Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs

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FEDERAL FUNDS AND NATIONAL SUPREMACY: THE ROLE OF STATE LEGISLATURES IN FEDERAL GRANT PROGRAMS

GEORGE D. BROWN*

INTRODUCTION

The federal grant-in-aid system represents the "cutting edge" of American intergovernmental relations.1 Eighty-five billion dollars in payments flow annually from the national government to state governments and their local units.2 Congress' choice among types of aid forms3 presents difficult and controversial issues about the division of power between the national and state governments.4 Significant state intragovernmental controversies that federal aid programs generate5 are frequently overlooked in analyses of such issues. One heated debate concerns whether federal grant programs enhance the power of governors to set priorities and allocate resources, thereby eroding traditional prerogatives of state legislatures.6

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3. Kinds of aid include categorical (restricted to narrow purposes with tight grantor control), block grants (broader grantee discretion within an overall program area accompanied by less grantor control), and revenue sharing (relatively unrestricted funds).
4. Indeed, much of the debate over the Nixon Administration's concept of a "New Federalism" involved grant legislation, particularly whether to adopt a number of so-called "special revenue sharing" programs. See, e.g., Fishman, Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development, 7 URB. L. ANN. 189 (1975).
6. The Advisory Commission on Intergovernmental Relations (ACIR) has stated that "it can well be argued that the fate of the intergovernmental grants system is tied to the resolution of this question." Role of State Legislatures in Appropriating Federal Funds to States, Hearing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 97 (1977) (statement of the U.S. Advisory Commission on Intergovernmental Relations) [hereinafter cited as 1977 Hearing].
Many legislators think the structure of grant programs is biased in favor of gubernatorial authority, and have instituted an intensive campaign to reclaim their traditional "power of the purse."7 One approach is to subject federal funds to the same legislative appropriation process as other state revenues.8 A second technique is to require legislative screening of grant applications prior to submission to federal agencies.9 A third method is to impose legislative control over the identity and structure of state agencies administering grant funds.10 Not surprisingly, this movement has provoked sharp opposition from governors and special interest groups that distrust state legislatures.11

These arguments frequently end up in court; as a result, a highly complex and totally inconsistent body of case law on the state legislative role in federal grant programs is emerging.12 To date, the courts' answers range from broad denials of any legislative power to interfere with gubernatorial "administration" of federal funds13 to strong vindication of such initiatives.14 Courts also vary in their responses to the basic question of whether the underlying legal issues are matters of state law, federal law, or both.15 Perhaps the most difficult issue—and the source of much of the judicial uncertainty in this area—is whether state legislative attempts to alter the institutional mechanism outlined in a federal grant statute violate the supremacy clause of the Constitution.16

This article analyzes the federal law aspects of this litigation, particularly the supremacy clause argument, and argues that the supremacy clause does not govern the power of state legislatures over federal grant funds. After examining the premises on which the federal grant-in-aid system rest, the article concludes that state legislative action inconsistent with the conditions of federal assistance simply renders the state ineligible for the funds.

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7. The former Speaker of the Minnesota House of Representatives' praise of this movement sums up the legislative side of the issue: "armed with an inherent right to the purse strings, state legislatures today are demanding an authoritative voice in the handling of federal funds pumped into their states. And rightly so." Sabo, State Control of Federal Funds, 9 NAT'L J. 1096 (1977).
9. INTERGOVERNMENTAL PERSPECTIVE, Fall 1978, at 5-6.
11. E.g., 1977 Hearing, supra note 6, at 128 (statement of John P. Mallan, representing American Association of State Colleges and Universities).
15. See notes 70-84 & accompanying text infra.
Moreover, the application of principles reflecting federalist values suggests strongly that such state legislative initiatives rarely should be found to conflict with grant statutes. In addition, the article draws on the "state sovereignty" rationale of National League of Cities v. Usery\textsuperscript{17} to consider whether a finding of conflict might not result in the invalidity of the federal conditions rather than the state's ineligibility.

After developing a general framework for analysis of federal law issues, the article discusses two specific questions that courts have been called upon to resolve: the power of state legislatures 1) to appropriate grant funds, and 2) to designate the executive branch agency to administer those funds notwithstanding federal statutory language referring to gubernatorial selection of the agency. In deciding these issues, most state courts have purported to rely on state law.\textsuperscript{18} The article contends, however, that these decisions, in some instances, are actually federal law holdings in disguise. Understanding federal law issues, therefore, is a prerequisite to an analysis of the escalating conflict between governors and state legislatures over federal grants-in-aid.

I. RECLAIMING THE POWER OF THE PURSE—AN OVERVIEW

A. THE FEDERAL GRANT-IN-AID SYSTEM

Federal grant outlays to units of state and local governments are massive\textsuperscript{19} and have grown at a consistently higher rate than most other forms of federal expenditure.\textsuperscript{20} The importance of these payments to the recipient governments has also increased;\textsuperscript{21} many state governments depend heavily on federal aid, which provides up to twenty-five percent of a state's budget.\textsuperscript{22}

Approximately 500 grant programs aid state and local government units.\textsuperscript{23} Literature exploring the reasons for such vast aid essentially concludes that the national government grants these funds to induce or increase certain governmental activity, to influence the manner in which existing activities are undertaken, and to stimulate innovation and experimentation.\textsuperscript{24} The grant

\textsuperscript{17} 426 U.S. 833 (1976).
\textsuperscript{19} OFFICE OF MANAGEMENT & BUDGET, SPECIAL ANALYSIS, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1979, at 175 (1978).
\textsuperscript{20} For example, the Office of Management and Budget has estimated that "from 1967 to 1977, the average annual increase in grants was 16.2 percent while total federal outlays grew by 9.8 percent per year, and the gross national product by 9.0 percent per year." Id.
\textsuperscript{21} Federal grants rose from 10 percent of state and local expenditures in 1967 to over 26 percent in fiscal year 1977. Id. at 184.
\textsuperscript{22} The Advisory Committee on Intergovernmental Relations calculates that in "many states federal aid makes up over 20 percent of the total state budget . . . ." 1977 Hearing, supra note 6, at 80.
\textsuperscript{23} INTERGOVERNMENTAL PERSPECTIVE, Fall 1978, at 7.
\textsuperscript{24} See generally G. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES (1967); M. DERTHICK, THE INFLUENCE OF FEDERAL GRANTS (1970).
system furthers these national goals while strengthening federalist values by leaving substantial responsibility for providing goods and services in the hands of state and local governments.

B. STATE LEGISLATIVE AND EXECUTIVE RESPONSIBILITIES IN GRANT ADMINISTRATION

1. The Federal Statutes

Although most grant-in-aid statutes do not specify any role for state legislatures,25 notable exceptions exist. The State and Local Fiscal Assistance Act of 197226 (General Revenue Sharing) requires revenue sharing funds to be spent under the same laws and procedures that the state utilizes for its own funds.27 Title I of the Omnibus Crime Control and Safe Streets Act28 provides for advisory review by the state legislature of the state’s criminal justice plan—the state’s annual outline of how it will use its block grant funds.29 In addition to these explicit provisions, some legislative action is implicit in grant conditions that require the state to match a specific percentage of the grant funds.30

Grant statutes frequently are more explicit about the role of the state executive branch. Some programs specify that the funds are to be granted to a state “agency,” or that a “single state agency” be utilized for the administration of the grant.31 Other statutes require the governor to designate the agency that is to receive federal funds.32 On the other hand, some programs simply grant funds to “states” without mentioning an agency, perhaps on the theory that use of an existing agency is implicit in the receipt of any such grant.33 Of course, reference to a state agency need not preclude a legislative role, because the legislature’s consent well may be a prerequisite to the establishment of the

27. Id. at § 1243(a)(4).
29. Id. at § 3726 (1976).
32. E.g., 16 U.S.C. § 1455(c)(5) (1976) (designation by governor of single agency to administer coastal zone management grants); 33 U.S.C. § 1288(a)(2) (1976) (designation by governor of each area in state with substantial water quality problems). Other statutes give governors the power to establish substate areas for such activities as health planning and water quality planning, e.g., 16 U.S.C. § 1455(h) (1976), and the power to approve or disapprove state “plans” for a number of federally assisted programs, e.g., 16 U.S.C. § 1455(c)(4) (1976).
state agency. In general, however, the omission of references to state legislatures in federal grant statutes has created uncertainty as to legislative roles and widely differing practices in the fifty states.

2. State Practices

The National Conference on State Legislatures estimates that forty state legislatures now play some role in reviewing the expenditure of federal grant funds. In 1975, the Advisory Commission on Intergovernmental Relations (ACIR) and the National Association of State Budget Officers conducted a detailed survey to ascertain state practices regarding federal grant funds. Questions focused on both the appropriation of grant funds and the review of grant applications. Overall, the ACIR concluded that the findings “suggest a continuing, fairly casual state legislative approach regarding the receipt and disbursement of federal aid.” The Commission then recommended “that State legislators take much more active roles in State decisionmaking relating to the receipt and expenditure of Federal grants to the State,” and drafted model state legislation to provide for an enhanced legislative role.

II. THE PRO AND CON ARGUMENTS

A. THE LEGISLATIVE POINT OF VIEW

Legislatures have responded to the ACIR recommendations by increasing their involvement in administering grants. This new activism on the part of state legislatures is part of a general pattern of legislatures reasserting their prerogatives at both the federal and state levels. In addition to the influence

34. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATIVE CONTROL OF FEDERAL FUNDS 2 (1978) (on file with the author).
35. In response to the question, “What proportion of Federal grant funds does the legislature include in the appropriation process?”, 15 states responded “all,” 12 responded “some,” and 7 responded “none.” It is likely, however, that some of the states which purport to “appropriate” federal funds do so merely through a blanket authorization to receive and disburse such funds. In response to the question, “What proportion of state applications for aid must be submitted for review by a legislative committee or staff agency prior to transmission to a Federal agency?”, only 4 states answered “all,” 3 answered “some,” and 28 answered “none.” ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, THE INTERGOVERNMENTAL GRANT SYSTEM AS SEEN BY LOCAL, STATE, AND FEDERAL OFFICIALS 101 (1977).
36. 1977 Hearing, supra note 6, at 81.
of this general trend, factors directly associated with the federal aid system explain state legislatures' great interest in grant programs.

Legislators criticize the federal grant-in-aid system for creating two governments within the same state.\(^{40}\) The first, state funded, operates according to each state's traditional institutional arrangements and balance of powers among the branches. The second, federally funded, operates virtually free of those arrangements and tilts the balance strongly toward gubernatorial authority.\(^{41}\) Resulting criticisms are both fiscal and programmatic in nature.

