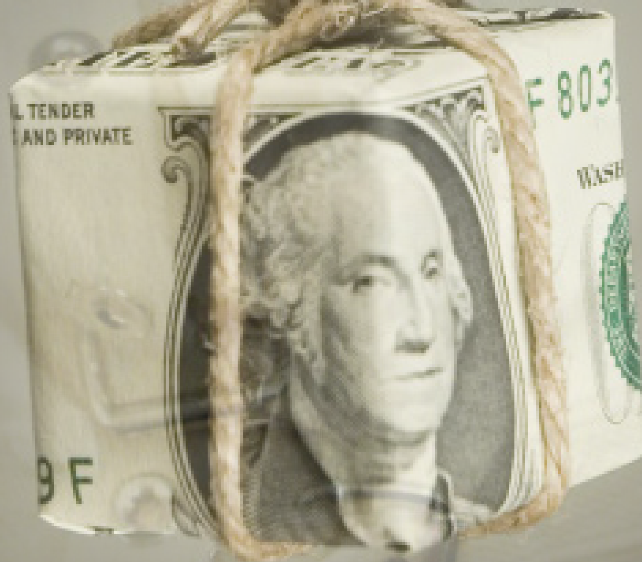
Texas Public Policy Foundation

Loosening the Federal Straightjacket

How the NFIB Decision Affects Federal Funds in State Budgets

Mario Loyola

October 2013



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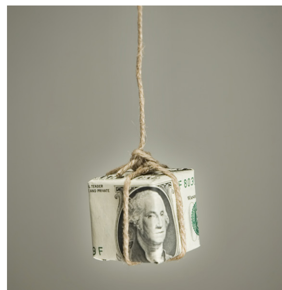

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Loosening the Federal Straightjacket

How the NFIB Decision Affects Federal Funds in State Budgets

by Mario Loyola, Chief Counsel

I. Introduction

The Supreme Court has insisted for decades that Congress can't command the states to do anything.[1] Yet Congress has accomplished much the same thing by taxing the state's residents and then offering to give the revenue back to the states, but only if they satisfy a myriad of federal conditions. The federal courts had long given Congress virtually free rein to control state governments through such "assistance." That changed, slightly but significantly, with the 2012 ObamaCare decision in *NFIB v. Sebelius*.[2]

The Court struck down a provision in ObamaCare that threatened states with the loss of all Medicaid funding if states refuse to expand their Medicaid programs as prescribed in the law. In essence, the Court ruled that where large sources of federal funding for states are conditioned on state compliance with new programs, there may be impermissible coercion of state governments. In those cases, the threat of losing existing funding is unconstitutional, and the states are therefore free to ignore the threat.

Key Points

- "Cooperative federalism" describes programs through which the federal government gives financial assistance to the states, or gives states permission to implement federal rules, but only on condition that the states act according to federal instructions.
- Through such "cooperative federalism" programs, the federal government is steadily taking over state governments, and turning them into instruments of federal policy.
- In order to remain independent and responsive to their constituents, state elected officials must resist "cooperative federalism."
- It has become vitally necessary to disentangle the finances and regulatory activities of state governments from those of the federal government.

The Court's ruling has significant implications for other sources of federal funding in the Texas state budget. According to the February 2013 report of the Texas Legislative Budget Board (*Top 100 Federal Funding Sources in the Texas State Budget,*[3] hereinafter, the "LBB Report"), there are more than 400 sources of federal funds in the Texas budget, totaling about 35 percent of the Texas All Funds budget for fiscal year 2012. Many of those programs have been conditioned on states' acceptance of new programs, just like the scheme struck down in the ObamaCare decision.

This paper examines the Court's *NFIB* Medicaid ruling in detail, assessing its impact and making the case that future rulings of the Court will have to go much further in order to protect states from the coercive effects of conditional federal funding. It then examines several state programs that are likely vulnerable as a result of containing a penalty similar to the one struck down in *NFIB*. Finally, we make specific recommendations for pushing back against coercive federal funds.

To buttress the analysis, this paper contains several appendixes. Appendix I contains a catalogue of all federal funding sources above $100 million in fiscal year 2012, describing the source of the program in federal law, and significant conditions attached to the funds. Appendix II contains model state legislation designed to reorient state agencies to identify and resist coercive conditions in the state budget. Taken together, the resources in this paper will hopefully prove useful guides in the effort to restore the Constitution's

intended separation of state and federal government functions.

Federal courts must begin to enforce a strict separation of powers both between the federal and state governments, and within the federal government itself. Congress will also have to help undo the consequences of its self-indulgence. And state legislators have perhaps the greatest incentive to insist on the separation of state and federal government functions.

II. The Supreme Court's Ruling on Medicaid Expansion

As enacted, ObamaCare's Medicaid expansion provisions gave the Secretary of Health and Human Services authority to withhold all existing Medicaid funding as a penalty for failure to comply with the new Medicaid expansion requirement of ObamaCare.[4] 42 U.S.C. §1396(c) provides:

> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds:
>
> > (1) that the plan has been so changed that it no longer complies with the provisions of section 1396(a) of this title; or
> >
> > (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
>
> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

The term "payments" refers to all payments under the Medicaid program, while "parts of the State plan not affected by such failure" refers to Medicaid payments unrelated to the Medicaid expansion in ObamaCare; i.e., payments under the preexisting Medicaid program. The Court focused on the cross-condition in this scheme, namely the fact that the law allows payments under the existing Medicaid program to be suspended if a state does not comply with the new Medicaid expansion requirement in ObamaCare.

The Court noted that conditional spending legislation is "in the nature of a contract":

> The legitimacy of Spending Clause legislation, however, depends on whether a State voluntarily and knowingly accepts the terms of such programs. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." When Congress threatens to terminate other grants as a means of pressuring the States to accept a Spending Clause program, the legislation runs counter to this Nation's system of federalism.[5]

This concern had led the Court to strike down laws of Congress under the principle of commandeering. "[T]he Constitution simply does not give Congress the authority to require the States to regulate," the Court had warned in *New York v. United States*:[6]

> Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability, just as in New York and Printz. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.[7]

The Court then performed what was nearly a magic trick: it distinguished *South Dakota v. Dole* (1987),[8] a seminal case that had appeared to foreclose any coercion challenge to the

Medicaid expansion provisions in ObamaCare.

In *Dole* the Court ruled that Congress could penalize states that refused to raise their drinking age to 21 by taking away up to 5 percent of federal highway funds. Congress could "encourage" states to adopt certain policies by attaching conditions to federal funds—so long as it did not cross the line into compulsion. The Court recognized that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[9]

Alas, *Dole* provided woefully little guidance on how courts should determine where that line is. But faced with ObamaCare's Medicaid expansion provision, the Supreme Court simply noted, "wherever that line may be, this statute is surely beyond it. Congress may not simply conscript state [agencies] into the national bureaucratic army, and that is what it is attempting to do with the Medicaid expansion."[10]

The key factor in distinguishing *Dole* was the comparatively modest scale of the penalty in that case compared to the prospect of losing *all* existing Medicaid funds. "[T]he federal funds at stake [in *Dole*] constituted less than half of one percent of South Dakota's budget at the time."[11] By contrast, under the provisions of the Medicaid expansion, states stand to lose "not merely a relatively small percentage of its existing Medicaid funding, but all of it," on average more than 20 percent of each state's total budget. This, wrote Roberts, is "much more than relatively mild encouragement—it is a gun to the head."[12]

That was surprising enough—given the refusal of any other federal court applying *Dole* to find impermissible coercion in any penalty. But the Court had to overcome yet another, and perhaps even more difficult, hurdle. At the outset of the Medicaid program in 1965, states had agreed to accept future alterations, amendments and repeals of any provision in the program.[13] The Court found a way around this obstacle by introducing a concept heretofore unknown in Spending Clause jurisprudence, namely the distinction between the mere modification of a conditional grant program and a wholesale transformation of that program:

> We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." *Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.*[14]

The essential problem in conditional federal funds for the states arises from the lack of restraints on the purposes for which Congress may use its taxing and spending power.

The Court noted that Medicaid was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. It then noted that ObamaCare's Medicaid expansion constitutes a "shift in kind, not merely degree" from this paradigm:

> Previous amendments to the Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care to the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.[15]

The Court concluded, "A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically."[16]

In the Texas Public Policy Foundation's brief for the Supreme Court in ObamaCare, we had argued that *Dole* was wrongly decided and should be reversed—a position we still maintain. Instead, the Court in effect modified the doctrine of *Dole*.

