration facility produces both electric energy and some other useful form of energy, such as steam. A small power production facility is one which has a production capacity of no more than 8 megawatts and uses biomass, waste or renewable resources (*e.g.*, wind or solar) to produce electricity. *Id.*

52. FERC is an independent regulatory commission within the Department of Energy, which has assumed many of the functions of the Federal Power Commission, under the Federal Power Act and Natural Gas Act, as well as assuming new functions under the National Energy Conservation Act, 42 U.S.C. §§ 7171-7177 (1982).

53. Pub. L. No. 95-617, § 210(a), 16 U.S.C. § 824a-3(a).

54. *Id.* § 210(f), 16 U.S.C. § 824a-3(f).

55. *Id.* § 210(e), 16 U.S.C. § 824a-3(e).

56. *FERC v. Mississippi*, 456 U.S. 742 (1982). See *infra* text and notes at notes 201-208.

4. The National Energy Conservation Policy Act⁵⁷

The National Energy Conservation Policy Act reflects the view that a long range energy policy in this country must include measures which seek to reduce the rate of growth of demand for nonrenewable energy resources.⁵⁸ Significant incentives are provided in the Act for conservation measures undertaken pursuant to residential energy conservation programs⁵⁹ and energy conservation programs for schools, hospitals, local government buildings, and public care institutions.⁶⁰ In addition, the Act provides for civil penalties to be imposed by the Secretary of Transportation on the automobile industry for failure to meet fuel economy standards⁶¹ and requires the Secretary of Energy to establish energy efficiency standards for certain products.⁶²

The scheme by which these conservation measures are to be implemented is essentially one of federal-state cooperation. The states are required to submit an energy conservation plan for the approval of the Secretary of Energy.⁶³ Such a plan must comply with standards promulgated by the Department of Energy.⁶⁴ Failure to promulgate a plan within the time-limits set by the National Energy Conservation Policy Act or failure of the state to "adequately" implement an approved plan will result in promulgation of a plan for that state by the Secretary of Energy.⁶⁵

5. The Energy Tax Act of 1978⁶⁶

The Energy Tax Act (ETA) also is designed to encourage the production and conservation of energy, but the ETA proposes to do so through a scheme of tax incentives and penalties. The only significant tax penalty to survive the Senate is the Gas Guzzler Tax, which imposes a tax on the sale by a manufacturer of automobiles which fall short of acceptable fuel economy standards.⁶⁷ The tax is limited in its

57. Pub. L. No. 95-619, 92 Stat. 3206 (1978) (codified in scattered sections of 12, 15, 23, 42 U.S.C.).

58. See, e.g., ENERGY FUTURE, *supra* note 2.

59. National Energy Conservation Policy Act, Pub. L. No. 95-619, §§ 210-255, 92 Stat. 3209-3238 (1978).

60. *Id.* §§ 301-312, 92 Stat. 3238-3254.

61. *Id.* § 402, 92 Stat. 3255.

62. *Id.* § 422, 92 Stat. 3259.

63. *Id.* § 212, 92 Stat. 3211.

64. *Id.*

65. *Id.*

66. Pub. L. No. 95-618, 92 Stat. 3175 (codified in scattered sections of 23, 26 U.S.C.).

67. *Id.* § 201, 92 Stat. 3180.

application to automobiles weighing less than 6,000 pounds and those manufactured primarily for use on public streets and highways.⁶⁸ Expressly exempted are trucks, ambulances, and police vehicles.⁶⁹

In addition to that tax, the ETA provides for various tax credits: residential energy credits for insulating or other energy conservation measures;⁷⁰ investment credit for purchase of vans for "car pooling"⁷¹ and; business investment credits for conversion from or conservation of oil and gas.⁷²

C. The Crude Oil Windfall Profit Tax Act of 1980⁷³

After passage of the National Energy Act in a form much altered from that originally proposed, the Carter administration approached Congress in 1979 and 1980 with a series of new energy proposals. One legislative proposal was for a gradual decontrol of domestic crude oil,⁷⁴ accompanied by a tax on the resulting oil producer profits, called the Windfall Profits Tax. The Windfall Profits Tax was crucial to the administration's energy plan in an economic sense because it would fund certain other energy programs and assistance for low income consumers adversely affected by higher fuel costs.⁷⁵ As finally enacted, the Windfall Profits Tax Act provides for a lower overall tax than that sought by the administration,⁷⁶ but it provides for a broader scheme of tax credits for the development of renewable energy resources.⁷⁷ The Act also provides for block grants to states to assist low-income families with heating and cooling costs.⁷⁸

D. The Energy Security Act⁷⁹

The last of the major energy bills passed during the Carter administration was the Energy Security Act, which, as proposed, dealt

68. *Id.* § 201(b)(1)(A), 92 Stat. 3181.

69. *Id.* § 201(b)(1)(C), 92 Stat. 3181.

70. *Id.* § 101, 92 Stat. 3175.

71. *Id.* § 241, 92 Stat. 3192.

72. *Id.* § 301, 92 Stat. 3194.

73. Pub. L. No. 96-223, 94 Stat. 229 (to be codified in scattered sections of 7, 15, 26, 31, 42, 43 U.S.C.).

74. *Id.*

75. *Id.* § 102(b)(1), 94 Stat. 229, 255.

76. *Id.* § 202, 94 Stat. 258.

77. *Id.*

78. *Id.* §§ 301-313, 94 Stat. 288-99.

