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A Gun to Whose Head? Federalism, Localism, and the Spending Clause

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A Gun to Whose Head? Federalism, Localism, and the Spending Clause

Daniel S. Cohen*

ABSTRACT

President Trump's executive order rescinding federal funds from "sanctuary jurisdictions" has brought a critical, but overlooked, question of constitutional law to the forefront of the political debate: how does the Spending Clause apply to local governments? The purpose of the Spending Clause is to empower the federal government to bargain with the states to enact policies it cannot enact itself. This power, however, is constrained within the confines of federalism. The Supreme Court has sought to restrict the Spending Clause by crafting the *Dole-NFIB* framework, a test to determine whether a federal grant has compromised federalism. At its core, the framework seeks to preserve states' agency in deciding whether to exchange policy for federal dollars. This core concern and the specific factors that comprise the *Dole-NFIB* framework are also implicated when the federal government bargains with local governments. Local governments in the United States have evolved from agents of their states to the third-tier of federalism. Accordingly, courts must apply the Spending Clause in a manner that protects local agency just as it protects state agency. This Article proposes two models by which the courts can effectively apply the Spending Clause to protect local governments: the Decision-Maker Model and the Localized Expenditure Model.

The Decision-Maker Model views localities as representative political entities that exercise agency in the same manner as states. Thus, this model applies the *Dole-NFIB* framework to a locality when the locality in question has the authority to accept

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the federal government's financial inducement. The Localized Expenditure Model accepts the traditional, bilateral conception of federalism, but also applies the *Dole-NFIB* framework to localities because it recognizes the targeted pressure the federal government places on states when it withholds funds from specific localities.

While these models assert different justifications for the role that general-jurisdiction local governments play in the Court's Spending Clause doctrine, they achieve the same result where local governments are offered and may accept federal funds: the locality is the subject of the Spending Clause analysis. Applying one of these two models and, more broadly, applying the Spending Clause to localities is essential because, as demonstrated by the sanctuary cities controversy, political polarization is increasing along a geographical dimension. Policy divides between federal officials and city leaders will be sharp for the foreseeable future, and federal funds will remain an attractive policy lever. Thus, the use of the spending power must be appropriately constrained to preserve American federalism as it exists.

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INTRODUCTION

Just five days after his inauguration, President Donald Trump began to fulfill his promise to block funding for “sanctuary cities”¹ by signing Executive Order 13768 (“EO 13768”).² According to the order, once the Secretary of the Department of Homeland Security determines which jurisdictions are “sanctuary jurisdictions,” the Attorney General may prevent those jurisdictions from receiving any federal funding.³ The President’s threat to rescind federal funding from sanctuary jurisdictions pits the federal government against the leadership of several of the largest states, such as California and New York, and the mayors of some of the nation’s biggest cities—including Chicago, San Francisco, New York City, and Washington, D.C.⁴ The order has also engendered conflict between various local governments and their state governments. Texas, in particular, has become an intense battleground. Some of the state’s largest cities—Houston, Dallas, and San Antonio—challenged a state law, enacted on the heels of EO 13768, that penalizes various law-enforcement policies associated with sanctuary cities.⁵ The political

1. See Douglas Hanks, *Miami-Dade Mayor Resists ‘Sanctuary Cities’ Label as Trump Promises Crackdown*, MIAMI-HERALD (Nov. 15, 2016), <https://hrlrld.us/2Lo4A8A> [<https://perma.cc/P2WP-462K>].

2. Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter EO 13768].

3. *Id.* at 8801.

4. See Ruairí Arrieta-Kenna, *Sanctuary Cities Stand Firm Against Trump*, POLITICO (Dec. 12, 2016), <https://politi.co/2S9Pg27> [<https://perma.cc/9Y4V-LE4Z>].

5. *Houston to Join Lawsuit Against Texas ‘Sanctuary City’ Law*, U.S. NEWS & WORLD REP. (June 21, 2017) [hereinafter *Houston Joins Sanctuary City Lawsuit*], <https://bit.ly/2Dmiy9I> [<https://perma.cc/4DSP-9R6G>]. Judge Orlando Garcia of the United States District Court for the Western District of Texas granted a preliminary injunction against the law on August 30, 2017. See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017). The Fifth Circuit, however, held that the Texas constitution does not prohibit the state from preempting cities’ Home-Rule authority and that the law does not, on its face, violate the Fourth Amendment by requiring local law enforcement who have custody of a person subject to an immigration detainer request to comply with that request. *City of El Cenizo v. Texas*, 890 F.3d 164, 190–91 (5th Cir. 2018). Consequently, and with respect to the afore-

fighters in cities and states across the country have made the intersection of federalism, localism, and the Spending Clause one of the most prominent constitutional issues of President Trump's term.

EO 13768 comes at an interesting and important time in the development of the Supreme Court's Spending Clause doctrine. Prior to 2012, legal scholars argued that the Court's Spending Clause doctrine was toothless, having never been used to strike down a single federal law.⁶ In 2012, the Court made history in *National Federation of Independent Business v. Sebelius* (*NFIB*)⁷ by using the Spending Clause to invalidate the Medicaid expansion provision of the Affordable Care Act.⁸ *NFIB* suggests that the Spending Clause places meaningful restrictions on Congress's spending power or at least demonstrates that the Roberts Court is more willing than its predecessors to find Spending Clause violations. Through its binding "Joint Opinion," the Court reaffirmed its Spending Clause jurisprudence—to protect the structure of federalism by ensuring that state governments can bargain with the federal government at will—and its legal principles—clear conditions, non-coercion, public welfare, germaneness, constitutional conditions, and contract law. The Court also affirmed the importance of political accountability in the Spending Clause analysis. At its heart, the Court's fractured opinion solidified the Spending Clause's role in safeguarding federalism by preserving states' autonomy when they bargain with the federal government.

The Court has yet to apply its new(er) Spending Clause jurisprudence in a case where the federal government offered federal funds directly to localities; and it is not clear how the Court would rule in such a case.⁹ Numerous localities have either changed their

mentioned issues, the Fifth Circuit vacated the district court's preliminary injunction and remanded the case to the district court. *Id.* at 192.

6. See Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 *IND. L.J.* 459 (2003) (arguing that the test established in *Dole* is "toothless," as evidenced by the fact that courts have hardly applied three of the five elements and have never struck down federal legislation on this basis, and conceptually infirm); see also Samuel R. Bagenstos, *The Anti-Leveraging Principle and Spending Clause After NFIB*, 101 *GEO. L.J.* 861 (2013) (explaining that *National Federation of Independent Business v. Sebelius* was the first time the Court struck down an act of Congress on the basis of the Spending Clause).

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

8. See *infra* Part I.B.

9. Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 *YALE L. & POL'Y REV.* 87, 158 (2016) ("How does the coercion ban apply to local governments? . . . Does that right tolerate federal efforts to restructure intra-state authority?").

law-enforcement policies to comply with EO 13768¹⁰ or initiated lawsuits to invalidate the order, asserting violations of the Spending Clause, the anti-commandeering doctrine, and the Tenth Amendment.¹¹ It is imperative for the Court to determine how its Spending Clause jurisprudence applies to localities.

The localist nature of American federalism complicates the Court's current Spending Clause jurisprudence. Traditionally, the United States has understood federalism as a two-tiered structure, with a federal tier and a state tier.¹² Each tier has its own powers and responsibilities; each has its own constituencies; each is supreme over the other in specific policy spheres. Specifically, states are supreme over the federal government when addressing issues that are the provenance of state government.¹³ Thus, when such issues arise, state governments are the only constitutionally relevant political institutions within a state's territory. On paper, this view seems unimpeachable, rooted in the durable precedent of *Hunter v. Pittsburgh*.¹⁴ A closer look at how American federalism actually functions and how courts have applied *Hunter*, however, reveals that the United States actually operates as a three-tiered political system in most areas.

The Supreme Court decided *Hunter* at the end of the "Dillon's Rule" era, a time when local governments were instruments of the state government.¹⁵ Under Dillon's Rule, localities had no powers except those specifically granted to them by the state.¹⁶ Beginning in the Progressive Era, and accelerating after World War II, states

10. See Alan Gomez, *Miami-Dade Commission Votes to End County's 'Sanctuary' Status*, USA TODAY (Feb. 17, 2017), <https://bit.ly/2LtKNEU> [<https://perma.cc/D2GS-4XEP>]; see also Cory Frolik, *Dayton Police Revise Immigration Status Policy*, DAYTON DAILY NEWS (Feb. 9, 2017), <https://bit.ly/2R3PbzD> [<https://perma.cc/7X2P-CE7A>].

11. See Maura Dolan, *San Francisco Sues Trump over Executive Order Targeting Sanctuary Cities*, L.A. TIMES (Jan. 31, 2017), <https://lat.ms/2LqashN> [<https://perma.cc/ER2D-SFJU>]; Daniel Beekman, *Seattle Sues Trump Administration over 'Sanctuary Cities' Order*, SEATTLE TIMES (Mar. 29, 2017), <https://bit.ly/2R2BKA0> [<https://perma.cc/6WQW-E46R>]; see also Maureen Dolan & James Queally, *Santa Clara County Seeks to Block Trump's Order to Defund Sanctuary Cities*, L.A. TIMES (Feb. 23, 2017), <https://lat.ms/2Gq2bez> [<https://perma.cc/8UVA-8K6D>].

12. See generally KENNETH R. THOMAS, FEDERALISM, STATE SOVEREIGNTY, AND THE CONSTITUTION: BASIS AND LIMITS OF CONGRESSIONAL POWER (Sept. 23, 2013), <https://bit.ly/2SRFmSu> [<https://perma.cc/BF6F-LMP7>].

13. *Id.*

14. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

15. Dillon's Rule was widely applied by state governments to their localities in the late 18th century. See RICHARD SCHRAGGER, CITY POWER 61–63 (2016).

16. States began implementing Home Rule in the early 20th century. See *infra* Part II.B.1.

granted their localities “Home Rule.”¹⁷ Under the Home-Rule system, local government began to take its current shape: locally elected officials exercising meaningful formal powers over a range of fundamental areas, such as land use, emergency services, sanitation, housing, and transportation. Importantly, Home Rule reversed the Dillon’s Rule structure by granting broad powers to local government rather than limiting them to specific delegations of authority only. For over seven decades, local governments have exercised these broad powers.

Since at least the end of World War II, state and federal governments have recognized local authority in a manner that strongly indicates that localism is a feature of the American political system. States rarely alter the territorial limits of local jurisdictions, unlike congressional districts, which are constantly redrawn.¹⁸ Leaving local boundaries untouched illustrates the respect the states have for localities as polities. The federal government also often treats local governments as a distinct tier of the federalist system. Consider three examples. First, the Supreme Court has held that the principle of “one man, one vote” applies to localities.¹⁹ Second, sovereign immunity does not automatically apply to localities, even though it automatically applies to state agencies.²⁰ Third, in many instances where Congress has enacted a law to preempt state authority, it has also explicitly stated that the law preempts local authority.²¹ It would be odd for the federal government to take such positions if local governments are no different from statewide agencies.

In stark contrast to the traditional conception of American federalism, the United States’ federalist system, which this Article terms “localist federalism,” endows local governments with significant formal legal authority.²² The broad scope of this legal authority and the protection localities receive from state governments make them, for the purposes of the Spending Clause, “mini-sovereigns,” rather than administrative units of their states. Accordingly, the federal government’s attempts to induce localities to enact specific policies through fiscal rewards or punishments implicate the federalism concerns that the Court’s restrictions on the Spending Clause are designed to protect.

17. See *infra* Part II.B.1.

18. See *infra* Part II.B.3.

19. See *infra* Part II.B.3.

20. See *infra* Part II.B.3.

21. See *infra* Part II.B.3.

22. See *infra* Part II.B.3.

This Article proposes two methods by which courts can faithfully apply the Spending Clause to cases of federal-local bargaining: the Decision-Maker Model and the Localized Expenditure Model. The Decision-Maker Model argues that the Spending Clause applies to the entity that has the authority to accept or decline an offer of federal funds. Accordingly, when the federal government offers funds to a general-jurisdiction local government that has the authority to accept or decline the funds, that entity—not its state government—is the subject of the Court’s limitations on the Spending Clause. Therefore, this model argues that the Court’s Spending Clause analysis should be applied to the local government directly, just as the Court has previously applied this analysis to state governments. The Decision-Maker Model ensures that the Spending Clause does not trample the federalism concerns upon which it is founded.²³

The Localized Expenditure Model is based on the conventional understanding of federalism. However, it proposes the same analysis as the Decision-Maker Model for two reasons. First, this model recognizes the authority of the states to govern their territory through representative local governments. Second, it identifies the coercive threat states face when the federal government rescinds federal funding from specific localities: the decision to recapitalize specific localities for lost funding. While both models assert different justifications for the role of general-jurisdiction local governments in the Court’s Spending Clause doctrine, they achieve the same result when the federal government offers federal funds to local governments: subjecting the locality to the Court’s Spending Clause analysis.

These models are presented as alternatives to what this Article terms the “*Hunter* Model.” Under the *Hunter* Model, the Court’s Spending Clause analysis is applied to the state government, even when the bargaining occurs solely between local officials and the federal government. This model applies a strong interpretation of *Hunter*, accepting the idea that localities are mere agents of the state.

