RIDING TO THE RESCUE: THE CONDITIONAL SPENDING AND COMMANDEERING JURISPRUDENCE OF SANDRA DAY O'CONNOR IN AN ERA OF FEDERAL OVERREACH

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INTRODUCTION

While contemporary Supreme Court Justices are often associated with grand projects—Justice Scalia with originalism, Justice Ginsburg with individual rights, especially women's rights—Justice Sandra Day O'Connor is often noted for her status: the first woman on the United States Supreme Court. Her jurisprudence is characterized as pragmatic, and sometimes, particularly by legal academics, it is criticized as being overly simplistic or disingenuous. Yet O'Connor also has been hailed as a "common law judge."[1] Her judicial opinions are guided by an acute sensitivity to the factual context of cases,[2] a belief in the accountability of leadership,[3] and twin values of a fair and independent court system and an educated public that is civically engaged in decision-making at a level that is accessible and understandable to it.[4] Like her peers on the Rehnquist Court, one of her judicial projects was to reinject content into the Tenth Amendment,[5] a "truism"[6] or tautology that states "[t]he powers

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[1] *A Bridge Builder and Trailblazer: Celebrating Justice Sandra Day O'Connor*, RONALD REAGAN PRESIDENTIAL FOUND. & INST. (Sept. 25, 2019), https://www.reaganfoundation.org/reagan-institute/events/celebrating-justice-sandra-day-oconnor/ [https://perma.cc/LMN4-S45H].

[2] *See* Judith Olans Brown et al., *The Rugged Feminism of Sandra Day O'Connor*, 32 IND. L. REV. 1219, 1229 (1999).

[3] *See infra* notes 20–21 and accompanying text.

[4] *See infra* notes 29–31 and accompanying text.

[5] *See* Stephen J. Wermiel, *O'Connor: A Dual Role—An Introduction*, 13 WOMEN'S RTS. L. REP. 129, 139 (1991).

[6] United States v. Darby, 312 U.S. 100, 124 (1941).

not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[7] Unlike the originalist Scalia, her analysis in these cases is not focused on the reasoning of the Framers, but on their intent: to maximize the ambit of independent policy-making authority of state governmental units, cabined by accountability to voters.[8] While O'Connor's project was not viewed with enthusiasm by many in an era when liberals sought to consolidate power in a federal regulatory state,[9] current circumstances show it in a far more favorable light,[10] and both academics and advocates might do well to brush up on her reasoning.

This Article will focus on three areas: leading decisions and dissents by O'Connor on conditional spending and commandeering; opinions since her departure from the Court where Justices have relied heavily on that reasoning; and the latest round of litigation, brought by state attorneys general, counties, and cities to curb the overreach of Trump Administration immigration policy, which rely either directly or by implication on her conditional spending and commandeering jurisprudence.

I. FEDERALISM AS A GUIDING PRINCIPLE

"States' rights" is a fraught term. In the Reconstruction era and in the mid-twentieth century South, it often was code for efforts by the southern states to disenfranchise minority voters and to evade responsibility to provide equal opportunity in education, jobs and housing.[11] But the federalist tradition that Justice O'Connor came from was different: it was the Western version of federalism, which was given to localist solutions on issues like water and property rights, a tradition which relied on improvisation, personal courage, experimentation, and compromise.[12] Her early years growing up on

[7] U.S. CONST. amend. X.

[8] *See* Wermiel, *supra* note 5, at 139.

[9] *See id.* at 130.

[10] *See* Ilya Somin, *How Liberals Learned to Love Federalism*, WASH. POST (July 12, 2019, 4:56 PM), https://www.washingtonpost.com/outlook/how-liberals-learned-to-love-federalism/2019/07/12/babd9f52-8c5f-11e9-b162-8f6f41ec3c04_story.html [https://perma.cc/VBL9-VPK8].

[11] *See* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L. J. 537, 537–38 (1993).

[12] *See* Marci Hamilton, *The Remarkable Legacy of Justice Sandra Day O'Connor*, FINDLAW (July 14, 2005), https://supreme.findlaw.com/legal-commentary/the-remarkable-legacy-of-justice-sandra-day-oconnor.html [https://perma.cc/Z42D-5NF6].

the Lazy B Ranch mattered too.[13] Her common law approach emphasized contextual fact-based (rather than rule-based) analysis and experiential reasoning consistent with her "rugged" experience.[14]

When he selected Sandra Day O'Connor, then serving as a judge on the Arizona Court of Appeals after her time in that state's legislature, as the first woman to ascend to the nation's highest court, one of the qualifications that was most attractive to President Ronald Reagan was her record of public service in her home state.[15] Some career paths that were open to her fellow Stanford Law graduates in that era had been closed to O'Connor, who was offered a position as legal secretary at the prestigious California firm Gibson, Dunn & Crutcher when she applied to work there shortly after her graduation.[16] As a result, she gravitated to positions close to home.[17] Among these was a storefront practice in Phoenix with a colleague, a position in the State Attorney General's office, and later, elected office, where she took advantage of the many contacts and friends she and her husband, John, cultivated in their privileged Scottsdale social circles.[18]

Her experience in state government was influential in forming Justice O'Connor's federalism jurisprudence.[19] The last member of the United States Supreme Court to hold any elected office, O'Connor's experience in the trenches of the Arizona state legislature confirmed views she had formed early in life on self-reliance and accountability.[20] Professor Stephen Wermiel observed:

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[13] *See* Richard Ruelas, *Arizona Lazy B Ranch Taught Sandra Day O'Connor Some of Life's Most Important Lessons*, USA TODAY (Mar. 15, 2019, 10:30 AM), https://www.usatoday.com/story/news/local/phoenix/2019/03/15/lazy-b-ranch-sandra-day-oconnor-arizona-el-paso/2232608002/ [https://perma.cc/TR8S-LVY8].

[14] *See* Brown et al., *supra* note 2, at 1229. O'Connor's memoir, *Lazy B: Growing Up on a Cattle Ranch in the American Southwest*, provides insights into early hardships that influenced her worldview. *See generally* SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST (2003). Evan Thomas's 2019 biography of O'Connor, *First: Sandra Day O'Connor*, details her years in the Arizona state legislature and challenges that came from being an early female leader in an old-boy political culture. *See* EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR 72 (2019).

[15] *See* Wermiel, *supra* note 5, at 131.

[16] *See id.* at 133.

[17] *See id.* at 131.

[18] *See* Beverly B. Cook, *Justice Sandra Day O'Connor: Transition to a Republican Court Agenda*, *in* THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 238–39 (Charles M. Lamb & Stephen C. Halpern eds., 1991); THOMAS, *supra* note 14, at 68.

[19] *See* Bradley W. Joondeph, *The Deregulatory Valence of Justice O'Connor's Federalism*, 44 HOUS. L. REV. 507, 509 (2007).

[20] *See* Wermiel, *supra* note 5, at 130–31; *Anthony Kennedy*, BRITANNICA, https://www.britannica.com/biography/Anthony-Kennedy [https://perma.cc/CNP7-4CTV]; *Antonin Scalia*, BRITANNICA, https://www.britannica.com/biography/Antonin-Scalia/

> If there is any unifying theme to Justice O'Connor's opinions . . . it appears to be her own brand of federalism. She is strongly motivated by her abiding faith in good government at the state level and her belief that the Framers of the Constitution envisioned a genuine partnership of shared powers between the federal government and the states. Her experience as a state legislator and judge gives her a degree of trust in state government and state courts that goes well beyond that of her colleagues.[21]

In a little-cited speech given at Cambridge in 2001, O'Connor provided a summary of her brief for federalism.[22] Quoting one of her own majority opinions on the subject, O'Connor noted that she was obliged to enforce federalism values "even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution."[23]

O'Connor ardently defends federalism's virtues as well, singling out four benefits: (1) "Democracy and accountability"; (2) "Comparative efficiency and laboratories for experimentation"; (3) "Individual liberty"; and (4) "Sense of community and shared purpose."[24] The political accountability value resonates to the former legislator because at the state level, "an individual's voice and vote are generally more effective in bridging the inevitable gaps between policy preferences and policy outcomes."[25]

[https://perma.cc/8JZ3-BQ8S]; *Brett Kavanaugh*, BRITANNICA, https://www.britannica.com/biography/Brett-Kavanaugh [https://perma.cc/SDG9-6WBK]; *Clarence Thomas*, BRITANNICA, https://www.britannica.com/biography/Clarence-Thomas [https://perma.cc/Z5TK-X8J2]; *David Hackett Souter*, BRITANNICA, https://www.britannica.com/biography/David-Hackett-Souter [https://perma.cc/TXK4-SJDW]; *Elena Kagan*, BRITANNICA, https://www.britannica.com/biography/Elena-Kagan [https://perma.cc/U7HH-N6SA]; *John G. Roberts, Jr.*, BRITANNICA, https://www.britannica.com/biography/John-G-Roberts-Jr [https://perma.cc/GFZ2-U844]; *Neil Gorsuch*, BRITANNICA, https://www.britannica.com/biography/Neil-Gorsuch [https://perma.cc/U36M-ETDT]; Ruth Bader Ginsberg, BRITANNICA, https://www.britannica.com/biography/Ruth-Bader-Ginsburg [https://perma.cc/VF5U-LCPU]; *Samuel A. Alito, Jr.*, BRITANNICA, https://www.britannica.com/biography/Samuel-A-Alito-Jr [https://perma.cc/7VR3-V4L2]; *Sonia Sotomayor*, BIOGRAPHY, https://www.biography.com/law-figure/sonia-sotomayor [https://perma.cc/9EZ8-BB6S]; *Stephen Breyer*, BRITANNICA, https://www.britannica.com/biography/Stephen-Breyer [https://perma.cc/7Z47-V4Y9].

[21] Wermiel, *supra* note 5, at 139.

[22] *See* Sandra Day O'Connor, *Altered States: Federalism and Devolution at the "Real" Turn of the Millennium*, 60 CAMBRIDGE L. J. 493, 493–510 (2001).

[23] New York v. United States, 505 U.S. 144, 157 (1992); O'Connor, *supra* note 22, at 508.

[24] O'Connor, *supra* note 22, at 509–10; *see also* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 77–82 (1998).

[25] O'Connor, *supra* note 22, at 509.

The reference to "laboratories for experimentation" is, of course, a nod to Justice Brandeis, whose view was that innovation in one state could be adopted by other states (now often known as horizontal federalism).[26] A more contemporary version of this also articulates a vertical view of federalism, whereby state-level change drives change at the federal level,[27] something that has been seen in everything from regulation of cell phone use while driving to the adoption of MassCare as the Affordable Care Act.[28]

The fourth factor—sense of community and shared purpose—reflects O'Connor's deep-seated belief in the importance of political participation and civic responsibility,[29] themes that are reflected beyond her jurisprudence in her projects both on and off the court on judicial independence, the rule of law abroad and at home, and civic education.[30] As she stated in her Cambridge speech:

> When meaningful decisions are made through democratic processes at levels close to us as citizens, we have a greater sense of responsibility for those decisions. We are challenged

[26] *See* Adler & Kreimer, *supra* note 24, at 78–79; Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 498–504 (2008); O'Connor, *supra* note 22, at 509.

