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**Conditional Spending and
Other Forms of Federal
Cost Sharing**

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INTRODUCTION

Many of the United States's most important social welfare programs are administered by the states under mandate from the federal government. This Briefing Paper seeks to provide background for the legal discussion and policy debate regarding such federal programs. Part I gives an overview of federal conditional spending, providing a rough taxonomy that can be used to categorize these programs. Part II discusses the recent history of this topic, including legislative efforts to reform the mechanism through which the federal government imposes spending mandates on the states. Part III explores the policy rationales and critiques for federal conditional spending. Part IV outlines the legal framework that courts use to assess the constitutionality of grants of federal funds and demonstrates the continued significance of this debate in light of recent litigation over the Bush Administration's Medicare reforms. Part V considers case studies of federal spending programs, focusing on the size, programmatic features of, and statutory structures of the programs. Part VI concludes.

I. FEDERAL COST SHARING: AN OVERVIEW

A. Introduction

The federal government often decides to address national social problems by channeling money to individuals through state governments. While often contextualized in larger legal debates about the relation between different sovereigns, the financial relationship between the federal and state governments is also circumscribed by political and budgetary realities both in Washington and in state capitals throughout the country.

Recognizing that many of their citizens face social problems that require government intervention, the states constantly struggle with the federal government over

the division of responsibility for the solutions to these problems. These struggles manifest themselves in a complicated system of federal government programs and grants designed to aid states in tackling many of the nation's challenges. In essence, states want the most federal money possible with the fewest conditions attached to it, and the federal government wants to spend the least possible while exerting as much control over program implementation at the state level as possible.

B. Classifying Federal Cost-Sharing Programs

Broadly speaking, there are two types of mechanisms for federal funding of state-level programs: fully funded programs and matching programs. Before exploring the difference between those two financing structures, it is useful to get a sense of where the federal money flowing through these mechanisms is targeted. Figure 1, which provides a breakdown of federal government grants to state and local governments by category, reveals that most of the funds in this area go to some form of income security program or to health related spending. Figure 2 shows the how this categorical breakdown has changed over time. While federal government grants to education have stayed constant over time, health grants and to some extent income security grants have risen rapidly over this period. Figure 2 also shows the amount by which grants to state and local governments by the federal government have grown over time. The total amount of grants from the federal government to state and local governments has grown in nominal dollars from \$91,385 million in 1980 to \$443,797 million in 2007.¹ As Figure 3 shows, in terms of percentage of GDP, there was a substantial growth in the grants to states until the mid-1970s, after which the percentage of GDP spent on states largely stabilized.

¹ OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2007, HISTORICAL TABLES [hereinafter HISTORICAL TABLES], *available at* <http://www.whitehouse.gov/omb/budget/fy2007/pdf/hist.pdf>.

From the perspective of state and local governments, 23% of their total general revenues in 2004 came from the federal government.² Figure 4 shows that the share of total state and local revenues from the federal government has been increasing in real terms since the late 1970s as state and local budgets have also grown in real terms. As a share of gross domestic product, state and local budgets have grown about 2.2 percentage points between 1977 and 2004, and federal government revenues account for about 30% of this increase. On a per capita basis, Wyoming receives the most federal revenue (\$3,916 per capita), and Nevada receives the least (\$823 per capita); overall, the federal government transfers \$1,450 to state and local governments per capita.³

With the functions and size of federal government grants to states in mind, it is useful to distinguish between the two aforementioned types of federal funding for state administered programs. The first type of program, in which the federal government fully funds the program, is generally tied to state need.⁴ Within this category there are two further sub-categories of fully funded spending. The first are block grants, such as the Head Start and School Lunch programs, which are funded at the beginning of each fiscal year by Congress and have their expenditures capped.⁵ The other sub-category of fully funded programs consists of federally funded payments to individuals. These programs include Food Stamps, Supplemental Security Income (“SSI”), and the Earned Income

² U.S. Census Bureau, Annual Survey of State and Local Government Finances, 2004, *available at* http://www.census.gov/govs/estimate/0400ussl_1.html. General revenue includes federal revenue, taxes, charges, and miscellaneous revenue. Additional non-general revenue sources include utility charges, social insurance and public employee retirement trust funds, and state liquor store revenue.

³ *Id.*

⁴ *See* TOBY DOUGLAS & KIMURA FLORES, URBAN INST., FEDERAL AND STATE FUNDING OF CHILDREN’S PROGRAMS 1 (1998), <http://www.urban.org/UploadedPDF/occa5.pdf>.

⁵ *Id.* at 10.

Tax Credit (“EITC”).⁶ Under these programs, the federal government sets all of the relevant policies and does not require states to spend any of their own money.⁷

Additionally, the programmatic outlays are not capped at the beginning of the year but rely on the relevant eligibility criteria to determine how much money must be spent.⁸

Matching programs are structurally much more complicated than fully funded programs. Matching programs can also be divided into two sub-categories: open-ended matching programs and closed-ended matching programs. In the case of open-ended matching programs, the state entirely controls how much money it receives because the federal government will match a portion of state spending.⁹ Medicaid is the primary example of an open-ended matching program: for Medicaid, the portion of state spending the federal government will match is inversely related to the state’s income and generally is determined by the Federal Medical Assistance Percentage (“FMAP”).¹⁰ On the other hand, closed-ended matching programs are capped at a certain level and have pre-determined matching rates.¹¹ The primary example of a closed-ended matching program is the Maternal and Child Health (“MCH”) Block Grant, under which the states pay \$3 for every \$4 of federal funds they receive.¹² However, the federal government’s annual outlay for the MCH program is currently capped at \$850 million annually.¹³

⁶ SSI provides supplemental payments to low income individuals who are over 65 or have disabilities. EITC functions as a negative income tax for low income workers.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 9.

¹⁰ *Id.*

¹¹ *Id.*

¹² 42 U.S.C. § 703(a) (2000).

¹³ *Id.* § 701(a).

To summarize, federal grants to states can be either uncapped or capped, and they can be either fully funded by the federal government or dependent on state matching.

Table 1 illustrates how the above-discussed programs fit into these categories.

Table 1. Classification of Federal Funding Programs

	<u>Uncapped</u>	<u>Capped</u>
Fully Funded	Food Stamps	Head Start
Matching	Medicaid	Maternal and Child Health Block Grant

While different in structure, these types of federal government grants to states have many common features in terms of how much money states ultimately receive from the federal government. First, and most relevant to the inquiry at hand, many of both types of programs come with conditions attached. As discussed above, these conditions include eligibility and service criteria. Additionally, all of these programs focus on the wealth of the states, the need of the residents in the state, or both in determining how to allocate money across states.¹⁴ Furthermore, regardless of whether the federal government pays for the entirety of the program, these programs generally have the effect of reducing the difference in social spending and outcomes between states, although large differences in both areas persist.¹⁵ Finally, state variation in spending and outcomes under any of these programs are determined by the same three factors: need, fiscal capacity, and fiscal effort.¹⁶ While need is self-evident, fiscal capacity refers to the ability of states to match federal funds and to provide their own resources to those in need. Fiscal effort, on the other hand, is the proportion of the resources available to the

¹⁴ DOUGLAS & FLORES, *supra* note 4, at 9.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 3–6.

state that it is willing to spend on these programs. The more fiscal capacity and fiscal effort a state has, the greater the amount of money it will receive from the federal government.¹⁷

II. RECENT HISTORY

The conflicting goals of the federal and state governments have come to a head in the area of unfunded mandates. In its desire to see its priorities achieved at the state level, the federal government often places many types of restrictions on states. To the extent that these restrictions require the spending of state and not federal dollars, they are traditionally characterized as unfunded mandates. Recognizing this phenomenon as a growing and potential long-term problem for states, Congress passed the Unfunded Mandates Reform Act of 1995¹⁸ (“UMRA”). The fundamental goal of the UMRA was to highlight the cost of congressional legislation for states.¹⁹ The UMRA, however, maintained that conditions for obtaining most federal grants are generally not considered mandates.²⁰ The UMRA defined federal mandates in three different ways: enforceable duties, changes in larger entitlement programs, and reductions in federal funding for existing mandates.²¹ An enforceable duty exists when Congress compels states to act in a certain way unless that requirement is imposed as a condition for federal aid.²² A change in an entitlement program that provides more than \$500 million to state governments and

¹⁷ The policy reasons behind the various structures employed by federal cost sharing initiatives are beyond the scope of this Briefing Paper. For an overview of the executive, legislative, and judicial forces that have combined in recent years to shift control over regulatory and fiscal authority to the states, see David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2546–50 (2005).

