Harvard Law School
Federal Budget Policy Seminar

Briefing Paper No. 19

Legal Limits on Conditional Spending including Recent Challenges to No Child Left Behind

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5-2-06

I. Introduction

In 2001, Congress reauthorized the Elementary and Secondary Education Act of 1965 (ESEA) as the No Child Left Behind Act of 2001. The purpose of the reauthorization was to continue to provide education funding to the states while strengthening accountability by requiring States to implement statewide accountability systems covering all public schools and students. Because No Child Left Behind places so many requirements on the states and the schools, Congress authorized a significant increase in federal education grants to the states. However, the states have found that the increase in federal funding is not large enough to cover the increased costs of complying with No Child Left Behind. Further, the amounts being appropriated by Congress on a yearly basis are lower than the amounts authorized in the bill. Therefore the states have started challenging No Child Left Behind as an unconstitutional use of Congressional spending power.

Part I of this paper outlines the history of the conditional federal spending doctrine and examines two other current conditional spending programs. Part II discusses the five restrictions on conditional spending. These restrictions were outlined by the Supreme Court in the 1987 case *South Dakota v. Dole*, and they remain good law. Part III discusses the history of federal spending in education and delves into the funding scheme and requirements of No Child Left Behind. This part also looks at recent challenges to No Child Left Behind. Finally, Part IV discusses the costs of implementing No Child Left Behind and looks at several studies that have attempted to estimate the gap between those costs and the funds being appropriated by the federal government.

A. A History of the Conditional Federal Spending Doctrine

Article I, section 8, clause 1 of the United States Constitution, also known as the Spending Clause, states that "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[1] From the time the Constitution was written, there was a debate amongst the founders as to how broadly Congress could use this spending power. James Madison believed that Congress should be able to use the Spending Clause only to achieve objectives that fall under the enumerated powers given to Congress.[2] On the other hand, Alexander Hamilton thought that the spending power is separate from the enumerated powers, and that Congress should be able to spend for any purpose as long as that purpose provides for the general welfare.[3] In the 1936 case *United States v. Butler*, the Supreme Court was asked to determine the constitutionality of certain provisions of the Agricultural Adjustment Act, a New Deal act which attempted to reduce agricultural production by imposing processing taxes on certain commodities and using the proceeds of those taxes to pay farmers who agreed to reduce production.[4] In its opinion, the Court noted the ongoing debate surrounding the Spending Clause and held that the Hamiltonian position was the correct interpretation. The Court stated that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[5] However, the Court found that the challenged provisions of the Agricultural Adjustment Act were unconstitutional because the taxes and expenditures were merely part of "a statutory plan to regulate and

[1] U.S. Const. art. I, §8, cl. 1.
[2] United States v. Butler, 297 U.S. 1, 65 (1936).
[3] Id.
[4] Id. at 53-57.
[5] Id. at 66.

control agricultural production," and the right to regulate agricultural production was a right reserved to the states under the Tenth Amendment.[6] This aspect of Butler has never been followed, nor has the Court ever held since 1937, in any context, that control of production is left entirely to the states.[7] Essentially the Court held that while taxing and spending for the general welfare are constitutional exercises of Congressional power, the spending power could not be used in *this* particular instance to circumvent Congress's inability to regulate a matter reserved to the states.

The Supreme Court reaffirmed its decision in *Butler* regarding the use of the spending power the following year in *Steward Machine Co. v. Davis*. In this case, the Supreme Court was asked to determine the validity of a tax imposed by the Social Security Act on employers who had eight or more employees.[8] Part of the Act allowed an employer to receive a credit on the tax if the employer made contributions to its state unemployment fund.[9] However, the credit would only be received if the state unemployment fund met certain conditions as determined by the Social Security Board.[10] In effect, a state could only guarantee the credit to the employers within its state by setting up a state unemployment fund that met the criteria required by the federal government. The petitioner argued that the Act was coercive in that it forced the states to set up unemployment funds by threatening to withhold the credit from employers within that state.[11] A state that refused to set up an unemployment fund that met the federal conditions would fear that its businesses would move to another state to get the tax credit,

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[6] Id. at 68.
[7] Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 91 (2001).
[8] Steward Machine Co. v. Davis, 301 US 548 (1937).
[9] Id. at 574.
[10] Id. at 574-575.
[11] Id. at 585-586.

and thus would be coerced into creating the fund. The Court disagreed that this was an example of coercion.[12] The Court held that the Act was an example of taxing and spending to promote the general welfare (the relief of unemployment), and that complying with the requirement to set up a state unemployment fund is a decision that each state can choose to make.[13] The Court pointed out that any state at any time could choose to repeal its state unemployment fund and not receive the credit.[14] Justice Cardozo wrote "every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."[15] Effectively, the Court determined that so long as the Act is for a lawful end and the state has the right to refuse the conditions, the law is a constitutional use of the spending power. The Court distinguished *Butler* by noting that while in *Butler* there was an attempt to regulate production without the consent of the state in which production was affected, in *Davis* the unemployment compensation law which was a condition of the credit had the approval of the state and could not be a law without it.[16]

The current interpretation of the Spending Clause was laid out in the 1987 case *South Dakota v. Dole*, where the state of South Dakota challenged a federal law that directed the Secretary of Transportation to withhold a percentage of federal highway funds from any state that allowed a person who is under twenty-one to purchase or

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[12] Id. at 585.
[13] Id. at 586-592.
[14] Id. at 592-593.
[15] Id. at 589-590.
[16] Id. at 592. *See* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1127-28 (1987) for a more detailed explanation of how the court tried to distinguish *Davis* from *Butler*.

publicly consume alcoholic beverages.[17] South Dakota argued that the statute violated its rights under the Twenty-first Amendment to control the importation and transportation of alcohol into the state.[18] Additionally, they argued that the statute violated limitations on congressional use of the Spending Clause.[19] The Court disagreed with South Dakota on both points, and held that

> Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in [the federal statue] is a valid use of the spending power.[20]

In reaching its decision, the Court identified five restrictions on congressional use of conditional federal spending. The use of the spending power must be in pursuit of the general welfare, the conditions must be unambiguous, the conditions must be related to the federal interest in particular projects, the conditions cannot force the state to do something unconstitutional, and the conditions cannot be coercive.[21] In Dole, the Court had little trouble finding that all five restrictions were met. The Court found that stated purpose of the statute – to combat interstate drinking and driving – was in pursuit of the general welfare.[22] The Court also determined that the conditions were unambiguous and related to the federal interest in safe highways.[23] The Court found that conditions did not

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[17] South Dakota v. Dole, 483 U.S. 203 (1987).
[18] Id. at 205-206.
[19] Id.
[20] Id. at 211-212.
[21] Id. at 207-208, 211.
[22] Id. at 208.
[23] Id. at 208-209.

force the state to do anything unconstitutional.[24] And finally the Court concluded that the small percentage of highway funds affected were not enough to establish coercion.[25] The five restrictions and their applications since *Dole* will be addressed in more detail in Section II below.

B. Examples of Conditional Spending Statutes

B(1). Medicaid

In 1965 Congress enacted the Medicaid health-care program as a cooperative venture jointly funded by the Federal and State governments to assist States in furnishing medical assistance to eligible needy persons.[26] Medicaid is the largest source of funding for medical and health-related services for America's poorest people.[27] If a state chooses to participate in the Medicaid program, it must comply with a variety of requirements established by the federal government.[28] Participating states groups have some discretion in determining who their Medicaid programs will cover and the financial criteria for Medicaid eligibility. However, in order to receive federal funds a state must cover certain populations including individuals who receive federally assisted income-maintenance payments.[29] Additionally, a state receiving federal funds must cover certain basic services including inpatient hospital services, outpatient hospital services, prenatal care, vaccines for children, nursing facility services, and laboratory and x-ray services.[30]

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[24] Id. at 209-211.
[25] Id. at 211.
[26] U.S. Department of Health & Human Services Centers for Medicare & Medicaid Services, *Medicaid Program - General Information: Technical Summary*, (2005), *available online at* http://www.cms.hhs.gov/MedicaidGenInfo/03_TechnicalSummary.asp#TopOfPage.
[27] Id.
[28] ROBERT D. BEHN & ELIZABETH K. KEATING, FACING THE FISCAL CRISES IN STATE GOVERNMENTS: NATIONAL PROBLEM; NATIONAL RESPONSIBILITIES, 10 (June 2004), *available online at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=563162.
[29] U.S. Department of Health & Human Services, *supra* note 25.
[30] Id.

States can also receive federal matching funds for other optional services like transportation and prescription drugs. The federal government reimburses states for a share of their annual Medicaid expenditures. States with a higher per capita income level compared to the national average are reimbursed a smaller share of their costs. By law, the share cannot be lower than 50 percent or higher than 83 percent.[31] On average, the federal government pays about 57 percent of all Medicaid expenditures.[32]

B(2). Children's Internet Protection Act

The Children's Internet Protection Act (CIPA) is a federal statute enacted by Congress in 2000 that requires schools and libraries to have certain Internet safety measures in place in order to receive particular types of federal funding.[33] Schools and libraries are eligible for discounted internet access through the "E-rate" and Library Services and Technology Act (LSTA) federal subsidy programs.[34] CIPA mandates that any school or library receiving these federal funds must install technology on all computers that blocks or filters visual depictions that are obscene, child pornography, or harmful to.[35] If a school or library fails to install the blocking technology or enforce its operation, the federal government can withhold the federal internet access subsidies.[36] The American Library Association sued arguing that CIPA violated both the First Amendment and the Spending Clause.[37] While the District Court agreed with the

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[31] Id.
[32] Iris J. Lav, *Piling On Problems: How Federal Policies Affect State Fiscal Conditions*, NATIONAL TAX JOURNAL 535, 545 (Sept. 2003).
[33] The Children's Internet Protection Act, Pub. L. No. 106-554 (2001) [hereinafter CIPA].
[34] Barbara A. Sanchez, Note, *United States v. American Library Association: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 470 (2005).
[35] CIPA at §§1711-1712, 1721 (The harmful to minors block is only required when minors are using the computer. It does not apply to computer users over the age of 18).
[36] Id.
[37] United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

American Library Association, the Supreme Court reversed the ruling.[38] The Court determined that Internet access in libraries can be subject to content-based restrictions, just as a library can make judgments in deciding which books to provide to library patrons.[39] The Court held that "because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power."[40] Thus, CIPA continues today as an example of Congressional use of conditional spending.

