



# Authority of State Legislatures to Accept Funds Under the American Recovery and Reinvestment Act of 2009

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## Summary

This report analyzes the language contained in §1607 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which provides that federal funds can be made available to a state by the federal government either after certification by a governor that such money will be requested and spent or after the adoption of a concurrent resolution by a state legislature. Although the language of § 1607 is arguably ambiguous, it does not appear likely that it would have the effect of significantly reallocating power between a state legislature and a state executive branch. Thus, once either a governor's certification or the legislature's acceptance has been made, § 1607 would have little or no apparent effect on the power of a governor, state or local official to choose whether or not to seek and administer these funds. Any interpretation of this language which did provide authority to a state legislature, by concurrent resolution, to direct the acceptance and spending of federal monies by state or local officials, would be likely to raise Tenth Amendment issues. Consequently, such an interpretation would be disfavored.

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## Background

This report analyzes the language contained in § 1607 of the American Recovery and Reinvestment Act of 2009 (Recovery Act),<sup>1</sup> which provides that federal funds can be made available to a state by the federal government either after certification by a governor that such money will be requested and spent or after the adoption of a concurrent resolution by a state legislature. This report evaluates the authority of state legislatures to, by concurrent resolution, provide for the acceptance of federal funds.

Section 1607 may be a congressional response to statements by several state governors who indicated a disinclination to seek, or have entities in their state seek, and receive funds provided under the Recovery Act.<sup>2</sup> The act requires that, in order to be eligible for such funds, a governor must first either certify that such funds will be requested, or, if that does not occur within 45 days of enactment,<sup>3</sup> then a state legislature may fulfill the same condition by passing a concurrent resolution (which does not generally require a governor's signature).<sup>4</sup> Specifically, § 1607 of the Recovery Act provides that:

(a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) the State will request and use funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.

(b) Acceptance by State Legislature- If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State.

(c) Distribution- After the adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State's discretion.

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<sup>1</sup> P.L. 111-5.

<sup>2</sup> Melinda Deslatter, *Some US governors may turn down stimulus money*, Associated Press Wire (February 19, 2009) ("A handful of Republican governors are considering turning down some money from the federal stimulus package ...").

<sup>3</sup> The Recovery Act became public law on February 17, 2009.

<sup>4</sup> See, e.g., SOUTH CAROLINA LEGISLATIVE MANUAL 2008 206 (Charles F. Reid ed., 89<sup>th</sup> ed. 2008) (1916), available at [http://www.scstatehouse.gov/man08/38\\_SenRules.pdf](http://www.scstatehouse.gov/man08/38_SenRules.pdf) ("A Concurrent Resolution affects the action of the entire General Assembly and the members thereof; does not carry an appropriation; does not have the force of law, as an Act or joint resolution does, but records the sense of the Senate and the House concurrently"). It is beyond the scope of this report to survey the use of concurrent resolutions at the state level. However, it would seem likely that other state concurrent resolution authorities (to the extent they exist) are similar. At the federal level, a concurrent resolution is passed by both the House and the Senate, but not presented to the president. See CRS Report 98-728, *Bills, Resolutions, Nominations, and Treaties: Characteristics, Requirements, and Uses*, by Richard S. Beth, at 2. This legislative vehicle is used by Congress principally for internal procedural matters such as adjournment *sine die*, to provide for joint session or joint committee, or to express a "sense of Congress." The exception to this is a concurrent resolution, passed by two-thirds of both houses, which is used to send a constitutional amendment to the states. U.S. Const. Article V. CRS Report 98-706, *Bills and Resolutions: Examples of How Each Kind Is Used*, by Richard S. Beth, at 2.

The language of § 1607 contains significant ambiguities, and the terms used may not be easily reconciled with either other portions of the act or with existing statutory law. Section 1607(a), for instance, requires a governor to, within 45 days, “certify” that the state will, at some unspecified future time, request and use funds provided by this act to create jobs and promote economic growth. The language does not specify to whom such certification shall be made;<sup>5</sup> nor does it specify whether, in making the certification, the state will be accepting all the funds that the state is eligible for under the act, or only some portion of the funds. Further, this subsection does not specify whether a governor’s office will be the political entity requesting the funds at some time in the future, or whether such a request will come from a state agency, a local government, or other public or public-private entities within a state.

Section 1607(b) provides that if funds “in any division of the Act” are not “accepted” for use by a governor, then it “shall be sufficient to provide funding to the state” for a state legislature to “accept[]” such funds by a concurrent resolution. However, the term “concurrent resolution” is not defined, and not all states appear to have this legislative vehicle.<sup>6</sup> Further, “accepting funds” is not a precise term of art, and it would appear to be a description of only a portion of the process usually used to distribute federal funds. Finally, it is not clear if the language which provides that a concurrent resolution shall “be sufficient” to provide funding to the state is intended only to fulfill the “certification” requirement of § 1607(a), or whether it is intended to be a waiver of all the requirements for receiving grant monies, such as submitting a grant application or providing supporting data or required assurances.

Finally, section 1607(c) provides that, after the adoption of a state legislature’s concurrent resolution, funding to the state “will be for distribution to local governments, councils of government, public entities, and public private entities within the State either by formula or at the State’s discretion.” In general, federal funds are by distributed by formula or by discretionary grants, depending upon the criteria specified in federal law governing a particular grant program. Thus, it is not clear if this language is intended to direct state and local officials to accept and spend these monies, or merely to indicate that the normal grant process may move forward after a state’s adoption of the specified concurrent resolution.

## Interpretation of § 1607(a)

As noted, § 1607(a) of the Recovery Act provides that in order to receive federal funds, “the Governor of the State shall certify that: (1) the State will request and use funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.” Under a broad interpretation of this language, one could argue that a governor would need to request and use all

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<sup>5</sup> Certification by the state of Texas was apparently made by a letter from Governor Rick Perry to President Obama, which provided “On behalf of the people of Texas, please allow this letter to certify that we will accept the funds in H.R. 1 and use them to promote economic growth and create jobs in a fiscally responsible manner that is in the best interest of Texas.” Dave Montgomery & Kevin Lyon, *Perry says Texas will take stimulus money*, Fort Worth Star-Telegram, February 18, 2009. A current list of state certifications can be found at [<http://www.recovery.gov/?q=content/state-certifications>].

<sup>6</sup> The term “concurrent” assumes the existence of two legislative bodies. Nebraska, however, has a unicameral legislature, and so does not have a legislative vehicle referred to as a “concurrent resolution.” Nebraska Legislature Glossary of Legislative Terms, [<http://www.nebraskalegislature.gov/about/glossary.php>] (no entry for concurrent resolution); Nebraska Legislature Frequently Asked Questions about the Legislative Process, [http://www.nebraskalegislature.gov/faq/faq\\_process.php](http://www.nebraskalegislature.gov/faq/faq_process.php) (describing the difference between bills and resolution).

funds provided in this act. Under this interpretation, the language of § 1607(a) should be read as follows (added text in italics):

- (a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that:
- (1) the State will request and use *all of the* funds provided by this Act *for which the state is eligible*; and
  - (2) the funds will be used to create jobs and promote economic growth.