The Court's decision has potentially far-reaching implications for the federal conditional spending programs through which Congress in effect purchases control of the state governments. In Part III of this paper, we survey the major areas of federal funding in the state budget and provide some examples of where the Court's decision increases state flexibility. In Part IV we suggest a strategy for capitalizing on that flexibility.

However, our survey also confirms the fear raised by *Dole's* conceptual omission, which was maintained by the Roberts Court in *NFIB*: Because the federal government can still deny funds for new programs such as Medicaid expansion, the coercion remains.

Coercion inheres in the condition attached to federal funds —and not all conditions are the same. As Justice Sandra Day O'Connor argued in her *Dole* dissent, conditions on federal funds must be integral to the federal interest in the program's goals.[17] Hence, federal conditions that affect only the manner in which federal money is to be spent advance federal interests without impacting state policies or state spending. But federal conditions that affect state policies or state spending do not advance the federal interest in the program. Instead, such conditions only advance the federal interest in controlling state governments.

States must continue to fight against coercive conditions, in the courts and in legislatures. For this reason, we recommend that states adopt specific legislation to push back against conditions attached to federal funding when those conditions qualify as "coercive" conditions. That legislation is discussed in Part IV, and model legislation is set forth in Appendix II.

III. Major Sources of Federal Funds in the Texas Budget

The vast majority of the more than 400 sources of federal funding in the Texas budget fall into three general areas: health care, education, and transportation. About 30 such programs entail more than $100 million in funding and are treated as "major" programs in this paper. They are detailed, along with the significant conditions attached to them in Appendix I.

The vast majority of the more than 400 sources of federal funding in the Texas budget fall into three general areas: health care, education, and transportation.

These programs are vulnerable in two different ways, requiring two separate analytical inquiries.

First, where a state's eligibility for an existing funding stream is made conditional on its compliance with a new program, the *NFIB* decision could render the condition unconstitutional. Virtually all federal funding program have been amended multiple times since their inception, and other programs linked to them by legislation. The question is whether any of those *subsequent* enactments constitute a "new program" within the meaning of *NFIB*. This can only be ascertained by closely examining each such amendment or program in relation to the underlying funding stream. Identifying which programs are vulnerable in this respect thus requires painstaking and highly technical legal research.

The second way such programs are vulnerable depends on the nature of the conditions themselves. Where the condition attaches to the manner in which federal funds are to be spent, they may be considered appropriate conditions. However, where the condition affects how the state spends its own money, or affects collateral state policies, such conditions should be considered coercive *per se*. That also requires painstaking and highly technical legal research, for each condition—whether in statute or in regulations—that attaches to a federal funding sources must be examined individually for purpose and effect.

The *per se* treatment of conditions unrelated to the federal interest in a program, which this paper proposes, follows the logic of O'Connor's dissent in *Dole*. In that light *NFIB* was a step in the right direction, but unfortunately the Supreme Court still holds to the flawed reasoning of the *Dole* majority—namely that coercion is a matter of degree, rather than essential to the proposition that states face when

confronted with conditional federal funding programs. When conditions apply to matters other than how the federal money is to be spent, the coercion inheres in the conditions, and states should treat them as such—both in their own policies and in court challenges.

States should not wait for glacial shifts in the Court's jurisprudence. The first step in freeing state governments from the tangle of conditions on federal funds is to develop policies that permit states to identify and push back against those conditions and programs that are incompatible with our federal system.

Health Care Programs

The largest federal funding program in state budgets is Medicaid. *NFIB* struck down the cross-condition that linked the ObamaCare Medicaid expansion to the existing Medicaid funding stream—but the underlying Medicaid program is still subject to a long list of exceedingly detailed conditions. Those conditions are set forth at 42 U.S.C. §1396(a), and are expanded upon in federal regulations.

None of the other major health programs appear to have been linked to Medicaid funding in quite the way that Obama-Care's Medicaid expansion was, but all of the major federal health care programs contain coercive conditions.

The conditions imposed on every state's Medicaid program highlight the gravity of the challenge posed by coercive federal funding programs, particularly where state and federal funds are comingled. Most of the conditions are related to the purposes and manner in which the federal funds are to be spent, but because federal and state funds are comingled, they also define how the state may spend its own money. And because the conditions define not just the *purposes* for which money may be spent, but also the *manner* in which it may be spent, the conditions are exceedingly intrusive with respect to minute matters of program administration, such as personnel policies, methods of processing applications for benefits, services covered, methods of providing payment to service providers, and of course an enormous amount of detail on eligibility requirements.

Federal grants to the states are couched as "federal assistance" for the states. But in fact, as shown in programs such as Medicaid, it is actually state governments that are subsidizing and implementing a federal program. As is obvious from an examination of the conditions in 42 U.S.C. §1396(a), states have scarcely any latitude to reflect the policy preferences of their residents in shaping the state Medicaid program. States are relegated to a function that is virtually identical to that of unelected federal regulatory agencies.

As with any conditional grant program where federal and state funds are comingled, the Medicaid program conditions should be classified as coercive because virtually all the conditions that apply to how federal funds are to be spent apply equally to how state funds are to be spent. Many of the federal health care programs have maintenance-of-effort and similar matching requirements. All such conditions should be deemed coercive *per se*.

Education Programs

After Medicaid, the next largest source of federal funds in the Texas budget is federal grants to local education agencies under Title I of the Elementary and Secondary Education Act of 1965.[18] Title I funds help school districts provide supplementary educational services for disadvantaged children who are at risk of failing educational requirements. Funds are funneled to local school districts through the state's education agency. The No Child Left Behind Act of 2001 (NCLB)[19] revamped Title I. It made the states' continued receipt of most Title I funds[20] contingent on the state's compliance with the educational assessment requirements of NCLB, pursuant to a federally-approved state plan.

By making it contingent on state compliance with an entirely new program, this modification of the existing Title I funding stream is virtually identical to the penalty struck down by the Supreme Court in the ObamaCare decision. As a result, states may now be able to opt out of NCLB without risk of losing Title I funds. Today, the statutory authority for the Secretary of Education to cut off any Title I funds for noncompliance with NCLB would now likely be ruled unconstitutional. And states don't risk anything by trying: the law provides for judicial review of a decision to cut off funds, and time for remedy in case of an adverse ruling.

Title I of the Elementary and Secondary Education Act of 1965 (Title I) establishes federal grants to local education agencies.[21] Title I funds help school districts provide sup-

plementary educational services for disadvantaged children who are at risk of failing educational requirements. The purpose of Title I was to help poor and at-risk students and school districts improve educational performance, specifically by providing states and local education agencies funds "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."[22] Funds are funneled to local school districts through the state's education agency, once a complex state plan has been approved and as long as the state and local districts continue to meet a series of requirements.

In 2001, the No Child Left Behind Act (NCLB)[23] imposed a new system of student assessments and attendant reporting requirements. The law authorized a modest expenditure to cover the administrative costs of the assessments and reporting—initially $75 million to be divided among the states—but the really powerful inducement was that the law made state compliance with its supposedly voluntary requirements a requirement of continuing to receive Title funds. As amended by NCLB, Title I now provides:

> FAILURE TO MEET REQUIREMENTS ENACTED IN 2001.— If a State fails to meet any of the requirements of this section […] then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.[24]

The phrase "funds for State administration under this part" refers to the funds authorized for disbursement to states under Part A of Title I. The authorization for these funds—the vast majority of Title I funding—is found in 20 U.S.C. Sec. 6302. Those funds amounted to $13.5 billion in 2002, rising to $25 billion in 2007, and have been carried forward in continuing resolutions since then. In fiscal year 2010, Texas received $1.3 billion under this program.[25]

This modification of the existing Title I funding stream, imposed by NCLB, is virtually identical to the penalty struck down by the Supreme Court in the ObamaCare decision. As a result, states may now be able to opt out of NCLB without risk of losing Title I funds.

As further discussed in Part IV, a state wanting to opt out of NCLB could simply stop complying with its requirements, and submit a state plan (application for Title I funds) that does not mention NCLB. If the Secretary of Education notes the deficiency, the state would have time to seek review on the basis of the Supreme Court's *NFIB* decision. If the review does not prevail, the state could always come back into compliance with all Title I conditions, without having lost any Title I funding beyond the small funds made available to cover the direct costs of the NCLB assessments and reporting requirements.