II. Legal Limits on Conditional Spending: The Dole Restrictions

In Dole, the Supreme Court held that "the spending power is of course not unlimited…but is instead subject to several general restrictions articulated in our cases."[41] Lawsuits objecting to Congressional use of the spending power often attempt to prove that the challenged statute violates one or more of the restrictions.

A. Pursuit of the General Welfare

The first restriction set out in Dole is that "the exercise of the spending power must be in pursuit of the 'general welfare.'"[42] However, the Court quickly limits the ability of litigants to challenge a statute under this restriction by noting that "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."[43] Further, the Court states in a footnote that "the level of deference to the congressional decision is such that

[38] Id.
[39] Id. at 205.
[40] Id. at 214.
[41] South Dakota v. Dole, 483 U.S. at 207.
[42] Id.
[43] Id. (citing Helvering v. Davis, 301 U.S. 619, 640, 645 (1937)).

the Court has more recently questioned whether "general welfare" is a judicially enforceable restriction at all."[44] Thus, the courts have generally treated the general welfare restriction as a nonjusticiable political question.[45] Several states have tried to argue that Congress acted outside the boundaries of the general welfare restriction in passing certain conditional spending statutes. In *Kansas v. U.S.*, Kansas challenged portions of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which made the receipt federal welfare funds dependent on a state's acceptance of certain conditions.[46] Many of the conditions were related to the Child Support Enforcement Program, which provides federal money to assist states in collecting child support from absent parents.[47] The PRWORA amended the Enforcement Program by requiring states to establish a Case Registry, pass laws facilitating genetic testing and paternity establishment, and pass the Uniform Interstate Family Support Act.[48] Kansas argued that the problem of unpaid child support was not serious enough to qualify as a general welfare issue.[49] The Court quickly dismissed this position and noted a number of findings by Congress that supported the view that unpaid child support is a serious problem.[50] In essence, the Court upheld the belief that courts should be deferential to Congress when applying the general welfare requirement of the Spending Clause.

B. Conditions Must be Unambiguous

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[44] Id. (citing Buckley v. Valeo, 424 U.S. 1, 90-91 (1976)).
[45] John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 66 (2001).
[46] Kansas v. U.S., 214 F.3d 1196 (2000).
[47] Id. at 1197.
[48] Id. at 1198.
[49] Id. at 1199 (in footnote 4).
[50] Id.

The second limitation on the use of conditional spending is "that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously ..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[51] Many of the cases that have challenged a statute under the unambiguous restriction have been cases where Congress conditioned receipt of federal funds on a state's waiver of its Eleventh Amendment sovereign immunity.[52] In *Hurst v. Texas Dep't of Assistive & Rehab. Serv.*, the plaintiff sued the Texas Department of Assistive and Rehabilitative Services in federal court in an effort to get judicial review of the Department's decision concerning her medical care.[53] The Department responded by filing a motion to dismiss stating among other things that Texas had not waived its Eleventh Amendment sovereign immunity to submit itself to the Court's jurisdiction.[54] The plaintiff argued that the Department and Texas had waived Eleventh Amendment immunity under the §102 Rehabilitation Act Amendments of 1998 (29 U.S.C.A. § 722(c)(5)(J)(i)) when they accepted federal funds under the Act.[55] The Department argued that this particular section of the Rehabilitation Act did not provide a clear statement to the states of a waiver requirement of sovereign immunity in return for receipt of federal funds.[56] The Court examined the intent of Congress in creating this section of the statute, and found that the purpose was to assist the states in helping people with disabilities, not to preempt a state's power and condition its participation on its

[51] South Dakota v. Dole, 483 U.S. at 207 (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).
[52] The Eleventh Amendment states that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S.C.A. Const. Amend. 11.
[53] Hurst v. Texas Dept. of Assistive and Rehab. Servs., 392 F.Supp.2d 794 (W.D.Tex.,2005).
[54] Id. at 796.
[55] Id. at 799.
[56] Id.

waiver of sovereign immunity.[57] The Court held that "Congress has not established any clear intent that would put the states on notice that they are waiving Eleventh Amendment immunity under § 102. The 1998 amendments to § 102 of the Rehabilitation Act, specifically § 722(c)(5)(J)(i), simply do not rise to the level of a clear statement that is required of legislation enacted through Congress's Article I Spending Clause powers."[58] The Court was careful to point out that the Fifth Circuit has generally been lenient when determining how clear Congress must be to signal to the states that a statute requires them to waive immunity.[59] However, the Court wrote "this Court does not read Fifth Circuit precedent to signify that any reference, however slight, to "Federal courts"- such as § 722(c)(5)(J)(i) - satisfies the "clear-statement" rule."[60] While rulings such as this one are rare, they show that the unambiguous restriction can have some bite.[61]

C. Conditions Must be Related to the Federal Interest in Particular National Projects

The third restriction laid out by the Court in *Dole* is that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[62] It has been noted that "although no court has denied the existence or justiciability of *Dole's* relatedness requirement, nearly all have given it only cursory attention."[63] One Court even remarked that "this Court has found no case, and plaintiffs have cited none, striking down a condition on federal funding solely

[57] Id. at 800-801.
[58] Id. at 801.
[59] Id.
[60] Id.
[61] For examples where the Court has found no ambiguity problem, *see* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272 (5th Cir. 2005), Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988); Nieves-Marquez v. Puerto Rico, 353 F. 3d 108 (1st Cir. 2003); A.W. v. Jersey City Pub. Schs., 341 F.3d 234 (3d Cir. 2003).
[62] South Dakota v. Dole, 483 U.S. at 207-208 (citing Massachusetts v. U.S., 435 U.S. 444, 461 (1978)).
[63] Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L. J. 459, 466 (2003).

because it was insufficiently related to the federal interest in the program funded."[64] However, in *Guillen v. Pierce County*, the Washington Supreme Court did find that some of the conditions states had to meet to receive federal highway funding did not meet the relatedness restriction.[65] In this case, the victims of several traffic accidents wanted access to accident reports, traffic surveys, and other documents held by the local government.[66] The County argued that these documents were nondiscoverable under a federal highway safety statute.[67] The Court held that the portion of the federal statute that made all the documents nondiscoverable violated the Constitution.[68] The Court was chiefly concerned with the fact that all documents, even those that were created for a state or local purpose and then later collected and used for a federal purpose, were deemed nondiscoverable under the statute.[69] The Court did not see how these "collected" documents were related to a federal interest in a particular national program or project. The Court wrote

> While the Spending Clause entitles Congress to offer states the option of accepting federal funds "with strings attached"--even when those "strings" interfere with the basic functioning of state government, as they do here--the United States Supreme Court has made it clear that Congress may do so only if those "strings" are also firmly "attached" to a legitimate federal interest in a

[64] Am. Civil Liberties Union v. Mineta, 319 F.Supp.2d 69, 80 (D.D.C. 2004). This statement was made after the Court noted that the suppression of messages aimed at legalizing drugs seemed quite far removed from the government's interest in funding and promoting mass transit.
[65] Guillen v. Pierce County, 31 P.3d 628 (Wash. 2001) *rev'd in part*, 123 S. Ct. 720 (2003).
[66] Id. at 632.
[67] Id. The statute, 23 U.S.C.A. §409, states that "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings…or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery…"
[68] Id. at 633.
[69] Id.

> specific federal project or program. We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and "raw data" that were originally prepared for routine state and local purposes, simply because they are "collected," for, among other reasons, pursuant to a federal statute for federal purposes.[70]

Guillen was eventually overturned by the Supreme Court on Commerce Clause grounds.[71] Thus it is possible that another challenge to a statute based on the relatedness restriction may be upheld using logic similar to that used by the Washington Supreme Court in *Guillen*.

D. Conditions Cannot Induce States to Engage in Unconstitutional Activities

The fourth restriction stated by the *Dole* Court is that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[72] In *Dole*, South Dakota argued that because the Twenty-First Amendment prohibits Congress from directly regulating drinking ages, Congress should be barred from using the spending power to get around the constitutional barrier.[73] The Court disagreed with this interpretation of the "independent constitutional bar" restriction, and instead held that the "limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the

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[70] Id. at 651.
[71] Pierce County v. Guillen, 537 US 139 (U.S. 2003) (stating that "Because we conclude that Congress had authority under the Commerce Clause to enact both the original § 409 and the 1995 amendment, we need not decide whether they could also be a proper exercise of Congress' authority under the Spending Clause or the Necessary and Proper Clause).
[72] South Dakota v. Dole, 483 U.S. at 208 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-270 (1985)).
[73] South Dakota v. Dole, 483 U.S. at 209.

unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[74] The Court used the example of a grant of federal funds conditioned on a state's infliction of cruel and unusual punishment to clarify the types of conditions that would be unacceptable under this restriction.[75] A more recent federal statute that has been challenged under the "independent constitutional bar" restriction is The Religious Land Use and Institutionalized Persons Act (RLUIPA). In order to receive federal funding for prisons, RLUIPA requires that "no [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution."[76] Several states argued that this condition required the states to violate the First Amendment's Establishment Clause.[77] In *Cutter v. Wilkinson*, the Supreme Court disagreed with the Sixth Circuit's holding that § 3 of RLUIPA "impermissibly advanc[es] religion by giving greater protection to religious rights than to other constitutionally protected rights," and held that RLUIPA did not violate the Establishment Clause, and therefore was not an unconstitutional use of Congress's spending power.[78] Similarly, in *American Library Association* mentioned above, the Supreme Court held that the Children's Internet Protection Act did not induce libraries to violate the First Amendment free speech rights of library patrons, and therefore was a constitutional exercise of Congress's spending power.[79]

E. Conditional Spending Cannot be Overly Coercive

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[74] Id. at 210.
[75] Id.
[76] Cutter v. Wilkinson, 125 S.Ct. 2113, 2118 (2005).
[77] *See* Madison v. Riter, 355 F.3d 310, 313 (C.A.4 2003) (§ 3 of RLUIPA does not violate the Establishment Clause); Charles v. Verhagen, 348 F.3d 601, 610-611 (7th Cir. 2003) (same); Mayweathers v. Newland, 314 F.3d 1062, 1068-1069 (9th Cir. 2002).
[78] Cutter v. Wilkinson, 125 S.Ct. 2113 at 2120.
[79] United States v. American Library Ass'n, Inc., 539 U.S. 194, 214 (2003).