[27] *See* Erbsen, *supra* note 26, at 494, 501–04.

[28] *See* Barbara Anthony, *Beyond Obamacare: Lessons from Massachusetts* 2 (Mossavar-Rahmani Ctr. for Bus. & Gov't, Working Paper No. 82, 2017); Ann Kitch, *State and Federal Efforts to Reduce Distracted Driving*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 2018), https://www.ncsl.org/research/transportation/state-and-federal-efforts-to-reduce-distracted-driving.aspx [https://perma.cc/6WF7-U9KD]; Robert Reich, *The Irony of Republican Disapproval of Obamacare*, CHRISTIAN SCI. MONITOR (Oct. 28, 2013), https://www.csmonitor.com/Business/Robert-Reich/2013/1028/The-irony-of-Republican-disapproval-of-Obamacare [https://perma.cc/PKR2-JKGY].

[29] *See* Joondeph, *supra* note 19, at 518; O'Connor, *supra* note 22, at 510.

[30] *See* O'Connor, *supra* note 22, at 510. After her retirement from the Court, O'Connor focused on projects to preserve judicial independence, with a particular focus on the pernicious effects of money on state court elections, and civics education. *See Our Story*, ICIVICS, https://www.icivics.org/our-story [https://perma.cc/KWB7-4SJ3]; James Podgers, *O'Connor on Judicial Elections: 'They're Awful. I Hate Them'*, A.B.A. J. (May 9, 2009, 1:09 PM), https://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s [https://perma.cc/LC4N-PTGY]. She was also concerned with the rule of law abroad and at home. *See* O'Connor, *supra* note 22. Through organizations including iCivics, the Sandra Day O'Connor Project on the State of the Judiciary, Institute for the Advancement of the American Legal System, Brennan Center, and CEELI, she continued to work in areas of concern she developed while on the Court. *See* Maggie Barron, *O'Connor & Breyer on Judicial Independence*, BRENNAN CENTER (Apr. 10, 2008), https://www.brennancenter.org/our-work/analysis-opinion/oconnor-breyer-judicial-independence [https://perma.cc/ETD8-MDF9]; *O'Connor Advisory Committee*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., https://iaals.du.edu/content/o-connor-advisory-committee [https://perma.cc/RZ9N-3JU6]; *Our Story*, *supra*; *The 2018 Conference of Chief Justices of Central and Eastern Europe*, CEELI INST. PRAGUE, https://ceeliinstitute.org/the-2018-conference-of-chief-justices-of-central-and-eastern-europe/ [https://perma.cc/4KT5-KLGY].

> to be not just spectators on the sidelines of democracy, but active stewards of the heritage and promise of our regions, our cities, our towns, our neighbourhoods. We learn the healthy habits of democracy and citizenship not by watching, but by doing.[31]

It is not surprising that when it came to cases that pitted state sovereignty and the duty of state officials to be held to account by voters for policies that might be influenced by federal money or federal rules, O'Connor looked to some pretty narrow guardrails to circumscribe federal action.

A. The Federalism Revival

Defenders of modern federalism face as their central challenge the vast growth of the national economy and shrinkage of purely intrastate activity since the 1930s. Spending by the Federal Government for state programs has vastly expanded.[32] Examples include the Food Stamp Act of 1964,[33] Individuals with Disabilities Education Act,[34] Title IX,[35] and Medicaid.[36] The regulatory state, centered in Washington, has experienced accompanying growth. Federal spending has given the federal government, both Congress and executive agencies, an enormous amount of leverage in shaping policy in the states.[37] What remains purely in the realm of state authority is difficult to identify.

Examination of O'Connor's reasoning in several key cases shows she was an acolyte of the approach to federalism announced in *National League of Cities v. Usery*, seven years before she joined the Court.[38] That case announced a "traditional government functions" test which would allow line-drawing as to which federal regulations of state functions were appropriate and which were unduly coercive.[39] In *Garcia v. San Antonio Metropolitan Transit Authority*, which

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[31] O'Connor, *supra* note 22, at 510.
[32] *See* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1103–04 (1987).
[33] *See* Supplemental Nutrition Assistance Program, 7 U.S.C. §§ 2011–2036 (2018).
[34] *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2018).
[35] *See* Title IX, 20 U.S.C. §§ 1681–1688 (2018).
[36] *See* Medicaid, 42 U.S.C. §§ 1396–1396w-5 (2018).
[37] *See* Joondeph, *supra* note 19, at 514.
[38] *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 876–77 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
[39] *Usery*, 426 U.S. at 852.

directly reversed *Usery*,[40] Justice O'Connor joined both the dissent in the 5-4 decision and wrote separately to say:

> The problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States. It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. . . . It remains relevant that a *State* is being regulated, as *National League of Cities* . . . recognized. As far as the Constitution is concerned, a State should not be equated with any private litigant. Instead, the autonomy of a State is an essential component of federalism. If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power "may well be negligible."[41]

O'Connor's reasoning looks to the areas states have historically regulated, and where federal interference, even to enforce federal law, becomes entangled with other state policy goals.[42] She accepts a duality set out in *Usery* that looks to both (1) historical precedent—what states have always done, and what they need to do to function as states, such as maintaining their own balance of power between three government branches; and (2) functional factors—what they need to do to provide state services and balance their budgets.[43] From the point of view of a state government, the question of a balanced budget is critical. Unlike the U.S. government, all U.S. states but one have balanced budget requirements.[44] Because of that, federal "unfunded" mandates that require states to assume financial

[40] *See Garcia*, 469 U.S. at 557.
[41] *Id.* at 588 (O'Connor, J., dissenting) (citations omitted).
[42] *See id.* at 580–81.
[43] *See id.*
[44] *See State Balanced Budget Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 12, 1999), https://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx [https://perma.cc/6YZK-9MJC].

burdens that neither voters nor state legislatures have had a say in are perceived as particularly overreaching.[45]

In *Garcia*, O'Connor's concern was with how enforcement of the Fair Labor Standards Act in payment of state workers would affect state budgeting.[46] Later in *Gregory v. Ashcroft*,[47] O'Connor's focus was on how enforcement of the Age Discrimination in Employment Act would interfere with the compromises between independence and accountability that Missouri struck when it set up its judicial selection system.[48] A mandatory retirement age, O'Connor knew from experience, would allow the turnover that kept the judiciary robust, even if its effects were overinclusive as to individual judges.[49] Each case posed a practical challenge: their budgets limited what states could afford to pay their workforce, and maintaining public confidence in the competence of the state judiciary was essential to the proper functioning of their courts.[50] The federal interest in regulating them with a "one size fits all approach" was contrary to core federalism principles.[51]

B. Spending and Dole

Where O'Connor chose to write at length were the cases most connected to her experience as a state legislator and state court judge. Each involved forms of coercion, a problem which O'Connor may have—based on inclination, experience, and gender—been acutely attuned to. Each was also a case where the federal mandate would have made attribution of accountability for policy outcomes to the federal or state government unclear. Particularly important was her dissent in *South Dakota v. Dole*[52] on Congress' conditional spending power.[53] The other was her opinion for the Court in *New York v. United States*,[54] which announced the modern anti-commandeering rule.[55]

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[45] *See* CONG. RESEARCH SERV., R40957, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES 1 (2020) [hereinafter UNFUNDED MANDATES REFORM ACT].
[46] *See Garcia*, 469 U.S. at 577–78 (Powell, J., dissenting).
[47] *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).
[48] *See id.* at 452, 458, 473.
[49] *See id.* at 472–73.
[50] *See id.*; *Garcia*, 469 U.S. at 577–78 (Powell, J., dissenting).
[51] *See Gregory*, 501 U.S. at 468; *Garcia*, 469 U.S. at 531.
[52] *See* South Dakota v. Dole, 483 U.S. 203, 212 (1987) (O'Connor, J., dissenting).
[53] *See id.* at 212.
[54] *See* New York v. United States, 505 U.S. 144 (1992).
[55] *See id.* at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

Before its decision in the Affordable Care Act case, *National Federation of Independent Business v. Sebelius*,[56] the Supreme Court had only once, at the height of the New Deal, invalidated the use of Congressional conditions on federal spending.[57] In the interim, the most notable challenge to federal spending came in the 1987 case, *South Dakota v. Dole*.[58] In a 7-2 decision, with Justices Brennan and O'Connor writing separate dissents, Justice O'Connor refused to join fellow conservative justices in upholding the use of the federal spending clause to secure the cooperation of a state on a policy issue.[59]

The case involved a 1984 Congressional Act, the National Minimum Drinking Age Act ("NMDAA").[60] Congress was barred from directly regulating the drinking age by the Twenty-First Amendment, which repealed Prohibition and reserved regulation of liquor to the states.[61] As an alternative approach, NMDAA withheld five percent of federal highway funds from states that did not maintain a minimum legal drinking age of twenty-one.[62] South Dakota, which allowed drinking at age nineteen, challenged the law on the grounds that it unduly burdened state policy autonomy by the threat of the financial sanction.[63]

The Supreme Court majority formulated a five-part test for considering the constitutionality of conditional spending sanctions: the spending must first, promote "the general welfare"; second, it must be unambiguous; third, it should relate "to the federal interest in particular national projects or programs"; fourth, it cannot itself be unconstitutional; and fifth, it cannot be coercive.[64] Applying this test, the Court upheld the federal highway grant spending sanction included in the NMDAA.[65] O'Connor characterized her dissent as "relatively narrow."[66] She agreed that Congress could attach conditions on federal spending allocations to the states, and that

[56] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
[57] *See* United States v. Butler, 297 U.S. 1, 74 (1936) (involving a challenge to provisions of the Agricultural Adjustment Act of 1933 at the height of Court resistance to the New Deal).
[58] *See Dole*, 483 U.S. at 205.
[59] *See id.* at 212 (Brennan, J., dissenting); *id.* at 212–13 (O'Connor, J., dissenting).
[60] *See id.* at 205 (majority opinion); National Minimum Drinking Age, 23 U.S.C. § 158 (2018).
[61] *See Dole*, 483 U.S. at 205 (quoting Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).
[62] *See Dole*, 483 U.S. at 211.
[63] *See id.* at 205.
[64] *Id.* at 207–08, 210 (first quoting Helvering v. Davis, 301 U.S. 619, 640–41 (1937); then quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); then quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978); and then citing Lawrence Cty. v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269–70 (1985)).
[65] *See Dole*, 483 U.S. at 208–12 (O'Connor, J., dissenting).
[66] *Id.* at 212.

what it could not do directly because of the Twenty-First Amendment, Congress could nudge through use of its conditional spending power.[67] In other words, the Twenty-First Amendment was not an "independent constitutional bar" that would preclude any federal regulation.[68] But she disagreed with the majority on whether the minimum drinking age requirement was "sufficiently related to [federal] interstate highway construction to justify so conditioning funds appropriated for that purpose."[69]

O'Connor reasoned that federal highway fund spending was to allow construction of safe highways; it could not bootstrap other policy agendas onto that, or the gate would be open to regulation in "any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."[70]

She cited, with approval, the brief of the National Conference of State Legislatures,[71] saying:

> The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.[72]

The majority decision in *Dole*, as commentators noted, was viewed as providing to Congress nearly a blank check on conditioning federal

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[67] *Id.* at 212–13 (first quoting *Massachusetts*, 435 U.S. at 461; and then citing United States v. Butler, 297 U.S. 1, 66 (1936)).