1. Fiscal Arguments

The fiscal arguments focus on executive branch agencies' expenditures of funds that bypass the normal state budgetary process because they are not subject to appropriation by the state legislatures.\(^{42}\) Legislators base their claim to fiscal control on two grounds. First, they argue that, functionally, they must control the purse strings in order to maximize the efficiency of the legislature's role in the budgetary process. The legislature must be aware of and pass on all revenues and expenditures of the state government;\(^{43}\) otherwise the budget documents do not accurately reflect the state's activities and priorities. This fiscal consideration has merit, but could be satisfied by estimates of federal receipts and boilerplate\(^{44}\) authorizations to spend them.

Second, to the legislative activists, control of the purse strings also means having a voice in whether to spend federal funds and how to spend them. The authority of state legislatures over these matters is not clear. If they attempt to divert federal funds to purposes not authorized by a particular grant statute, the state may lose the funds altogether. Legislative advocates insist that diversion is not the goal; rather, they assert that executive expenditure of funds without legislative approval intrudes into the legislature's sphere of authority.\(^{45}\)

The proposition that appropriation is a prerequisite to expenditure flows from the doctrine that only the legislature can raise money through exercise

\(^{40}\) See, e.g., 1977 Hearing, supra note 6, at 53–54 (statement of George Roberts, speaker, N.H. House of Representatives).

\(^{41}\) Sabo, supra note 7, at 1096.

\(^{42}\) As one state senator put it, "We are engaged in a struggle to keep the Madison check and balance system of three coequal branches of government, and the legislatures of this country are losing. If we cannot control the purse strings we are nothing." Senator Harold Schreier (S.D.) quoted in ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE LEGISLATURES AND FEDERAL GRANTS 14 (Information Bull. No. 76-4) (Nov. 1976).

\(^{43}\) 1977 Hearing, supra note 6, at 61 (statement of Martin Sabo, speaker, Minn. House of Representatives).

\(^{44}\) "Boilerplate" authorizations have been described as "kind of a hunting license for executive agencies that said, in effect, there is hereby appropriated whatever funds any agency may receive during the ensuing year from Federal grants and from other sources to use for whatever purposes for which they were received." Id. at 51 (statement of Rep. Tom Jensen).

\(^{45}\) See Brief for Amicus Curiae Legis 50/The Center for Legislative Improvement, supra note 25, at 3. This brief provides an excellent summary of many arguments supporting a broad legislative role.
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of the power to tax.\textsuperscript{46} This reasoning, however, is not necessarily persuasive in the grant context, since Congress, the legislative body that raised the funds, has approved the expenditures.

2. Programmatic Arguments

The legislators’ fiscal arguments can be restated in programmatic terms: the federal grant system erodes the legislatures’ primary role as resource allocators and priority setters for the state—a role that is broader than the appropriation of funds. Two frequently voiced legislative complaints support this analysis. First, governors and executive branch agencies utilize discretionary federal funds for activities that the legislatures would not, or did not, approve for state funding.\textsuperscript{47} Second, executive branch participation in grant programs may commit the state to long term courses of action without the legislature’s knowledge.\textsuperscript{48} Detailed appropriation in the state budget of all federal funds would probably meet the first objection, but not necessarily the second, because in some programs mere appropriation is not equivalent to policymaking.\textsuperscript{49}

B. THE EXECUTIVE POINT OF VIEW

Governors and their allies have attempted to counter the legislatures’ arguments both by legal challenges and by invoking the policies and functional constraints of the federal grant-in-aid system. They point to Congress’ reasons for enacting aid programs as strong justification for minimizing state legislative action.\textsuperscript{50} Congress enacts these programs to further national interests that currently are not being served adequately at the state level; if the states were doing what Congress wanted, no grant program would be necessary.\textsuperscript{51} Clearly, Congress needs to be free to enhance the power

\textsuperscript{46} See, e.g., U.S. CONST. art. I, § 8, cl. 1: “The Congress shall have power to lay and collect taxes.” State constitutional provisions regarding the power to spend take a form like that of U.S. CONST. art. I, § 9, cl. 7: “No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.” Analogous state constitutional provisions can be found at, e.g., CAL. CONST. art. 4, §§ 22, 25; N.Y. CONST. art. 3, § 22, art. 7, § 7; VA. CONST. art. 4, § 15, art. 10, § 7.

\textsuperscript{47} 1977 Hearings, supra note 6, at 50 (statement of Stanley Steingut, speaker N.Y. Assembly).

\textsuperscript{48} Id. at 50-51.

\textsuperscript{49} For example, the preparation and submission of a Coastal Zone Management Program may commit a state to major long term regulatory and planning goals. Mere “appropriation” of the federal planning funds would not ensure a legislative voice in the formulation of those goals. Some Massachusetts legislators attempted to block submission of that state’s Coastal Zone Management Program on the ground that the legislature had been left out of the planning process. See Mass. H. 6687 (1977) (forbidding implementation of state coastal zone management program unless its “policies, plans, programs, rules and regulations are approved” by the legislature and the governor).

\textsuperscript{50} See, e.g., Brief of Governor Michael S. Dukakis, supra note 16, at 4-7, 19-20.

\textsuperscript{51} This situation is not true for a program such as General Revenue Sharing, which reflects primarily a “fiscal federalism” rationale: the national government should provide general assistance to state and local governmental units because of its superior revenue raising capability and its more equitable income tax structure. See W. Heller, New Dimensions of Political Economy 117-72 (1966).
of those state institutions that are most likely to effectuate national purposes. For example, statutes frequently require creation of a grantee advisory committee, with the expectation that it will become an ongoing advocate of the grant program within the state government.\footnote{See generally M. DERTHICK, supra note 24, at 201–14 (use of grant system to increase federal leverage over state political processes).} Similarly, Congress may believe that governors will favor national goals in innovative programs more than legislators will.\footnote{See note 58 infra.} If so, Congress should be able to enhance the governors' role.

The 1976 amendments to the Omnibus Crime Control and Safe Streets Act\footnote{Pub. L. No. 94-503, 90 Stat. 2407 (codified at 42 U.S.C. § 3701-3796c (1976)).} provide a specific example of a program-based institutional choice. Congress added a new section providing for advisory review by state legislatures of state criminal justice plans prior to their submission to the Law Enforcement Assistance Administration (LEAA).\footnote{42 U.S.C. § 3726 (1976).} The legislative history strongly suggests that a fear of the political nature of state legislatures was the principal reason for limiting the review to an advisory one.\footnote{The Senate Judiciary Committee explained that it rejected the idea of placing the state planning agency under the jurisdiction of the legislature because "[i]t would be inconsistent with the centralized and coordinated state-wide planning which is one of the key elements of the LEAA program and render close supervision more difficult. Such a structuring of the program would also create a greater danger of politicization of the LEAA effort." S. REP. No. 847, 94th Cong., 2d Sess. 16, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5374, 5381.} The notion that legislatures decide issues on political grounds while governors decide issues on the merits seems naive;\footnote{As Aaron Wildavsky responded to the rhetorical question of why issues are not decided on their merits, "The most obvious answer is that the question presupposes an agreement on what merit consists of when the real problem is that people do not agree. That is why we have politics." A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 176 (2d ed. 1974).} rather, Congress may have felt that state legislatures would be less inclined to support "innovative" and "progressive" programs than governors and executive branch agencies.\footnote{There is some evidence to support such a position. For example, in Massachusetts the Legislative Committee on Post Audit and Oversight has been very critical of a former Commissioner of Youth Services for using federal funds to operate "liberal" programs for which he could not have obtained direct state funding. MASSACHUSETTS JOINT COMM. ON POST AUDIT AND OVERSIGHT, MANAGEMENT AUDIT OF THE DEPARTMENT OF YOUTH SERVICES 38–39 (1974).} Some analysts of the federal system have suggested that state legislatures are less likely to have a broad "public interest" viewpoint than their national counterparts.\footnote{See generally Susskind, Revenue Sharing and the Lessons of the New Federalism, 8 URB. L. ANN. 33, 43–51 (1974).} It may well be that Congress intends to limit the state legislative role in specific grant programs in order to prevent the frustration of the programs' goals by those hostile to them.

In addition to these arguments supporting a strong executive role, governors also have cited serious "mechanical" problems created by legislative...
involvement in implementing programs and expending federal funds. For example, the receipt of funds may be conditioned upon a very rapid submission of grant proposals and a commitment to spend the funds quickly. If state legislative review and approval were necessary for either the application or the expenditure of funds or both under such a program, serious operational problems would seem inevitable. Critics of the Pennsylvania legislature's extensive involvement in the administration of grant funds have stressed the long delays and bureaucratic red tape that have resulted. In addition, governors argue that state legislatures simply lack the expertise to deal with the complex world of federal grant programs.

The functional arguments against legislative involvement are relatively insubstantial. Lack of expertise is a self-fulfilling prophecy. If legislatures take seriously the job of dealing with federal funds, they will acquire the expertise. As for delay, legislatures could employ such devices as recess committees to accelerate review of grant decisions when the legislatures are not in session. Implementation problems are inevitable, but these problems can be solved if legislatures and executives cooperate.

A far more serious problem is that legislative involvement might thwart the objectives of federal grant programs through practices such as legislative screening of grant applications to be submitted by executive branch agencies. From a state perspective, such screening is within the legislature's role as priority setter. The legislature can prevent the state's participation in the program or attempt to mold the program by altering the application. From the legislature's point of view, potential federal-state conflicts over program content should surface early, before long term commitments are made. From a federal perspective, however, this may be undesirable; the objectives of federal grant programs may be advanced by practices which avoid airing potential conflicts at an early stage of the grant process. By developing programs during a period of low visibility, free from intense legislative scrutiny, the state executive branch agency can build constituent support through such techniques as advisory committees and citizen participation. By

61. 1977 Hearing, supra note 6, at 116 (statement of John P. Mallan).
64. The legislature can alter the application in hopes that the funds will be granted on the state's terms. Of course, the grantor agency ultimately determines whether the application is consistent with the underlying grant statute. If the application is not accepted, the state legislature may still be able to choose to submit another application or to forego the funds.
65. It is no accident that legislators frequently say of a federally funded activity that they never would have authorized it if they had known what was going on. See, e.g., 1977 Hearings, supra note 6, at 53–54 (statement of George Roberts, speaker, N.H. House of Representatives).
66. See note 52 & accompanying text supra.
the time the state is required to assume greater financial or other obligations, lobbying force is available.67

This argument has some appeal, at least as an accurate description of how grant programs operate. Yet it is hard to accept when measured against a normative concept of a federal system that relies heavily on the vitality of state representative governments. Indeed, the very choice of the grant mechanism as opposed to direct federal performance of a function suggests that Congress preferred to implement the programs through the states' basic institutional structure.