The final restriction set out in the *Dole* opinion is that financial inducements cannot be so coercive that they pass the point where "pressure turns into compulsion."[80] In *Dole*, the Court determined that tying 5% of highway funds to the condition that states raise the drinking age was "relatively mild encouragement" and not overly coercive.[81] The Court gave no indication as to where the line between coercion and compulsion may lie. In decisions since *Dole*, there has been a trend against finding coercion in conditional spending statutes, despite the large sums of money at stake.[82] For example, in *California v. U.S.*, California argued that the Federal Government's conditioning the receipt of Medicaid funds on the State's agreeing to provide emergency medical services to illegal aliens is coercive.[83] California admitted that it had entered into the Medicaid program voluntarily; however the state maintained that it now had "no choice but to remain in the program in order to prevent a collapse of its medical system."[84] The Court, quoting a previous Ninth Circuit case, wrote

> "[C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds-or is the state merely presented with hard political choices? The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."[85]

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[80] South Dakota v. Dole, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 595 (1937)).
[81] South Dakota v. Dole, 483 U.S. at 211.
[82] Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 180-181 (2001).
[83] State of California v. United States, 104 F. 3d 1086, 1092 (9th Cir. 1997).
[84] Id.
[85] Id. (citing Nevada v. Skinner, 884 F.2d 445, 448-49 (9th Cir.1989)).

Coercion was also an issue in *Burt v. Rumsfeld*, a case challenging the Solomon Amendment. However, since the Solomon Amendment cases involve private universities, rather than the states, suing the federal government under the spending clause, they may not be applicable to this paper.[86]

III. No Child Left Behind Act of 2001

A. *A History of Federal Spending in Education – Title I*

The original Department of Education was created in 1867 and designed to collect information on schools and teaching. Over the next one hundred years, the role of the federal government in education grew slowly. In the 1890s the government gave support to the original system of land-grant colleges and universities, in the early 20th century vocational education programs received federal aid, and during World War II payments were made directly to school districts affected by an increased military presence. Through the end of World War II, the federal government contributed less than 1.5 percent of total revenues for public elementary and secondary education.[87] Congress didn't pass the first comprehensive education legislation until 1958, when it enacted National Defense Education Act (NDEA) in response to the Cold War. This legislation was specifically aimed at helping the United States compete with the Soviet Union,

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[86] In the original *Burt v. Rumsfeld* case, the District Court concluded that the "coercion [was] well past the point of pressure and [was] compulsion." By refusing to allow military recruiters on campus, Yale University would lose all of its $300 million in federal funding. In its argument, the Department of Defense actually conceded the fact of coercion, and the Court concluded as a matter of law that the conceded coercion reached the point of compulsion However, the constitutionality of the Solomon Amendment was upheld by the Supreme Court in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* and the Court stated that "this case does not require us to determine when a condition placed on university funding goes beyond the "reasonable" choice… and becomes an unconstitutional condition [because] a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." The Court held that since the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of funds.

[87] CONGRESSIONAL BUDGET OFFICE, EXPLANATION OF ACHIEVEMENT TRENDS (August 1987), *available online at* http://www.cbo.gov/ftpdocs/62xx/doc6204/doc13b-Part_3.pdf.

specifically in areas of science and technology. It was not until 1965, with the passage of the Elementary and Secondary Education Act (ESEA), that the Federal government began providing general funds for elementary and secondary education. Included in the Elementary and Secondary Education Act was the Title I program of federal aid to disadvantaged children.

Title I provided aid directly to school districts with "educationally deprived children of low-income families." Ninety-four percent of school districts qualified for aid.[88] As a result of ESEA and its successive reauthorizations, the federal share of public school revenues grew to over 9 percent by 1980.[89] In 1981 Congress passed the Education Consolidation and Improvement Act of 1981 which consolidated 42 programs into 7 programs to be funded under the elementary and secondary block grant authority. In a block grant the federal government allocates funds with no conditions and leaves decisions on how to use the money to the local or state government.[90] By 1990, the federal share of revenues had dropped to almost 6 percent.[91] In the most recent *Public Education Finances* report issued by the U.S. Census Bureau, the federal share of revenues was up to 8.4%.[92]

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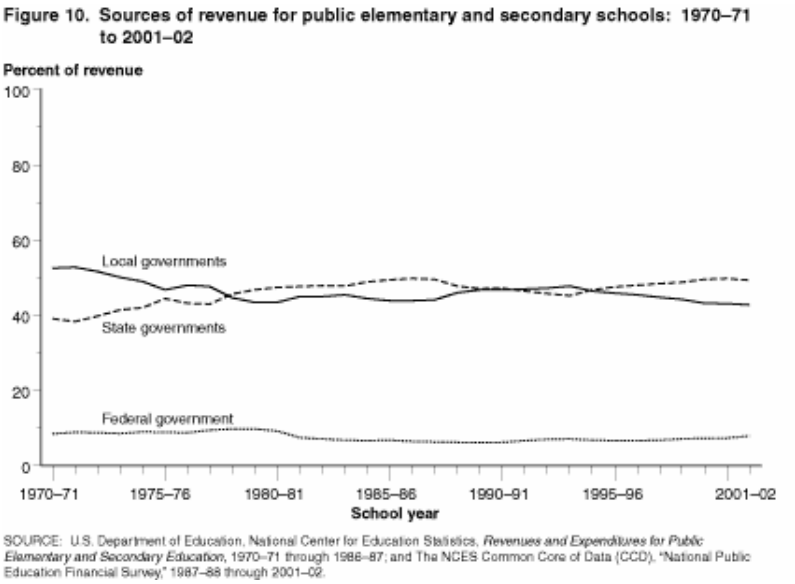
[88] Ellen Condliffe Lagemann, *A Commitment to Equity: What Matters About the Elementary and Secondary Education Act of 1965?, in* EDUCATION WEEK (April 13, 2005), *available online at* http://www.gse.harvard.edu/events/esea/ed_week.htm.
[89] CONGRESSIONAL BUDGET OFFICE, TRENDS IN EDUCATIONAL ACHIEVEMENT (April 1986), *available online at* http://www.cbo.gov/ftpdocs/59xx/doc5965/doc11b-Part_03.pdf.
[90] Carl F. Kaestle, *Federal Aid to Education Since World War II: Purposes and Politics, in* THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION 13, 28 (2000), *available online at* http://www.cep-dc.org/pubs/futurefederal_esa/future_fed_role_kaestle.pdf.
[91] U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, *Revenues for public elementary and secondary schools, by source of funds: Selected years, 1919-20 to 2001-02, available online at* http://nces.ed.gov/programs/digest/d04/tables/dt04_153.asp.
[92] US CENSUS BUREAU, PUBLIC EDUCATION FINANCES (March 2005), *available online at* http://ftp2.census.gov/govs/school/03f33pub.pdf.



Title I of ESEA was reauthorized in the No Child Left Behind Act of 2001. Supporters of No Child Left Behind see the law as a necessary step in attaining the goal laid out in the ESEA – achieving educational equity.[93] There has been a continuing achievement gap between students of different socio-economic, racial, ethnic, and language backgrounds, and politicians from both parties almost unanimously supported revamping ESEA to address the gap.[94] NCLB changed the traditional role of the federal government in education by tying a number of conditions to the receipt of federal funds. Some of the conditions include implementation of statewide accountability systems, creation of alternatives for children attending low-performing schools, and set requirements of progress in specific subjects. These and other conditions will be discussed below.

B. How Does the Funding Work in No Child Left Behind?

[93] In his announcement of No Child Left Behind in January 2001, President George W. Bush stated "These reforms express my deep belief in our public schools and their mission to build the mind and character of every child, from every background, in every part of America."

[94] The final votes were 87-10 in the Senate and 381-41 in the House. Senators Ted Kennedy (D-MA) and Judd Gregg (R-NH) and Congressmen George Miller (D-CA) and John Boehner (R-OH) were its chief sponsors in the Senate and the House.

The No Child Left Behind Act encompasses a number of major initiatives, including Title I – Improving the Academic Achievement of the Disadvantaged, Title II – Preparing, Training, and Recruiting High Quality Teachers and Principals, Title V – Promoting Informed Parental Choice and Innovative Programs, and Title VI – Flexibility and Accountability. Within each title there are a number of programs, each with their own authorization of appropriations. In some cases Congress authorized to be appropriated a specific dollar amount for each fiscal year from 2002 through 2007. In other programs, Congress authorizes a specific amount for fiscal year 2002 and then such sums as may be necessary for each of the five succeeding fiscal years. Additionally, some programs receive no dollar figure at all in their authorizations. Instead Congress simply authorizes to be appropriated such sums as may be necessary for fiscal year 2002 and for each of the five succeeding fiscal years. In such cases, Congress is giving the appropriating committees the power to determine annually how much money to give the states for those programs. Below are examples of authorizations for appropriations for selected programs in Title I of No Child Left Behind.

	FY2002	FY2003	FY2004	FY2006	FY2006
Improving Basic Programs Offered by Local Educational Agencies (Part A of Title I)	$13.5 Billion	$16 Billion	$18.5 Billion	$20.5 Billion	$22.75 Billion
Education of Migratory Children (Part C of Title I)	$410 million	Such sums as may be necessary	Such sums as may be necessary	Such sums as may be necessary	Such sums as may be necessary
Comprehensive School Reform (Part F of Title I)	Such sums as may be necessary	Such sums as may be necessary	Such sums as may be necessary	Such sums as may be necessary	Such sums as may be necessary

The allocation to states of funds appropriated under Part A of Title I (Improving Basic Programs Operated by Local Educational Agencies) is determined by calculating the amount of grants that each local educational agency is entitled to receive. Local education agencies are entitled to receive three types of grants: Basic Grants (Section 1124), Concentration Grants (Section 1124A), and Targeted Grants (Section 1125). The amount of the Basic Grant is determined by multiplying the number of poor and disadvantaged children in the school district by 40 percent of the average per-pupil expenditure in the state.[95] Concentration Grants are available to local educational agencies that receive basic grants and have a high number or percentage of poor and disadvantaged children.[96] Targeted Grants provide increased grants per poor child as the percentage of economically disadvantaged children in a school district increases.[97] Once the total amount of grants for each local education agency is determined by the Secretary of Education, each state is allocated funds to make these grants. However, each state will only receive an amount equal to the amount made available to it in fiscal year 2001 unless the amount made available to carry out the grant programs exceeds the amount made available in 2001.[98] If the sums available for any fiscal year are insufficient to pay the full amounts that all local educational agencies are eligible to receive under the grant

[95] No Child Left Behind Act §1124, 20 U.S.C. § 6333 (2002). Poor and disadvantaged children include children from families living below the poverty level, children living in institutions for neglected and delinquent children, and children from families above the poverty level where those families receive state and federal aid.
[96] 20 U.S.C § 6334. The number of poor and disadvantaged children must be greater than 6,500 or 15% of the total number of school-aged children in the district.
[97] 20 U.S.C § 6335
[98] 20 U.S.C § 6332

programs, the Secretary of Education will ratably reduce the allocations to such local educational agencies.[99]

After a state has received its allocation under Title I, it is not all sent directly to the local educational agencies. Under the School Improvement program in Title I, each state is ordered to reserve two percent of the money it receives in fiscal years 2002 and 2003, and four percent of the amount it receives in fiscal years 2004 through 2007, to use in schools identified for improvement, corrective action, or restructuring.[100] Some of the reserved money is also for carrying out the State educational agency's statewide system of technical assistance and support for local educational agencies.[101] Additionally, a state may reserve one percent of the amounts received under Parts A, C, and D of Title I or $400,000 (whichever is greater) to carry out administrative duties required under those parts.[102] In essence, under Title I of No Child Left Behind, each state receives funding based on the amount of poor and disadvantaged children in the state. The state takes most of the money and gives it directly to the local educational agencies, while a small portion is reserved for state administrative tasks.