It should be noted, however, that § 1607(b) provides that a state legislature can take action “if funds provided to any State in any division of this Act are not accepted for use by the Governor.” This would seem to strongly imply that a Governor could reject some of the funds in the Recovery Act, while accepting others. Thus, a better interpretation of the language of § 1607(a) would be as follows (added text in italics):

- (a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that:
- (1) the State will request and use *some or all of the* funds provided by this Act; and
  - (2) the funds will be used to create jobs and promote economic growth.

It should also be noted that this certification by the governor is neither a present request for, nor a present acceptance of, federal funds. Rather, it is merely an indication that the state “will” request and use funds. Since the use of the term “will” indicates an event that is going to occur in the future, a more accurate interpretation of § 1607(a) would appear to be (added text in italics):

- (a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that:
- (1) the State *at some time in the future* will request and use *some or all of the* funds provided by this Act; and
  - (2) the funds will be used to create jobs and promote economic growth.

The final ambiguity is the use of the term “State.” Although the governor is the chief executive officer of a state, he is generally not the only officer vested with legislative power to apply for and accept grants. That power may be distributed to various state and local officials, who are authorized to act on behalf of the state without approval of the governor.<sup>7</sup> Thus, while the governor is required to certify that the “State” will request and use funds, it does not appear that the application for those funds need come from the governor in all instances. Consequently, the certification does not necessarily appear to be statement of a governor’s intent to apply for funds. Rather, such certification would appear to be an acknowledgement by the governor that, based on available information, the governor, or other state or local officials are planning on applying for funds under the Recovery Act.

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<sup>7</sup> See, e.g., Tenn. Code Ann. § 5-8-108 (2009) (“Counties of this state, acting through their appropriate governing bodies, have the power and are authorized to apply for, receive and disburse for public purposes grants, loans and funds from the federal and state governments or any department or agency thereof authorized to administer grant, loan or similar programs.”); R.R.S. Neb. § 13-605 (2009) (“The Legislature hereby finds and declares ... that it is in the public interest for the state, cities of all classes, villages, or counties to be authorized to apply for, receive, or expend federal funds for the eligible activities under [the Housing and Community Development Act of 1974 as amended] or to administer such programs); S.C. Code Ann. § 1-25-50 (C) (2007) (providing that a Human Services Project Managing Agency “shall be authorized to apply for and receive federal, state and local funds, grants and other funding”); Va. Code Ann. § 32.1-122.8 (2009) (“The Board of Health is hereby authorized to apply for, receive, and expend federal and any other available funds for the enhancement of the primary health care system ... ”); N.J. Stat. § 26:4-100.8 (2009) (“The commissioner on behalf of the State is authorized and directed to apply for and receive Federal grants of the vaccine or funds therefor and to use such funds for the purchase of the vaccine ... ”).

Thus, a more accurate interpretation of § 1607(a) would appear to be (added text in italics):

(a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) *the Governor, state or local officials at some time in the future* will request and use *some or all of the* funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.

## Alternative Interpretations of § 1607(b)

A more difficult question is how to interpret § 1607(b) of the Recovery Act. Although many of the terms and phrases used in that subsection are ambiguous, perhaps the most significant ambiguity is the meaning of the term “acceptance” and the phrase “shall be sufficient to provide funding.” Without considering the context of the rest of the Recovery Act, the “acceptance” language in §1607(b) might at first be read to authorize the state legislature, by concurrent resolution, to accept the federal funds on behalf of the relevant state agency, and by doing so to waive all federal program requirements which would otherwise need to be followed for a state or local entity to apply for and receive federal funds. It might even be argued that this language could be interpreted to direct state entities to spend such monies consistent with a state legislature’s concurrent resolution.

If this “accept, waive and spend” interpretation is correct, then the language of § 1607(b) might be read as follows (added text in italics):

(b) Acceptance by State Legislature- If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to ~~provide funding to such State~~ *waive all federal program requirements, and direct that relevant state entities will accept and spend those funds.*

As will be explored below, however, the more expansive “accept, waive and spend” interpretation is difficult to reconcile with the rest of the Recovery Act, with canons of statutory interpretation, or with constitutional doctrine.

A more likely interpretation of this language is that an “acceptance ... [which] shall be sufficient to provide funding” would only trigger the authority of federal agencies to offer, and upon application of the states, distribute federal funds, but would not otherwise reallocate power within the state. Under this narrow “certification” interpretation, “acceptance” by a state legislature by concurrent resolution under § 1607(b) is merely the functional equivalent of the “certification” that can be made by a governor under §1607(a). Either of these actions would appear to be nothing more than preliminary conditions which must be met before a state becomes eligible to apply for and receive federal funds under the Recovery Act. In effect, §1607(a) gives a governor the opportunity to exercise a veto over receipt of federal funding under the act by failing to make such certification within 45 days, but then § 1607(b) gives the state legislature the opportunity to act to negate the effect of the governor’s veto.

If this interpretation were correct, then language of § 1607(b) might be read as follows (added text in italics):

(b) Acceptance by State Legislature- ~~If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance~~ *If the Governor does not provide such certification in 45 days regarding funds provided in any division of this Act, then certification* by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to ~~provide funding to such State~~ *meet the requirements of subsection (a).*

Under this “certification” interpretation, § 1607 would not appear intended to reallocate power between the executive and legislative branches of state governments in applying for, accepting and spending federal grants. Rather, it merely provides a preliminary federal grant condition, which could be met by either certification by the governor or by a concurrent resolution by the state legislature. After such certification has been made, federal funds may then be distributed under whatever other authority has been established for such funds in the rest of the Recovery Act or in federal law.<sup>8</sup>

Thus, under this narrow interpretation, even after certification by either the governor or state legislature, the governor would still have to apply for those federal funds which require an application from the governor’s office.<sup>9</sup> Conversely, if the governor chose not to apply for particular funds, then those funds would not be provided to the state. Similarly, other state and local officials with independent legal authority to apply for such funds would also have to submit grant applications and comply with any other such conditions as are required to gain access to those funds. Again, if those state or local officials choose not to apply for the funds, then the funds would not be provided to the state.

It should be noted that this interpretation closely mirrors language found on the website Recovery.gov, which was established by the Obama Administration to explain the Recovery Act.<sup>10</sup> This website, which lists state certifications submitted, notes that “In order to receive funds from the ARRA, governors have 45 days to certify that they will first ‘request and use’ funds from the ARRA, and second use them to create jobs and promote economic growth. If a governor does not accept funds allocated to his or her state before that window expires, the state’s legislature then has the option of certifying those two conditions itself.”