[68] *Dole*, 483 U.S. at 213.

[69] *Id.* at 213–14.

[70] *Id.* at 215.

[71] *See id.* at 216. As the association representing all state legislatures in the nation, O'Connor was well acquainted with NCSL, and would have utilized its resources while in the Arizona Legislature. *See About Us*, NAT'L CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/aboutus.aspx [https://perma.cc/7JNM-PZN6].

[72] *Dole*, 483 U.S. at 216.

spending by Congress on compliance with grant conditions.[73] The relatedness and anti-coercion prongs of the *Dole* test were characterized as toothless.[74] O'Connor's dissent would have provided context and content by requiring a tight nexus correlating the federal policy goal with the spending condition. Surprisingly, it received little attention at the time from commentators.

C. State Autonomy and Commandeering

O'Connor further elaborates her jurisprudence in the mirror image to conditional spending, a principle known as anti-commandeering,[75] used to strike down a federal provision for the first time in modern Court history in a 1992 case, *New York v. United States*.[76] O'Connor authored the majority opinion in the 5-4 case, invalidating portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[77] The Act did not preempt the states by regulating the generators of waste directly.[78] Instead, it required states alone or through regional compacts to provide for the disposal of low-level radioactive waste generated within their borders.[79]

In *New York v. United States*, the Supreme Court upheld the monetary incentives in the Act as within Congress' Commerce Clause and Spending Clause authority.[80] It struck down a "take title" provision in the statute that offered the States a choice between "accepting ownership of [the] waste or regulating according to the instructions of Congress."[81] O'Connor wrote for the Court that the take title provision violated the Tenth Amendment by offering a State two unconstitutional choices: either to take title of the waste, and assume its accompanying liability, thus assuming debts that

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[73] *See* Andrew Coan, *30 Years of Comparative Institutional Analysis: A Celebration of Neil Komesar: Judicial Capacity and The Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 348.

[74] S*ee id.* at 348 n.46. Professor Coan discusses seven decades of judicial deferral to Congress on conditional spending, notes the anti-coercion principle that unites the two doctrines, and analyzes the case law, including *Dole*. *See id.* at 346–47, 348, 362–63, 371–77.

[75] *See* New York v. United States, 505 U.S. 144, 176 (1992); Coan, *supra* note 73, at 349–50.

[76] *See New York*, 505 U.S. at 176. Commandeering challenges were rejected in two earlier preemption cases. *See id.* at 202 (White, J., dissenting) (first citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981) (upholding a federal mining regulatory law because it did not commandeer the states into regulating mining); and then citing FERC v. Mississippi, 456 U.S. 742, 761–62 (1982)).

[77] *See New York*, 505 U.S. at 149, 188.

[78] *See id.* at 151–55, 178.

[79] *See id.*

[80] *See id.* at 185.

[81] *Id.* at 175.

otherwise would accrue to private parties, or alternatively, to enact state legislation that mirrored the federal mandate.[82]

O'Connor rejected the argument that the federal interest at stake in regulating low-level nuclear waste was sufficiently important to justify state submission.[83] Nodding to the *Usery* duality she favored, she acknowledged that some interests were essentially federal and could lead to the compulsion.[84] However, the method by which the Act achieved this failed:

> [N]o Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact *state* regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation . . . . [I]t may not conscript state governments as its agents.[85]

O'Connor's federalism is particularly centered on the challenge of political accountability in a system where funding and decision making comes in large measure from Washington, but where voters are confronted by its effects at the State and local level.[86] The *New York v. United States* opinion is particularly concerned with the confusion she believes would result if state elected officials were charged with political accountability for actions they were compelled to take under the federal regulatory regime.[87]

As a former state legislator, O'Connor knew that the federal mandate would require the states to assume costs from their general fund under a take title arrangement—an unfunded mandate. It would also hide the ball, so to speak, on who was the decisionmaker and who was the servant charged with carrying that decision out. Keeping the line of accountability more clearly connected to the members of Congress who enacted the low-level radioactive waste

[82] *See id.* at 149, 174–75, 177.
[83] *See id.* at 177–78.
[84] *See id.* (citing Nat'l League of Cities v. Usery, 426 U.S. 833, 853 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).
[85] *New York*, 505 U.S. at 178.
[86] *See id.* at 168–69.
[87] *See id.* at 169.

regime, rather than the state officials charged with executing the scheme, appears to be a key concern.[88]

O'Connor insists that if the Federal government is going to regulate, it needs to grasp the preemption nettle, and do it directly.[89] Just as the state legislators are held to account by their voters at two- or four-year intervals, members of Congress should face the same accountability in this version of federalism. Call it the grocery store narrative. It is common for a state assemblywoman to be buttonholed by a constituent while buying the week's breakfast cereal and salty snacks. By contrast, Members of Congress, whose trips to their home districts from Washington, D.C. are dominated by highly motivated constituents at town halls, rarely share that slice of reality, so it less affects their view of their constituents' world.

In the contemporary complex federal commerce and conditional spending environment, whether O'Connor's project of disentangling accountability of federal government and state government is realistic has been the subject of extensive criticism from academics who see it as simplistic or disingenuous.[90] They view the contemporary administrative state as so thick a matrix of federal and state elements that efforts to disentangle it are sure to fail, and so their project is to look at federalism as functionalism: figure out how the system works as it is, and then chisel away at particular functions to achieve preferred outcomes.[91] Perhaps it would be more accurate to view O'Connor's point as a normative one, in which the task of the Court is to take what measures it can in judicial review of cases to preserve the accountability model.

Her critics, focused on federalism as functionalism,[92] look at the dish as it is served; and that is fair. O'Connor's concern is the ingredients that go into the dish, and how the dish is cooked. That is equally apt.

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[88] *See id.*

[89] *See id.* at 169, 178.

[90] *See* Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 114 (2014) (attacking the models of federalism as sovereignty and as autonomy). Dean Gerken argues that the regulatory state means that state and federal governments now govern shoulder-to-shoulder in a tight regulatory space, meaning that the most meaningful power of the states is their implementation power or "power of the servant" as she characterizes it—criticizing *New York v. United States* reasoning as an oversimplification of the contemporary state regulatory process even as of 1992. *Id.* at 115. *See also* Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877, 887–891 (2001) (questioning the consistency of federalism principles O'Connor applies).

[91] *See* Gerken, *supra* note 90, at 98–99, 99 n.84.

[92] *See id.*

Our tour of her federalism opinions would not be complete without noting that O'Connor, for the most part, joined with a conservative majority during the Burger and Rehnquist Court years, providing a critical fifth vote to cases reviving the Tenth Amendment as a limit on federal power in key cases including *United States v. Lopez*,[93] *Printz v. United States*,[94] and *United States v. Morrison*.[95]

In *Printz v. United States*, O'Connor joined the majority to strike the Brady Handgun Control Act's requirement that state law enforcement authorities cooperate with federal law enforcement to perform gun licensing background checks as an exercise of federal commandeering of state and local law enforcement officers.[96] Justice Scalia's *Printz* majority opinion is concerned with limiting the Article I power of Congress rather than considering its relation to state functions.[97] O'Connor's short concurrence is interesting. It comes five years after she articulated the anti-commandeering principle in *New York v. United States*, and she sticks with the principle,[98] but low-level radioactive waste regulation is clearly less emotionally fraught than gun safety, and O'Connor's compassionate pragmatism starts to show. Her concurrence adds an "out," suggesting state or state subdivision cooperation on background checks could be

[93] *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (finding that the federal Gun-Free School Zone Act is unconstitutional as exceeding the scope of Congress's commerce power).

[94] *See* Printz v. United States, 521 U.S. 898, 902 (1997) (holding that the Brady Handgun Violence Prevention Act, which requires state and local law enforcement personnel to conduct background checks before issuing firearm permits, violates the Constitution).

[95] *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating portions of the Violence Against Women Act as exceeding Commerce Clause powers). O'Connor's dissent in the *Gonzales v. Raich* case, one of her last decisions on the Court, suggests distress with the majority's inconsistent approach to marijuana grown for home and medical consumption versus gun regulation and violence against women. *See Gonzales v. Raich,* 545 U.S. 1, 54–55 (2005) (O'Connor, J., dissenting). This suggests that the Commerce Clause jurisprudence she had joined in *Lopez* and *Morrison* was starting to collapse under its own weight. O'Connor's *Raich* dissent revisits the underlying regulatory scheme and record, and she asks of *Morrison* notably:

> [I]f declarations like these [the one in the federal controlled substance act, CSA] . . . pass[] rationality review before us, then our decision in *Morrison* should have come out the other way. In that case, Congress had supplied numerous findings regarding the impact gender-motivated violence had on the national economy . . . . [H]ow can it be that voluminous findings, documenting extensive hearings about the specific topic of violence against women, did not pass constitutional muster in *Morrison*, while the CSA's abstract, unsubstantiated, generalized findings about controlled substances do?

Id. (citations omitted). *See also* Joondeph, *supra* note 19 (interesting but generalized approach to O'Connor's federalism jurisprudence as a statistical analysis).

[96] *See Printz*, 521 U.S. at 902.

[97] *See id.* at 902, 919.

[98] *See id.* at 935–36 (O'Connor, J., concurring); *see also* New York v. United States, 505 U.S. 144, 149, 187–88 (1992).

voluntary or could occur by contractual arrangement.[99] She also distinguishes state cooperation with other nationwide programs, like those to find missing children.[100]

Three years later, those reservations about a bright line anti-commandeering approach were front and center in *Reno v. Condon*,[101] which seems to walk back the commandeering principle, at least when it comes to protection of information collected by state agencies.[102] In *Reno v. Condon*, O'Connor joined a unanimous decision of the Court brushing back a challenge to the federal Driver's Privacy Protection Act of 1994.[103] The Act prohibits state departments of motor vehicles and their employees from disclosing personal information about individuals without their consent.[104] It does not make it into the case decision, but as background, when the Act passed Congress, women's groups were worried that information secured from state databases could be used to harass and threaten domestic violence victims or reproductive service providers.[105] Importantly, the Court distinguished between cases like the one under current consideration, where the States could refuse to share information with the federal government, and a case like *Printz*, where the federal government compelled state officials to collect such information.[106] The *Reno v. Condon* court also found significant that driver's license data sharing was restricted for all who held it—private party insurance carriers as much as state government databases—and so the law was of equal application to government and non-government entities.[107]

O'Connor's position in the three cases reveals the sort of pragmatic compromise that bedevils her critics: she opposes commandeering that imposes costs on the states, and makes it unclear where true accountability lies,[108] but she leaves room for a true cooperative federalism, where government officials may choose, but may not be bludgeoned, into cooperation with federal authorities.[109]

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[99] *See Printz*, 521 U.S. at 936 (O'Connor, J., concurring).
[100] *See id.*
[101] *See* Reno v. Condon, 528 U.S. 141 (2000).
[102] *See id.* at 143.
[103] *See id.* at 142–43.
[104] *See id.* at 144.
[105] *See* Brief of Feminist Majority Foundation et al. as Amici Curiae Supporting Petitioner at 12–14, Reno v. Condon, 528 U.S. 141 (2000) (No. 98-1464), 1999 WL 503879; Erwin Chemerinsky, *Right Result Wrong Reason:* Reno v. Condon, 25 OKLA. CITY U. L. REV. 823, 834 (2000).
[106] *See Reno*, 528 U.S. at 149 (citing Printz v. United States, 521 U.S. 898, 902 (1997)).
[107] *See Reno*, 528 U.S. at 151.
[108] *See* New York v. United States, 505 U.S. 144, 166 (1992).
[109] *See Printz*, 521 U.S. at 935–36 (O'Connor, J., concurring).