C. What are the Conditions Placed on the Receipt of Funds

C(1). State Plans

To receive a grant under No Child Left Behind, each state must submit a plan to the Secretary of Education that provides for academic standards, academic assessments, and academic accountability. The academic standards must be the same for all students, and must include standards in mathematics, language arts, and science (science standards

[99] 20 U.S.C § 6332, Section (b)(1)
[100] 20 U.S.C § 6303 (a)
[101] 20 U.S.C § 6303 (a)
[102] 20 U.S.C § 6304

began in the 2005-06 school year). The content standards must specify what students are expected to know and the achievement standards must describe three levels of achievement (basic, proficient, and advanced) that determine how well students are mastering the material in the content standards.[103] The state plan must also contain a single, statewide accountability system to ensure that local educational agencies and public schools are making adequate yearly progress based on the academic standards.[104] Adequate yearly progress is defined by each state, but it must be defined to result in continuous and substantial academic improvement for all students.[105] In measuring adequate yearly progress, each state must also have separate measurable annual objectives for the achievement of economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.[106] These measurable annual objectives must identify a single minimum percentage of students who are required to meet or exceed the proficient level on the academic assessments. For an individual school to make adequate yearly progress, each group of students defined above must meet or exceed the measurable annual objective.[107]

In order to measure adequate yearly progress, each state must implement yearly student academic assessments in math, reading or language arts, and science.[108] The assessments must meet a number of requirements, including (i) be the same academic assessments used to measure the achievement of all children; (ii) be aligned with the

[103] 20 U.S.C § 6311 (b)(1)
[104] 20 U.S.C § 6311 (b)(2)
[105] 20 U.S.C § 6311 (b)(2)(C)
[106] 20 U.S.C § 6311 (b)(2)(C)(v)
[107] 20 U.S.C § 6311 (b)(2)(I)
[108] 20 U.S.C § 6311 (b)(3)

state's academic content and student academic achievement standards, and provide coherent information about student attainment of such standards; (iii) be consistent with relevant, nationally recognized professional and technical standards; (iv) be used only if the state educational agency provides to the Secretary of Education evidence from the test publisher or other relevant sources that the assessments used are of adequate technical quality, and (v) measure the proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during grades 3 through 5; grades 6 through 9; and grades 10 through 12.[109] If a state fails to meet deadlines the for demonstrating that it has in place challenging academic content standards and student achievement standards, and a system for measuring and monitoring adequate yearly progress, the Secretary of Education will withhold 25 percent of the funds that would otherwise be available to the state for state administration and activities.[110] If the state fails to meet any other requirements of the state plan, the Secretary can withhold any state administration funds.[111]

C(2). Report Cards

In addition to the requirements in the state plan, a state receiving funds under Title I of No Child Left Behind must prepare and disseminate an annual state report card.[112] The state report card must include (i) information, in the aggregate, on student achievement at each proficiency level on the state academic assessments, then information disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged; (ii) information that

[109] 20 U.S.C § 6311 (b)(3)(C)
[110] 20 U.S.C § 6311 (g)(1)
[111] 20 U.S.C § 6311 (g)(2)
[112] 20 U.S.C § 6311 (h)

provides a comparison between the actual achievement levels of each group of students and the state's annual measurable objectives for each such group of students on each of the academic assessments; (iii) the most recent 2-year trend in student achievement in each subject area, and for each grade level; (iv) information on the performance of local educational agencies in the state regarding making adequate yearly progress, including the number and names of each school identified for school improvement; and (v) the professional qualifications of teachers in the state, the percentage of such teachers teaching with emergency or provisional credentials, and the percentage of classes in the state not taught by highly qualified teachers, in the aggregate and disaggregated by high-poverty compared to low-poverty schools.[113]

Each local educational agency is also required to prepare and disseminate an annual report card. The report card must contain the same information as the state report card, but on a local educational agency and individual school level. The local agency report card must also include the number and percentage of schools identified for school improvement and how long the schools have been so identified; information that shows how students served by the local educational agency achieved on the statewide academic assessment compared to students in the state as a whole; and in the case of a school - whether the school has been identified for school improvement; and information that shows how the school's students achievement on the statewide academic assessments and other indicators of adequate yearly progress compared to students in the local educational agency and the state as a whole.[114] The local educational area must publicly disseminate the report card to all schools in the district and to all parents of students in those

[113] 20 U.S.C § 6311 (h)(1)(C)
[114] 20 U.S.C § 6311 (h)(2)(B)

schools.[115] The information must be in an understandable and uniform format, and must be widely available to the public such as via the internet or the media.[116]

C(3). Local Educational Agency Plans

In order to receive subgrants from the state grant, a local educational agency must also complete a plan and file it with the state educational agency. Some of the items the plan must include are (i) any additional student academic assessments to be used in determining the success of students covered under Title I; (ii) a description of how the local educational agency will provide additional educational assistance to individual students assessed as needing help in meeting the state's student academic achievement standards; (iii) a description of the strategy the local educational agency will use to coordinate programs under Title I with programs under title II to provide professional development for teachers and principals; (iv) a description of how the local educational agency will coordinate and integrate services provided under Title I with other educational services at the local educational agency or individual school level; (v) a description of the actions the local educational agency will take to assist its low-achieving schools identified as in need of improvement; and (vi) a description of the actions the local educational agency will take to implement public school choice and supplemental services.[117] In the local educational agency plan, the agency must also agree to abide by specific requirements for parental notification and parental involvement for students who are limited English proficient and enrolled in special language instruction educational programs.[118]

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[115] 20 U.S.C § 6311 (h)(2)(E)
[116] Id.
[117] 20 U.S.C § 6312 (b)
[118] 20 U.S.C § 6312 (g)

C(4). School Improvement

Each year, a local educational agency must use the state academic assessments to determine whether each school is making adequate yearly progress.[119] If a school fails to make adequate yearly progress for two consecutive years, the local educational agency must identify it as in need of school improvement prior to the beginning of the next school year.[120] In the case of a school identified for school improvement, the local educational agency must, not later than the first day of the school year following such identification, provide all students enrolled in the school with the option to transfer to another public school served by the local educational agency, which may include a public charter school, that has not been identified for school improvement.[121] The local educational agency must provide or pay for transportation to the new school.[122] After a school is identified as in need of school improvement, the school must create a two-year plan detailing many programs including how it will strengthen the core academic subjects, increase teacher and principal professional development, establish specific annual objectives for progress by each group of students, and increase parental involvement.[123] The local educational agency must provide technical assistance to each school identified for school improvement.[124]

If a school fails to make adequate yearly progress in the year following its designation as in need of school improvement, the local educational agency must continue offering the students the ability to transfer and students must be offered

[119] 20 U.S.C § 6316 (a)
[120] 20 U.S.C § 6316 (b)(1)
[121] 20 U.S.C § 6316 (b)(1)(E)
[122] 20 U.S.C § 6316 (b)(9)
[123] 20 U.S.C § 6316 (b)(3)(A)
[124] 20 U.S.C § 6316 (b)(4)

supplemental educational services.[125] These services are provided by state approved providers (either non-profit or for-profit) selected by the parents. The local educational agency must notify parents of the availability of these services, the identity of approved providers, and a brief description of the services, qualifications, and demonstrated effectiveness of each provider.[126] The state educational agency must ensure maximum participation by providers, maintain an updated list of approved providers, develop standards for monitoring the effectiveness of services offered by approved providers, and publicly report on the effectiveness of the approved providers.[127] The amount of money local educational agency must make available for supplemental educational services for each child receiving those services is the lesser of (i) the amount of the agency's allocation under Title I divided by the number of children from families below the poverty level; or (ii) the actual costs of the supplemental educational services received by the child.[128] The state may contribute funds it has reserved under Title I to assist local educational agencies that do not have sufficient funds to provide these services to all eligible students, but it is not a requirement.[129]

If a school identified for school improvement fails to make adequate yearly progress by the end of the second year after the identification, the local educational agency must continue to provide for transfers and supplemental educational services, and must take at least one of the following corrective actions: (i) replace the school staff who are relevant to the failure to make adequate yearly progress; (ii) institute and fully implement a new curriculum, (iii) significantly decrease management authority at the

[125] 20 U.S.C § 6316 (b)(5)
[126] 20 U.S.C § 6316 (e)(2)
[127] 20 U.S.C § 6316 (e)(4)
[128] 20 U.S.C § 6316 (e)(6)
[129] 20 U.S.C § 6316 (e)(7)

school level; (iv) appoint an outside expert to advise the school on its progress toward making adequate yearly progress, based on its school plan; (v) extend the school year or school day for the school; (vi) restructure the internal organizational structure of the school.[130] Any corrective action taken must be disseminated to the public and the parents. If after one full year of corrective action a school still fails to make adequate yearly progress, the local educational agency must implement one of the following alternative governance arrangements: (i) reopening the school as a public charter school; (ii) replacing all or most of the school staff who are relevant to the failure to make adequate yearly progress; (iii) entering into a contract with an entity, such as a private management company, with a demonstrated record of effectiveness, to operate the public school; (iv) turning the operation of the school over to the state educational agency; (v) any other major restructuring of the school's governance arrangement that makes fundamental reforms.[131]

C(5). Statewide School Support System

Each state must establish a statewide system of intensive and sustained support for local educational agencies and schools who receive funding through Title I.[132] One of the requirements is the establishment of school support teams for each school under corrective action or in need of school improvement.[133] The school support teams must be composed of persons knowledgeable about teaching and learning, school reform, and educating low-achieving children, including highly qualified teacher and principals, parents, representatives of institutions of higher education, and representatives of outside