Transportation

The oldest of the programs that provide federal funding to the states is the National Highway System established during the Eisenhower Administration. After its inception, the amount of money transferred by the federal government to the states never dropped below one percent of GDP; by 1970 it was two percent of GDP; by 1980 it was three percent of GDP; and under the Obama administration it has reached four percent of GDP, greater than the average fed-

The Common Core Standards

Federal manipulation of the Common Core Standards shows the limits of the Court's reasoning in *NFIB* and *Dole*. Common Core was supposed to be purely a coordinated state-level effort, led principally by the organizations such as the National Governors' Association. But the Obama administration decided to bring it within the Race-to-the-Top program, allotting 40 of the 500 points in the competitive application process to state compliance with Common Core. As a result, virtually all states have adopted Common Core (Texas has refused). States that refused will find themselves comparatively starved of federal funds that other states get. Thus, the program styles itself as a system of rewards, but in fact it is a system of punishment.

eral deficit going back 30 years.[26]

Federal gas taxes are allocated to states for transportation spending, mostly on the basis of formulas, with levels adjusted by "equity bonuses" to alleviate the disparity in state share of their own federal gas tax contributions.[27] States may draw down on their allocations in connection with transportation projects approved by the Secretary of Transportation. A host of detailed "standards" apply to any such federal approval.[28]

The federal highway program contains several potential vulnerabilities. The most recent congressional transportation enactments (2012)[29] extensively amended the existing highway program. Among the new provisions is a requirement for statewide and local transportation planning that must be submitted to the Secretary of Transportation for his approval.[30] To the extent that the pre-existing highway funding program was made contingent on this new requirement, a court might compare it to the penalty struck down in *NFIB*. Other provisions of the 2012 law could be likewise vulnerable.

In addition, all of the conditions attached to highway funding impact the manner in which state "matching" funds are spent—typically 10 to 20 percent of overall transportation spending. The "standards" collected at 23 U.S.C. §109 go well beyond restrictions on how the federal match is to be spent. Again, the language recalls congressional commandments to the federal administrative agencies. The conditions should be challenged as *per se* coercive.

In addition, the Clean Air Act provides that states which do not comply with certain requirements can be penalized by losing highway funds. Because the highway program predated the Clean Air Act by nearly 20 years, and the goals of the Clean Air Act have nothing to do with the federal interest in highway funding, this penalty could be doubly vulnerable under the Supreme Court's spending clause jurisprudence.

IV. The Road Ahead

Combating the federal control that comes with federal money will be the central front in the war on federal overreach for decades to come. There are two dimensions to this fight: First, what we can do now, and second, what we can fight for in the future.

Flexibility Now

The NFIB decision implies that where a state refuses to go along with an entirely new program, the federal government cannot penalize it by cutting off the funds under an existing program. That means that state will be able to ignore certain kinds of new conditions imposed on existing program, without fear of losing the existing funding. The likely scenario for opting out of NCLB would be typical for virtually any program; in every case, the federal government must notify the state that funding will be cut off, and provide time for review and remediation. Therefore, states can challenge those strictures by challenging the cut-off letter, without risking the underlying funding.

For example, if a state opts out of NCLB, its "state plan" under Title would likely not be approved, whereupon, the Secretary might elect to withhold state funds, per 20 U.S.C. §6311(e)(1):

> SECRETARIAL DUTIES. The Secretary shall—
>
> (A) establish a peer-review process to assist in the review of State plans;
>
> (B) appoint individuals to the peer-review process who are representative of parents, teachers, State educational agencies, and local educational agencies, and who are familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other educational needs of students;
>
> (C) approve a State plan within 120 days of its submission unless the Secretary determines that the plan does not meet the requirements of this section;
>
> (D) if the Secretary determines that the State plan does not meet the requirements of subsection (a), (b), or (c) of this section, immediately notify the State of such determination and the reasons for such determination;
>
> (E) not decline to approve a State's plan before—

(i) offering the State an opportunity to revise its plan;
(ii) providing technical assistance in order to assist the State to meet the requirements of subsections (a), (b), and (c) of this section; and
(iii) providing a hearing; and

(F) have the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items.

Therefore, before any definitive cutoff in funding, the state would have an opportunity for judicial review, and (in case of an adverse ruling) a chance to remediate the program.

The Department of Education's own regulations provide that the Secretary may disapprove a state plan only after (a) notifying the state, (b) offering a reasonable opportunity to be heard, and (c) holding an administrative hearing.[31] The state would have a further opportunity to petition for review before a federal court of appeals either after the initial notification or after the administrative hearing. At each such hearing, the state would be able to defend its eligibility for Title I funds on the basis of the Supreme Court's ObamaCare decision.

Flexibility in the Long Term

The flexibility which the Supreme Court gave to the states is far short of what states will need to be free of federal coercion. It is incumbent on states to identify and fight coercive conditions in federal funding. One bill presented in the Texas Legislature recently (HB 1379, 83rd Regular Session) provides an example. The legislation is set forth in full at Appendix II.

HB 1379 requires the Texas attorney general to designate coercive federal funding programs (such as Medicaid expansion under ObamaCare) and develop a litigation strategy against them. It also reorients the mission of the Office of State-Federal Affairs to coordinating an inter-agency effort to gain maximum flexibility under conditional federal funding programs.

If a large number of states band together to refuse to abide by the coercive conditions in a given program, that will help them escape the "prisoner's dilemma" of each trying to escape federal conditions separately.

In order for states to combat federal overreach, it is vital that they develop ways of combating the allure of "free" federal money. One way is to resist coercive conditions attached to federal programs, by arguing in the courts and to Congress that state policies and state spending priorities are improper subjects for federal manipulation.

Above all, states must work together. If a large number of states band together to refuse to abide by the coercive conditions in a given program, that will help them escape the "prisoner's dilemma" of each trying to escape federal conditions separately. For example, the states that have refused to expand Medicaid in keeping with ObamaCare would have been much more effective if they presented a united front and refused to expand Medicaid as a block. It is vital for states to work together in confronting the coercive reach of federal funding programs.

V. Conclusion

The Supreme Court's decision, in the ObamaCare case, to strike down the broad penalty for refusing to comply with the Medicaid expansion constitutes a significant victory for the Constitution and its Tenth Amendment. The ruling could grant states expansive new flexibility to modify or withdraw from programs without losing the funds which Congress thought it could use to cudgel the states into compliance with its endless stream of new programs. Now it is up to the states to test the boundaries of that new flexibility—and to push back everywhere that federal coercion comes attached to a dollar of federal "assistance." ✭

Appendix I: Catalogue of Major State Programs[32]

This appendix lists major sources of federal funds in the state budget, defined as more than $100 million in federal funds for the Texas budget in FY 2012. (Amounts are in millions of dollars). The programs are grouped by subject matter to facilitate cross-condition analysis.

Appendix IA Health Care Programs
Appendix IB Education Programs
Appendix IC Transportation Programs
Appendix ID Other

Appendix IA: Health Care Programs

- Medicaid ($17,517.6)
- Children's Health Insurance Program (CHIP) ($882.6)
- Nutrition Program for Women, Infants and Children (WIC) ($548.6)
- Temporary Assistance For Needy Families (TANF) ($486.3)
- Supplemental Nutrition Assistance Program—State Administration ($307.2)
- Child and Adult Care Food Program ($283.5)
- Vocational Rehabilitation Grants ($241.6)
- Foster Care (Title IV-E) ($231.7)
- Disability Determinations ($152.4)
- Child Support Enforcement Administration ($150.4)
- Social Services Block Grant ($137.7)
- Substance Abuse Prevention & Treatment Block Grant ($135.0)

CHILDREN'S HEALTH INSURANCE PROGRAM (CHIP)

CHIP provides health insurance coverage for children from low-income families who are not eligible for Medicaid and do not have access to affordable health insurance. $882.6 million in FY 2012.

Legal Source: Title XXI of the Social Security Act as amended by the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA; Public Law 111-003) and the Affordable Care Act (ACA; Public Law 111-148 taken together with Public Law 111-152).

Conditions:

- Enhanced federal match varies by state based upon Enhanced Federal Medical Assistance Percentage (EFMAP); the federal share is 70.89 percent in fiscal year 2012.
- States must provide coverage for certain healthcare services, including preventive care and inpatient and outpatient hospital services.
- Children found through the enrollment process to be Medicaid-eligible must be enrolled in Medicaid.
- No more than 10 percent of federal funds may be used for administrative costs.
- There may be cost-sharing based upon household income.

NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC)

The WIC program provides supplemental nutritious foods, nutrition education, and healthcare referrals to low income pregnant, breast-feeding, or postpartum women and to young children determined to be at nutritional risk. The federal Food and Nutrition Service provides funds to the Department of State Health Services, which in turn distributes the funds to participating local agencies. $548.6 million in FY 2012.

Legal Source: Child Nutrition Act of 1966, as amended, Section 17, 42 U.S.C. 1786. Healthy, Hunger-Free Kids Act of 2010, Public Law 111-296, 7 U.S.C. 1746.

Conditions:

- States receiving WIC funding must enter into cost-containment contracts for the purchase of infant formula, providing rebates and reducing program costs.
- In addition to food purchases, funds may be used for nutrition education, the purchase of breast pumps, screenings, assessments, and referrals to health, welfare, and social service providers.
- Expenditures for healthcare services are not allowable.

TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF)

TANF provides assistance to families with needy children so that children can be cared for in their own homes; promotes job preparation, work, and marriage; strives to reduce and prevent out-of-wedlock pregnancies; and encourages the formation and maintenance of two-parent families. TANF was one of the major products of the 1996 welfare reform. It is a block grant based on the historical level of federal spending in each state under pre-welfare reform programs. Funds are made available by the Secretary of Health and Human Services to states pursuant to an approved state plan. In Texas the program is administered by the Health and Human Services Commission; Department of Family and Protective Services; Texas Workforce Commission; Department of State health Services; Texas Education Agency. $528.6 million in FY 2012.

Legal Source: Social Security Act of 1935, Title IV, Part A, 42 U.S.C. 601 et seq.

Conditions:

- States must maintain spending at 80 percent of what expenditures were in fiscal year 1994 on related programs, or 75 percent if the state meets national work participation standards (50 percent of all families participating in work activities and 90 percent of two-parent families participating in work activities).
- To receive contingency funding, states must maintain spending on low-income families at 100 percent of the level of expenditures in fiscal year 1994, excluding expenditures on child care.
- States have broad flexibility to use the grant funds in any manner that meets the program's purposes. Under a "grandfather" clause, funds cannot be used for medical assistance, except pre-pregnancy family planning.
- States must achieve minimum work participation rates to avoid penalties.
- Not more than 15 percent of federal funds may be spent on administrative costs.

SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM – STATE ADMINISTRATION

The federal Supplemental Nutrition Assistance Program (SNAP), the former food stamp program, is a direct-payment, open-ended entitlement based on a 50-50 federal-state match. The program is administered by state agencies, the Health and Human Services Commission in the case of Texas. This budget program covers only the administration costs of the program – federal funds for the underlying benefits are not included in the state budget or in this report. $307.2 million in FY 2012.

Legal Source: Food and Nutrition Act of 2008, as amended, Section 16, Public Law 95-113, 91 Stat. 958, 7 U.S.C. 2025; Public Law 99-198, Public Law 105-33, Public Law 105-185,Public Law 110-246, American Recovery and Reinvestment Act of 2009, Public Law 111-5, Healthy Hunger Free Kids Act, Public Law 111-296.

Conditions:

Funds may be spent for the following purposes:

- To provide Federal funding for administrative costs incurred by State and local agencies to operate SNAP.
- To provide Federal funding to States through two-year grants for SNAP nutrition education costs.
- To provide Federal funding to States to help SNAP recipients find work or gain the skills, training and experience that lead to employment.

CHILD AND ADULT CARE FOOD PROGRAM

The Child and Adult Care Food Program provides cash reimbursement for nonprofit meal service programs for children, elderly or impaired adults in nonresidential day care facilities, and children in emergency shelters. The funds are disbursed through the Texas Department of Agriculture. $283.5 million in FY 2012.

Legal source: Richard B. Russell National School Lunch Act, as amended, Sections 9, 11, 14, 16 and 17, as amended, 89 Stat. 522-525, 42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766.

Conditions:

- Funds may be used to reimburse eligible organizations for part of the costs in providing meals and snacks. Allowable daily reimbursement per participant ranges from a snack and a meal to three meals, and household income determines the rate of reimbursement for each meal.

VOCATIONAL REHABILITATION GRANTS

Vocational Rehabilitation Grants assist persons with disabilities to become gainfully employed. A wide range of services is permitted, including counseling and vocational services. Funds are disbursed to the Department of Assistive and Rehabilitative Services, pursuant to an approved state plan under the Rehabilitation Act, as amended. $241.6 million in FY 2012.

Legal Source: Rehabilitation Act of 1973, Title I, Part A and B, Sections 100-111.

Conditions:

- The state share is 21.3 percent for rehabilitative services and 50 percent of construction costs for rehabilitation facilities.
- States must maintain spending at the level of expenditures for the fiscal year two years earlier.
- Funds provide vocational rehabilitation services including assessment, counseling, vocational and other training, job placement, reader services for the blind, interpreter services for the deaf, medical and related services, prosthetic and orthotic devices, rehabilitation technology, transportation to secure vocational rehabilitation services, maintenance during rehabilitation, and other goods and services necessary for a disabled person to achieve employment.

FOSTER CARE (TITLE IV-E)

Foster Care funding assists states in providing safe, appropriate, foster home care for children who are under the jurisdiction of the administering state agency and need temporary placement and care outside their homes. The federal government reimburses the Department of Family and Protective Services and the Juvenile Justice Department for part of the cost of allowable services provided to eligible persons. $231.7 million for fiscal year 2012.

Legal Source: Social Security Act, Title IV-E, Section 470, et seq.; as amended. Contains ARRA.

Conditions:

- The federal:state match ratio is the Federal Medical Assistance Percentage (FMAP) (58.22% federal share in fiscal year 2012). The state match for training is 25 percent. Administrative costs are shared 50 percent state to 50 percent federal.
- Funds may be used for payments on behalf of eligible children to individuals providing foster family homes, to child-care institutions, or to public or nonprofit child-placement agencies.
- Payments may include the cost of food, clothing, shelter, daily supervision, school supplies, personal incidentals, liability insurance (with respect to a child), and reasonable travel to the child's home for visitation.
- Funds may not be used for counseling or treatment services provided to a child, the child's family, or the child's foster family.

DISABILITY DETERMINATIONS

Funds for Disability Determinations support states' processes for making initial determinations of medical eligibility or Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) for the federal government. Benefits themselves are paid directly to beneficiaries and not included here. The State agency is the Department of Assistive and Rehabilitative Services. $152.4 million in FY 2012.

Legal Source: The underlying SSDI entitlement is found in the Social Security Act of 1935, Title II, as amended; Public Laws 96-265; 97-123, and 97-35. 42 U.S.C. 401; 42 U.S.C. 402; 42 U.S.C. 416; 42 U.S.C. 420-425. These funds are an open-ended entitlement with benefits paid directly to beneficiaries; those funds are not included in the state budget. Administrative costs are reimbursed to the states, and those funds do appear in the state budget. Reimbursements to states, paid in advance or by way of reimbursement, for necessary costs in making disability determinations are under 20 CFR 404 Subparts P and Q. Necessary costs are direct as well as indirect costs as defined in 41 CFR 1-15, subpart 1-15.7 of the Federal Procurement Regulations System for costs incurred before April 1, 1984; and 48 CFR 31, Subpart 31.6 of the Federal Acquisition Regulations System and Federal Management Circular A-74-4, as amended, or superseded for costs incurred after March 31, 1984.

Conditions:

- The federal government prescribes the criteria for evaluating disability status; the state agency only does its bidding. The determination of medical eligibility includes a review of the applicant's medical records and an evaluation of the applicant's functional capacity. No match funding or maintenance of effort requirements.

CHILD SUPPORT ENFORCEMENT ADMINISTRATION

Funds are available to enforce the support obligations owed by absent parents to their children; locate absent parents; establish paternity; and obtain child, spousal, and medical support. Funding is an open-ended entitlement. The federal government reimburses state attorney general for part of program costs. States must serve those current or past beneficiaries of federally funded foster care maintenance payments, Medicaid, or TANF, as well as those who request child support enforcement services. This amount fluctuates significantly from year to year. $172.2 million in FY 2012.

Legal Source: Social Security Act of 1935, Title IV, Part D, 42 U.S.C. § 651-655.