Greater state legislative involvement in federal grant decisions raises difficult questions, the resolution of which may depend on whether one approaches it from a state or federal perspective. Although Congress could spell out the extent and limits of the legislative role in specific grant programs,68 it rarely mentions legislatures at all. Governors argue that this pattern of omission evinces Congress' intent to restrict the legislative role; legislators treat this "silence of Congress" as leaving the matter open.69 Of course, if state law operates to limit the legislative role in federal grants, it might be unnecessary to reach any potential federal questions.

III. THE STATE LAW GROUNDS—INDEPENDENT AND ADEQUATE?

Most courts that have dealt with the issue have invalidated legislative assertions of power over grant funds.70 Many courts reaching this result purport to rely solely on state constitutional provisions such as separation of powers without focusing on the federal nature of the funds.71 In at least two cases, however, courts have formulated state constitutional doctrines dealing specifically with federal funds.72 These decisions appear to be based largely on the courts' perceptions of the federal grant-in-aid system, and may, in fact, be disguised federal law holdings.

67. See 1977 Hearing, supra note 6, at 76.
68. See notes 182-201 & accompanying text infra for a discussion of possible constitutional limitations on Congress' right to delineate the state legislative role.
69. See, e.g., 1977 Hearing, supra note 6, at 53.
70. See, e.g., cases cited in notes 71, 72 infra.
71. See, e.g., Opinion of The Justices, 369 Mass. 990, 341 N.E.2d 254 (1976), where the Massachusetts Supreme Judicial Court struck down the legislature's attempt to exercise a virtual veto power over the hiring of new employees, including those in federally funded programs. Characterizing the attempt as an incursion upon the executive's inherent power to select personnel, the court employed the traditional separation of powers analysis to determine the constitutionality of the legislation and emphasized that its holding applied to federally funded employees as well as others. Id. at 992-94, 341 N.E.2d at 256. Similarly, other state courts have struck down or restricted the use of interim or recess legislative committees to oversee the use of federal funds, not because federal funds per se were involved, but because recourse to such committees violated state law doctrines against delegation of legislative power. E.g., State ex rel. Judge v. Legislative Finance Comm., 168 Mont. 470, 543 P.2d 1317 (1975).
In the principal case, *MacManus v. Love*, 73 Colorado senators challenged a gubernatorial veto of a bill prohibiting the expenditure of federal funds without legislative appropriation. In holding that the bill violated the Colorado Constitution's separation of powers provision 74 and therefore was "void as an infringement upon the executive function of administration,"75 the court found it unnecessary to reach the question of whether it conflicted with federal grants statutes.76 The court's reasoning is unpersuasive on two grounds. First, the court merely characterized the expenditure of federal funds as administrative without analyzing the procedures by which such funds are obtained. The decision of whether to spend funds is a traditional legislative function, related to its powers of budget preparation, oversight and control.77 It is only after that decision is made that the executive is given the power to decide the exact manner in which the funds are to be spent.

Second, the logical extension of the court's blanket statement that "federal contributions are not the subject of the appropriative power of the legislature,"78 is that the legislature cannot act even when mandated to do so by Congress as a precondition to receiving funds. Since it is unlikely that the court intended to prevent Colorado's receipt of General Revenue Sharing funds,79 the nature of the grant program in question would seem controlling. This would require the court to examine each federal statute under which Colorado received funds to determine whether or not legislative appropriation was permissible.80 The underlying question of what the legislature can do, therefore, appears to be governed not by state law, but by congressional intent.

Reaching a similar result to that in *MacManus*, the Massachusetts Supreme Judicial Court focused on the nature of grant funds in an advisory opinion on proposed legislation to subject all federal funds to legislative appropriation.81 In interpreting a constitutional provision requiring legislative

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73. 179 Colo. 218, 499 P.2d 609 (1972).
74. COLO. CONST. art. 3 provides that "[N]o person . . . charged with the exercise of powers belonging to one of these departments shall exercise any power properly belonging to either of the others . . . ."
75. 179 Colo. at 222, 499 P.2d at 611. Cf. Housing Authority v. Superior Court, 35 Cal. 2d 550, 219 P.2d 457 (1950)(city council's approval of application for federal public housing funds not legislative but properly exercised executive function).
76. 179 Colo. at 222, 499 P.2d at 611.
79. 31 U.S.C. § 1243(a)(4) (1976) provides that revenue sharing funds are to be expended in the same manner as the state's own revenue.
80. The court may have reasoned that legislative appropriation would make the state ineligible for federal funds under some programs, and that therefore legislative action that deprives the state of federal funds is invalid as a matter of state law. Nevertheless, this way of stating the problem does not avoid the necessity of examining federal grant statutes to determine precisely what, as a matter of federal law, is wrong with the legislative action in question.
appropriation of all funds, the court declared that funds received in trust were exempt from the provision and that federal funds were received in trust.\textsuperscript{82} Citing \textit{MacManus}, the Court rationalized that by such action, the legislature would be "interfering with the right and obligation of the executive to decide the extent and manner of expending funds in performing its constitutional duty faithfully to execute and administer the laws."\textsuperscript{83} The Massachusetts court, however, did leave room for reaching a different conclusion by acknowledging that not all federal money is received in trust.\textsuperscript{84} The court recognized therefore, that the issues involved federal law but did not address it.

On close analysis, these two courts seem to have accepted tacitly the governors' contention that Congress intends to limit the state legislative role in federal grant programs. Further, the courts may have been influenced by the governors' argument that any legislative initiatives that run counter to this intent are invalid under the supremacy clause because they violate federal statutes.\textsuperscript{85} Because the supremacy clause issue dominates much of the current debate over the legal limits of state legislative involvement in federal grant programs, it will be analyzed at this point. After analyzing what the effects of a state legislature's "violation" of a federal grant statute might be, Section V then suggests an approach courts should utilize to determine whether such a violation exists.

\textbf{IV. THE FEDERAL LAW ISSUES—A QUESTION OF NATIONAL SUPREMACY?}

\textbf{A. "THE SIMPLE EXPEDIENT OF NOT YIELDING"}

According to traditional grant-in-aid theory, the supremacy clause has no bearing on state legislative actions that run afoul of federal statutory language. Under this theory, if a state does not comply with the terms of a federal grant, it is not eligible to receive the funds. The Supreme Court cases permitting the imposition of conditions upon the award of federal funds to states\textsuperscript{86} reject the argument that a state's sovereignty is invaded; instead they emphasize that a state may escape federal conditions that it considers violative of its sovereignty by not accepting federal funds.\textsuperscript{87} In Justice

\begin{itemize}
  \item[82.] Opinion of the Justices, \textit{Mass. at }\underline{378 N.E.2d} at 436.
  \item[83.] \textit{Id.} Such an analysis rests on a misreading—or more precisely a nonreading—of the federal grants statutes.
  \item[84.] \textit{Id.}
  \item[85.] E.g., \textit{Brief of Governor Michael S. Dukakis, supra note }16; \textit{1977 Hearing, supra note }6, at 117 (statement of John P. Mallan).
  \item[86.] \textit{See e.g. Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947).}
  \item[87.] The doctrine can be traced to \textit{Massachusetts v. Mellon, 262 U.S. 447 (1923).} Although purporting
Sutherland's famous language, the state has "the simple expedient of not yielding." It follows that if a state legislature acts inconsistently with the conditions attached to receipt of federal funds, the state has chosen "not to yield" and therefore is ineligible for the funds. Much of the escalating volume of grant-in-aid litigation involves precisely this issue: whether funds should be terminated or not awarded for grantee noncompliance with the conditions of the underlying grant statute. Indeed, the Third Circuit has held that ineligibility for funding is the only legal consequence that can follow from a grantee's noncompliance with federal conditions.

Governors claim, however, that the issue must be approached from a different perspective: the supremacy of federal law. They argue that attempts to appropriate funds in a manner that is inconsistent with the conditions of a federal grant statute violate federal law, and therefore, such attempts are null and void under the supremacy clause. Governors contend that because grant programs constitute an exercise of the federal spending power, any state legislative attempt to impede a governor's compliance with grant conditions is an interference with the exercise of federal power and therefore has no effect. Several bodies of case law can be cited in support of this surprising proposition.

B. THE WELFARE CASES—KING v. SMITH AND ITS PROGENY

The governors have relied principally on cases in which welfare beneficiaries attacked state statutes or regulations affecting state participation in federal income-transfer programs as inconsistent with the terms upon which the assistance was granted. The first such case, King v. Smith, challenged an Alabama regulation affecting aid to families with dependent children on...
grounds that it violated both the equal protection clause and the Social
Security Act. 97 Finding a clear inconsistency between the Alabama regulation
and federal law, the Court struck down the regulation. 98 From the perspective
of federal grant program analysis, the significance of the decision is that the
Court did not order the termination of funds. 99 The Court reasoned that
because "the federal government has the power to impose the terms and
conditions under which its money is allocated to a state, "any state law or
regulation inconsistent with such federal terms and conditions, is to that
extent invalid." 100

This conclusion is startling, 101 and is questionable on several grounds.
First, the notion of invalidity runs counter to the fundamental tenet of grant-
in-aid doctrine that a state can elect not to accept the terms and conditions of
federal aid; if the state is out of compliance, it loses the aid. Second, because
the grantee is not required to participate in the program at all, the term
"imposed obligations" seems inaccurate; these obligations are binding only
because the parties have agreed upon a cooperative venture for a limited time
period. 102 Finally, the two precedents cited by Chief Justice Warren are not
strong support for invoking the supremacy clause. Oklahoma v. Civil Service
Commission, 103 an early case upholding the practice of attaching grant
conditions, rejected Oklahoma's attack on those sections of the Hatch Act
that prohibit federally-funded state employees from engaging in political
activities. 104 Oklahoma claimed that the penalties imposed for noncompliance
invaded its state sovereignty. 105 The Court, however, noting that the issue of
the federal government's power to compel the removal of a state employee
was not before it, held that Congress could dictate the terms upon which
federal funds were disbursed since state participation was voluntary. 106

The second case, Ivanhoe Irrigation District v. McCracken, 107 involved the
question whether the federal government could restrict the distribution of

98. 392 U.S. at 334. The Alabama regulation defined "parent" as a person cohabitating with
the mother, even if infrequently and not in the home, and terminated AFDC funds if such a "substitute father"

309, 314 n.8. The Court stated that the federal law implied that funds could be terminated only if someone
other than the mother had a legal obligation to support the child. 392 U.S. at 327.
99. 392 U.S. at 333.
100. Id. at n.34. Chief Justice Warren emphasized that Alabama could not breach a "federally imposed
obligation." 392 U.S. at 333.
105. 330 U.S. at 142. Under § 12(b) of the Hatch Act, 4 U.S.C. § 1506 (1976), the Civil Service
Commission holds a hearing and if it so concludes, notifies a state agency that the violation warrants
removal of the employee. If the agency does not comply with the recommendation, an amount equal to
twice the annual compensation of the offending employee is withheld.
106. 330 U.S. 143.
water supplied by a joint federal-state irrigation project in contravention of the state's statutorily endorsed doctrine of reasonable beneficial use. Reversing the state supreme court, the Court held, as a matter of federal statutory interpretation, that Congress did not intend to allow state law to govern the point at issue.\footnote{108} The supremacy clause was invoked only incidentally, as support for the dicta that "a state cannot compel the use of federal property on terms other than those prescribed or authorized by Congress."\footnote{109} Thus, \textit{Ivanhoe} seems a weak precedent for the strong supremacy clause implications of \textit{King v. Smith}.