## **Interpretation of § 1607(c)**

While the terms of § 1607(c) are less ambiguous, it might also be subject to varying interpretation. For instance, one might argue that, in conjunction with § 1607(b), the language used might support the argument that a state legislature could, by concurrent resolution, direct state or local officials to spend the federal monies received. For instance, one might argue that the state legislature would have the ability to direct state or local officials to apply for and spend discretionary grant money. In this case, the language in question might be understood as if rewritten as follows:

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<sup>8</sup> § 1607(c) provides that “After the adoption of a State legislature’s concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State’s discretion.”

<sup>9</sup> See, e.g., § 14005(a) of the Recovery Act which states: “The Governor of a State desiring to receive an allocation under section 14001 shall submit an application at such time in such manner, and containing such information as the Secretary may reasonably require.”

<sup>10</sup> See State Certifications [<http://www.recovery.gov/?q=content/state-certifications>].



(c) Distribution- After the adoption of a State legislature’s concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the ~~State’s~~ *state legislature’s* discretion.

However, as discussed in the section regarding § 1607(b), it seems unlikely that the use of the term “State’s” is intended to mean the state legislature. The term “State” is used throughout § 1607 in contexts which clearly indicated that the term State is referring to entities which receive federal funds – i.e., state or local agencies or officials.<sup>11</sup> As is discussed below, absent statutory context indicating otherwise, like terms in discrete sections of a statute are generally given the same meaning by a court. If this language refers to state or local officials, however, then § 1607 provides that funding will be “at state or local official’s” discretion.

In this case, the language in question might be rewritten as follows:

(c) Distribution- After the adoption of a State legislature’s concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at ~~the State’s~~ *the State’s state or local official’s* discretion.

Under this reasoning, once a state legislature has authorized the distribution of funds, then it is up to the discretion of state or local officials as to whether to apply for such funds or not. This would be consistent with the provisions in the Recovery Act which provide for discretionary grants. Although, as discussed below, the nature of discretionary grants is that they are not made until after application by state or local officials, because such applications help the federal agency establish what the level of funding will be. Since the § 1607 leaves “discretion” with state or local officials as to such funding, the state or local officials could use their discretion to choose not to apply for discretionary grants. Further, as discussed below, even if federal funds were allocated to a state by formula, it is not clear whether state or local officials would be obligated to spend it. There is no language in §1607(c) that appears to require that state or local officials spend federal funds once they are allocated.

It should also be noted that the distribution of federal funds by formula or discretionary grant are the two ways that federal grant funds are distributed. Thus, these are also the methods by which funds would flow under the Recovery Act after the governor has made his certification under § 1607(a). While the absence of such language does not directly lead to an ambiguity in the statute, adding that information to § 1607 may clarify the meaning of the other sections. Thus, § 1607(c) might best be interpreted as follows (added text in italics):

(c) Distribution- After *either the Governor’s certification or* the adoption of a State legislature’s concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at ~~the State’s~~ *the State’s state or local official’s* discretion.

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<sup>11</sup> See, e.g., § 1607(b) (“for funds provided to any State or agency thereof”).

## Statutory Interpretation

Thus there appear to be two possible interpretation of the provisions of § 1607. As reworded, these interpretations would be as follows.

**Table I. Varying Interpretations of § 1607 of the Recovery Act**

<b>Narrow Interpretation: “Certification”</b>	<b>Broad Interpretation: “Accept, Waive, and Spend”</b>
<p>a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) the <del>State</del> Governor, state or local officials at some time in the future will request and use some or all of the funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.</p>	<p>a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that: (1) the <del>State</del> Governor, state or local officials at some time in the future will request and use some or all of the funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.</p>
<p>(b) Acceptance by State Legislature- <del>If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance</del> If the Governor does not provide such certification in 45 day regarding funds provided in any division of this Act, then certification by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to <del>provide funding to such State</del> meet the requirements of subsection (a).</p>	<p>(b) Acceptance by State Legislature- If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to <del>provide funding to such State</del> waive all federal program requirements, and direct that relevant state entities will accept and spend those funds.</p>
<p>(c) Distribution- After either the Governor’s certification or the adoption of a State legislature’s concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at <del>the State’s</del> state or local official’s discretion.</p>	<p>(c) Distribution- After either the Governor’s certification or the adoption of a State legislature’s concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at <del>the State’s</del> state or local official’s discretion.</p>

In reading statutes, there are a variety of rules and conventions, and presumptions that courts use to evaluate statutory language. Since there seems to be little legislative history available to shed light on which of these interpretations should be favored, it would appear that other tools of statutory interpretation should be utilized. Two of the more important canons of statutory construction applicable to this statutory provision are: 1) that a statute should be read as a harmonious whole, and 2) that statutory interpretations which lead to constitutionally doubtful results are disfavored.

## A Harmonious Whole

In general, a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.<sup>12</sup> As discussed above, once the ambiguous terms are clarified, the narrow “certification” interpretation of § 1607(b) seems to have a relatively straight-forward application: if the governor fails to make a certification under § 1607(a), the state legislature makes it for him. There would also be no conflict between § 1607(b) and § 1607(c), as the latter would merely state a relative truism, i.e., that the federal funds “will be for” distribution under either a formula or at a state’s discretion. Finally, because this narrow interpretation of § 1607(b) does not “waive” all federal grant requirements, it does not significantly conflict with the various grant conditions that are otherwise specified in the act.

The broader “accept, waive and spend” interpretation, however, seems to create a significant tension between § 1607(b) and the requirements of many provisions of the act. One of the more significant features of the Recovery Act is the imposition of a variety of grant conditions on states, which, in some cases, may even require the modification of state laws.<sup>13</sup> Further, some of these grant conditions would appear to require some states to expend significant additional state funds in order to comply with the grant conditions.<sup>14</sup> Under this broad interpretation of § 1607, a state wishing to evade expensive grant requirements need only have their state legislature, rather than the governor “accept” the money in question by concurrent resolution. Thus, a state would be able to, relatively easily, receive all the funds available to it, with none of the attendant conditions.

Although a complete analysis of how the “accept, waive, spend” interpretation of § 1607(b) would interact with other provisions of the Recovery Act is beyond the scope of this report, a sampling of three grant programs in Title XIV of the act can elucidate some issues that may arise. Thus, the following sections interpret the workability of § 1607(b) in relation to 1) funds allocated by a formula and made available only upon application of a governor under the State Fiscal Stabilization Fund, 2) State Incentive discretionary grants made available only upon application of a governor, and 3) Innovation Fund Awards made available upon application by subordinate governmental entities.