¹⁸ Pub. L. No. 104-4, 109 Stat. 48 (codified as amended in scattered sections of 2 U.S.C.).

¹⁹ *Id.* § 2, 109 Stat. at 48–49; CONG. BUDGET OFFICE, IDENTIFYING INTERGOVERNMENTAL MANDATES 1 (2005), available at <http://www.cbo.gov/ftpdocs/60xx/doc6052/01-06-IntergovernmentalMandates.pdf>.

²⁰ CONG. BUDGET OFFICE, *supra* note 19, at 3.

²¹ *Id.* at 1.

²² See UMRA § 101, 2 U.S.C. § 658(5)(A)(i) (2000) (defining enforceable duties that qualify as federal intergovernmental mandates).

results in a new condition or reduction in funding is a mandate as long as states do not have the flexibility to offset the costs or loss of funding with reductions to other parts of the program.²³ Finally, a general reduction in federal funding for an existing mandate is itself considered a mandate under the UMRA.²⁴

The UMRA requires the Congressional Budget Office (“CBO”) to provide Congress with estimates of the size of any intergovernmental mandates in authorizing legislation.²⁵ The UMRA prohibits consideration of a piece of legislation unless the authorizing committee has published a CBO mandate statement and the legislation provides direct spending or authorizing authority to cover the costs above the threshold established by the Act.²⁶ A member of the House or Senate must raise a point of order for these rules to be enforced.²⁷ Since the passage of the UMRA, a point of order has been raised only twelve times, all in the House.²⁸ Although the aforementioned technical methods of enforcement are available, the primary result of the UMRA has been to bring the unfunded mandate issue to the attention of legislators.²⁹ In fact, between 1996 and 2004, the CBO found only 12% of the 4700 bills proposed in Congress to have any intergovernmental mandates and of those, 91% would not have created costs for states in excess of those allowed under the UMRA.³⁰ Although the UMRA did resolve some of the tension surrounding the unfunded mandate issue, states continue to argue that the Act

²³ *Id.*, 2 U.S.C. § 658(5)(B) (defining changes in entitlements that qualify as federal intergovernmental mandates).

²⁴ *Id.*, 2 U.S.C. § 658(5)(A)(ii) (defining reductions in federal financial assistance that qualify as federal intergovernmental mandates).

²⁵ *See id.*, 2 U.S.C. § 658c; CONG. BUDGET OFFICE, *supra* note 19, at 1–2.

²⁶ *See* UMRA § 101, 2 U.S.C. § 658d(a).

²⁷ *Id.*, 2 U.S.C. § 658d(c)(2).

²⁸ CONG. BUDGET OFFICE, *supra* note 19, at 2

²⁹ *Id.* at 1.

³⁰ *Id.* at 2.

did not go far enough and that the federal government continues to impose sizable unfunded obligations on the states.³¹

The issues surrounding unfunded mandates and more generally the struggle between the federal and state governments over funding issues arose again during the early 2000s. As money from tax revenues and tobacco settlement awards began to dry up, many states found themselves in untenable financial positions.³² Faced with budgetary shortfalls, and almost universally bound by balanced budget requirements in state constitutions, state legislators and governors faced a choice: raise taxes, cut spending, or transfer obligations to the federal government.³³ For obvious political reasons, the last option was the most popular, and so state political actors clamored for more federal government funding.³⁴

III. DISADVANTAGES, ADVANTAGES AND CALLS FOR REFORM OF COST SHARING

While the existence of some federal conditional spending is generally accepted, like SSI, conditional spending can be controversial. Federally conditioned state spending is often criticized for creating administrative costs not covered by the funding. One such program is No Child Left Behind (NCLB).³⁵ NCLB illustrates an additional objection states sometimes have to federal conditional spending—it creates stringent, often highly-specific, yet formulaic requirements that states dislike. Recently Virginia has joined Utah

³¹ See, e.g., Nat'l Conference of State Legislatures, *Mandate Monitor*, Aug. 2007, at 1, available at <http://www.ncsl.org/print/standcomm/scbudg/MandateMonitorAugust2007.pdf>.

³² See Dennis Cauchon, *Bad Moves, Not Economy, Behind Busted State Budgets*, USA TODAY, June 22, 2003, at A1; NAT'L CONFERENCE OF STATE LEGISLATURES, STATE FISCAL OUTLOOK FOR FY 2002 (2001), available at <http://www.ncsl.org/programs/fiscal/sfo2002b.pdf>.

³³ MICHAEL S. GREVE, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, WASHINGTON AND THE STATES (2003), available at http://www.aei.org/publications/pubID.17053/pub_detail.asp.

³⁴ See Michael A. Pagano & Christopher Hoene, *Fend-for-Yourself Federalism: The Impact of Federal and State Deficits on America's Cities*, GOV'T FIN. REV., Oct. 2003, at 36.

³⁵ For a description and case study of NCLB, see *infra* Part V.C.

in considering rejecting NCLB funding due to what some legislators find to be onerous administrative requirements and an overly compartmentalized and punitive testing scheme.³⁶

On the other side are strong arguments in favor of federal conditional spending. First, states have the freedom to reject conditional funding if they find the conditions too burdensome. As Professor David Super points out, “The extreme rarity of states refusing even heavily conditioned federal funding suggests that the value of that funding exceeds the costs of compliance.”³⁷ Second, it is worth noting that these administrative apparatuses would often exist regardless of the federal mandate, and absent federal funding, states might well be left paying the entire cost for a program it wanted to implement anyway.³⁸ Third, Professor Super argues that the superior data gathering and revenue raising abilities of the federal government constitute further justification for conditional federal spending.³⁹

But some argue that federal conditional spending could play a more constructive role in making state budgets more effectively countercyclical. Traditional Keynesian economics suggests that when the economy is in a recession, governments should run a deficit in order to lower savings and induce greater consumption, spurring growth. The opposite is true when the economy is growing at a rate that is unattainably high in the long term. While for this reason economists disfavor pro-cyclical budgeting generally,

³⁶ Richard Quinn, *Va. considers leaving education act behind*, THE VIRGINIAN-PILOT, (Norfolk, Va.) Feb. 25, 2008, at A1.

³⁷ David A. Super, *Federal-State Budgetary Interactions*, in FISCAL CHALLENGES, 366, 379 (Elizabeth Garret, et al. eds., 2008). [Hereinafter Super, *Budgetary Interactions*]. However, states are not given the opportunity to avoid paying federal taxes that go towards conditional spending even if they refuse to accept such spending. Therefore, that states virtually always accept such spending does not conclusively show that the state believes the benefit of an accepted program outweighs its costs to the state.

³⁸ *Id.* at 379–380.

³⁹ *Id.* at 379.

this is particularly true at the state level. Often macroeconomic conditions vary by region or even by state, meaning that the state level is best for targeted macroeconomic efforts.⁴⁰ State budgets, even when federal conditional spending is taken into account, tend to be less countercyclical than they should be. It is indeed the case that the need for many categories of state spending tend to fall when the economy rises and rise when the economy falls. In particular, programs that provide support for low-income and unemployed people, including Medicaid, tend to be countercyclical.⁴¹ Further, during economic downturns, while property tax rates do not adjust quickly, some tax revenues naturally decline. For example, people consume less, lowering sales tax receipts.

All of these factors naturally should create a budget that is at least somewhat countercyclical, but states are hampered in almost all cases by constitutional provisions requiring them to balance their budgets.⁴² Therefore, states end up taking action to raise taxes, cut spending, or both. Most notably within the realm of federal conditional spending, states sometimes use their discretion to reduce their Medicaid caseload during economic downturns. For example, in the last decade Hawaii, Tennessee, and Oregon have all elected to either drastically cut coverage or scale back planned Medicaid expansions due to economic downturns.⁴³ This has at least a doubly pro-cyclical effect—for every dollar of reduced state spending, a minimum of one dollar of federal spending is lost as well.

