

SANCTUARY CITIES AND THE POWER OF THE PURSE:
AN EXECUTIVE *DOLE* TEST

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ABSTRACT

*A constitutional clash is brewing. Cities and counties are flexing their muscles to frustrate national immigration policy while the federal Executive is threatening to interfere with local law enforcement decisionmaking and funding. Although the federal government generally has plenary authority over immigration law, the Constitution forbids the commandeering of state and local officials to enforce federal law against their will. One exception to this anti-commandeering principle is the Spending Clause of Article I that permits Congress to condition the receipt of federal funds on compliance with federal law. These conditions, according to more than thirty years of Supreme Court precedent since *South Dakota v. Dole*, must be clearly articulated in advance, related to the underlying purpose of the federal funds, and not deemed coercive by the courts.*

The Attorney General recently announced conditions on federal law enforcement grants that would defund police departments who do not cooperate with federal immigration officials. These new funding conditions triggered legal challenges by a dozen jurisdictions under the Spending Clause. While the case law is clear that Congress may delegate its authority to the Executive to add conditions on federal grants, two important questions remain unresolved: (1) does the authority to add conditions on spending inherently attach to delegations to implement federal grant programs or must that authority be delegated separately and unambiguously? and (2) are executive conditions subject to the same standards of clarity, germaneness, and non-coercion? Recent threats by the President to withhold funding for

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elections, education, and public parks amplify the need for clarity on these questions.

In this Article, I argue that executive conditions on federal spending are unquestionably appropriate, but only when Congress has unambiguously delegated the authority to add conditions. This delegation should not act as a loophole in the Dole doctrine. In fact, because the central constitutional concern in Spending Clause cases is the undue aggrandizement of federal power at the (literal) expense of the states, I argue that executive conditions on federal spending should be subject to stricter limits than conditions imposed by Congress; inter-branch coordination poses a greater threat to state sovereignty than either Congress or the Executive acting alone. The upshot of stricter executive limits is that conditions on federal spending will likely shift away from the Executive to Congress, which may be desirable on accountability grounds.

Finally, the recent appointment of Justices Gorsuch and Kavanaugh to the Supreme Court have raised the stakes of this particular debate. Both of the new Justices have publicly articulated concerns about expanding federal power and federal administrative power in particular. The question of sua sponte executive conditions on federal grants-in-aid thus pose a ripe opportunity for skeptics of the administrative state to rein in the regulatory state in particular, and the Spending Clause more generally.

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PART I

INTRODUCTION

A constitutional clash is brewing. Law enforcement agencies in several dozen cities and more than one hundred counties nationwide have passed resolutions and/or endorsed policies and practices that limit cooperation with federal immigration officials.¹ Many of these jurisdictions will simply not honor ICE detainers without a warrant or a judicial order despite federal law requiring cooperation with federal immigration authorities.² These so-called sanctuary cities (and counties) argue that non-cooperation is necessary to build trust between immigrant communities and law enforcement, to reduce the chance of family break-ups, to avoid costly legal fees, to boost the economy and, ultimately, to preserve the peace.³ But there are political

¹ For a summary of policies enacted by sanctuary cities see Christopher S. Lasch, *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703 (2018), Benjamin Gonzalez O’Brien, Loren Collingwood & Stephen Omar El-Khatib, *The Politics of Refuge: Sanctuary Cities, Crime, and Undocumented Immigration*, 55 URBAN AFFAIRS REV. 3 (2019); Jennifer Ridgely, *Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities*, 29 URBAN GEOGRAPHY 53 (2013).

² In February 2017, U.S. Immigration and Customs Enforcement published a report pursuant to Executive Order 13,768 documenting sixty-five declined detainers by thirty-two detention centers during the week of Feb. 11, 2017 and 134 cities, towns, counties, and states that had publicly enacted or endorsed a non-cooperation policy with ICE since 2008. *Enforcement and Removal Operations: Weekly Declined Detainer Outcome Report for Recorded Declined Detainers Feb. 11-Feb. 17, 2017*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Feb. 17, 2017), https://www.ice.gov/doclib/ddor/ddor2017_02-11to02-17.pdf [<https://perma.cc/4CT3-47T8>]. See also 8 U.S.C. § 1373 prohibiting limitations on voluntary cooperative information sharing by local authorities (“a local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, or any individual.”); U.S. CONST. ART. VI (“... the Laws of the United States . . . shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any state to the contrary notwithstanding.”).

³ Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017) (arguing that “crime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties. Moreover, economies are stronger in sanctuary counties—from higher median household income, less poverty, and less reliance on public assistance to higher labor force participation, higher employment-to-population ratios, and lower unemployment.”). See also Alexia Fernandez Campbell, *U.S. Police Chiefs are Fighting the Crackdown on “Sanctuary Cities,”* VOX (Aug. 18, 2017) at: <https://www.vox.com/policy-and-politics/2017/8/18/16130954/police-sanctuary-cities> (“Police chiefs who oversee America’s largest law enforcement agencies unwaveringly assert that enforcing federal immigration laws is not their responsibility, and doing so would actually make their cities a lot more dangerous.” Houston Police Chief Art Acevedo “and

undertones as well. Sanctuary cities are flexing their muscles to signal displeasure with the Trump administration and to assert their authority as local sovereigns over their own law enforcement.⁴ This conflict between local and federal power is made possible because the federal government lacks the resources it needs to enforce its own laws. Instead, federal immigration officials rely on the cooperation of state and local law enforcement. This cooperation has its limits, however.⁵ The Constitution prevents Congress from commandeering state officials to enforce federal law against their will,⁶ but does permit Congress to incentivize cooperation through grant-in-aid programs.⁷ These programs offer financial inducements to state and local governments who voluntarily agree to their terms so long as the terms are clearly articulated in advance, related to the underlying purpose of the grant, and not coercive.⁸

Just two weeks after his inauguration, President Donald Trump signed Executive Order 13,768 directing the Attorney General and Secretary of Homeland Security to withhold federal funding from sanctuary jurisdictions.⁹

many of his colleagues want to make clear that separating immigration enforcement from police work is not about protecting undocumented immigrants, it's about keeping cities safe.”).

⁴ See, e.g., John Hudak, Elaine Kamarck & Christine Stenglein, *Trump Threatened Sanctuary Cities, and They Shrugged—Here’s Why*, BROOKINGS INSTITUTION (May 1, 2019) at <https://www.brookings.edu/blog/fixgov/2019/05/01/trump-threatened-sanctuary-cities-and-they-shrugged-heres-why/> (“Many of the mayors and governors who have declared sanctuary status for their jurisdictions, have effectively said “bring it on.”)

⁵ Jessica Bulman-Pozen and Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

⁶ *N.Y. v. U.S.*, 505 U.S. 144, 161 (1992) (“As an initial matter, Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”) (internal citations omitted); *Printz v. U.S.*, 521 U.S. 898, 925 (1997) (“... later opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).

⁷ See *Grants-in-Aid*, CTR. FOR THE STUDY OF FEDERALISM, <http://encyclopedia.federalism.org/index.php/Grants-in-Aid> [<https://perma.cc/MK4W-JYKC>] (“A grant-in-aid is the transfer of money from one level of government to another for a specific purpose and subject to substantive and procedural conditions found in the authorizing legislation and administrative regulations.”)

⁸ See *South Dakota v. Dole*, 483 U.S. 203 (1987). The *Dole* opinion highlights additional requirements for conditional grants, namely that they function to promote the general welfare and do not violate any constitutionally guaranteed rights or privileges (e.g., First Amendment rights, equal protection). See *infra* Part IV.

⁹ Exec. Order 13,768, *Enhancing Public Safety in the Interior of the United States*, §2(c) (Jan. 25, 2017) (“It is the policy of the executive branch to . . . Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law.”)

Six months later the Attorney General, pursuant to E.O. 13,768, added a set of immigration-related conditions to federal grants under the control of the Department of Justice.¹⁰ These “Edward Byrne Memorial Justice Assistance Grants” (“Byrne JAG”), were created by Congress in 2005 as part of the Violence Against Women and Department of Justice Reauthorization Act, which consolidated the preexisting Edward Byrne Memorial Formula Grant (created in 1988) and the Local Law Enforcement Block Grant (created in 1996).¹¹ The grants were named after a 22-year-old on-duty New York City police officer who was murdered while guarding the home of a cooperating witness in a drug trial.¹² The Byrne JAG program is the largest source of federal funding to support local law enforcement, and its primary purpose is to give local jurisdictions flexibility to respond quickly to the changing needs of their local communities.¹³

When the Attorney General added conditions on the Byrne JAG funds, he triggered legal challenges in federal courts in several states.¹⁴ According to the authorizing statute, the Attorney General is authorized to review grant applications from state and local governments,¹⁵ develop program assessment guidelines,¹⁶ and provide technical assistance to grantees.¹⁷ Nowhere is the Attorney General authorized to add substantive conditions or otherwise amend the eligibility requirements of the grant program. By imposing conditions on the Byrne JAG funds to “encourage . . . ‘sanctuary’

¹⁰ *Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs*, DEPT. OF JUSTICE (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [https://perma.cc/VPM5-SB75]. Hereinafter *Byrne JAG Press Release*.

¹¹ NATHAN JAMES, CONG. RESEARCH SERV., EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM RS22416 (Jan. 3, 2013).

¹² *About Officer Byrne*, BUREAU OF JUSTICE ASSISTANCE, available at <https://bja.ojp.gov/program/jag/about-officer-byrne> [https://perma.cc/P6QS-KRM9].

¹³ NAT’L. CRIM. JUSTICE ASS’N, THE IMPACT OF THE BYRNE JUSTICE ASSISTANCE GRANT PROGRAM: HOW BYRNE IS CHANGING THE CRIMINAL JUSTICE SYSTEM, available at: <https://higherlogicdownload.s3.amazonaws.com/NCJA/8d0b2ead-b5b8-47ef-96d0-9aca227fcb2/UploadedImages/Issues-and-Legislation/Bryne-JAG/byrne-jag-system-change-report.pdf> [https://perma.cc/Q4T2-ZCL9] (“Byrne JAG’s hallmark is its flexibility...Only when the criminal justice system is in balance can it function fairly, efficiently and cost effectively.”)

¹⁴ See, e.g., *Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017); *San Francisco v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018); *Chicago v. Barr*, 2019 WL 4511546 (N.D. Ill. Sept. 19, 2019); *New York v. Dep’t of Justice*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018).

¹⁵ 34 U.S.C. §10153(a).

¹⁶ 34 U.S.C. §10152(c).

¹⁷ 34 U.S.C. §10153(b).

jurisdictions to change their policies,”¹⁸ the Attorney General raised a set of novel legal questions: does the Spending Clause in Article I of the U.S. Constitution authorize the Executive and his agents to add conditions on federal appropriations? If so, what are the limits on this authority? The courts are just beginning to grapple with these questions.

Every court that has so far considered the first question recognizes that the Spending Clause does not authorize the Executive to add conditions on congressionally-appropriated funding absent a delegation of that authority from Congress.¹⁹ However, lower courts are split about whether the Attorney General was acting pursuant to delegated authority when he conditioned Byrne JAG funds on cooperation with federal immigration agents. The First, Third, Seventh, and Ninth circuits held that he was not.²⁰ On the other hand, the Second Circuit held that the delegated authority to review grant applications and develop assessment guidelines was sufficient to confer authority on the Executive to add discretionary conditions on the grants themselves.²¹

On the question of the Executive’s discretion itself, courts unanimously agree that the discretion is limited, but disagree on the contours of the limits. The Ninth Circuit cited to *Youngstown Sheet & Tube Co. v. Sawyer* for the proposition that the limits of executive conditions on federal spending become stricter as the Executive’s goals diverge from the intent of Congress.²² The Second Circuit relied on the Administrative Procedures Act for the proposition that the Executive’s discretion is broad, limited only by arbitrary and capricious actions which would include grant conditions that

¹⁸ *Byrne JAG Press Release*, *supra* note 10.

¹⁹ *See infra* Part III.C.

²⁰ *Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *Philadelphia v. Attorney General*, 916 F.3d 276, 279 (3d Cir. 2018) (“Concluding that Congress did not grant the Attorney General this authority [to add conditions], we hold that the Challenged Conditions were unlawfully imposed.”); *Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018) (noting that “Congress may of course delegate such authority to the Executive Branch” but that delegation did not occur); *Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *see also San Francisco v. Trump*, 897 F.3d 1225, 1233-34 (9th Cir. 2018) (stating, in relation to the President’s power utilized in E.O. 13,768, “In this instance, because Congress has the exclusive power to spend and has not delegated authority to the Executive to condition new grants on compliance with §1373, the President’s power is at its lowest ebb. And when it comes to spending, the President has none of his own constitutional powers to rely upon.”) (internal citations omitted).

²¹ *New York, et al. v. Dept. of Justice*, 951 F.3d 84, 90 (2d Cir. 2020) (rev’g 343 F. Supp. 3d 213 (S.D.N.Y. 2018) (granting a preliminary injunction against the DOJ).