79. Pub. L. No. 96-294, 94 Stat. 611 (1980) (to be codified in scattered sections of 2, 5, 42, 50 U.S.C.).

only with the development of synthetic fuels, but as enacted is much broader. The focus of the Energy Security Act is on the development of alternative types of fuel. In addition to synthetic fuels,⁸⁰ the Act provides for loan guarantees,⁸¹ price guarantees⁸² and government purchase agreements⁸³ in order to promote biomass and alcohol fuels,⁸⁴ solar energy,⁸⁵ and geothermal energy.⁸⁶ Significantly, the Act also requires the establishment of a research program on the acid rain problem as it relates to the increased use of coal and coal derivatives.⁸⁷

E. Summary of Federal Energy Legislation

By enacting the various energy acts outlined above, the Congress made use of several different forms of implementing federal policies, including the use of conditional grants to induce cooperation, various directives to state regulatory bodies, and the full or partial preemption of the states' authority to regulate certain activities. Some of these statutes, particularly PURPA, raise constitutional questions concerning the possible limits of the federal government's power to compel state compliance with its energy plan.

III. THE FEDERALISM DILEMMA

As the discussion of recent federal energy legislation illustrates, the federal government has attempted to formulate an energy policy which is national in scope. Nevertheless, the strong federal interest and action in establishing this comprehensive energy policy "does not . . . operate in virgin territory."⁸⁸ Energy development and use have traditionally been state and local concerns and federal energy regulation often is in conflict with state and local interests.⁸⁹ Given these conflicts, the question remains whether or under what circumstances the federal government has the power to mandate state compliance with an implementation of national energy legislation.

80. *Id.* §§ 115, 116, 191, 94 Stat. 611, 636-38, 681.

81. *Id.* §§ 131, 133, 94 Stat. 654-58, 660-61.

82. *Id.* §§ 131, 134, 94 Stat. 654-58, 661.

83. *Id.* §§ 301-304 (to be codified at 42 U.S.C. §§ 7361-7364).

84. *Id.* § 211(a), 94 Stat. 686.

85. *Id.* § 505, 94 Stat. 722.

86. *Id.* § 611, 94 Stat. 763.

87. *Id.* §§ 701-706, 94 Stat. 770-74.

88. Fischer, *supra* note 3 at 785.

89. *See id.* (discussing competing state and federal interests in the energy area and federal attempts to accommodate those competing interests).

A. The Constitutional Basis for Energy Legislation

The enactment of federal energy laws finds constitutional support both in the Commerce Clause⁹⁰ and the Spending Clause⁹¹ of the United States Constitution. Since the late 1930's the Supreme Court has interpreted congressional power under the Commerce Clause very broadly. The Court has displayed great deference to congressional findings that regulated activities affect interstate commerce, provided there is a rational basis for such findings and the means of regulation "chosen by [Congress] is reasonably adapted to the end permitted by the Constitution."⁹² By 1941, the Supreme Court determined that the Tenth Amendment imposed no limitation on the exercise by Congress of its plenary commerce clause powers. The Court characterized the Tenth Amendment's reservation of State powers as "but a truism that all is retained which has not been surrendered."⁹³

The Supreme Court's position on the Tenth Amendment remained consistent over the next thirty years and, as late as 1968, the Court expressed its position in firm and clear language. In *Maryland v. Wirtz*,⁹⁴ the Supreme Court upheld amendments to the Fair Labor Standards Act which had extended the coverage of the Act to employees of state hospitals, institutions, and schools.⁹⁵ In so doing, the Court stated that the federal government, "when acting within delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."⁹⁶

The spending power of the Congress is primarily manifested in energy legislation in the form of grants to the states.⁹⁷ That power, the Supreme Court has held, is not limited by the other constitutional grants of power in Article I, section 8, but rather is limited only by

90. U.S. CONST. art. I, § 8, cl. 3.

91. U.S. CONST. art. I § 8, cl. 1.

92. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

93. *United States v. Darby*, 312 U.S. 100, 124 (1941). The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amendment X.

94. 392 U.S. 182 (1968), *overruled by* *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976).

95. 392 U.S. at 193-99.

96. *Id.* at 195.

97. U.S. CONST. art. I, § 8, cl. 1.

the requirement that it shall be exercised to provide for the general welfare of the United States.⁹⁸ In a 1937 case, *Steward Machine Co. v. Davis*,⁹⁹ the Court indicated that the Tenth Amendment might pose a limit on federal spending in the situation in which a state was "coerced" rather than "induced" to accept federal funds.¹⁰⁰ The Court has not, however, invalidated a federal spending program on that basis.¹⁰¹

B. The Doctrine of National League of Cities v. Usery

A major shift in the Court's view of state sovereignty vis a vis federal regulation came in its 1976 decision, *National League of Cities v. Usery*.¹⁰² That decision overruled *Maryland v. Wirtz*¹⁰³ and held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which extended both minimum wage and maximum hour provisions to the employees of states and their political subdivisions.¹⁰⁴ Justice Rehnquist's plurality opinion focused not upon the rationality of Congress's exercise of its commerce clause powers, but instead upon the sovereignty of the States, "which may not be impaired by Congress."¹⁰⁵ The Court characterized the issue before it as "whether these determinations [as to employee wages and hours] are 'functions essential to separate and independent existence,' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them."¹⁰⁶

The factor which distinguished *National League of Cities* from other commerce clause cases in Justice Rehnquist's view, was that these challenged federal regulations were imposed upon the "States as States" rather than directed against private individuals "who are necessarily subject to the dual sovereignty of federal and state governments."¹⁰⁷ As to the latter, the Tenth Amendment is no barrier to federal regulation. As to the former, it may so serve. The

98. See *United States v. Butler*, 297 U.S. 1 (1936).

99. 301 U.S. 548 (1937).