II. EXUENT O'CONNOR, BUT NOT HER PROJECT

Justice O'Connor's jurisprudence on federalism does veer to the "Our Federalism" model of separate sovereigns operating in distinct spheres, clashing on issues like the reach of the Commerce Clause, conditional spending, and federal preemption.[110] Since 1979, through the works of scholars like Kaden,[111] McCoy and Friedman,[112] Merritt,[113] and Briffault,[114] a new theory of federalism has emerged. Rather than the static separate sovereign model of high school civics texts, this new federalism paradigm extrapolates a thick matrix of horizontal and vertical interactions in which the inferior subdivision exercises its *power of the servant* and professional porosity to negotiate, cajole, and at times obstruct, affecting the timing and costs of implementation of federal goals; in its extreme permutation, this constitutes "uncooperative" (as distinct from cooperative) federalism.[115] In that matrix, state and local government hold cards the Supreme Court does not generally touch on—ones that create an opening for equal opportunity political activism: on the pace of implementation, for example, or the dissemination of state executive power to state agencies. Today "federalism doesn't have a political valence," as a leading proponent of the new school of federalism, Dean Heather Gerken of Yale Law School has said.[116]

Sometimes, though, old school has a role. Two recent cases show the power of the conditional spending limitation doctrine and the commandeering doctrine. They have allowed different wings of the Court to find common ground and craft unusual majority opinions.

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[110] *See* Younger v. Harris, 401 U.S. 37, 43–45 (1971).

[111] *See generally* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979).

[112] *See generally* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85.

[113] *See generally* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

[114] *See generally* Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994).

[115] *See* Blake Hudson, *Dynamic Forest Federalism*, 71 WASH. & LEE L. REV. 1643, 1651–52 (2014).

[116] Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY (2017), https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/ [https://perma.cc/7PNV-8WZ6].

A. The Sebelius *Decision and Medicaid: Finding the Outer Limit of Conditional Spending*

National Federation of Independent Business v. Sebelius[117] was a legal challenge brought by twenty-six conservative state attorneys generals and NFIB, the association representing small businesses, to invalidate the Affordable Care Act ("ACA").[118] O'Connor's reasoning in her *Dole* dissent and her majority opinion in *New York v. United States* provide a refuge for compromise in the Supreme Court decision in the case, possibly rescuing the result from becoming a political question nightmare.[119] Most commentary on the case focused on the critical individual mandate, which requires individuals to purchase health insurance.[120] The lesser-examined second part of the opinion was a challenge to the Medicaid expansion provision of the statute, and that is where *Dole* and *New York v. United States* provide critical doctrinal underpinnings that allowed the Court to reach the merits, rather than invoking an unappealing avoidance doctrine.[121]

Medicaid is the largest of all federal grant-in-aid programs to the States.[122] It covered an estimated seventy million U.S. children and adults in 2011.[123] The program spent more than $430 billion that year, over 60% of which was federal money.[124] Medicaid accounts for more than 20% of the average state budget.[125] Not 20% of its healthcare spending, but 20% of entire state budgets.[126] The ACA provisions phases out federal funding to states over time.[127] The

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[117] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[118] *See id.* at 530.

[119] *See id.* at 538, 588–89; New York v. United States, 505 U.S. 144, 184–88 (1992); South Dakota v. Dole, 483 U.S. 203, 212–16 (1987) (O'Connor, J., dissenting).

[120] *See, e.g.*, *Affordable Care Act Ruled Invalid by Texas Federal Judge*, NAT'L FED'N INDEP. BUS. (Dec. 19, 2018), https://www.nfib.com/content/news/healthcare/affordable-care-act-ruled-invalid-by-texas-federal-judge/ [https://perma.cc/MA3S-SLDR]; Leah Litman, *Supreme Court to Review Obamacare Ruling That Was a Sick Joke*, NBC NEWS (Dec. 19, 2019, 12:59 PM), https://www.nbcnews.com/think/opinion/obamacare-ruling-voiding-part-health-care-law-joke-s-really-ncna1104976 [https://perma.cc/FHR3-BBM7].

[121] *See Sebelius*, 567 U.S. at 579–86 (first quoting *New York*, 505 U.S. 144; then quoting *Dole*, 483 U.S. 203).

[122] *See* THE PEW CHARITABLE TRUSTS, MEDICAID MAKES UP MOST FEDERAL GRANTS TO STATES 1 (2019).

[123] *See* CYNTHIA MONIZ & STEPHEN GORIN, HEALTH CARE POLICY AND PRACTICE: A BIOPSYCHOSOCIAL PERSPECTIVE 122 (4th ed. 2014).

[124] *See* DEP'T OF HEALTH & HUMAN SERVS., 2012 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID iii (2012).

[125] *See Sebelius*, 567 U.S. at 581.

[126] *See id.*

[127] *See* Sara Rosenbaum & Timothy M. Westmoreland, *The Supreme Court's Surprising Decision on the Medicaid Expansion: How Will the Federal Government and States Proceed?*, 31 HEALTH AFF. 1663, 1664 (2012).

federal government would largely be paying for Medicaid from 2014 to 2016.[128] Then the federal share would decline in 5% increments to 90% in 2020, creating a large new expense for the states (what governors like to call an unfunded federal mandate).[129] The alternative to expansion was a cut-off to the federal grant-in-aid four years after the ACA's enactment.[130] Thus, when the ACA required states to expand their state-legislated Medicaid programs, there was no effective option for states to decline the invitation—the resulting budget hole simply would have been too staggering.[131]

Justices Scalia, Kennedy, Thomas, and Alito would have voted to invalidate the entire Act based on that provision, as well as on the individual mandate.[132] However, the ACA was saved not just by the Chief Justice's sleight of hand on the individual mandate issue, but also by two separate opinions that together formed a majority to strike the Medicaid expansion and craft an unusual remedy limiting the federal government's power to enforce state compliance.[133] O'Connor's influence is notably present.

This portion of the *Sebelius* opinion marks the first time since the New Deal, that the Supreme Court has upheld a conditional spending challenge.[134] The *Dole* test and *New York v. United States* provided the reasoning for this portion of the plurality opinion.[135]

Recall that in *Dole*, the test announced by the majority required both relatedness and that the grant penalty sanction not be so onerous that States were effectively bludgeoned into accepting the condition.[136] While the *Dole* majority found the minimum age twenty-one drinking law satisfied both the relatedness test and the non-coercion principle,[137] O'Connor was more skeptical than her colleagues about the potential for coercion.[138] She agreed that the withdrawal of five percent of federal highway funds in *Dole* was only a fraction of a percent of the South Dakota public safety budget and

[128] *See id.*

[129] *See id.*; *see also* UNFUNDED MANDATES REFORM ACT, *supra* note 45, at 4–6; Michael A. Memoli, *Governors Divided Over Medicaid Expansion*, TRIB. NEWS SERV. (July 16, 2012), https://www.governing.com/news/state/mct-national-governors-association-divided-over-medicaid-expansion.html [https://perma.cc/5JGF-SVBH].

[130] *See Sebelius*, 567 U.S. at 576, 581.

[131] *See id.* at 530–32, 588.

[132] *See id.* at 646, 648–49 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

[133] *See id.* at 529, 588–89 (majority opinion).

[134] *See id.* at 588; United States v. Butler, 297 U.S. 1, 74–75 (1936).

[135] *See Sebelius*, 567 U.S. at 522–23 (first quoting New York v. United States, 505 U.S. 144, 178 (1992); and then citing South Dakota v. Dole, 483 U.S. 203, 211 (1987)).

[136] *See Dole*, 483 U.S. at 208–12.

[137] *See id.* at 208–11.

[138] *See id.* at 212 (O'Connor, J., dissenting).

thus by any logic not sufficiently coercive to trigger the *how much is too much* prohibition,[139] but she was concerned that imposing conditions to secure adherence to unrelated policy goals went beyond the spending power, and were constitutionally fatal.[140]

In *Sebelius*, the Court had finally answered *Dole*'s question: how much is too much in terms of funds withheld to assure compliance with a federal policy goal over state objection?[141] O'Connor's coercion concern is here in full display.[142] Congress may refuse to supplement the Medicaid grant to non-compliant states but cannot turn "pressure . . . into compulsion."[143] The total loss of the Medicaid grant-in-aid, because it constitutes such a large part of the States' general fund, would be in Chief Justice Roberts's words, "a gun to the head."[144]

The Court also uses O'Connor's reasoning on relatedness, the other critical prong of the *Dole* test.[145] The plurality opinion asks what the expansion was designed to accomplish.[146] It concluded that the ACA Medicaid expansion was not merely in the numbers of people covered, but in the categories of people.[147] Traditional Medicaid covered:

> [T]he disabled, the blind, the elderly, and needy families with dependent children. Previous amendments . . . merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level.[148]

So as in *Dole*, the condition is not related to the same policy goal the state accepted the funds for.[149] A new policy goal is announced in the ACA, and the states must dance to its tune or risk funding that they had become dependent on in a simpler time, when Medicaid was not such a mammoth portion of its state budget, and when Medicaid was a much different program.

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139 *See id.* at 213.
140 *See id.* at 218.
141 *See Sebelius*, 567 U.S. at 581 (citing *Dole*, 483 U.S. at 211).
142 *See Sebelius*, 567 U.S. at 577–78.
143 *Id.* (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).
144 *Sebelius*, 567 U.S. at 581.
145 *See id.* at 580 (quoting *Dol*e, 483 U.S. at 208).
146 *See Sebelius*, 567 U.S. at 583.
147 *Id.*
148 *Id.*
149 *See Dole*, 483 U.S. at 213 (O'Connor, J., dissenting).

In *New York v. United States*, Justice O'Connor announced the second line of reasoning that the plurality relied upon in *Sebelius*. As she said there, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[150] Congress may encourage cooperation through conditional spending, it may preempt, but it may not withhold grant money to a degree that coerces compliance, or attach conditions so marginal to the funds in question that it serves simply as a pretext to secure compliance with a separate federal policy goal.[151]

In its analysis, the Chief Justice's opinion seems to collapse commandeering and conditional spending reasoning into one,[152] perhaps because of the ACA Medicaid sanction's enormity. Future cases will see if distinctions emerge as spending in the gray areas are tested in the Court.