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<sup>12</sup> *United Savings Ass’n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (“Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” (citations omitted)). *United States v. Boisdore’s Heirs*, 49 U.S. (8 How.) 113, 122 (1850) (opinion of Court) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy”). A related canon of statutory construction is that statutes should be construed “so as to avoid rendering superfluous” any statutory language. *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991). *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003) (interpreting word “law” broadly could render word “regulation” superfluous in preemption clause applicable to a state “law or regulation”).

<sup>13</sup> *See, e.g.,* Michael Luo, *Jobless Angry At Possibility Of Losing Out On Benefits*, *The New York Times*, A13 (February 27, 2009) (“The stimulus bill recently passed by Congress includes incentives to states to expand benefits to many more jobless people, including part-time workers and those who have cycled in and out of the work force, who are not covered in many states”).

<sup>14</sup> *See, e.g.,* Brendan Riley, *Nevada Requests Waiver*, *San Francisco Chronicle* (March 18, 2009) (“To get \$396 million for K-12 and higher education, the federal stimulus law requires [Nevada] to ... restore \$268 million in cuts to higher education”).

## Authority To Receive State Fiscal Stabilization Fund Allocations

For instance, one can evaluate how the broader “accept, waive and spend” interpretation of the phrase “acceptance ... [which] shall be sufficient to provide funding” would be reconciled with Title XIV of the Recovery Act.<sup>15</sup> If this interpretation does not seem consistent with that portion of the statute, then the narrower “certification” interpretation would appear to be favored. Under § 14001(d) of the act, the United States Department of Education is given authority over a “State Fiscal Stabilization Fund” (Stabilization Fund) of \$53.6 billion.<sup>16</sup> After providing for certain reserve funds, the Secretary of Education is directed to determine how much of these funds will be allocated to each state based on a population-related formula.<sup>17</sup>

Section 14005(a) & (b) provide that, in order for a state to receive its allocation from the Stabilization Fund, a state governor must do, among other things, the following:

- Submit an application to the Department of Education, containing such information as the Secretary may reasonably require.<sup>18</sup> In that application, a governor shall provide assurances regarding “maintenance of effort” for elementary, secondary, and postsecondary schools,<sup>19</sup> address the issue of inequitable distribution of high quality teachers,<sup>20</sup> establish a longitudinal data system,<sup>21</sup> and enhance the quality of academic assessments.<sup>22</sup>
- Provide baseline data that demonstrates the state’s current status in each of the areas described in such assurances;<sup>23</sup>
- Describe how the state intends to use its allocation, including whether the state will use such allocation to meet maintenance of effort requirements under the Elementary and Secondary Education Act<sup>24</sup> and Individuals with Disabilities Education Act<sup>25</sup> and, in such cases, what amount will be used to meet such requirements.

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<sup>15</sup> For further information and background on Title XIV of the Recovery Act see CRS Report R40151, *Funding for Education in the American Recovery and Reinvestment Act of 2009 (P.L. 111-5)*, by Rebecca R. Skinner et al.

<sup>16</sup> Information about the Department of Education’s administration of the Stabilization Fund is available online at [<http://www.ed.gov/policy/gen/leg/recovery/factsheet/overview.html>].

<sup>17</sup> The formula for allocation is (1) 61 percent on the basis of their relative population of individuals aged 5 through 24, and (2) 39 percent on the basis of their relative total population. Recovery Act, § 14001.

<sup>18</sup> Recovery Act, § 14005(a).

<sup>19</sup> Recovery Act, § 14005(b) & (d)(1) require that states “maintain State support for elementary and secondary education at least at the level of such support in fiscal year 2006” and “maintain State support for public institutions of higher education (not including support for capital projects or for research and development or tuition and fees paid by students) at least at the level of such support in fiscal year 2006.”

<sup>20</sup> “The State will take actions to improve teacher effectiveness and comply with section 1111(b)(8)(C) of the ESEA (20 U.S.C. § 6311(b)(8)(C)) in order to address inequities in the distribution of highly qualified teachers between high- and low-poverty schools, and to ensure that low-income and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers.” Recovery Act, § 14005(b) & (d)(2).

<sup>21</sup> This data system must include the elements described in section 6401(e)(2)(D) of the America COMPETES Act, 20 U.S.C. § 9871. Id. at § 14005(b) & (d)(3).

<sup>22</sup> Id. at § 14005(b) & (d)(4).

<sup>23</sup> Recovery Act, § 14005(b)(2).

<sup>24</sup> 20 U.S.C. § 6301, *et. seq.*

<sup>25</sup> 20 U.S.C. § 1400, *et. seq.*

Thus, the question arises whether the phrase “acceptance by the State legislature ... shall be sufficient to provide funding to such State” would give a state legislature the authority to “accept” the allocations from the Stabilization Fund, even if a governor did not make the necessary application and otherwise comply with the statutory requirements.<sup>26</sup>

However, “accepting” money does not, under the plain meaning of the term, address the issue of “spending” money. In theory state or local officials, even once they have accepted money, are not compelled by the federal government to spend it. In general, unspent or unobligated grant funds must be returned to the grantor agency at the end of the grant period unless the statute governing the particular grant program permits unused grant funds to be carried over to another fiscal year or grant term, or unless the grantee is permitted to apply the unspent funds toward another program.<sup>27</sup> Courts have upheld the authority of federal agencies to seek recovery of grant funds where the grantee has not used the payments for authorized purposes within a prescribed period or where the grantee has not provided for an accounting of the funds within a reasonable period of time.<sup>28</sup>

Thus, in order to effectuate the “accept, waive and spend” interpretation, a state legislature would need to be able to direct state or local officials to spend any federal money that they receive. As is discussed below, a concurrent resolution would not generally be sufficient under state law to achieve this result. Thus, the state would need to find the authority to direct state and local officials to spend federal monies under § 1607(b).

However, it is not clear that § 1607(b) could be interpreted to provide such authority. The phrase “acceptance by the state legislature ... shall be sufficient to provide funding to that State” appears to only trigger a federal obligation to provide monies. The language does not, however, further specify that “acceptance” is sufficient to “direct that relevant state entities will accept and spend those funds.” In particular, it is unclear how the term “provide funding,” which seems to speak to the actions of the federal government, could be interpreted to apply to state and local officials, who will be *receiving* the monies. Thus, it is not clear under what theory the language in § 1607(b) could be reasonably interpreted as authorizing a state legislature, by concurrent resolution, to direct the behavior of state or local officials.

### **Authority To Receive State Incentive Grants under the Recovery Act**

The Secretary is directed, under § 14001(c), to reserve certain funds from the Stabilization Fund for “State Incentive Grants” to the states. In order to receive a state incentive grant, a governor

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<sup>26</sup> It should be noted that nothing in Title XIV appears to authorize or require a governor to “accept” the state’s allocation from the Stabilization Fund. Rather, Title XIV speaks to a relatively elaborate application process which must be completed prior to federal funds being disbursed. Thus, a governor who does not wish to receive Title XIV funds would not generally refuse to “accept” funds — rather, he would just not apply. It is unclear, under the more expansive interpretation of §1607, when the state legislature’s power (which can be implemented only after a governor refuses funds) could be exercised.