In the next major "welfare" case, \textit{Rosado v. Wyman},\footnote{110} the Court held that the challenged New York regulations were incompatible with the federal grant statute, and that declaratory and injunctive relief were appropriate; if the state failed to develop a conforming plan, an injunction terminating federal monies would be granted.\footnote{111} The reference to \textit{federal monies} suggests that the Court was following traditional grant theory concerning the states' ability to reject federal aid by not complying with federal statutes. Moreover, in addressing the question of the appropriate remedy, Justice Harlan stated that "the unarticulated premise [in \textit{King}] was that the State had alternative choices of assuming the additional cost of paying benefits to families with substitute fathers or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements."\footnote{112} He went on, however, to characterize the New York provisions as \textit{invalid},\footnote{113} an echo of the supremacy clause implications of \textit{King}.

The supremacy clause issue arose squarely in \textit{Townsend v. Swank},\footnote{114} in which plaintiffs challenged Illinois statutes and regulations that disqualified children in college from AFDC eligibility.\footnote{115} The Court held that the state law conflicted with the federal law which included college students in the definition of eligible recipients; the state provisions, therefore, were "invalid under the supremacy clause."\footnote{116} The Court based its decision directly on \textit{King v. Smith}\footnote{117} which, it said, established the principle that nonconforming

\footnotesize{108. \textit{Id.} at 293. At issue were two sections of the Reclamation Act of 1902, ch. 1093, §§ 5, 8, 32 Stat. 389-90 (codified at 43 U.S.C. §§ 431, 383 (1976)). Section 5 prohibits the sale of water to tracts in excess of 160 acres and § 8 negates Congress' intent to affect or interfere with state water laws. Although the California Supreme Court held that § 8 is absolute and controls other sections of the Act, the United States Supreme Court ruled that it applied only to the acquisition of water rights, not to the operation of federal projects. 357 U.S. at 291.

109. 357 U.S. at 295. The court seemed influenced by the fact that the dam construction project was nearing completion with nearly half a billion federal dollars already expended. 357 U.S. at 279-80. Termination under such circumstances, therefore, was not a feasible alternative.


111. \textit{Id.} at 420.

112. \textit{Id.} at 420-21.

113. \textit{Id.} at 421.


115. ILL. REV. STAT. ch. 23, § 4-1.1 (1967).


117. 392 U.S. 309 (1968).}
statements were invalid under the supremacy clause.\textsuperscript{118} Chief Justice Burger's concurring opinion is significant because he disagreed as to the effect of a finding of conflict between state and federal laws. Rejecting the supremacy clause analysis, he reasoned that since adherence to the federal statute is "not mandatory under the supremacy clause," the only inquiry could be whether the grantee was in conformity; if not, the state should be found ineligible for federal funds.\textsuperscript{119}

Notwithstanding the Chief Justice's \textit{caveat}, the Court adhered to the supremacy clause analysis one year later in \textit{Carleson v. Remillard}.\textsuperscript{120} In subsequent cases holding for plaintiffs the Court tended to characterize the challenged state statute or regulation as "invalid" or "in conflict" with federal law, rather than specifically invoking the supremacy clause.\textsuperscript{121} In 1976, however, the Court suggested the supremacy clause as an alternative ground of decision on remand in \textit{Youakim v. Miller},\textsuperscript{122} and recently affirmed the summary judgment for the plaintiffs that resulted.\textsuperscript{123} This suggests that the Court continues to adhere to the supremacy clause analysis.

At times, courts have referred to conflicts between state actions and provisions of federal grant statutes as raising issues of federal preemption.\textsuperscript{124} Such preemption occurs when the federal government forbids all state action in a specific area.\textsuperscript{125} Because the ability to preempt is derived from the supremacy clause, references to preemption support a supremacy clause analysis of grant litigation.

\begin{itemize}
\item \textsuperscript{118} 404 U.S. at 286. Lower courts that find for plaintiffs in "welfare" cases frequently adhere to the \textit{Townsend} interpretation of \textit{King}. See, \textit{e.g.}, Doe v. Rampton, 497 F.2d 1032 (10th Cir. 1974); Green v. Barnes, 485 F.2d 242 (10th Cir. 1973); Lopez v. Vowell, 471 F.2d 690 (5th Cir.), cert. denied, 411 U.S. 939 (1973); Hurley v. Van Lare, 365 F. Supp. 186 (S.D.N.Y. 1973), aff'd, 421 U.S. 338 (1975). At least one circuit judge has challenged this analysis, assuming that "California can still fold its hands under the decree and let the federal grants be terminated. If that is not permissible, then I dissent." Bryant v. Carleson, 444 F.2d 353, 361 (9th Cir. 1971) (concurring opinion).
\item \textsuperscript{119} 404 U.S. at 292 (Burger, C.J., concurring).
\item \textsuperscript{120} 406 U.S. 598 (1972). It is interesting to note that Chief Justice Burger concurred in the opinion and judgment without objecting to the supremacy clause argument. \textit{Id.} at 604 (Burger, C.J., concurring).
\item \textsuperscript{122} 425 U.S. 231, 234-36 (1976) (per curiam).
\item \textsuperscript{123} Youakim v. Miller, 431 F. Supp. 40 (N.D. Ill. 1976), aff'd, 562 F.2d 483 (7th Cir. 1977), aff'd, 99 S. Ct. 957 (1979).
\item \textsuperscript{124} \textit{E.g.}, Ohio Dep't of Employment Services v. Hodory, 431 U.S. 471, 482-89 (state disqualification of involuntarily unemployed worker for unemployment compensation not preempted by federal law); New York Dep't of Social Services v. Dublino, 413 U.S. 405 (1973) (federal Work Incentive Program does not preempt state Work Rules); Park East Corp. v. Califano, 435 F. Supp. 46, 50 (S.D.N.Y. 1977) (federal procedures for hospital closures preempt state procedures).
\item \textsuperscript{125} In \textit{New York Dep't of Social Services v. Dublino}, however, the Court noted that preemption was being used "in a special sense," because the federal government was not attempting to supplant an independent state program. 413 U.S. at 411 n.9.
\end{itemize}
Judicial references to preemption and conflict, however, may be misplaced. These doctrines arose in the context of the exercise of regulatory powers. Courts have not addressed directly the issue of whether the regulatory concepts of conflict and preemption should apply to exercises of the spending power. From a conceptual standpoint, expenditure and conduct regulation may well be viewed as alternative methods of resource allocation. Furthermore, the spending power has been declared a separate and independent power of the national government, "limited only by the requirement that it shall be exercised to provide for the general welfare of the United States." 126

The analogy to commerce clause conflicts, however, is inappropriate when applied to grant programs—the result of conflict ought to be ineligibility for grant funds, not invalidity of the state legislation. 127

As for "preemption," the term is misleading when applied to grant programs. The federal grant-in-aid programs represent a "cooperative" venture in which each government shares a portion of the undertaking. The federal government provides some or all of the financing, while the grantee is largely responsible for program administration. If the national government preempted the activity, no grant-in-aid relationship would exist. Although the concept of the general welfare might be stretched to permit the national government to carry out directly many of the spending and other functions that are currently accomplished through the grant-in-aid programs, the choice of the grant-in-aid mechanism represents a decision by the federal government not to do so. Congress clearly does not want to prohibit all state activity in these areas, which application of the preemption doctrine would call for. It is not accurate or helpful, therefore, to analyze disputes between the two "partners" as presenting questions of federal preemption of the state's activity. 128

126. United States v. Butler, 297 U.S. 1, 65-66 (1936). In Butler, the government claimed that the "voluntary" nature of the Agricultural Adjustment program removed constitutional impediments to regulating local activity found in the Child Labor Tax Case, 259 U.S. 20 (1922). The Court discounted this argument stating that "[t]he farmer . . . may refuse to comply, but the price of such refusal is the loss of benefits . . . The power to confer or withhold unlimited benefits is the power to coerce or destroy." 297 U.S. at 70-71. It should be noted that Butler was among the last cases decided before Roosevelt's threatened court-packing scheme induced the Court to reverse its position on economic regulation. See, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). For this reason, Butler has been discredited. See, e.g., Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 807 n.13 (1961) (Frankfurter, J., dissenting). The independence of the taxing and spending powers, however, remains intact.