The plurality opinion finds a middle path between severing the provision and having the entire Act fall on the basis of the Medicaid provision, suggesting that states be provided the option of accepting or declining the invitation to Medicaid expansion, without penalty for the latter.[153] The refusal to invalidate and sever the offending Medicaid provision was the most astonishing aspect of the Court's solution, as many commentators observed.[154] But it is a solution that mirrors remarkably O'Connor's abbreviated concurrence in the *Printz* case, suggesting that state and local law enforcement officers could accept an invitation to cooperate in a federal regime that they could not be compelled to cooperate in.[155]

As many have observed, the Court's decision in *Sebelius* avoided a showdown with a popular President on his signature program, and a potential Constitutional crisis on whether the political question

[150] New York v. United States, 505 U.S. 144, 162 (1992) (citing Coyle v. Smith, 221 U.S. 559, 565 (1911)).

[151] *See Sebelius*, 567 U.S. at 577–78.

[152] *See id.* at 585–86.

[153] *See Sebelius*, 567 U.S. at 585.

[154] *See, e.g.*, Joan Biskupic, *The Inside Story of How John Roberts Negotiated to Save Obamacare*, CNN POLITICS (March 25, 2019, 4:35 PM), https://www.cnn.com/2019/03/21/politics/john-roberts-obamacare-the-chief/index.html [https://perma.cc/DAG3-W6WA]; Andrew Prokop, *The Battle Over Medicaid Expansion in 2013 and 2014, Explained*, VOX (May 12, 2015, 3:46 PM), https://www.vox.com/2015/1/27/18088994/medicaid-expansion-explained [https://perma.cc/5S8F-S4NT].

[155] *See* Printz v. United States, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring).

doctrine was appropriate to the case.[156] By finally reaching the questions that *Dole* left unresolved, the *Sebelius* plurality answered an important question: whether there was an outer limit to the conditional spending power or whether state reliance on federal grants had turned them into mere vassals?[157] It revived the debate on whether relatedness of a condition to the federal policy purpose is a mere fig leaf, or whether sanctions must be tightly correlated to a federal grant's purpose. As we will see in Section III, that relatedness is a critical aspect of the current litigation challenging Executive Order 13768 and its use to withdraw federal grant funding to sanctuary jurisdictions.[158] Finally, it said that while the ACA could not commandeer a state into changing the scope and purpose of its Medicaid program, it could invite it to do so.

Unresolved by the case is O'Connor's accountability question, which the Chief Justice, in a measured way, chose to leave unaddressed in *Sebelius*. Of course, one way that Congress might have implemented an ACA-like program would have been to create a federal health care plan or preempt the state role in Medicaid and turn it into an all-federal program, say, with a name like "Medicare For All." That would have been a straightforward policy choice, using core Article I taxation power, that voters could have chosen to reward or punish at the polls. That was a politically unpalatable approach in 2011, and a non-starter in Congress.[159] It chose instead to make the States do things—some of them very expensive things—that governors and state legislators objected to not only on ideological grounds, but on cost grounds.[160]

The penalty portion of the ACA was repealed as part of the Tax Cuts and Jobs Act in 2017,[161] precipitating a challenge to the entire

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[156] *See Sebelius*, 567 U.S. at 644 (Ginsburg, J., concurring) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)); Nicole Huberfeld, *Heed Not the Umpire (Justice Ginsburg Called NFIB)*, 15 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 43, 52 (2012).

[157] *See Sebelius*, 567 U.S. at 631–32 (citing South Dakota v. Dole, 483 U.S. 203, 207–08, 210 (1987)).

[158] *See infra* notes 195–260 and accompanying text.

[159] *See* American Health Security Act of 2011, S. 915, 112th Cong. (2011).

[160] *See, e.g.*, Richard Cauchi, *State Laws and Actions Challenging Certain Health Reforms*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 17, 2018), https://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx [https://perma.cc/F2ZX-Z4Z7]; Kevin Sack, *Opposing the Health Law, Florida Refuses Millions*, N.Y. TIMES (July 31, 2011), https://www.nytimes.com/2011/08/01/us/01florida.html [https://perma.cc/H3AK-3FBL].

[161] *See* MaryBeth Musumeci, *Explaining Texas v. U.S.: A Guide to the Case Challenging the ACA*, THE HENRY J. KAISER FAM. F. (Mar. 10, 2020), https://www.kff.org/report-section/explaining-texas-v-u-s-a-guide-to-the-case-challenging-the-aca-issue-brief/ [https://perma.cc/2935-JKCW].

ACA by conservative Attorney General's offices.[162] Lingering resentment over the ACA is fueled by costs to the states have been hidden, making it more difficult to have an informed debate at the operative level of accountability.[163] O'Connor's call for clear guardrails at the appropriate level of political accountability is illustrated by these developments.

B. Let Me Sit Here Next to You, or, Justice Alito Shows the Feds the Statehouse Door

Meanwhile, the second pillar of O'Connor federalism, the anti-commandeering doctrine, was getting a second look, with states seeking to flex their muscles, passing laws that ran contrary to weakly articulated federal legislation that did not preempt, but also did not leave room for state choice, either.

Printz and *Reno v. Condon* articulated a bright line: states were commandeered if they were charged with gathering data in service of a federal policy goal, but were not precluded from voluntary data-sharing at the state or state subdivision level.[164] The distinction was compulsion versus prohibition, and the burdens that would encumber states were different. But what if the imposition went beyond ministerial matters and went to the actual mechanism of state government? That was the baseline issue in *New York. v. United States*, and also became an issue in *Sebelius*, where federal regulation threatened to bust state budgets. What if the federal government sought to commandeer by forcing state legislators' hands on an inherent power like funding their own state budget?

That iteration of the commandeering problem was considered in the 2018 Term. *Murphy v. National Collegiate Athletic Ass'n*[165] takes a broad view of the anti-commandeering role.[166] Its formulation shows that the federal government cannot coerce states into lending their enforcement mechanisms to federal policy,[167] but also that in an absence of specific congressional acts supported by the Commerce

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[162] *See* Texas v. United States, 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom.* California v. Texas, 140 S. Ct. 1262 (2020); Musumeci, *supra* note 161. A critique of these lawsuits correctly notes that people of color disproportionately rely on Medicaid. These critics argue with force that there is a recist element to the resistance to Medicaid expansion in Republian-dominated states.

[163] *See Texas*, 945 F.3d at 369.

[164] *See* Reno v. Condon, 528 U.S. 141, 151 (2000); Printz v. United States, 521 U.S. 898, 935 (1997).

[165] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

[166] *See id.* at 1478.

[167] *See id.*

Clause or Fourteenth Amendment, or preemption express or implied, Congress cannot exercise its power by prohibiting states from exercising their inherent powers.[168]

The State of New Jersey wanted to legalize sports gambling at casinos and horseracing tracks, but a federal law, the 1992 Professional and Amateur Sports Protection Act ("PASPA"). generally makes it unlawful for a State to "authorize" sports gambling schemes.[169] PASPA does not make sports gambling a federal crime, but instead, it allows the U.S. Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations.[170] As enacted, PASPA gave New Jersey a one-year grace period to legalize sports gambling in Atlantic City.[171] It declined to do so, but two decades later, in 2011, economic hardship caused it to rethink its position.[172] New Jersey amended its constitution to lift the ban on sports gambling and a 2012 Act of the New Jersey Legislature authorized sports gambling.[173]

The National Collegiate Athletic Association and professional sports leagues sued to enjoin the law as a violation of PASPA.[174] The case made its way to the Third Circuit twice: first as an affirmative authorization of sports gambling,[175] then in a law that acted as a repeal of the prior prohibition,[176] each an effort to find its way around PASPA. In each case, the Third Circuit sided with PASPA.[177] Writing for a 6-3 Court, Justice Alito disagreed with his former Third Circuit colleagues.[178]

PASPA violated anti-commandeering doctrine, the Court reasoned, by issuing a direct order to the states.[179] Past anti-commandeering cases had involved affirmative commands that required states to

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[168] *See id.* at 1479–80 (first quoting Armstrong v. Exceptional Child Ctr., 575 U.S. 320, 324 (2015); then quoting New York v. United States, 505 U.S. 144, 166 (1992); and then quoting English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990)).

[169] *See* 28 U.S.C. § 3702(1) (1992); Nick Corasaniti & Joe Drape, *New Jersey's Appeal of Sports Betting Ban Heads to Supreme Court*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/nyregion/new-jerseys-appeal-of-sports-betting-ban-heads-to-supreme-court.html?auth=login-google [https://perma.cc/R95Z-SJCZ].

[170] *See* 28 U.S.C. § 3703 (1992).

[171] *See Murphy*, 138 S. Ct. at 1471.

[172] *See id.*

[173] *See id.*

[174] *See id.*

[175] *See id.* (citing Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013)).

[176] *See Murphy*, 138 S. Ct. at 1472.

[177] *See id.* at 1471–72 (first citing *NCAA*, 730 F.3d 208; and then quoting Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389 (3d Cir. 2016)).

[178] *See Murphy*, 138 S. Ct. at 1468.

[179] *See id.* at 1478.

act.[180] The respondents argued that PASPA, by contrast, simply required states to refrain from acting.[181] The Court saw no difference: in both instances, Congress "issue[d] direct orders to state legislatures," placing them under its "direct control."[182] That past cases confronted only "affirmative" commands, not prohibitions, was "happenstance."[183] The majority also declined to uphold as severable the New Jersey law's application to prohibit sports gambling schemes operated by private parties.[184]

The Court, adopting both the language and reasoning of Justice O'Connor's opinions in *New York v. United States* and *Printz v. United States*, stated that complying with the anti-commandeering rule is important because it serves as one of the Constitution's structural safeguards of liberty, advances political accountability, and prevents Congress from shifting regulatory costs to the states.[185] Justice Alito noted:

> [T]he anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.[186]

As both Justice Breyer, concurring in part, and Justice Ginsburg, dissenting, note, it is the form and not the substance of PASPA that is problematic.[187] Under its Commerce Clause power, Congress could well have made the policy decision to prevent the spread of sports gambling by an outright ban or other forms of prohibition.[188] The lines of accountability would be clear. Instead, it authorized the Attorney General to bring actions to enjoin sports gambling in the

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[180] *See id.*
[181] *See id.*
[182] *Id.*
[183] *See id.*
[184] *See id.* at 1484.
[185] *See id.* at 1476–77 (first quoting New York v. United States, 505 U.S. 144, 161 (1992); and then quoting Printz v. United States, 521 U.S. 898, 921, 935 (1997)).
[186] *See Murphy*, 138 S. Ct. at 1477 (first citing *New York*, 505 U.S. at 168–69; and then citing *Printz*, 521 U.S. at 929–30).
[187] *See Murphy*, 138 S. Ct. at 1488 (Breyer, J., concurring in part and dissenting in part); *id.* at 1490 (Ginsburg, J., dissenting).
[188] *See id.* at 1489 (Ginsburg, J., dissenting) (citing Gonzales v. Raich, 545 U.S. 1, 17 (2005)).

states.[189] Justice Breyer found the form of PAPSA to constitute a dodge of the responsibility to regulate it directly; Justice Ginsburg (joined by Justice Sotomayor) disagreed, finding that Congress had been sufficiently clear in articulating its regulatory intent.[190] Significantly, Justice O'Connor's articulation of the accountability value was adopted by the majority and the dissenters alike.[191]

Accountability is a primary O'Connor preoccupation; in *Murphy*, it is a concern taken up by Justices as diverse in their views as Alito, Breyer, and Ginsburg.[192] But it is not only a negative constraint. Just as legislators may be blamed for bad choices, they may be credited for good ones by re-election, increased power to enact their policy agendas, and increased legislative majorities. The "smallness" of state government allows that feedback mechanism to operate in a more transparent and traceable way. *Murphy v. National Collegiate Athletic Ass'n* allowed New Jersey politicians to take credit for the popular repeal of the prohibition on sports gambling in the state; it is a small irony that by the time the case was decided by the Supreme Court, Governor Phil Murphy was the named respondent, and not Governor Chris Christie, who had piloted sports gambling in New Jersey.[193]

Commentators seized on *Murphy v. National Collegiate Athletic Ass'n* as a green light for states to experiment on every issue from marijuana legalization to assisted suicide and, very notably, on

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[189] *See Murphy*, 138 S. Ct. at 1470–71 (majority opinion).