The Court’s method of determining which entity is subject to the federal government’s inducement or coercion is of considerable importance. The result of the Court’s decision will (1) determine whether President Trump’s actions, and similar future actions, are constitutional; (2) shape the balance of power between the federal government and localities moving forward; and (3) shape the func-

23. See *infra* Part III.A.

tioning of America's form of localist federalism. Because the United States is politically polarized along an urban/non-urban axis, it is imperative that the Supreme Court answer this question definitively. This trend of political polarization, which seems durable, will lead to increased conflict between federal and local entities. Republican politicians will seek to induce or threaten Democratic cities to comply with their preferred policy positions, and Democratic politicians will do the same to Republican suburbs and rural communities. It is critical for the courts to recognize the role localities play in American government or, at least, to apply the Spending Clause in a consistent manner for both federal-state and federal-local bargaining and thus preserve the crucial elements of federalism.

I. BACKGROUND

A. *Sanctuary Cities*

On January 25, 2017, President Donald Trump signed EO 13768—"Enhancing the Public Safety of the Interior of the United States."²⁴ The purpose of the order is to "[e]nsure that jurisdictions that fail to comply with applicable Federal [immigration] law," 8 U.S.C. § 1373²⁵ in particular, "do not receive Federal funds, except as mandated by law."²⁶ These jurisdictions, usually local governments, are more popularly known as *sanctuary cities*. The label refers to these cities' refusals to assist federal immigration officials.²⁷ For example, these localities often refuse to comply with Immigration and Customs Enforcement agents' detainer requests for undocumented immigrants held in the custody of local law enforcement.²⁸

Sanctuary cities first gained prominence in 2008 when several localities refused to comply with President George W. Bush's SECURE Communities program; this program "required local authorities to share the fingerprints of *all* arrestees—legal and illegal, citizens and foreigners—for a run through a federal database to make sure they were in the country legally."²⁹ More localities be-

24. EO 13768, *supra* note 2.

25. 8 U.S.C. § 1373 (2018).

26. EO 13768, *supra* note 2, at 9.

27. Darla Cameron, *How Sanctuary Cities Work, and How Trump's Blocked Executive Order Could Have Affected Them*, WASH. POST (Jan. 18, 2017), <https://wapo.st/2CllNfT> [<https://perma.cc/J5MB-HJSX>].

28. *Id.*

29. Shikha Dalmia, *Undocumented Aliens May Be Safe in Sanctuary Cities, Thanks to Conservative Justices*, REASON (Feb. 2, 2017), <https://bit.ly/2EBGC9m> [<https://perma.cc/M46Y-7HW7>].

came sanctuary cities during President Barack Obama's first term as he expanded the Bush era program.³⁰ By early 2017, over 500 cities and counties self-identified as or were labeled sanctuary cities.³¹ These localities include major metropolitan areas such as New York, Washington, D.C., San Francisco, and Chicago as well as small towns like Ashland, Oregon and Aberdeen, Washington.³²

Since 2011, Republican representatives have introduced at least four different bills to strip sanctuary cities of immigration and law-enforcement-related federal funds. The House of Representatives passed three of these bills. In 2011, Republicans introduced the "Mobilizing Against Sanctuary Cities Act."³³ The bill provided that "[a]ny State or local government that violates section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1373) may not receive any Federal financial assistance."³⁴ The bill also empowered the Attorney General to determine which jurisdictions violated section 642.³⁵ The bill was re-introduced in 2013, but it did not receive a vote on either occasion.³⁶

Republicans introduced the "Enforce the Law for Sanctuary Cities Act" in 2015 and the "Stop Dangerous Cities Act" in 2016.³⁷ The latter would have prohibited sanctuary jurisdictions from receiving block grants from the Economic Development Assistance Programs (EDAP) and the Community Development Block Grant (CDBG) Program.³⁸ In 2016, the federal government distributed \$238 million in EDAP grants and \$3 billion in CDBG grants.³⁹ Ten of the largest sanctuary cities collectively received \$700 million in block grants that year.⁴⁰

30. *Id.*

31. *Id.*

32. Arrieta-Kenna, *supra* note 4.

33. James Rogers, *Congressman's Bill Would Do More to Curtail Sanctuary Cities than Trump's Executive Order*, DAILY SIGNAL (Feb. 10, 2017), <https://dailysign.al/2ECJgvC> [<https://perma.cc/FM6U-6GUU>]; *see* H.R. 2057, 112th Cong. (2011).

34. H.R. 2057 § 2.

35. *Id.*

36. Rogers, *supra* note 33.

37. *See* Stop Dangerous Sanctuary Cities Act, S. 87, 115th Cong. (2017); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. (2015).

38. S. 87, § 4(a)–(b).

39. Lauren Etter & Tim Jones, *Sanctuary-City Mayors Gird for Fight as Trump Threatens Budgets*, BLOOMBERG POL. (Nov. 16, 2016), <https://bloom.bg/2qqjvW8> [<https://perma.cc/439J-K545>].

40. *Id.* These cities include San Francisco, New York, Chicago, Los Angeles, Denver, New Orleans, Oakland, Boston, and Seattle. *See also* Rory Carroll et al., *Top 10 U.S. Sanctuary Cities Face Roughly \$2.27 Billion in Cuts by Trump Policy*, REUTERS (Jan. 25, 2017), <https://reut.rs/2rKV053> [<https://perma.cc/RVK4-DW55>].

In 2017, the Houses of Representatives passed “Kate’s Law.”⁴¹ Like its predecessors, Kate’s Law stripped sanctuary cities of various federal grants due to their alleged failure to comply with federal immigration law and their refusal to assist federal immigration officials.⁴² However, none of these bills have been enacted. Thus, EO 13768 is the only federal policy currently threatening to strip federal grant money from hundreds of localities.

EO 13768 empowers the Attorney General and the Secretary of Homeland Security to ensure that sanctuary jurisdictions “are not eligible to receive Federal grants,” “in their discretion and to the extent consistent with law,” except as they deem necessary for law-enforcement purposes.⁴³ Their roles are divided. The Secretary of Homeland Security has the authority to designate sanctuary jurisdictions “in his discretion and to the extent consistent with law,”⁴⁴ while the Attorney General “shall take appropriate enforcement action” against any jurisdiction that “violates 8 U.S.C. [§] 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”⁴⁵

Given the broad language of EO 13768, the Attorney General may be empowered to strip billions of dollars from sanctuary cities. Sanctuary cities received nearly \$27 billion in federal money in Fiscal Year 2016.⁴⁶ These dollars helped fund municipal services such as school programs, housing, emergency services, and community development.⁴⁷ If the Attorney General rescinded all federal funding from sanctuary jurisdictions, a few major metropolitan areas would bear the brunt of the cutback. For example, Chicago would lose approximately \$5.3 billion and Washington, D.C. would forfeit a little more than \$2 billion in federal funds.⁴⁸

On July 25, 2017, former U.S. Attorney General Jeff Sessions announced the Department of Justice’s (“DOJ”) first rule to implement EO 13768: the DOJ stopped awarding the Edward Byrne Memorial Justice Assistance Grant Programs—a grant for local law-enforcement agencies—to sanctuary jurisdictions, as defined by

41. Cristina Marcos, *House Passes ‘Kate’s Law’ and Bill Targeting Sanctuary Cities*, HILL (June 29, 2017), <https://bit.ly/2Lnflb6> [<https://perma.cc/K8M8-WMGQ>].

42. *Id.*

43. EO 13768, *supra* note 2.

44. *Id.*

45. *Id.*

46. Adam Andrzejewski, *Mapping \$27 Billion in Federal Funding of America’s Sanctuary Cities*, FORBES (Feb. 2, 2017), <https://bit.ly/2PM5Z9u> [<https://perma.cc/T5NM-552B>].

47. *Id.*

48. *Id.*

the order.⁴⁹ Specifically, a jurisdiction must “allow federal immigration access to detention facilities, and provide 48 hours’ notice before they release an illegal alien wanted by federal authorities” to receive the grant.⁵⁰ This grant allocated \$174 million, collectively, to localities in Fiscal Year 2017.⁵¹ If the Attorney General prohibits sanctuary cities from receiving all similar law-enforcement grants, the DOJ may end up withholding \$550 million in funds from sanctuary cities.⁵²

Even before the former Attorney General’s announcement, EO 13768 spurred powerful responses from numerous sanctuary cities.⁵³ Various jurisdictions, from large metropolitan areas like San Francisco and Seattle, to small towns like Chelsea, Massachusetts, filed lawsuits against the administration seeking to enjoin the order.⁵⁴ In their respective complaints, San Francisco and Santa Clara alleged that EO 13768 violates Congress’s tax and spend authority because it is coercive and it violates the Tenth Amendment’s anti-commandeering principle.⁵⁵ San Francisco contends that EO 13768 jeopardizes 13 percent of its annual budget, which amounts to \$1.2 billion.⁵⁶ Santa Clara County fears it will lose up to 15 percent of its budget if all of its federal funds are cut-off.⁵⁷ As a result of these lawsuits, the U.S. District Court for the Northern District of California issued a nationwide preliminary injunction on the en-

49. Kathryn Watson, *DOJ Cracking Down on Sanctuary City Funding*, CBS NEWS (July 25, 2017), <https://cbsn.ws/2tCjZbI> [<https://perma.cc/N6D4-64TS>].

50. *Id.*

51. DEP’T OF JUSTICE, FISCAL YEAR (FY) 2017 STATE EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) ALLOCATIONS (2017), <https://bit.ly/2R0wU6g> [<https://perma.cc/7HNF-6RRJ>].

52. Watson, *supra* note 49.

53. The office of Chicago mayor Rahm Emanuel called EO 13768 “unlawful” and claimed it would “undermine[] public safety.” Daniella Diaz & Laura Jarrett, *Chicago Mayor Defends Lawsuit Against DOJ Over Sanctuary Cities*, CNN (Aug. 7, 2017), <https://cnn.it/2SewF52> [<https://perma.cc/UH4Z-P4ZS>]. Mayor Ed Lee of San Francisco stated, “we are still a sanctuary city” in response to EO 13768. Emily Green & Kevin Fagan, *SF Mayor Lee Stands Up to Trump, Says City Remains a Sanctuary*, SFGATE (Jan. 26, 2017), <https://bit.ly/2BwRQI3> [<https://perma.cc/AQQ8-HUGF>].

54. Dolan, *supra* note 11; Beekman, *supra* note 11; *see also* Dolan & Qually, *supra* note 11.

55. *See* Complaint for Declaratory and Injunctive Relief at 12, *City of San Francisco v. Trump*, No. 3:17-cv-00485 (N.D. Cal. Oct. 11, 2017) [hereinafter *San Francisco Complaint*]; Complaint for Declaratory and Injunctive Relief at 3, *Cty. of Santa Clara v. Trump*, No. 5:17-cv-00574 (N.D. Cal. Feb. 3, 2017) [hereinafter *Santa Clara Complaint*].

56. *San Francisco Complaint*, *supra* note 55.

57. *Santa Clara Complaint*, *supra* note 55.

forcement of EO 13768 in April 2017.⁵⁸ The district court held that the order violates the Spending Clause because it amounts to new conditions on federal grants; there is an insufficient nexus between the federal funds and the purpose of the federal program; and the rescission of the funds would be coercive.⁵⁹ Moreover, the court held that the order amounts to federal commandeering of local officials.⁶⁰

The DOJ filed a motion to reconsider and dismiss the lawsuit in light of the Attorney General's directive regarding the Byrne grant, but the court rejected the DOJ's motions and found that the directive was "illusory."⁶¹ Ultimately, the district court granted the counties' summary judgment motion and ordered a permanent injunction on the same basis as its previous order granting the preliminary injunction.⁶² On appeal, the Ninth Circuit held that EO 13768 violated the separation of powers doctrine because the spending power is accorded to Congress, not the President, and Congress has not delegated to the President the power to condition new grants on compliance with § 1373.⁶³ The Ninth Circuit refused to grant

58. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539–40 (N.D. Cal. 2017).

59. *Id.* at 532–33.

60. *Id.* at 533–34.

61. *Cty. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1209–14 (N.D. Cal. 2017) (finding that the Attorney General's memorandum was an illusory promise to enforce EO 13768 narrowly because it was not a legal opinion). Moreover, the district court found that even if the Attorney General's memorandum was a legal opinion, it does not bind the Attorney General, the Secretary of the Department of Homeland Security, or other executive agencies with respect to enforcement of EO 13768. *Id.* Accordingly, the court determined that the memorandum was a formalized, but non-binding, promise not to enforce EO 13768 in an unconstitutional manner. As such, the court reasoned, the Attorney General is free to revoke the memorandum at any time, which makes it an illusory promise. *Id.*

62. *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017). Notably, the opinion is vague as to which entity the court applied the Spending Clause analysis. For example, the court stated that EO 13768 imposed conditions that "the states and local jurisdictions" accepting the funds did not know at the time they accepted the funds. *Id.* at 1214. Moreover, the court stated that EO 13768 does not "make clear to states and local governments what funds are at issue and what conditions apply." Yet, it states that "the Counties cannot voluntarily and knowingly choose to accept the conditions on such funds." *Id.* at 1214–15. The court further stated that EO 13768 "threatens to deny such sanctuary jurisdictions all federal grants . . . on which the Counties rely" and that "Congress cannot use the spending power in a way that compels local jurisdictions to adopt certain policies." *Id.* at 1215. However, it asserts that "States must have a 'legitimate choice whether to accept the federal conditions in exchange for federal funds.'" *Id.* at 1214–15.