²² 343 U.S. 579 (1952) (J. Jackson concurring).

are coercive.²³ Several district courts relied on the provisions articulated in *South Dakota v. Dole* that describe the limits on congressional conditional spending, namely that the conditions must provide unambiguous guidance to grant recipients, be related to the underlying purpose of the grant program, and avoid financial inducements that “might be so coercive as to pass the point at which pressure turns into compulsion.”²⁴ While these courts seem to agree that the *Dole* provisions should apply to executive conditions on spending, they have struggled to consistently apply the provisions.²⁵ For example, courts disagree whether the delegation of authority to the Executive should be unambiguous, or whether executive conditions themselves should be unambiguous, or both.²⁶ Furthermore, whereas Congress appropriates grants-in-aid via legislation, the Executive administers the grant programs in several stages, including solicitation announcements, application intake, and awards, raising a question of *when* the inquiry into ambiguity should happen.²⁷

The diversity of opinions in the lower courts coupled with a split among the Circuit courts has opened the door for the Supreme Court to weigh in on this issue. As the Second Circuit opined, these cases

implicate[] several of the most divisive issues confronting our country and, consequently, filling daily news headlines: national immigration policy, the enforcement of immigration laws, the status of illegal aliens in this country, and the ability of States and localities to adopt policies on such matters contrary to, or at odds with, those of the federal government.²⁸

Adding to these stakes are recent changes at the Supreme Court. No conditional spending grant has been invalidated by the Supreme Court since 1936, although scholars have predicted the Spending Clause’s demise since

²³ *New York, et al. v. Dept. of Justice*, *supra* note 21 at 123 (“Thus, it was hardly arbitrary or capricious for DOJ to impose these conditions without discussing detrimental effects that they were unlikely to cause.”) and at 116 (“This case is much more akin to *Dole* [not coercive] than to *NFIB* [coercive].”).

²⁴ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (internal citations omitted).

²⁵ See *infra* Section III.C.1.

²⁶ See *infra* notes 134- and accompanying text.

²⁷ See Peter J. Smith, Pennhurst, Chevron, and the Spending Power, 110 YALE L.J. 1187, 1233-1236 (2001) (discussing temporal challenges in Spending Clause cases) and David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEXAS L. REV. 1197, 1216-1222 (2004) (discussing the impact of the timing of executive conditions on the notice provided to state grant recipients).

²⁸ *New York, et al. v. Dept. of Justice*, *supra* note 21 at 90.

the “federalism revolution” of the Rehnquist court.²⁹ These predictions have yet to materialize but the modern controversy over sanctuary cities is a recipe for their resurrection. In particular, Justices Gorsuch and Kavanaugh have articulated concerns about expanding federal power, and federal administrative power in particular.³⁰ The question of *sua sponte* executive conditions on federal grants-in-aid poses a ripe opportunity for skeptics of federal power to rein in the Executive, but also the Spending Clause more generally.

In this Article, I argue that executive conditions on federal spending are entirely appropriate, but only when Congress has unambiguously delegated authority to add conditions. This predicate of delegatory clarity lies in some tension with *Chevron* deference, though to be clear there need not be clarity from Congress on the conditions to be imposed, merely on the fact that authority to add conditions has been delegated. My primary argument is thus quite modest: Congressional delegation should not be a loophole in the *Dole* doctrine. In other words, when Congress (unambiguously) delegates to the Executive authority to add conditions on federal grants, the Executive should also be subject to the *Dole* framework. My argument admittedly goes a bit further, however. Because the power of the purse remains with Congress, I propose that executive conditions on spending should be held to a higher standard of review than Congressional conditions.

Why should courts be more skeptical of executive conditions than of those enacted by Congress? Indeed, because the Executive is already subject to congressional rebuke, judicial intervention may appear unnecessary. However, the central constitutional concern in Spending Clause cases is not the separation of powers, but the undue aggrandizement of federal power at the (literal) expense of the states. And inter-branch coordination enflames rather than alleviates this problem. Furthermore, the upshot of our proposed rigid-*Dole* test is that conditions on federal spending will likely shift away from the Executive to Congress, which may be desirable on accountability grounds.³¹

In Part II, I briefly summarize the history of the Spending Clause from the 1770s through the mid-2000s, highlighting the long record of executive involvement in the administration of grant-in-aid programs.³² I also trace the

²⁹ See *infra* Part II.C.

³⁰ *Id.*

³¹ *New York v. United States*, 505 U.S. 144, 168 (1992) (“[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”).

³² See *infra* Part II.A-B.

slow rollback of federal power by the Supreme Court beginning in 1995.³³ I show that between 1995 and 2012 the Supreme Court imposed limits on Congress's authority under the Commerce Clause,³⁴ the Tenth Amendment,³⁵ and the enforcement clauses of the Reconstruction Amendments.³⁶ I also show how the Court expanded the zone of state sovereignty by expanding the reach of the Eleventh Amendment's sovereign immunity doctrine.³⁷ The Spending Clause has so far escaped unscathed.³⁸

In Part III, I outline the Trump administration's attempts to invigorate immigration enforcement by targeting sanctuary cities and counties. I summarize the fate of E.O. 13,768 and the Attorney General's conditions on Byrne JAG funds in the courts. In February 2020, the Second Circuit reversed a lower court ruling that had invalidated the Attorney General's conditions, creating a circuit split on the constitutionality of executive conditional spending.³⁹

In Part IV, I defend the basic logic of *South Dakota v. Dole*. Several scholars have argued that the provisions of *Dole* are vacuous and illogical, and thus a proposal to double-down on *Dole* in the case of executive conditions is likely to draw some critics.⁴⁰ While I agree that the *Dole* provisions are analytically problematic, I argue that they are a useful heuristic for balancing federal and state power. I posit that the core *Dole* provisions are reasonable proxies for the central doctrines of federalism: due process (unambiguousness), enumerated federal powers (nexus), and anti-commandeering (coercion). Finally, I note that the *Dole* conditions are the culmination of at least fifty years of organic doctrinal evolution, solidified in 1987, cited hundreds of times since, and thus entitled to a measure of deference.

In Part IV, I also highlight three distinct characteristics of the sanctuary cities cases that complicate a standard application of *Dole*. First, the Byrne JAG funds have been awarded since 2005 and cities have long incorporated these funds into their budgets and relied on their renewal. Adding conditions

³³ See *infra* Part II.C.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 350 (2008) (“[T]he Court is not likely to [limit conditional spending] in the way some hoped and some feared the Rehnquist Court would—by imposing direct limitations on the kinds of legislation Congress has power to pass under the Spending Clause.”)

³⁹ *New York, et al. v. Dept. of Justice*, *supra* note 21.

⁴⁰ See *infra* Part IV.A.

mid-stream raises the question of whether notice is even possible pre-award. Second, the vast majority of sanctuary jurisdictions are cities and counties. These sub-state units do not possess the same elevated sovereignty status afforded to states. On the one hand, courts might be more concerned about the coercive potential of federal grants in the absence of state-level political safeguards of federalism. On the other hand, sub-state jurisdictions are subject to higher governmental authorities and they lack the bargaining posture of states whose status is explicitly fortified by the Tenth and Eleventh Amendments. Third, the defining characteristic of a sanctuary jurisdiction is its antagonistic attitude toward *immigration law*. In the words of the recent Second Circuit opinion on sanctuary cities, “As the Supreme Court has repeatedly observed, in the realm of immigration policy, it is the federal government that maintains broad and preeminent power.”⁴¹

These three distinct characteristics cut in opposite directions and raise the possibility that the sanctuary cities cases may be decided on grounds other than the Spending Clause. Nevertheless, the Trump administration’s response to the recent proliferation of sanctuary jurisdictions raises important constitutional questions that have yet to be resolved. Because President Trump continues to threaten the withholding of a variety of federal funds from uncooperative states and cities—from immigration and law enforcement to voting procedures and public health policies—these questions are likely to be tested. In Part V I propose that executive conditions should be subject to a rigid-Dole test that balances the discretionary authority of the Executive with the Article I authority of Congress to marshal the power of the purse in defense of the general welfare of the United States.

PART II

CONDITIONAL SPENDING AND THE EXECUTIVE

A. History of the Spending Clause

An estimated \$790 billion in federal grant money will be disbursed to state and local governments in FY2020.⁴² These funds are used to fund or otherwise subsidize public education, health insurance for the poor, job training, housing, transportation, and more. Federal grants currently comprise

⁴¹ *New York, et al. v. Dept. of Justice*, *supra* note 21 at 113 (internal citations omitted).

⁴² OFFICE OF MANAGEMENT BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2020: HISTORICAL TABLES, TABLE 12.1.

approximately 25% of state and local budgets,⁴³ though the federal government was not always so flush with resources. Under the Articles of Confederation, the power to tax resided in the states.⁴⁴ The national government primarily raised funds via tariffs, by borrowing from states, and by selling land. In some cases the national government used land grants to incentivize states to pursue national policy objectives that the federal government could not achieve on its own.⁴⁵ Even still, the federal government was quite weak and dependent on the voluntary compliance of states. One of the primary motivations for the 1787 constitutional convention was to improve the federal government's ability to raise money to pay back debts incurred during the Revolutionary War and to better incentivize states to work collectively for the good of the entire Union.⁴⁶ Thus, the very first enumerated authority of the new federal government read:

“The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁴⁷

⁴³ *Federal Aid to State and Local Governments*, CTR. ON BUDGET & POL'Y PRIORITIES at <https://www.cbpp.org/research/state-budget-and-tax/federal-aid-to-state-and-local-governments> (last accessed Mar. 13, 2020).

⁴⁴ The only provision of the Articles that explicitly refers to the taxing power gives states the authority and responsibility to levy taxes in order to pay down war debts. ARTICLES OF CONFEDERATION ART. VIII (“The taxes for paying that proportion [of war debts] shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.”). *See also* ARTICLES OF CONFEDERATION ART. II (“Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”).

⁴⁵ CONG. RES. SVC. Rep. No. R40638, 12 (2019) (“However, even before the Constitution’s ratification, the federal government found ways to provide state and local governments with assistance to encourage them to pursue national policy objectives.”).

⁴⁶ *Id.* at 13 (“When the Framers met in Philadelphia in 1787 to rework the Articles of Confederation and Perpetual Union, the national economy was in recession, state governments were saddled with large debts left over from the Revolutionary War, the continental dollar was unstable and destined to be a national joke (‘not worth a continental’), the navy could not protect international shipping, and the army proved unable to protect its own arsenal during Shay’s rebellion in 1786.”); *See also* ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789*, 556 (1924) (“As for the unneighborly regulations of the States, Hamilton feared in light of the past that they would become more and more ‘serious sources of animosity and discord.’ Of this group of disputes, those hinging upon State tariffs were paramount in importance . . . ‘The king of New York levied impost upon New Jersey and Connecticut,’ later wrote Fisher Ames, ‘and the nobles of Virginia bore with impatience their tributary dependence upon Baltimore and Philadelphia. Our discontents were fermenting into civil war.’”)

⁴⁷ U.S. CONST. ART. I § 8.

Even with this new authority to collect taxes, Congress continued to offer states ownership of land in the early years of the Republic in exchange for state investments in public education and infrastructure projects, like canals and harbors.⁴⁸

Formal federal grant-in-aid programs primarily developed in the wake of the Civil War when the federal government asserted its authority vis-à-vis the states.⁴⁹ Because these new programs drew funds from the U.S. Treasury, Congress began to attach conditions on the grants to disincentivize frivolous or fraudulent spending by the states. For example, Congress frequently required states to provide matching funds as a way to create shared incentives for efficient use of the federal grant money. Congress also attached strings to these grants to ensure that the states complied with the purpose of the grant. For example, the Morrill Act of 1890 authorized the Secretary of Treasury to withhold education funding from states that failed to eliminate race as an admissions criteria to colleges and universities.⁵⁰

The ratification of the federal income tax in 1913 changed the game.⁵¹ With a near-instant infusion of cash into the federal Treasury, Congress was able to dangle serious sums of money in exchange for policy concessions by the states. States immediately challenged this expansion of federal power. In 1923, the state of Massachusetts sued the Secretary of Treasury for violating state sovereignty by requiring the state to account for its expenditure of federal funds earmarked for maternal health and prenatal care.⁵² The Supreme Court dismissed the case for lack of standing, but importantly noted that

⁴⁸ CONG. RES. SVC. Rep. No. R40638, supra note 45 at 12-13 (“These land grants for public education were reauthorized by Congress in the Northwest Ordinance of 1787. Congress subsequently adopted similar legislation for all states admitted to the union from 1802 to 1910.”).

⁴⁹ *Id.* at 15.

⁵⁰ Agricultural College Act of 1890 (commonly referred to as the Morrill Act of 1890 or “Second Morrill Act” after Vermont Representative and sponsor Justin Smith Morrill), 26 STAT. 417. The Act has been codified as 7 U.S.C. §326 (“On or before the 1st day of October in each year, the Secretary of Agriculture shall ascertain and certify to the Secretary of the Treasury as to each State and Territory whether it is entitled to receive its share of the annual appropriation for colleges, or of institutions for colored students, under this subchapter, and the amount which thereupon each is entitled, respectively, to receive.”).