100. *Id.* at 585-90.

101. But see *Edelman v. Jordan*, 415 U.S. 651 (1974) in which the Court found that the Eleventh Amendment may bar federal court actions by private parties seeking expenditure of state funds, even where the state violated federal regulations under a federal spending program.

102. 426 U.S. 833 (1976).

103. *Id.* at 855.

104. *Id.* at 852.

105. *Id.* at 845.

106. *Id.*

107. *Id.*

Court declined, however, to reach the question whether this newly established Tenth Amendment limitation extended beyond the Commerce Clause to congressional action under powers granted by the Spending Clause of the Constitution.¹⁰⁸

The plurality opinion held that "insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress of Art. 1, § 8, cl. 3."¹⁰⁹ Neither the term "integral operations" nor "areas of traditional governmental functions" was defined by the Court except insofar as the power to determine wages and hours was characterized as an "undoubted attribute of state sovereignty,"¹¹⁰ and "fire prevention, police protection, sanitation, public health, and parks and recreation" were said to be integral governmental functions.¹¹¹

Justice Blackmun, the fifth member of the *National League of Cities* majority, filed a separate concurrence in which he indicated that he joined the majority with the understanding that "it adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."¹¹²

The Supreme Court's decision in *National League of Cities* was subjected to extensive analysis and much criticism.¹¹³ Both courts and commentators sought to formulate workable standards within which federal regulations might be considered, and to define the outer limits of the *National League of Cities* doctrine.¹¹⁴

108. *Id.* at 852 n.17 ("We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, Cl. 1, or § 5 of the Fourteenth Amendment").

109. *Id.*

110. *Id.* at 845.

111. *Id.* at 851.

112. *Id.* at 856 (Blackmun, J., concurring).

113. See, e.g., Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Beard & Ellington, *A Commerce Power Seesaw: Balancing N.L.C.*, 11 GA. L. REV. 35 (1977); Ripple & Kenyan, *State Sovereignty—A Polished But Slippery Crown*, 54 NOTRE DAME LAW 745 (1979); Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871 (1976); Comment, *Redefining The National League of Cities State Sovereignty Doctrine*, 129 U. PENN. L. REV. 1460 (1981).

114. *Id.* See, e.g., *United Transportation Union v. Long Island R. Co.*, 634 F.2d 19 (2d Cir. 1980) *rev'd*, 455 U.S. 678 (1982); *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979); *Peel v. Florida Dept. of Transp.*, 600 F.2d 1070 (5th Cir. 1979); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978).

C. The Surface Mining Act Cases

Five years after *National League of Cities*, the Supreme Court again took up the central issues posed by that case.¹¹⁵ Once again, the Court's opinion left many questions unanswered. In *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*,¹¹⁶ and *Hodel v. State of Indiana*,¹¹⁷ challenges were made to the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act)¹¹⁸ on the ground that the "steep slope"¹¹⁹ and "prime farmland"¹²⁰ provisions violated the Tenth Amendment's limitation on congressional commerce power. The district court in each case, relying upon *National League of Cities*, concluded that the Surface Mining Act contravened the Tenth Amendment because it interfered with the States' "traditional governmental function" of regulating land use.¹²¹

In the *Virginia Surface Mining* case, the invalidated provisions of the Act, sections 1265(d) and (e), prescribe performance standards for surface coal mining on steep slopes.¹²² These standards require steep slope operators to: (1) reclaim the mined area by completely covering the highwall and returning the site to its appropriate original contour; (2) refrain from dumping spoiled material on the downslope below the mining cut; and (3) refrain from disturbing land above the highwall unless permitted to do so by the regulatory authority. While these provisions are directed to private operators, the district court decision found that the provisions impermissibly constrict the state's ability to make "essential decisions" through "forced relinquishment of state control of land use planning; through loss of state control of its economy; and through economic harm from expenditure of state funds to implement the Act and from

115. That is not to say that the Court had not had occasion to refer to or cite *National League of Cities* with approval in the interim. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Rose v. Mitchell*, 443 U.S. 545 (1979); *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

116. 452 U.S. 264 (1981), *rev'g* *Virginia Surface Mining & Reclamation Ass'n v. Andrus*, 483 F. Supp. 425 (W.D. Va. 1980).

117. 452 U.S. 289 (1981), *rev'g* *Indiana v. Andrus*, 501 F. Supp. 452 (S.D. Ind. 1980). These cases, *Virginia Surface Mining* and *Hodel v. Indiana*, will be referred to collectively as the *Surface Mining Act Cases*.

118. 30 U.S.C. §§ 1201-1328 (1976 & Supp. IV 1980).

119. 30 U.S.C. § 1265(d).

120. *Id.*

121. 483 F. Supp. 425 (W.D. Va. 1980); 501 F. Supp. 452 (S.D. Ind. 1980).