63. *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) [hereinafter *San Francisco I*]. In a similar case also before the U.S. District Court for the Northern District of California, the court found that EO 13768 violated the

deference to the Attorney General's directive, choosing instead to interpret the text of the EO 13768 directly.⁶⁴ However, the Ninth Circuit restricted the preliminary injunction to the plaintiffs only, stating that the record did not support a nationwide preliminary injunction.⁶⁵

The city of Chicago also sought a preliminary injunction in response to the DOJ's directive.⁶⁶ The U.S. District Court for the Northern District of Illinois granted Chicago's motion on a nationwide basis.⁶⁷ The district court held that the Attorney General's actions violated the separation of powers doctrine by imposing additional conditions on the grant of federal funds without congressional authority.⁶⁸ The district court did not, however, make a determination regarding Chicago's Spending Clause argument.⁶⁹ The district court later granted Chicago's motion for summary judgment and ordered a permanent injunction, holding that EO 13768 violated the separation of powers doctrine because Congress did not empower the Attorney General to impose new conditions on the receipt of the Edward Byrne Memorial Justice Assistance grant funds.⁷⁰

In *City of Philadelphia v. Sessions*,⁷¹ the U.S. District Court for the Eastern District of Pennsylvania also ruled on a challenge to EO 13768.⁷² The court granted Philadelphia's motion for preliminary injunction, in part, because EO 13768 violated the Spending Clause by imposing ambiguous conditions.⁷³ Philadelphia subsequently filed an amended complaint alleging that the DOJ had not

Spending Clause because its conditions were ambiguous and not sufficiently related to the relevant federal funds' purpose. See *City of San Francisco v. Sessions*, No.17-cv-04642, 2018 WL 4859528, at *19 (N.D. Cal. Oct. 5, 2018).

64. *San Francisco I*, 897 F.3d at 1242–43.

65. *Id.* at 1243–45.

66. Complaint for Injunctive and Declaratory Relief at 5, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (No. 1:17-cv-05720).

67. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017).

68. *Id.* at 940–43.

69. *Id.* at 943.

70. *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 876–79 (N.D. Ill. 2018). As of August 10, 2018, the district court had not entered the permanent injunction. Accordingly, the Seventh Circuit vacated its prior decision to hear en banc the Department of Justice's appeal on the scope of the preliminary injunction but maintained the stay on the preliminary injunction it had previously granted. See *City of Chicago v. Sessions*, Nos. 17-2991 & 18-2649, 2018 WL 4268814, at *2 (7th Cir. Aug. 10, 2018).

71. *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017).

72. *Id.*

73. *Id.* at 645–47.

disbursed certain federal funds to it.⁷⁴ The district again ruled, in part, that EO 13768's conditions violated the Spending Clause.⁷⁵ The case is currently on appeal to the Third Circuit.⁷⁶ Given the constitutional questions raised by these lawsuits, and the various rulings and future rulings by several circuit courts, the Supreme Court will need to step in to provide finality.

Prior to the aforementioned lawsuits, Miami-Dade County took the opposite approach; it changed its law-enforcement policies to comply with the order. The day after President Trump announced EO 13768, Miami-Dade County Mayor Carlos Gimenez ordered the county's jails to comply with any requests from federal officials on immigration-enforcement matters.⁷⁷ Mayor Gimenez deemed the risk of non-compliance too great because Miami-Dade County was slated to receive \$355 million in federal grants for Fiscal Year 2017.⁷⁸ On February 17, 2017, the Miami-Dade County Commission formally adopted a resolution ending the county's sanctuary jurisdiction policies by a vote of nine to three, citing Mayor Gimenez's concerns.⁷⁹

Several states have also taken action in response to EO 13768. Texas, for example, banned sanctuary cities just four months after President Trump issued EO 13768.⁸⁰ Pursuant to that Texas law, local-government officials and law-enforcement agents must comply with detention requests from federal immigration officials.⁸¹ If police departments fail to comply, they may be subject to civil penalties.⁸² In response to the law, several cities in Texas, including Houston, San Antonio, Dallas, and Austin, filed a joint lawsuit against the state.⁸³ Other state governments, however, have re-

74. Amended Complaint for Declaratory, Injunctive, and Mandamus Relief at 7–8, *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018) (No. 2:17-cv-03894-MMB).

75. *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 325 (E.D. Pa. 2018).

76. See Notice of Appeal, *City of Philadelphia v. Attorney General*, No. 2:17-cv-03894-MMB (E.D. Pa. filed Jan. 16, 2018).

77. Shanika Gunaratna, *Miami-Dade Abandons "Sanctuary" Status One Day After Trump's Crackdown*, CBS NEWS (Jan. 26, 2017), <https://cbsn.ws/2kziWsc> [<https://perma.cc/S47A-QYU9>].

78. *Id.*

79. Gomez, *supra* note 10.

80. See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017); see also Chuck Johnston & Darran Simon, *Texas Governor Signs Bill Banning Sanctuary Cities*, CNN (May 8, 2017), <https://cnn.it/2D7fb5n> [<https://perma.cc/Q39U-LBBU>].

81. Tex. S.B. 4.

82. *Id.*

83. *Houston Joins Sanctuary City Lawsuit*, *supra* note 5. Judge Orlando Garcia of the U.S. District Court for the Western District of Texas granted a preliminary injunction against the law on August 30, 2017. See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 812–13 (W.D. Tex. 2017).

jected EO 13768 and have either supported or mandated sanctuary cities. The California legislature, for example, passed a bill requiring its localities to observe many of the policies adopted by California sanctuary cities.⁸⁴ Additionally, the New Jersey Senate considered a bill to reimburse New Jersey's sanctuary cities for all of the federal funding those cities lost due to their immigration policies.⁸⁵

The combination of EO 13768's broad scope and the controversy surrounding sanctuary cities has placed Congress's spending power at the forefront of the political and legal debate. Large cities like Chicago and San Francisco are litigating against the federal government while Texas is witnessing an intense legal dispute between its state legislature and its most populous cities.⁸⁶ These high-profile, high-stakes litigations are occurring across the nation; they stress the need for the Supreme Court to provide clarity with respect to the scope of Congress's spending power in relation to local governments.

B. *The Spending Clause*

EO 13768 raises several constitutional questions, of which one of the most important is: what is the scope of the federal government's spending power? More specifically, it raises the currently unanswered question: do the restrictions on the Spending Clause protect localities themselves or just states? Over 80 years ago, in the landmark case of *United States v. Butler*,⁸⁷ the Supreme Court created the foundations of the modern "conditional spending"⁸⁸ doctrine by ruling that the federal government's power to "authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."⁸⁹ Instead, pursuant to the Spending Clause, the federal government may offer monetary grants to the states, with various conditions attached, to "attain" objectives not thought to be within

84. S.B. 54, 2017–2018 Leg., Reg. Sess. (Cal. 2017); see Jazmine Ulloa, *California Lawmakers Approve Landmark 'Sanctuary State' Bill to Expand Protections for Immigrants*, L.A. TIMES (Sept. 16, 2017), <https://lat.ms/2w0EOia> [<https://perma.cc/B9EQ-M5VW>].

85. S.B. 3007, 217th Leg., Reg. Sess. (N.J. 2017); see Salvador Rizzo, *N.J. Democratic Mayors Defy Trump with Sanctuary City Orders*, NORTHJERSEY.COM (Feb. 11, 2017), <https://njersy.co/2kxTRdz> [<https://perma.cc/7H4P-2X9H>]. The New Jersey bill, however, has not been enacted.

86. See *Houston Joins Sanctuary City Lawsuit*, *supra* note 5.

87. *United States v. Butler*, 297 U.S. 1 (1936).

88. See Bagenstos, *supra* note 6, at 866.

89. *Butler*, 297 U.S. at 66.

Article I's "enumerated legislative fields."⁹⁰ This Article terms this authority Congress's "conditional spending power." At its heart, the conditional spending power allows Congress to incentivize state governments to adopt Congress's policy preferences, but only in a manner that preserves federalism.⁹¹ Since *Butler*, the Court has heard several conditional spending power cases;⁹² the most important of which are *South Dakota v. Dole*⁹³ and *NFIB*.

In 1984, Congress enacted 23 U.S.C. § 158,⁹⁴ which ordered the Secretary of Transportation to withhold five percent of federal highway funds from states that did not adopt a minimum drinking age of 21 years old.⁹⁵ In *South Dakota v. Dole*, South Dakota challenged the constitutionality of § 158, arguing that the decision to withhold federal funds exceeded Congress's conditional spending power.⁹⁶ In its opinion, the Court articulated the framework by which it now evaluates Spending Clause challenges.⁹⁷ While the Court's decision did not establish this framework, the *Dole* opinion is the clearest articulation of the framework, thus making *Dole* the foundation of the modern conditional spending doctrine.

In *Dole*, the Court clarified that Congress may offer federal funds to the states to persuade them to enact specific policies, provided that five conditions are met. First, the federal government must provide the federal funds to promote the general welfare.⁹⁸ "In considering whether a particular expenditure is intended to serve general public purposes," the *Dole* Court stated, "courts should defer substantially to the judgment of Congress."⁹⁹ Second, the funding must be germane to the policy the federal government seeks to promote.¹⁰⁰ Third, the federal government must provide the states notice of clear and "unambiguous" conditions, thus "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."¹⁰¹ Fourth, the conditional

90. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("[O]bjectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.").

91. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–78 (2012).

92. *See Pennhurst State Sch. v. Halderman*, 451 U.S. 1 (1981); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

93. *South Dakota v. Dole*, 483 U.S. 203 (1987).

94. 23 U.S.C. § 158 (2018)

95. *Id.* § 158(a).

96. *Dole*, 483 U.S. at 206–11.

97. *Id.*

98. *See id.* at 207.

99. *Id.* (quotation marks omitted).

100. *Id.*

101. *Id.* (quoting *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 17 (1981)).

grants must not violate constitutional provisions.¹⁰² Finally, the offer must not be coercive, meaning the federal government cannot allow its “pressure [to] turn[] into compulsion.”¹⁰³

In *Dole*, the Court reasoned that the federal government did not violate any of the five conditions and ruled against South Dakota.¹⁰⁴ The highway funds served a public purpose—reducing drunk driving made possible by the different drinking ages in each state—and were germane to that purpose.¹⁰⁵ Additionally, the Court found that the sole condition on the funds—that the state-recipient must prohibit individuals under the age of 21 from purchasing alcohol—was clear and unambiguous.¹⁰⁶ The Court further reasoned that § 158 did not violate any constitutional provisions because, if South Dakota accepted the federal funds, it would not violate any citizen’s constitutional rights.¹⁰⁷ Moreover, the Court reasoned that while the Twenty-First Amendment prevents Congress from directly regulating the drinking age, the Spending Clause allows Congress to encourage the states to regulate areas beyond “Article I’s enumerated legislative fields.”¹⁰⁸ Thus, the funding did not run afoul of any constitutional principles. Nor was South Dakota compelled to accept Congress’s funds. If South Dakota rejected the funds, it would only have lost “5% of the funds otherwise obtainable under certain highway grant programs.”¹⁰⁹ Such a small sum did not, in the Court’s estimation, amount to coercion.¹¹⁰ Accordingly, Congress’s financial inducement was within its conditional spending power; therefore, it was constitutional.

Dole remained the framework for Spending Clause cases until 2010 when the Court decided *NFIB*, a severely fractured decision. Chief Justice Roberts wrote the controlling opinion (the “Joint Opinion”), which was joined in its entirety only by Justices Breyer and Kagan. The Joint Opinion reaffirms the fundamental premise of prior Spending Clause cases: restrictions on Congress’s conditional spending power are “critical to ensuring that Spending

102. *Id.* at 210.

103. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 573, 590 (1937)).

104. *Id.* at 211–12.

105. *Id.* at 208 (“Congress found that . . . this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress.”).

106. *Dole*, 483 U.S. at 208.

107. *Id.* at 209–11.

108. *Id.* at 207, 209–10.

109. *Id.* at 211.

110. *Id.*

Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.”¹¹¹ It also reiterated *Dole*’s view that federal financial inducements are unconstitutional when they threaten federalism, and they do so when, among other things, “pressure turns into compulsion.”¹¹²

In the Joint Opinion, Chief Justice Roberts, Justice Kagan, and Justice Breyer reaffirmed the contractual framework that underlies the Court’s Spending Clause analysis. As in prior Spending Clause cases, the Joint Opinion stated that the Spending Clause polices contracts between the federal government and the states.¹¹³ Citing cases such as *Barnes v. Gorman*¹¹⁴ and *Pennhurst State School & Hospital v. Halderman*,¹¹⁵ Chief Justice Roberts declared that “Spending Clause legislation is ‘much in the nature of a contract.’”¹¹⁶ The Joint Opinion also reaffirmed the roots of Congress’s conditional spending power—namely, federalism and contract law.¹¹⁷

Additionally, the Joint Opinion reiterated the five prongs of the *Dole* framework.¹¹⁸ However, the Joint Opinion placed greater emphasis on coercion and articulated additional elements for the framework. In *NFIB*, the Court considered whether the expansion of Medicaid under the Affordable Care Act violated the Spending Clause. Under the legislation, states were given a choice: expand Medicaid to cover “all individuals under the age of 65 with incomes below 133 percent of the federal poverty line” and receive compensation to offset most of the cost, or lose all federal funding for Medicaid.¹¹⁹ The Court held that this offer constituted coercion because, rather than the “relatively mild encouragement” presented by the federal government’s highway funding program in *Dole*, the terms were “a gun to the head”¹²⁰ of the state officials deciding

111. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012).

112. *Id.* at 577–78.

113. *Id.* at 577.

114. *Barnes v. Gorman*, 536 U.S. 181 (2002).

115. *Pennhurst State Sch. v. Halderman*, 451 U.S. 1 (1981). *Pennhurst* was an important precursor to *Dole*.

116. *Sebelius*, 567 U.S. at 577 (internal citations omitted).

117. *Id.* at 576–77 (describing the role of the Spending Clause in preserving the structures of federalism and characterizing the nature of the Spending Clause relationship as a contract).

118. *See id.* at 580–82.