In turn, the federal government may enhance this effect. In times of high federal deficits—typically during economic downturns—the federal government may choose to

⁴⁰ Super, *Budgetary Interactions*, *supra* note 37, at 367.

⁴¹ See Super, *supra* note 17, at 2629–31.

⁴² Super, *Budgetary Interactions*, *supra* note 37, at 367.

⁴³ Ezra Klein, *Over Stated*, WASH. MONTHLY, July/Aug. 2007, at 28–29.

soften its reported deficit by demanding greater spending from the states, essentially “export[ing] the deficit.”⁴⁴ This in turn exacerbates the pro-cyclical implications of balanced budget provisions. In particular, because of federal budgeting procedures, cyclically important federal conditioned funding programs, like Medicaid, may be easier to cut during downturns than less cyclically useful, automatically funded programs such as Social Security. Medicaid funding must be appropriated every year, whereas Social Security is funded according to a predetermined level unless Congress takes specific legislative action.⁴⁵ Recent Medicaid cuts have actually been fairly modest, but further study is warranted to determine if over the long run Congress has been faster to cut annually-funded conditional programs like Medicaid than it has been to cut automatically funded programs.⁴⁶ If so, changes in the federal budgetary process might be warranted.

Professor Super has argued that the federal government could play an important role in helping state governments achieve appropriately countercyclical ends.⁴⁷ For example, he would amend the Medicaid disbursement rules to be more countercyclical. Under his proposal, the federal government would use the relationship between a state’s current unemployment rate and its ten-year average unemployment rate to determine if a state’s economy is above or below trend. The proportion paid for by the federal government would go up during recessions and down during booms.⁴⁸ This holds the potential to give an additional stimulus to areas of the country experiencing the most

⁴⁴ Peter Harkness, *States & Localities: Imaginary Numbers*, 64 CQ WKLY. 590, 590 (2006).

⁴⁵ See William C. Fay, et al. *Appropriations for Mandatory Expenditures* 10, 18 (Harvard Law Sch. Briefing Papers on Federal Budget Policy, Paper No. 17, 2008). Social Security payments are less countercyclical than Medicaid, since payments are mostly based on historical, not current income like Medicaid. Further, since Social Security is a program exclusively funded by the federal government, federal cuts do not result in corresponding state cuts.

⁴⁶ See *Id.* at 18, 25–26

⁴⁷ Super, *Budgetary Interactions*, *supra* note 37, at 390–391.

⁴⁸ *Id.* at 390

severe economic hardships, while diminishing the incentives for state governments to make pro-cyclical budget cuts. Currently, Temporary Assistance to Needy Families (TANF), the capped successor to AFDC, has a contingency fund and provisions for loans to struggling states, but this has not yet been successfully implemented.⁴⁹ Conversely, one could argue that states themselves should take the lead to make their budgetary rules more flexible in order to ensure a properly countercyclical budget cycle.

IV. LEGAL PRINCIPLES

A. Doctrine

The Supreme Court made its seminal decision about the federal government's power to condition funding on state policy in *South Dakota v. Dole*.⁵⁰ The law at issue in *Dole* attempted to establish a national minimum drinking age by requiring the Secretary of Transportation to withhold a fraction of federally apportioned highway funding to any state "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."⁵¹ South Dakota argued that the condition exceeded the constitutional limitations on Congress's spending power,⁵² but the Court, in a 7–2 opinion, held that Congress's encouragement of a national minimum

⁴⁹ *Id.* at 391

⁵⁰ 483 U.S. 203 (1987).

⁵¹ *Id.* at 205 (omission in original) (quoting Pub. L. No. 98-363, § 6(a), 98 Stat. 435, 437 (1984) (codified as amended at 23 U.S.C. § 158 (2000)) (internal quotation marks omitted). The Secretary was required to withhold five percent of each noncompliant state's funding in the fiscal year beginning October 1, 1995, and the withholding rose to ten percent in the fiscal year beginning October 1, 1996. *See* § 6(a), 98 Stat. at 437. The statute was later amended to make the ten-percent withholding perpetual. *See* Pub. L. No. 99-272, § 4104(a), 100 Stat. 82, 114 (1986) (codified as amended at 23 U.S.C. § 158(a)(2)).

⁵² *Cf.* U.S. CONST. art I, § 8, 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.").

drinking age “is a valid use of the spending power” even if Congress could not impose a national minimum drinking age directly.⁵³

In rejecting South Dakota’s challenge, the Court established a five-element test that a conditional spending decision must satisfy to be a valid exercise of congressional power. First, Congress can only exercise its spending power to promote the general welfare.⁵⁴ Second, Congress must abide by a clear statement rule: any spending condition must be unambiguous and must “enabl[e] the States to exercise their choice knowingly, cognizant of the consequences” of their policy decisions.⁵⁵ Third, a nexus must exist between the condition and the federal interest in the related spending decision.⁵⁶ Fourth, the condition must not violate an independent constitutional limitation on the spending power.⁵⁷ Fifth, and finally, the condition must not be “so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁵⁸ Although the *Dole* decision has been much criticized because it allows Congress to effectuate state policy reforms even when it cannot mandate such reforms directly,⁵⁹ *Dole* remains a viable precedent.⁶⁰

⁵³ *Dole*, 483 U.S. at 211–12.

⁵⁴ *Id.* at 207.

⁵⁵ *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

⁵⁶ *See id.* at 207–08 (“[C]onditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion))).

⁵⁷ *Id.* at 208. For example, a condition that directly preferences one race over another would presumably fail to meet this element of the test.

⁵⁸ *Id.* at 211 (quoting *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 301, 590 (1937)).

⁵⁹ *See, e.g.,* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 30–42 (2001) (arguing that the spending condition in *Dole* should have been held unconstitutional); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85, 86 (stating that *Dole* “seriously undermines the role of state government in the federal system”).

⁶⁰ For example, the Sixth Circuit recently applied *Dole* to conclude that Federal prison funds can lawfully be conditioned on a state’s agreement to comply with the Religious Land Use and Institutionalized Persons Act. *See Cutter v. Wilkinson*, 423 F.3d 579, 584–90 (6th Cir. 2005). And two courts of appeals

In addition, the Supreme Court’s decisions in *Printz v. United States*⁶¹ and *New York v. United States*⁶² make clear — or at least strongly suggest — that state participation in or administration of any federal program must be voluntary, even if the federal government funds the entire program. In *New York*, for example, the Court considered a federal law that provided incentives for and imposed obligations upon states to dispose of radioactive waste. The Court upheld the monetary incentives as valid exercises of the federal spending power,⁶³ but it invalidated the obligation as an infringement of the political safeguards of federalism.⁶⁴ As a general rule, the Court stated, “where the federal government compels states to regulate, the accountability of both state and federal officials is diminished” because “elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”⁶⁵ Thus, as a doctrinal matter, the federal government cannot “‘commandeer’ state governments into the service of federal regulatory purposes”; doing so would “be inconsistent with the Constitution’s division of authority between federal and state governments.”⁶⁶

Likewise, in *Printz*, the Court considered a provision of the Brady Handgun Violence Prevention Act (commonly known as the “Brady Bill”) that required state law enforcement officers to run background checks on prospective handgun purchasers, on an

recently used *Dole* to conclude that Federal education funds can lawfully be conditioned on a state’s waiver of sovereign immunity from suit under the Rehabilitation Act of 1973. *See Miller v. Tex. Tech Univ. Health Sciences Ctr.*, 421 F.3d 342, 348–50 (5th Cir. 2005); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 490–96 (4th Cir. 2005) (same).

⁶¹ 521 U.S. 898 (1997).

⁶² 505 U.S. 144 (1992).

⁶³ *See id.* at 171–73 (citing *Dole*, among other cases).

⁶⁴ *See id.* at 174–77.

⁶⁵ *Id.* at 168–69.

⁶⁶ *Id.* at 175.

interim basis, until the federal government was able to adopt a national system and take over responsibility for the background checks.⁶⁷ In a 5–4 opinion, the Court held the provision unconstitutional, again as an infringement of the political safeguards of federalism that is destructive of state officials’ accountability to the local electorate:

[*New York v. United States* held] that Congress cannot compel the States to enact or enforce a federal regulatory program. Today [in *Printz*] we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.⁶⁸

The *New York–Printz* doctrine thus illustrates that the Constitution tightly circumscribes the federal government’s power to compel state participation in a federal legislative or regulatory scheme.