122. 30 U.S.C. § 1265(d)(4) defines a "steep slope" as "any slope above 20 degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or state." *Id.*

destruction of the taxing power of certain counties, cities and towns."¹²³

Upon direct appeal in both cases from the district court pursuant to 28 U.S.C. § 1252, the Supreme Court reversed, reaffirming its position in *National League of Cities* that the Tenth Amendment only serves as an impediment to congressional action which seeks to regulate the "States as States."¹²⁴ The Supreme Court stated:

Congressional Power over areas of private endeavor, even when its exercise may preempt express state-law determinations contrary to the result that has commended itself to the collective wisdom of Congress has been held to be limited only by the requirement that 'the means chosen by (Congress) must be reasonably adapted to the end permitted by the Constitution'.¹²⁵

The Court held that in order to be successful, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. "First, there must be a showing that the challenged statute regulates the States as States. . . . Second, the federal regulation must address matters that are indisputably 'attributes of sovereignty' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' "¹²⁶ The Tenth Amendment challenge to the Surface Mining Act failed, the Court held, because the first of these requirements was not met.¹²⁷

The Court applied the same three-step analysis in both *Surface Mining Act* cases. Unfortunately, the second and third requirements set out in *Virginia Surface Mining* case and followed in the *Indiana* case were not explained or discussed by the Court. What constitutes a matter which is an "attribute of state sovereignty" or an impairment of the State's ability "to structure integral operations" in such areas was not made clear by the Court. The Court assumed, without reaching the question, that "land use regulation is an 'integral governmental function'."¹²⁸

The first requirement, the one upon which the Court's decision turned, was dealt with at length. The Court noted that, under the

123. 483 F. Supp. at 435. Although the Act allows a state to elect to have its own regulatory program, the district court held that this was not a real choice since the state program must comply with federally prescribed standards. *Id.*

124. 452 U.S. 264, 290 (1981).

125. *Id.* at 286.

126. *Id.* at 288.

127. *Id.*

128. *Id.* at 293 n.34.

Surface Mining Act, a state is not compelled to enforce the Act's provisions, nor is it required to expend any state funds or "to participate in the federal regulatory program in any manner whatsoever."¹²⁹ The Act as formulated permits a state to participate by submitting a proposed permanent program that complies with the Act, but if a state does not wish to do so, the full regulatory burden is upon the federal government.¹³⁰ The Court observed that this statutory scheme was not one whereby the States are compelled to enact laws or adopt regulations to enforce a federal program. "The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."¹³¹ Thus, the Court found the challenged provisions of the Act to be a permissible use of the legislative commerce power.¹³²

The Court rejected the invitation of the States to look beyond the activities actually regulated by the Act to "its conceivable effects on the States' freedom to make decisions in areas of integral governmental functions." The Court's rejection was based on the view that the Tenth Amendment imposes no limit on congressional power to preempt or displace state regulation of private activities affecting interstate commerce.¹³³ Since "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining," the Court found there was no reason "why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role."¹³⁴

Interestingly, Justice Marshall's majority opinion indicates that even if the three stated requirements are satisfied, a Tenth Amendment challenge to federal commerce power legislation might fail. "There are situations in which the nature of the federal interest advanced may be such that it justified State submission."¹³⁵ Thus, in dicta at least, the Court in *Virginia Surface Mining* adopts the balancing approach of Justice Blackmun's *National League of Cities* concurrence: does a state autonomy interest exist according to the three express requirements; and if so, is there some "demonstrably

129. *Id.* at 288.

130. *See* 30 U.S.C. § 1201 *et seq.* (1976 & Supp. IV 1980).

131. 452 U.S. at 289.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 288 n.29.

greater" federal interest which supports overriding the state interest?

Supreme Court cases after the *Surface Mining Act* cases continue to apply the analysis of those cases.¹³⁶ Different prongs of the three-pronged test have been analyzed and applied by the Court, but the Court has not found it necessary to resort to the balancing approach in order to uphold challenged federal legislation.¹³⁷

IV. IMPLEMENTATION OF NATIONAL ENERGY POLICIES

Rules relating to the discovery, sale and use of energy, perhaps more than other areas of federal concern, are "caught in a quagmire of competing sovereignties—national, state and local. . . ."¹³⁸ Although Congress has in the past been sensitive to state and local interests in formulating energy legislation,¹³⁹ complete deference to those interests may not be possible. In any event, the constitutional validity of any federal energy legislation, existing or proposed, which is to be implemented at the state or local level, must be tested against the standards established in the recent Supreme Court cases.¹⁴⁰

One logical approach to assessing the validity of such legislation is through use of a two-tiered analysis. First, the nature of the state or local function which the federal law seeks to regulate must be ascertained, that is, is it an "integral" or "traditional" governmental function. This threshold consideration may prove to be the key consideration by eliminating the need to proceed further with the analysis, since presumably *National League of Cities* has no impact upon federal regulation of nonintegral or nontraditional state functions. Assuming an "integral" or "traditional" governmental function is regulated, the second tier of the analysis would require a consideration of the form which the regulation takes, in order to establish whether the federal regulation operates upon the "States as States" and addresses matters that are indisputably attributes of state sovereignty.

A. *The Nature of the State Function*

After *National League of Cities* and before the Supreme Court's recent decision in *United Transportation Union v. Long Island Rail*

136. See, e.g., *EEOC v. Wyoming*, ____ U.S. ____, 51 U.S.L.W. 4219 (March 1, 1983).

137. *Id.*

138. Fischer, *supra* note 3 at 785.

139. For a full discussion of that sensitivity and how it has manifested itself, see Fischer, *supra* note 3.

140. See *supra* text and notes at notes 95-135.

Road Company,¹⁴¹ lower courts struggled to formulate a workable definition for those protected state functions which *National League of Cities* had designated as integral or traditional.¹⁴² Unfortunately, after *Long Island R.R.*, determining whether an activity is an integral government function continues to present difficulties.