Conditions:

- Federal match is 66 percent.
- States and some Tribes provide support enforcement services directly to individuals who are receiving federally-funded Foster Care Maintenance Payments, Medicaid, Temporary Assistance to Needy Families (TANF) (or those who cease to receive TANF), and to individuals not otherwise eligible for such services.
- TANF, Medicaid, and certain federally-funded Foster Care applicants or recipients must have assigned support rights to the State. Non-TANF individuals other than those who cease to receive TANF and/or who provide authorization to the IV-D agency to continue support enforcement services, must have signed a written application for support enforcement services.
- The State must provide services to locate absent parents, establish paternity and enforce support obligations.

SOCIAL SERVICES BLOCK GRANTS (TITLE XX)

To enable each State to furnish social services best suited to the needs of the individuals residing in the State. These funds go to a wide array of state agencies. $137.7 million in FY 2012.

Legal Source: Social Security Act of 1935, Title XX, as amended; Omnibus Budget Reconciliation Act of 1981, as amended, Public Law 97-35; Jobs Training Bill, Public Law 98-8 and 473; Medicaid and Medicare Patient and Program Act of 1987; Omnibus Budget Reconciliation Act of 1987, Public Law 100-203; Family Support Act of 1998, Public Law 100-485; Omnibus Budget Reconciliation Act of 1993, Public Law 106-66, 42 U.S.C §§ 1397 et seq.

Conditions:

- Federal block grant funds may be used to provide services directed toward one of the following five goals specified in the law: (1) To prevent, reduce, or eliminate dependency; (2) to achieve or maintain self-sufficiency; (3) to prevent neglect, abuse, or exploitation of children and adults; (4) to prevent or reduce inappropriate institutional care; and (5) to secure admission or referral for institutional care when other forms of care are not appropriate.
- The law provides a list of purposes for which federal funds may not be used; waivers are available in some cases.

SUBSTANCE ABUSE PREVENTION AND TREATMENT BLOCK GRANTS

This block grant provides financial assistance to States and Territories to support projects for the development and implementation of prevention, treatment and rehabilitation activities directed to the diseases of alcohol and drug abuse. Funds are distributed to the Department of State Health Services. $135.0 million in FY 2012.

Legal Source: Public Health Service Act, Title XIX, Part B, Supart II, as amended, Public Law 106-310; 42 U.S.C 300x. Regulations at 45 CFR Part 96.

Conditions:

- Not less than 20 percent of the funds shall be spent for education and prevention rather than treatment, by developing community-based strategies for prevention of substance abuse.
- States shall expend not less than 5 percent of the grant to increase (relative to fiscal year 1994) the availability of treatment services designed for pregnant women and women with dependent children.
- States must require programs of treatment for intravenous drug abuse to admit individuals into treatment within 14 days after making such a request or 120 days of such a request, if interim services are made available within 48 hours.
- States will provide, directly or through arrangements with other public or nonprofit entities, tuberculosis services such as counseling, testing, treatment, and early intervention services for substance abusers at risk for the human immunodeficiency virus (HIV) disease.

Appendix IB: Education

- Title I Grants to Local Educational Agencies, No Child Left Behind ($1,372.6)
- National School Lunch Program ($1,205.5)
- Special Education Basic State Grants ($980.7)
- School Breakfast Program ($482.1)
- Improving Teacher Quality ($200.0)
- 21st Century Community Learning Centers ($104.4)
- English Language Acquisition Grants ($101.4)

TITLE I GRANTS TO LOCAL EDUCATION AGENCIES

Title I grants provide significant funding support local school district ("local educational agencies" or LEAs) to improve teaching and learning in high-poverty schools, in particular for children failing, or most at-risk of failing, to meet challenging State academic achievement standards. Funds are disbursed to the Texas Education Agency, pursuant to a state plan approved by the Secretary of Education, and then disbursed to school districts (LEAs). $1.4 billion in FY 2012.

Legal Source: Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001, Title I, Part A, 20 U.S.C § 6301 et seq.

Conditions:

- Use of funds varies, depending on whether a school is operating a schoolwide program under Section 1114 of the ESEA or a targeted assistance program under Section 1115 of the ESEA. A school with at least a 40 percent poverty rate may choose to operate a schoolwide program under Section 1114, which allows Title I funds to be combined with other Federal, State, and local funds to upgrade the school's overall instructional program.
- Schoolwide program schools must receive the amount of non-Federal resources they would have received in the absence of Title I funds.
- All other participating schools must operate targeted assistance programs, which provide extra instruction to those children failing, or most at risk of failing, to meet challenging State academic achievement standards.
- Targeted assistance programs must ensure that Title I services supplement, not supplant the regular education programs normally provided with non-Federal funds by local educational agencies.
- This program is subject to non-supplanting requirements and must use a restricted indirect cost rate which is referenced under 34 CFR Part 76.564-76.569
- The No Child Left Behind Act of 2001 imposed significant new state-policy requirements on the continued receipt of Title I funds.
- Title I support was recently extended to the Common Core standards.

NATIONAL SCHOOL LUNCH PROGRAM

The program provides cash grants and food donations to the States, to make the school lunch program available to school children and to encourage the domestic consumption of nutritious agricultural commodities. Funds are disbursed to a variety of State agencies, in the form of federal letters of credit and also agricultural products for distribution. Reimbursement rates are set (e.g., $2.77 per free lunch, etc.). Lunch is free for children of families up to 130 percent of the Federal Poverty Level (FPL), and at a reduced price for families between 130 and 185 percent FPL. $1.2 billion for FY 2012.

Legal Source: Richard B. Russell National School Lunch Act, as amended, 42 U.S.C. §§ 1751, 1760, and 1779.

Conditions:

- No matching requirements, but historical maintenance of effort applies. State revenues for program must be at least 30 percent of the amount of federal funds provided to the state for the National School Lunch Program during the 1980–81 school year.
- If a state's average per capita income in a school year is lower than the average per capita income of all the states, then the state's maintenance of effort requirement is reduced by a corresponding percentage.
- To participate, all schools must agree to serve free and reduced price meals to eligible children. Schools cannot charge more than $0.40 for reduced-price meals. Given the reimbursements, this means that schools cannot serve lunches that "cost" more than $2.77. In other words, this is a food-rationing program.

SPECIAL EDUCATION BASIC STATE GRANTS

Special Education grants assist states in meeting the costs of providing free special education and related services to children with disabilities. The state (Texas Education Agency) receives a base amount equal to the amount received in 1999, adjusted for population and income. $980.7 million in FY 2012.

Legal Source: Individuals with Disabilities Education Act (IDEA), as amended, Part B, Sections 611-618, 20 U.S.C 1411-1418. State eligibility for funds is established under IDEA Part B Sec. 612.

Conditions:

- Maintenance of effort: The state must not reduce spending for special education and related services below the amount from the preceding fiscal year.
- Funds must be used to supplement, not supplant, state, local, and other federal funds.
- Funds may be used to cover administrative expenses, including the salaries of teachers and other personnel, education materials, and education-related services that allow children with disabilities to access education services.

SCHOOL BREAKFAST PROGRAM

This program assists States in providing a nutritious nonprofit breakfast service for school children, through cash grants and food donations. The School Breakfast Expansion Grants provide grants, on a competitive basis, to State educational agencies for the purpose of providing subgrants to local educational agencies for qualifying schools to establish, maintain, or expand the school breakfast program. Similar to the National School Lunch Program in its reimbursement scheme. $482.1 million in Fiscal Year 2012.

Legal Source: Child Nutrition Act of 1966, as amended, 42 U.S.C. 1773, 1779, 1793, Public Laws 104-193, 100-435, 99-661, 97-35. American Recovery and Reinvestment Act of 2009, Public Law 111-5. School Breakfast Expansion Grants are authorized by the Child Nutrition Act of 1966 as amended, 42 U.S.C. 1793.

Conditions:

- All participating schools must agree to serve free and reduced price meals to eligible children, and to operate the program on a nonprofit basis for all children.
- School aged children receive one of three benefit levels based on an application used to determine need.

IMPROVING TEACHER QUALITY

Provides grants to State and local education agencies (SEA and LEA), to State agencies for higher education (SHEA) and, though SHEAs, to eligible partnerships, to increase student academic achievement through such strategies as improving teacher and principal quality and increasing the number of highly qualified teachers in the classroom. Added by No Child Left Behind. $200 million in FY 2012.

Legal Source: Elementary and Secondary Education Act of 1965, P.L. 89-10, Title II, Part A, § 2101, as added by No Child Left Behind Act of 2001, P.L. 107-110, Title I, § 201, 115 Stat. 1620, 20 U.S.C. §§ 6601 et seq.