[130] 20 U.S.C § 6316 (b)(7)
[131] 20 U.S.C. § 6316 (b)(8)
[132] 20 U.S.C. § 6317 (a)(1)
[133] 20 U.S.C. § 6317 (a)(4)

consulting groups.[134] The school support teams must review and analyze all facets of the school's operation, assist the school in developing recommendations for improving student performance, collaborate with parents, school staff, and the local educational agency to design, implement, and monitor a plan to help the school make adequate yearly progress, and evaluate school personnel.[135] To pay for the statewide school support system, the state is ordered to use the funds reserved from its Title I grants to help underperforming schools, or the funds reserved for state administrative duties.[136]

D. Recent Challenges to No Child Left Behind

D(1). Utah

In January 2004, the Superintendent of Public Instruction in the Utah State Office of Education wrote a letter to the Secretary of Education asking for an opinion on the consequences of potential nonparticipation by the state in No Child Left Behind. In February 2004, the Department of Education responded with a five page letter of technical assistance (not a legal opinion) addressing various questions posed by Utah.[137] First, the state wanted to know if it could still participate in discretionary grant programs, even if chose not to participate in state-administered formula grant programs like Title I, Part A. The Department said that the state could apply for discretionary grants "assuming it otherwise meets the requirements of an eligible applicant for the particular discretionary grant program. The federal requirements would be whatever requirements are included in the respective program's statute, regulations and applicable notices. In addition, the requirements of equal access to Boy Scouts and other similar groups for

[134] 20 U.S.C. § 6317 (a)(5)
[135] 20 U.S.C. § 6317 (a)(5)(B)
[136] 20 U.S.C. § 6317 (c)(1)
[137] Eugene W. Hickok, Letter to Dr. Steven O. Laing, February 6, 2004, http://www.ccsso.org/content/pdfs/USDEdLettertoUtah.pdf

meetings (20 U.S.C. § 7905) would apply to the Utah State educational agency, or any local educational agency or public school in Utah if it accepts any funds provided through the Department and the requirements regarding unsafe school choice (20 U.S.C. § 7912) would apply if Utah accepts any ESEA funds, including discretionary grant funds."[138] The Department also said that Utah could choose not to participate in one or more Titles under No Child Left Behind, but that nonparticipation in Title I, Part A would be particularly detrimental because a number of the formulas for allocating funds to other programs are linked to the state's funding under Title I, Part A.[139] Utah also asked if individual local educational agencies could opt out of No Child Left Behind. The Department answered that while a local educational agency may opt out of the program, if the state as a whole accepts funds, the state must ensure that the local educational agency complies with certain provisions such as assessing all students in reading and math, and making adequate yearly progress determinations for all schools.[140] Additionally, be opting out of Title I, Part A, the local educational agency would be jeopardizing funding for a number of other programs since the funding formulas are linked.[141]

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[138] Id. at 3. (The Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905, provides that notwithstanding any other provision of law, no public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department of Education shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America. The Unsafe School Choice Policy, 20 U.S.C. §7912, requires each State receiving funds under to establish and implement a statewide policy requiring that a student attending a persistently dangerous public elementary school or secondary school, as determined by the State in consultation with a representative sample of local educational agencies, or who becomes a victim of a violent criminal offense, as determined by State law, while in or on the grounds of a public elementary school or secondary school that the student attends, be allowed to attend a safe public elementary school or secondary school within the local educational agency, including a public charter school.)

[139] Id.

[140] Id. at 4

[141] Id. at 5

In May 2005, three months after receiving the letter from the Department of Education, Utah's governor signed a bill giving Utah's education standards priority over the federal requirements of No Child Left Behind.[142] The bill instructs school officials to "prioritize resources…providing first priority to meeting state goals, objectives, program needs, and accountability systems as they relate to federal programs; and providing second priority to implementing federal goals, objectives, program needs, and accountability systems that do not directly and simultaneously advance state goals, objectives, program needs, and accountability systems."[143] The statute also orders school officials to minimize the amount of additional state resources used to implement federal programs beyond the federal monies that are provided to fund the programs.[144] However, even with the statute Utah still plans to obey benchmark No Child Left Behind requirements, like reporting schools' annual yearly progress and informing parents when schools fail to measure up.[145] Utah will not lose federal funds unless it strays from the federal requirements.

D(2). Michigan/Vermont/Texas

In April 2005, the National Education Association and nine school districts in Michigan, Vermont, and Texas sued the Secretary of Education, Margaret Spellings, accusing her of violating both No Child Left Behind and the spending clause by not spending all of the funds Congress authorized in the Act.[146] The suit was based on Section 9527(a) of No Child Left Behind Act which states that

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[142] Associated Press, *Utah snubs federal No Child Left Behind Act*, May 2, 2005, http://www.msnbc.msn.com/id/7713931/
[143] UT ST § 53A-1-903
[144] Id.
[145] Associated Press, *supra* note 148.
[146] Associated Press, *NEA, 3 states sue over No Child Left Behind*, April 20, 2005, http://www.msnbc.msn.com/id/7576092/

> (a) General prohibition
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> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local education agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.[147]

The plaintiffs referred to this section of the Act as the "Unfunded Mandates Provision" in their brief.[148] The plaintiffs argued that the Secretary of Education was violating this provision by requiring states and school districts to comply fully with all of the NCLB mandates even though states and school districts have not been provided with sufficient federal funds to pay for such compliance.[149] The plaintiffs also contended that the Secretary was violating the spending clause "by changing one of the conditions pursuant to which states and school districts accepted federal funds under the NCLB--viz., that states and school districts would not be required to spend any funds or incur any costs not paid for under this Act." [150] The plaintiffs spent part of the complaint detailing the shortfall between the costs of compliance and the federal funds appropriated.[151] The plaintiffs requested that the court "issue an order declaring that states and school districts are not required to spend non-NCLB funds to comply with the NCLB mandates, and that a failure to comply with the NCLB mandates for this reason does not provide a basis for withholding any federal funds to which they otherwise are entitled under the NCLB."[152]

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[147] 20 U.S.C. § 7907
[148] Sch. Dist. of the City of Pontiac v. Spellings, 2005 WL 3149545 (E.D.Mich. 2005).
[149] Id.
[150] Id.
[151] Id.
[152] Id.

In her motion to dismiss, the Secretary argued both that the plaintiffs lacked standing and that they failed to state a claim.[153] In an order and opinion granting defendant's motion to dismiss, the Court first found that the plaintiffs had alleged facts in support of standing because the school districts were alleging direct injury to themselves and the NEA was alleging direct harm to their members caused by the fact that funding is now being diverted from NEA-supported programs to pay for NCLB requirements.[154] However, the Court granted the Secretary's motion to dismiss due to failure to state a claim.[155] The Secretary argued that the plaintiffs misinterpreted Section 9527(a) (the "Unfunded Mandates Provision"), and that the section simply means no federal "officer of employee" can require states or school districts to "spend any funds or incur any costs not paid for under this Act."[156] Congress, however, can require the states and school districts to spend the money, and has done so by passing the Act.[157] The Court determined that "if Congress meant to prohibit "unfunded mandates" in the NCLB, it would have phrased 20 U.S.C. §7907(a) to say so clearly and unambiguously. By including the words "an officer or employee of," Congress clearly meant to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute."[158] The Court ordered the Secretary's motion to dismiss and held that Section 9527(a) cannot reasonably be interpreted to prohibit Congress itself

[153] Id.
[154] Id. The court did note that Defendant's arguments would more properly be raised in support of a motion for summary judgment because at the pleading stage the court must accept the allegations in the complaint as true. Thus plaintiffs met their "relatively light" burden of alleging injury, causation and redressability.
[155] Id.
[156] Id.
[157] Id.
[158] Id.

from offering federal funds on the condition that States and school districts comply with the statutory requirements.[159]

D(3). Connecticut

Connecticut has filed suit against the Secretary of Education in August 2005, and the case is still pending. Connecticut is also using Section 9527(a) of No Child Left Behind to argue that the Act itself bars the federal government from imposing mandates without financing them.[160] In addition, Connecticut contends that the Secretary is violating the Spending Clause "by requiring the State and its school districts to comply with USDOE's rigid, arbitrary, and capricious interpretation of the NCLB mandates even though she has the authority to waive these mandates and the State of Connecticut and its school districts have not been provided with sufficient federal funds to pay for such compliance."[161] Connecticut argues that when it initially accepted the federal funding from No Child Left Behind, it made its decision based on Section 9527(a), which says that the state and the school districts would not be required to "spend any funds or incur any costs not paid for."[162] Connecticut maintains that the Secretary has changed the condition, "thereby precluding the State from exercising its choice to participate in the NCLB Act knowingly, cognizant of the consequences of its participation.[163] Connecticut claims that its unfunded burden of meeting just the assessment requirements will be in the tens of millions of dollars through fiscal year 2008, and that the unfunded burden on Connecticut's local school districts of meeting all the Act's requirements will be in the

[159] Id.
[160] Sam Dillon, *U.S. Is Sued By Connecticut Over Mandates On School Tests,* N.Y. TIMES, August 23, 2005
[161] Complaint, Connecticut v. Spellings, August 23, 2005
[162] Id. p. 26
[163] Id.

hundreds of millions of dollars.[164] The federal government has filed a motion to dismiss alleging that the additional expenses incurred by Connecticut to comply with No Child Left Behind are actually the result of the state's decision to reject a less expensive form of testing.[165] The judge ordered Connecticut to file an amended complaint by February 28 to answer whether federal funding is adequate to meet at least minimum standards outlined by the Secretary.[166] The federal government has until March 30 to reply.