1. *Long Island R.R. Co.*: The Nature of the State Function

The Long Island Rail Road (the Railroad) is a passenger and freight line which, after 132 years of private ownership, was acquired by New York State in 1966. After state acquisition, the Railroad continued to conduct collective bargaining pursuant to the procedures of the federal Railway Labor Act.¹⁴³ In February 1980, in the midst of a labor dispute, the state converted the Railroad from a private stock corporation to a public benefit corporation. The State of New York then filed suit in state court seeking to enjoin the impending strike by invoking the Taylor Law,¹⁴⁴ a state law prohibiting strikes by public employees. Before the State Court acted, however, the United States District Court for the Eastern District of New York heard the Union's suit for declaratory relief and held the Railroad, as an interstate carrier, subject to the Railway Labor Act and not the Taylor Law.¹⁴⁵

On appeal, the Court of Appeals for the Second Circuit reversed,¹⁴⁶ holding that the state's operation of the Railroad was an integral government function within the meaning of *National League of Cities* and that the federal law displaced "essential governmental decisions" involving that function.¹⁴⁷ The Second Circuit's opinion is an example of a federal court's attempt to bring a reasoned approach to this determination. Emphasizing the passenger service aspect of the Railroad, the court relied heavily upon the shared views of Professors Tribe and Michelman that the sovereignty interests which *National League of Cities* sought to protect should

141. See, e.g., *Anersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) (Municipally-owned airport is "an integral governmental function"); *Public Service Co. of North Carolina, Inc. v. Federal Energy Regulatory Commission*, 587 F.2d 716, 721 (5th Cir. 1979) ("Texas's oil and gas business is not a 'traditional government function'"); *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (state licensing of drivers is an integral governmental function).

142. 455 U.S. 678 (1982).

143. 45 U.S.C. §§ 151-188 (1976 & Supp. IV 1980).

144. N.Y. CIV. SERV. LAW §§ 200-214 (Consol. 1980).

145. 509 F. Supp. 1300 (E.D.N.Y. 1980).

146. 634 F.2d 19, 30 (2d Cir. 1980).

147. *Id.* at 25-28.

be defined in terms of "the state's role of providing for the interests of its citizens in receiving important social services."¹⁴⁸ The Second Circuit opinion, therefore, focused upon the importance of the public service furnished, that the service was one which state and local governments are particularly suited to provide, and that the service is one increasingly provided by state and local governments.¹⁴⁹

Although the Second Circuit's approach might appear attractive at first glance, it is a troublesome one. If followed, its reasoning represents a potentially broad limitation upon congressional exercise of its commerce clause power.¹⁵⁰ In choosing to view *National League of Cities* as an effort by the Supreme Court to protect the rights of individuals to certain essential public services, the court formulated a standard which could be extended to cover virtually any public service a state chooses to provide its citizens.¹⁵¹ That such a standard could seriously interfere with Congress's commerce power is illustrated by the *Long Island R.R.* case itself. Under the Second Circuit's reasoning, legislative judgments embodied in the Railway Labor Act and made applicable to the Long Island Railroad, a railroad which concededly has a serious impact upon interstate commerce,¹⁵² were overturned in the name of protecting New York's ability to structure integral operations in an area of "essential" public service.

The most positive aspect of the Supreme Court's decision in *Long Island R.R.* is that it rejected the reasoning of the Second Circuit and reversed that court's holding.¹⁵³ The Chief Justice's opinion for a unanimous Supreme Court found the Second Circuit's distinction between passenger and freight service to be without significance and, therefore, concluded that the situation in *Long Island R.R.* fell squarely within earlier railroad cases which refused to immunize state-owned railroads from federal regulation.¹⁵⁴ The Court observed that those cases were expressly reaffirmed in *National League of Cities*. The Court noted that although in recent years some

148. *Id.* at 25 n.15.

149. *Id.* at 27.

150. For an extended discussion of the threat posed by the *Long Island R.R.* rationale, see Comment, *Redefining the National League of Cities State Sovereignty Doctrine*, 129 U. PA. L. REV. 1460, 1472-1475 (1981).

151. *Id.*

152. 634 F.2d at 23 ("The LIRR's freight business, while declining and less significant than its passenger business, still generates over \$12 million in revenues derived from business in interstate commerce").

153. 455 U.S. at 682.

154. *Id.* at 685.

passenger railroads have come under state control, it "does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments."¹⁵⁵

Other than reiterating its earlier exemption of railroads from the category of integral government functions, the Court in *Long Island R.R.* offered no underlying rationale, no further definition of the terms "integral" or "traditional" to assist in making a determination concerning any state function other than operating a railroad. Moreover, an examination of the Court's opinion suggests that the Court possesses neither a clear view of the three separate prongs of the three-pronged test of *Surface Mining Act Cases* nor ability or willingness to articulate the real concerns which underlie each of those prongs.

The Court analyzed *Long Island R.R.* under the third prong of the *Surface Mining Act Cases* standard, that is, whether "the States' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional functions."¹⁵⁶ The Court made no attempt to distinguish that prong from the second prong, that "the federal regulation must address matters that are indisputably 'attributes of state sovereignty' "— if, indeed, those prongs may be said to refer to separate requirements.¹⁵⁷ In fact, the Chief Justice seems to confuse the two at times, commenting that the "*National League of Cities* opinion focused its delineation of the 'attributes of sovereignty' . . . on a determination as to whether the State's interest involved 'functions essential to separate and independent existence.' "¹⁵⁸ This same standard is used later in the *Long Island R.R.* opinion in reference to defining traditional governmental functions.¹⁵⁹

In concluding that operation of a passenger railroad is "not among those governmental functions generally immune from federal regulation" under *National League of Cities*, the Court insisted it was not "looking only to the past to determine what is 'traditional.' "¹⁶⁰ Nonetheless, the bulk of the Court's opinion supporting its conclusion dealt with the long history of federal

155. *Id.* (emphasis in original).

156. *Id.*

157. *Id.* (citing the *Surface Mining Act Cases*, 452 U.S. 287-288).

158. *Id.* at 288 n.11.