<sup>27</sup> For example, OMB Circular A-110, which sets forth administrative requirements for universities, hospitals and other non-profits, states: “The recipient shall promptly refund any balances of unobligated cash that the Federal awarding agency has advanced or paid and that is not authorized to be retained by the recipient for use in other projects.” (Section \_\_.71(b), Closeout Procedures). See also, OMB Circular A-102, “Uniform Administrative Requirements for Grants and Agreements With State and Local Governments.”

<sup>28</sup> *Mayor and City Council of Baltimore v. Browner*, 866 F. Supp. 249 (D. Md. 1994), *City of New York v. Shalala*, 34 F.3d 1161 (2<sup>nd</sup> Cir. 1994).

must submit an application<sup>29</sup> which documents the status of the state’s progress in a variety of different areas.<sup>30</sup> A governor must also describe the status of the state’s progress in implementing various existing federal standards.<sup>31</sup> Finally, a governor must submit a plan for evaluating the state’s progress in closing achievement gaps.<sup>32</sup> At that point, the Secretary will determine which states receive grants and the amount of those grants on the basis of information provided by the states and such other criteria as the Secretary determines appropriate.<sup>33</sup>

It should be noted that, under § 1607(b), the state legislature has the authority to “accept” funds under “any division” of the Recovery Act. Thus, the power of “acceptance” by the state legislature applies to those divisions of the Recovery Act that provide for discretionary grants. However, while the “accept, waive and spend” interpretation might have some practical application regarding funds allocated by a formula, the argument that the § 1607(b) phrase “acceptance by the State legislature ... shall be sufficient to provide funding to such State” actually means “waiver of the application and other statutory conditions and requirements” appears to fail in this context.

The amount of monies awarded under discretionary grants cannot be determined until after a state or local official has made an application for such funds.<sup>34</sup> Absent a state or local official submitting a grant application and providing the required information, the Secretary would have no basis upon which he could distribute the state incentive grants. So, the ability of a state legislature to “accept” funds could not logically mean “waiver of the application and other statutory conditions and requirements” in this context.

### **Authority To Receive Innovation Fund Awards under the Recovery Act**

Finally, in some instances, an expansive “accept, waive and spend” interpretation of the language in § 1607 would appear to run counter to existing facts. For instance, § 1607(b) envisions exercise of the state legislature’s authority regarding “any division of this Act ... not accepted for use by the Governor.” However, a governor does not appear to have underlying authority to “accept”

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<sup>29</sup> Recovery Act, Section 14005(c).

<sup>30</sup> These areas include, under §§ 14005(d), achieving equity in teacher distribution, improving collection and use of data, standards and assessments, and supporting struggling schools.

<sup>31</sup> For instance, the Governor must ensure that students in the subgroups described in section 1111(b)(2)(C)(v)(II) of the ESEA (20 U.S.C. § 6311(b)(2)(C)(v)(II)) who have not met the State’s proficiency targets continue making progress toward meeting the State’s student academic achievement standards and describe the achievement and graduation rates (as described in section 1111(b)(2)(C)(vi) of the ESEA (20 U.S.C. § 6311(b)(2)(C)(vi)) and as clarified in section 200.19(b)(1) of title 34, Code of Federal Regulations) of public elementary and secondary school students in the State. Additionally, the State must employ strategies to ensure that all subgroups of students identified in section 1111(b)(2) of the ESEA (20 U.S.C. § 6311(b)(2)) in the State continue making progress toward meeting the State’s student academic achievement standards, and describe how the State would use its grant funding to improve student academic achievement in the State, including how it will allocate the funds to give priority to high-need local educational agencies. Recovery Act, Section 14005(c)(2) – (4).

<sup>32</sup> Recovery Act, Section 14005(c)(5).

<sup>33</sup> Recovery Act, Section 14006(b).

<sup>34</sup> Another possible interpretation would be that any concurrent resolution passed by a state legislature will include a completed grant application and all supporting data and assurances, which are required to be provided to the federal government. This does not appear to be a reasonable interpretation of § 1607(b), however, as the phrase “shall be sufficient to provide funding to the state” would seem to imply that the federal agency will have no discretion in allocating these funds. Consequently, any application and supporting documentation provided in the concurrent resolution would be superfluous, and thus this interpretation would disfavored.

funds under all divisions of the act. For instance, under § 14007, the Secretary is given the authority to reserve up to \$650 million to establish an Innovation Fund which will be used to provide academic achievement awards. These awards may only go to a local educational agency or a partnership between a nonprofit organization and either one or more local educational agencies or a consortium of schools.<sup>35</sup>

Although this section does not specify an application process, it would appear that local entities, not the governor's office, would submit the application and provide supporting data to justify such awards.<sup>36</sup> Further, it may be the case that, under state law, a governor would not have a role in determining whether the local education agency will apply for or accept such awards.<sup>37</sup> Again, this would seem to undercut the broader interpretation of § 1607(b),

## Analysis

As noted, a broad interpretation of the § 1607(b) phrase "acceptance by the State legislature... shall be sufficient to provide funding to such State" might imply that Congress intends that all statutory requirements for the receipt of federal funds, such as submitting an application and complying with grant conditions, can be waived by a state legislature. The Recovery Act, however, offers money to states both in the form of state funds allocated by formula and by discretionary grants available to states and entities within states.<sup>38</sup> As noted above, the phrase under consideration could only logically be applied in the case of funds allocated by a formula, since waiving the requirement of application and provision of necessary information in the context of discretionary grants would leave no basis for determination of the amount of funds to be awarded. Thus, in order for the language of § 1607(b) to take on the broader meaning in the context of formula-allocated funds, the language "shall be sufficient to provide funding under this Act" would have to mean something different in relation to discretionary grants. However, under general rules of statutory construction, the same words of a statute cannot be interpreted differently in different contexts.<sup>39</sup>

As noted, a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes. The broader "accept, waive and spend" interpretation, however, cannot be easily applied in relation to the funding sources of the Recovery Act discussed above. On the other hand, the narrower "certification" interpretation, when viewed as merely a complement to the gubernatorial certification scheme (and having no effect on the various funding requirements such as are

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<sup>35</sup> Recovery Act, § 14007(a)(1).

<sup>36</sup> To be eligible to receive an award, these entities must have made gains in closing certain specified achievement gaps. Recovery Act, § 14007(b).