IV. The Effects of NCLB on state budgets and school districts

A. What are the costs of implementing NCLB? How much funding do states receive from the federal government?

Several states have started to conduct studies to determine how much it will cost to comply with the various requirements of No Child Left Behind.[167] The Minnesota auditor collected cost estimates from the Minnesota Department of Education and a sample of nine school districts.[168] The auditor identified 26 categories of state activities under Title I, Part A, and 25 categories of local activities.[169] For each cost category, they asked for estimates of (1) the total cost of carrying out the NCLB-related activities, even if they would have been carried out without NCLB, and (2) the portion of the total costs directly attributable to NCLB.[170] The auditor was careful to point out that the cost estimates are not definitive because identifying and estimating the costs can be

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[164] Id. p. 12
[165] Robert A. Frahm, *Expenses at Issue in 'No Child' Lawsuit*, THE HARTFORD COURANT, February 1, 2006.
[166] Id.
[167] MINNESOTA OFFICE OF THE LEGISLATIVE AUDITOR, EVALUATION REPORT – NO CHILD LEFT BEHIND, 57, (March 2004), *available online at* http://www.auditor.leg.state.mn.us/ped/pedrep/0404ch4.pdf.
[168] Id. at 58.
[169] Id.
[170] Id.

subjective, and a lot of the required activities have not yet been undertaken.[171] However, using the cost estimates, as well as interviews with state and district officials and surveys of superintendents, Minnesota believes that No Child Left Behind will likely have a substantial fiscal impact on the state.[172] Appendix A is a chart detailing the various cost categories and Minnesota's estimate as to the fiscal impact attributable to No Child Left Behind. Minnesota also analyzed whether the increase in funding from No Child Left Behind will cover the state's costs. Minnesota was expected to receive $42 million more from the entire Elementary and Secondary Education Act (ESEA) in fiscal year 2005 than it did in the pre-NCLB baseline year of fiscal year 2002.[173] However, the total funding received by Minnesota for programs related to No Child Left Behind is estimated to decrease in fiscal year 2006 and stay below the 2005 actual figure in 2007.[174] Minnesota was unable to determine the long-term annual costs of implementing NCLB because many of the programs, such as corrective action and school restructuring, are just beginning.[175] Nonetheless, the auditor concluded that in the future, it is quite plausible that the cost of NCLB's new requirements for Minnesota could exceed the increase in federal funding that the state receives under the act, but this will be unclear until school districts proceed further with implementing the act and the federal government determines future funding levels.[176]

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[171] Id. at 59.
[172] Id.
[173] Id. at 82.
[174] U.S. DEPARTMENT OF EDUCATION, FISCAL YEAR 2001-2007 STATE TABLES FOR THE U.S. DEPARTMENT OF EDUCATION, *available online at* http://www.ed.gov/about/overview/budget/statetables/07stbystate.pdf.
[175] MINNESOTA at 83.
[176] Id. at 84.

Ohio did a similar study to measure the costs to the state of No Child Left Behind. First, the report identified the costs associated with the Act's requirements.[177] Then the researchers applied a deduction, offset, or other adjustment to separate total NCLB costs associated with a requirement from existing expenditures for the same purpose.[178] Finally, NCLB federal aid was applied to remaining costs. Any amount by which costs exceeded available federal dollars would suggest a net NCLB cost to the State of Ohio.[179] Costs were divided into two categories: direct costs capable of relatively easy measurement such as administrative costs and costs of administering tests, and "intervention" costs which are the costs required to help failing students.[180] The intervention costs are more difficult to measure because it is unknown how many students will need these resources and what types of programs the states may utilize to increase achievement.[181] The methodology used to measure the intervention costs is complicated, and the researchers admit that reasonable people can disagree with the methodology.[182] The method basically uses data from actual results from the 4th and 6th grade tests to estimate how many pupils currently in kindergarten through the 3rd grade would likely require additional intervention services beyond what is currently provided in order to achieve proficiency in the new testing program required by NCLB.[183] Then the costs of performance-enhancing programs such as summer school, extended school day, and intensive in-school intervention was estimated and multiplied by the number of

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[177] WILLIAM DRISCOLL and DR. HOWARD FLEETER, PROJECTED COSTS OF IMPLEMENTING THE FEDERAL "NO CHILD LEFT BEHIND ACT" IN OHIO, iii, (December 12, 2003), *available online at* http://www.ccsso.org/content/pdfs/CostOfImplementing.pdf
[178] Id.
[179] Id.
[180] Id.
[181] Id.
[182] Id.
[183] Id. at 13

students estimated to need these programs.[184] The researchers concluded that the total annualized costs of No Child Left Behind assuming full implementation of NCLB and 100% compliance is $105.4 million in direct costs and $1.386 billion in intervention costs, for a total cost of $1.491 billion.[185] Federal funding to Ohio for No Child Left Behind programs was $663 million in fiscal year 2005 and is expected to stay the same for fiscal year 2006.[186] This leaves an unfunded gap of $828 million per year.

As part of the compromise to pass No Child Left Behind, the bill promised large increases in Title I spending.[187] In the first fiscal year following the No Child Left Behind, Title I Grants to local educational agencies increased by 18% and total elementary and secondary appropriations increased by 17%.[188] However, since then funding increases have declined and the president's 2006 proposed budget would have decreased appropriations for elementary and secondary education by 2.6%.[189] While it is true that the federal government is spending more on education now that at any time in history, the federal share of total educational expenditures has remained at about 7% of total educational spending.[190] Furthermore, a comparison of the yearly authorizations and appropriations for Title I, Part A demonstrates that the annual appropriations have failed to meet the amounts authorized in No Child Left Behind every year since the bill's passage, and that the shortfall has been steadily increasing. However, it is hard to compare authorizations and appropriations for all programs in the Act because many only

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[184] Id. at 14.
[185] Id. at 59.
[186] U.S. DEPARTMENT OF EDUCATION BUDGET OFFICE, FY 2001-2007 STATE ALLOCATIONS, BY PROGRAM AND BY STATE, (last updated 3/2/2006), *available online at* http://www.ed.gov/about/overview/budget/statetables/07stbystate.pdf.
[187] GAIL SUNDERMAN, JAMES S. KIM & GARY ORFIELD, NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD 10 (2005).
[188] Id.
[189] Id.
[190] Id. at 11.

had specific authorizations for the first year. The table in Appendix B summarizes the President's budget requests and enacted appropriations for elementary and secondary education programs from 2005 through 2007.[191] Appendix C shows the authorization-appropriation gaps for ESEA Title I Funds.[192] Appendix D shows the appropriations for the entire No Child Left Behind program compared to a cost estimate based on the Ohio study. Ohio receives about 3 percent of federal appropriations each year. By taking the Ohio annual cost estimate and dividing it by the percentage Ohio is supposed to receive in a given year, a total nationwide annual cost estimate can be extrapolated.[193]

B. How are state and local governments making up shortfalls?

The Minnesota study asked school superintendents how they have been paying for No Child Left Behind requirements. The study found that 72 percent of superintendents said that their districts have paid for new, NCLB-required activities in the past two years (2002-2004) primarily through spending reductions or reallocations, rather than through new revenues, and the 73% expect to use the same tactics over the next two years.[194] Six percent said that they have increased local revenues and anticipate continuing to increase them over the next two years.[195] Some states, like Utah (mentioned above), have ordered local educational agencies to stop funding No Child Left Behind requirements once they have exhausted their federal funds. The National Education Association released a study detailing how school districts and states are laying off teachers, cutting music, art, and

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[191] U.S. DEPARTMENT OF EDUCATION, EDUCATION DEPARTMENT BUDGET HISTORY TABLE, (last updated 2/6/2006), *available online at* http://www.ed.gov/about/overview/budget/history/index.html.
[192] U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE DEMOCRATIC STAFF, FULL HISTORY OF THE ESEA EFFORT (2006), *available online at* http://edworkforce.house.gov/democrats/eseainfo.html.
[193] The appropriations are from the U.S. DEPARTMENT OF EDUCATION BUDGET OFFICE TABLES *supra* note 186. The cost estimates are from DRISCOLL & FLEETER, *supra* note 177.
[194] MINNESOTA at 85.
[195] Id.

athletics programs, and increasing class sizes in an effort to save money for use in complying with No Child Left Behind.[196]

C. What will happen if states are unable to meet the achievement conditions required by NCLB?

Every state is expected to have 100% of students demonstrate proficiency in reading and math by the end of the 2013 school year.[197] In order to meet this goal, states must determine whether schools are making adequate yearly progress. If a school fails to make adequate yearly progress, it must undergo corrective action as described in the NCLB Requirements section above. If a state fails to measure adequate yearly progress, or fails to subject failing schools to corrective action, it will be violating the conditions of No Child Left Behind. Violating the conditions leads to the withholding of federal funds. If the cost studies are correct and No Child Left Behind is being underfunded, the states and local school districts must decide whether it is more cost-effective to comply with No Child Left Behind by spending state and local money and continue to receive federal education funding, or to forfeit all federal funds and return to the educational assessment and accountability systems they had in place prior to 2002.

V. Normative Analysis

A. Does No Child Left Behind Violate the Dole Restrictions?

The first limitation on conditional spending is that the exercise of the spending power must be in pursuit of the general welfare. Although education has traditionally fallen under the domain of state and local government, it would be difficult for states to argue that federal education spending does not promote the general welfare. One of the

[196] NATIONAL EDUCATION ASSOCIATION, CUTS LEAVE MORE AND MORE PUBLIC SCHOOL CHILDREN BEHIND (December 2003), *available online at* http://www.nea.org/esea/storiesfromthefield.html.
[197] 20 U.S.C § 6311(b)(2)(F).

major goals of No Child Left Behind is to close the achievement gap and make sure all students, including those who are disadvantaged, achieve academic proficiency.[198] Educating the nation's children certainly appears to be in pursuit of the general welfare. Some legal scholars have argued that the general welfare clause has been misinterpreted, and that rather than being a grant of power to Congress, it is actually a limitation on the Spending Power.[199] This argument basically adopts the Madisonian view of the spending power – that Congress can only spend for enumerated purposes. Under this argument, federal education spending doesn't fall within the general welfare condition because only spending that improves the nation as a whole (such as national defense spending) qualifies. Even if the spending is undertaken in all states and enhances general welfare in the aggregate, it would still be benefiting individual states rather than the nation as a whole. However, it is unlikely that the Court will overturn seventy years of precedent dating back to *Butler*.

The second limitation on conditional spending is that the conditions must be unambiguous. This is the limitation being used by the Connecticut and other parties to argue that No Child Left Behind violates the spending power. The primary conditions in No Child Left Behind – developing accountability and assessment programs, measuring adequate yearly progress, disseminating information to the public, offering school choice and supplemental educational services – are all unambiguous. If anything, they are so detailed as to provide no flexibility to states and local educational agencies. The so-called "unfunded mandate condition" of No Child Left Behind, as mentioned in the section on Recent Challenges, is probably the best hope for states contesting the Act. If

[198] U.S. DEPARTMENT OF EDUCATION, FOUR PILLARS OF NCLB (2004), *available online at* http://www.ed.gov/nclb/overview/intro/4pillars.html.
[199] *See* John C. Eastman, *supra* note 45.

the courts interpret this condition as a guarantee that no state and local money needs to be spent in order to comply with the rest of the Act, then the Department of Education would be changing the condition by withholding funds from states that did not spend their own money on NCLB requirements. By changing the condition after the fact, the condition becomes ambiguous, thus violating the Dole restriction. However, based on the court's slip opinion in the NEA/Michigan case, it appears unlikely that a court will interpret the "unfunded mandate condition" in this way. It is more likely that they will agree that the condition prevents federal employees and officials from requiring states to spend their own money, but does not prevent Congress from forcing states to spend their own money in order to receive federal funding.