159. *Id.* at 686.

160. *Id.*

regulation of railroads in general and the regulation of the Long Island Rail Road in particular.¹⁶¹

2. Implications of *Long Island R.R.*

Only two things are clear from the Court's opinion in *Long Island R.R.*: first, that the Court continued to narrow the field of federal regulatory schemes subject to the *National League of Cities* doctrine; and, second, that the traditional or historical nature of a state function was specifically stated to be of significance in determining those state functions which trigger the special inquiry of *National League of Cities*. Although the Court alluded to other considerations relevant to that determination, none were actually described.¹⁶² *Long Island R.R.* does reflect a narrowed approach to the application of *National League of Cities*, but the Court shows no sign of abandoning that doctrine. The problem remains, then, to devise an approach to determining integral government functions which is consistent with the Court's current expression of its *National League of Cities* concerns, but also consistent with the well-established view of the broad commerce clause powers of Congress.¹⁶³

One such approach can be found in a system making use of presumptions and shifting burdens of proofs. The system can be illustrated in application to three categories of federally regulated state functions: (1) Those functions historically subject to federal regulation, but which have been newly acquired by the state; (2) Those functions which have historically been subject to state regulation or control, and which the federal government has newly regulated; (3) Those functions which historically have not been subject to either federal or state regulation or control.

The first of these categories is, of course, the *Long Island R.R.* situation. In that situation the Supreme Court's opinion suggests a conclusive presumption that this is not a function which should trigger the heightened judicial concern of *National League of Cities*. The Court stated "there is no justification for a rule which would allow the States, by acquiring functions previously performed by the private sector, to erode the federal authority in areas traditionally subject to federal statutory regulation."¹⁶⁴ Creating a conclusive presumption in favor of the federal regulation in this situation is con-

161. *Id.* at 687-90.

162. *Id.* at 686.

163. *See supra*, text and notes at notes 84-88.

164. 455 U.S. at 687.

sistent with the Supreme Court's focus in *National League of Cities* on whether the federal regulation would affect basic state prerogatives in such a way as to threaten the state's ability to fulfill its independent role in the federal system.¹⁶⁵ That is so because the state had maintained its "separate and independent existence"¹⁶⁶ without this newly acquired function.¹⁶⁷

The second category presents the converse situation, that is, an activity or function which historically has been subject to state control, but one which the federal government now seeks to regulate. Given the Court's emphasis in *Long Island R.R.* on the historical or traditional nature of the state function in determining whether the function is within that area of state activity constitutionally sheltered by *National League of Cities*, it follows that this second category is the most likely repository of protected functions. Maximum sensitivity to those protected functions can be exhibited by recognizing a rebuttable presumption in favor of the State function as an integral function, absent a federal showing that the challenged regulation does not endanger the separate and independent existence of the State or affect the State's ability to perform its role in the federal system.¹⁶⁸

The third category is perhaps the most difficult to resolve. If neither the state nor the federal government has exercised authority in a given area, how should the balance be struck consistent with the *National League of Cities* doctrine? Arriving at an answer to this question is aided to a large extent by the understanding that the Court in *National League of Cities* did not write upon a clean slate. A long history of Supreme Court cases prior to *National League of Cities* established a broad power in Congress to exercise its authority under the Commerce Clause.¹⁶⁹ *National League of Cities*, as later elaborated upon by the Court, placed only a narrow limitation upon congressional exercise of that commerce power.¹⁷⁰ Consistent with the Court's views, the activities or functions which fall within the

165. *Id.*

166. *Id.*

167. See ____ U.S. ____, 51 U.S.L.W. 4219, 4223. A variation on this category is suggested by the majority opinion in *FERC v. Mississippi*, in which Justice Blackmun makes continued reference to an "otherwise preemptible field," one as to which Congress might have completely preempted state action, as presumptively falling outside the class of "integral governmental functions." 456 U.S. 742, 748. See *infra* text and notes at notes 201-208.

168. With respect to this decision, courts might consider, among other factors, the extent of federal interference with State functions and whether the State interest was adequately represented in the political decisionmaking process which resulted in the federal regulation.

169. See, *supra* text and notes at notes 84-88.

170. See, *supra* 95-135 text and notes at notes 95-135.

third category should create a rebuttable presumption in favor of the federal regulation, absent a showing by the state that the federal regulation *does* endanger the state's separate and independent existence.

From the perspective of implementing federal energy legislation, such legislation probably would fall with slightly greater frequency into the second category, placing a slightly greater burden upon the federal government to show that such legislation does not go to the heart of the States' ability to function as States. A good deal of energy regulation, particularly with regard to renewable alternative energy resources, arguably will fall within the third category requiring a state demonstration of the threat to its separate and independent existence. Category one situations will probably be rare in the energy field because the federal presence in the field is a recent occurrence.

B. The Form of the Federal Regulation

The implementation of federal energy legislation at the state level may take one of three forms. First, the federal government may attempt to implement its program through direct mandates to the States, requiring some action to be taken by the States.¹⁷¹ Second, the federal government may seek implementation of its policies by regulating private entities in some substantive area or a manner usually reserved to state and local governments, thereby preempting a state's decisionmaking in that area.¹⁷² Third, implementation of federal energy policy may be effected through the use of conditional grants to the states.¹⁷³ Each of these will be considered with a view toward the narrowing of the *National League of Cities* limitation upon the implementation of federal energy legislation.