[190] *See id.* at 1488 (Breyer, J., concurring in part and dissenting in part); *id.* at 1489 (Ginsburg, J., dissenting).

[191] *See id.* at 1477 (majority opinion) (citing *New York*, 505 U.S. at 168–69); *Murphy*, 138 S. Ct. at 1488 (Breyer, J., concurring in part and dissenting in part) (quoting *New York*, 505 U.S. 144, 166); *Murphy*, 138 S. Ct. at 1489 (Ginsburg, J., dissenting) (citing *New York*, 505 U.S. at 168). The dissenters note another distinction in *Murphy v. National Collegiate Athletic Ass'n* from O'Connor's carefully crafted anticommandeering opinions: it found severable portions of the federal law in *New York v. United States*, applying a chisel only to the offending provision. *See Murphy*, 138 S. Ct. at 1489–90 (Ginsburg, J., dissenting) (quoting *New York*, 505 U.S. at 186). The *Murphy v. National Collegiate Athletic Ass'n* majority went much further, striking down provisions that only applied to private sponsors of sports gambling. *See Murphy*, 138 S. Ct. at 1483–84 (majority opinion). This appears to contradict another part of O'Connor's formulation that Tenth Amendment violations, like commandeering, occur only in regulation of the conduct of states, not of private parties. *See id.* at 1476 (quoting *New York*, 505 U.S. at 176).

[192] *See generally Murphy*, 138 S. Ct. 1461.

[193] *See NJ Governor Phil Murphy to Deliver Keynote Address at SBC's—Betting on Sports America 2020*, PR NEWSWIRE (Mar. 2, 2020), https://www.prnewswire.com/news-releases/nj-governor-phil-murphy-to-deliver-keynote-address-at-sbcs—-betting-on-sports-america-2020-301013277.html [https://perma.cc/Q4PY-XPLU].

sanctuary jurisdictions.[194] It is to that aspect of Justice O'Connor's federalism legacy that we will turn in closing.

III. RIDING TO THE RESCUE: A COWGIRL'S FEDERALISM AND THE TRUMP IMMIGRATION ENFORCEMENT REGIME

There are few efforts to force the hand of states today that are as coercive as the immigration policy of the Trump Administration. It has taken direct aim at sanctuary jurisdictions, which refuse to assist the federal government in efforts to deport illegal immigrants.[195] These jurisdictions all happen to be in large, Democratic-leaning, and largely urban states.[196] Through executive orders empowering the Justice Department and immigration agencies under the Department of Homeland Security ("DHS"), the Trump Administration has attempted to coerce sanctuary cities and states that have made a policy judgment that their own public safety interests lie in a cooperative and transparent relationship with its undocumented residents and their documented family members.[197]

We cannot know exactly WWSD ("What Would Sandra Do?") on sanctuary jurisdictions. She left the Court in 2005, well before sanctuary jurisdictions became an issue.[198] But a series of Court

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[194] *See* Mark Joseph Stern, *Three Cheers for Federalism*, SLATE (May 14, 2018, 5:50 PM), https://slate.com/news-and-politics/2018/05/justice-alitos-opinion-on-sports-betting-shows-up-federalism-can-be-good-for-liberals.html [https://perma.cc/5VQ3-5TUF].

[195] *See* Ilya Somin, *Federal Court Rules Against Trump's Executive Order Targeting Sanctuary Cities*, WASH. POST (Apr. 25, 2017, 5:52 PM) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/25/federal-court-rules-against-trumps-executive-order-targeting-sanctuary-cities/ [https://perma.cc/N9BU-AMW2].

[196] *See 2016 Presidential Election Results*, POLITICO (Dec. 13, 2016, 1:57 PM) https://www.politico.com/2016-election/results/map/president/ [https://perma.cc/3J8B-ATNF]; Harper Neidig, *Appeals Court Rules Trump Administration Can Withhold Grants from 'Sanctuary Cities'*, HILL (Feb. 26, 2020, 11:43 AM), https://thehill.com/regulation/court-battles/484715-appeals-court-rules-trump-administration-can-withhold-grants-from [https://perma.cc/2Y5M-UDHS].

[197] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,796, 8,801 (Jan. 25, 2017); Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy* (Jan. 26, 2017, 1:00 AM), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/ [https://perma.cc/H2C4-DTH9].

[198] *See* Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87, 89 (2016); William Branigin et al., *Supreme Court Justice O'Connor Resigns*, WASH. POST (July 1, 2005, 7:11 PM), https://www.washingtonpost.com/archive/business/technology/2005/07/01/supreme-court-justice-oconnor-resigns/89bfdb78-f039-47ed-a129-31acc722eea8/ [https://perma.cc/9SKC-PZN7]. Lai and Lasch provide a review of relevant court decisions on sanctuary jurisdictions and criminal justice before late 2017. *See* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 558–61 (2017). Lai and Lasch cite eight pieces of federal legislation that would have outlawed sanctuary cities; Congress declined to enact any of them. *See id.* at 553 & n.87.

decisions have handed one defeat after the other to the Trump Administration's approach to state assertion of their own policy priorities on immigration. There is a direct line traceable from these cases back to O'Connor's conditional spending and anti-commandeering doctrine cases.

O'Connor's immigration jurisprudence is a mixed bag, providing few clues.[199] Her view of executive power, though, is driven by a process orientation that emphasizes the importance of judicial review.[200] For instance, in cases decided after September 11, 2001, she generally upheld challenges to unreviewed executive action against enemy combatants, whether American citizens of foreign nationals.[201]

A key decision on immigration federalism postdates O'Connor's departure from the Court, but provides needed context. In *Arizona*

[199] There is no single ideological plumb line except O'Connor's strict reading of Congressional legislation. In one of her earliest opinions for the Court, *INS v. Phinpathya*, O'Connor strictly construed "continuous physical presence" language in the governing statute to permit deportation of a long-time U.S. resident non-citizen who had traveled once out of the U.S. during a long period of residency, and was tied to the U.S. by her husband and his citizen daughter. INS v. Phinpathya, 464 U.S. 183, 185–86, 187 & n.3, 189–90 (1984); *see generally* Branigin et al., *supra* note 198. Near the end of her tenure on the Court, O'Connor sided with liberal Justices granting relief to two resident aliens on their habeas petitions, finding that due process rights were guaranteed to aliens in deportation hearings, and that while the Attorney General could hold a deportable alien past the ninety-day authorized statutory removal period if no country would accept him, the detention could not be indefinite. *See* Zadvydas v. Davis, 533 U.S. 678, 682, 684 (2001); Branigin et al., *supra* note 198. The same term, though, she dissented in *INS v. St. Cyr*, in which two Congressional immigration bills appeared to strip habeas jurisdiction from the federal courts. *See* INS v. St. Cyr, 533 U.S. 289, 292, 298, 326 (2001). The majority held in favor of the respondent, Enrico St. Cyr, a deportable citizen of Haiti. *See id.* at 293, 326.

[200] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509, 525 (2004) (citing *INS*, 533 U.S. at 301).

[201] *See Hamdi*, 542 U.S. at 509–10. The Guantanamo cases provide us insight on O'Connor's view of the limit of powers of the executive branch. These were cases relating to detentions of enemy combatants at a U.S. military prison facility at Guantanamo Bay, Cuba, in connection with the U.S. campaign to curb global terrorism following September 11, 2001. *See* Boumediene v. Bush, 553 U.S. 723, 732–33 (2008); *Hamdi*, 542 U.S. at 510–11; Rasul v. Bush, 542 U.S. 466, 470–71 (2004). One case involved an American citizen, and the two others involved non-citizens. *See Boumediene*, 553 U.S. at 732; *Hamdi*, 542 U.S. at 509; *Rasul*, 542 U.S. at 470–71. In *Hamdi*, Justice O'Connor, writing for the majority, said in the context of the detention even of enemy combatants: "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 542 U.S. at 509, 530 (citing *Ex parte* Milligan, 71 U.S. 2, 125 (1866)). She went on to say that: "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)). Lest we think her belief on this extended only to U.S. citizens, O'Connor joined the majority in *Rasul*, another of the group of cases that extended habeas corpus rights to alien alleged enemy combatants held at the U.S. military jail at Guantanamo. *See Rasul*, 542 U.S. at 470, 485. By 2008, when *Boumediene v. Bush* extended the due process rights of detained enemy aliens even further, she had left the Court. *See Boumediene*, 553 U.S. at 732; Branigin et al., *supra* note 198.

v. United States,[202] the Court rejected an effort by Arizona to utilize its own law enforcement officers to engage in a more aggressive detection and removal regime than the one being pursued by DHS.[203] The Court found that immigration enforcement, as a foreign policy matter, was field-preempted by the federal government, and that even choices on the amount of funding and number of officers to assign in a state were exclusively federal decisions.[204] That sweeping ruling set the stage for an unfortunate series of events after the election of Donald Trump.