127. See notes 86-90 & accompanying text supra.

128. In this context, the 1974 case of Wheeler v. Barrera, 417 U.S. 402 (1974), is instructive. Parents of Missouri nonpublic school children challenged that state's administration of Title I of the Elementary and Secondary Education Act. They alleged that the state's refusal to provide the same on-the-premises instruction to disadvantaged children in parochial schools as was provided under Title I funds to such children in public schools violated the Act's "comparability" requirement. The state relied in part on a provision of its constitution, which forbade payment "from any public fund whatever" to aid religious schools. Mo. Const. art. 9, § 8. Looking to congressional intent, the Supreme Court held that the court of appeals erred in characterizing the funds as federal and in concluding that federal law governed; Missouri
C. THE ALTERNATIVE OF SPECIFIC PERFORMANCE—A CONTRACTUAL INTERPRETATION OF THE WELFARE CASES

Despite language in some cases, the question of whether a grantee is in compliance with the underlying federal statute need not result in only the two alternatives of finding a state in compliance or ineligible for the funds. A recent analysis of rights and remedies under grants-in-aid asserts that the "award of a grant creates a relationship between grantor and grantee which is contractual, not donative."129 In addition, an early land grant case, McGehee v. Mathis,130 concluded that acceptance of a land grant created a contract which "was binding upon the state, and could not be violated by its legislation without infringement of the Constitution."131 The clear implication of this language and analysis is that a federal common law of contract binds the state to live up to its agreement.132 Recent cases such as Lau v. Nichols133 and Wheeler v. Barrera134 support this view. Notwithstanding its earlier allusion to the possibility of preemption, the Court in Barrera directed the district court on remand to "assure that the state and local agencies fulfill their part of the Title I contract if they choose to accept Title I funds."135

If one accepts this analysis, it follows that inconsistent state actions, including actions of the legislature, can be invalidated during the term of the grant because they violate the contract,136 thereby requiring the state to meet the federal conditions. Such specific performance of grant conditions is an alternative to finding the state in noncompliance and terminating funds.137 If law was not to be preempted but accommodated. 417 U.S. at 416–19. Stressing that comparability did not require identical programs, the opinion stated that if state law prevented on-the-premises instruction for disadvantaged students in parochial schools, the state had three choices: it could make the Title I aid in those schools comparable to that in public schools through some unspecified means, it could terminate on-the-premises assistance currently given in public schools, or it could simply forfeit the opportunity to participate in Title I. Id. at 423–26. Even though the Court suggested that Congress could have preempted state law provisions, id. at 416, the result of the case seems more consistent with traditional grant-in-aid theory than with supremacy clause analysis. If the state ultimately were found to be unwilling or unable to comply with the conditions attached to the federal funds, it had "the simple expedient of not yielding," thereby foregoing its entitlement to those funds. See notes 86–90 & accompanying text supra.


130. 71 U.S. (4 Wall.) 143 (1866).

131. Id. at 155. "All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds." Id.

132. It may well be that the supremacy clause gives this law of contract its binding effect, but the governors do not base their supremacy clause argument on any theory of contract.


136. "[F]rom the grantor’s viewpoint, the purposes, terms, and conditions of a grant, if consistent with the enabling statute, clearly are enforceable against the grantee, at least during the period and to the extent that the grantee uses the funds." Wallick & Montalto, supra note 129, at 166–67.

137. Although specific performance generally is a disfavored remedy in contract litigation, some
upheld by courts, specific performance is likely to be used frequently because both beneficiaries and federal grantor agencies want to achieve program objectives.\textsuperscript{138}

The results of the welfare cases can be harmonized with the contractual rationale. In the welfare cases, invalidating the offending condition essentially was a means of insuring that the state fulfilled its obligations until it terminated the contract.\textsuperscript{139} This analysis differs from that advanced by the governors: the thrust of the supremacy clause argument is that legislatures have no power to initiate state actions inconsistent with the terms of federal grant statutes, while the contractual analysis suggests that such attempts may be invalidated only during the term of outstanding grant contracts. The importance of this distinction arises from the differing consequences. The contractual rationale simply forbids the state to take inconsistent actions once it has accepted the grant and is in a contract, while the supremacy clause rationale invalidates all inconsistent state actions at any time during the federal statute's existence.

D. THE IMPACT AID CASES AND CONCEPT OF "INTERFERENCE"

Governors have relied principally on the welfare cases to support their position that legislative initiatives which interfere with the operation of federal spending programs are invalid.\textsuperscript{140} Another line of supremacy clause cases, however, involving federal "impact aid" also has been cited for this proposition. In 1950, Congress initiated a program of providing federal grants to school districts in which the population of children was substantially increased or local property tax bases decreased as a result of the federal activities.\textsuperscript{141} Conflict arose when some states adopted equalization formulas

\begin{itemize}
  \item [138.] Grantors could choose to suspend or terminate funds rather than to seek specific performance under the federal statute. Because termination of funds would thwart rather than fulfill federal objectives, grantor agencies probably would prefer specific performance.
  \item [139.] See United States v. Frazer, 297 F. Supp. 319, 322 (M.D. Ala. 1968) (termination not exclusive remedy). The contractual analysis presents some difficult problems of its own, including the question of who acts for the state in contracting with the federal government. Logically, the contracting party for the state must be the executive branch acting under express, implied, or apparent authority derived from the constitution or legislature. Thus, for example, a legislature might be deemed to have "ratified" a grant agreement by voting matching funds for the program. In such a case, specific performance would be an appropriate remedy during the term of the contract since those acting for the state clearly had authority to do so.
  \item [140.] Brief of Governor Michael S. Dukakis, supra note 16, at 19–20.
  \item [141.] 20 U.S.C. § 236 (1976), "declares it to be the policy of the United States to provide financial assistance . . . for those local educational agencies upon which the United States has placed financial burdens . . . ." Four bases of eligibility are stipulated: (1) reduction in revenue from local sources because of federal acquisition of real property; (2) education of children who live on federal property; (3) education
that took these federal subsidies into account in determining the amount of state aid to be provided to "impacted areas." School districts and parents successfully challenged the state formulas, primarily on supremacy clause grounds. In ruling on these challenges, the courts employed the doctrine of federal supremacy enunciated in McCulloch v. Maryland, and reasoned that the state statutes frustrated and impeded Congress' intent to supplement the revenues available to such districts from all other sources.

The cases have been criticized on the ground that the courts misread the intent of Congress. Commentators argue that Congress intended to "make the districts whole" by compensating them for the loss of local tax revenues and recognizing the additional burdens caused by the presence of extra pupils. They reason that a certain amount of equalization had already come from federal sources, and that state formulas should be able to take this equalization into account when calculating the comparative resources available to all school districts. The courts focused their analysis on whether the state and federal efforts conflicted, and concluded that if they did, the conflicting portions of the state aid statutes would be rendered invalid under the supremacy clause. Several lines of reasoning support this conclusion.

First, one might argue that impact aid is, in fact, a federal subsidy to federal dependents that can be administered more effectively by supporting local school districts than by operating separate schools or making payments directly to families of government employees. Under such a theory, federal

Article by: [Author Name]

References:
142. These distribution formulas attempt to compensate for inequalities among local school districts by providing proportionately greater payments to districts with poorer revenue-raising capabilities.
145. The federal district court followed the same reasoning in Middletown School Comm. v. Board of Regents, 439 F. Supp. 1122 (D.R.I. 1977), but held for the defendants saying that, "the Rhode Island formula retains the supplementary character of Pub.L. 81-874 funds precisely as Congress intended, and comports with the letter and spirit of Congressional intent." Id. at 1126.
147. The nature of the federal aid is compensatory rather than supplementary. The courts in the impact aid cases erroneously imputed to Congress the intent to provide an extraordinary grant to impacted school districts. Where a state had already augmented its aid to impacted areas because of increased need, the deduction of state aid in response to federal assistance merely restored equality between impacted and nonimpacted districts. The Dilemma of Federal Impact Area School Aid, supra note 146, at 43–47.
148. Id. at 48–52.
149. At least one commentator disagreed with the courts on the merits, but did not question their supremacy clause analysis. Id. at 37–41.
programs are advanced by such payments, and state formulas that dilute or eliminate the subsidies frustrate the will of Congress.

Second, one might contend that the equalization formulas involved interfered with the relationship that Congress established between the national government and such school districts. Under this view, Congress intended to give these districts a "bonus." In this sense, a district might be regarded as analogous to a federal instrumentality. Thus, districts receiving impact aid would be immune from any action by the state that affected their financial relationships with the federal government. The argument errs, however, in analogizing local school districts to federal instrumentalities. The districts are creatures of the state; American constitutional doctrine has always accorded the states sweeping control over their political subdivisions. The state is faced with a choice: it may forbid local acceptance of federal impact aid, or it may permit acceptance, but only in a manner which ensures that the aid effectuates congressional intent. An absolute bar to the receipt of federal impact aid might be politically inexpedient. On the other hand, the reduction of state aid in proportion to federal payments deprives the latter of the "bonus" effect which this argument presumes they were intended to have. Once the state chooses to permit acceptance of impact aid, the frustration of the intended effect supports the conclusion that the supremacy clause invalidates the state action.

150. Cf. Los Alamos School Bd. v. Wugalter, 557 F.2d 709, 714 (10th Cir. 1977). "Because the morale of project-connected persons is essential to the common defense and security of the United States, Congress found the federal government could not totally divorce itself from the new civilian communities. Therefore, it authorized funds for assistance in operating the communities." Id. Note, however, that the court upheld a state equalization funding formula that allowed fewer state funds to a school district receiving impact aid.

151. Douglas Indpt. School Dist. No. 3 v. Jorgenson, 293 F. Supp. 849, 852 (D.S.D. 1968), stressed that the funds were to be "given to the local districts and are meant to be distributed by the local districts . . . ."

152. In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 415 (1819), the Court treated the Bank of the United States as a federal instrumentality, and protected it from state taxation.

153. Whether the state formulas did affect these relationships is a question separate from the legal result of such interference.


155. See, e.g., Barrera v. Wheeler, 475 F.2d 1338, (8th Cir. 1973), aff'd, 417 U.S. 402 (1974). In this case, the court of appeals concluded that a state could conceivably pass a law that prohibited the use of any Title I funds in a private school, assuming such a law could survive a challenge on equal protection grounds. As a result, the state would not be entitled to a Title I grant since it could not comply with the statutory requirement that educationally deprived public and nonpublic school children receive comparable services. The state then would have to choose between repeal of the law or denial of the economic benefits of Title I to its educationally-deprived children. 475 F.2d at 1352.

But see Alabama NAACP Conference of Branches v. Wallace, 269 F. Supp. 346 (M.D. Ala. 1967). Assurances of compliance with § 601 of the Civil Rights Act of 1964 by local school boards are a prerequisite to federal financial assistance. A state statute barring the giving of such assurances precludes compliance and conflicts with the policies embodied in the Act. Because the state statute is an effort to frustrate the operation of the federal statute, the former must fall under the supremacy clause. 269 F. Supp. at 349.
Several courts have viewed the state action as a "diversion" of federal funds from their original purpose. Congress intended to provide direct aid to federally impacted local school districts; instead, the state aid formula resulted in a form of general aid to the state. The courts reasoned that the basic state formula was designed to increase by a certain amount funds available to localities from their own revenue sources. Upon discovering that an impacted district was already receiving a portion of that increase from the federal government, the state "diverted" those federal funds by reducing its intended contribution and by using the now available state funds for other purposes. Congress did not enact the impact program to help ease the burden on states but to provide compensatory relief to impacted localities above and beyond their ordinary share of state aid.

If one accepts the courts' statutory interpretation, invocation of the supremacy clause to invalidate the state statutes seems correct. The argument for invalidation in impact aid cases is strengthened by the lack of judicial control over funds. Courts could not order recipients to terminate misuse of the aid or to forfeit it, because the state, not the recipients, allegedly violated the terms of the statute. Thus, the traditional remedy of withholding or terminating aid from a noncomplying grantee was not available in the impact cases. Courts therefore may have been more willing to invalidate the state statutes since there were no other means to effectuate Congress' purpose.