Conditions:

- SEA must use 95 percent of awards for subgrants to LEAs for the following purposes: to assist schools in effectively recruiting and retaining highly qualified teachers; to afford to LEAs the means of recruiting, hiring, and retaining teachers; to make available professional development activities that address subject-matter knowledge; and other activities as set forth in Section 2123 of the ESEA.
- This program is subject to non-supplanting requirements for all but subgrants to partnerships, and all but partnerships must use a restricted indirect cost rate which is described in 34 CFR 76.563-76.569.
- SEAs retain 2.5 percent of award to conduct State-level activities and 2.5 percent is given to SAHEs for competitive projects carried out by partnerships of institutions of higher education (IHEs) and high-need LEAs.
- One percent of the total award for each State is divided between the SEAs and SAHE for administrative activities.

21st CENTURY COMMUNITY LEARNING CENTERS

This program provides funds to state education agencies (Texas Education Agency) to create community learning centers that provide academic enrichment opportunities for children, particularly students who attend high-poverty and low-performing schools. The program is intended to help students meet state and local student standards in core academic subjects, such as reading and math; to offer students a broad array of enrichment activities that complement their regular academic programs; and to offer literacy and

other educational services to the families of participating children. $104.4 million in FY 2012.

Legal Source: Elementary and Secondary Education Act of 1965, P.L. 89-10, Title IV, Part B, § 4201, as added by No Child Left Behind Act of 2001, P.L. 107-110, Title IV, § 401, 115 Stat. 1765, 20 U.S.C. §§ 7171 et seq.

Conditions:

- Projects funded under this program must be for the purpose of meeting the needs of the residents of rural and inner-city communities, through the creation or expansion of community learning centers.
- This program is subject to non-supplanting requirements and must use a restricted indirect cost rate which is referenced under 34 CFR 76.564-76.569.

ENGLISH LANGUAGE ACQUISITION GRANTS

This program provides funds to TEA to ensure that limited English proficient (LEP) children, including immigrant children and youth, attain English proficiency and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet.

Legal Source: Elementary and Secondary Education Act of 1965, P.L. 89-10, Title III, § 3001, as added by No Child Left Behind Act, P.L. 107-110, Title III, § 301, 115 Stat. 1689, 20 U.S.C. §§ 6801 et seq.

Conditions:

- The Department makes awards to States and outlying areas using a formula based on their share of limited English proficient (LEP) children and immigrant children and youth.
- States/outlying areas must use at least 95 percent of their allocations to award subgrants to local educational agencies to assist limited English proficient children in learning English and meeting challenging State academic content and student academic achievement standards, and may reserve up to 15 percent of their allocations for subgrants to local school districts that have experienced a significant increase in the number of immigrant children and youth.
- States may reserve up to 5 percent of their allocations for planning, evaluation and administrative costs, professional development activities, and technical assistance to subgrantees.
- Subgrantees must use funds to increase the English proficiency of LEP children by providing high-quality language instruction educational programs that are based on scientifically based research and effective in increasing LEP students' English proficiency and achievement in the core academic subjects.
- Subgrantees must also provide high-quality professional development to teachers and other educational personnel that is designed to improve instruction and assessment of limited English proficient children, enhance teachers' ability to understand and use curricula, assessment measures, and instructional strategies for LEP students and of sufficient intensity and duration to have a positive and lasting impact.
- Funds may also be used for identifying, acquiring, and upgrading curricula, instructional materials, educational software, and assessment procedures, tutorials and academic or vocational education, and community participation programs, family literacy services and parent outreach and training activities.
- Subgrantees awarded funds based on a substantial increase in the number of immigrant children and youth must use the funds to provide activities that provide enhanced instructional opportunities, including tutorials, mentoring, and career counseling.
- This program is subject to non-supplanting requirements and grantees must use a restricted indirect cost rate, which is referenced under 34 CFR 76.564-76.569.

Appendix IC: Transportation

- Transportation Equity Bonus ($1,192.5)
- Surface Transportation Program ($550.1)
- National Highway System ($518.2)
- Interstate Maintenance ($411.0)
- Bridge Rehabilitation and Replacement ($134.8)
- Congestion Mitigation & Air Quality ($104.1)

HIGHWAY PLANNING AND CONSTRUCTION – TRANSPORTATION EQUITY BONUS

Starting 2005, this program provides funds to ensure that no state's rate of return on contributions to the Highway Trust Fund drops below a given amount. Texas Department of Transportation. $1.2 billion in FY 2012.

Legal Source: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 23 U.S.C §§ 101 et seq.

Conditions:
- Texas' guaranteed relative rate of return on contributions to the Highway Trust Fund is 92.0 percent for 2008 through 2012.
- Applicable conditions depend on the program to which the equity bonus is applied.

HIGHWAY PLANNING AND CONSTRUCTION – SURFACE TRANSPORTATION PROGRAM

This program provides funds for states and localities to use on any federal-aid highway, including the National Highway System, any public road bridge project, transit capital projects, and bus terminals and facilities. $550.1 million in FY 2012.

Legal Source: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 23 U.S.C §§ 101 et seq.

Conditions:
- Federal match 80 percent; 90 percent or higher under certain circumstances.
- Federal funds may be used for purposes specified in detail in federal law.

HIGHWAY PLANNING AND CONSTRUCTION – NATIONAL HIGHWAY SYSTEM

This program provides funds to TxDOT for improving rural and urban roads. The National Highway System includes the Interstate System, urban and rural principal arterial routes, connector highways (including toll facilities), the strategic defense highway network (on or off the Interstate System), and major strategic highway network connectors between major military installations and highways. $518.2 million in FY 2012.

Legal Source: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 23 U.S.C §§ 101 et seq.

Conditions:
- Federal match generally 80 percent, but rises to 90 percent for interstate projects.
- Funds may be used for purposes specified in detail in federal law. May include bicycle and pedestrian walkways and habitat conservation.

HIGHWAY PLANNING AND CONSTRUCTION – INTERSTATE MAINTENANCE

This program provides funds for resurfacing, restoring, rehabilitating, and reconstructing activities on most routes on the Interstate System. $411.0 million in FY 2012.

Legal Source: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 23 U.S.C §§ 101 et seq.

Conditions:
- Federal match 80 percent; 90 percent or higher under certain circumstances.
- Federal funds may be used for purposes specified in detail in federal law.

HIGHWAY PLANNING AND CONSTRUCTION – BRIDGE REHABILITATION & REPLACEMENT PROGRAM
Provides funds to states for replacement or rehabilitation of deficient highway bridges and to seismic retrofit bridges located on any public road. $134.7 million in FY 2012.

Legal Source: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 23 U.S.C §§ 101 et seq.

Conditions:
- Federal match 80 percent.
- Federal funds may be used for purposes specified in detail in federal law, including replacement and rehabilitation of structurally deficient or functionally obsolete highway or public road bridges. However, deficient bridges eligible for rehabilitation or replacement must be over waterways or other topographical barriers, or highways and railroads. A minimum of 15 percent (and a maximum of 35 percent) of a state's apportioned funds must be expended for bridge projects not located on federal-aid highways (off -system). Off -system funds are primarily passed through to county and local governments in Texas.

HIGHWAY PLANNING AND CONSTRUCTION – CONGESTION MITIGATION AND AIR QUALITY IMPROVEMENT
This program provides funds for reducing transportation-related emissions through projects in air quality nonattainment and maintenance areas for ozone, carbon monoxide (CO), and small particulate matter. Areas in Texas designated as nonattainment include Houston–Galveston, Dallas–Fort Worth, Beaumont–Port Arthur, El Paso, and San Antonio. $104.0 million in FY 2012.

Legal Source: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU),, Public Law 109-59, 23 U.S.C §§ 101 et seq.

Conditions:
- The federal participation share is 80 percent except that, when funds are used on the Interstate System, the federal share is 90 percent.
- Grants may be used for transportation control measures to assist certain areas designated as nonattainment and for pedestrian and bicycle on- and off-road facilities (including modifications needed to comply with the Americans with Disabilities Act). Funds may also be used for traffic management, monitoring, congestion relief strategies, new transit system/service expansion or operations, alternative fuel projects, inspection and maintenance programs, intermodal freight, telecommunications, and project development for new services and programs with air quality benefits.