119. *Id.* at 576, 579–80. The federal government offered to pay for 100 percent of the cost of expanding the program through 2016 and to continue paying expansion costs in future years at gradually declining rates, ultimately bottoming out at 90 percent. *Id.* at 576.

120. *Id.* at 581.

whether to accept the offer.¹²¹ An essential factor in the Court's determination was the effect on state governments. The Court analyzed the federal funds at issue as a proportion of the state's overall budget; it viewed the state as the non-federal government that was the target of the federal government's financial inducement.¹²²

For this "contract" to be valid, the Joint Opinion held the states being offered the federal financial inducement must "voluntarily and knowingly accept[] the terms of the 'contract.'"¹²³ States cannot be coerced by the federal government to either voluntarily accept or reject the terms of the federal government's financial inducement. While Congress may attach conditions to the funds it provides the state, "conditions [that] take the form of threats to terminate other significant independent grants" are not conditions; they are tools to coerce the states into acquiescence.¹²⁴ The Affordable Care Act's Medicaid funding conditions coerced the states to expand Medicaid because the federal government threatened to rescind a state's pre-existing Medicaid funding if the state did not agree to participate in what the Court believed was a new program.¹²⁵

The size of the financial inducement relative to the state's budget, according to the Joint Opinion, also helps determine whether the inducement is coercive. The Joint Opinion distinguished the Medicaid expansion from the highway funding at issue in *Dole*, clarifying that South Dakota would have been able to reject the funds "not merely in theory but in fact" because Congress's financial inducement was equal to half of one percent of South Dakota's budget.¹²⁶ According to the *Dole* Court and the Joint Opinion, such a small grant relative to South Dakota's budget could not constitute coercion.¹²⁷ In contrast, under the Affordable Care Act, a state that opted out of the Medicaid expansion stood "to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but *all* of it."¹²⁸ Taking away Medicaid funding from the average state would have cost "over 10 percent of a State's overall

121. *Id.*

122. *See id.* at 581–82 (describing the Medicaid expansion's impact on states, not localities).

123. *Id.* at 577 (citation omitted).

124. *Id.* at 580.

125. *Id.* at 582–83 ("The original program was designed to cover medical services for four particular categories of the needy It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.").

126. *Sebelius*, 567 U.S. at 580–81.

127. *Id.* at 580 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

128. *Id.* at 581.

budget,” a figure 20 times larger than the highway funding Congress withheld from South Dakota in *Dole*.¹²⁹ A financial inducement of this size relative to a state’s budget is not, the Joint Opinion contends, the “mild encouragement” that the Spending Clause protects but an “economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”¹³⁰ Without defining clear limits on how much Congress can offer to a state or rescind from the state’s budget under the Spending Clause, the Joint Opinion declared that a loss of ten percent is unconstitutionally coercive.¹³¹

In justifying its ruling, the Court also touched on *Pennhurst’s* prohibition of retroactive or unambiguous conditions.¹³² While the Joint Opinion recognized the federal government’s ability to alter the nature of pre-existing, federally funded state programs, provided that the state recipients knew of that power prior to accepting the funding, it ruled that Congress’s Medicaid expansion was beyond a mere alteration: it was a “shift in kind, not merely degree.”¹³³ According to Chief Justice Roberts:

Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.¹³⁴

When they originally accepted Medicaid funding, the states could not have reasonably anticipated that Congress would revise the program so dramatically.¹³⁵ Because the Medicaid expansion was an unanticipated change, the conditions set forth in the Social Security Act did not provide the states with adequate notice that acceptance of Medicaid funding under the Affordable Care Act would allow Congress to make such onerous demands of the

129. *Id.* at 581–82.

130. *Id.*

131. *Id.* at 582.

132. *Id.* at 583–84 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 25 (1981)).

133. *Id.* at 583.

134. *Id.*

135. *Id.* at 584–85 (“A State could hardly anticipate that Congress’s reservation of the right to ‘alter’ or ‘amend’ the Medicaid program included the power to transform it so dramatically.”).

state.¹³⁶ Consequently, the Court found the Affordable Care Act's Medicaid expansion provision violated the Spending Clause's unambiguous-conditions prong.¹³⁷

But the Joint Opinion did more than apply the framework and principles outlined in *Dole* to the Affordable Care Act's Medicaid expansion provision. The Joint Opinion also added new elements to the *Dole* test by evaluating the Affordable Care Act's political ramifications on state officials, which the Court termed "political accountability," and the states' reliance on the pre-existing federal funding.¹³⁸ Because the Joint Opinion added factors to *Dole*, this Article refers to the Court's Spending Clause test as the *Dole-NFIB* framework. Citing *New York v. United States*,¹³⁹ a landmark anti-commandeering case, the Joint Opinion argued that federal coercion of the states through financial inducements undermines the federal government's political accountability.¹⁴⁰ In *New York*, the Court reasoned that if the federal government could tell the states how to regulate local matters, then "state officials . . . will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."¹⁴¹ Giving such power to the federal government would undermine the structure of federalism; thus, the exercise of such power would violate the Tenth Amendment.¹⁴² The Joint Opinion found that financial inducements that a state is obligated to accept pose the same threat to federalism as direct orders from the federal government.¹⁴³ Where the state does not have a "legitimate choice whether to accept the federal conditions in exchange for federal funds," "the Federal Government can achieve its objectives without accountability, just as in *New York* and *Printz*."¹⁴⁴ Therefore, it is relevant to the Spending Clause analysis whether and, presumably, to what extent a federal grant

136. *Sebelius*, 567 U.S. at 584.

137. *Id.* at 583–85.

138. *Id.* at 578 (describing how the federal government must allow state officials to choose to accept federal funding because the state's citizens will hold those officials responsible for that choice); *see also id.* at 581 (explaining how the states developed "intricate statutory and administrative regimes" to accomplish their objectives under the original Medicaid regime).

139. *New York v. United States*, 505 U.S. 144 (1992).

140. *Sebelius*, 567 U.S. at 578.

141. *New York*, 505 U.S. at 169.

142. *See Sebelius*, 567 U.S. at 577–78 ("[T]he Constitution simply does not give Congress the authority to require a state to regulate.").

143. *Id.* (describing how allowing Congress to impose requirements on how states govern would threaten the very foundations of the system of government created by the Framers).

144. *Id.* at 578.

shifts political blame to the state officials who decide to accept the grant.¹⁴⁵

According to Professor Samuel Bagenstos, the Joint Opinion also considered the fact that Medicaid is a pre-existing, cooperative federal-state program.¹⁴⁶ Bagenstos argues that “[i]n determining whether a state has a real choice, the Chief Justice found it significant that the new conditions were attached to continued participation in an entrenched and lucrative cooperative program.”¹⁴⁷ In other words, because the states and the federal government were already engaged in a long-standing and expensive cooperative program, the Medicaid expansion was more coercive than an identical mandate would have been for a less-expensive or less-established cooperative program.¹⁴⁸

NFIB severely fractured the Court; only three justices signed on to the controlling opinion, and eight justices filed three dissents. Justices Scalia, Kennedy, Thomas, and Alito filed a dissenting opinion (the “Joint Dissent”). While not legally binding, the Joint Dissent is worthy of consideration because it fell just one vote short of being the controlling opinion. At the heart of the Joint Dissent is its declaration that “[o]nce it is recognized that spending-power legislation cannot coerce state participation, two questions remain: (1) What is the meaning of coercion in this context? (2) Is the ACA’s expanded Medicaid coverage coercive?”¹⁴⁹ Accordingly, the Joint Dissent focuses almost exclusively on *Dole*’s coercion prong.¹⁵⁰

When it refers to “coercion,” the Joint Dissent means: did the state have the actual, rather than purely legal, capability to reject the offer of federal funds?¹⁵¹ The magnitude of the money at stake is generally determinative of whether the state has an actual choice. The amount of money at stake dictates the state’s decision because a state may be unable to refuse a large offer or a state may be unable to create enough revenue to otherwise match the amount.¹⁵² According to the Joint Dissent, if the federal government creates

145. *See id.* (explaining how political accountability is a key component of the federal system).

146. Bagenstos, *supra* note 6, at 871 (arguing that the Joint Opinion placed emphasis on the fact that Medicaid was already an established program).

147. *Id.*

148. In contrast, *Dole* did not touch on the nature of the pre-existing relationship between the federal and state governments with respect to the federal funds at issue.

149. *Sebelius*, 567 U.S. at 678.

150. *See* Bagenstos, *supra* note 6, at 871 (explaining how the joint dissenters focused on what choice the states realistically, not just theoretically, had).

151. *Sebelius*, 567 U.S. at 678–80.

152. *Id.* at 680.

such a situation, this is coercion.¹⁵³ The Joint Dissent's view is a significant departure from both the Joint Opinion's understanding of coercion and the Court's ruling in *Dole*—both of which focus on a grant's size as a percentage of the state's budget rather than the grant's magnitude in absolute terms.¹⁵⁴

In light of its unique understanding of coercion, the Joint Dissent found that the Affordable Care Act's take-it-or-leave-it, high-financial-stakes approach to the Medicaid expansion clearly indicated Congress's understanding that it was not providing the states an actual choice.¹⁵⁵ According to the Joint Dissent, "the sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue."¹⁵⁶ In other words, the states could not reject the federal government's offer because too many federal dollars were at stake and state revenues were too small to compensate for the loss of federal funds.

The Joint Dissent also contends that Congress ensured that states could not choose to reject the expansion because it did not devise a back-up plan to provide Medicaid for residents of the states that rejected the expansion.¹⁵⁷ This combination resulted in a Faustian choice: (A) accept the terms of the Medicaid expansion and receive near-complete funding; or (B) lose all Medicaid funding and choose between impossibly raising revenues to sustain Medicaid or ending the program.¹⁵⁸ Such a choice, the Joint Dissent ar-

153. *Id.* ("When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative.").

154. Compare *id.* at 582 (Joint Opinion), with *id.* at 683 (Joint Dissent); see also *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

155. *Sebelius*, 567 U.S. at 681. In the Joint Dissent's view, when Congress designed the Affordable Care Act, it "unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid expansion." *Id.*

156. *Id.* at 683.

157. *Id.* at 686 ("If Congress had thought that States might actually refuse to go along with the expansion of Medicaid, Congress would surely have devised a backup scheme so that the most vulnerable groups in our society, those previously eligible for Medicaid, would not be left out in the cold.").

158. For further analysis of the Court's holding in *NFIB*, see Amdur, *supra* note 9; Bagenstos, *supra* note 6; Lynn A. Baker, *The Spending Clauses After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL'Y 71 (2014); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283 (2013); Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577 (2013).

gued, is no choice at all,¹⁵⁹ and the Medicaid expansion therefore violates the Spending Clause.

Notably, the Joint Dissent, like the Joint Opinion and the Court's precedent, conceives of the Spending Clause as a mechanism to govern contracts between the federal government and the states. According to the Joint Dissent, the federal government enters into a contract with the state when the state accepts the offer of federal funds.¹⁶⁰ Moreover, it asserts that "just as a contract is voidable if coerced, '[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State *voluntarily* and knowingly accepts the terms of the "contract.'"¹⁶¹

The Joint Opinion and Joint Dissent's focus on coercion and contract law and the Joint Opinion's additional focus on political accountability indicate a fundamental concept of the conditional spending power: political agency. The Joint Opinion and the Joint Dissent clearly agree that the limitations on the Spending Clause safeguard federalism by protecting the states' ability to choose whether to contract with the federal government.¹⁶² A state's ability to voluntarily and knowingly accept the federal government's offer is best described as the state's political agency. Thus, political agency is a central component of the coercion prong of the Spending Clause analysis and the conditional spending power.

II. THE PROBLEM OF LOCALISM: HOW FEDERALISM ACTUALLY WORKS

The Court designed the *Dole-NFIB* framework to prevent the federal government from commandeering non-federal government actors through coercive financial inducements.¹⁶³ By protecting non-federal government actors from coercion, the Court's *Dole-NFIB* framework begs the question: *who* is the federal government coercing? The default assumption is that the federal government is coercing the state because its political agency is for sale. In many

159. *Sebelius*, 567 U.S. at 688–89 (clarifying that the Affordable Care Act's success depended on the participation of every state in the Medicaid expansion, no matter if the participation was voluntary or not).

160. *Id.* at 676.

161. *Id.* at 676–77 (quoting *Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 17 (1981)).

162. *Compare id.* at 577 (explaining how Congress legitimately exercises its spending power when it allows states to knowingly and voluntarily participate in the grant program), *with id.* at 678–79 (explaining that measuring how coercive a federal grant is means measuring whether the states can voluntarily choose to participate in that grant program).

163. *Id.* at 557–78.

cases, however, local governments decide whether to accept or reject federal funds.¹⁶⁴ In those instances, local governments, not the states, are the ones in danger of being coerced.

To be coerced, the entity must be able to exercise some meaningful amount of agency. If the entity cannot act independently, then it cannot be coerced by the federal government. Thus, agency is at the heart of coercion, which is at the heart of the conditional spending power. Localism, therefore, presents a problem. Contrary to the Supreme Court's ruling in *Hunter v. Pittsburgh*, local governments are not mere administrative units of the state.¹⁶⁵ Far from it. Instead, local governments are what they purport to be: governments. As elected governments, localities, like their state governments, have political agency. In other words, local governments make political decisions for their constituents, such as whether to accept federal funds subject to conditions.¹⁶⁶

Protecting federalism by preserving the political agency of non-federal government actors is at the heart of the conditional spending power. Local governments have political agency. Therefore, the *Dole-NFIB* framework must be applied to localities directly when localities decide whether to accept federal funds.