1. Direct Mandates

Once it is established that a federal regulation is directed to the States as States and impacts upon an integral or traditional function, *National League of Cities*, as refined by the *Surface Mining Act Cases*, requires only a showing that the challenged regulation addresses matters that are "indisputably attributes of state sovereignty."¹⁷⁴ It may be difficult to envision a federal regulation affecting

171. See, e.g., *supra* note 11.

172. See, e.g., Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1976 & Supp. IV 1980).

173. See, e.g., *supra* note 89.

174. 452 U.S. at 288.

an integral state function which does not address such attributes of sovereignty, and in fact, the Court has merged these two concepts on occasion.¹⁷⁵ The Court, however, has established this second prong as an independent requirement of a claim seeking to invalidate legislation premised on the Commerce Clause.¹⁷⁶ While no explanation of this requirement has been offered by the Court, the reference to "indisputable attributes of state sovereignty" seems to be to the decisionmaking processes of states and their political subdivisions.

In *FERC v. Mississippi*,¹⁷⁷ the provisions of the Public Utility Regulatory Policies Act (PURPA) which direct state regulatory agencies to consider certain proposed federal standards and to enforce rules promulgated by the FERC,¹⁷⁸ were challenged by the State of Mississippi as "commandeering" state regulatory power in a manner which violates the Tenth Amendment.¹⁷⁹ The district court agreed, holding that Congress had exceeded its power under the Commerce Clause.¹⁸⁰ The court found the PURPA provisions invalid because "they constitute a direct intrusion on integral and traditional functions of the State of Mississippi."¹⁸¹ The FERC and the Secretary of Energy appealed directly to the Supreme Court pursuant to 28 U.S.C. § 1252, and the Court reversed, upholding the PURPA requirements.¹⁸²

Although the Supreme Court did not deny that PURPA contains federal mandates which directly impact on traditional state functions, the Court distinguished its opinion in *National League of Cities*, which it said dealt with "the extent to which state sovereignty shields States from generally applicable federal regulations. In PURPA, in contrast, the Federal Government attempts to use state regulatory machinery to advance federal goals."¹⁸³ The Court found PURPA's imposition on the States permissible. It did not entail the type of intrusion which *National League of Cities* sought to prohibit,

175. In *National League of Cities*, the Court referred to the States' "power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions" as "functions essential to separate and independent existence." 426 U.S. at 845.

176. 452 U.S. at 288.

177. *FERC v. Mississippi*, 456 U.S. 742 (1982).

178. See *supra* 42-55 text and notes at notes 42-55.

179. See 452 U.S. at 288 (argument of the Appellee).

180. ____ F. Supp. ____ (S.D. Miss. 1979).

181. *Id.* at ____.

182. 456 U.S. at 748.

183. *Id.*

at least to the extent that the federal law simply establishes "requirements for continued state activity in an otherwise preemptible field."¹⁸⁴

Even assuming that a direct federal mandate does impermissibly impact upon state sovereignty, the Supreme Court in the *Surface Mining Act Cases* and the more recent case of *EEOC v. Wyoming*¹⁸⁵ stated that the Tenth Amendment will not necessarily serve as a limitation upon federal action if it can be shown that there is some demonstrably greater federal interest in upholding the federal mandate.¹⁸⁶ The energy area is replete with federal interests which, together or individually, may override state sovereignty interests. Examples of such federal interests include the resolution of interstate disputes regarding the exploitation or distribution of energy resources; national security interests in reducing the nation's dependence on unpredictably foreign sources of energy; and the regulation of spillovers of adverse environmental effects of energy use in bordering states.

2. Indirect Action

The second form of federal implementation consists of federal action which, although directed toward private entities, has the effect of displacing state authority in an area of traditional state governmental function. Those courts and commentators who gave a broad reading to the intent of *National League of Cities* viewed this type of legislation as the inevitable victim of the Supreme Court's swing to increased recognition of state sovereignty interests meriting constitutional protection.¹⁸⁷ As the *Surface Mining Act Cases* revealed, however, the Court was unwilling to take that next logical step towards further limiting the federal government's powers. Instead, the Court reaffirmed its traditional position concerning the federal government's power to displace state authority and restated the narrowness of its prior holding which was made applicable only to federal action directed to the "States as States."¹⁸⁸ Thus, it seems clear that federal energy legislation directed at private entities

184. *Id.* at 751.

185. ____ U.S. ____, 51 U.S.L.W. 4219 (March 1, 1983).

186. 452 U.S. at 288.

187. See, e.g., Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 76-89 (1977); Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1883 (1976).

188. See *supra* text and notes at notes 110-35.

which incidentally displaces the States' authority to regulate and mandate conduct is a valid exercise of federal authority even if a consequence of such action is the loss of revenues to the state.¹⁸⁹

This conclusion was affirmed in the challenge directed toward PURPA provisions which makes use of a variation on this form of implementation. Section 210 of PURPA, authorizes, *inter alia*, FERC to exempt qualified power facilities from state laws and regulations.¹⁹⁰ The Supreme Court, in the *FERC v. Mississippi*, found this to be a proper form for implementing the commerce power legislation, stating that the "Federal Government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.'" ¹⁹¹ Current energy legislation, enacted during the Carter administration, makes use of this implementation mechanism in several other instances.¹⁹² Given the extensive private development of energy resources in this country, this should prove a valuable form of implementation in the future.

3. Conditional Grants

The last form of implementation is the one most commonly used in federal legislation—that of making conditional grants. Pursuant to a variety of federal programs, including energy legislation, Congress has made funds available to state and local governments contingent on the satisfaction of certain stated conditions.¹⁹³ This is currently the most problematic of the implementation mechanisms because no court has determined what, if any, limits the Tenth Amendment imposes upon the spending clause power. Despite the potential for serious interference with state and local decisionmaking in critical areas, the conditional grant generally has been held to be a permissible vehicle for the effectuation of federal policies.¹⁹⁴

189. 452 U.S. at 292 n.33.