⁵¹ U.S. CONST. AMEND. XVI.

⁵² *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447 (1923) (challenging the constitutionality of the Sheppard-Towner Act of 1921, commonly referred to as the “Maternity Act.”)

because the grants were optional, they could not be deemed coercive to states as sovereigns in violation of the Tenth Amendment.⁵³

During the New Deal era, the scope of federal grant programs exploded. The Social Security Act of 1935 was perhaps the most important, providing funds for elder care, unemployment insurance, and aid to dependent children, conditional on successful financial audits by the Executive branch.⁵⁴ The central provisions of the Social Security Act were upheld by the Supreme Court in 1937 as a proper exercise of the Taxing and Spending Clause.⁵⁵ The Court relied on its 1936 holding in *U.S. v. Butler* that congressional spending was appropriate so long as it broadly advances the general welfare.⁵⁶ The Court in *Butler* rejected the argument that the Taxing and Spending Clause was confined solely to federal expenditures in pursuit of the enumerated powers of Congress.⁵⁷

Congress took advantage of this broad power during the 1950s when it provided more than \$2 billion in funding to states to support the construction of the federal highway system.⁵⁸ In 1958, the U.S. Supreme Court held in *Ivanhoe Irrigation District v. McCracken* that when Congress adds conditions to its grant-in-aid programs, the conditions must be relevant to the objectives

⁵³ *Id.* at 480 (“Probably it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation, but simply extends an option which the State is free to accept or reject.”). See also Cynthia Cates Colella, *The United States Supreme Court and Intergovernmental Relations*, in AMERICAN INTERGOVERNMENTAL RELATIONS TODAY: PERSPECTIVES AND CONTROVERSIES, 47 (Robert Jay Dilger ed., 1986)

⁵⁴ See Social Security Act of 1935, 49 STAT. 620, Title I (grants for old age assistance), Title III (grants for unemployment), Title IV (grants for aid to dependent children) and Title V (grants for maternal and child welfare).

⁵⁵ See *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the constitutionality of the payroll tax) and *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding the constitutionality of the unemployment compensation provisions and citing *Massachusetts v. Mellon* to hold that the provisions were not coercive against the states).

⁵⁶ 297 U.S. 1 (1936).

⁵⁷ *Id.* at 65-66 (noting that the Taxing and Spending Clause “confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant from them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.”).

⁵⁸ The Federal-Aid Highway Act of 1956, 70 STAT. 374 “expanded the Interstate System by 1,000 miles to 41,000 miles and authorized \$25 billion to be made available in fiscal years 1957 through 1969 for its construction to accommodate traffic demand in 1975. The Federal share of costs would be 90 percent” (with approximately \$2.5 billion available in grants to states). Richard Weingroff, *Highway History—The Greatest Decade: 1956-1966*, DEPT. OF TRANSPORTATION FED. HIGHWAY ADMIN. available at <https://www.fhwa.dot.gov/infrastructure/50interstate.cfm> (last accessed Mar. 18, 2020).

of the underlying funds.⁵⁹ In the case of federal highway funds, courts considered conditions requiring motorcycle helmet laws (1966),⁶⁰ uniform speed limits (1974),⁶¹ and a minimum drinking age of 21 (1984)⁶² to be relevant to the overall objectives of a safe interstate highway system. In recent years, members of Congress have proposed withholding federal highway funding unless states ban texting and driving.⁶³ (To date these proposals have not garnered majority support).

The most consequential federal grant-in-aid program in U.S. history is Medicaid. Established in 1965 as part of President Johnson's "Great Society" agenda, Medicaid remains the largest federal grant, comprising approximately 15% of every state's budget.⁶⁴ And setting Medicaid aside, the number of federal grants to state and local governments more than tripled between 1960 and 1968.⁶⁵ These new programs increasingly employed cross-cutting conditions, which are broad statements that apply to all federal funding. For example, Title VI of the Civil Rights Act conditions funding for "any program receiving Federal financial assistance" on the elimination of racially-exclusive eligibility requirements.⁶⁶ In fact, by 1980 the Office of

⁵⁹ *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (" . . . the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.").

⁶⁰ National Highway Safety Act of 1966, 23 U.S.C. § 402 (Sept. 9, 1966) (giving the Secretary of Transportation discretion to withhold up to 25% of federal highway funding for noncompliance with Secretary's uniform safety standards). In 1967 the Secretary issued safety standards that required states to adopt universal motorcycle helmet laws. See *Evaluation of the Repeal of Motorcycle Helmet Laws in Kentucky and Louisiana*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. DOT HS 809 530, (Oct. 2003) available at: <https://one.nhtsa.gov/people/injury/pedbimot/motorcycle/kentucky-la03/background.html>.

⁶¹ Emergency Highway Energy Conservation Act of 1974, Pub. L. 93-239 (Jan. 2, 1974) (authorizing the Secretary of Transportation to withhold all federal highway funding for noncompliance).

⁶² National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (July 17, 1984) (reducing federal highway funding by 10% for noncompliance). The Act was upheld by the U.S. Supreme Court in *South Dakota v. Dole* *supra* note 8.

⁶³ Matt Richtel, *Senators Seek a Ban on Texting and Driving*, N.Y. TIMES (July 29, 2009) at <https://www.nytimes.com/2009/07/30/technology/30distracted.html> (threatening to revoke 25% of federal highway funding to states that fail to formally ban texting and driving). See also Brian Resnick, *Four Times the Government Held Highway Funding Hostage*, THE ATLANTIC (July 16, 2014) at <https://www.theatlantic.com/politics/archive/2014/07/four-times-the-government-held-highway-funding-hostage/454167/>.

⁶⁴ *Medicaid's Share of State Budgets*, MEDICAID & CHIP PAYMENT & ACCESS COMM'N at <https://www.macpac.gov/subtopic/medicaids-share-of-state-budgets/> (reporting that Medicaid accounts for 15.9% of spending from state general funds as of FY2016).

⁶⁵ CONG. RES. SVC. Rep. No. R40638 *supra* note 45 at 24 (reporting that the number of federal grants to state and local governments increased from 132 in 1960 to 387 in 1968.)

⁶⁶ 42 U.S.C. § 2000d (1964).

Management and Budget (OMB) counted 59 cross-cutting requirements in various federal statutes.⁶⁷

In addition to the increasing number of federal grants and scope of conditions on those grants, the motivation for conditional spending has changed in recent years. In particular, federal grants have increasingly been used to push states and local governments into new policy areas.⁶⁸ This shift has been referred to as “coercive federalism,” where grants that used to incentivize efficient intergovernmental cooperation are now used “to ensure the supremacy of federal policy.”⁶⁹ Not coincidentally, the number of unfunded mandates increased from zero between 1940-1963, to nine between 1964-1969, and twenty-five in the 1970s.⁷⁰

The Supreme Court showed signs of pushing back against this expansion of power in the 1980s. In the 1984 case *Pennhurst State School and Hospital v. Halderman*, the Court held that Congress must articulate any conditions on federal funds *unambiguously*, otherwise states are entitled to the funds.⁷¹ In the 1987 case *South Dakota v. Dole*, the Supreme Court summarized the constitutional limit on the Spending Clause of Article I, holding that states are entitled to federal grants unless the conditions on those grants are stated unambiguously (citing to *Pennhurst*), related to the purpose of the spending program (citing to *Ivanhoe v. McCracken*), and not coercive (citing to *Massachusetts v. Mellon*).⁷² Subsequent courts have cited to *Dole* more than 400 times and it has become the canonical test for states challenging conditions of federal outlays.⁷³ In almost every case, although Congress appropriates the funds at issue, states file suit against the Executive because,

⁶⁷ CONG. RES. SVC. Rep. No. R40638 *supra* note 45 at 27.

⁶⁸ John Kincaid, *From Cooperative to Coercive Federalism*, 509 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCI. 139 (1990) (describing the use of federal grants to spur recalcitrant states on economic inequality and affirmative action.).

⁶⁹ *Id.* at 139.

⁷⁰ “Coercive Federalism,” CTR. FOR THE STUDY OF FEDERALISM at: http://encyclopedia.federalism.org/index.php/Coercive_Federalism (last accessed Mar. 13, 2020).

⁷¹ 451 U.S. 1, 17 (1981) (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract . . . The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”) (internal citations omitted).

⁷² *South Dakota v. Dole*, 483 U.S. 203, 207-210 (1987).

⁷³ According to Westlaw KeyCite search there are 440 citations to *Dole* since 1987 (last accessed March 23, 2020).

in practice, administrative agencies ultimately implement most grant programs.

B. Marionettist Executive

The Executive plays a crucial role in the appropriation of federal funds. In most cases, Congress delegates authority to the Executive to administer and implement federal spending programs and grants-in-aid.⁷⁴ This authority extends to grant solicitation and monitoring and tracking applications, awards, and post-award audits.⁷⁵ In fact, the primary responsibility of the Executive vis-à-vis spending for much of modern American history has been to monitor spending to ensure compliance with congressional directives and to guard against fraud and abuse.⁷⁶

In some policy domains Congress has delegated increasing authority to the Executive including, in some cases, the authority to develop conditions itself. For example, in the context of deploying international aid dollars, Congress has delegated broad authority to set conditions, identify priorities, and administer the aid programs however the Executive decides best meets the country's foreign policy priorities.⁷⁷ In other areas of the law, Congress has delegated very specific authority to the Executive that severely limits its discretion. For example, in the context of Title IX of the Education Amendments of 1972, Congress delegated authority to the Department of Education to monitor compliance with new federal guidelines, but limited the Department's ability to enforce this compliance. Specifically, Congress provided for "pinpoint" enforcement that stipulates that if the Department seeks to terminate grant funding, "such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found."⁷⁸

In some cases the Executive has unilaterally rescinded funding against the wishes of Congress. Notably, after Congress overrode President Nixon's veto of the 1972 amendments to the Federal Water Pollution Act, Nixon

⁷⁴ CONG. RES. SVC. Rep No. R40638 *supra* note 45.

⁷⁵ *Id.*

⁷⁶ *Id.* at 18 ("federal administrative conditions attached to these grants [between 1930s and 1960s] focused on the prevention of corruption and fraudulent expenditures").

⁷⁷ *See, e.g.*, 22 U.S.C. § 2151t(a) (authorizing the President to "furnish assistance, on such terms and conditions as he may determine, to countries and areas through programs of grant and loan assistance, bilaterally or through regional, multilateral, or private entities.")

⁷⁸ 20 U.S.C. § 1682.

refused to disburse all of the appropriated funds.⁷⁹ Congress responded by passing the Congressional Budget and Impoundment Control Act which prohibited the President from impounding funds without first getting approval from Congress.⁸⁰ Presidential impoundments are the most extreme form of executive conditional spending: Withholding federal funding against the wishes of Congress, often without notice, and for nakedly political reasons.⁸¹

More recently, President Trump has threatened in broad terms to withhold federal funding from Michigan and Nevada if they adopted vote-by-mail procedures for the November 2020 election,⁸² to withhold funding from states that do not mandate in-person learning in K-12 public schools,⁸³ and to defund police departments that fail to “protect monuments, memorials, and statues from destruction and vandalism.”⁸⁴

⁷⁹ See *Train v. City of New York*, 420 U.S. 35 (1975),

⁸⁰ 2 U.S.C. § 683(a) (“Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President shall transmit to both Houses of Congress a special message”).

⁸¹ Note that budget rescissions or deferrals under the Impoundment Control Act are not limited to federal grants to the states. For example, in July 2019 the Office of Management and Budget (OMB) initiated a delay of appropriated funds to aid Ukraine’s defense against Russian encroachment. The delay was alleged to have been motivated by political concerns since it was initiated a few hours after President Trump pressed the President of Ukraine to investigate former Vice President Biden. The nonpartisan Government Accountability Office (GAO) later determined that the proposed delay in funding violated the Impoundment Control Act. The funding delay was cited as evidence that President Trump had abused his office in the first article of impeachment that was passed by the House of Representatives.

⁸² @realDonaldTrump, TWITTER (May 20, 2020, 7:11 AM), <https://twitter.com/realDonaldTrump/status/1263094958417985538>.

⁸³ @realDonaldTrump, Twitter (July 8, 2020, 7:16 AM), <https://twitter.com/realDonaldTrump/status/1280853299600789505>. Secretary of Education Betsy DeVos also repeated this threat in a Fox News interview with Chris Wallace on July 12, 2020.

⁸⁴ Executive Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence (June 26, 2020). Secretary of the Interior David Bernhardt told Fox News that “We are going to examine all of our funding mechanisms to these communities and to the extent that we have the authority, we will take into account their failure to protect these monuments.” (June 27, 2020). This particular threat garnered attention in Congress. On July 2 the House Minority Leader Kevin McCarthy said he would introduce a bill to block federal funding for states that fail to protect monuments and statues. <https://www.foxnews.com/politics/mccarthy-says-hell-introduce-bill-blocking-funds-for-states-that-dont-protect-statues>.