A. Agency: The Crux of the Conditional Spending Power Doctrine

Agency is the key consideration underlying the Spending Clause. Four major elements of the *Dole-NFIB* framework make it clear that agency is key because these elements only apply to the entity that has the authority to decide to accept federal funds.¹⁶⁷

164. See Pasachoff, *supra* note 158, at 652–53.

165. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the government powers of the State as may be entrusted to them”); see *infra* Part II.B.1 (discussing the theory of federalism of those who subscribe to the *Hunter* view).

166. See *infra* Part II.B.3.

167. See *Sebelius*, 567 U.S. at 577–81 (clarifying that the federalist structure of U.S. government mandates that entities who contract with the federal government do so voluntarily and knowingly, without coercion, and for the purpose of maintaining the “general welfare” of the nation); *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (explaining how the spending power is subject to several general restrictions, including that the federal government offer the grant to the deciding entity with unambiguous conditions so that the entity can make a knowledgeable and voluntary decision).

1. *Notice of Clear Conditions*

First, the *Dole-NFIB* framework requires the federal government to make the conditions of its financial inducements clear to state officials before those officials accept the offer.¹⁶⁸ The purpose of this rule is obvious: to ensure that the state can make a fully informed decision prior to accepting the inducements. If the federal government could determine retroactively or obscure its conditions, then federal government could use the power of the purse to commandeer the states. Without knowing all of the conditions, states would agree to a contractual relationship with the federal government from which it could not escape. In other words, the states' political agency would be compromised because they would not be able to make informed decisions.

In many cases, however, localities, not the states, decide whether to accept certain federal grants.¹⁶⁹ Accordingly, to ensure that a locality can properly exercise its political agency, the federal government must also make the locality aware of all the conditions of the federal grant. The Court requires the federal government to provide clear conditions to the deciding officials. This requirement allows the deciding officials to make a fully informed decision. In a situation where the localities are the decision-makers, the federal government should provide the localities with clear conditions. However, if the courts consider the state officials to be the relevant officials, the federal government would not be required to inform the local officials. In such a scenario, the federal government's decision not to inform the localities of all the conditions would frustrate the purpose of the clear-conditions requirement and undermine the political agency of localities.

Aside from comporting with the logic of the clear-conditions prong of the *Dole-NFIB* framework, requiring the federal government to inform local officials when they decide whether to accept federal funds follows directly from Supreme Court precedent. In *Arlington Central School District Board of Education v. Murphy*,¹⁷⁰ the Court stated that the Spending Clause's clear statement rule requires the judiciary to view the offer of federal funds "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [those] funds and the obligations that go with [them]."¹⁷¹ In this passage, the Court

168. *Sebelius*, 567 U.S. at 583; *Dole*, 483 U.S. at 207.

169. See *infra* Part II.A.2.

170. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006).

171. *Id.* at 296.

unequivocally recognized that the agents who decide whether to accept or reject federal funding are central to the Spending Clause analysis. In *Murphy*, the decision-maker was a state official;¹⁷² but in many other cases, the decision-maker is a local official.¹⁷³ Thus, the Court has mandated that when a federal court applies the Spending Clause analysis, it must consider the perspective of the deciding local official. To satisfy the clear-conditions prong of the Spending Clause analysis, the federal government must notify the local official of all the conditions associated with the federal grant. If the federal government fails to provide the local official with such notice, it compromises the local official's political agency and, by extension, the very foundations of federalism.

2. *Non-Coercive Inducement*

The coercion prong of the *Dole-NFIB* framework also reinforces the centrality of political agency in the Spending Clause analysis. In *NFIB*, the Court held that Congress cannot hold “a gun to the head” of the state.¹⁷⁴ In other words, the state must freely decide to either accept or reject federal funding. Otherwise, the federal government can coerce the states to act, which compromises the states' political agency, thus undermining federalism. Where the locality, not the state government, decides whether to accept federal funds, however, the locality is the entity being coerced. Thus, its political agency is undermined when the federal government offers a coercive inducement. Therefore, the courts would frustrate the purpose of the non-coercion prong if they did not view localities as the subject of coercion in cases where local governments have the authority to accept federal funding.

For an illustration, consider Professor Mitchell Berman's insights into the Joint Opinion in *NFIB*.¹⁷⁵ Berman noted that “the usual way in which one puts wrongful pressure on a target's choices is by threatening to wrong him if he does not comply with the threatener's ‘demand’ or ‘condition.’”¹⁷⁶ Under Berman's view, therefore, the federal government can only pressure the entity that is empowered to choose whether to accept or reject its financial offers. Consider the following federal grants: the State Criminal

172. *Id.*

173. See *infra* Part II.B.2.

174. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–81 (2012) (clarifying how the Spending Clause derives its legitimacy from a state's ability to voluntarily accept the terms of the contract).

175. Berman, *supra* note 158, at 1292.

176. *Id.*

Alien Assistance Program (SCAAP) grant;¹⁷⁷ the Economic Development Administration (EDA) grant;¹⁷⁸ the CDBG grant,¹⁷⁹ specifically the Entitlement Communities Program,¹⁸⁰ the Section 108 Loan Guarantee Program,¹⁸¹ and the Neighborhood Stabilization Program,¹⁸² and the Community Oriented Policing Services (COPS) grant.¹⁸³ The federal government offers each of these grants directly to localities.¹⁸⁴ For each of these grants, the federal government's "target" is a local government because a local government accepts the funds. Thus, for these specific grants, the federal government can apply "wrongful pressure" only on the local government.¹⁸⁵ If the federal government coerced a local government to accept the SCAAP, EDA, CDBG, or COPS grants, the federal government would threaten the local government's agency, but not the state's agency. Therefore, if a federal court assesses the federal inducement's coercive effect on the state only, it fails to consider the inducement's coercive effect on the true decision-maker: the locality.

3. *Principles of Contract Law*

The Joint Opinion also views the Spending Clause as rooted in contract law, particularly the concept of reliance.¹⁸⁶ As with the clear-conditions and non-coercion requirements, the principles of contract law only apply to the entity engaging in the contract. Where local governments make the decision to accept federal funds, these governments exercise their agency by entering into a

177. *State Criminal Alien Assistance Program (SCAAP)*, BUREAU JUST. ASSISTANCE, <https://bit.ly/2Gtu9Gw> [<https://perma.cc/6WU2-L3TP>].

178. *Funding Opportunities*, U.S. ECON. DEV. ADMIN., <https://bit.ly/1RR2Kxx> [<https://perma.cc/UL4B-R3QB>].

179. *Community Development Block Grant Program – CDBG*, HUD.GOV, <https://bit.ly/2EzsA7x> [<https://perma.cc/4BHD-C8CU>].

180. *Community Development Block Grant Entitlement Program*, HUD EXCHANGE, <https://bit.ly/29AEmPE> [<https://perma.cc/974Q-2JNE>].

181. *Section 108 Loan Guarantee Program*, HUD EXCHANGE, <https://bit.ly/2CnyWFn> [<https://perma.cc/7ETC-R629>].

182. *Neighborhood Stabilization Program Data*, HUD USER, <https://bit.ly/2Sap3Am> [<https://perma.cc/D5K5-GSU9>].

183. COMMUNITY ORIENTED POLICING SERVS., <https://bit.ly/2lafkwo> [<https://perma.cc/56QD-8TX8>].

184. Angelo Mathay et al., *How Much Funding for Sanctuary Jurisdictions Could Be at Risk?*, CTR. FOR A]M. PROGRESS (Mar. 7, 2017), <https://ampr.gs/2pzMfNH> [<https://perma.cc/53NY-FC39>] (listing the five federal grant programs that might be affected by EO 13768).

185. See Berman, *supra* note 158, at 1292 (defining coercion as exerting "wrongful pressure" on an individual so that the individual acts how the coercer intended).

186. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012).

contract with the federal government. Contract law seeks to protect an entity's agency by prohibiting coercive force by the counterparty.¹⁸⁷ The pivotal entity in a contractual relationship is the one that can manifest assent regarding the funds offered, which is often a locality.

The Joint Dissent agrees that contract law underlies the Spending Clause, thereby prohibiting the federal government from coercing its bargaining partner.¹⁸⁸ In *NFIB*, the state was the relevant actor in accepting or rejecting the Medicaid funding.¹⁸⁹ But for many federal grants, local governments are the relevant actors. Therefore, the contract law principles included in the *Dole-NFIB* framework protect the agency of local governments.

The Joint Opinion also emphasizes that Congress sought to withdraw funding from a long-standing program, indicating that such withdrawal was more coercive than it would have been otherwise.¹⁹⁰ Underlying this argument is the concept of reliance. Because the states had participated in Medicaid for so long, the Joint Opinion indicates they had established reliance interests in the federal funds. Disrupting this reliance interest appears to have further substantiated the states' argument that Congress's action was coercive.¹⁹¹

4. *Political Accountability*

The Court's concern for political accountability in *NFIB* further underscores the pivotal role of agency in the Spending Clause analysis. In *NFIB*, the Court expressed its concern that federal grants thwart political accountability because these grants entrench voters' policy preferences while obscuring the culprit who ends the policy.¹⁹² According to the Court, "the political accountability key to our federal system" would suffer if voters do not know which government officials—federal or state—to blame for a particular program.¹⁹³ The Court feared that the federal government could create undue pressure on state officials by threatening to blame

187. "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable." RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (AM. LAW INST. 1981); see also Berman, *supra* note 158, at 1298.

188. *Sebelius*, 567 U.S. at 676–77.

189. *Id.* at 538–43 (describing the facts of the case and the nature of the states' challenge to the Affordable Care Act).

190. *Id.* at 583–84; see Bagenstos, *supra* note 6, at 882.

191. See *Sebelius*, 567 U.S. at 582.

192. *Id.* at 578.

193. *Id.*

these officials for refusing to accept continued Medicaid funds in exchange for supporting a new program.¹⁹⁴ By shifting the blame to the state officials, the federal government undermines the states' agency.¹⁹⁵

In *NFIB*, the Court reasoned that voters can only hold state officials accountable for their decision to accept or reject federal grants if those officials have a legitimate choice whether to do so.¹⁹⁶ In other words, courts must protect the states' agency so state officials can make a decision for which their constituents can fairly hold them accountable. But where local government officials decide whether to accept grants, it is their political capital that is unduly burdened.¹⁹⁷ The Joint Opinion's concern for political accountability also applies to local officials in such cases. The Court's concern for ensuring that the state entity exercises its political agency is reflected in the *Dole-NFIB* framework's requirement of political accountability.¹⁹⁸ Thus, agency lies at the heart of the *Dole-NFIB* framework. Because local governments are the ones exercising agency when deciding to accept federal funds, courts employing the Spending Clause analysis should not forget about the localities.

B. *Localist Federalism*

The purpose of the *Dole-NFIB* framework is to preserve the agency of the non-federal government entity with which the federal government is bargaining. As the previous section asserted, local governments, like their state governments, exercise political agency. Critics may retort that local governments do not, in fact, have such agency. They would argue that the landmark Supreme Court case *Hunter v. City of Pittsburgh* unequivocally held that cities are just

194. *Id.* (“[I]t may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

195. *Id.*

196. *Id.* (“[S]tate officials can fairly be held politically accountable for choosing to accept or refuse the federal offer.”).

197. In *Arlington Central School District Board of Education v. Murphy*, the Court held that the Spending Clause's clear-statement rule requires the judiciary to “view the [offer of federal funds] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [those] funds and the obligations that go with [them].” *Arlington Cent. Sch. Dist. Bd. Educ. v. Murphy*, 548 U.S. 291, 296 (2006). With this statement, the Court unequivocally recognized that the agents who decide whether to accept or reject federal funding are central to the Spending Clause analysis.

198. *Sebelius*, 567 U.S. at 578.

instruments of states.¹⁹⁹ Therefore, “[c]oercing cities amounts to coercing states.”²⁰⁰ This Article terms this perspective the “*Hunter Model*” because proponents of this perspective would apply the *Dole-NFIB* framework to the locality’s state government, rather than its local government, to determine whether federal grants offered to localities violate the Spending Clause.

Yet, the *Hunter Model* reflects neither how American federalism functions in practice nor the evolution of the legal doctrine of local government autonomy. For decades, state statutes and federal and state judicial doctrine have entrenched the formal authority of general-jurisdiction local governments and strengthened their status as mini-sovereigns.²⁰¹ As a result, local governments have sufficient formal legal authority and autonomy to raise the federalism concerns that the conditional spending power doctrine seeks to address. Those who endorse the *Hunter Model* ignore the “dynamic nature of federalism in practice” and fail to ensure that courts use “constitutional federalism” to protect federalism as it exists on the ground.²⁰² This section elaborates on local government’s history of exercising significant political agency and the conceptual limitations of state supremacy that restrain our understanding of federalism.

1. *Legal Background: Dillon’s Rule, Hunter, and Home Rule*

In 1868, Judge John Dillon articulated the foundational theory of state supremacy over local government. In his opinion in *City of Clinton v. Cedar Rapids & Missouri River Railroad*,²⁰³ Judge Dillon declared that states are supreme over local governments because “[m]unicipal corporations owe their origin to, and derive their pow-

199. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); see also Noah Feldman, *Sanctuary Cities Are Safe, Thanks to Conservatives*, BLOOMBERG (Nov. 29, 2016), <https://bloom.bg/2SHRpBG> [<https://perma.cc/6EPG-BA7P>].

200. Feldman, *supra* note 199.

201. SCHRAGGER, *supra* note 15, at 81 (“As a formal matter, cities in the United States enjoy a significant amount of legal authority, at least when compared with cities in some other western democracies.”).

202. Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 402–03 (2015). As Professor LaCroix notes:

Studying the evolution of [the spending power] over time, especially where the text itself remains constant, demonstrates that ideas about federal structure are not fixed. Therefore, constitutional federalism itself is not fixed—a particularly important insight in an area of constitutional doctrine that is dominated by originalist approaches. . . . Since the earliest days of the Republic, federalism has been an unstable and contested concept, worked out through the meshing of theory and practice.

Id. at 397, 402.

203. *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455 (1868).

ers and rights wholly from, the [state] legislature.”²⁰⁴ Judge Dillon refined his views in his treatise *Commentaries on the Law of Municipal Corporations*.²⁰⁵ In this treatise, Judge Dillon articulated a legal principle that would come to be known as “Dillon’s Rule.” According to Dillon’s Rule, “local governments may exercise only those powers ‘granted in *express words*,’ or ‘those *necessarily or fairly implied* in or *incident* to, the powers expressly granted,’ or ‘those *essential* to the declared objects and purpose of the [municipal] corporation—not simply convenient, but indispensable.’”²⁰⁶ Dillon’s Rule dominated legal thought on local government law for decades.²⁰⁷ In fact, it was adopted by nearly every state during the last quarter of the 19th century.²⁰⁸

Thirty-five years later, the Supreme Court decided the landmark case *Hunter v. Pittsburgh*, which agreed with Judge Dillon’s belief that cities are merely extensions of states. The previous year, pursuant to Pennsylvania state law, the city of Pittsburgh annexed the city of Allegheny.²⁰⁹ Angered by the annexation, residents of Allegheny sued the city of Pittsburgh, arguing that the annexation violated the Contract Clause and the Fourteenth Amendment to the Constitution. In a unanimous opinion, the Court rejected Allegheny’s claims and stated that “[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them.”²¹⁰ Moreover, the Court declared that the Constitution does not constrain a state’s authority

204. *Id.* at 475.

205. JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* 449–50 (5th ed. 1911).

206. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990) (quoting DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM: CASES AND MATERIALS* 83 (2d ed. 1983)).

207. Elijah Swiney, *John Forrest Dillon Goes to School: Dillon’s Rule in Tennessee Ten Years After Southern Constructors*, 79 TENN. L. REV. 103, 105–06 (2011) (discussing the prominence of Dillon’s Rule among scholars of local government law).

208. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1123 (2007) (explaining how Dillon’s Rule gained widespread acceptance among politicians in the late 19th century); Louis V. Csoka, *The Dream of Greater Municipal Autonomy: Should the Legislature or the Courts Modify Dillon’s Rule, A Common Law Restraint on Municipal Power?*, 29 N.C. CENT. L.J. 194, 199 (2007) (explaining how Dillon’s Rule gained popularity and acceptance in state courts throughout the 20th century).

209. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 174–75 (1907).

210. *Id.* at 178.

over its localities.²¹¹ To the *Hunter* Court, municipalities are state agencies, just as Judge Dillon said they were.

Just a few years later, however, the Progressive Era ushered in the decline of Dillon's Rule. As Dillon's Rule declined, the so-called "Home Rule" became more popular.²¹² Professor Richard Briffault notes:

states adopted constitutional amendments giving localities the power to adopt their own charters and to legislate with respect to local matters. The home rule movement had two goals: to undo Dillon's Rule by giving localities broad lawmaking authority and to provide local governments freedom from state interference in areas of local concern.²¹³

Home Rule was an outgrowth of the Progressive Era's reforms, seeking to "free cities" from "the state's political machines" and dominant rural politicians.²¹⁴ Home Rule took two forms: *Imperio* and *Legislative*. *Imperio Home Rule* treated municipalities as a "state within a state, possessed of the full police power with respect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference."²¹⁵ Similarly, *Legislative Home Rule* reversed Dillon's Rule because state legislatures endowed local governments with police powers, subject to their authority to restrict or deny certain powers.²¹⁶ Thus, for the vast majority of local governments, the Home-Rule movement effectively unwound Dillon's Rule.²¹⁷

By 1990, 41 states had given their localities Home Rule or a partial version of it.²¹⁸ Today, most states still have Home Rule for their localities.²¹⁹ Thus, rather than retain top-down control of lo-

211. *Id.* at 179.

212. SCHRAGGER, *supra* note 15, at 62–64.

213. Briffault, *supra* note 206, at 10. *But see* SCHRAGGER, *supra* note 15, at 63 ("Home rule was not an effort to shift power to representatives of the local government; it was oftentimes instead an effort to limit the law-making role of the city's state legislative delegation, which was (according to reformers) responding too readily to every costly demand of their urban constituents."). Even accepting this view, the Home-Rule movement did empower most local governments and deconstructed the prior era's model of centralized state control.

214. *See* Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1186 (2018).

215. Briffault, *supra* note 206, at 10.

216. *Id.*

217. *Id.* at 10–11 ("In a sense, it reverses Dillon's Rule—all powers are granted until retracted.")

218. *Id.*

219. *See* JON D. RUSSEL & AARON BOSTROM, *FEDERALISM, DILLON RULE AND HOME RULE* 6 (2016), <http://bit.ly/2QYk3RX> [<https://perma.cc/9PP4-T7QZ>] (explaining that 44 states have adopted Home Rule in some capacity).

cal governments, the states themselves have opted to establish their local governments as the third-tier of American federalism. For example, in all states, localities are governed by elected officials, rather than directed by bureaucrats, and exercise significant political powers, such as levying taxes and condemning land.²²⁰ Moreover:

Even during the late nineteenth and early twentieth centuries—the heyday of Dillon’s Rule, the era of plenary state power and the unsteady beginnings of home rule—American city governments pioneered in public health, education, parks, libraries, water supply, sanitation and sewage removal, street paving and lighting and mass transit, building the infrastructure that still serves modern urban centers.²²¹

Local governments still exercise significant authority in these areas. Although the Court in *Hunter* viewed local governments as administrative agencies of the states,²²² local governments are, and have been for decades, political entities that exercise significant autonomy and authority over their constituents, just like state governments.

2. *Conceptual Limits of State Supremacy*

Although the *Hunter* Model and Dillon’s Rule rely on the idea that states are supreme over local governments, the foundations of this idea are not as certain and expansive as it may appear.²²³ Many scholars view *Hunter* as the Court’s unambiguous affirmation of state supremacy over local government.²²⁴ Yet, Professor Roderick Hills notes that *Hunter* simply expanded the Court’s earlier precedent of *Trustees of Dartmouth College v. Woodward*²²⁵ by holding that the Fourteenth Amendment does not provide protections for local governments, unlike private corporations, from state regula-

220. For a discussion of localities’ general powers and the evolution of those powers, see Briffault, *supra* note 206.

221. Briffault, *supra* note 206, at 15.

222. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”).

223. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1207–16 (1999) (highlighting the uncertain foundations of the *Hunter* Model).

224. See *infra* Parts II.B.1, IV.A (discussing the origins and proponents of the *Hunter* Model).

225. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

tion.²²⁶ Thus, Hills argues that *Hunter*'s narrow holding does not inevitably lead to the conclusion that Congress cannot, without the approval of the state, expand local governments' powers through its conditional spending power or its other powers.²²⁷ Rather, *Hunter* concludes that municipal corporations have fewer protections from state police power than private corporations do.

Hills also posits that the Court's anti-commandeering principle does not necessarily support state supremacy.²²⁸ The anti-commandeering principle prohibits the federal government from forcing state or local officials to conduct business on its behalf.²²⁹ However, Hills argues the principle does not apply when federal law "preempts state laws that limit the powers of state or local officials" since such laws do not "require anyone to *do* anything."²³⁰ When federal law preempts state law in this context, local governments that want to assist the federal government are allowed, but not required, to do so. Moreover, federal-local bargaining at the expense of the state or federal empowerment of localities through preemption also do not necessarily undermine federalism.²³¹ In such cases, the federal government is not "supplant[ing] nonfederal power with federal power," as is the case in the anti-commandeering context. Instead, the federal government is distributing power from one non-federal entity to another.²³²

In addition, the Court's concern for political accountability as a safeguard of federalism does not justify state supremacy. A state will remain blameless if the federal government preempts the state's authority to restrict a locality's power to facilitate a federal policy and the locality enforces the federal policy. If, to promote a federal policy, the federal government preempts the state from

226. Hills, *supra* note 223, at 1209. *Woodward* is an important case because it is the first time the Court drew a clear distinction between municipal and private corporations; this line restricts state power over the latter but not the former. See Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58, 67 n.34 (2018) (citing *Woodward* as the case where the Supreme Court distinguished municipal corporations from private corporations).

227. Hills, *supra* note 223, at 1209–10.

228. *Id.* at 1211–12.

229. The Supreme Court established the anti-commandeering principles in *Printz v. United States* and *New York v. United States*. See *Printz v. United States*, 521 U.S. 898 (1997) (striking down federal legislation compelling state law-enforcement officers to perform federally mandated background checks on handgun purchasers); *New York v. United States*, 505 U.S. 144 (1992) (invalidating provisions of an Act that would have compelled a state to either take title to nuclear waste or enact particular state waste regulations).

230. Hills, *supra* note 223, at 1211 (emphasis added).

231. *Id.* at 1214.

232. *Id.*

placing restrictions on local governments, and a local government promotes that policy, neither the federal government nor the local government will be able to shift the blame to the state.²³³ In such a scenario, the federal government and the local government have taken two “visible action[s]”: (1) the federal government preempted a state law; and (2) the local government implemented a federal policy.²³⁴ Meanwhile, the state government has not taken any “visible action that might invite retribution from affected voters.”²³⁵ Instead, it is the local and federal officials who have taken visible actions and are thus at risk of receiving retribution. While Hills ultimately endorses the notion of state supremacy, his criticisms illustrate how American federalism actually has three tiers: federal, state, and local.

Professor Kathleen Morris has criticized *Hunter* even more aggressively, arguing that the case is based on three faulty assumptions. First, *Hunter* conflates “state government” and the “sovereign state.”²³⁶ In *Hunter*, the Court stated that state governments are sovereign within their territorial jurisdictions.²³⁷ However, Morris points out that 38 state constitutions define the people as the sovereign.²³⁸ Because “the people” are sovereign within a state’s boundaries, the state government does not have the implicit supreme authority over localities that *Hunter* accords it.²³⁹

Hunter’s second faulty assumption is the belief that state governments established local governments.²⁴⁰ On the contrary, the original state constitutions recognized the pre-existing local political entities, which included contemporary local governments: counties, cities, towns, and townships.²⁴¹ Moreover, “there was never a time—and likely never will be—when a state’s government can constitutionally” eliminate all local governments.²⁴²

Hunter’s final faulty assumption is the view that localities operate “solely as instrumentalities of state governments.”²⁴³ Localities

233. *Id.* at 1213–14.

234. *See id.* at 1212 (arguing the condition of “political accountability” retains less weight when the federal government simply authorizes a state or local official to take an action, rather than requiring them to do so).

235. *Id.*

236. Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 6 (2012).

237. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–80 (1907).

238. Morris, *supra* note 236, at 6.

239. *Id.*

240. *Id.*

241. *Id.* at 30.

242. *Id.* at 31.

243. *Id.* at 7.

serve state governments in some contexts, but serve their constituencies in many others, including when the needs of their constituents conflict with the needs of the state government.²⁴⁴ For example, consider San Francisco's challenge to California's prohibition on gay marriage. In 2004, the San Francisco City Attorney sued California for violations of the state constitution's privacy, equal protection, and due process provisions.²⁴⁵ When the California Supreme Court heard the case, it did not raise questions over the City's standing to challenge the state.²⁴⁶ Rather, it was unquestioned that the city was representing its constituents, whose interests conflicted with state law; it was equally obvious that such a challenge was an appropriate action and was not a non-sensical fight between the state government and its instrumentality.²⁴⁷

Not only is *Hunter* poorly and inaccurately reasoned, Professor Morris argues it has been implicitly overturned by *Erie Railroad v. Tompkins*.²⁴⁸ In *Erie*, the Court prohibited federal courts from creating "federal general common law."²⁴⁹ In *Hunter*, the Court found that the "nature of municipal corporations" was "to be acted upon wherever [] applicable,"²⁵⁰ yet no federal law nor the Constitution empowers the Court to determine how states should allocate power among its municipalities.²⁵¹ Thus, the Court's ruling in *Hunter* is exactly the type of federal general common law that *Erie* forbids.²⁵² At best, *Hunter* rests on shaky foundations; at worst, it isn't even good law.

3. Formal Local Authority over Substantive Policies

Since at least the second half of the 20th century, general-jurisdiction local governments have possessed formal authority over substantive policy areas. Such authority is a hallmark of America's localist federalism. Briffault and Schragger have noted that gen-

244. *Id.* at 33.

245. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928–29 (N.D. Cal. 2010) (citing *In re Marriage Cases*, 183 P.3d 384, 404 (Cal. 2008)) (listing the provisions of the California Constitution the plaintiffs claimed that the state violated).

246. Morris, *supra* note 236, at 33.

247. See *id.* (explaining that the City Attorney acted pursuant to his role as an agent of his constituents, not the state).

248. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

249. *Id.* at 78–79; see also Morris, *supra* note 236, at 18 (explaining that federal courts are not empowered to devise law, as state courts do, in the absence of a federal statute).

250. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

251. Morris, *supra* note 236, at 18.

252. See *id.* ("It is difficult to square *Hunter*'s disregard of state constitutional designs in favor of a federal general common law rule with the principle announced in *Erie*.").

eral-jurisdiction local governments can levy property taxes;²⁵³ raise (some) municipal debt;²⁵⁴ determine education finance policy;²⁵⁵ and provide essential services such as sanitation, emergency services, and water.²⁵⁶ One of local governments' most important powers is authority over land use. The Supreme Court first recognized a locality's authority to regulate land use in 1926 in the landmark case of *Village of Euclid v. Ambler Realty Co.*²⁵⁷ Since then, the Court has reaffirmed this power in other influential cases such as *Village of Belle Terre v. Boraas*²⁵⁸ and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²⁵⁹ According to Briffault, local governments derive their authority to exercise such sweeping power from their representative nature of local institutions.²⁶⁰ As representative political entities, it makes sense to grant expansive authority to localities, which also makes these localities fundamentally similar to state and federal government in ways that administrative agencies are not. Such expansive local authority clearly indicates that local governments possess a significant degree of agency and are thus one of the three tiers of American federalism.

Localities' control over their own boundaries further demonstrates the significant extent of local autonomy. Briffault has noted that while the federal and state governments redraw congressional and legislative districts, respectively, on a set schedule, state governments generally do not alter localities' geographical boundaries.²⁶¹ In fact, state law generally prohibits the state government from modifying localities' borders to ensure that local governments remain responsive to local concerns.²⁶² Local governments' control

253. See Briffault, *supra* note 206, at 99 (explaining how most states rely on the local property taxes to fund schools).

254. SCHRAGGER, *supra* note 15, at 220 (discussing some of these powers in the context of state limitations on them).

255. *Id.*; see also Briffault, *supra* note 206, at 99.

256. Briffault, *supra* note 206, at 15.

257. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–89 (1926) (ruling that land-use ordinances are, on their face, legitimate exercises of the state's police power which localities may exercise).

258. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (holding that an ordinance restricting one-family residencies to traditional families fell within the local government's authority).

259. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977) (ruling on whether a locality's decision to deny a rezoning request was driven by racially discriminatory intent).

260. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 417 (1990) [hereinafter Briffault, *Localism Part II*].

261. Briffault, *supra* note 206, at 73.

262. *Id.*

over their own boundaries means that “local governments are formed largely in response to local desires.”²⁶³ States’ ingrained respect for local structures and geographical boundaries is a recognition that localities are political entities rather than administrative units. As such, state governments have long respected the political agency local governmental entities exercise on behalf of their residents.²⁶⁴ Local governments exercise their authority by enacting substantive policies on behalf of a specific group of people within defined boundaries. The agency that local governments exercise is the same type of agency that the *Dole-NFIB* framework seeks to protect.²⁶⁵

Functionally, the federal government recognizes local governments as independent entities rather than as arms of the state. Consider the following example. In *Avery v. Midland County*,²⁶⁶ the Supreme Court held that the concept of “one man, one vote” applies to local governments.²⁶⁷ If local governments are simply administrative units of the state, rather than representative political institutions, why would the people have a right to elect their representatives?²⁶⁸

Further, if local governments are merely instruments of the states, one expects sovereign immunity to apply to local governments the same way it applies to state agencies. Yet, localities do “not always enjoy the immunities from federal regulation available to the states, as they would if localities were merely state agencies.”²⁶⁹ In *Community Communications Co. v. City of Boulder*,²⁷⁰ the Court determined that the exemption from federal antitrust laws that the states receive under the Sherman Anti-Trust Act, according to *Parker v. Brown*,²⁷¹ does not automatically extend to local governments.²⁷² By refusing to automatically apply preemption

263. *Id.*

264. *See id.* (describing how local boundaries are infrequently modified once they are drawn, and if they are modified at all, it is the result of a local decision).

265. *See supra* Part II.A.

266. *Avery v. Midland Cty.*, 390 U.S. 474 (1968).

267. *Id.* at 481, 488; *see also* Briffault, *supra* note 206, at 87–88.

268. *See* Briffault, *supra* note 206, at 88 (“If the county government were simply a state agency, and the state saw the county’s function as the protection of rural interests, the state reasonably could have sought a rural-oriented county structure.”).

269. *Id.* at 91; *see also* Hills, *supra* note 223, at 1210 (describing how the Supreme Court has held that the Eleventh Amendment does not protect localities from lawsuits because the Eleventh Amendment only grants immunity to the states, not their subparts).

270. *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40 (1982).

271. *See Parker v. Brown*, 317 U.S. 341, 368 (1943).

272. *Boulder*, 455 U.S. at 52–56; *see also* Briffault, *supra* note 206, at 91–93.

to local governments, the Court treated local governments as autonomous governments apart from the state.²⁷³

Importantly, the Court in *Boulder* also determined that Home Rule does not shield municipalities from antitrust liability under federal law.²⁷⁴ In determining whether state sovereign immunity applied to the local government, the *Boulder* Court applied the two-pronged test from *Parker*.²⁷⁵ In doing so, the Court functionally recognized a clear distinction between state power and local power, thus making local government fundamentally different from state agencies.²⁷⁶

Finally, federal preemption of state power and local power indicates that local governments are distinct political entities. Consider just two examples: the Immigration and Nationality Act (INA)²⁷⁷ and the Airline Deregulation Act (ADA).²⁷⁸ Under the INA, “it is unlawful for a person or entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”²⁷⁹ Subsection h(2) states “[t]he provisions of this section preempt any *State or local* law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”²⁸⁰ The ADA prohibits any “State or political subdivision thereof” from implementing laws which relate to scheduling or pricing rates of “interstate or intrastate transportation provided by a motor carrier . . . on an interstate route.”²⁸¹ Noticeably, both laws specifically preempt states *and* their political subdivisions from regulating these issues.²⁸² If local governments are just instrumentalities of the state, such wording

273. Briffault, *supra* note 206, at 92.

274. See *Boulder*, 455 U.S. at 52–57 (rejecting the respondents’ argument that their Home-Rule amendment is a “state action” and thereby meets one of the required criterion of *Parker*); see also Briffault, *supra* note 206, at 92–94 (explaining what the Court did in *Boulder* and the impact of that ruling on the agency of localities).

275. *Boulder*, 455 U.S. at 52–54; see Briffault, *supra* note 206, at 93 (laying out the two prongs of the *Parker* test).

276. See Briffault, *supra* note 206, at 93 (“The *Boulder* Court properly treated home rule as a statement of the municipality’s relative autonomy from state supervision and of the state’s neutrality concerning municipal decision making, rather than as an affirmative authorization of local anticompetitive actions.”).

277. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

278. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

279. 8 U.S.C. § 1324a(a)(1)(A) (2018).

280. 8 U.S.C. § 1324a(h)(2) (emphasis added).

281. 49 U.S.C. § 14501(a)(1)(A) (2018).

282. See 8 U.S.C. § 1324a(h)(2); 49 U.S.C. § 14501(a)(1).

would be superfluous. By including explicit references to state governments and their political subdivisions, Congress implicitly recognized local governments as a separate tier of federalism.

4. *Counterpoints and Response*

Admittedly, states have retained significant limitations on local governments. For example, many states regulate the types of taxes local governments can levy, the rates at which they can levy taxes, and how much debt localities may raise in a fiscal year.²⁸³ Such limitations seem inconsistent with the notion of local governments as political, representative governments exercising agency on behalf of their constituents.

Moreover, unlike states in the early 20th century, states in the 21st century have made significant moves to win back local power. Over the last two decades, dozens of states have preempted local authority over a variety of controversial public policies—such as right-to-work laws, the minimum wage, and employment discrimination.²⁸⁴ By July 2017, at least 25 states enacted laws preempting local governments from setting minimum-wage regulations on private employers.²⁸⁵ Fourteen of these states passed such laws between 2011 and 2017.²⁸⁶ Over that same period, 17 states ratified preemption laws governing employment benefits offered by private employers,²⁸⁷ and six established right-to-work laws.²⁸⁸ During the 2000s, states also targeted local governments' authority over housing. Since 2001, for example, eight states have preempted local rent-control ordinances,²⁸⁹ and five have preempted inclusionary zoning ordinances.²⁹⁰

283. See SCHRAGGER, *supra* note 15, at 220.

284. See *supra* notes 253–56.

285. NAT'L EMP'T LAW PROJECT, FIGHTING PREEMPTION: THE MOVEMENT FOR HIGHER WAGES MUST OPPOSE STATE EFFORTS TO BLOCK LOCAL MINIMUM WAGE LAWS 2 (2017), <http://bit.ly/2GycTjc> [<https://perma.cc/P78M-VPTC>].

286. *Id.* at 5 n.12.

287. NICOLE DUPUIS ET AL., CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3, 8–9 (2017), <http://bit.ly/2GnsEJL> [<https://perma.cc/JA2M-J6P6>].

288. *Right-to-Work Resources*, NAT'L CONF. ST. LEGISLATURES, <http://bit.ly/2R5TN8a> [<http://bit.ly/2R5TN8a>] (listing Indiana, Kentucky, Michigan, Missouri, Wisconsin, and West Virginia as the six states who passed right-to-work laws between 2011 and 2017).

289. *Rent Control Laws by State*, NAT'L MULTIFAMILY HOUSING COUNCIL (Aug. 29, 2018), <http://bit.ly/2R2NcLR> [<https://perma.cc/Q2LL-9JLE>].

290. DUPUIS ET AL., *supra* note 287, at 23.

Although many states have restricted local authority over some issues over the last two decades,²⁹¹ local governments still possess significant formal legal authority and remain representative governmental entities. This Article does not argue that local governments are equal to their state governments. Local governments are undeniably subordinate to their state governments, just as state governments are subordinate to the federal government in certain areas and vice versa. This Article demonstrates how local governments exercise agency in the same manner as political entities, like states. Local governments are mini-sovereigns,²⁹² and as such, they have the authority to act on behalf of their constituents, independent of the states. Local governments possess formal authorities over various political issues and exercise agency to enact policies; they are the third-tier of American federalism. As the third-tier of American federalism, local governments, just like state governments, command the respect of the Spending Clause.

III. RECONCILING LOCALIST FEDERALISM AND THE CONDITIONAL SPENDING POWER

EO 13768 has put local governments and the federal government on a collision course over the Spending Clause. To faithfully apply the Spending Clause, the courts must recognize the role local governments play in American federalism. This Article provides two models that the courts can apply in such situations to ensure that the Spending Clause is applied appropriately to local governments: the *Decision-Maker Model* and the *Localized Expenditure Model*. The Decision-Maker Model is predicated on the concept of localist federalism, while the Localized Expenditure Model tracks the traditional view of federalism. Despite their fundamentally different foundations, both models reach the same result—the preservation of federalism—because they recognize local governments' entrenched political agency.

It was important that this Article provide two models for courts to use. Because the Spending Clause cannot undermine federalism, this Article needed to account for both the localist and the traditional conceptions of American federalism. Thus, the two models proposed by this Article appeal to the two factions in the debate over federalism: those who believe that localism is im-

291. See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 17 (1999); Nestor M. Davidson, *Leaps and Bounds*, 108 MICH. L. REV. 957, 959 (2010) (reviewing GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008)).

292. SCHRAGGER, *supra* note 15, at 81.

printed in American federalism and those who do not. Regardless of which model is applied, both are superior to the *Hunter Model*,²⁹³ which subverts local government autonomy and undermines the purpose of the Spending Clause's restrictions: the preservation of federalism.

A. *The Decision-Maker Model*

1. *Thesis*

Under the Decision-Maker Model, courts must apply the *Dole-NFIB* framework to either the state government or the government of the locality that will receive the federal funding, based on which entity has the authority to accept the funds. Under this model, the court will apply a two-step process when considering Spending Clause challenges. First, the court will determine which entity has the authority to accept the federal government's financial inducement. This entity is the "decision-maker." Once the court has determined who the decision-maker is, the court will then apply the *Dole-NFIB* framework.

The Constitution limits the conditional spending power to prevent the federal government from coercing the states by constraining their ability to freely and fairly choose whether to receive federal funds and to follow the attached conditions.²⁹⁴ However, every state, either through Home-Rule delegations or specific delegations under Dillon's Rule, has empowered localities to accept various types of federal grants directly.²⁹⁵ Throughout the country, states have empowered tens of thousands of local governments to, most simply put, govern. Considering this nation's long-standing and robust history of localist federalism,²⁹⁶ the courts must apply the *Dole-NFIB* framework to localities when they are empowered to accept or reject federal funds. Accordingly, when the federal government bargains directly with local governments that have the authority to accept an offer by the federal government—as with the federal funds implicated by EO 13768—the courts must determine whether the *Dole-NFIB* framework has been followed with respect to the local government.

However, if the state government decides whether to accept federal funds, either on a statewide basis or on behalf of specific localities, then the state is the proper subject of the Spending

293. See *supra* Part II.B.2 (outlining the parameters of the *Hunter Model* and recalling its roots).

294. See *supra* Part I.B.

295. See *supra* Part II.B.1.

296. See *supra* Part II.B.

Clause analysis. With respect to the Medicaid expansion, for example, the state governments, not local governments, were the actual decision-makers. The states, not local governments, had the authority to accept or reject the funds and would have been held responsible for failing to comply with Congress's conditions. Thus, their agency had to be protected from federal coercion. Therefore, in this instance, it was logical for the Court to apply the *Dole-NFIB* framework to the state. Doing so was consistent with the Court's emphasis on considering the perspective of the officials tasked with accepting or rejecting federal funds, as highlighted in *Arlington School District*.²⁹⁷ The Decision-Maker Model respects long-standing notions of localist federalism while respecting the primacy of the states' localized expenditure over their respective local governments. In doing so, it ensures that the Spending Clause respects federalism as it exists.