On January 25, 2017, President Trump issued Executive Order 13,768 (the "EO"). It stated that:

> [T]he Attorney General and the [DHS] Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.[205]

Section 1373, the Act of Congress referenced in the EO, is itself oddly phrased in that it prohibits state or local entities or officials from restricting any government entity or official from sending to, or receiving from, INS information on the legal or illegal citizenship or immigration state of any individual.[206] Enacted in 1996, it appears to deprive state and local government from enacting orderly policy regimens regarding data-sharing on immigration status, setting up a kind of freelance arrangement where agencies can choose to voluntarily make that choice to share data with their federal counterparts.[207] Since its enactment, and through both Democratic and Republican administrations, state and local jurisdictions have refused to share that data, or have opted not to collect the data.[208] Until the end of the Obama Administration, the Justice Department

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[202] Arizona v. United States, 567 U.S. 387 (2012).
[203] *See id.* at 410, 416.
[204] *See id.* at 401 (citing American Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 & n.11 (2003)).
[205] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801.
[206] *See id.* § 1373(a)–(b); Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801.
[207] *See* 8 U.S.C. § 1373(b)–(c).
[208] *See generally* Stephan Dinan, *Half of All Americans Now Live in 'Sanctuaries' Protecting Immigrants*, WASH. TIMES (May 10, 2018), https://www.washingtontimes.com/news/2018/may/10/half-of-americans-now-live-in-sanctuaries/ [https://perma.cc/BV77-PNQ5].

had made no effort to enforce its provisions, and it has been considered constitutionally vulnerable on commandeering grounds.[209]

Then in July 2017, the Justice Department sought to impose three new conditions on a formula grant to state and local law enforcement, known as Byrne Justice Assistance Grants ("Byrne JAG").[210] The conditions require states and their subdivisions to certify compliance with 8 U.S.C. § 1373, and more specifically require states and subdivisions to (1) provide access for DHS agents to their detention facilities to meet with aliens, and inquire on their legal or illegal presence in the US, and (2) provide 48 hours' notice to DHS of the relief of an alien in the jurisdiction's custody.[211]

The EO appears to require no relationship between the grant condition imposed by the Attorney General and the purpose of the grant.[212] It confuses the authority of Congress to place conditions on a grant with the executive branch's ability to do so.[213] 8 U.S.C. § 1373 appears either to commandeer the databases of the state and local governments, or offer a cooperative federal arrangement in which officials can "choose" to share information with federal immigration authorities outside of their regular chain of command in state and

[209] *See* Andrew R. Arthur, *Judge Orrick Rules Section 1373 Is Unconstitutional*, CTR. FOR IMMIGR. STUD. (Oct. 10, 2018), https://cis.org/Arthur/Judge-Orrick-Rules-Section-1373-Unconstitutional [https://perma.cc/5M8R-LPVL]; Kara Rowland & Stephan Dinan, *Justice: Sanctuary Cities Safe from Law*, WASH. TIMES (July 14, 2010), https://www.washingtontimes.com/news/2010/jul/14/justice-sanctuary-cities-are-no-arizona/ [https://perma.cc/A7TX-UK9J].

[210] *See* U.S. Dep't of Justice, OMB No. 1121-0329, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM: FY 2017 LOCAL SOLICITATIONS 32 (2017).

[211] *See id.* at 31, 32. This is not the first Administration to overreach on immigration. *See* Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), https://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html [https://perma.cc/RD3S-F8ZZ]. The Trump Administration is attempting to accomplish by executive order what it cannot do by securing acts of Congress. *See* Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1248 (2019). But it is not without precedent: it picks up on an effort with perhaps unforeseen consequences by the Obama Administration, which put in place an executive order after Congress failed to act to protect Dream Act youth. *See* Preston & Cushman Jr., *supra*. And the Obama Administration hauled Arizona into court when that state attempted to augment federal enforcement of immigration law, resulting in a declaration by the Supreme Court that the federal government preempts the states in immigration enforcement, a helpful precedent when federal rules are compassionate and tolerant, problematic when they are Draconian. *See* Arizona v. United States, 567 U.S. 387, 393–94, 401–02 (2012).

[212] *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)); *Dole*, 483 U.S. at 213 (O'Connor, J., dissenting) (citing *Massachusetts*, 435 U.S. at 461); Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801.

[213] *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801.

local agencies, or worse still, contrary to state and local law.[214] And the Justice Department rules place restrictions on Byrne JAG that seem designed to secure compliance with immigration enforcement, not the capacity-building function of the Byrne JAG program.[215]

Federal courts, with and without a nod to Justice O'Connor's groundwork, have taken up her federalism jurisprudence in response to lawsuits filed around the nation by state's attorneys general, cities, and counties. There are three primary categories of challenge: one to the EO itself,[216] one to federal public safety grant denials to sanctuary jurisdictions,[217] and one to the information sharing requirement in 8 U.S.C. § 1373.[218] Ilya Somin excellently analyzes the rulings through mid-2019 in his thoughtful and thorough symposium article [219]

Professor Somin also makes a point well worth repeating—that by its overreach on immigration enforcement, the Trump Administration is battering state autonomy in unprecedented ways.[220] As a result, the scholars of federalism, on both the left and on the right, have come together in an unusual union to develop the theoretical fuel for the lawsuits being filed nationally challenging the Trump Administration's approach.[221] Whether this is "fair weather federalism" that will devolve to business as usual after the crisis ends, or a detente leading to the development of neutral principles on the limits of state power, is yet to be determined.[222] What is safe to say is that both sides are giving a lot more thought to O'Connor's federalism project: how far conditional spending can be pushed and what conditions or requirements constitute commandeering by the federal executive branch.

By its terms, the EO and Byrne grant conditions appear to be just the sort of abuse that most concerned O'Connor, failing both the relatedness and coercion test articulated in *Dole and New York v. United States*.[223] To be fair, several of the rulings don't even need to reach that issue, instead resting on a separation of powers analysis.

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[214] *See* 8 U.S.C. § 1373.
[215] *See* U.S. Dep't of Justice, *supra* note 210, at 31.
[216] *See* Somin, *supra* note 211, at 1248.
[217] *See id.*
[218] *See id.* at 1248–49.
[219] *See generally id.*
[220] *See id.* at 1284.
[221] *See id.* The same point is also made from the progressive side in this article. *See* Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L. J. 997, 1011 (2015).
[222] *See id.*
[223] *See* New York v. United States, 505 U.S. 144, 167–69 (1992); South Dakota v. Dole, 483 U.S. 203, 207–08 (1987); Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801; U.S. Dep't of Justice, *supra* note 210, at 31–32.

Those decisions say simply that the spending condition never was announced by Congress,[224] that since it was not, it could not be delegated to the executive branch, and that to fabricate it constitutes a separation of powers violation.[225] To those interested in the conditional spending issue, the reluctance of several of the Circuits to take up the conditional spending analysis of lower court rulings in these lawsuits, and reliance only on the separation of powers argument, is puzzling and disappointing.

A. The Executive Order

First, let's look at the EO: it purports to cut off all federal aid to jurisdictions that do not share information on the immigration status of its residents, potentially cutting off funds for hospitals, schools, and transportation, as well as aspects of law enforcement that have nothing to do with immigration.[226] As at least one federal judge has already found, the EO fails the relatedness test of *Dole* and would seem to reach so many aspects of federal grant funding that it might fall within the *National Federation of Independent Business v. Sebelius* rule, rising to an unduly coercive exercise of the spending power.[227] Decisions by Judge William Orrick of the Northern District of California took on each of the arguments made by the Trump Administration on the EO and pursued by it through multiple appeals.[228] Among his rulings was the decision that conditions on federal grants must, under *Dole*, be reasonably related to the purpose of the grant program.[229] Adopting O'Connor's *Dole* approach, Judge Orrick found that while the relatedness test has been given a fairly relaxed interpretation, this EO finally failed the test.[230]

Also applying *Dole*, Orrick found the EO's grant conditions unconstitutionally coercive because the EO, by its terms, relates to all federal grants to Santa Clara County, amounting to millions of dollars that are essential to fund government functions of the

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[224] *See New York*, 505 U.S. at 181–82; *Dole*, 483 U.S. at 210–212.

[225] *See New York*, 505 U.S. at 181–82.

[226] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801.

[227] *See* County of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1214 (N.D. Cal. 2017) (first quoting *Dole*, 483 U.S. at 203; and then citing Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 576–581 (2012)), *aff'd in part, vacated in part sub nom.* City & County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018).

[228] *See* County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 507, 514 (N.D. Cal. 2017); *County of Santa Clara*, 275 F. Supp. 3d at 1201–02.

[229] *See County of Santa Clara*, 250 F. Supp. 3d at 532 (citing *Dole*, 483 U.S. at 213 (O'Connor, J., dissenting)).

[230] *See County of Santa Clara*, 250 F. Supp. 3d at 532–33 (citing *Dole*, 483 U.S. at 213 (O'Connor, J., dissenting)).

county.[231] Other judges have followed Judge Orrick's reasoning. In *City of Seattle v. Trump*, the Court's reasoning was very similar to Judge Orrick's.[232]

B. Byrne JAG

While it is a fast-moving situation, at least nine federal courts have ruled against the Administration on the three new conditions on the Byrne grants.[233] Prevailing plaintiffs have included the City of San Francisco, City of Los Angeles, City of Chicago, City of Philadelphia, and seven Governors, together with New York City.[234]

In 2018, the Court of Appeals for the Seventh Circuit upheld a nationwide injunction won by the City of Chicago that prohibited the DOJ from denying Byrne grants to the City because it declined to cooperate in federal immigration enforcement.[235] The Seventh Circuit said:

> The Attorney General in this case used the sword of federal funding to conscript state and local authorities to aid in federal civil immigration enforcement. But the power of the purse rests with Congress, which authorized the federal funds at issue and did not impose any immigration enforcement conditions on the receipt of such funds.[236]

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[231] *See County of Santa Clara*, 250 F. Supp. 3d at 533 (citing *Dole*, 483 U.S. at 211).

[232] *See* City of Seattle v. Trump, No. 17-497-RAJ, 2017 U.S. Dist. LEXIS 173376, at *24–26 (W.D. Wash. 2017).

[233] *See* City of Philadelphia v. Attorney Gen. of U.S., 916 F.3d 276, 279 (3d Cir. 2019); City of Chicago v. Sessions, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017), *aff'd*, 888 F.3d 272 (7th Cir. 2018); New York v. U.S. Dep't of Justice, 343 F. Supp. 3d 213, 220–21 (S.D.N.Y. 2018); City & County of San Francisco v. Sessions, 349 F. Supp. 3d 924, 936–37, 948–49, 975 (N.D. Cal. 2018); City of Los Angeles v. Sessions, No. CV 17-7215-R, 2018 U.S. Dist. LEXIS 226842, at *7 (C.D. Cal. Sept. 13, 2018); City of Evanston v. Sessions, No. 18 C 4853, 2018 U.S. Dist. LEXIS 204500, at *1–2 (N.D. Ill. Aug. 9, 2018) (basing the decision largely on the same judge's previous ruling in *City of Chicago v. Sessions*, 321 F. Supp. 3d 855); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 861, 874 (N.D. Ill. 2018); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 344, 345 (E.D. Pa. 2018); City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 593 (E.D. Pa. 2017). *But see* California *ex rel.* Becerra v. Sessions, 284 F. Supp. 3d 1015, 1019, 1037 (N.D. Cal. 2018).

[234] *See City of Philadelphia*, 916 F.3d 276; *City of Chicago*, 888 F.3d 272; *City of Chicago*, 264 F. Supp. 3d 933; *New York*, 343 F. Supp. 3d 213; *City & County of San Francisco*, 349 F. Supp. 3d 924; *City of Los Angeles*, 2018 U.S. Dist. LEXIS 226842 at *1; *City of Chicago*, 321 F. Supp. 3d 855; *City of Philadelphia*, 309 F. Supp. 3d 289; *City of Philadelphia*, 280 F. Supp. 3d 579.