Although this lack of alternatives supports invalidation in the impact cases, it dilutes their value as support for invalidating state statutes that conflict with a grant to a state government, because the alternative of withholding aid is feasible. In other words, invoking the supremacy clause may not be necessary when the state is both the violator and the recipient. In sum, although these cases are another example of supremacy clause analysis in the context of grants-in-aid, the courts viewed the state legislation as interfering with federal-local relationships. Consequently, this focus may diminish the precedential value of these cases in the area of federal-state relationships.

E. THE FEDERAL LICENSEE CASES—ENDOWING CREATURES OF THE STATE WITH FEDERAL AUTHORITY GREATER THAN THAT POSSESSED UNDER STATE LAW

Federal courts of appeals have held that municipal corporations operating facilities, such as dams and airports, licensed and regulated by federal

157. Id. at 1245.
158. The "diversion" analysis may be simply a restatement of the "subsidy" and "bonus" arguments already made as to why such state formulas violate the supremacy clause. See notes 150–55 & accompanying text supra.
agencies can perform acts beyond the authority of municipalities under state law.\(^{160}\) The most famous case, *State of Washington Department of Game v. FPC*,\(^ {161}\) involved a challenge to the Federal Power Commission's grant of a license to the city of Tacoma to construct a dam. The challengers attacked the issuance of the license on the grounds that the city had failed to obtain the necessary approval from state officials and that the dam would exceed maximum heights for such structures set by state law.\(^ {162}\) Emphasizing that Tacoma was a creature of the state, plaintiffs argued that the city could not act "in opposition to the policy of the state or in derogation of its laws."\(^ {163}\) The Ninth Circuit rejected the proposition that the state statute could control a federal licensee's conduct or bar the city's construction of a dam on a stream that the federal government had the power to regulate.\(^ {164}\)

Although the governors have not relied on this litigation, the licensee decisions may be seen as providing some support for their position, because they establish that the federal government can confer greater powers upon municipal corporations than exist under state law. Arguably, therefore, Congress also can confer such powers upon governors. In that event, governors might be granted appropriation powers that are unauthorized or even expressly forbidden to them under state law.\(^ {165}\)

Nevertheless, a number of factors caution against such a broad reading. First, in rejecting a subsequent collateral attack on Tacoma's operation of the dam, the Supreme Court emphasized that state law gave the city the basic authority to operate an electric utility system.\(^ {166}\) If a municipal corporation totally lacks state authority to operate a particular type of facility, therefore, a federal agency cannot confer such a power on it; if authorized by state law to run the facility, it must be endowed with all the powers of any other licensee.\(^ {167}\)

Second, the licensee cases were decided prior to the Supreme Court's decision in *National League of Cities v. Usery*.\(^ {168}\) The consequence of the independent sovereignty doctrine enunciated in *National League of Cities* is that Congress, even in the exercise of the otherwise plenary commerce power,

161. 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954).
162. 207 F.2d at 395.
163. Id. at 396.
164. Id. The court did note, however, that there might be limitations in the city charter, such as a limitation on indebtedness, which would bear on the legal capacity of the city to act under the license. Id.
165. In fact, one governor has referred to a federal grant statute as "vesting" state executive branch agencies with power to implement the grant program. Brief for Appellants in Opposition to Motion to Dismiss at 7, Shapp v. Casey, appeal filed, 47 U.S.L.W. 3302 (U.S. Oct. 31, 1978), appeal dismissed sub nom. Thornburgh v. Casey, 99 S. Ct. 1415 (1979).
cannot regulate states in the same manner that it can regulate individual businesses. 169 A broad reading of National League of Cities suggests that if the relationship between the state and its municipal corporations constitutes one of the essential attributes of "state sovereignty," federal schemes that disrupt that relationship transgress the limitations on the exercise of federal power.

The claims of national supremacy are stronger in a regulatory context, however, than in the partnership context of joint federal-state spending programs. As noted above, a commerce clause analysis is based on the premise that the exercise of federal power can act to "displace" state power totally; 170 this hierarchical notion is difficult to apply to the typical grant-in-aid context. Compliance with state law in the Tacoma litigation would have prevented the construction of a facility in the manner which Congress, through its delegate, had properly authorized. With a grant system, however, the possibility of frustrating the will of Congress is inherent because a state has the option of refusing a grant and forbidding local governments from participating in grant programs. This risk is acknowledged and accepted by Congress when it chooses the grant mechanism. Thus, the licensee cases are of limited value to the governors' argument that legislative attempts to share power over federal grants-in-aid are invalid.

V. RESOLUTION OF CONFLICTS BETWEEN STATE LEGISLATIVE INITIATIVES AND FEDERAL LAW—A SUGGESTED APPROACH

The analysis thus far can be summarized as follows: first, state legislative assertions of authority over federal grants are not necessarily inconsistent with the policies and goals of the federal grant system; and, second, even if in a particular case such an assertion conflicts with a federal grant statute, the result is not that the state legislative action is null and void, but that the state must forego the funds if the legislature is unwilling to repeal or amend the conflicting provision. 171

Courts need a general approach for resolving purported conflicts between state legislative initiatives and federal grant statutes. In developing such an approach, construing federal legislation will be difficult since most grant statutes are silent about the legislative role, even when they delineate the executive role. Three principles of statutory construction, derived from the nature and values of the federal system, are relevant in construing the legislation. All operate in favor of legislative authority.

169. Id. at 845.
170. See text at notes 124–27 supra.
171. See notes 86–90 & accompanying text supra.
A. THE PRESUMPTIVE VALIDITY OF STATE STATUTES

The question of whether state legislation is inconsistent with congressional enactments arises frequently. The Supreme Court has stressed that this issue should be approached with a desire to harmonize the statutes, and that a finding of conflict between federal and state law should be avoided.172 Justice Brennan has explained "the Court’s reluctance to interpret legislation to alter the federal-state balance of power" as a "traditional canon of construction in the face of statutory ambiguity that recognizes a presumption that Congress normally considers effects on federalism before taking action displacing state authority."173 This concern is one example of the clear statement rule, by which state legislation is upheld unless Congress explicitly declares its intent to displace state choices.174

The federal-state conflicts which the Court has attempted to harmonize usually are in the area of regulation. A finding of conflict results in invoking the supremacy clause to strike down legislation enacted by a sovereign state. In the grant-in-aid context, such a finding may lead only to the loss of a given amount of federal funds rather than invalidation of the state statute. Notwithstanding this different result, however, the traditional conflict approach of harmonizing the statutes should be followed in the grant cases as well as in the regulatory area. It reflects a value judgment that the federal government does not wish to overturn state choices, given the importance of the states as vital units of a federal system. Because threat of aid withdrawal clearly influences and may determine a state’s action, the "effects on federalism" rationale should create a presumption of validity for state statutes.

B. THE PRINCIPLE OF DEFERENCE TO STATE DECISIONS IN GRANT PROGRAMS

Just as the Court developed the "presumption against preemption" and corollary approaches to commerce clause litigation, the Court may be

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172. See, e.g., DeCanas v. Bica, 424 U.S. 357 (1976)(section 2805(a) of the California Labor Code, which prohibits employers from knowingly hiring illegal aliens if such employment would adversely affect lawful resident workers, held not to be unconstitutional as a regulation of immigration or as preempted under the supremacy clause by the Immigration and Nationality Act). See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973). In Merrill Lynch, the Court emphasized that "[o]ur analysis is tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" Id. at 127 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)).


174. See United States v. Bass, 404 U.S. 336, 349-50 (1971)(where statute is ambiguous, Court assumes congressional intent not to diminish state power); L. Tribe, supra note 125, at 243. Professor Tribe stresses that "[a] rule like the clear statement requirement is . . . essential: Congress must be prevented from resorting to ambiguity as a cloak for its failure to accommodate the competing interests bearing on the federal-state balance." Id. at 244.
developing an analogous canon of construction to deal with the increasing volume of grant-in-aid litigation. This canon can be stated as the presumption that Congress, in enacting grant programs, intended that individual states should retain some latitude in expending the funds. One case that supports the existence of such a canon is *New York Department of Social Services v. Dublino.* In resolving an asserted conflict between state work rules and the Federal Work Incentive Program, the Court invoked federalist values when it stressed the need for deference to state choices in the expenditure of welfare grant funds. This approach is consistent with the traditional grant-in-aid premise that Congress has consciously chosen to enlist the states as partners in expenditure programs rather than to administer them solely on a national basis. Some variety in program operation among the states is inevitable, therefore, and should be encouraged, given the need to preserve the states as independent entities.

A slightly different, although complementary, rationale for such an approach to statutory construction in grant litigation was elucidated recently by the Supreme Court. In *Batterton v. Francis,* the Court upheld an HEW regulation that granted states considerable latitude in defining unemployment for purposes of a particular income transfer program, despite legislative history that pointed strongly in the other direction. The Court reasoned that Congress wanted states to participate in the program, and that they would be more likely to do so if the program gave them flexibility. Thus, in addition to the notion that Congress takes the states "as it finds them," there is the additional argument that a presumption in favor of state latitude will encourage participation in grant programs, thereby advancing the basic congressional intent.

C. CONSTRUING FEDERAL STATUTES TO UPHOLD THEIR VALIDITY: STATE SOVEREIGNTY AS A PRINCIPLE OF CONSTRUCTION

The Supreme Court frequently twists federal statutory language to avoid a literal interpretation that would render the statute violative of a constitutional

175. Professors Michelman and Sandalow state that "there has been a veritable explosion of cases involving claims that private rights have been violated by the failure of a state or local grantee to comply with requirements established by Congress in grant-in-aid statutes." F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 275 (Supp. 1972).


177. "The problems confronting our society in these areas are severe, and the state governments in cooperation with the Federal Government must be allowed considerable latitude in attempting their resolution." Id. at 413. 432 U.S. 416 (1977).

178. Id. at 430-32 (citing S. REP. No. 744, 90th Cong., 1st Sess. 3-4, 160 (1967); H.R. REP. No. 544, 90th Cong., 1st Sess. 3, 17, 108 (1967); 113 CONG. REC. 32592 (1967)(remarks of Sen. Long)).