<sup>37</sup> Cynthia Dickers, *Stimulus Plan Ties the Hands of Reluctant Governors*, *MinnPost.com*, available at [http://www.minnpost.com/stories/2009/02/19/6785/stimulus\\_plan\\_ties\\_the\\_hands\\_of\\_reluctant\\_governors](http://www.minnpost.com/stories/2009/02/19/6785/stimulus_plan_ties_the_hands_of_reluctant_governors) (noting that some federal programs allow cities to apply directly for federal money).

<sup>38</sup> Section § 1607 specifically provides that the language of § 1607(b) shall apply to "funds provided to any State in any division of this Act."

<sup>39</sup> Where the same term is used several places in statutory text, it is generally presumed to have the same meaning in every instance. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). See also *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995); *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214, 225 (1992). This presumption is particularly strong when the term is used within the same sentence, *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329-30 (2000), and this conclusion seems inevitable when the different meanings are sought in the same word.

established in Title XIV), raises few or no statutory conflicts. Further, this interpretation would allow the terms in question—“acceptance” and “sufficient to provide funding”—to more closely relate to their plain meaning.

## **Constitutional Doubt**

To the extent that a proposed statutory interpretation were to raise constitutional doubts, while another interpretation was free of constitutional concerns, the former interpretation would generally be disfavored.<sup>40</sup> A variety of concerns could be raised regarding both the broader “accept, waive and spend” interpretation and the narrower “certification” interpretation. These issues would include principles of federal delegation of authority, state doctrines of separation of powers, and Tenth Amendment federalism concerns. In general, however, it appears that the narrower “certification” interpretation would avoid significant constitutional challenges while the “accept, waive and spend” interpretation would, at a minimum, raise Tenth Amendment concerns.

## **Delegation of Federal Authority**

The first question that could be asked is whether the Constitution provides Congress, under either the broad or narrow interpretation of § 1607 suggested above, the authority to delegate its legislative authority in this manner. Under either interpretation, Congress has delegated to either the governor or the state legislature some authority to determine whether federal monies in the Recovery Act will be available to the states and various entities within the states. Thus, this would appear to be an attempt to delegate Congress’ authority to effectuate a statute to non-federal actors.

Early in the evolution of case law regarding federal power, the Supreme Court established the non-delegation doctrine—the precept that “the legislative power of Congress cannot be delegated.”<sup>41</sup> Despite this language, the Court has long recognized that administration of the law requires exercise of discretion, and that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>42</sup> The Court has thus recognized that “that there is some difficulty in discerning the exact limits,” and that “the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.”<sup>43</sup> In practice, the Court has rejected delegation challenges in all but the most extreme cases, and has allowed the delegation of vast powers to entities outside of Congress.

One such delegation issue arises when Congress provides that a statute be effectuated, revived, suspended, or modified, upon the finding of certain facts by an executive or administrative officer. Such laws, often referred to as “contingent delegations,” were approved in an early case,

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<sup>40</sup> Under the doctrine of constitutional doubt, courts will construe statutes, “if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

<sup>41</sup> *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932). *See also* *Field v. Clark*, 143 U.S. 649, 692 (1892).

<sup>42</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989). *See also* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (“Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility”).

<sup>43</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42.



*The Brig Aurora*.<sup>44</sup> After previous restraints on British shipping had lapsed, Congress passed a new law stating that those restrictions should be renewed in the event the President found and proclaimed that France had abandoned certain practices that violated the neutral commerce of the United States. The argument was made that this was an invalid delegation of legislative power. The Court had little trouble upholding the law, noting that “we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1<sup>st</sup>, 1809, either expressly or conditionally, as their judgment should direct.”<sup>45</sup>

The nature of the event that triggers these “contingent delegations” need not be directly related to factual findings by government entities. For instance, the Court has upheld such delegations to the relatively unfettered wishes of private persons. For example, in *Currin v. Wallace*,<sup>46</sup> a statute that placed restrictions upon the production or marketing of agricultural commodities was to become operative only upon a favorable vote by a prescribed percentage of those persons affected. The Court’s rationale was that such a provision does not involve a delegation of legislative authority because Congress has merely placed a restriction upon its own regulation by withholding its operation unless it is approved in a referendum.<sup>47</sup>

The same principles that apply to federal agencies or individuals appear to extend to delegations to states. Beginning in the Nation’s early years, Congress enacted many statutes that contain provisions authorizing state officers to enforce and execute federal laws,<sup>48</sup> and challenges to these practices have been uniformly rejected. When, in the *Selective Draft Law Cases*,<sup>49</sup> the contention was made that the 1917 statute authorizing a military draft was invalid because of its delegations of duties to state officers, the argument was rejected as “too wanting in merit to require further notice.” Congress continues to empower state officers to act.<sup>50</sup>

Under either the “certify” or the “accept, waive and spend” interpretation, § 1607(b) appears to allow the state legislature to, by concurrent resolution, affect the availability of federal funds. Providing assurances and certification, is a commonplace mechanism used in the federal grant area. It is only the devolution of the exercise of this authority to a state legislature by concurrent resolution that appears to be novel.<sup>51</sup>

As noted, a concurrent resolution is not generally a legislative vehicle by which a legislature, under a state constitution, can regulate activities outside of the state Legislative Branch. Consequently, the passage of a concurrent resolution in this case would not generally be an invocation of a state authority, but would appear more analogous to an action by a private organization or individual. Thus, the question arises, not as to whether the federal government can

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<sup>44</sup> 11 U.S. (7 Cr.) 382 (1813).

<sup>45</sup> 11 U.S. (7 Cr.) at 388.

<sup>46</sup> 306 U.S. 1 (1939).

<sup>47</sup> *Currin v. Wallace*, 306 U.S. at 15, 16.

<sup>48</sup> See Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925).

<sup>49</sup> 245 U.S. 366, 389 (1918).

<sup>50</sup> *E.g.*, P.L. 94-435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (state attorneys general may bring antitrust *parens patriae* actions); Medical Waste Tracking Act, P.L. 100-582, 102 Stat. 2955, 42 U.S.C. § 6992f (States may impose civil and possibly criminal penalties against violators of the law).

<sup>51</sup> It should be noted, however, that Congress has required grant conditions that, in order for a state comply with, the state would have to amend its constitution. *State of North Carolina v. Califano*, 445 F. Supp. 532 (1977) (federal requirement that state agency should be created to issue “certificates of need” for new institutional health services upheld, despite state Supreme Court ruling that such conditions were beyond the power of the state legislature).

delegate to a state government, but whether the federal government can delegate federal authority to the functional equivalent of a private organization or individual.