How should courts interpret these threats? How should they construe the various delegation arrangements with Congress when the Executive announces conditions on spending? Does authority to add conditions on spending inherently attach to delegations to implement federal grant programs generally, or must that authority be delegated separately and unambiguously? In the context of sanctuary jurisdictions, a recent Second Circuit opinion held that Congress had functionally delegated authority to add conditions even though the authority had not been directly delegated.⁸⁵ As I discuss below, this decision coexists uncomfortably with the requirement in *Dole* that conditions be announced unambiguously: Why should conditions be unambiguous while the source of the conditions remains uncertain? In other words, how should courts resolve the tension between the required clarity in *Dole* with the tolerance for ambiguity in *Chevron*? I take up this question in Part III.

C. Federalism Revolution

Perhaps the most controversial aspect of the Spending Clause is its unyoked relationship to the enumerated powers of Congress. The Supreme Court has explicitly rejected the argument that the Spending Clause only authorizes federal spending in pursuit of Article I powers; a kind of monetary Necessary and Proper Clause.⁸⁶ Instead, the Court has found that the power of the purse is “limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.”⁸⁷ The upshot is that Congress can, and has, used the Spending Clause to circumvent the (otherwise) express limits on its power.⁸⁸ As a result, one might expect the Spending Clause to be the first place federalists would look to rein in the aggrandizement of congressional power. Instead, beginning in 1995, the Supreme Court significantly scaled back the power and reach of the federal government on multiple fronts while largely ignoring the Spending Clause.

In 1995, the Supreme Court struck down the federal Gun-Free School Zones Act on the grounds that Congress lacked the authority to regulate the possession of handguns under the Commerce Clause.⁸⁹ The Court’s holding in *Lopez* marked the first time in fifty-eight years that an Act of Congress was

⁸⁵ *New York et al. v. Dept. of Justice*, 951 F.3d 84 (2d Cir. 2020).

⁸⁶ See *infra* notes 162-163 and accompanying text.

⁸⁷ *U.S. v. Butler*, *supra* note 86.

⁸⁸ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999) (“Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take.”)

⁸⁹ *U.S. v. Lopez*, 514 U.S. 549 (1995).

invalidated under the Commerce Clause and it ushered in a “federalism revolution” that saw the powers of Congress curtailed across a number of domains in exchange for expanded state power.⁹⁰ With respect to the Commerce Clause, the Rehnquist Court invalidated portions of the Violence Against Women Act in 2000⁹¹ and the intrastate enforcement of the Controlled Substances Act in 2005.⁹² However, the Court had more arrows in its quiver.

In 1997, the Rehnquist Court invalidated an enforcement provision of the Brady Handgun Violence Prevention Act that required state law enforcement officers to conduct background checks on handgun purchasers on an interim basis until the Attorney General established a national background check system.⁹³ The Court rejected this arrangement because “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”⁹⁴ Citing to the Tenth Amendment and the Necessary and Proper Clause, the majority held that the federal government may not commandeer state officials to enforce federal regulatory programs.⁹⁵ Federal power was thus cabined even further.

The Supreme Court put its thumb on the scale against the federal government in other ways, too. For example, the Court narrowed the authority of Congress to enforce the Reconstruction Amendments in *City of Boerne v. Flores* (1997),⁹⁶ and interpreted the Equal Protection Clause to exclude anti-subordination efforts in *Adarand Constructors v. Peña* (1995).⁹⁷

During this same period, the Supreme Court explicitly expanded the rights of states. For example, in 1999 the Court held that states cannot be sued by private individuals in their own state courts.⁹⁸ This holding was especially consequential since the 11th Amendment protects states from being sued by

⁹⁰ See Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7 (2001); Engstrom *supra* note 27.

⁹¹ *U.S. v. Morrison*, 529 U.S. 598 (2000).

⁹² *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁹³ *Printz v. U.S.*, 521 U.S. 898 (1997) (invalidating 107 STAT. 1536).

⁹⁴ *Id.* at 920 (internal citations omitted).

⁹⁵ *Id.* at 935-936 (O'Connor concurring) (“The Brady Act violates the Tenth Amendment”) and at 923 (“This argument also falsely presumes that the Tenth Amendment is the exclusive source of protection for principles of federalism” . . . “What destroys the dissent’s Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself.”).

⁹⁶ 521 U.S. 507 (1997).

⁹⁷ 515 U.S. 200 (1995)

⁹⁸ *Alden v. Maine*, 527 U.S. 706, 749 (1999) (“A power to press a State’s own courts into federal service is the power to commandeer the entire political machinery of the State against its will.”).

private individuals in federal courts. The result was that plaintiffs seeking redress for unlawful state action were left with no legal forum to hold states accountable.⁹⁹ The Court recently affirmed this outcome by clarifying that states cannot be sued in other states' courts either.¹⁰⁰

Notably absent from the Court's jurisprudence during this "federalism revolution" were cases reining in the power of Congress under the Spending Clause. Indeed, several scholars noted that the Court's federalism cases were like squeezing a balloon: While limiting so many other channels of federal power, the Court had unwittingly expanded the power of Congress under the Spending Clause. Chemerinsky wrote in 2001 that "we may be seeing Congress trying to achieve through the spending [clause] what it's not going to be able to achieve through the commerce power or through Section Five of the Fourteenth Amendment."¹⁰¹ Baker and Berman predicted in 2003 that an ambitious Congress may expand its ballooning power under the Spending Clause to the point where it pops.¹⁰² In 2008, Bagenstos predicted a more limited retrenchment. Because Spending Clause cases are often cast as contracts between Congress and the states, Bagenstos argued that courts were likely to employ theories of contract law that would curtail the scope of conditional spending.¹⁰³ These predictions of the Spending Clause's demise proved somewhat exaggerated.

In only a single case since 1936 has the Supreme Court invalidated a conditional spending program under the Spending Clause. In 2012, the Roberts Court held that Congress could not condition all of the federal government's Medicaid funding to states on compliance with a new federal Medicaid mandate. According to the majority, the denial of all funds is "more than relatively mild encouragement—it is a gun to the head."¹⁰⁴ The Court stopped short, however, of invalidating the Medicaid mandate. Instead, the

⁹⁹ U.S. CONST. AMEND. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State").

¹⁰⁰ *Tax Franchise Bd. of Calif. v. Hyatt*, 587 U.S. ____ (2019).

¹⁰¹ Chemerinsky, *supra* n. 90 at 18. Some scholars have argued that Congress *should* expand its Spending authority in this era to achieve important policy goals, like environmental protection. See, e.g., Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAPMAN L. REV. 147 (2001).

¹⁰² Lynn A. Baker and Mitch Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003).

¹⁰³ Bagenstos *supra* note 38.

¹⁰⁴ *Nat. Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012). Hereinafter *NFIB*.

Court upheld the underlying conditions on federal spending by interpreting their reach to only the marginal costs of those conditions.¹⁰⁵

Since 2012 the Court has been relatively silent with respect to the Spending Clause. The recent controversy over sanctuary cities is likely to resurrect predictions of the Clause's inconspicuous destiny.¹⁰⁶ In particular, the appointment of Justices Gorsuch and Kavanaugh to the Court raise the prospect that the federalism revolution is far from over. Both Justices Gorsuch and Kavanaugh have articulated concerns about expanding federal power, and federal *administrative* power in particular.¹⁰⁷ Thus, the question

¹⁰⁵ The Court was split on the Medicaid provisions of the Affordable Care Act. Five Justices voted to invalidate the conditions on Medicaid as applied to *all* Medicaid funds, and four Justices would have upheld the conditions on all Medicaid funding. Chief Justice Roberts split from the majority and held that the conditions on Medicaid funding could apply to *new* funds (to accommodate the proposed expansion) and Justices Ginsburg and Sotomayor concurred on this point to save the conditions. 567 U.S. at 646 (“The Chief Justice is undoubtedly right to conclude that Congress may offer States funds “to expand the availability of health care, and require that States accepting such funds comply with the conditions on their use.”). There were thus seven votes to invalidate the conditions as enacted, but no majority on the remedy: four Justices would have invalidated the conditions and three would apply the conditions just to new funding. Under Supreme Court precedent, “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted). Thus, the narrower conclusion of Justices Roberts, Ginsburg, and Sotomayor controls.

¹⁰⁶ Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL’Y 71, 81 (2014) (arguing that the Court’s analysis in *NFIB v. Sebelius* has already neutered the Spending Clause and that “The Court’s 1987 five-pronged Dole test seems no longer to be the governing doctrine, but it is far from clear what has replaced it.”).

¹⁰⁷ See, e.g., *Gundy v. U.S.*, 139 S.Ct. 2116, 2131 (2019) (J. Gorsuch dissent) (“The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?”) As a judge on the Tenth Circuit, Gorsuch strongly signaled a desire to limit the dominion of the administrative state. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (2016) (“There’s an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”). Justice Kavanaugh has expressed concerns about the *Chevron* doctrine in academic articles as well as judicial opinions. See CONG. RES. SVC. Rep. No. LSB10204, 3 (2018) (“In his scholarly writing, Justice Kavanaugh argued that the *Chevron* doctrine incentivizes federal agencies to push the boundaries of their statutory

of *sua sponte* executive conditions on federal grants-in-aid poses a ripe opportunity for the Court to not only rein in the Spending Clause more generally, but also the regulatory state more specifically.

PART III

SANCTUARY CITIES AND THE SPENDING CLAUSE

A. Executive Order 13,768

One week after the new administration took power in January 2017, President Trump issued Executive Order 13,768,¹⁰⁸ and in so doing, set federal courts on the course to confront the issue of executive conditional spending. The Executive Order, entitled “Enhancing Public Safety in the Interior of the United States,” issued a policy which directed the Attorney General and the Secretary of Homeland Security to ensure that state and local jurisdictions who refuse to comply with federal efforts at immigration enforcement would not receive federal grants.¹⁰⁹ The E.O. states (in relevant part):

Section 1. Purpose. Interior enforcement of our Nation’s immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic . . .

Section 2. Policy. It is the policy of the executive branch to:

authority, taking actions unless “clearly forbidden.” . . . Justice Kavanaugh’s judicial opinions from his time on the D.C. Circuit reflect these concerns.”). *See also* Jacob Gershman, *Brett Kavanaugh Has Shown Deep Skepticism of Regulatory State*, WALL ST. J. (July 9, 2018) available at <https://www.wsj.com/articles/nominee-has-shown-deep-skepticism-of-regulatory-state-1531186402>.

¹⁰⁸ Exec. Order No. 13,768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799 (Jan. 25, 2017).

¹⁰⁹ *Id.*

- (a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;
- (b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;
- (c) Ensure that jurisdictions that fail to comply with applicable Federal law **do not receive Federal funds**, except as mandated by law . . .¹¹⁰

B. Byrne JAG Funds

In response to the Executive Order, in July 2017, the Attorney General attached immigration-related conditions to federal grants under the control of the Department of Justice—the “Byrne JAG” grants.¹¹¹ The Byrne JAG program is the primary source by which state and local jurisdictions receive federal funding to support various criminal justice institutions and programs.¹¹² It has been referred to as “the cornerstone federal justice assistance program.”¹¹³

The Department of Justice did not attempt to conceal its intentions in imposing the Byrne JAG conditions—Attorney General Jeff Sessions stated that the conditions were imposed in order to “encourage . . . ‘sanctuary’ jurisdictions to change their policies.”¹¹⁴ The conditions imposed three requirements on sanctuary jurisdictions: state and local law enforcement were

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Byrne JAG Press Release*, *supra* note 10. The full title of the grant program is the Edward Byrne Memorial Justice Assistance Grant Program, which was established through the Omnibus Crime Control and Safe Streets Act of 1968. CORNERSTONE FOR JUSTICE: BYRNE JAG AND ITS IMPACT ON THE CRIMINAL JUSTICE SYSTEM, NATIONAL CENTER FOR JUSTICE PLANNING, at 2 (May 2011), https://www.bja.gov/Publications/NCJA_JAGReport.pdf. Hereinafter as “CORNERSTONE FOR JUSTICE REPORT.”

¹¹² Byrne JAG: Funding State and Local Criminal Justice Programs, National Criminal Justice Association, <https://www.ncja.org/ncja/byrne-jag-investments-and-impact/investing-byrne-jag>. The top five areas where state and local authorities used Byrne JAG money in 2016 were drug, gang, and other task force operations and personnel; law enforcement equipment; prosecution and indigent defense initiatives; corrections and community corrections; and crime prevention programs. Byrne JAG Spending Data, National Criminal Justice Association, <http://www.ncja.org/ncja/byrne-jag-investments-and-impact/expenditures-by-project-type>.

¹¹³ CORNERSTONE FOR JUSTICE REPORT, *supra* note 111 at 2.