B. A Recent Development

In 2003, the United States enacted the Medicare Prescription Drug, Improvement, and Modernization Act of 2003⁶⁹ (“MMA”). The MMA, among other things, added certain prescription drug benefits to the Medicare Act effective January 1, 2006.⁷⁰ The states are required to contribute to the MMA’s financing by making payments to the federal government,⁷¹ known as “clawbacks,”⁷² ostensibly because the MMA’s

⁶⁷ See *Printz v. United States*, 521 U.S. 898, 902–03 (1997).

⁶⁸ *Id.* at 935.

⁶⁹ Pub. L. No. 108-173, 117 Stat. 2066 (codified in scattered sections of 42 U.S.C.).

⁷⁰ See 42 U.S.C. § 1395w-101.

⁷¹ *Id.* § 1396u-5(c).

⁷² See, e.g., CONG. BUDGET OFFICE, A DETAILED DESCRIPTION OF CBO’S COST ESTIMATE FOR THE MEDICARE PRESCRIPTION DRUG BENEFIT, at xi (2004), available at <http://www.cbo.gov/ftpdocs/56xx/doc5668/07-21-Medicare.pdf>; Robert Pear, *States Protest Contributions to Drug Plan*, N.Y. TIMES, Oct. 18, 2005, at A24.

prescription drug benefit displaces part of the Medicaid drug costs currently borne by the states.

In March 2006, five states filed a lawsuit against the U.S. Department of Health and Human Services, unsuccessfully seeking to invoke the Supreme Court’s original jurisdiction⁷³ and alleging that the MMA’s prescription drug benefit program is an unconstitutional infringement on state sovereignty. These states—Texas, Kentucky, Maine, Missouri, and New Jersey—contended that the MMA’s prescription drug benefit is a “purely federal benefit program” and that the clawbacks thus represent an unconstitutional tax levied on the states.⁷⁴ The states sought to distinguish the clawback payments from the condition in *Dole* on the ground that the clawbacks are not conditions on the receipt of federal funds, but rather are taxes—direct mandates for the states to remit payments to the federal government.⁷⁵ But even if the clawbacks are classified as conditions on federal spending, the states maintained that they should still be held unconstitutional under *Dole*. In particular, the states contended that the clawbacks fail the second element of the *Dole* test—the requirement that conditions be unambiguous. “The clawback introduces a substantial element of uncertainty into each States’ budget-making process,” the states argued, because “[s]tates have no control over, nor any way to accurately predict . . . future Part D spending, yet they are compelled to fund it,” which renders the clawback “a monetary burden on the States each year of uncertain dimensions.”⁷⁶ Additionally, the states asserted that the clawbacks violate “the

⁷³ Texas v. Leavitt, No. 22O135 ORG (U.S. filed Mar. 3, 2006).

⁷⁴ Motion for Leave To File Bill of Complaint, Supporting Brief, and Bill of Complaint at 3–4, *Texas*, No. 22O135 ORG, available at http://www.oag.state.tx.us/newspubs/releases/2006/030306medicare_complaint.pdf.

⁷⁵ *Id.* at 14–15.

⁷⁶ *Id.* at 15 n.10.

anticommandeering doctrine” established in *New York* and *Printz* because the clawbacks “command[] action by the States in their sovereign capacities” by “conscript[ing] state legislatures to appropriate and remit funds to support a purely federal program.”⁷⁷

Ten states, as amici, advanced a slightly different argument. The amici states read *Dole* as permitting only those spending conditions that “satisfy accountability concerns” because the legislators who superintend conditional grants are politically accountable to their constituents and responsible for their decisions at both the state and federal levels.⁷⁸ The clawbacks, in contrast, “thwart[] accountability in a way that traditional Spending Clause legislation does not” because they remove all control over the clawback payments from the states.⁷⁹ The amici also make an argument based *New York* and *Printz* that echoes the argument that the complaining states advance.⁸⁰

On June 19, 2006, the Supreme Court denied the states’ motion for a preliminary injunction and motion for leave to file a bill of complaint.⁸¹ Since the Supreme Court declined to take original jurisdiction in this matter, the state attorneys general may pursue the challenge in their respective district courts.⁸²

V. CASE STUDIES

A. Fully Funded Program Case Study: Food Stamps

The Food Stamp program is a national need-based program financed entirely by the federal government and run by states and localities. Eligibility for the program is

⁷⁷ *Id.* at 17–18.

⁷⁸ See Brief of the States of Arizona et al. as Amici Curiae in Support of Plaintiffs at 12–13, *Texas*, No. 22O135 ORG, available at http://www.oag.state.tx.us/newspubs/releases/2006/030306medicare_sweeney.pdf.

⁷⁹ *Id.* at 13.

⁸⁰ See *id.* at 8–11.

⁸¹ *Texas v. Leavitt*, 547 U.S. 1204 (2006).

⁸² Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N. C. L. Rev. 441, 484 (2008).

determined by a household's income and resources. There are also work and citizenship requirements. Currently, a household of three cannot have over \$1,861 in gross monthly income or over \$1,431 in net monthly income.⁸³ However, in some cases, such as when a member of the household is elderly or receiving certain types of disability payments, the household must only meet the net income test.⁸⁴ Furthermore, a household cannot have resources, such as a bank account, worth more than \$2000 or, if a member of the household is over 60 or disabled, \$3000.⁸⁵ Many resources, such as a home or other government benefits, and in some cases cars, are not counted. Finally, able-bodied adults must register for work, take part in employment training classes and accept suitable jobs, in order to qualify for food stamps.⁸⁶

The Food Stamp Act of 1977⁸⁷ authorizes the Federal Food Stamps program. Section 4 of the Act authorizes the Secretary of Agriculture “to formulate and administer a food stamp program under which, at the request of [an agency responsible for administering the food stamp program within each state], eligible households within the State shall be provided an opportunity to obtain a more nutritious diet through the issuance to them of an allotment.”⁸⁸ Although the state agencies have obligations to engage in recordkeeping and antifraud measures,⁸⁹ the states need not contribute any

⁸³ Food Stamp Program, Eligibility, http://www.fns.usda.gov/fsp/applicant_recipients/eligibility.htm (last visited March 10, 2008).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 7 U.S.C. §§ 2011–2036 (2000).

⁸⁸ *Id.* § 2013(a). In addition, the current version of the Act has “authorized to be appropriated such sums as are necessary [to carry out the Food Stamps program] for each of the fiscal years 2003 through 2007.” *Id.* § 2027(a)(1).

⁸⁹ *See, e.g., id.* § 2020(a).

financing to the program other than a portion of their own administrative costs.⁹⁰

Additionally, in keeping with the *New York/Printz* doctrine described in Section IV.A, state participation in the Food Stamps program is voluntary.⁹¹

Since the national Food Stamps program began, the number of participants has grown from 4.3 million in 1970 to 26.5 million in 2007 while the average benefit per person has risen from \$10.55 to \$95.64.⁹² This has translated into total federal government food stamp grants to states rising from \$559 million in 1970 to \$4,602 million in 2007.⁹³ As Figure 5 reveals, while there has been nominal growth in spending on the Food Stamp program, it has stayed almost constant as a percentage of federal government grants to states over time. When the federal government reduced its commitment to the Food Stamp Program by between \$200 and \$300 million a year, the CBO scored the reduction as a new mandate under the UMRA.⁹⁴ This demonstrates that even though the Food Stamps program is a fully funded program, it creates some of the same issues as other more explicitly conditional programs.

B. Matching Program Case Study: Medicaid

The Medicaid program provides healthcare related benefits to low-income people. While the federal government establishes some broad guidelines for the program, the

⁹⁰ See *id.* § 2025(a) (“[T]he Secretary is authorized to pay to each State agency an amount equal to 50 per centum of all administrative costs involved in each State agency’s operation of the food stamp program . . .”).

⁹¹ See *id.* § 2013(a) (stating that the Food Stamps program operates “*at the request of the State agency*” (emphasis added)); *id.* § 2020(d) (imposing administration requirements only on “each State *desiring* to participate in the food stamp program” (emphasis added)).

⁹² Food Stamp Program Annual Summary, <http://www.fns.usda.gov/pd/fssummar.htm> (last visited March 10, 2008).