The next two limitations are that the conditions must be related to the federal interest in particular national projects, and the conditions cannot induce states to engage in unconstitutional activities. One federal interest in No Child Left Behind is increasing economic productivity. The federal government states that "satisfying the demand for highly skilled workers is the key to maintaining competitiveness and prosperity in the global economy," and they site "a recent report [that] found that raising student achievement directly leads to national economic growth…the report estimates that 'significant improvements in education over a 20-year period could lead to as much as a 4 percent addition to the Gross Domestic Product' or over $400 billion in today's terms."[200] It would be difficult for the states to argue that the conditions in No Child Left Behind are not related to the federal interests in improving education and increasing economic productivity. The conditions are designed to make sure that all children are

[200] U.S. DEPARTMENT OF EDUCATION, EDUCATION AND THE ECONOMY, *available online at* http://www.ed.gov/nclb/overview/intro/guide/guide_pg3.html#econ

receiving an adequate education, and therefore are able to become economically productive members of society. The limitation on inducing states to engage in unconstitutional activities is not applicable to No Child Left Behind. There have been no arguments that NCLB forces states to violate other parts of the Constitution.

The final limitation on conditional spending bills is that they cannot be overly coercive. In *Dole*, the Court suggested that coercion is related to the amount of funding the state would lose by not participating in the conditional spending program.[201] Federal funds only make up about 7% of education revenues. Moreover, the fact that several states have considered giving up the funds would provide additional support for the federal government's argument that the amount of money at stake doesn't rise to the level of coercion. It would also be difficult for states to argue that they have been relying on federal education funds since the 1960s. This reliance argument didn't work in *California v. U.S.* even though in that case turning down federal funds would have bankrupted the state's Medicaid program. It has been suggested that the courts should not determine whether a statute is coercive based on the amount of money at stake, but rather should look at whether the condition interferes with sovereign accountability.[202] Regardless of the amount of money at stake, as long as the state can freely choose whether to implement a particular program, there is no coercion.[203] In either interpretation of the coercion limitation, a state would find it hard to argue that No Child Left Behind is coercive.

There are also some scholars who have suggested that No Child Left Behind may violate the Tenth Amendment to the Constitution. The Tenth Amendment states that

[201] South Dakota v. Dole, 483 U.S. at 211.
[202] McConville, *supra* note 82 at 174.
[203] Id.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[204] Those who bring up the Tenth Amendment in the context of No Child Left Behind believe that since the federal Constitution does not mention education, it is a concern which should be left solely to the states.[205] However, the Tenth Amendment is most often used by states to argue that a particular federal statute is being used to "commandeer" the states.[206] The Supreme Court stated in *Reno v. Condon* that

> "In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment. In *New York*, Congress commandeered the state legislative process by requiring a state legislature to enact a particular kind of law…In *Printz*... we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly."[207]

Therefore it is unlikely that a court would rule that Congress does not have power under the Tenth Amendment to pass laws related to education. What Congress cannot do is directly force state legislatures or state officers to enact particular provisions. This is not the case in No Child Left Behind where each state has choices about whether to take the money and how to implement the federal conditions.

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[204] U.S. CONST. amend. X.
[205] *See* Neal McCluskey, *No Federal Failure Left Behind*, THE NATIONAL REVIEW, July 12, 2004, *available online at* http://www.nationalreview.com/comment/mccluskey200407120836.asp.
[206] *See* New York v. U.S., 505 U.S. 144 (1992); Printz v. U.S., 521 U.S. 898 (1997); Reno v. Condon, 528 U.S. 141 (2000).
[207] Reno v. Condon, 528 U.S. at 149.

B. Would the court actually find NCLB unconstitutional given its history of approving conditional spending laws?

As outlined in Part II of this paper, the courts have been very reluctant to find that conditional spending laws violate the Spending Clause. In the few cases where statutes have been found to defy the Dole limitations, the courts have either determined that the statutes were legal on other grounds (*Pierce v. Guillen*), or Congress has rewritten the law to fit into the Dole structure (Children's Internet Protection Act). As one legal scholar noted in response to Dole, "although the Court held that the 'the spending power is of course not unlimited…but is instead subject to several general restrictions articulated in our cases,' none of the stated restrictions was portrayed as having much bite."[208] The makeup of the Court has changed significantly since the *Dole* decision, and now that Chief Justice Rehnquist, the author of the decision, is no longer on the court, there is a possibility that the Court could overturn Dole. There is significant concern that Dole has negatively impacted the current federalism doctrine, and unconstitutionally invaded states' rights.[209] It can be argued that by allowing Congress to pass virtually any conditional spending bill it chooses, Dole is reducing aggregate social welfare because every state is forced into the same norms and standards.[210] This can be seen in No Child Left Behind. While the Department of Education touts the "flexibility" available to states and local educational agencies, in fact all states must have virtually identical methods of assessment and accountability. If a parent does not like the emphasis on testing in a particular state, he cannot just move his child to a different state. All states have the

[208] Baker & Berman, *supra* note 63 at 463.
[209] *See* Baker & Berman *supra* note 63, Eastman, *supra* note 45. *See also* Lynn A. Baker, *The Spending Power and the Federalist Revivial*, 4 CHAP. L. REV. 195 (2001).
[210] Baker & Berman, *supra* note 63 at 471.

same emphasis on testing. However, at this point there is no indication that the Court will overturn Dole anytime soon. Thus, it is unlikely that No Child Left Behind would be found unconstitutional under the current conditional spending limitations doctrine.

APPENDIX A

Table 4.1: Fiscal Impact of NCLB-Initiated Activities

Cost Category	Fiscal Impact Attributable to NCLB
General ESEA administration	**State—Small impact.** **Local—Small impact.** At both the state and local level, there have been some initial planning and implementation activities required by NCLB, but many of the general administrative and financial duties mandated by NCLB are similar to previous requirements.
Standards development and curriculum alignment	**State—Small impact.** The state's cost for developing grade-specific standards in reading, math, and science has been small. **Local—Potentially significant impact, but attribution to NCLB is debatable.** While aligning school districts' curriculum with state content standards can be expensive, it is debatable how much of these costs should be attributed to NCLB. NCLB would have required some curriculum alignment by districts, and the high stakes nature of NCLB may have created an urgency for districts to devote more resources to these efforts. But others contend that due to the state's independent adoption of new content standards in 2003, districts would have had to carry out curriculum alignment without NCLB.
Student assessment	**State—Significant future impact.** In order to comply with NCLB, the state has to develop and administer (1) reading and math assessments for grades 4, 6, and 8, (2) three science assessments, and (3) English proficiency assessments in listening and speaking. Federal revenues for test development will offset many, or all, of the state's costs. NCLB appears to have been the major impetus for the development of the reading and math assessments in grades 4, 6, and 8; in contrast, the other reading and math assessments required by NCLB were already in place or were in the planning stages prior to NCLB.[a] **Local—Significant future impact.** Once school districts begin to administer the reading and math assessments for grades 4, 6, and 8 in state fiscal year 2006, and the science assessments in state fiscal year 2008, the districts will face significant new costs.[b]
AYP determination	**State—Small impact.** Federal law prior to NCLB required states to calculate AYP for Title I schools; however, NCLB now requires some additional state effort (e.g., AYP calculations for all schools, rather than just Title I schools; and separate AYP calculations for a variety of subgroups). **Local—Small impact.** As a result of the high stakes nature of NCLB's sanctions, school districts have spent additional time verifying demographic and assessment data used to determine schools' AYP status. Also, as school districts administer assessments at more grade levels, more verification will be required. Nevertheless, these costs should be relatively small.
Reporting (report cards and notices)	**State—Small impact.** The state developed templates to help school districts provide notices regarding school sanctions. In addition, there will be some staff costs to prepare NCLB-specific school report cards each year, starting in 2004. **Local—Small impact.** Some NCLB notification requirements (notifying parents of assessment results, providing notices regarding Title I parent meetings) were in federal law before NCLB. But NCLB contained new requirements for parent notices regarding school sanctions and teacher qualifications.
Sanctions and supplemental services	**State—Small but growing impact.** The state has incurred some additional costs to administer supplemental services. It may incur additional costs as more schools and school districts fail to make AYP, thus requiring more assistance from the state and more time to oversee service providers. **Local—Potentially significant impact in the future.** Relatively few schools and school districts have been categorized as "needing improvement," but this number will grow—resulting in implementation of more improvement plans, school choice-related transportation, supplemental services, corrective actions, and school restructuring. NCLB requires affected districts to set aside the equivalent of up to 20 percent of their Title I, Part A funds for school choice and supplemental services.
Teacher and paraprofessional requirements	**State—Small impact so far; future costs are unclear.** The state has spent staff time determining its qualification standards for teachers and paraprofessionals. Future costs will depend on how the state monitors compliance with its standards and how many districts comply. **Local—Variable among districts, but potentially significant impact.** To comply with NCLB's stricter requirements regarding staff qualifications, districts could incur costs for salary increases, training, or hiring additional staff. But the state's standards were still in flux at the time districts provided estimates, and many districts did not know what actions they would take to comply with the requirements.
Professional development	**State—Small impact so far; future costs are unclear.** The state has not yet defined or set annual objectives for implementing "high quality" professional development, and it is unclear how the state will monitor professional development activities. **Local—Small impact so far; future costs are unclear.** Until standards and objectives are set by the state, it is difficult to estimate additional costs that might be incurred by school districts.
Parental involvement	**State—No impact.** **Local—Small impact.** Some districts have intensified their parent-related activities in response to NCLB, but the overall cost of these efforts is limited.

NOTE: "Small" impacts are those estimated to cost less than $1.5 million annually on a statewide basis.

[a]Some people contend that the state would have implemented the grade 4, 6, and 8 tests without NCLB, as reflected in the fact that these tests are required in state law. But the Legislature adopted this testing requirement after NCLB was enacted.

[b]However, there may be some offsetting cost savings if districts decide to discontinue some of their non-NCLB standardized tests.

SOURCE: Office of the Legislative Auditor.