¹¹⁴ *Byrne JAG Press Release*, *supra* note 10.

to provide forty-eight hours' notice to federal officials before releasing an "illegal alien wanted by federal authorities;"¹¹⁵ U.S. Department of Homeland Security personnel were to be afforded the ability to "access any detention facility" for the purpose of meeting with an "alien" in order to "inquire as to his or her right to be or remain in the United States,"¹¹⁶ and; jurisdictions were to certify compliance with 8 U.S.C. § 1373, a federal statute which prohibits states from limiting voluntary exchanges of immigration and citizenship information to and from the Immigration and Naturalization Service.¹¹⁷ The Attorney General added three more similarly-themed conditions to the grants the following year.¹¹⁸

These two actions—Executive Order 13,768 and the Byrne JAG conditions—quickly found their way into federal courts when various sanctuary jurisdictions filed lawsuits challenging their constitutionality. The Executive Order was challenged in California district court within a week of its publication¹¹⁹ and the Byrne JAG conditions were challenged in numerous district courts, including those of Pennsylvania, California, Illinois, and New York.¹²⁰ These district courts, along with the circuit courts who would later hear the appeals, faced a jurisprudential quandary about how to harness conditional spending power, a power that has typically belonged to Congress. The main confusion among the courts has been in how to interpret the Spending Clause and the Supreme Court precedent in *South Dakota v. Dole*, because *Dole* and other Spending Clause cases generally only contemplate situations where Congress was the entity that attached conditions to federal grants.¹²¹

C. In the Courts

¹¹⁵ *Id.*

¹¹⁶ Backgrounder on Grant Requirements, Department of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/press-release/file/984346/download>.

¹¹⁷ 8 U.S.C. § 1373; *Byrne JAG Press Release*, *supra* note 10.

¹¹⁸ *Chicago v. Barr*, 2019 WL 4511546, at *2–3 (N.D. Ill. Sept. 19, 2019).

¹¹⁹ The lawsuit was filed by the City of San Francisco on January 31, 2017 and a motion to relate the case to the lawsuit filed by the City and County of Santa Clara on February 3, 2017 was later granted. *Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

¹²⁰ The cases include *Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017); *San Francisco v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018); *Chicago v. Barr*, 2019 WL 4511546 (N.D. Ill. Sept. 19, 2019); *New York v. Dep't of Justice*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018).

¹²¹ *See, e.g., id.*; *NFIB supra* note 104; *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

When the decisions in the federal cases that contemplated Executive Order 13,768 and the Byrne JAG conditions are taken as a whole, two overarching categories of judicial approaches appear. One category is comprised of the circuit and district courts which held that the dispositive issue was whether Congress actually delegated conditional spending power to the Executive in the cases before them. Because these courts determined that Congress did not delegate the power, they never reached a discussion of the substance of the imposed conditions in relation to the conditional spending doctrine of *South Dakota v. Dole*. This approach was taken by the First, Third, Seventh, and Ninth Circuits, as well as several district courts, including the District Courts for the Northern District of Illinois and Southern District of New York.¹²²

The Ninth Circuit dealt with Executive Order 13,768 and the Byrne JAG conditions in separate cases. In the first, the court analyzed the President's power to issue E.O. 13,768 pursuant to *Youngstown Sheet & Tube Company v. Sawyer*.¹²³ In the second, the court held that Congress had not delegated conditional spending power to the Department of Justice in a way that would justify the Byrne JAG conditions themselves.¹²⁴

The other category of judicial approaches is comprised of the district courts which made forays into applying *Dole* to executive conditional spending, and did so with varying levels of confusion and accuracy.¹²⁵ However, when these cases were appealed, circuit courts focused almost exclusively on whether Congress had actually delegated the conditional spending power to the Executive in the first place.¹²⁶ Since they concluded that Congress did not delegate the authority to add conditions, the circuit courts were silent on the applicability of *Dole*.

One notable exception is the recent Second Circuit opinion that interpreted the statutory delegation of authority to the Attorney General to administer the Byrne JAG program as sufficiently broad to include adding

¹²² These cases are *Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *Philadelphia v. Attorney Gen. of the United States*, 916 F.3d 276 (3d Cir. 2019); *Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018); *Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *Chicago v. Barr*, 2019 WL 4511546 (N.D. Ill. Sept. 19, 2019); *New York v. Dep't of Justice*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018).

¹²³ *San Francisco v. Trump*, 897 F.3d 1225, 1233–35 (9th Cir. 2018).

¹²⁴ *Los Angeles v. Barr*, 941 F.3d 931, 935-936, 944-945 (9th Cir. 2019).

¹²⁵ These cases include *Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017); *San Francisco v. Sessions*, 349 F. Supp. 3d 924 (N.D. Cal. 2018); *Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017); *Seattle v. Trump*, 2017 WL 4700144 (W.D. Wash. Oct 19, 2017).

¹²⁶ See cases cited *supra* note 122.

conditions on program funding.¹²⁷ The Second Circuit’s decision focused on the question of congressional delegation while intertwining aspects of *Dole* in its analysis, both expressly and implicitly.¹²⁸

1. Applying *Dole* to Executive Conditions

The jurisprudential problem created by executive conditions boils down to whether limits on the Spending Clause should apply to both Congress and the Executive in equal measure. As recent lower court opinions make clear, the law is not well-defined on this question. The reason for confusion is understandable: The existing case law has only contemplated the constitutionality of conditional spending when Congress attaches them.¹²⁹ As courts grapple with executive conditions, they disagree about *which* doctrines to apply and are inconsistent about *how* they apply the doctrines they do choose to apply.

Regarding the first level of confusion, courts have contemplated a wide range of constitutional doctrines when confronted with executive conditional spending. District courts have applied traditional separation of powers doctrines, arbitrary and capricious agency action analysis, anticommandeering and Tenth Amendment arguments, and the conditional spending doctrine in *Dole*—sometimes all in the same decision.¹³⁰ In the context of challenges to Executive Order 13,768 directly, courts have replaced their arbitrary and capricious analysis with discussions of vagueness and procedural due process under the Fifth Amendment.¹³¹ Among all of the cases that have addressed these executive-issued conditions substantively, no particular doctrinal line of argument has dominated the others.

Lower courts that apply the *Dole* framework have been inconsistent. Judges are split on the relevant inquiry to satisfy the ambiguity prong of *Dole*.

¹²⁷ *New York et al. v. Dept. of Justice*, 951 F.3d 84 (2d Cir. 2020).

¹²⁸ I accept as given that Congress has the ability to delegate its spending power to the Executive. As the Seventh Circuit declared, “Congress may of course delegate such authority to the Executive Branch.” *Chicago v. Sessions*, 888 F.3d at 283. See also *Philadelphia v. Attorney Gen. of the United States*, 916 F.3d at 279.

¹²⁹ E.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); *NFIB supra* note 104; *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

¹³⁰ See, e.g., *Philadelphia v. Sessions*, 280 F. Supp. 3d; *San Francisco v. Sessions*, 349 F. Supp. 3d. The wide range of doctrines that district courts have addressed is partly explained by noting that the complaints challenging these conditions advanced a variety of bases for their unconstitutionality.

¹³¹ E.g., *Santa Clara v. Trump*, 250 F. Supp. at 534–36.

Is a court to look to the Byrne JAG authorizing statute,¹³² official proclamations of the Department of Justice,¹³³ or grant award letters? In short, courts have conflated the ambiguity of Congress's delegation of authority to add conditions on Byrne JAG funds with the ambiguity of the conditions themselves.¹³⁴ There is also a temporal component that inherently creates confusion in applying *Dole* to executive-issued conditions. Congress appropriates grant money, while an agency later administers the grant, including making grant solicitation announcements, taking applications from state and local jurisdictions, and eventually awarding grants. When should courts evaluate the ambiguousness of the proffered conditions? At the appropriation/authorizing stage? During the request for proposals and solicitation of grants? At the award stage? If courts differ on which stage is most probative of constructive notice for grantees, they may arrive at different conclusions about different governmental actors.

¹³² *E.g.*, *Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 593 (E.D. Pa. 2017) (“However, regardless of the amount of authority delegated by Congress to the awarding agency, all grant terms must be consistent with the authorizing statute.”)

¹³³ *E.g.*, *San Francisco v. Trump*, 897 F.3d 1225, 1241 (9th Cir. 2018) (“The Administration asks us to look beyond the Executive Order’s text and the Administration’s rhetoric to give controlling construction to the DOJ Memorandum.”)

¹³⁴ In *Philadelphia v. Sessions*, the District Court for the Eastern District of Pennsylvania simultaneously contemplated the actions of both Congress and the Executive in trying to ascertain whether the conditions were unambiguous. In concluding that the three Byrne JAG conditions did not pass the *Dole* test, the court stated that two of the conditions “cannot have been unambiguously authorized by Congress if they were never statutorily authorized.” *Philadelphia v. Sessions*, 280 F. Supp. 3d. at 646. But this statement is ambiguous itself—is the court concluding that: Congress imposed ambiguous conditions (strange, because the Attorney General imposed the conditions), that the Attorney General was not *unambiguously authorized* by Congress to impose the conditions (strange, because *Dole* requires that the condition itself be unambiguous), or that the Attorney General was not delegated the power to impose the conditions (a separate argument altogether)? In *San Francisco v. Sessions*, the District Court for the Northern District of California had similar confusions in analyzing ambiguousness under *Dole*. In its inquiry into the ambiguity of the Byrne JAG conditions, the court first acknowledged the Department of Justice’s arguments that the conditions were not ambiguous because they were clear in their language, they were listed in the grant awards, and because the grant solicitations stated that a grant manager was available to answer questions. *San Francisco v. Sessions*, 349 F. Supp. 3d 924, 956 (N.D. Cal. 2018). But the court pivoted from a substantive discussion of the conditions and instead concluded that they were ambiguous because there was “no authority within the Byrne JAG statute to support the Attorney General’s purported power to impose the new conditions.” *Id.* at 957. The court appeared to conflate an analysis of the actual conditions with an inquiry into the authority of the Executive to impose the conditions. Some courts have expressly stated their confusion in applying existing conditional spending case law to the Byrne JAG conditions. *See Philadelphia v. Sessions*, 280 F. Supp. 3d. at 645 (“Spending Clause ambiguity cases generally involve statutory construction, not interpretation of conditions imposed by an agency.”).

This timeline gets even more complicated when the administration becomes directly involved via executive order. In analyzing Executive Order 13,768 courts have made confused statements about congressional authority while analyzing the E.O. for ambiguousness under *Dole*.¹³⁵

As a possible point of clarification, the Supreme Court has stated that determining whether a condition is unambiguous can be likened to contract formation—i.e., a condition is unambiguous if it can be said that sufficient offer and acceptance has occurred.¹³⁶ But this analogy provides limited clarity because there are now two possible sources of the offer: Congress and the Executive. Courts have expressly voiced this specific confusion.¹³⁷ This contract formation analogy has an even more limited effect in the context of Executive Order 13,768, because in that case there is no offer, only an edict that the Attorney General and the Secretary of Homeland Security should act, yet the E.O. does not itself attach any conditions.

With respect to the other *Dole* factors—relatedness and coercion—the lower courts have not struggled nearly as much. For example, in both *San Francisco v. Sessions* and *Philadelphia v. Sessions* the district courts determined that the Byrne JAG program’s focus on “criminal drug enforcement, violent crime, and gang activities” were not sufficiently related to “immigration enforcement.”¹³⁸ Notably, nowhere in the reporting by states about their expenditures under Byrne JAG is immigration mentioned. Not a single time.¹³⁹ The courts that have evaluated the nexus of Attorney General

¹³⁵ The District Court for the Northern District of California, in *Santa Clara v. Trump*, concluded that the unambiguous prong of *Dole* was not met because the condition that Executive Order 13,768 imposed, a withholding of seemingly all federal funds absent immigration compliance, “was not an unambiguous condition that the states and local jurisdictions voluntarily and knowingly accepted at the time Congress appropriated these funds.” 250 F. Supp. 3d 497, 532 (N.D. Cal. 2017). Here, although this conclusion was reached in the context of the ambiguousness inquiry, the real issue for the court appears to be the fact that it was not Congress that imposed the condition. Further, the court combined the act of Congress appropriating funds with the act of a state later accepting conditioned funds into a single, amorphous action, when these are actually two separate stages of the process. But the court offered better reasoning later in the opinion by stating that the E.O.’s condition is also ambiguous because it is not clear “what funds are at issue” and “what conditions apply to those funds.” *Id.*

¹³⁶ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹³⁷ See *Philadelphia v. Sessions*, 280 F. Supp. 3d at 645–46 (posing several questions that the contract formation analogy creates including: “Was it Congress or the agency making the offer?” and “What must be unambiguous?,” among others).

¹³⁸ *San Francisco v. Sessions*, 349 F. Supp. 3d at 960; See also *Philadelphia v. Sessions*, 280 F. Supp. 3d at 639–44.