⁹³ HISTORICAL TABLES, *supra* note 1, at 286 tbl.12.3.

⁹⁴ CONG. BUDGET OFFICE, *supra* note 19, at 2.

amount and quality of coverage is primarily determined at the state level.⁹⁵ There are three groups of people states may cover: the categorically needy, the medically needy, and special groups.⁹⁶ States are required to cover the categorically needy who are primarily families who meet Aid to Families with Dependent Children eligibility requirements as of July 16, 1996, pregnant women and children under the age of six with a family income less than 133% of the federal poverty level, children age six to nineteen with family income below 100% of the Federal poverty level, and SSI recipients. The federal government requires that states provide certain services to the categorically needy, including inpatient hospital care, outpatient hospital care, nursing facility services, family planning services, and pregnancy related services. If the state has a medically needy program, it must cover pregnant women, children under the age of eighteen, and certain blind people. The state has the option to cover children up to the age of twenty-one, the elderly, disabled people as well as a number of other, smaller groups of people. Beyond the categorically and medically needy, states can cover certain groups such as Medicare beneficiaries and qualified working disabled individuals and can apply for waivers to cover additional groups.

The Medicaid Act⁹⁷ requires states that choose to participate in Medicaid to participate in financing the program as well: “The sums made available under [the annual Medicaid authorization] shall be used for making payments to the States which have

⁹⁵ See CTRS. FOR MEDICAID & MEDICARE SERVS., MEDICAID AT-A-GLANCE 2005 (2005), available at <http://www.cms.hhs.gov/MedicaidGenInfo/Downloads/MedicaidAtAGlance2005.pdf>.

⁹⁶ *Id.* at 1–2.

⁹⁷ 42 U.S.C. §§ 1396–1396v (2000).

submitted . . . State plans for medical assistance.”⁹⁸ Each state plan must satisfy sixty-seven statutory requirements⁹⁹ and, in particular, must:

[P]rovide for financial participation by the State equal to all . . . non-federal share [of the expenditures under the plan for which payments are authorized] or provide for distribution of funds from federal or state sources, for carrying out the state plan, on an equalization or other basis which will ensure that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan.¹⁰⁰

Provided that a state’s plan complies with the § 1396a requirements, the federal government is obligated to remit to the state, among other reimbursements, a proportion of the amount expended as medical assistance¹⁰¹ under the State plan,¹⁰² where the proportion varies inversely with the state’s per capita income.¹⁰³ If a state plan falls out of substantial compliance with the § 1396a requirements, the federal government has the authority to terminate all payments after reasonable notice.¹⁰⁴

In 2004, Medicaid had over 55 million beneficiaries with an overall average payment of \$4,686 per beneficiary.¹⁰⁵ The amount the federal government spends on Medicaid through grants to the states has risen from \$272 million in 1965 to \$190,624

⁹⁸ *Id.* § 1396.

⁹⁹ *See id.* § 1396a(a)(1)–(67).

¹⁰⁰ *Id.* § 1396a(a) (2).

¹⁰¹ The Medicare Act defines “medical assistance” as payment for needy individuals of the cost of inpatient hospital services, laboratory services, nursing facility services, dental services, hospital care, and various other types of medical services. *Id.* § 1396d(a).

¹⁰² *Id.* § 1396b(a)(1).

¹⁰³ The proportion of Federal assistance is termed the “Federal medical assistance percentage” (FMAP). Mathematically, the FMAP for each state is computed as $[100\% - (45\% \times (\text{state's per capita income} / \text{national per capita income})^2)]$, except that each state’s FMAP always remains between 50% and 83%. *See id.* § 1396d(b).

¹⁰⁴ *Id.* § 1396c.

¹⁰⁵ CTRS. FOR MEDICARE & MEDICAID SERVS., FISCAL YEAR 2004 NATIONAL MSIS TABLES (2007), available at <http://www.cms.hhs.gov/MedicaidDataSourcesGenInfo/Downloads/msistables2004.pdf>.

million in 2007.¹⁰⁶ As Figure 5 reveals, this large nominal increase has also translated into a large increase in Medicaid's percentage of the federal government grants to states. While states are primarily responsible for administering Medicaid, the federal government will match all expenditures at a level adjusted for state income, with a static minimum match of 50% and a current maximum of 76% in Mississippi.¹⁰⁷ As a result of the state budgetary shortfalls in the early 2000s, the federal government gave the states a one-time \$20 billion grant over two years to help further subsidize Medicaid.¹⁰⁸ Even in that context, states have increasingly cut back on their expenditures on Medicaid by reducing non-required eligibility and services provided.¹⁰⁹ This shows that while Medicaid is a heavily conditioned program, in many practical senses the states control the amount of money the federal government spends on the program as well as the program's effects.

C. Partially Funded Mandate Case Study: No Child Left Behind Act

The No Child Left Behind Act of 2001 (NCLB)¹¹⁰ does not fit as neatly into the categories shown in Table 1. It is block grant payment to states, not individuals, and it is not a matching program, but it has been criticized for not being fully funded. NCLB represented a substantial shift in how the federal government provides money for elementary and secondary education. Education has historically been funded through local property taxes, with state governments playing varying roles in their exercise of

¹⁰⁶ HISTORICAL TABLES, *supra* note 1, at 285 tbl.12.3.

¹⁰⁷ See CTRS. FOR MEDICAID & MEDICARE SERVS., *supra* note 105, at 7.

¹⁰⁸ Patrick McMahon, *Governors Say \$20B Bailout Won't Fix Woes*, USA TODAY, May 29, 2003, at 9A.

¹⁰⁹ See Robert Pear, *Nation's Health Spending Slows, but It Still Hits a Record*, N.Y. TIMES, Jan. 11, 2005, at A15; *Healthcare Economics: States Cut Health Spending on the Poor*, HEALTH & MED. WK. Jan. 12, 2004, at 388.

¹¹⁰ 20 U.S.C. §§ 6301 *et seq.* (2008).

central control over local school district funding.¹¹¹ In 1965, the federal government first began providing general supplemental funds for elementary and secondary education with the passage of the Elementary and Secondary Education Act (ESEA).¹¹² In the 2000–2001 school year, the last before the NCLB took effect, federal sources comprised 7.1% (\$28.6 billion) of total revenue for elementary and secondary education.¹¹³ By the 2004–2005 school year, federal sources were contributing 9.1% (\$44.4 billion).¹¹⁴

The largest funding component of the ESEA is Title I, which provides funding to the states and local districts based on the number of students from low-income families.¹¹⁵ Other programs funded by the ESEA include special education, English language acquisition, and professional development. Over 50,000 public schools and 12.5 million students benefit from Title I.¹¹⁶ Almost all federal education funding passes through state governments and is distributed to local school districts, but the state can retain one percent of Title I funds or \$400,000 (whichever is greater) to carry out related administrative duties.¹¹⁷

¹¹¹ For instance, in California, the state government controls the amount of money available for K-12 education and how these funds are allocated among districts. This system is the result of Proposition 13, passed in 1978, which capped local property tax rates and dramatically reduced the amount of revenue available from this funding source, and a series of cases culminating in *Serrano v. Priest*, 20 Cal.3d 25 (1977) (Serrano III) that declared a property-tax based finance scheme for schools unconstitutional. As a result, the state income tax funds a significant portion of K–12 education, and the state equalizes funding across school districts. See EdSource, California’s School Finance System, <http://www.californiaschoolfinance.org/FinanceSystem/tabid/54/Default.aspx> (last visited March 10, 2008).

¹¹² Pub. L. 89-10, 79 Stat. 77 (codified as amended at 20 U.S.C. §§ 6301 *et seq.* (2008)).

¹¹³ U.S. Census Bureau, Public Education Finances, 2005 (2007), available at <http://ftp2.census.gov/govs/school/01fullreport.pdf>

¹¹⁴ *Id.*

¹¹⁵ The definition of low-income is based on Census poverty estimates and the cost of education in each state. School districts may receive Title I funding based on the number or percentage of poor children in the district or school-wide Title I funding if 40 percent of enrolled students are Title I eligible. See U.S. Dep’t of Educ., Improving Basic Programs Operated by Local Education Agencies (Title I, Part A), <http://www.ed.gov/programs/titleiparta/index.html> (last visited March 10, 2008).