179. Id. at 431-32.

180. This argument assumes that states would be willing to forego funds from at least some grant programs if they were not given some control. If the state is dependent on the aid, it may well succumb to Congress' conditions. See notes 194-96 & accompanying text infra.
limitation on the power of Congress.\textsuperscript{182} Such cases have arisen in the context of potential clashes between federal legislation and constitutional guarantees that protect individuals. National League of Cities v. Usery,\textsuperscript{183} however, makes it clear that the concept of state sovereignty, rooted in principles of federalism, is a limitation on Congress' powers also when dealing with states. Although National League of Cities struck down federal legislation, at least two circuit courts have utilized the decision as a guide to statutory construction in upholding congressional action.\textsuperscript{184} These courts reasoned that if one construction would bring a federal statute into conflict with state sovereignty limitations, courts should seek a permissible alternative construction that does not run afoul of the limitations. They apply a second clear statement technique, that of avoiding judicial inquiry into the limits of congressional authority by assuming that Congress always intends to act within those limits.\textsuperscript{185}

The circuit courts were grappling with the same underlying issue present in National League of Cities—an asserted conflict between state sovereignty and exercise of federal regulatory power. It is uncertain whether state sovereignty limitations apply to grants-in-aid.\textsuperscript{186} Congress may well be able to impose any conditions it chooses upon receipt of federal funds by state and local governments, as long as these conditions are related to the purpose of the grant program or some other valid, national purpose. Under this view, state sovereignty could never be invaded by a grant because the state always has the alternative of not accepting the funds at all. This was the position taken by the district court in North Carolina v. Califano\textsuperscript{187} which upheld the federal requirement of certificates of need for new health care facilities as a condition to federal financial assistance for health programs. The Supreme Court's summary affirmance of the decision\textsuperscript{188} lends added support to the argument that state sovereignty is not a limitation on the imposition of grant conditions.

\textsuperscript{182} "Examples are legion where literalness in statutory language is out of harmony . . . with constitutional requirements." Oestereich v. Selective Serv. Local Bd. No. 11, 393 U.S. 233, 238 (1968). In Kent v. Dulles, 357 U.S. 116 (1958), for example, the Court avoided the constitutional issue of the national government's ability to deny passports to individuals who might be Communists. Despite strong legislative history to the contrary, it held that the Secretary of State lacked statutory authority to deny passports under the circumstances. \textit{Id.} at 129-30.

\textsuperscript{183} 426 U.S. 833 (1976).

\textsuperscript{184} Maryland v. EPA, 530 F.2d 215, 226-27 (4th Cir. 1975), \textit{vacated and remanded}, 431 U.S. 99 (1977) (per curiam); Brown v. EPA, 521 F.2d 827, 831 (9th Cir. 1975), \textit{vacated and remanded}, 431 U.S. 99 (1977) (per curiam). The Court refused to review these judgments invalidating transportation control plan regulations promulgated by the EPA under the Clean Air Act and imposed on various states as elements of an implementation plan where the federal parties conceded that the regulations remaining in controversy were invalid unless modified.


\textsuperscript{186} Several commentators have concluded that it does not. See, e.g., Wallick & Montalto, supra note 129, at 170-72.


\textsuperscript{188} North Carolina v. Califano, 98 S. Ct. 1597 (1978)(mem.).
The language of *National League of Cities* is ambiguous on this issue. The spirit of the decision, however, definitely suggests that the concept of state sovereignty could apply in the grant context. Even though the regulations at issue in that case were mandatory while grants-in-aid are theoretically voluntary, onerous grant requirements may in fact interfere with attributes of state sovereignty that "may not be impaired by Congress . . . ." This leads to the conclusion that there may be state sovereignty limitations upon the imposition of federal grant conditions. If so, courts must determine whether those limitations have been exceeded. One commentator has noted that "[i]f *National League of Cities* is interpreted as establishing a balancing test weighing the relative importance of the federal interest against the strength of the state's interest in autonomy, then in extreme cases the balance may swing against federal grants-in-aid that impose conditions subverting the independence of state legislatures." It is unclear whether the size or nature of a grant should be a factor in the application of any such balancing test. The landmark decisions on the spending power indicate that at some point the threatened loss of federal funds can become so unattractive as to constitute coercion. Certainly a state's loss of millions of dollars in revenue sharing funds for failure to observe a particular organizational condition might be viewed as a far greater impairment of its sovereignty than

189. Justice Brennan's dissent appears to take as given that Congress could attach as conditions to grants, the very wage and overtime standards that *National League of Cities* struck down in mandatory form. 426 U.S. at 856–80 (Brennan, J., dissenting). The plurality, in a footnote, expressed "no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the Spending Power, Article I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." *Id.* at 852, n.17. It seems likely that the plurality recognized the drastic nature of striking down federal legislation on what appeared to be tenth amendment grounds and wished to signal the holding's limited applicability. Accordingly, several lower courts have interpreted *National League of Cities* narrowly and concluded that it has no impact upon congressional power to attach conditions to federal grants given to other units of governments. See, e.g., Florida v. Mathews, 526 F.2d 319 (5th Cir. 1976)(state electing to participate in the medicaid program must comply with federal standards; such compliance not an infringement upon state's tenth amendment powers); City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977)(once a municipality chooses to participate in federally funded program, it must comply with federal statute).

190. The reason the Court found the wage and hour requirements to "interfere" with state sovereignty was that they would "significantly alter or displace the States' abilities to structure employer-employee relationships . . . ." 426 U.S. at 851. Grant conditions can also alter or displace the states' abilities to structure relationships.

191. *Id.* at 845 (emphasis added). The prospect of losing funds upon which the state had been relying to balance its budget might well be as effective as coercive legislation in forcing the state to make choices. Of course, it is also necessary that the subject matter of a particular choice involve an "attribute of state sovereignty." Decisions about the allocation of power between governors and legislators would seem to be well within this admittedly undefined category.


193. Grants can range from a one-time project grant to ongoing formula entitlement funds.

194. *See*, e.g., *Steward Machine Co. v. Davis*, 301 U.S. 548, 589–91 (1937). In this early case involving the tax imposed by Title IX of the Social Security Act, the Court held that every rebate from a tax, when conditioned upon conduct, is a temptation. Although *Steward Machine Co.* stresses that motive or temptation is not the equivalent of coercion, the Court seems to recognize that, at some point, pressure upon the state by the national government constitutes compulsion.
ineligibility for a $100,000 planning grant based on the same organizational condition.\textsuperscript{195}

On the other hand, the balancing formulation suggests that only the nature of the condition is relevant. As Professor Richard Stewart of the Harvard Law School points out, it may not be helpful to engage in inquiry of coercion \textit{vel non}; rather, courts should inquire whether federal grant conditions “unduly compromise a normative political conception of state autonomy”\textsuperscript{196} because of tremendous pressure on states to reduce the burden on their own resources by accepting federal grants. Whichever approach one takes, the nature of the condition is obviously a key variable.

Grant conditions that explicitly favor governors and exclude state legislatures are especially problematic when considering state sovereignty limitations. Although \textit{Oklahoma v. United States Civil Service Commission}\textsuperscript{197} involved the activities of state officials in local politics, the Court upheld federal grant conditions prohibiting such activities.\textsuperscript{198} One commentator concluded that “conditions reasonably related to the purposes of federal spending programs will not be invalidated unless they impose quite extreme or unusual constraints on the structure of state government.”\textsuperscript{199} Still, attempts by Congress to alter the internal state balance of power between the executive and legislative branches do impose such constraints and present serious state sovereignty issues. \textit{National League of Cities v. Usery}\textsuperscript{200} may provide grounds for construing federal grant statutes so as not to preclude legislative assertion of prerogatives.\textsuperscript{201}


\textsuperscript{196}. Stewart, supra note 185, at 1254. Certainly the intensity with which regional spokesmen have battled for changes in major grant formulas is evidence of the perceived importance of those funds to the jurisdictions they represent. See, e.g., Peirce & Hagstrom, \textit{Regional Groups Talk About Cooperation But They Continue to Feud}, 10 \textit{NAT’L. J.} 844 (1978). Another illustration of the attractiveness of federal funds is the fact that although the Coastal Zone Management Program obviously contained the potential for great controversy at the state and local levels, 33 of the 34 coastal states and territories were reported to be participating at the close of 1976. \textit{U.S. DEP’T OF COMMERCE, STATE COASTAL ZONE MANAGEMENT ACTIVITIES 1975-1976} at 1 (1976).

\textsuperscript{197}. 330 U.S. 127 (1947). In this case, a member of the State Highway Commission of Oklahoma, whose position was financed in part by loans and grants from a federal agency, served, at the same time, as Chairman of the Democratic State Central Committee. The Civil Service Commission determined that his political activities violated §12 of the Hatch Act, 18 U.S.C. § 611 (1976), and warranted his removal from the Highway Commission. See notes 103-06 & accompanying text supra.

\textsuperscript{198}. 330 U.S. at 142-44.

\textsuperscript{199}. Stewart, supra note 185, at 1256.

\textsuperscript{200}. 426 U.S. 833 (1976).

\textsuperscript{201}. See Shapp v. Sloan, 480 Pa. 449, 469-72, 391 A.2d 595, 604-06 (1978) (supremacy clause and federal statutes do not preclude legislature from requiring that all federal funds be deposited in the general fund and be available for appropriation by the general assembly), appeal dismissed sub nom. Thornburgh v. Casey, 99 S. Ct. 1415 (1979); Opinion of the Justices, —— N.H. ——, 381 A.2d 1204, 1210-11 (1978)(supremacy clause and Public Health Service Act do not preclude legislature from requiring the governor to designate the agency to receive federal health funds).
VI. Federal Law Challenges to Legislative Initiatives: Two Examples.

This article provides a general framework for analysis of the federal law questions that specific legislative assertions of power may present. These questions will arise in a large number of contexts; state initiatives will take various forms and apply to hundreds of different federal grant statutes. Two recent cases upholding legislative assertions of power over federal programs appear to represent the most extensive consideration of the federal law issues to date. Moreover, they are excellent illustrations of conflicts between legislatures and governors that grant programs foment.

A. Appropriation of Grant Funds: Shapp v. Sloan

In 1976, the Pennsylvania General Assembly sharply altered its practice of pro forma approval of federal grant funds by passing sweeping legislation that required the specific appropriation of federal funds and prohibited their disbursement by the state treasurer without an express appropriation. It then authorized several hundred "line appropriations" of grant funds but refused to appropriate LEAA funds for a special prosecutor; the state treasurer, therefore, refused to disburse them. In response, the Governor and other executive branch officials sued the treasurer, claiming that the refusal to fund the special prosecutor violated the Omnibus Crime Control and Safe Streets Act. They further challenged the entire scheme of legislative appropriation of grant funds on both state and federal constitutional grounds.