¹³⁹ See, e.g., *The Impact of the Byrne Justice Assistance Grant Program*, NAT’L CRIM. JUSTICE ASS’N (2013) (summarizing how states spend their Byrne JAG funds. The term

Session’s immigration-related conditions to the Byrne JAG program have found that the connection is insufficient under *Dole*. Finally, courts have largely avoided any discussion of the potential coercion of E.O. 13,768 or the Byrne JAG conditions.¹⁴⁰

2. Avoiding *Dole* Altogether

The First,¹⁴¹ Second,¹⁴² Third,¹⁴³ Seventh,¹⁴⁴ and Ninth Circuits¹⁴⁵ have primarily focused their inquiry on whether Congress delegated conditional spending power to the Executive. Because this decision precedes the conditions themselves, these approaches largely avoid the *Dole* test. Only the Second Circuit held that Congress had delegated authority to the Attorney General when it required that all grant recipients comply with “all other applicable Federal laws.”¹⁴⁶ The remaining four circuits held that the Attorney General lacked the delegated authority to add conditions on Byrne JAG funds, despite this language. The Seventh Circuit expressly stated that Congress *could* delegate conditional spending power and the Third Circuit signaled the same view.¹⁴⁷ The Ninth Circuit offered that Congress could

“immigr*” does not appear a single time in the summaries). *See also FY 2018 Byrne JAG Program Grant Application Program Narrative*, STATE OF HAWAII ATT’Y GEN. (2018).

¹⁴⁰ In *San Francisco v. Sessions*, the conditions were only challenged as violating the unambiguous and relatedness requirements of *Dole*, and the court limited its analysis to those prongs. 349 F. Supp. 3d 924, 955 (N.D. Cal. 2018). In both *Santa Clara v. Trump* and *Seattle v. Trump*, the courts determined that Executive Order 13,768 was coercive without much analysis as it seemingly conditioned all federal grants on immigration compliance. *Seattle v. Trump*, 2017 WL 4700144, at *9 (W.D. Wash. Oct. 19, 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 536 (N.D. Cal. 2017). Two other district courts focused on delegation and did not apply the *Dole* test. *Chicago v. Barr*, 2019 WL 4511546 (N.D. Ill. Sept. 19, 2019); *New York v. Dep’t of Justice*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018). In *Philadelphia v. Sessions*, the court approached the coercive prong of *Dole* by incorporating it into its decision on the City’s separate Tenth Amendment challenge and the court never actually analyzed whether the financial inducement was coercive. 280 F. Supp. 3d 579, 647–51 (E.D. Pa. 2017).

¹⁴¹ *Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020).

¹⁴² *New York et al. v. Dept. of Justice*, 951 F.3d 84 (2d. Cir. 2020).

¹⁴³ *Philadelphia v. Att’y Gen. of the U.S.*, 916 F.3d 276 (3d Cir. 2019).

¹⁴⁴ *Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018).

¹⁴⁵ *Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019) and *San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

¹⁴⁶ 34 U.S.C. § 10153(a)(5)(D).

¹⁴⁷ *See Chicago v. Sessions*, 888 F.3d at 283 (stating that “Congress may of course delegate such authority to the Executive Branch”). *See also Philadelphia v. Attorney Gen. of the United States*, 916 F.3d at 279. Note both of these opinions framed the issue generally as “Executive Branch” authority, without distinguishing between the President and the regulatory state more generally.

delegate conditional spending power to the executive branch in general, but ultimately the court narrowed its actual analysis to the *President's* use of conditional spending power.¹⁴⁸ While the Ninth Circuit determined that it was clear that Congress had not delegated conditional spending power to the President,¹⁴⁹ it did not hold that lack of delegation as dispositive. The court also analyzed the Executive Order pursuant to *Youngstown Sheet & Tube Company v. Sawyer*, but ultimately concluded that the order exceeded the President's authority because his power was at its lowest ebb as it was not aligned with the will of Congress.¹⁵⁰ Unfortunately, all of these circuits—the First, Third, Seventh, and Ninth—did not offer any guidance as to what a court should do when Congress *has* delegated conditional spending power to the Executive.¹⁵¹

There are several aspects of the Second Circuit's opinion that bear highlighting because the opinion not only stands as a counterargument to the other circuits, but also poses threshold matters for debate. First, the Second Circuit framed the issue not as whether the Attorney General had been delegated conditional spending power specifically, but rather whether he had been delegated the authority to act in this way more broadly¹⁵²—i.e., whether the conditions represent actions that were permissible through several other bases of delegated authority. With this shifted focus, the Second Circuit appeared to imply that the Attorney General was not even attaching conditions in a way that implicates conditional spending doctrine, but rather was operating within his delegated discretion to effectively administer the grant program.

This poses an interesting question because, of course, a certain amount of discretion is necessary for the Executive to effectively administer a grant program. In this case, however, it does not appear that the conditions were necessary to administer the Byrne JAG program; the Attorney General

¹⁴⁸ *San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

¹⁴⁹ *Id.* at 1234.

¹⁵⁰ *Id.* at 1233–35. After its *Youngstown* analysis, the Ninth Circuit referenced the Executive's limits on impoundment by noting that “[a]bsent congressional authorization, the Administration may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals.” *Id.* at 1235.

¹⁵¹ The Seventh Circuit explicitly noted that “[w]hether the conscription of local and state law enforcement . . . through the sword of withholding federal funds presents other Constitutional concerns is not before us.” 888 F.3d 272, 282–83 (7th Cir. 2018). The court then listed three cases as a “see generally” citation to this comment, *N.F.I.B. v. Sibelius, Printz v. United States*, and *Dole*, perhaps signaling that court would consider anti-commandeering, the Tenth Amendment, and the *Dole* test as possible bases of analysis.

¹⁵² *Id.* at 101-104 (evaluating DOJ authority under 34 U.S.C. §§ 10102(a)(6), 10153(a)(4), 10153(a)(5)(C), 10153(a)(5)(D), and 10155).

explicitly stated that the intent of the conditions was to pursue a particular policy agenda.¹⁵³ To the extent there is any doubt about the purpose of the conditions, E.O. 13,768 provides a clear statement of the government’s interest, although the Second Circuit does not mention the E.O.¹⁵⁴

A second notable aspect of the Second Circuit’s opinion is its criticism that sanctuary jurisdictions are biting the hand that feeds them—that sanctuary policies “frustrate” federal immigration enforcement.¹⁵⁵ I discuss the implications that immigration has on federal-state relations below in Section IV.B.

3. Other Themes

Beyond the formal inquiries of the *Dole* test, courts and legal scholars have described general concerns that conditional spending implicates. These concerns include accountability, notice, and issues related to contract law doctrine.¹⁵⁶ Executive conditions add even greater complexity and also pose the refrain common to any novel issue, whether a slippery slope is being constructed.

Courts have been concerned with issues of notice outside of formal *Dole* inquiries. Whether cities and states have been afforded fair notice in deciding whether to apply for or accept grants, and whether they had full awareness of what obligations would follow the grants, has been a theme in several cases.¹⁵⁷ Of course, notice can be interwoven into the ambiguousness prong of *Dole*, but here, notice is spoken of outside that inquiry. In the context of conditional spending, courts have a choice whether to focus upon the actions of the Executive or Congress. Some district courts have contemplated the notice afforded by Congress’ language in the Byrne JAG statute underlying the executive-issued conditions, noting that the authorizing statute requires the Attorney General not to deny a jurisdiction’s application without first

¹⁵³ See Byrne JAG Press Release *supra* note 10.

¹⁵⁴ See *supra* note 108 (defining the “Purpose” of the Executive Order as “Interior enforcement of our Nation’s immigration laws.”)

¹⁵⁵ *Id.* at 4–5, 42–43.

¹⁵⁶ See e.g., Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2232 (2020) and David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496 (2007).

¹⁵⁷ See Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561 (2015) (summarizing the case law where courts evaluate grant programs as contracts and demonstrating that the contractual relationship between states/cities and the federal government is complicated by various consent procedures.)

“affording the applicant reasonable notice of any deficiencies in the application and opportunity for correction and reconsideration.”¹⁵⁸

The Second Circuit concluded that sufficient notice to grantee jurisdictions was provided by the Executive, reasoning that Congress relies on the Executive to resolve ambiguities in administering grant programs.¹⁵⁹ On the other hand, Executive Order 13,768 has been found to violate procedural due process because it seeks to deprive jurisdictions of federal funds before affording sufficient notice or opportunity to be heard.¹⁶⁰

PART IV

IN DEFENSE OF *DOLE*

I begin this Part with a pragmatic defense of the basic logic of *South Dakota v. Dole*. Several scholars have argued that the provisions of *Dole* are vacuous and illogical,¹⁶¹ and thus a proposal to double-down on *Dole* in the case of executive conditions is likely to draw some critics. In short, I argue that the *Dole* provisions, while analytically problematic, are a useful heuristic for balancing federal and state power. The Supreme Court has repeatedly interpreted the Spending Clause broadly, including as a vehicle for Congress to circumvent other limits on its power.¹⁶² The Court has also held, however,

¹⁵⁸ See, e.g., *New York v. Department of Justice*, 343 F. Supp. 3d 213, 230-231 (S.D.N.Y. 2018) (citing 34 U.S.C. § 10154 and noting that the requirement that grantees comply with “all other applicable Federal laws” would supply sufficient notice to grantees subject to the “clear notice” rule. 343 F.

¹⁵⁹ When the Second Circuit contemplated whether the same language in the Byrne JAG statute—compliance with “all other applicable Federal laws”—provided sufficient notice to grantees, it held that there was “no *Pennhurst* concern” even though “notice was provided by the DOJ and not Congress.” *New York, et al. v. Department of Justice*, *supra* note 21 at 51. For the court, Congress supplied the condition generally, and the DOJ selected an appropriate “applicable” federal law (8 U.S.C. § 1373).

¹⁶⁰ *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 536 (N.D. Cal. 2017).

¹⁶¹ See, e.g., Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 123 (referring to the relatedness prong as a “contentless restriction”); Bagenstos, *supra* note 38 at 356-80; Engstrom, *supra* note 27; Baker and Berman, *supra* note 102.

¹⁶² *United States v. Butler*, 297 U.S. at 65-66 (arguing that “the [Spending] clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.”). See also *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980) (“the reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress.”) (emphasis added), and *Printz v. United States*, 521 U.S. 898, 917-18 (1997)

that the power to spend is not unlimited.¹⁶³ If the power of Congress is not limited by the enumerated powers of Article I § 8, then how should one think about the limits on its power? The federalism concerns with Spending Clause overreach can be separated into two general classifications: (1) fairness of contract and (2) accountability.

In *Pennhurst v. Halderman*, the Supreme Court wrote that “legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”¹⁶⁴ The animating theory behind the contract model of federalism is that the federal government and the states are dual sovereigns, whose disputes should be refereed like disputes between two equally situated private citizens in a contract dispute. This contract theory has found strong support in the academic literature.¹⁶⁵ The role of courts in contract disputes is to ensure that the elements of contract formation have been met, and then to enforce performance unless the terms are deemed unconscionable or otherwise unacceptable for public policy reasons.¹⁶⁶ In Spending Clause cases, courts do not hold parties to the same performance standards as private parties under the common law, but the general idea is that courts should defer to the terms of the contract and only intervene when the terms are extremely unfair.¹⁶⁷ In addition, if the federalism concern is related to notice and foreseeability, then courts should not distinguish between spending conditions authored by Congress and those affixed by the Executive. As Peter

(making a distinction between “conditions upon the grant of federal funds” and actual “mandates to the States” while discussing commandeering).

¹⁶³ See e.g., *United States v. Butler*, 297 U.S. at 66 (“But the adoption of the broader construction leaves the power to spend subject to limitations.”); *Pennhurst v. Halderman*, 451 U.S. at 18 (fn 13) (“There are limits on the power of Congress to impose conditions on the States pursuant to its spending power.”); *South Dakota v. Dole*, 483 U.S. at 207 (“The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases.”).

¹⁶⁴ *Pennhurst supra* note 71.

¹⁶⁵ See, e.g., Engdahl *supra* note 156 (arguing that although spending conditions are “articulated in a statute or rule, they have no force as ‘law:’ their only force is contractual. Consequently, they are not among the ‘Laws of the United States’ . . . made in Pursuance of the Constitution to which the Supremacy Clause applies.”); Bagenstos, *supra* note 38 at 385 (arguing against the normative value of the contract analogy, but predicting its continued use in courts); Fahey *supra* note 156; Fahey *supra* note 157 (focusing on the offer, acceptance, and meeting of the minds involved in federal grants-in-aid); Smith *supra* note 27.

¹⁶⁶ See, e.g., JOSEPH M PERILLO, CALAMARI & PERILLO ON CONTRACTS (2009).

¹⁶⁷ Smith *supra* note 27 at 1191 (noting that courts should intervene in cases “that involve obvious unfairness to the states.”)

J. Smith notes, “an agency regulation provides a state with notice of its federal obligations just as effectively as a statute does.”¹⁶⁸

On the other hand, if the federalism concern about congressional spending is a lack of accountability, then conditions on spending should be enforced by courts in a way that ensures the electorate can trace them back to Congress. The animating theory behind the accountability model of spending power is the political safeguards of federalism.¹⁶⁹ Because states are represented in Congress (e.g., each state has two Senators regardless of land or population), courts should worry less about states being victimized by Congress as opposed to agency heads, who are less accountable to both the states and to the general electorate. Thus, when Congress announces conditions directly, courts should worry less about whether states had proper notice or were coerced into service than whether the electorate understands the role of Congress in the spending scheme. When the Executive announces conditions on spending, however, courts should be more exacting in their inquiry into the nature of the conditions themselves vis-à-vis notice and coercion.