¹¹⁶ *Id.*

¹¹⁷ 20 U.S.C. § 6304

NCLB fundamentally altered how federal education grants had previously been administered by tying funds to accountability standards and imposing conditions on the states, districts, and schools in order to meet these standards. In order to fund the costs of compliance, Congress authorized significant increases in federal education grants to the states; however the amounts appropriated have been significantly lower than the amounts authorized, and states argue that even the authorized amounts do not cover the large costs of compliance. In 2007, Congress authorized \$25 billion to fund Title I, Part A, but appropriated only \$12.8 billion.¹¹⁸ Senator Edward Kennedy, an initial NCLB sponsor, now criticizes the law by stating, "The tragedy is that these long overdue reforms are finally in place, but the funds are not."¹¹⁹ However, proponents of NCLB respond that the authorizations in the legislation were intended as spending caps, not spending promises.¹²⁰

NCLB's central provisions impose accountability measures on the states in order to continue receiving federal education funding. Each state is required to submit a plan to the Secretary of Education that includes academic standards, assessment mechanisms, and progress objectives in math, science, and language arts. States first had to identify standards of what students are expected to know and how students are mastering the material based on three levels of achievement—basic, proficient, and advanced.¹²¹ States then had to implement annual, statewide testing in order to ensure that districts and

¹¹⁸ U.S. Dep't of Educ., *Improving Basic Programs Operated by Local Education Agencies (Title I, Part A), Funding Status*, <http://www.ed.gov/programs/titleiparta/funding.html> (last visited March 10, 2008).

¹¹⁹ W. James Antle III, *Leaving No Child Behind*, THE AMERICAN CONSERVATIVE, Aug. 1, 2005.

¹²⁰ U.S. Dep't of Educ., *10 Facts About K-12 Education Funding*, <http://www.ed.gov/about/overview/fed/10facts/index.html> (last visited March 14, 2008) (In the history of the United States, actual appropriations have rarely matched authorization levels.).

¹²¹ 20 U.S.C. § 6311(b)(1).

schools are making adequate yearly progress based on the identified standards.¹²² Adequate yearly progress targets must increase each year to reflect academic improvement by all students. To measure adequate yearly progress, not only do schools and districts have to meet targets overall, but specified subgroups also must meet separate annual measurable objectives; subgroups include economically disadvantaged students, disabled students, racial minorities, and students with limited English proficiency.¹²³ Each state, school, and district must prepare an annual report card on how it is meeting adequate yearly progress. By 2014, NCLB legislates that 100% of students will have reached “proficiency” in math and language arts.¹²⁴ If a school or district fails to achieve adequate yearly progress, the Secretary of Education will begin imposing penalties including withholding federal funds, allowing students to transfer to a different school, requiring the school to provide supplemental educational services, replacing school staff, and finally state takeovers or shut downs.¹²⁵ NCLB is currently up for reauthorization. The Bush administration has offered a number of proposals to tweak the law,¹²⁶ however Congress has so far failed to overcome partisan strife to pass the renewal.¹²⁷

Since its passage, several states have challenged NCLB requirements. Utah wrote a letter to the Department of Education in 2004 asking about the consequences of opting out of NCLB formula grants such as Title I. The Department responded that the state could choose not to participate in some or all Titles under No Child Left Behind but

¹²² 20 U.S.C. § 6311(b)(2).

¹²³ 20 U.S.C. § 6311(b)(2)(C)(v).

¹²⁴ 20 U.S.C. § 6311(b)(2)(F).

¹²⁵ 20 U.S.C. § 6316.

¹²⁶ SECRETARY MARGARET SPELLINGS, U.S. DEP’T OF EDUC., BUILDING ON RESULTS: A BLUEPRINT FOR STRENGTHENING THE *NO CHILD LEFT BEHIND ACT* (Jan. 2007).

¹²⁷ See Sam Dillon, *Court Revives Lawsuit Against No Child Left Behind Act*, N.Y. TIMES, Jan. 8, 2008.

opting out of Title I would jeopardize other, non-NCLB federal funding that is based on a state's level of Title I funding.¹²⁸ Additionally, if a local district or school opted out, in order for the state as a whole to receive federal education funds, the local entity would still have to comply with annual testing and adequate yearly progress assessments.¹²⁹

In April 2005, the National Education Association (the nation's largest teachers' union) and nine school districts in Michigan, Vermont, and Texas sued the Secretary of Education based on violations of NCLB and the Spending Clause for not spending all authorized funds in the Act. The Act states: "Nothing in this Act shall be construed to authorize an officer or employee of the federal government to mandate . . . a state or any subdivision thereof to spend any funds or incur any costs not paid for under this Act."¹³⁰ Relying on this "unfunded mandate" language, the plaintiffs argued that the Secretary is violating the Act by requiring states to fully comply with NCLB without providing sufficient federal funds to finance compliance. They argue further that the Secretary violates the Spending Clause by changing one of the conditions of NCLB funds that states and school districts would not have to finance any costs not paid for in the Act.¹³¹

A federal district court granted the Secretary's motion to dismiss, finding that Congress intended NCLB to impose requirements on states that accepted federal funding regardless of whether states also had to contribute their own resources.¹³² However in January 2008, the Sixth Circuit reversed the district court and remanded for further proceedings. The circuit court held that statutes enacted under the Spending Clause had

¹²⁸ Eugene W. Hickok, Letter to Dr. Steven O. Laing, Feb. 6, 2004, <http://www.ccsso.org/content/pdfs/USDEdLettertoUtah.pdf>.

¹²⁹ *Id.*

¹³⁰ 20 U.S.C. §7907.

¹³¹ *Sch. Dist. Of the City of Pontiac v. Spellings*, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. 2005).

¹³² *Id.* at *12–13.

to provide clear notice to the States of their liabilities if they accept federal funding, and NCLB failed to provide clear notice of who bore the unfunded costs of compliance.¹³³

The Department of Education intends to file a petition for rehearing en banc.¹³⁴

Connecticut also sued Secretary Spellings in August 2005 based on violations of the “unfunded mandate” language in the Act and the Spending Clause. Connecticut claims that the unfunded burden on school districts to meet NCLB requirements is hundreds of millions of dollars, or 5% of overall education spending in the state.¹³⁵ A federal district judge dismissed three of the state’s four claims in October 2006; the remaining claim is based on the Secretary’s violation of the Administrative Procedures Act when it denied Connecticut a specific exemption.¹³⁶

Total costs to the state and local governments to finance the unfunded portion of NCLB are difficult to estimate since many of the Act’s provisions are just beginning to be fully implemented. In a 2004 study for the state of Ohio, researchers estimated that unfunded implementation costs for NCLB would total \$1.447 billion, an 11% increase in education spending, on top of the \$662 million received in federal aid.¹³⁷ To be sure, federal spending on education increased sharply following the passage of NCLB. NCLB program spending increased from \$14.2 billion in 2001 to \$20.1 billion in 2002.¹³⁸

¹³³ Sch. Dist of Pontiac v. Sec’y of the U.S. Dep’t of Educ., 512 F.3d 252, *57–58 (6th Cir. 2008).

¹³⁴ Press Release, U.S. Dep’t of Educ., Statement by Secretary Margaret Spellings on the Pontiac (MI) School District et al. v. U.S. Department of Education Case, Feb. 1, 2008, *available at* <http://www.ed.gov/news/pressreleases/2008/02/02012008a.html>.

¹³⁵ Connecticut v. Spellings, 453 F. Supp. 2d 459, 474 (D. Conn. 2006).

¹³⁶ *Id.* 502–03.

¹³⁷ WILLIAM DRISCOLL & DR. HOWARD FLEETER, PROJECTED COSTS OF IMPLEMENTING THE FEDERAL “NO CHILD LEFT BEHIND ACT” IN OHIO vii (Dec. 12, 2003), *available at* http://www.schoolfunding.info/states/oh/oh_nclb_coststudy.pdf.

¹³⁸ U.S. Dep’t of Educ., Fiscal Year 2001-2009 State Tables for the U.S. Department of Education, *available at* <http://www.ed.gov/about/overview/budget/statetables/index.html#update> (last visited March 10, 2008).