Unlike the Colorado Supreme Court in MacManus v. Love, the Pennsylvania Supreme Court held that the power of appropriating federal funds was
clearly within the constitutional prerogatives of the state legislature. Although the Court did consider the federal law issues, it relied more on general views of federalism than on the specific language of the Safe Streets Act. The Court simply stated that "[n]othing in the federal legislation pursuant to which... funds are granted suggests that the same principles by which programs wholly state funded are operated are inapplicable to programs for which federal funds are supplied." 

The legal question of whether the legislature's actions conflict with the Safe Streets Act is a close one. Assuming a position directly opposed to that of the Pennsylvania Supreme Court, LEAA has ruled that legislatures cannot appropriate on a project-by-project basis if this practice includes the right to disapprove items in a federally approved plan. Both the language and the legislative history of the Act, however, leave congressional intent in doubt. The language requiring matching funds to be appropriated "in the aggregate" is inconclusive as to line-item approval of individual components of a state plan. Far more difficult problems are raised by the 1976 amendment that provides for advisory review by state legislatures of the state's criminal justice plan prior to submission to the grantor agency. As

legislators challenged the governor's veto of a bill subjecting all federal funds to legislative appropriation. In Shapp, the governor challenged a similar bill, passed over his veto. 480 Pa. at 460, 391 A.2d at 600. Construing Pa. Const. art. 111, § 24, the court declared: "The constitution says 'no money' shall be paid without an appropriation. We think the constitution means exactly what it says." 480 Pa. at 465, 391 A.2d at 602. Construing Pa. Const. art. 111, § 24, the court declared: "The constitution says 'no money' shall be paid without an appropriation. We think the constitution means exactly what it says." 480 Pa. at 467, 391 A.2d at 603.

210. 480 Pa. at 469, 391 A.2d at 604. Shapp is the proverbial "hard case." The facts suggest strongly that the legislature was more concerned with stopping an investigation into political corruption than with overall priorities within the criminal justice system. Failure to appropriate the funds for a special prosecutor, in fact, resulted in the termination of the grand jury that had initiated such an investigation. Id. at 479-81, 391 A.2d at 610 (dissenting opinion).

The Act specifies that "the non-Federal funding of the cost of any program or project to be funded by a grant under this section shall be of money appropriated in the aggregate, by State or individual units of government, for the purpose of the shared funding of such programs or projects." 42 U.S.C. § 3731(c) (1976) (emphasis added). This language supports the reasoning that Congress was willing to give state legislatures only one, all-or-nothing decision on state participation, rather than a project-by-project review. The legislative history suggests, however, that Congress was concerned primarily with sparing grantees the need to show that a 10% matching appropriation was made "for each and every of its programs and projects." H.R. REP. NO. 249, 93d Cong., 1st Sess. 6, reprinted in [1973] U.S. CODE CONG. & AD. NEWS, 1729, 1732. It does not follow that Congress wished to preclude such a showing if a state wanted to make it.
discussed above, there is strong legislative history indicating that Congress was authorizing only an advisory review of the plan. Neither the Act nor the legislative history, however, specifies how to reconcile the apparent conflict between the advisory review and the power to appropriate matching funds. If the legislature can appropriate matching funds on a project-by-project basis, then its role is dispositive, not advisory, at least in so far as the ability to veto projects is concerned.

Under the analysis developed in Section V, the result in Shapp seems correct unless the legislature had taken some action which could be deemed a "ratification" of the state plan prior to its refusal to appropriate the LEAA funds. The Safe Streets Act is ambiguous as to the legislative role, and even the legislative history indicating a limited role is insufficient to overcome the first clear statement requirement, that Congress must explicitly declare its intent to displace state choices.

The Governor of Pennsylvania argued that the Act "vests" the federal spending power solely in the executive branch. This argument, however, may trigger the second clear statement requirement, based on state sovereignty limitations. Utilization of the grant system to deny state legislatures the power to determine criminal justice priorities might well be the "extreme case" of an invalid grant condition. It seems preferable, therefore, to construe the Act as permitting legislative appropriation of LEAA funds on a line-item basis in those states where legislatures are sufficiently concerned with federal funds to assert the power to do so.

The United States Supreme Court rejected the opportunity to resolve the issues raised in this article when it dismissed the Pennsylvania appeal "for want of a substantial federal question." Unlike a denial of a petition for certiorari, such dismissals "carry the same practical consequences as summary affirmances. The dismissal operates as an adjudication that the federal question was properly decided on the merits by the state court. It carries the stare decisis effect of binding state courts and lower federal courts..."

214. See notes 54-59 & accompanying text supra.
216. If, for example, the legislature had exercised some review of the criminal justice plan prior to its submission, as was later authorized by Congress, and did not indicate its disapproval of the special prosecutor, this might be deemed a ratification.
218. See text accompanying note 192 supra.
219. Thornburgh v. Casey, 99 S. Ct. 1415 (1979) (mem.). 28 U.S.C. § 1257(2) (1976) provides for mandatory Supreme Court review of final judgments of the highest state court in which decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution... or laws of the United States, and the decision is in favor of its validity."
Although there is sharp and frequent criticism of this rule,221 the Court’s recent reaffirmation of it in *Hicks v. Miranda*222 would seem to entitle the legislative side to claim total victory in *Shapp*. A close examination of the case’s progress in the Supreme Court, however, suggests that the issues raised in *Shapp* remain open. In a brief submitted at the Court’s invitation, the Solicitor General of the United States urged dismissal of the appeal “for want of a substantial federal question,”223 but *not* on the ground that the Pennsylvania statute was valid. In fact, the brief acknowledged that there are strong arguments both in favor of and against validity.224 The Solicitor General argued instead that any inconsistency between the Pennsylvania statute and Title I would simply render the state ineligible for funds.225

The brief insisted that the questions raised in *Shapp* remained open, and that they might, in the future, come before the Court in a “proper” case such as a challenge to a federal agency’s refusal to make a grant.226 Given the unequivocal language in *Hicks*, it is highly unlikely that state and lower federal courts will undertake the task of scrutinizing the papers filed in *Shapp*. Thus, the case may well stand as a disposition on the merits in favor of state legislatures.

**B. DESIGNATING THE GRANTEE AGENCY: OPINION OF THE JUSTICES**

Apart from programmatic conflicts exemplified by the appropriation issue, federal grant programs also create what might be called structural conflicts over the selection of a state agency to administer a particular grant program, and the organization of that agency. Traditionally, the allocation of functions among agencies, and related questions, such as the composition of each agency, have been determined primarily by the legislature. A number of federal grant statutes, however, specify that the funds are to be administered by an agency “designated by the governor.” When the legislature and governor disagree over the choice of an agency, a classic conflict arises. The Supreme Court of New Hampshire recently had to resolve this issue.

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221. One argument is that such cases do not receive scrutiny by the Court adequate to carry the same precedential weight as cases that are argued and decided. See Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975)(Clark, J., concurring). See also Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 COLUM. L. REV. 508, 526–27 (1976). A second objection is that the Court uses the dismissal technique as a discretionary screening device analogous to certiorari. *Id.* at 518–19, 533.

222. 422 U.S. 332 (1975). The Court bases this rule on the fact that jurisdiction is obligatory, not discretionary, when state courts uphold the federal constitutionality of state laws. See note 219 supra. In *Hicks*, Justice White insisted that in such cases, the Court must and does deal with the merits. 422 U.S. at 343–44.


224. *Id.* at 15–18.

225. *Id.* at 18–19.

226. *Id.* at 19–20 n.17.
The National Health Planning and Resources Development Act of 1974 provides that federal grants are to be awarded to a state health planning and development agency selected by the governor. The Governor of New Hampshire originally designated his own office. Then he designated the state's Department of Health and Welfare. Finally, by executive order, he took back the authority for administering these federal grants. Shortly thereafter, the legislature directed the governor to designate the Department of Health and Welfare as the recipient agency.

In an advisory opinion sought by the executive branch, the New Hampshire Supreme Court ruled in the legislature's favor on both state and federal law questions. Assessing state law, the court found that, under the traditional separation of powers doctrine, the legislature had the ultimate responsibility for creating state agencies and prescribing their duties. The Court dealt with the federal question by applying the first clear statement requirement, discussed above, to the grant statute. Even though the statute specified gubernatorial selection, and did not mention legislatures at all, the Court found "no clear manifestation of congressional intent to override the powers of our legislature . . . ."

The result seems correct, at least in the context of the particular grant statute. The legislative history suggests strongly that Congress' main concern was to centralize health planning and related functions somewhere in the state government, not to favor governors over legislatures. Of course, a case might arise under a statute in which Congress explicitly denies a legislative role in agency selection, perhaps out of concern that legislative designation of the grantee agency for a particular program might politicize that program. Testing the validity of such a statute would require application of a "state sovereignty" balancing test. Even though the national interest in the administration of a grant program is strong, it is not strong enough to justify the use of federal grants to substantially alter the balance of power between state legislatures and governors.

227. 42 U.S.C. § 300m(b)(1) (1976). This section provides that: a designation agreement under subsection (a) . . . is an agreement with the Governor of a State for the designation of an agency (selected by the Governor) of the government of that State as the State health planning and development agency . . . to administer the State administrative program . . . and to carry out the State's health planning and development functions . . . . Id. (emphasis added).

228. Opinion of the Justices, ___ N.H. ___, 381 A.2d 1204, 1207 (1978). In the Budget Act, the legislature referred to "returning" responsibility for comprehensive health planning to the Department. Id.

229. ___ N.H. at ___, 381 A.2d at 1208-09.

230. See notes 172-74 & accompanying text supra.

231. ___ N.H. at ___, 381 A.2d at 1211. The opinion also suggested that Congress had chosen to deal with the states and, therefore, had to accept their institutional structures.


233. See note 56 & accompanying text supra.

234. See notes 182-201 & accompanying text supra.
Legislative assertions of power over grant programs present novel and complex issues of federal law. The Supreme Court's summary dismissal of Shapp provides no resolution of these issues nor guidelines for future cases. In the author's view, it is imperative to analyze such cases in the light of the grant system itself. Grants are a partnership between independent entities of government. If the national government wants programs to be conducted in a manner that conflicts with state legislative authority, Congress has the option of choosing mechanisms other than grants-in-aid. Units of state and local government, on the other hand, at least in theory, have the option of refusing grants that threaten state sovereignty. Thus, the supremacy clause has no bearing on legislative initiatives that are inconsistent with the terms under which federal aid is offered.

The task remains of construing the grant statutes setting forth these terms. The fact that grantees will rarely exercise their option to refuse preferred aid affords the national government opportunities to convert "our States into provinces and our local governments into administrative precincts molded and run by a powerful central government in Washington." In construing grant statutes, courts should not presume that Congress has accepted this opportunity. In the rare case where Congress has clearly done so, the principle of state sovereignty should block its path.