[235] *See City of Chicago*, 888 F.3d at 293. In an en banc rehearing, the injunction was scaled back to cover only Chicago. *See City of Chicago*, 321 F. Supp. 3d at 881–82.

[236] *City of Chicago*, 888 F.3d at 277.

Oddly, although a phrase like "the sword of federal funding to conscript state and local authorities" seems to be the prelude to an analysis of conditional spending limits and commandeering, the Seventh Circuit opinion follows with an analysis limited to the separation of powers defect relying on a conclusion that the Attorney General had improperly claimed for himself the conditional spending powers that lay solely with Congress.[237] The Seventh Circuit did not reach the nexus or coercion prongs of the *Dole* test, or the anti-commandeering cases. Neither did the Ninth Circuit, in its opinion rejecting the conditions imposed on the Byrne JAG grants,[238] although the same Circuit considered, and rejected, the *Dole* test's applicability to identical Justice Department imposed conditions on a different grant program, which provides discretionary grants to state and local law enforcement agencies.[239]

It is not clear why some of these decisions use O'Connor's analysis, but do not reach the conditional spending point head-on. One concern may be the Justice Department's efforts to impose a limiting principle on the EO. While the EO itself does not contain any limiting language, the DOJ, in defending the state and local lawsuits against the EO, has attempted to limit the scope of its application only to DOJ law enforcement grants that they contend are the subject of Section 1373, an actual Congressional enactment.[240] While Judge Orrick rejected that approach, and his reasoning was affirmed by the circuit court,[241] the Seventh Circuit may be wary of a circuit split, and so is using what seems like a narrower ground for decision.

So far, none of the courts have reached an issue that ties the current crisis back to ideas about traditional state function and O'Connor's accountability concern: the question of what happens when immigration enforcement butts up against the traditional public safety functions of state and local government. In *Arizona v. United States*, the Supreme Court accepted the argument that immigration enforcement preempts all state regulation of immigration enforcement—it is a field preemption.[242] *Murphy v. National Collegiate Athletic Ass'n* made the point that preemption

[237] *See id.*; *id.* at 295–96 (Manion, J., concurring).
[238] *See* City of Los Angeles v. Barr, 941 F.3d 931, 934 (9th Cir. 2019).
[239] *See* City of Los Angeles v. Barr, 929 F.3d 1163, 1175–76 (9th Cir. 2019) (first quoting South Dakota v. Dole, 483 U.S. 203, 207–08 (1987); and then quoting Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002)).
[240] *See* County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 507–08 (N.D. Cal. 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801.
[241] *See* City of Los Angeles v. Barr, 929 F.3d 1163, 1188–89 (9th Cir. 2019) (citing County of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1231–35 (N.D. Cal. 2017)).
[242] *See* Arizona v. United States, 567 U.S. 387, 401–02 (2012).

requires either an express or implied intention to occupy the field and, in its absence, backhanded attempts to force the states to legislate in particular ways offend the anti-commandeering principle.[243] But undocumented people are more than just their immigration status. They eat, work, drive, and need medical care. That is why some cities and states became sanctuary jurisdictions in the first place.[244] Their concern is not immigration enforcement but public health and public safety.[245] *Arizona v. United States* did not speak to that, and *Murphy* suggests that in the absence of clear preemption, states are free to legislate as they choose, subject to other Constitutional limitations.[246]

Briefing in the Seventh Circuit sanctuary case provides one good example. Chicago argued that the conditions the federal immigration authorities sought to impose were inconsistent with its Welcoming City ordinance,[247] which reflect a City of Chicago policy that as a place "where one-out-of-five of the City's residents is an immigrant . . . the cooperation of all persons, both documented citizens and those without documentation status, is essential to . . . protect[] life and property, prevent[] crime and resolv[e] problems."[248]

The argument that the cities and states are making in the immigration cases is that they have primacy in those areas of traditional local government function, so preemption in immigration is not complete after all, and conditional spending and commandeering cannot be used to prevent state and state subdivision exercise of those powers. The accountability those subnational governments face is for orderly administration of their cities and states, which means enforcing the law in a sufficiently even-handed manner that no resident, even if undocumented, needs to hide from for fear of deportation.

The cases on the EO and Section 1373 are evolving rapidly. As this volume closed, the Second Circuit Court of Appeals announced its decision in *New York v. U.S. Department of Justice*.[249] The case, brought by Attorneys General of New York, New Jersey, and Connecticut, among others, challenge the Byrne JAG denial for FY

[243] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475, 1480–81 (2018).
[244] *See* CHI. ILL. MUN. CODE § 2-173-005 (2012).
[245] *See id.*
[246] *See Murphy*, 138 S. Ct. at 1476.
[247] *See* City of Chicago v. Sessions, 321 F. Supp. 3d 855, 862–63 (N.D. Ill. 2018); CHI. ILL. MUN. CODE § 2-173-005.
[248] CHI. ILL. MUN. CODE § 2-173-005.
[249] *See* New York v. U.S. Dep't of Justice, 951 F.3d 84 (2d Cir. 2020).

2017 and 2018.[250] But unlike the Third, Seventh, and Ninth Circuits, the three-judge panel in the Second Circuit found that Congress had delegated the power to condition Byrne JAG to the Attorney General, and that the information-sharing, notice, and access provisions were "applicable" law that could be attached to the grant.[251] The Second Circuit relied on canons of construction saying that Section 1373 did not require the states to comply with "all federal law" but with "applicable" federal law.[252] The former would be overbroad, but the "applicable" language, the Court found, gave the Attorney General substantial latitude.

Here is where the O'Connor *Dole* dissent may be useful. The Second Circuit appears to be the first court of appeals to analyze *United States v. Arizona*, *Murphy*, and *Dole* together as a continuum delineating the contours of authority of the federal and state governments to regulate in the immigration context.[253] The Second Circuit panel dismisses, without analyzing, the relatedness requirement of the *Dole* test.[254] It says that the Byrne JAG relates to law enforcement, and that immigration enforcement is part of law enforcement, hence the condition relates to law enforcement.[255] O'Connor's reasoning would not allow that connection to be drawn so cavalierly. She inquired into the purpose of the condition.[256] Byrne JAG is a general capacity-building grant. Conditioning it on one small element of overall law enforcement lets the tail wag the dog. Nor did the Second Circuit examine the underlying factual assumption: that undocumented immigrants are any more likely than others to commit crime. Indeed, the data seems to point the other way.[257] The Second Circuit decision considers the factors, but the decision does not accurately and adequately consider the relatedness test.[258] This may be of interest in a request for en banc consideration or appeal.

Even as this Article reaches an end, there are news reports that ICE agents have arrested people in state courthouses in Sonoma

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[250] *See id.* at 91.
[251] *See id.* at 91–92, 94, 114.
[252] *See id.* at 107–08.
[253] *See id.* at 113, 114–15.
[254] *See id.* at 115 n.28 (citing South Dakota v. Dole, 483 U.S. 203, 207–08, 210 (1987)).
[255] *See id.*
[256] *See Dole*, 483 U.S. at 213 (O'Connor, J., dissenting).
[257] *See* Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-rates-research.html [https://perma.cc/5V9M-4D9J]; Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370, 394 (2018).
[258] *See New York*, 951 F.3d at 115 n.28 (citing *Dole*, 483 U.S. at 207–08, 210).

County, California, ignoring a state law that bars immigration agents from making such arrests.[259] This comes on the heels of indictment on federal charges of a Massachusetts judge charged criminally in connection with the release of an alien detainee who had appeared in her courtroom.[260] The intrusion of federal authorities into state courthouses to enforce federal immigration law, interfering with the administration of justice by the state judiciaries, may become the next front in an escalating confrontation between federal and state authorities.

Advocates and scholars should consider O'Connor's conditional spending reasoning on relatedness as well as the *how much is too much* prong of *Dole*. The right balance between the reserved powers of states under the Tenth Amendment and the federal role on immigration enforcement would preclude federal agencies from using the withholding of grants as a sanction to secure compliance with extraneous policy goals. It would require courts to consider the degree to which commandeering of state functions by federal regulatory or administrative procedures blur the lines of political accountability. And it should privilege the value of permitting states, and their subdivisions, to have maximum policy-making autonomy in the absence of clearly delegated federal authorities.

CONCLUSION

Ten years ago, the discontents of federalism were conservative governors, legislators and attorneys general.[261] They litigated against the Obama Administration on gun regulation, DACA, and the Affordable Care Act, alleging that they were unfunded mandates and commandeering of state resources.[262] Today, the discontents are the officials with those same roles in large, urban, and predominantly coastal states with diverse populations.[263] But the role of the Court

[259] *See* Chantal Da Silva, *ICE Ignored California State Law and Arrested Immigrants at Courthouses*, NEWSWEEK (Feb. 20, 2020, 6:25 AM), https://www.newsweek.com/ice-accused-ignoring-california-state-law-arresting-immigrants-courthouses-1488185 [https://perma.cc/38BY-PY3J].

[260] *See* Ellen Barry, *When the Judge Became the Defendant*, N.Y. TIMES, https://www.nytimes.com/2019/11/16/us/shelley-joseph-immigration-judge.html [https://perma.cc/8YBN-2YWB] (last updated Feb. 10, 2020).

[261] *See* Cauchi, *supra* note 160.

[262] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 540, 577 (2012); Texas v. United States, 787 F.3d 733, 743 (5th Cir. 2015); Klayman v. Obama, No. 16-CV-80087, 2016 U.S. Dist. LEXIS 187472, at *1 (S.D. Fla. June 16, 2016).

[263] *See* Tim Henderson, *Cities, States Resist—and Assist—Immigration Crackdown in New Ways*, PEW (Aug. 3, 2018), https://www.pewtrusts.org/en/research-and-

in federalism cases remains, or at least ought to remain, the same—to set up the guardrails that allow states enough autonomy to experiment and innovate, and not merely to act as servants to implement federal policy. While states are inevitably subject to the substantial constraints of federal co-funding and regulations formulated in the modern, highly centralized federal administrative state, Tenth Amendment residual power deserves, and as O'Connor observed, requires, meaningful protection by the federal courts. The intergovernmental relationship must have sufficient transparency and clarity so that both credit and blame can be assigned at the right level of government and to the responsible actors.

"Why states?" some scholars have asked over the past thirty years.[264] Through her opinions on the conditional spending and commandeering cases, Justice O'Connor had the answer. It is because, when faced with the encroachment of federal overreach, it is the bands of states, counties, and cities, with their quaint and undervalued reserved Tenth Amendment powers, that can take the legacy of the cowgirl from Arizona, and with the aid of our courts, ride to the rescue.

analysis/blogs/stateline/2018/08/03/cities-states-resist-and-assist-immigration-crackdown-in-new-ways [https://perma.cc/KC6M-6SR8].

[264] *See* Briffault, *supra* note 114, at 1305–06; Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Health Care For?*, 70 STAN. L. REV. 1693, 1697 (2018).