However, federal spending leveled off after this and actually declined in 2006. In 2007, the federal government spent \$21.8 billion on all NCLB programs. The full amount of costs to be borne by the states and how states will finance this new obligation remain to be seen, especially as states experience budget shortfalls. A Minnesota study found that 72% of district superintendents were paying for NCLB requirements through spending reductions or reallocations instead of with new revenue.¹³⁹ A study by the National Education Association stated that some districts and states are laying off teachers; cutting music, art, and athletic programs; reducing Head Start slots; and increasing class sizes to comply with NCLB funding requirements.¹⁴⁰ This debate over NCLB's mandates, funding, and effectiveness will continue to play out in Congress, the courts, and in the private homes of American citizens.

VI. CONCLUSION

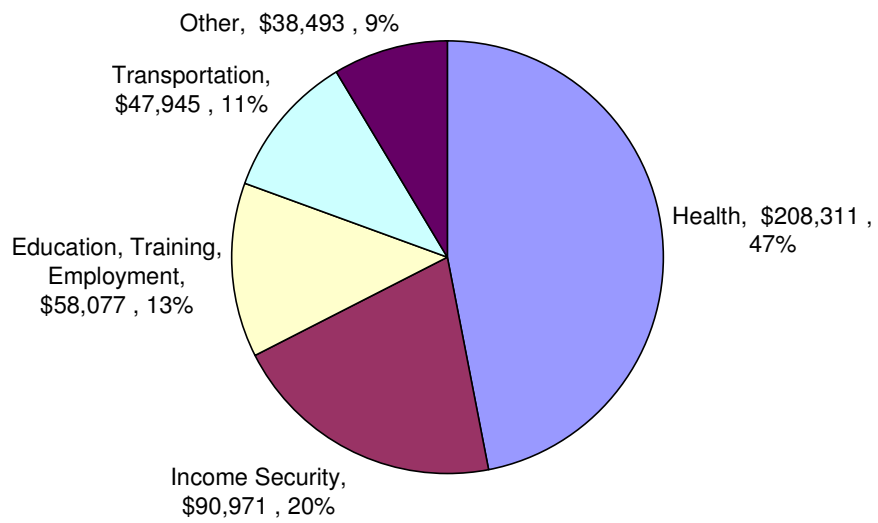
This paper has examined the recent history of federal conditional spending allocations to states. Even with the advent of the UMRA and recent challenges to federal mandates in the courts, there seems to be little question that federal conditional spending will continue to fund a substantial portion of state and local government activities. In fact, with the growth of programs like Medicaid and the advent of No Child Left Behind, federal conditional spending will likely further increase in size. Given the variety of the goals, funding, and structure of these programs, it is difficult to say how popular or useful they are in the aggregate. On one hand, some believe they threaten to impair state functionality through the creation of a morass of regulations that could stifle policy

¹³⁹ MINN. OFFICE OF THE LEGISLATIVE AUDITOR, EVALUATION REPORT – NO CHILD LEFT BEHIND 85 (March 2004), *available at* <http://www.auditor.leg.state.mn.us/Ped/pedrep/0404all.pdf>.

¹⁴⁰ Nat'l Educ. Ass'n, *Cuts Leave More and More Public School Children Behind* (Dec. 2003), *available at* <http://www.nea.org/esea/storiesfromthefield.html>.

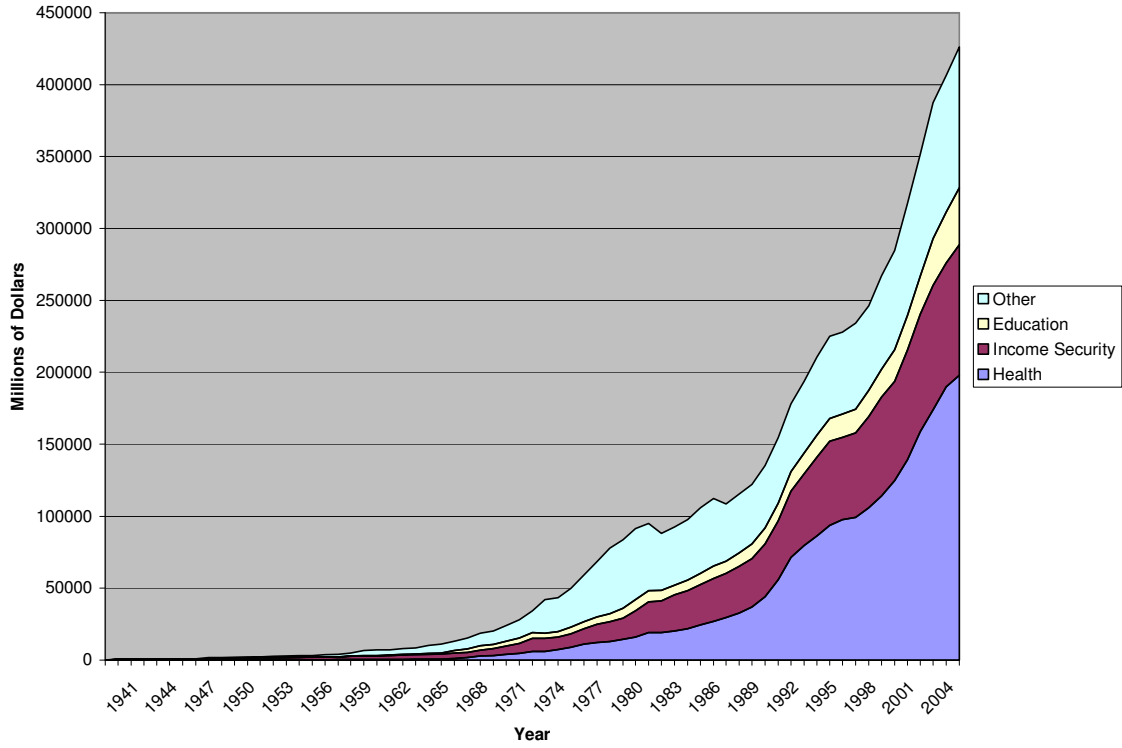
innovation and force the states to squander resources on administrative efforts. On the other hand, they may represent an efficient use of federal policy making knowledge and revenue generating resources in critical areas, they can always be rejected by states, and they may hold the potential to counteract the effects of the business cycle more effectively than states or other federal government action could accomplish alone.

Figure 1
Federal Government Grants to State and Local Governments by Category, 2007
(Millions of Dollars)¹⁴¹



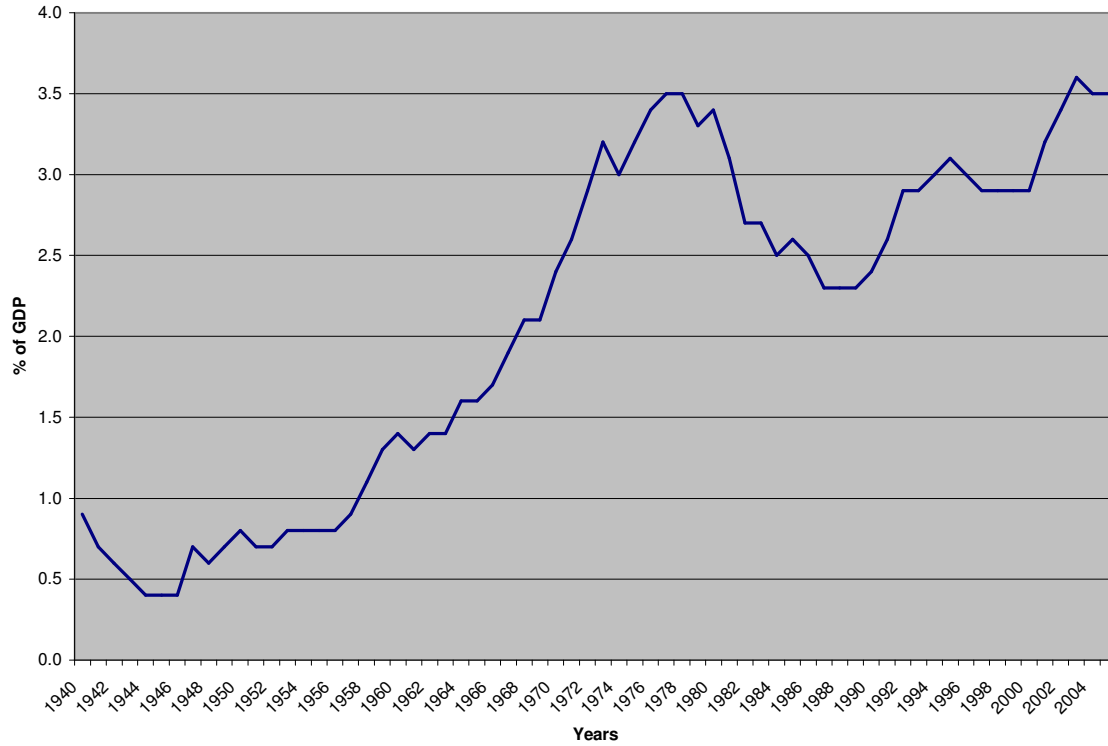
¹⁴¹ HISTORICAL TABLES, *supra* note 1, at 240 tbl.12.2.