A. Pragmatic Heuristics of Federalism

Critics of *Dole* have generally argued that the decision underplays the importance of notice and foreseeability,¹⁷⁰ and overplays the potential for accountability.¹⁷¹ Recent scholarship challenges the accountability model because it is under-specified and thus poses a threat to *Chevron* because it cuts against judicial deference to executive decisions in the face of ambiguity.¹⁷² I do not discount the analytic critiques of the accountability model. Instead, I argue that the accountability model is *relatively* preferable to the contract model for parsing out a Spending Clause doctrine that distinguishes between conditions authored by the Executive versus Congress.

¹⁶⁸ *Id.*

¹⁶⁹ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

¹⁷⁰ See *supra* note 165.

¹⁷¹ See, e.g., Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989 (2018).

¹⁷² Smith, *supra* note 27 at 1190 (“the accountability model upsets the delicate balance that *Pennhurst* achieved between federal and state interests and undermines the important values advanced by the Court’s decision in *Chevron*.”); Engstrom *supra* note 27 at 1202 (“As a number of commentators have noted, the political accountability rationale is both under-specified and over-inclusive as a means of constraining federal power.”)

The standards articulated by the Supreme Court in *Dole* are particularly constructive not because of their precision, but because they provide a channel for courts to confront the federalism concerns of the Spending Clause related to both the contract theory and the accountability theory. The requirement that conditions on federal spending be unambiguously announced prior to the receipt of funding speaks to the need for notice and a proper offer in the contract context, and to the clarity of source necessary to hold the author of the conditions accountable for the terms of the conditions. The requirement that conditions on federal spending be related to the purpose of the spending speaks to the foreseeability concerns under the contract model, and ensures that backlash against actions taken pursuant to the conditions will be properly targeted to those responsible. Finally, the concern about coercion speaks to contract formation under duress as well as direct accountability concerns of the anti-commandeering cases under the Tenth Amendment.¹⁷³

Above all, the *Dole* conditions are the culmination of fifty years of organic doctrinal evolution solidified in 1987 and cited hundreds of times since. As a result, despite their flaws, they are entitled to a measure of deference.¹⁷⁴

B. Three Wrinkles of Sanctuary Cities

There are three distinct characteristics of the sanctuary cases that complicate a standard application of *Dole*. First, the Byrne JAG funds have been awarded since 2005 and both cities and counties have long incorporated these funds into their budgets and spent in reliance of their renewal. Adding conditions mid-stream raises the question of whether notice is even possible pre-award. Chief Justice Roberts has suggested that it is not. In *NFIB v. Sebelius* the Court grappled with whether Congress could condition *ongoing* Medicaid funding on compliance with a changed mandate. In his majority opinion, Roberts wrote:

As we have explained, though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or

¹⁷³ *New York v. United States*, 505 U.S. 144, 168 (1992) (“Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”); *Printz v. United States*, 521 U.S. 898 (1997).

¹⁷⁴ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992).

“retroactive” conditions. 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.¹⁷⁵

Justice Ginsburg countered Robert’s framing of the issue with a formalist account of federal spending:

Future Congresses are not bound by their predecessors’ dispositions; they have authority to spend federal revenue as they see fit. The Federal Government, therefore, is not, as The Chief Justice charges, threatening States with the loss of “existing” funds from one spending program in order to induce them to opt into another program. Congress is simply requiring States to do what States have long been required to do to receive Medicaid funding: comply with the conditions Congress prescribes for participation.¹⁷⁶

Because the issue was resolved on different grounds (see below) the question remains open whether conditions that are added to existing spending programs provide adequate notice, or whether they represent retroactive conditions that can only survive if they were foreseeable at the time Congress first appropriates the funding, if at all. (Though, it is worth noting that the Chief Justice was writing for the majority above). In *NFIB v. Sebelius* the Court ultimately sidestepped the unambiguous notice prong of *Dole* and instead held that the amount of money at stake was outcome determinative: Because Medicaid funding comprised approximately 15% of the overall budget of states, Congress could not annul its federal contribution to the Medicaid funding all at once.¹⁷⁷ Missing from the Court’s analysis was the fact that reneging already-existing funding programs *itself* increases the potential for coercion independent of the overall amount, particularly when federal spending is administered via reimbursements. Congress often provides for spending via reimbursement in order to protect against fraud and abuse. Because local jurisdictions first spend their own money in reliance on federal reimbursements, cutting these reimbursements could actually push a city or county into debt. As the Northern District of California wrote in its evaluation of E.O. 13,768: “A sudden and unanticipated cut midfiscal year

¹⁷⁵ *NFIB* at 584.

¹⁷⁶ *NFIB v. Sebelius* *supra* note X at 626.

¹⁷⁷ See *supra* note 104. See also Baker, *supra* note 106 at 78 (2014) (“The joint dissenters paid lip service to the other four requirements of the *Dole* test, but did not invoke any of them en route to invalidating the Medicaid expansion provision of the ACA.”).

would substantially increase the injury to the Counties by forcing them to make even more drastic cuts to absorb the loss of funds during a truncated period in order to stay on budget.”¹⁷⁸

A second feature of the sanctuary cases complicates a straight-forward *Dole* analysis: the vast majority of sanctuary jurisdictions are cities and counties.¹⁷⁹ These sub-state units do not possess the same elevated sovereignty status afforded to states. On the one hand, courts might be more concerned about the coercive potential of federal grants in the absence of state-level political safeguards of federalism and thus side with the cities and counties.¹⁸⁰ On the other hand, sub-state jurisdictions are subject to higher governmental authorities and they lack the bargaining posture of states whose status is explicitly fortified by the Tenth and Eleventh Amendments, thus leading courts to potentially side with the federal government. The only lower court to address this issue in the sanctuary cases did so by noting that “the federal government’s choice to pursue deportation on the basis of local criminal justice outcomes is something that cities and localities have no control over and presumably no input in.”¹⁸¹

The third distinctive characteristic of the sanctuary cases is related. That is, sanctuary jurisdictions are by their very definition antagonistic toward immigration law. As the Supreme Court held in *Arizona v. U.S.*, “the Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens” and “the federal power to determine immigration policy is well settled.”¹⁸² The field of immigration has thus been interpreted to be preempted in all cases by federal law.¹⁸³ The Second Circuit recognized the implications of this preemption by noting that “As the Supreme Court has repeatedly observed, in the realm of immigration

¹⁷⁸ *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 526-27 (N.D. Cal. 2017). The Eastern District of Pennsylvania directly pointed to Philadelphia’s reliance on Byrne JAG funds to grant the City’s motion for preliminary injunction. See *Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 655 (E.D. Pa. 2017) (“This Court finds that, given the long history of Philadelphia’s reliance on the annual receipt of Byrne JAG grants, and the absence of any evidence of abuse or misapplication, the preservation of the status quo is one substantial reason to grant the City’s motion for preliminary injunction.”)

¹⁷⁹ See *supra* note 1.

¹⁸⁰ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

¹⁸¹ *Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 632 (E.D. Pa. 2017).

¹⁸² *Arizona v. United States*, 567 U.S. 387, 394-95 (2012).

¹⁸³ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (6TH ED. 2019). It is perhaps worth noting that the Supreme Court has, on numerous occasions, identified law enforcement and public safety as quintessentially *local* issues into which federal authority should be limited.

policy, it is the federal government that maintains broad and preeminent power.”¹⁸⁴ The Third Circuit flagged the issue but did not pass judgment: “Underlying this question, and potentially complicating its resolution, is the stark contrast in the priorities of the City and those of the Executive Branch regarding immigration policy. In resolving the discrete legal question before us, however, we make no judgment as to the merits of this policy dispute.”¹⁸⁵

These three distinguishing characteristics cut in opposite directions—the ongoing nature of the Byrne JAG funds likely favor cities and counties, the subject matter of immigration law favors the Executive, and the local nature of the suits could favor either side depending on one’s view of federalism. The upshot is that any application of *Dole* in the sanctuary cases is likely to be complicated, and the ultimate disposition of these cases may be decided on grounds other than the Spending Clause. Nevertheless, the blunt nature of E.O. 13,768 and the retroactive character of the new Byrne JAG conditions highlight important constitutional questions that remain open. Repeated threats by President Trump to withhold federal grants for political reasons are likely to keep these questions in the foreground.

PART V

A RIGID EXECUTIVE *DOLE* TEST

Executive conditional spending should be subject to a “rigid-Dole” test. Before detailing the specific contours of this test, a discussion of several justifications for its establishment is in order. There is an array of arguments to support the establishment of a rigid-Dole test, including the desire to provide courts with a consistent doctrinal framework and considerations related to the distinct powers of the Executive branch. Further, a rigid-Dole test would mitigate federalism concerns by protecting traditional state powers and limiting federal cost-shifting, concerns that are exacerbated in the context of immigration.

First, there is the need for a single, clear framework by which to judge executive conditional spending. A rigid-Dole test would afford a degree of consistency and predictability to parties in legal proceedings, and to the courts themselves. (Admittedly, applying the traditional *Dole* test could achieve the same end). As described in Part III.C, district courts that have evaluated the Byrne JAG cases have addressed myriad arguments and

¹⁸⁴ *New York, et al. v. Dept. of Justice*, *supra* note 21 at 113 (internal citations omitted).

¹⁸⁵ *Philadelphia v. Sessions* at 279.

doctrines including anticommandeering, separation of powers, and arbitrary and capriciousness agency action, as well as the conditional spending doctrine. Although other arguments may still be raised by parties, a single, prevailing test would focus the issues and narrow a court's analysis.

Relatedly, the need for this framework will become very clear in cases involving executive conditions when Congress *has* delegated conditional spending power. The decisions of the First, Third, Seventh, and Ninth Circuits struck down the Attorney General's conditions in the cases before them because Congress had not delegated this power, and it remains unclear how they would approach a substantive analysis of the conditions themselves if delegation were present.

The importance of a rigid-Dole test is heightened when Congress unambiguously delegates the authority to add conditions on federal spending because other bases for challenging the constitutionality of executive conditions may lose force. For example, as previously noted, the Supreme Court has stated that the anti-commandeering doctrine is not applicable in the context of conditional spending.¹⁸⁶ Further, an impoundment argument—that the Executive withheld funds duly apportioned by Congress—would also be unsuccessful when Congress has expressly delegated this power. Although the Supreme Court has held that “legislative intention, without more” is insufficient to confer on the Executive discretion in distributing apportioned funds, an outright delegation of conditional spending power would likely survive such a challenge.¹⁸⁷ A rigid-Dole test would be an important tool in such cases.

Another justification for an executive *Dole* test is that the Executive, in many situations, can act more quickly than Congress, and with more individualized power, especially in the context of executive orders. Therefore, the Executive should be subject, at a minimum, to the same standards of constitutional limits as Congress when enacting or enforcing conditions on federal funds. Although a President's executive order can likely not impose such conditions directly, at least without a delegation of such power, it can quickly influence and guide executive agency actions, as evidenced by Executive Order 13,768 and the subsequent Byrne JAG conditions. A rigid-Dole test would restrain this type of executive chain reaction.

Further, the unique functions of the Executive, especially the office of the White House, should not be reason to absolve it of complying with the

¹⁸⁶ *Printz v. United States*, 521 U.S. 898, 917–18 (1997).

¹⁸⁷ *Train v. New York*, 420 U.S. 35, 44–46 (1975).

principles of *Dole*. As an analogue, in *Harlow v. Fitzgerald*, the Supreme Court stated that although senior White House aides may be tasked with “the unhesitating performance of functions vital to the national security,” the Court rejected a “‘special functions’ rationale” as a basis for affording these members of the Executive special treatment.¹⁸⁸ A similar conclusion—rejecting a special function rationale—could be made in the context of conditional spending, especially, as in the current case of sanctuary cities, when the Executive frames the issue as one of national security.¹⁸⁹ The need for a rigid-Dole test is likely at its height during an emergency or other threat to national security. In these cases a court is likely to apply *Youngstown* to any presidential actions undertaken in the course of an emergency. Because the conditional spending power can only be delegated to the Executive, the Executive’s authority will always be at its highest peak under *Youngstown*.¹⁹⁰ This inter-branch coordination potentially exacerbates the risk of federal overreach (two branches against state and local jurisdictions instead of one) and so a rigid-Dole test is all the more appropriate when the Executive adds conditions to federal outlays in the name of national security.