190. § 210(e), 16 U.S.C. § 824a-3(e) (1974 & Supp. 1982).

191. 456 U.S. at 747-48.

192. *See, e.g.*, The Energy Tax Act of 1978, Pub. L. No. 96-618, 92 Stat. 3174 at § 201 and 92 Stat. 3180 (imposing Gas Guzzler Tax upon automobile manufacturers); The National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206, §§ 422-23, 92 Stat. 3259-63 (setting efficiency standards for certain products and imposing civil penalties upon private manufacturers who fail to meet the standards).

193. *See supra* note 59 (statutes cited).

194. *See, e.g.*, *Steward Machine Co. v. Davis*, 301 U.S. 548, 593-98 (1937) (conditional grants which induce rather than coerce state participation are valid); *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 142-43 (1947) (application of Hatch Act to the states as a condi-

In *National League of Cities*, the Court declined to reach the question whether its newly established doctrine extended beyond congressional power under the Commerce Clause to congressional power under the Spending Clause granted by the Constitution.¹⁹⁵ Given the entrenched position of the conditional federal grant in intergovernmental dealings in this country, it is not surprising that the lower courts have generally refused to extend *National League of Cities* in the face of challenges to federal conditional grants.¹⁹⁶ Nonetheless, many of the same concerns which underlie the Court's decision in *National League of Cities* are present in the conditional grant situation, and the Supreme Court has recently suggested the possibility that Tenth Amendment protected sovereignty interests may limit the Spending Power.¹⁹⁷

In *Pennhurst State School and Hospital v. Halderman*,¹⁹⁸ a case which was decided on due process and equal protection grounds,¹⁹⁹ the Court had occasion to discuss the nature of Congress's power to legislate pursuant to the spending clause powers.²⁰⁰ The Court affirmed the traditional view that such legislation is "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions"²⁰¹ and Congress's power "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"²⁰² The Court, however, also referred in a footnote to "limits on the power of Congress to impose conditions on

tion for receiving federal highway funds does not violate Tenth Amendment); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968); *Law v. Nichols*, 414 U.S. 561, 569 (1974).

195. 426 U.S. at 852 n.17.

196. *E.g.*, *New Hampshire Dept. of Employment Sec. v. Marshall*, 616 F.2d 240, 245 (1st Cir. 1980) (state unemployment compensation system must conform to federal guidelines as a condition of federal tax credit); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 98-99 & n.20 (3d Cir. 1979) ("Pennsylvania has accepted federal funds and has thus consented to federally mandated standards for treatment and habilitation of the developmentally disabled"), *rev'd on other grounds*, 101 S. Ct. 1531 (1981); *North Carolina v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (requiring state to amend its constitution to facilitate compliance with federal conditions attached to health grants upheld), *aff'd mem.*, 435 U.S. 962 (1978).

197. *Pennhurst State School & Hosp. v. Halderman*, ____ U.S. ____, 101 S. Ct. 1531 (1981).

198. In *Pennhurst* residents of a state facility for the care and treatment of the mentally retarded brought a class action against the hospital and various officials responsible for its operation. The residents alleged that conditions at the hospital were "unsanitary, inhumane and dangerous" and denied them due process and equal protection in violation of the Fourteenth Amendment and certain rights conferred by federal statute. *Id.* at 1534.

199. *Id.* at 1536-47, 1540-42.

200. *Id.* at 1535.

201. *Id.*

202. *Id.* at n.13. See Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694-1716 (1981).

the States pursuant to its Spending Power," and cited among other cases, *National League of Cities*.²⁰³

If the *Pennhurst* decision can be interpreted as signalling a new willingness on the part of the Court to extend the Tenth Amendment limitation to the area of congressional spending powers, serious doubts may be raised with respect to the federal government's ability to implement federal energy policy in its present form. Nonetheless, assuming that to be true, and that conditional grants are no more promising a vehicle than commerce power legislation for mandating state implementation of federal policy,²⁰⁴ conditional grants certainly should be no *less* promising. Thus, the Court imposed requirements and the inherent limitations of the *National League of Cities* doctrine applicable to commerce powers should also be applicable in spending powers cases.

V. CONCLUSION

Federal energy legislation in the last decade has attempted to deal with some peculiarly national concerns, but has done so in the context of an area of law historically dominated by the decentralized decisionmaking of the States. Because of these factors, such legislation raises the issue of federalism dealt with in *National League of Cities* and subsequent Tenth Amendment cases. While those cases express a heightened sensitivity to certain state sovereignty interest, and a consequent limitation on congressional commerce power, the picture is by no means as bleak for proponents of federal action in the energy fields as some commentators had painted it following *National League of Cities*. In its most recent opinions in the area, the Court has narrowly applied the "integral governmental function" standard, and has, for the first time, suggested that even direct federal mandates to the States which appear to impact upon traditional state functions may not interfere impermissibly with attributes of state sovereignty if they deal with an otherwise preemptible field. Moreover, the Court since *National League of Cities* has recognized that substantial federal interests may override state sovereignty interests, and has refused to extend *National League of Cities* to legislation which displaces state activity where it is directed to private entities and not the "States as States." Much energy

203. Stewart, *supra* note 127 at 1262.

204. See *supra* text and notes at notes 121-82.

regulation is supported by strong federal interests, arguably sufficient to override state sovereignty interests. Ultimately, the Court's recent decisions leave open the possibility of well-structured federal energy legislation, which may constitutionally direct state implementation of national goals and standards.