This form of delegation does not appear to be of constitutional concern. The Court has upheld statutory delegations to private persons in the form of contingency legislation. It has upheld, for example, statutes providing that restrictions upon the production or marketing of agricultural commodities are to become operative only upon a favorable vote by a prescribed majority of those persons affected.<sup>52</sup> The Court's rationale has been that such a provision does not involve any delegation of legislative authority, because Congress has merely placed a restriction upon its own regulation by withholding its operation unless it is approved in a referendum.<sup>53</sup>

It should be noted, however, that the more expansive "accept, waive and spend" interpretation may raise delegation issues. As discussed below, an argument can be made that under the Tenth Amendment, Congress does not have the authority to "commandeer" state or local officials to administer federal programs. Under this analysis, it may be the case that Congress could not direct state officials to spend federal monies which it provided. Since Congress cannot delegate powers that it does not have, it would appear that a state could not, by concurrent resolution, "commandeer" state and local officials.

## Separation of Powers

A second concern that might arise regarding the language found in § 1607(b) would be whether allowing a state legislature to "accept" funds, by concurrent resolution, would violate the doctrine of separation of powers at the state level, as it could be argued that it was providing a state legislature the opportunity to exercise legislative power without presentment to a governor. A state-by-state analysis of state separation of powers doctrine is beyond the parameters of this report. An examination of the separation of powers doctrine as developed at the federal level, however, should be helpful in discussing the issues raised by the instant statutory provisions.

This concern could be raised regarding both the narrow "certification" interpretation and the "accept, waive and spend" interpretation of § 1607 of the Recovery Act. As noted above, a concurrent resolution does not usually require approval by an executive, and thus is not generally used for substantive law-making. In particular, at the federal level, Article I of the Constitution requires that bills passed by the House be presented to the President for approval.<sup>54</sup> In *Immigration & Naturalization Service v. Chadha*,<sup>55</sup> the Supreme Court held that every exercise of legislative power by Congress is subject to this presentment requirement. An exercise of

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<sup>52</sup> *Currin v. Wallace*, 306 U.S. 1 (1939); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577 (1939); *Wickard v. Filburn*, 317 U.S. 111, 115-116 (1942); *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

<sup>53</sup> *Currin v. Wallace*, 306 U.S. 1, 15, 16 (1939).

<sup>54</sup> Art. 1, § 7, cl. 2 provides that:

[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

<sup>55</sup> 462 U.S. 919 (1983).

legislative power is defined as one which has the purpose and effect of altering the legal rights, duties, and relations of persons outside of the Legislative Branch.<sup>56</sup>

As separation of powers jurisprudence has developed, however, the test that the Court has frequently employed evaluates whether the acting party, usually Congress, has either “impermissibly undermine[d]” the power of a coequal branch, or has “impermissibly aggrandize[d]” its own powers at the expense of another branch. Phrased another way, the Court generally considers whether the acting party has “disrupt[ed] the proper balance between the coordinate branches [by] preventing the [other] Branch from accomplishing its constitutionally assigned functions.”<sup>57</sup> In deciding cases involving the doctrine of separation of powers, the Court has wavered between two different approaches, at times relying on a strict, “formalist” approach,<sup>58</sup> while in other cases opting for more of a balancing or “functional” methodology.<sup>59</sup>

It should be noted, however, that under the narrow “certification” interpretation of § 1607(b), the state legislature which “accepts” the federal funds may not be exercising its state authority. Instead, as noted above, the power that appears to have been delegated to the state legislature was the power to trigger federal law, which would have no significant effect on state law. In effect, as noted above, the state legislature would be essentially acting as a private organization, whose action would trigger contingent federal legislation. Exercising this preliminary trigger would not appear to intrude on powers inherent in the state executive branch, since that branch’s cooperation would still appear to be needed. Thus, it would seem that, under the narrow “certification” interpretation, the exercise of authority by the state legislature would be unlikely to raise separation of powers issues.

Under the broader “accept, waive and spend” interpretation of § 1607(b), however, for a state legislature to direct the activities of state and local officials by concurrent resolution would appear to be “altering the legal rights, duties, and relations of persons outside of the Legislative Branch.” To the extent that such an exercise of a concurrent resolution would be beyond the legislature’s authority under the state constitution, the exercise of such authority by the legislature would appear likely to raise state constitutional issues.

Such a violation of a state’s separation of power doctrine, however, would not mean that that implementation of § 1607 would necessarily violate the United States Constitution. If the state legislature were acting under § 1607, then it would be acting under federal law. The Supremacy Clause of the United States Constitution specifically provides that federal law can preempt not only state law, but also state constitutions.<sup>60</sup> Thus, to the extent that the exercise of § 1607(b) by a

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<sup>56</sup> 462 U.S. at 952.

<sup>57</sup> *Morrison v. Olson*, 487 U.S. 654, 655 (1988); *see also* *Mistretta v. United States*, 488 U.S. 361 (1989); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise*, 501 U.S. 252 (1991).

<sup>58</sup> *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that Congress could not appoint officials to an executive agency); *see also* *INS v. Chadha*, 462 U.S. 919 (1983) (striking down Congress’s use of the one-house legislative veto on separation of powers grounds); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress had unconstitutionally usurped executive branch functions by assigning executive duties to the Comptroller General, a legislative branch officer).

<sup>59</sup> *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (rejecting the “archaic view of separation of powers as requiring three airtight compartments of government”) (internal citation omitted); *see also* *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) (holding that Congress’s grant of authority to the CFTC to entertain state law counterclaims in reparation proceedings did not violate Article III of the Constitution).

<sup>60</sup> U.S. Const., Art. VI, cl. 2 provides that:

(continued...)

state legislature under the broad “accept, waive and spend” interpretation would violate state constitutional doctrine of separation of powers, the state constitution would be likely to be preempted.

### **Tenth Amendment Concerns**

If the term “acceptance by the state legislature ... shall be sufficient to provide funding to such State” were to be interpreted broadly so as to provide for a waiver of requirements regarding applications and other statutory conditions, this might not be effective in requiring that the federal monies actually be spent by a state. For instance, in some cases, a governor might have direct control over the administrative apparatus under which a federal grant might be administered, and might decline to spend any monies received. In other instances, a governor may have significant indirect control over many aspects of state agencies, mostly exercised by his power to appoint or dismiss persons of authority in the executive branch, by which he could dissuade state officials from spending such monies. Finally, local governmental entities and other public or public-private entities which accept and utilize federal funds might have independent authority to decline to spend any monies received.

In order for the state legislature to actually direct entities to spend federal monies, one would need to interpret the phrase “acceptance ... shall be sufficient to provide funding to such state” to essentially authorize the state legislature, by concurrent resolution, to direct the activities of local governments, and other public or public-private entities. On its face, §1607(b) is not consistent with such an interpretation, as the language addresses “provid[ing] funding” (which is done by federal agencies), not spending monies (which would be done by state entities). But even more importantly, an interpretation of § 1607 which provides that a state legislature could, by concurrent resolution, direct the activities of a governor, state, and local entities would appear to violate the Tenth Amendment. Since the narrow “certification” interpretation would not similarly impact state and local officials, a finding that the “accept, waive and spend” interpretation would violate the Tenth Amendment would disfavor the latter interpretation.