Figure 2
 Grants to State and Local Governments by Category of Over Time
 (Millions of Dollars)¹⁴²



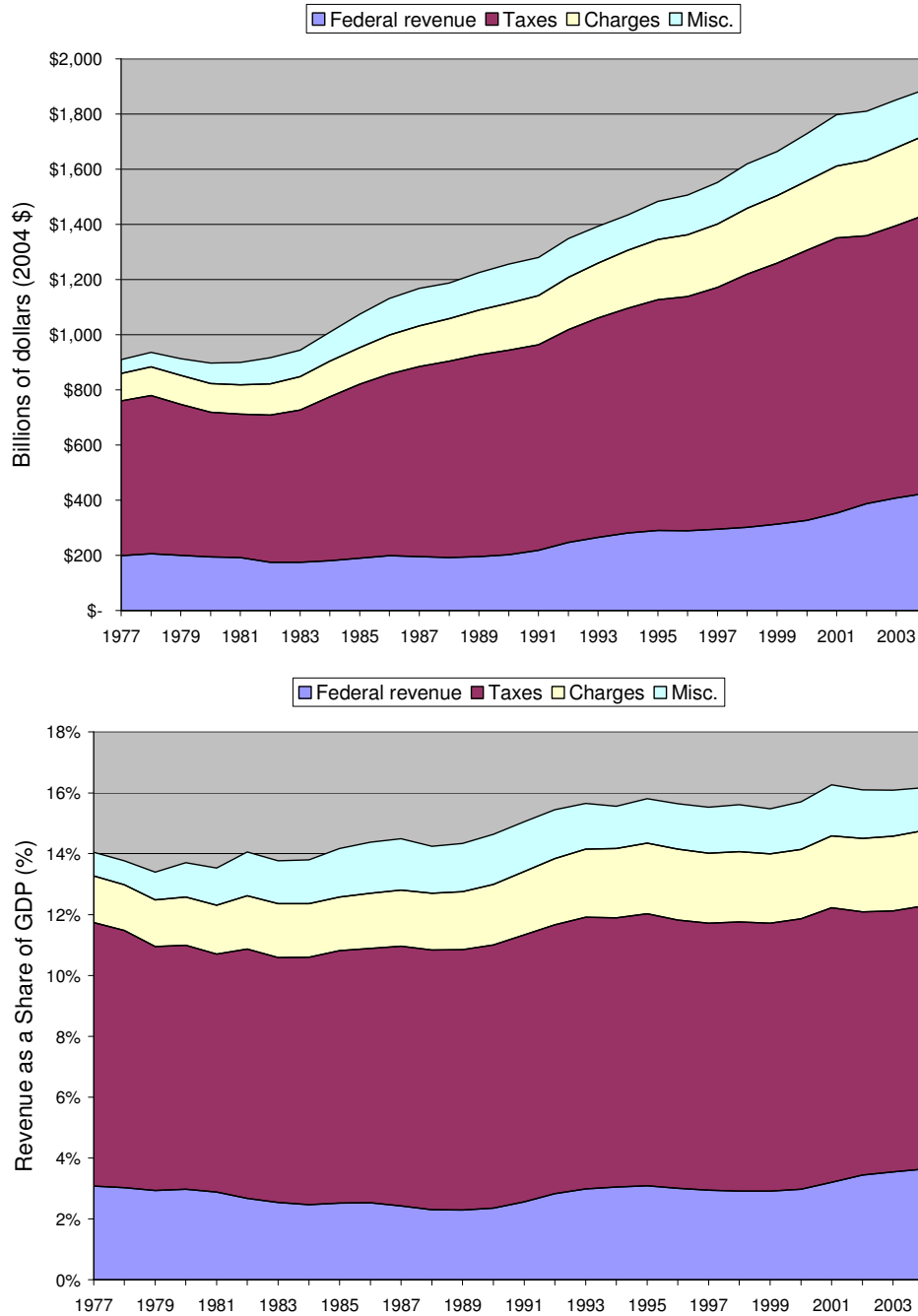
¹⁴² *Id.*

Figure 3
Grants to State and Local Governments Over Time
(% of GDP)¹⁴³



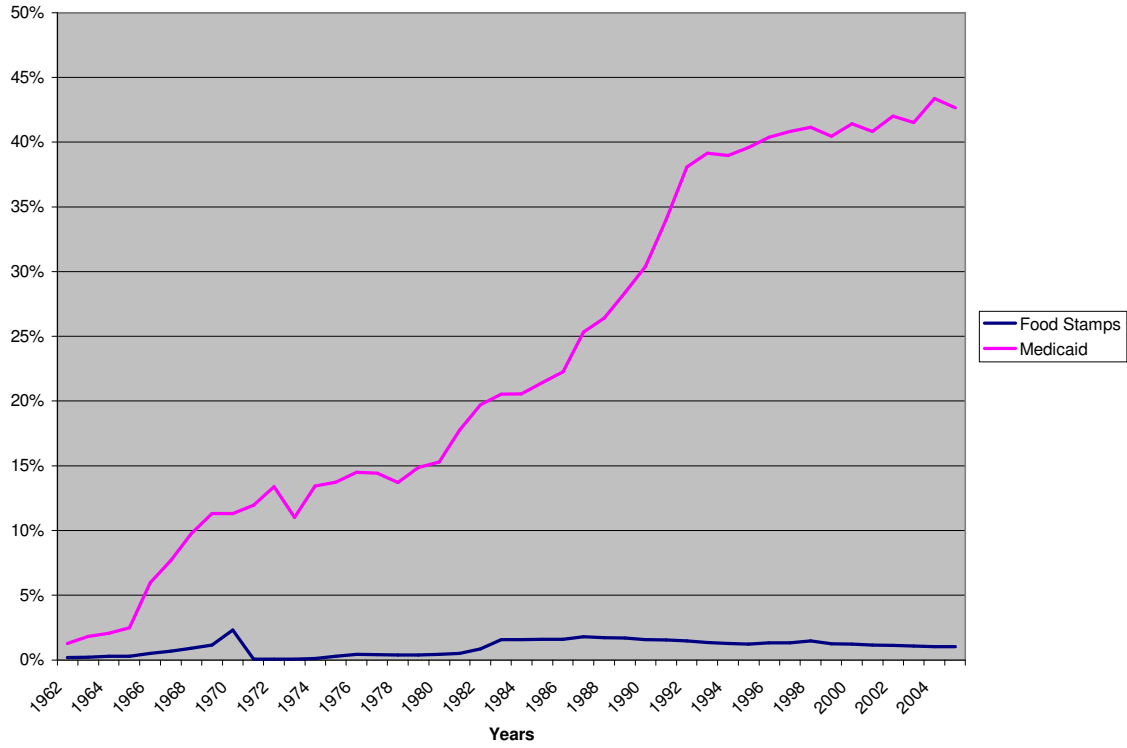
¹⁴³ *Id.*

Figure 4
 State & Local Government General Revenue by Source¹⁴⁴
 (Billions of 2004 Dollars and % of GDP)



¹⁴⁴ U.S. Census Bureau, Annual Survey of State and Local Government Finances, multiple years. Data compiled by Public Policy Institute of California, available at <http://www.ppic.org/main/datadepot.asp>; Bureau of Econ. Analysis, National Economic Accounts, Gross Domestic Product, <http://www.bea.gov/national/index.htm>.

Figure 5
 Programs as a Percent of Total Grants to States
 (Millions of Dollars)¹⁴⁵



¹⁴⁵ HISTORICAL TABLES, *supra* note 1, at 240 tbl.12.2.

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