Appendix ID: Other Major Programs

Labor
- Child Care and Development Block Grant ($243.0)
- Child Care Mandatory and Matching Funds ($219.2)
- Unemployment Insurance Administration ($161)

Housing and Community Development
- Low-Income Energy Assistance Program

CHILD CARE AND DEVELOPMENT BLOCK GRANT
This program provides state agencies with support for low-income families, by providing financial assistance for child care; it improves the quality and availability of child care, and establishes and expands child development programs. Funds are distributed by the Texas Workforce Commission, and the Department of Family and Protective Services. The program is related to the Temporary Assistance for Needy Families and arose from the welfare reform of 1996. $243.0 million in FY 2012.

Legal Source: Child Care and Development Block Grant Act of 1990, as amended, 42 U.S.C 9858; Consolidated Appropriations Act, 2012, Public Law 112-74.

Conditions:

- Funds must supplement, not supplant, state spending on child care assistance for low-income families.
- Discretionary funds must be used on a sliding fee scale basis.
- No more than 5 percent may be spent on administrative costs.
- A large number of additional conditions apply.

CHILD CARE MANDATORY AND MATCHING FUNDS

Child Care Mandatory and Matching Funds assist states in providing child care to parents trying to achieve independence from public assistance. Funds may be used to promote parental choice, encourage states to provide consumer education information, and assist states in implementing state regulatory standards (i.e., licensing, safety) relating to child care. Texas Workforce Commission. $219.2 million in FY 2012.

Legal Source: Social Security Act, Title IV, Section 418, 42 U.S.C 618; Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104-193); Child Care and Development Block Grant Act of 1990, as amended (Public Law 101-508, 42 USC 9858, et seq); Balanced Budget Act of 1997 (Public Law 105-33); the Deficit Reduction Act of 2005 (Public Law 105-171); and the Middle Class Tax Relief and Job Creation Act (Public Law 112-96).

Conditions:

- For matching funds, at a minimum states must maintain spending at the level of expenditures for the former programs in fiscal year 1994 or fiscal year 1995, whichever is greater.
- The federal:state match ratio is FMAP.
- Federal regulations allow states to count pre-kindergarten expenditures for low-income families for up to 20 percent of the maintenance of effort (MOE) and 30 percent of the state match, as long as certain provisions are met.
- State match may also include local public funds and donated private funds. For mandatory funds, no match or MOE is required.
- Not less than 70 percent of the total grant amount must be used to provide child care assistance to families who are receiving Temporary Assistance for Needy Families (TANF), attempting through work activities to transition off TANF, or are at risk of becoming dependent on TANF.
- There is 5 percent cap on administrative costs.
- At least 4 percent of the combined totals of the Child Care and Development Block Grant and the Child Care Mandatory and Matching Funds provided to a state must be used to improve child care quality and availability, including activities such as consumer education, resource and referral services, provider grants and loans, monitoring and enforcement of requirements, training and technical assistance, and improved compensation for child-care staff.

UNEMPLOYMENT INSURANCE ADMINISTRATION

Unemployment Insurance Administration funds are direct payments to states for operating unemployment insurance programs, trade adjustment assistance, disaster unemployment assistance, and unemployment compensation for federal employees and ex-service members. It does not include payments to unemployed individuals. Texas Workforce Commission. $161.0 million in FY 2012.

Legal Source: Social Security Act (Titles III, IX, XI, XII) 42 USC 501-504; 1101-1110; 1320b-7; 1321-1324; Federal Unemployment Tax Act, 26 U.S.C 3301 et seq.; Unemployment Compensation for Federal Civilian Employees, 5 U.S.C 8501 et seq.; Unemployment Compensation for Ex-Servicemembers, 5 U.S.C 8521 et seq.; Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C 5177; Federal-State Extended Unemployment Compensation Act, Title II, Section 201 et seq., Public Law 91-373, 26 U.S.C 3304(a)(11); Trade Act of1974, 19 U.S.C 2291 et seq.; Supplemental Appropriations Act of 2008, P.L. 110-252 as amended P.L. 110-449, 111-5, 111-92, 111-118, 111-144, 111-157, 111-205, 111-312, 112-78; 112-96.

Conditions:

- The states have the direct responsibility for establishing and operating their own unemployment insurance programs, while the Federal government finances the cost of administration.
- State unemployment insurance tax collections are used solely for the payment of benefits.
- Federal unemployment insurance tax collections are used to finance expenses deemed necessary for proper and efficient administration of the state unemployment insurance laws; to reimburse state funds for one-half (temporarily 100 percent) the costs of extended benefits paid under the provisions of state laws which conform to the provisions of the Social Security Act and the Federal Unemployment Tax Act; and to make repayable advances to states when needed to pay benefit costs.

- Funds used for benefit payments may not be used for any program administration costs nor for training, job search, and job relocation payments.

LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM

Low-Income Home Energy Assistance Program (LIHEAP) funds are available to states and other jurisdictions to assist eligible households in meeting the costs of home energy cooling and heating. Block grants are awarded to States, which then make payments directly to an eligible low-income household or, on behalf of such household, to an energy supplier to assist in meeting the cost of home energy. Texas Department of Housing and Community Affairs. $129.8 million in FY 2012.

Legal Source: Low Income Home Energy Assistance Act of 1981, as amended.; The Omnibus Budget Reconciliation Act of 1981; Energy Policy Act of 2005 , Public Law 109-58.

Conditions:
- Up to 10 percent of these funds may be used for State and local planning and administration.
- Up to 15 percent may be used for low-cost residential weatherization.
- Grantees may request that HHS grant a waiver for the fiscal year that increases from 15 percent to 25 percent funds that can be allotted for residential weatherization.
- Depending upon specific appropriations, HHS may allocate supplemental LIHEAP leveraging incentive funds to grantees that have acquired nonfederal leveraged resources in order to provide additional benefits and services to LIHEAP-eligible households to help them meet their home heating and cooling needs.
- Up to 25 percent of Leveraging Incentive Funds may be allocated by HHS to LIHEAP grantees that provide services through community-based nonprofit organizations to LIHEAP-eligible households to reduce their energy vulnerability, under the Residential Energy Assistance Challenge Program (REACH).

Appendix II: Model State Legislation to Control Coercive Federal Funds for the State

A BILL TO BE ENTITLED
AN ACT

relating to coercive conditions placed on the receipt by this state of federal money.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 10, Government Code, is amended by adding Chapter 2116 to read as follows:

CHAPTER 2116. COERCIVE CONDITIONS ON RECEIPT OF FEDERAL MONEY

Sec. 2116.001. DEFINITIONS. In this chapter:

(1) "Coercive condition" in relation to federal funding means a condition that is placed on the receipt by this state or a political subdivision of this state of federal money to be provided under a federal program that requires:

(A) the amendment, enactment, or adoption of a state or local law, regulation, or order the subject of which is unrelated to how the money is to be spent; or

(B) a particular use of state or local revenue.

(2) "Coercive federal funding program" means a program that involves a transfer of federal money to this state or a political subdivision of this state by the federal government the receipt of which is subject to a coercive condition. The term does not include a federal program that returns to this state a pro-rata share of this state's residents' total tax contributions to the program if this state refuses to comply with the conditions attached to the program.

Sec. 2116.002. IDENTIFICATION OF COERCIVE FEDERAL FUNDING PROGRAMS; REPORT. Not later than December 1 of each even-numbered year, the attorney general and the Legislative Budget Board jointly shall:

(1) identify each coercive federal funding program from which this state received more than $100 million during a state fiscal year in the preceding state fiscal biennium; and

(2) prepare and submit a report to the legislature that lists the coercive federal funding programs described by Subdivision (1) and the coercive conditions associated with each of those programs.

Sec. 2116.003. SUIT TO ENJOIN ENFORCEMENT OF OR TO CONTEST COERCIVE CONDITION. (a) The attorney general may, to the extent authorized by law:

(1) bring an action to enjoin the enforcement of a coercive condition and recover reasonable expenses incurred in obtaining injunctive relief under this section; and

(2) sue for appropriate relief if the federal government:

(A) rejects a request by this state for a waiver of one or more provisions of a coercive federal funding program identified under Section 2116.002; or

(B) attempts to condition the continued receipt of federal money under an existing federal funding program on this state's expansion of that funding program, if the legislature has determined that it is in this state's best interest not to expand the funding program.

(b) During the pendency of an action brought by the attorney general as authorized under this section, a state agency or state officer, as applicable, shall apply for and administer all programs that result in the receipt of federal money by this state, including a coercive federal funding program, in a manner that complies with federal law.

Sec. 2116.004. MULTISTATE RESPONSE TO COERCIVE FEDERAL FUNDING PROGRAMS. The governor shall consult with the governors of other states to develop a coordinated approach to issues relating to coercive federal funding programs.