The Tenth Amendment provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In *New York v. United States*,<sup>61</sup> Congress had attempted to regulate in the area of low-level radioactive waste. In a 1985 statute, Congress provided that states must either develop legislation on how to dispose of all low-level radioactive waste generated within the state, or the state would be forced to take title to such waste, which would mean that it became the state’s responsibility. The Court found that although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it only had the power to regulate the waste directly. Here, Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the state to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to “commandeer” the legislative

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(...continued)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

<sup>61</sup> 505 U.S. 144 (1992).

process of the states. In the New York case, the Court found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.

A later case presented the question of the extent to which Congress could regulate through a state's executive branch officers. This case, *Printz v. United States*,<sup>62</sup> involved the Brady Handgun Act. The Brady Handgun Act required state and local law-enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase. This portion of the act was challenged under the Tenth Amendment, under the theory that Congress was without authority to "commandeer" state executive branch officials. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress's power, and consequently a violation of the Tenth Amendment.

In the instant case, if the statutory language in question were interpreted to mean that state or local public entities could be directed by the state legislature to accept and utilize federal funds, this would arguably be a commandeering of those entities for a federal purpose, which would violate the principles of the cases cited above. One might argue that the federal government is not requesting that the state expend funds, but is merely providing federal funds for the state or local officials to administer. However, the Supreme Court has specifically rejected arguments that the level of burden imposed on a state in order to administer federal programs is relevant to a Tenth Amendment analysis. In *Printz*, the Court stated that where the "the very principle of separate state sovereignty is ... offend[ed], ... no comparative assessment of the various interests can overcome that fundamental defect."<sup>63</sup>

One might also argue that since the directions would not be coming from the federal government, but from the state legislature, federalism concerns would be diminished. However, this distinction would not appear relevant if the power being exercised by the state legislature arose out of the federal law, and not state law.<sup>64</sup> If Congress does not have the power to require a state to spend federal funds in furtherance of a federal program, then it would not appear to have the authority to delegate such power to others. The fact that such a law is "contingent" legislation does not appear to change its federal character.

One might argue that, once Congress has distributed money to the state based on a concurrent resolution by the state legislature, that it would then have the ability to control how that money is spent.<sup>65</sup> In generally, this authority would be exercised by the threat of denying or taking back the federal monies. In this case, the solution would make little practical difference. Since the grant condition at issue is that state or local officials spend the money, taking back the federal funds would not be a disincentive to those officials.

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<sup>62</sup> 521 U.S. 898 (1997).

<sup>63</sup> 521 U.S. at 932. "Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

<sup>64</sup> Generally, legislatures are not authorized by state constitutions to exercise significant legislative authority by a concurrent resolution.

<sup>65</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987).

It has been held, however, that Congress may not only impose grant conditions on federal monies, but it may actually exercise substantive jurisdiction over federal monies once the monies have been distributed to a state.<sup>66</sup> In this case, the argument might be made, once the state legislature has accepted federal funds by concurrent resolution, Congress then has the authority to commandeer state and local officials (through the state legislature) to implement that spending program.

Such an analysis, however, belies the grounds on which the federal authority to establish grant conditions is based. In general, the Court has held that the grant conditions are not a violation of the Tenth Amendment, which generally prevents Congress from “commandeering” state legislatures to implement federal programs, because the state officials are voluntarily waiving these rights in order to receive federal grants.<sup>67</sup> Thus, in order for the imposition of grant conditions to be valid, it must be determined that the state, under its normal governmental processes, has voluntarily accepted such funds. Directing that some other entity, such as a private entity or a governmental body not authorized under state law to accept such funds, could make that decision on behalf of the state, would not meet the criteria for voluntariness.

## Conclusion

Section 1607(a) of the Recovery Act provides that, in order for a state to be eligible for the federal funds in the Recovery Act, a governor must certify that (1) a state will request and use funds in the future, and (2) the funds will be used to create jobs and economic growth. This language does not appear to bind a governor to request or accept any particular level of governmental funding, nor does it appear that the certification must be based on the governor’s future acceptance of funds, as such request or acceptance can sometimes be made by other state officials or by local officials.

Forty-five days after enactment of the Recovery Act, if a governor has not provided the necessary certification, then § 1607(b) would appear to provide a state legislature the authority to step in to “accept” state funds by concurrent resolution, achieving the same result as would have been achieved by the certification. However, it seems clear that such acceptance, while “sufficient” to trigger the availability of federal funds under the Recovery Act, does not free a state from any other conditions for receiving funds, such as filling out applications, justifying needs, and providing assurance of compliance with program requirements.

Many of the interpretive problems with §1607 result from the ambiguity of the terms used. However, if the statute were interpreted as if it had the following words inserted, the most likely interpretation of the language becomes clear (added text in italics):

- a) Certification by Governor- Not later than 45 days after the date of enactment of this Act, for funds provided to any State or agency thereof, the Governor of the State shall certify that:

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<sup>66</sup> *Sabri v. United States*, 541 U.S. 600 (2004) (upholding imposition of criminal penalties for bribery of state and local officials administering programs receiving federal funds).

<sup>67</sup> In evaluating grant conditions, the Court determines whether the statute imposes such coercive pressure on the state that the acceptance of those conditions is no longer voluntary. For instance, in *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court evaluated efforts by Congress to withhold a percentage of federal highway funds from states in which the age for purchase of alcohol was below 21 years. The Supreme Court held that, as the indirect imposition of such a standard was directed toward the general welfare of the country, it was a valid exercise of Congress’ spending power.

(1) ~~the State Governor, state or local officials at some time in the future~~ will request and use some or all of the funds provided by this Act; and (2) the funds will be used to create jobs and promote economic growth.

(b) Acceptance by State Legislature- ~~If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance~~ *If the Governor does not provide such certification in 45 days regarding funds provided in any division of this Act, then certification* by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to ~~provide funding to such State~~ *meet the requirements of subsection (a).*

(c) Distribution- *After either the Governor's certification or the adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State's state or local official's discretion.*

Under this interpretation, it does not appear likely that § 1607 was intended to significantly reallocate powers between a state legislature and a state executive branch. Thus, once either a governor's certification or the legislature's acceptance is made, § 1607 would have little or no apparent effect on the remaining power of a governor, state or local official to choose whether or not to seek and administer these funds. The language of § 1607(b), while adding an additional requirement to the federal funding process, does not otherwise appear to supplant or replace existing federal requirements, nor does it appear to change the allocation of power within a state to make decisions regarding the application for, acceptance of and use of such federal funds. Any interpretation of this language which did provide authority to a state legislature, by concurrent resolution, to direct the acceptance and spending of federal monies would likely raise Tenth Amendment issues. Consequently, such an interpretation would be disfavored.

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