Finally, the Executive has potential incentives to reward or punish specific jurisdictions in a way that Congress, when considered as a single entity, does not. Specifically, electoral battleground states receive seven percent more federal funding than spectator states¹⁹¹ and the allocation of federal funds more generally has been found to be driven by a President’s political interests.¹⁹² A sitting President, especially one in his or her first term, thus has the incentive to reward battleground states with lenient conditions on federal funds and to punish spectator states and their local jurisdictions by imposing stricter conditions. Even if the Executive acted in a way that was not meant to directly punish a spectator state, the Executive may be less inclined to revise conditions in the face of complaints from such states. It is unlikely that a single grant program could be custom-tailored with different conditions for different states, but generally applicable programs and rules

¹⁸⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 811–12 (1982) (the special treatment sought, and which was rejected by the Court, was affording presidential aides a blanket, absolute immunity).

¹⁸⁹ *E.g.*, Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 at § 1 (Jan. 25, 2017).

¹⁹⁰ *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (outlining three categories of presidential power which are defined by an action’s “disjunction or conjunction” with the will of Congress).

¹⁹¹ *Agreement Among the States to Elect the President by National Popular Vote*, NATIONAL POPULAR VOTE, <https://www.nationalpopularvote.com/written-explanation>.

¹⁹² *See* JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS (2014).

are not always felt equally, and the President may be incentivized to take advantage of this. It should be noted that the sanctuary cities of San Francisco, Seattle, Chicago, and New York City are located in non-battleground states, but all of them vote heavily Democratic and are far more liberal than the national average.¹⁹³ It is unlikely that President Trump and the Department of Justice would have engaged in punitive executive conditional spending to effectuate immigration policy if a majority of sanctuary cities were located in battleground states or staunchly Republican states.

A. *Contours of the Test*

The foundation of the rigid-Dole test is provided by the standards articulated in *South Dakota v. Dole*. My proposal is relatively modest, addressing only those conditions issued in the wake of an unambiguous delegation from Congress. There is some tension between a requirement for delegatory clarity and *Chevron*,¹⁹⁴ but to be clear, there need not be clarity from Congress on the conditions to be imposed, only on the fact that authority to add conditions has been delegated. In practice, this predicate is perhaps more significant than the actual test that I propose; however, limiting the test to clear delegations significantly narrows the scope of my argument since I simply argue that a rigid-Dole test apply only when Congress has unambiguously delegated authority to add conditions on federal spending. A rigid-Dole test modifies three of the primary inquiries under *South Dakota v. Dole*.

1. Strict Clarity

Under the ambiguousness inquiry in a rigid-Dole test, a strict clarity standard is needed. This heightened level of clarity is similar to that advocated by Justice Thomas' dissenting opinion in *Cedar Rapids Community School District v. Garrett*.¹⁹⁵ Additionally, as detailed above, a primary source of judicial confusion in the Byrne JAG cases has been the interplay of both Congress and the Executive, which the current conditional

¹⁹³ The City of Philadelphia, another more Democratic city is located in the battleground state of Pennsylvania. See *A Recent Voting History of the 15 Battleground States*, NATIONAL CONSTITUTION CENTER (Nov. 2, 2016), <https://constitutioncenter.org/blog/voting-history-of-the-15-battleground-states>.

¹⁹⁴ See, e.g., Smith *supra* note 27 and Engstrom *supra* note 27.

¹⁹⁵ 526 U.S. 66, 84 (2003) (Thomas, J., dissenting) (“It follows that we must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate.”).

spending doctrine does not easily accommodate. The intervention of the rigid test in this area is clear: The conditions themselves are to be the focus of the ambiguity inquiry, and not language in the authorizing statute. Congressional delegation and executive authority to impose conditions would not be intertwined in a rigid-Dole test. Each would stand separate as other bases for challenging executive conditional spending.

Under the strict clarity standard, it is not only important that the language of a condition be clear, but also that the timing of the presentation of a condition provide sufficient notice. In other words, courts should evaluate the ambiguity of conditions at the stage of grant solicitation. Detailing conditions in a grant program's solicitation materials would allow a state or local jurisdiction a sufficient opportunity to weigh its options in deciding whether to apply for or accept a federal grant. This is not to say that grants could not be modified in future award years. Under the rigid-Dole test, however, notifying a jurisdiction of conditions in a grant's award letter, or in official proclamations after a grant has been accepted, would be inadequate.

2. Substantially Related

A rigid-Dole test requires that a condition be substantially related to the underlying grant program. In part, this modification has a practical rationale: Grants under the control of an executive agency will almost always be somewhat related to the agency's area of control, or else the grants would likely not have been assigned to that agency, and the substance of any imposed condition would likely be one related to an agency's zone of regulation. Therefore, executive-issued conditions should be closely scrutinized by courts to ensure that what the conditions require of a jurisdiction are closely aligned with the purpose of the grant program to which it is attached, not simply that the condition and the grant program could be categorized under the same general area of regulation. In practice, courts would evaluate the substance of executive conditions against the stated goals of the authorizing statute and the stated goals of the executive for the conditions. The judicial inquiry would focus on the purpose of the grant itself and not the purpose of the implementing agency. For example, if a court determines that the conditions on Byrne JAG funding is related to immigration then the court would ask whether the Byrne JAG funds were appropriated and distributed with an eye on immigration. The Executive could not remedy an adverse judicial holding by merely transferring implementing authority over the Byrne JAG funds from the Department of Justice to the Department of Homeland Security.

3. Coercion as Commandeering

Under the more traditional *Dole* framework, courts inquire whether impermissible financial inducement has occurred by looking at the percentage of a state's budget for which the conditioned federal funding accounts.¹⁹⁶ In the rigid-*Dole* test, coercion would not be determined by the size of the grant in question, but by the nature of the mandate. The coercion prong in *Dole* is subjective, arbitrary, and ultimately subject to the Sorites paradox.¹⁹⁷ Thus, while the Supreme Court has permitted Congress to sidestep anti-commandeering limits under the Spending Clause, the rigid-*Dole* test would close this loophole. A condition on spending would be considered coercive if the condition mandated action that would otherwise be beyond the purview of the federal government, whether enumerated in Articles I and II, or protected under the Tenth Amendment. Questions about the amount of funds at stake, the reliance interests of states, and the risk of "policy lock-in" would be irrelevant in a judicial proceeding; these concerns would be limited to political remedies. A rigid-*Dole* test would replace an arbitrary functional inquiry with a more formal categorical examination.

B. As Applied to Sanctuary Cities

Illustrative applications of the rigid-*Dole* test are in order. The federal cases discussed in earlier sections grappled with two executive actions, Executive Order 13,768 and the Byrne JAG conditions. We begin with an analysis of the Byrne JAG conditions of "notice," "access," and "Section 1373 compliance."¹⁹⁸ Under the ambiguousness prong of the rigid-*Dole* test,

¹⁹⁶ See *Nat. Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (holding that placing conditions on grants that comprise approximately twenty percent of the average state's overall budget was coercive). In *Dole*, the Court framed the amount of money at issue as the percentage of the state's highway budget (5%), but in *N.F.I.B.*, the Court also referred to the amount that had been at issue in *Dole* as a percentage of the state's overall budget (less than half of 1%). *Id.*

¹⁹⁷ See Baker & Berman *supra* note 102 at 485 (referring to the coercion prong of *Dole* as "at best, ill-suited for judicial administration and, at worst, incoherent.")

¹⁹⁸ The conditions being: (1) state and local law enforcement were to provide forty-eight hours' notice to federal officials before releasing an "illegal alien wanted by federal authorities;" (2) U.S. Department of Homeland Security personnel were to be afforded the ability to "access any detention facility" for the purpose of meeting with an "alien" in order to "inquire as to his or her right to be or remain in the United States, and (3) jurisdictions were to certify compliance with 8 U.S.C. § 1373, a federal statute which requires sending, and receiving, immigration and citizenship information to and from the Immigration and Naturalization Service. *Supra* at Part III. See, e.g., *Chicago v. Barr*, 2019 WL 4511546, at *1-2 (N.D. Ill. Sept. 19, 2019).

the three conditions all contain language that is quite clear and unambiguous. However, the conditions likely do not satisfy the strict clarity rule because their presentation did not appear in Byrne JAG solicitation materials, but in award letters instead.¹⁹⁹ As a result, jurisdictions lacked the ability to decide whether to apply for, or accept, a Byrne JAG grant since the funds had already been awarded and the conditions applied retroactively. Identical conditions would survive a rigid-Dole inquiry in future years if they are unambiguously presented to states prior to their application for the funds.

Although the conditions on Byrne JAG funds would likely be held uncoercive under a traditional *Dole* analysis (inasmuch as they represent a fraction of state and local budgets), the Executive would face a tougher challenge under a rigid-Dole test. The conditions on Byrne JAG funds require state and local law enforcement officers to implement and enforce federal law in the absence of federal law enforcement. This relationship is the textbook definition of commandeering and would be coercive under the stricter test.²⁰⁰ The fact that Byrne JAG grants have been awarded to many jurisdictions for more than a decade and that there are strong reliance interests should have no bearing on the outcome. The nature of the condition is itself coercive and would not be constitutional if directly mandated.

Finally, under the relatedness prong of the rigid-Dole test, courts are unlikely to determine that the executive conditions on Byrne JAG funds are substantially related to the underlying purpose of the grant (which is to provide states, counties, and cities with flexibility to respond to changing law enforcement needs as identified by the state and local jurisdictions themselves).²⁰¹ Every trial court that has considered the nexus between the Byrne JAG program and the Attorney General's recently-added conditions has, to date, found that the conditions are not sufficiently related to the program's goals. Some of these courts have applied the kind of narrow inquiry into the relatedness of grant conditions that is beyond the traditional *Dole* test and more like the rigid-Dole test that proposed here.²⁰² The Byrne JAG program is intended to support state and local criminal justice institutions—the top five areas of expenditures in 2016 were: drug, gang, and other task force operations and personnel; law enforcement equipment; prosecution and indigent defense initiatives; corrections and community

¹⁹⁹ *San Francisco v. Sessions*, 349 F. Supp. 3d 924, 956 (N.D. Cal. 2018).

²⁰⁰ *Printz v. New York* (1992).

²⁰¹ NAT'L CRIM. JUSTICE. ASS'N., *supra* note 13.

²⁰² See *San Francisco v. Sessions*, 349 F. Supp. 3d at 958–6; *Philadelphia v. Sessions*, 280 F. Supp. at 639–44.

corrections; and crime prevention programs.²⁰³ Under the narrow inquiry required by the rigid test, these areas of criminal justice are not substantially related to the conditions, which speak to immigration enforcement. Simply categorizing them under the same theme of law enforcement is insufficient. Thus, under a rigid-Dole test, the conditions announced by the Attorney General on Byrne JAG funds would likely fail under each prong and thus be held unconstitutional.

Executive Order 13,768 would similarly fail a rigid-Dole test on the grounds that it is coercive and not substantially related to the goals of the targeted funding. However, E.O. 13,768 would likely survive a challenge under the strict clarity rule because the language is clear, specific, and announced prior to the solicitation of funds. E.O. 13,768 is exceptionally clear in what is required of jurisdictions: compliance with 8 U.S.C. § 1373.²⁰⁴ Section 1373 prohibits states from limiting the voluntary sending, and receiving, of immigration and citizenship information to and from the Immigration and Naturalization Service.²⁰⁵ Further, the Executive Order is exceedingly clear that non-compliance will render a jurisdiction “not eligible to receive Federal grants,” an announcement made prior to any solicitation or award of these grants.²⁰⁶ However, E.O. 13,768 conditions *all* federal funds upon immigration compliance,²⁰⁷ meaning the relationship between the conditions and the funding is tenuous (or non-existent) for the overwhelming majority of grant programs.

PART VI

CONCLUSION

In this Article, I have argued that executive conditions on federal spending are entirely appropriate, but only when Congress has unambiguously delegated the authority to add conditions. I have further argued that executive conditions on federal spending should be subject to a rigid-Dole analysis by courts. Because the central constitutional concern in Spending Clause cases is the undue aggrandizement of federal power, inter-branch coordination poses a greater threat to state sovereignty than either Congress or the

²⁰³ BYRNE JAG SPENDING DATA, NAT’L CRIM. JUSTICE ASS’N, <http://www.ncja.org/ncja/byrne-jag-investments-and-impact/expenditures-by-project-type>.

²⁰⁴ *Id.*

²⁰⁵ 8 U.S.C. § 1373.

²⁰⁶ Exec. Order No. 13,768 at §9(a).

²⁰⁷ *Id.*

Executive acting alone. A rigid-Dole test mitigates against several risks of executive conditional spending, namely those related to cost-shifting by the federal government. The upshot of a rigid-Dole test is that conditions on federal spending will likely shift away from the Executive to Congress, which is desirable on accountability grounds.

A recent Second Circuit opinion upholding the Attorney General's conditions on federal grants to sanctuary jurisdictions runs counter to holdings by the First, Third, Seventh, and Ninth Circuits, increasing the likelihood that the Supreme Court will soon wade into this hotly contested cross-section of divisive issues: national immigration policy, immigration enforcement, the clash of national and local sovereignty, and the unbridled power of the administrative state. The controversy over *sua sponte* executive conditions on federal grants poses a ripe opportunity for a Court wary of the regulatory state to rein in the Executive, and also the Spending power more generally.