SECTION 2. Section 751.001, Government Code, is amended to read as follows:

Sec. 751.001. DEFINITIONS. In this chapter:

(1) "Board" means the Office of State-Federal Relations Advisory Policy Board.

(2) "Coercive condition" has the meaning assigned by Section 2116.001.

(3) "Coercive federal funding program" has the meaning assigned by Section 2116.001.

(4) [~~(2)~~] "Director" means the director of the Office of State-Federal Relations.

(5) [~~(3)~~] "Office" means the Office of State-Federal Relations.

(6) [~~(4)~~] "State agency" means a state board, commission, department, institution, or officer having statewide jurisdiction, including a state college or university.

SECTION 3. Section 751.005(b), Government Code, is amended to read as follows:

(b) The office shall:

(1) help coordinate state and federal programs dealing with the same subject;

(2) inform the governor and the legislature of federal programs that may be carried out in the state or that affect state programs and identify which of those programs may be defined as a coercive federal funding program;

(3) provide federal agencies and the United States Congress with information about state policy and state conditions on matters that concern the federal government;

(4) provide the legislature with information useful in measuring the effect of federal actions on the state and local programs;

(5) prepare and supply to the governor and all members of the legislature an annual report that:

(A) describes the office's operations;

(B) contains the office's priorities and strategies for the following year;

(C) details projects and legislation pursued by the office;

(D) discusses issues in the following congressional session of interest to this state; [~~and~~]

(E) contains an analysis of federal funds availability and formulae;

(F) lists all conditions attached to federal funding programs, in a format that clearly identifies each condition that may be a coercive condition; and

(G) contains the office's strategy for ensuring that this state receives an equitable share of federal money from all federal funding programs while resisting compliance with coercive conditions;

(6) notify the governor, the lieutenant governor, the speaker of the house of representatives, and the legislative standing committees in each house with primary jurisdiction over intergovernmental affairs of federal activities relevant to the state and inform the Texas congressional delegation of state activities;

(7) conduct frequent conference calls with the lieutenant governor and the speaker of the house of representatives or their designees regarding state-federal relations and programs;

(8) respond to requests for information from the legislature, the United States Congress, and federal agencies;

(9) coordinate with the Legislative Budget Board regarding the effects of federal funding on the state budget and the effect of coercive conditions on this state's ability to remain responsive to the preferences of its residents; and

(10) report to, and on request send appropriate representatives to appear before, the legislative standing committees in each house with primary jurisdiction over intergovernmental affairs.

SECTION 4. Section 751.022, Government Code, is amended to read as follows:

Sec. 751.022. POWERS AND DUTIES. (a) The office has primary responsibility for monitoring, coordinating, and reporting on the state's efforts to:

(1) ensure receipt of an equitable share of federal formula funds; and

(2) resist compliance with coercive conditions placed on federal formula funds.

(b) The office shall:

(1) serve as this [~~the~~] state's clearinghouse for information on federal formula funds and on the coercive conditions, if any, placed on those funds;

(2) prepare reports on federal funds and earned federal formula funds;

(3) analyze proposed and pending federal and state legislation to determine whether the legislation would have a significant negative effect on the state's ability to receive an equitable share of federal formula funds and to resist compliance with coercive conditions placed on federal formula funds;

(4) make recommendations for coordination, including the coordinated resistance against compliance with coercive conditions placed on federal formula funds, between:

(A) state agencies and local governmental entities;

(B) [~~and between~~] state agencies; and

(C) state agencies and the agencies of other states; and

(5) adopt rules under the rule-making procedures of the administrative procedure law, Chapter 2001, Government Code, as necessary to carry out the responsibilities assigned by this subchapter.

(c) The office shall annually prepare a comprehensive report to the legislature on the effectiveness of this [~~the~~] state's efforts to ensure a receipt of an equitable share of federal formula funds and to resist compliance with coercive conditions placed on federal formula funds for the preceding federal fiscal year. The report must include:

(1) an executive summary that provides an overview of the major findings and recommendations included in the report;

(2) a comparative analysis of the state's receipt of federal formula funds relative to other states, prepared using the best available sources of data;

(3) an analysis of federal formula funding trends that may have a significant effect on resources available to the state; [~~and~~]

(4) an analysis of the effect that the conditions imposed by the 10 coercive federal funding programs that have the greatest effect on the state budget have on the ability of this state and political subdivisions of this state to implement policies and programs to deliver necessary and beneficial services to residents of this state; and

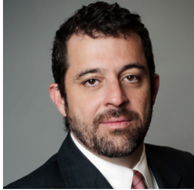
(5) recommendations, developed in consultation with the Legislative Budget Board, the Governor's Office of Budget, [~~and~~] Planning, and Policy, and the comptroller, for any state legislative or administrative action necessary to increase this [~~the~~] state's receipt of federal formula funds and to resist compliance with coercive conditions placed on federal formula funds.

SECTION 5. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2013.

Endnotes

[1] *New York v. U.S.* (1992); *Printz v. U.S.* (1997).
[2] *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). The Obama administration commonly refers to the Patient Protection and Affordable Care Act of 2010 as "ObamaCare" in keeping with common usage.
[3] Texas Legislative Budget Board, *Top 100 Federal Funding Sources in the Texas State Budget*. February 2013.
[4] 42 U.S.C. §1396c.
[5] 132 S. Ct. at 2602 (internal citations omitted).
[6] Ibid., quoting *New York v. United States*, 505 U.S. at 178 (other internal citations omitted).
[7] Ibid., 2602-03 (internal citations omitted).
[8] 483 U.S. 203.
[9] 483 U.S. at 211, quoting *Steward Machine Co*. 301 U.S. at 590.
[10] *NFIB v. Sebelius* internal quotations and citations omitted).
[11] *NFIB v. Sebelius*.
[12] Ibid.
[13] 42 U.S.C. Sec. 1304.
[14] Ibid. at 2603-04 (emphasis supplied).
[15] *NFIB v. Sebelius*, p. 2604.
[16] Ibid. at 2606.
[17] 483 U.S. at 213-14.
[18] 20 U.S.C. Sec. 6301et seq.
[19] P.L. 107-110.
[20] 20 U.S.C. Sec. 6302.
[21] 20 U.S.C. Sec. 6301et seq.
[22] 20 U.S.C. Sec 6301.
[23] P.L. 107-110.
[24] 20 U.S. Sec. 6311(g)(2).
[25] LBB Report, fig. 55, p. 56.
[26] Office of Management and Budget. Historical Table 12.1
[27] Moving Ahead for Progress for the 21st Century Act, P.L. 112-141 (2012).
[28] 23 U.S.C. Sec. 109.
[29] Moving Ahead for Progress for the 21st Century Act, P.L. 112-141 (2012).
[30] See 23 U.S.C. 135.
[31] 34 CFR Sec. 72.202.
[32] This information is drawn from a concordance of the LBB Report, the Catalogue of Federal Domestic Assistance Programs, and the statutory and regulatory provisions cited therein.

About the Author



Mario Loyola is Chief Counsel to the Texas Public Policy Foundation, responsible for overseeing TPPF's work in areas related to constitutional law and federalism, including constitutional litigation. Mario Loyola joined the Foundation in July 2010 as founding director of the Center for Tenth Amendment Action, focusing on energy and environment, healthcare, and other federalism issues. Mario began his career in corporate law. Since 2003, he has focused on public policy, dividing his time between government service and research and writing at prominent policy institutes. He served in the Pentagon as a special assistant to the Under Secretary of Defense for Policy, and on Capitol Hill as counsel for foreign and defense affairs to the U.S. Senate Republican Policy Committee.

Mario is a regular contributor to *National Review* and National Public Radio, and has written extensively for national and international publications, including op-eds in *The Wall Street Journal*. He has appeared on Fox News, CNN, BBC Television, and more. Together with Prof. Richard A. Epstein, Mario wrote three *amicus* briefs for the U.S. Supreme Court in the Obamacare case, *NFIB v. Sebelius*.

Mario received a B.A. in European history from the University of Wisconsin-Madison and a J.D. from Washington University School of Law. He is admitted to practice law in New York State, the Commonwealth of Puerto Rico, the U.S Supreme Court, and the Fifth Circuit Court of Appeals.

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900 Congress Ave., Suite 400 | Austin, Texas 78701 | (512) 472-2700 phone | (512) 472-2728 fax | www.TexasPolicy.com