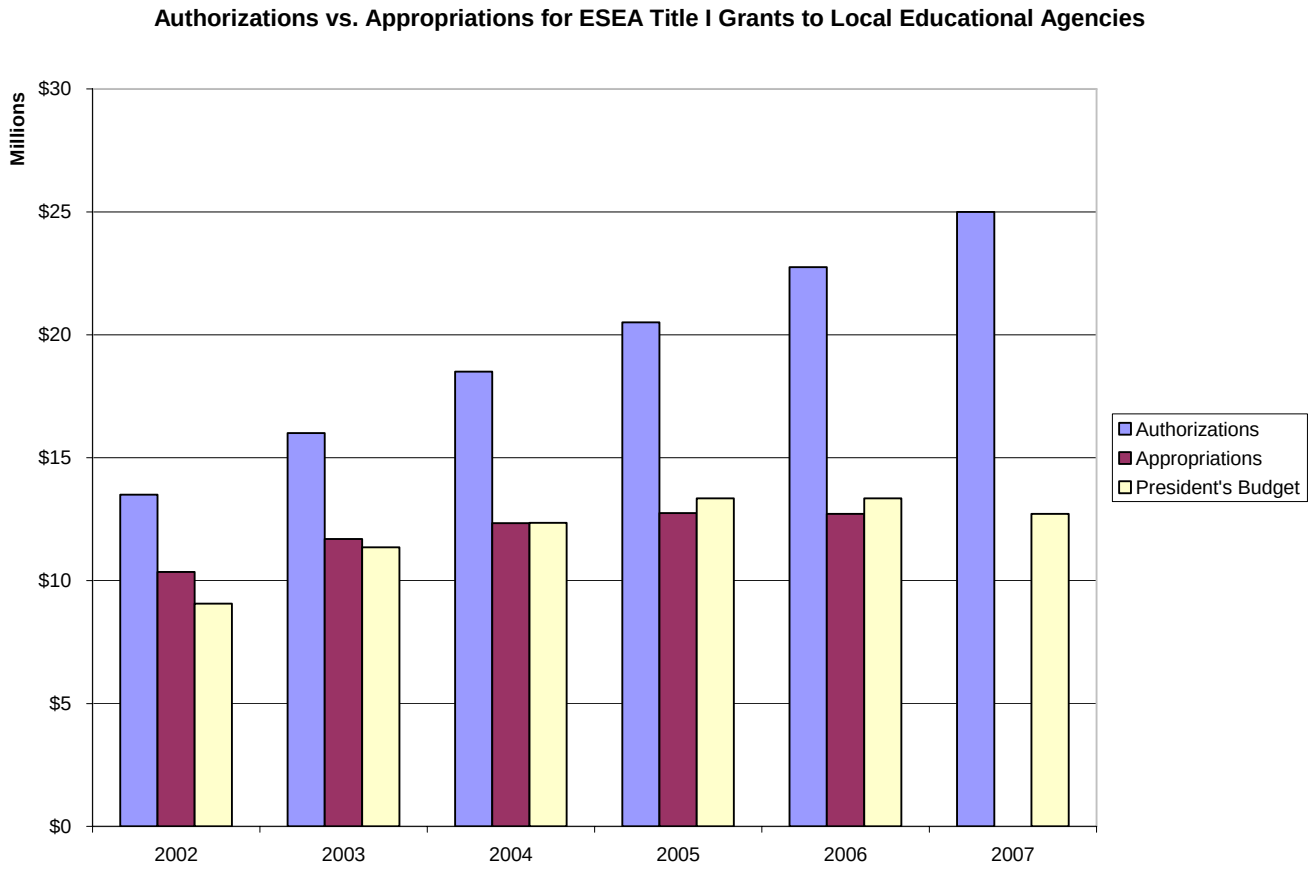
APPENDIX B

APPROPRIATIONS FOR NO CHILD LEFT BEHIND
2002-2006

Office, Account, Program and Activity (In thousands of dollars)	2002 President's Budget	2002 Appropriation	2003 President's Budget	2003 Appropriation	2004 President's Budget	2004 Appropriation	2005 President's Budget	2005 Appropriation	2006 President's Budget	2006 Appropriation	Pr
Education Department Budget by Major Program											
Elementary and Secondary:											
ESEA Title I Grants to Local Educational Agencies	9,880,721	10,350,000	11,350,000	11,688,684	12,350,000	12,342,309	13,342,309	12,739,571	13,342,309	12,713,125	12
Reading First	975,000	975,000	1,075,000	1,068,012	1,150,000	1,116,382	1,257,000	1,145,760	1,145,760	1,132,352	1
Striving Readers	0	0	0	0	0	0	100,000	24,800	200,000	29,700	
High School Reform	0	0	0	0	0	0	0	0	1,240,000	0	
Impact Aid	1,130,500	1,143,500	1,140,500	1,188,226	1,015,500	1,229,527	1,229,527	1,243,662	1,240,662	1,228,453	1
Improving Teacher Quality State Grants	2,850,000	2,850,000	2,850,000	2,930,825	2,850,000	2,930,126	2,930,126	2,916,605	2,916,605	2,887,439	2
Mathematics and Science Partnerships	0	12,500	12,500	100,344	12,500	149,115	269,115	178,560	269,000	182,160	
Educational Technology State Grants	817,096	700,500	700,500	695,947	700,500	691,841	691,841	488,000	0	272,250	
21st Century Community Learning Centers	845,614	1,000,000	1,000,000	993,500	600,000	999,070	999,070	991,077	991,077	981,166	
State Assessments	320,000	387,000	387,000	384,484	390,000	390,000	410,000	411,680	411,680	407,563	
Indian Education	116,000	120,368	122,368	121,573	122,368	120,856	120,856	119,889	119,889	118,690	
Teacher Incentive Fund	0	0	0	0	0	0	0	0	500,000	99,000	
Choice Incentive Fund	0	0	50,000	0	75,000	0	50,000	0	50,000	0	
Safe and Drug-Free Schools and Communities	644,250	472,017	472,017	468,949	422,017	440,908	440,908	437,361	0	346,500	
English Language Acquisition	460,000	664,289	685,000	683,747	685,000	681,215	681,215	675,765	675,765	669,007	
Special Education	6,355,595	8,594,424	9,809,424	9,956,707	10,611,724	11,160,707	12,176,101	11,673,606	12,126,130	11,853,013	11
Vocational Education	1,216,000	1,314,500	1,300,000	1,325,626	1,000,000	1,327,646	1,012,000	1,326,107	0	1,295,306	
Other	2,138,734	3,494,356	2,271,867	3,506,449	2,239,467	3,390,596	2,380,116	3,149,564	2,403,231	3,847,116	
Total, Elementary and Secondary	26,881,510	32,078,434	33,008,176	35,113,253	34,204,076	36,942,476	38,090,184	37,530,257	37,632,308	37,883,640	3

Free Department of Education Budget Tables

APPENDIX C


Authorizations vs. Appropriations for ESEA Title I Grants to Local Educational Agencies
Millions
$30
$25
$20
$15
$10
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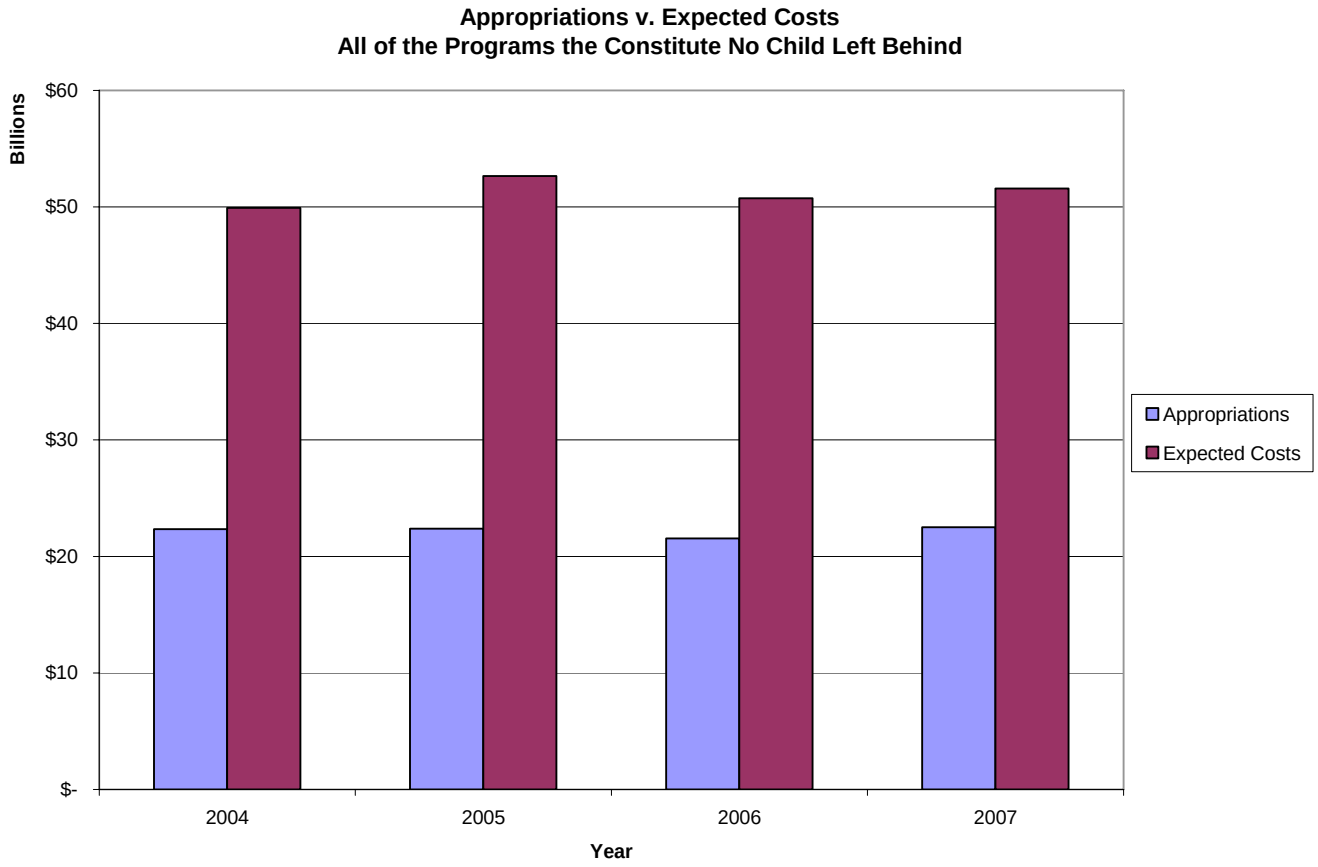
$0
2002
2003
2004
2005
2006
2007
Authorizations
Appropriations
President's Budget

APPENDIX D


Appropriations v. Expected Costs
All of the Programs the Constitute No Child Left Behind
Billions
$60
$50
$40
$30
$20
$10
$-
2004
2005
2006
2007
Year
Appropriations
Expected Costs

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