Some scholars seem to agree with the logic behind the Decision-Maker Model. Professors Vikram Amar and Michael Schaps, for example, have evaluated the validity of EO 13768 as applied to San Francisco, arguing that the *Dole-NFIB* framework should be applied to San Francisco directly.²⁹⁸ They did so because the "Spending-Clause doctrine in *NFIB* . . . [is] consciously designed to preserve some meaningful choice by *states/localities* about whether or not to accept conditional federal funds."²⁹⁹ Thus, Amar and Schaps applied the *Dole-NFIB* framework to San Francisco for the same reason this Article sets forth the Decision-Maker Model: to preserve the decision-maker's agency.

Professor Ilya Somin may also agree with the Decision-Maker Model. Somin posits that the clear-conditions prong of the *Dole-NFIB* framework applies to grants offered to "states *and* localities."³⁰⁰ According to Somin, EO 13768 violates the clear-conditions prong because "[f]ew if any federal grants to sanctuary cities

297. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("Thus, in the present case, we must view the [federal funds] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [those] funds"); see also *supra* notes 170–73 and accompanying text (discussing the relevance of the *Arlington School District* decision in the Court's Spending Clause jurisprudence).

298. Vikram David Amar & Michael Schaps, *How Strong Is San Francisco's "Sanctuary City" Lawsuit Against the Trump Administration?*, VERDICT (Feb. 10, 2017), <http://bit.ly/2GoQOnc> [<https://perma.cc/QW74-V4AS>].

299. *Id.* (emphasis added).

300. Ilya Somin, *Why Trump's Executive Order on Sanctuary Cities Is Unconstitutional*, WASH. POST (Jan. 26, 2017), <https://wapo.st/2R5G6GE> [<https://perma.cc/J4GV-26HW>] (emphasis added).

are explicitly conditioned on compliance with Section 1373.”³⁰¹ Rather than apply the clear-conditions element to the states, Somin believes it must be applied directly to the sanctuary cities³⁰²—which is exactly what a court would do when applying the Decision-Maker Model.

To some extent, Hills’s work is also consistent with the Decision-Maker Model. For example, Hills has noted that “when Congress specifies localities as the recipients of federal money, they really mean *localities* and not the state generally.”³⁰³ Hills has also argued that a local government’s acceptance of federal funds may not be considered a proxy for its state’s acceptance of those funds, and vice versa.³⁰⁴ These arguments are completely consistent with the Decision-Maker Model.³⁰⁵

Spencer Amdur, a staff attorney with the American Civil Liberties Union, agrees that it is unclear how the *Dole-NFIB* framework applies to local governments or whose budget the Court must evaluate to determine coercion.³⁰⁶ Amdur also recognizes that the answers to these questions likely depend on the “answers to some deeper questions about local government’s role in federalism.”³⁰⁷ Yet, Amdur argues that the *Dole-NFIB* framework likely protects local governments.³⁰⁸ The Decision-Maker Model is based on the answers to these “deeper questions” about local government, and protects local governments’ role in American federalism.

2. Criticism

Nevertheless, several legal scholars completely disagree with the Decision-Maker Model. Professor Noah Feldman believes that the Spending Clause cannot be applied to localities given the Supreme Court’s ruling in *Hunter v. Pittsburgh*.³⁰⁹ Hans von Spakov-

301. *Id.*

302. *Id.* An open letter signed by 292 law professors and scholars, including Professors Gerald Frug, Laurence Tribe, Jamal Greene, and Erwin Chemerinsky, made a similar argument. See Letter from 292 Law Professors and Scholars to President Donald J. Trump (Mar. 13, 2017), <http://bit.ly/2R5ZMd8> [<https://perma.cc/RDD3-4YSB>].

303. Hills, *supra* note 223, at 1244.

304. *Id.* at 1247 (“The power of the federal government to preempt state laws under the Supremacy Clause depends on the state’s voluntary acceptance of federal money, and Connecticut had never accepted any federal grant.”).

305. See *supra* Part III.A (describing the goals of the Decision-Maker Model).

306. Amdur, *supra* note 9, at 142–45. In this thoughtful article, Amdur discusses the intersection of immigration law and the Spending Clause.

307. *Id.* at 147.

308. *Id.*

309. See *supra* Part II.B (describing the views of Feldman and the pitfalls of those views).

sky of the Heritage Foundation is also a proponent of the *Hunter Model*.³¹⁰ In addressing the coercion prong of the Spending Clause analysis in regard to EO 13768, Spakovsky argues that states can decide whether to apply for grants from the DOJ for local law enforcement.³¹¹ Therefore, states, not localities are the subject of the *Dole-NFIB* framework because “[w]hat’s at stake are discretionary grants that *the states* may or may not decide to apply for, and which the [DOJ] may or may not choose to grant.”³¹²

Professor Eloise Pasachoff, an expert on the conditional spending power, is also skeptical of the logic of the Decision-Maker Model. Pasachoff has pointed out that “[i]t is perfectly consistent to be concerned about the federal government coercing the states and not worried about the federal government coercing local school districts, because local school districts answer to the states through whose coffers most federal education money flows.”³¹³

In fact, Pasachoff seems to argue that the Joint Opinion in *NFIB* relies on the traditional, bifurcated conception of American federalism.³¹⁴ She believes that federal coercion of local school districts is “something of a sideshow” because

the rationales offered in *NFIB* for finding coercion were strongly rooted in the idea that the states are sovereign entities with independent constitutional rights under the Tenth Amendment. The concerns about commandeering, “our system of federalism,” “invading the states’ jurisdiction,” “the unique role of the States in our system,” respect for “the legislative processes of the States,” the accountability of state officials, the dangers of “co-opting the States’ political processes,” “the practical ability of States to collect their own taxes,” and so on were crucial to the articulation of the justification for a robust coercion inquiry. These concerns simply do not have the same traction with entities other than the states, whose existence is not part of the core constitutional compact on which the country’s existence depends.³¹⁵

310. Hans A. von Spakovsky, *Sanctuary Cities? That’s a Constitutional ‘Hell No’*, HERITAGE FOUND. (Apr. 18, 2017), <https://herit.ag/2GmwG5q> [<https://perma.cc/E5LH-URUS>].

311. *Id.*

312. *Id.* (emphasis added).

313. Pasachoff, *supra* note 158, at 653.

314. *Id.* at 652–53 (“These concerns simply do not have the same traction with entities other than the states, whose existence is not part of the core constitutional compact on which the country’s existence depends.”).

315. *Id.*

However, Pasachoff's point misses the mark. Local governments are mini-sovereigns.³¹⁶ Communities elect their local government officials through elections that require one man, one vote.³¹⁷ Local governments govern land use in their jurisdictions; they provide sanitation and emergency services; they subsidize businesses; and they develop public spaces.³¹⁸ To carry out these actions, local governments raise revenue, implement laws, and enforce ordinances.³¹⁹ The concerns raised in *NFIB* to which Pasachoff refers touch on each of these local government activities and also to the political nature of local government itself. These concerns are as equally relevant to local governments as they are to state governments.³²⁰

Pasachoff justifies her view by relying on the fact that the states' existence is "part of the core constitutional compact on which the country's existence depends."³²¹ That is completely true; there is no federalism without the states. Yet, it misunderstands the nature of American federalism, "on which the country's existence depends."³²² Localist federalism is the enduring form of federalism in the United States.³²³ Local government need not be equal to the states to be the third-tier of the American federalist system. Because local governments are the third-tier, the concerns underlying

316. See *supra* Part II; Briffault, *supra* note 206, at 87–90; SCHRAGGER, *supra* note 15, at 81.

317. See *Avery v. Midland Cty.*, 390 U.S. 474, 476 (1968) (holding that the principle of "one man, one vote" applies to local governments); see also *supra* notes 266–68 and accompanying text.

318. Briffault, *supra* note 206, at 19 n.59.

319. *Id.* at 19.

320. See *supra* Part II (detailing the similarities between the state government's relationship with constituents and local government's relationship with constituents).

321. See Pasachoff, *supra* note 158, at 653.

322. Former Chief Justice Rehnquist shared this sentiment:

Both [the Tenth and Eleventh] Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.

Fry v. United States, 421 U.S. 542, 557 (1975). Chief Justice Rehnquist viewed federalism as the foundation of the Constitution, arguing that "[s]urely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments." *Id.* at 559.

323. See *supra* notes 253–60 and accompanying text (discussing the shift in American federalism over the past decade).

the *Dole-NFIB* framework are present in full force when the federal government bargains with local governments.

However, Pasachoff is not necessarily convinced that the courts should determine coercion by analyzing state budgets when localized funding is in question: “When the question is whether school districts are being coerced, it is much less clear whose budget is the proper denominator. Is it the school district’s own budget? The budget of the jurisdiction in which the school district sits? The state budget?”³²⁴ Pasachoff’s skepticism demonstrates that the logic of the *Hunter* Model does not sit too easily upon examination, even among its supporters.

B. *The Localized Expenditure Model*

1. *Thesis*

In contrast to the Decision-Maker Model, the Localized Expenditure Model is rooted in the traditional notion of American federalism. Like the *Hunter* Model, the Localized Expenditure Model accepts the “common” view that localities are the instrumentalities of their states. As such, localities are completely subordinate to the state government, despite their democratic nature. However, the Localized Expenditure Model takes a more nuanced view of federalism than the *Hunter* Model does, resulting in an application of the Spending Clause that is functionally identical to the Decision-Maker Model.

The Localized Expenditure Model is founded upon two key points. First, many federal grants are contracts between the federal government and a specific local government, rather than between the federal government and a state government.³²⁵ While state governments can prevent their localities from directly contracting with the federal government by outrightly prohibiting such action, by requiring state approval, or by enacting some other type of control mechanism, they often do not. Thus, localities themselves often accept federal funds subject to conditions.³²⁶ Second, federal-to-local grants supplement states’ budget allocations to their local governments. More specifically, a federal grant given to a specific locality supplements the revenue that the state normally would distribute to that particular locality. State governments allocate some of the to-

324. See Pasachoff, *supra* note 158, at 654.

325. See *supra* notes 186–91 (discussing how the Joint Opinion and the Joint Dissent in *NFIB* emphasized the principles of contract law in relation to Congress’s conditional spending power).

326. See *supra* notes 169–70 and accompanying text.

tal statewide revenue to fund local governments.³²⁷ Some states list the dollar amount to be distributed to each local government as a specific item in the budget,³²⁸ whereas others designate funds to local government more generally.³²⁹ Regardless of how a state distributes its funds, each state's budget sets aside an amount of funds that each locality will receive for the fiscal year.³³⁰ Because the state sets the amount of revenue it will distribute to its localities, and localities often bargain directly with the federal government for supplemental funds, any loss of bargained-for federal funds will present the state with an unsavory choice: replace the specific locality's lost funds or allow that locality to operate with a smaller-than-expected budget.

These premises lead to an important nuance that the *Hunter Model* misses: funds for specific localities are at stake when the federal government takes action upon localities, like in EO 13768. When a state sets its budget, it decides how much money to allocate to local governments. In so doing, the state decides how much financial support to give each locality. Thus, conditional spending by the federal government forces states to choose between expending additional state funds to recapitalize specific localities or allowing specific localities to be underfunded relative to initial expectations. To capture this nuance, the *Localized Expenditure Model* applies the *Dole-NFIB* framework to the locality's budget that would be affected by the acceptance or rejection of federal funds because that is the budget the state is being pressured to recapitalize.

Consider a hypothetical. If the city of San Francisco loses federal funds because of EO 13768, San Francisco's budget would be smaller than the state of California originally anticipated. In that event, California would have to decide whether to recapitalize San Francisco. Such a decision creates obvious political pressure for the state, a key concern discussed in the Joint Opinion in *NFIB*.³³¹ To determine whether the actions of the federal government place un-

327. See *State and Local Expenditures*, URBAN INST., <https://urbn.is/2R23uog> [<https://perma.cc/W3U2-J9CM>] (explaining how localities use funds from the state to administer certain programs).

328. See, e.g., OHIO DEP'T OF TAXATION, 2009 ANNUAL REPORT 142–44 (2009), <http://bit.ly/2R3t10i> [<https://perma.cc/HM5B-VFP3>]; COMMONWEALTH OF VA., 2016–2018 BIENNIAL BUDGET AND AMENDMENTS TO THE 2015 APPROPRIATION ACT, at C-3 to C-10 (2015), <http://bit.ly/2R5SfT0> [<https://perma.cc/A7BK-9Y8P>].

329. See, e.g., S.B. 848, 99th Leg., Reg. Sess. (Mich. 2018).

330. See *supra* notes 327–29.

331. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (clarifying that the Court has used its Spending Clause analysis to ensure that the federal government was not unduly influencing the states).

due pressure on the state to recapitalize San Francisco, the Localized Expenditure Model would apply the *Dole-NFIB* framework to San Francisco's budget because that is the segment of the state's budget being squeezed by the federal government. Accordingly, under the Localized Expenditure Model, when the court applies the coercion prong of the *Dole-NFIB* framework, it would also determine what percentage of San Francisco's budget the federal funds constitute.

By using the targeted locality's budget as the relevant baseline, the Localized Expenditure Model focuses on the impact that the federal government's conditional spending has on the targeted locality while preserving the supremacy of the states over their localities. Moreover, by recognizing that the pressure that conditional federal spending applies in such cases affects both the localities and the state governments, this model provides a method by which the courts can account for both pressures. Accounting for both pressures is essential to ensure that the Spending Clause does not compromise federalism by allowing the federal government to coerce state action.

2. Criticism

One potentially significant criticism of the Localized Expenditure Model is that it uses the wrong budget. If, as this model argues, a state is indirectly pressured to recapitalize one or more of its localities due to lost revenues from federal grant programs, then, as critics may argue, the proper measure of coercion is the percentage of the state's revenues that the supplemental funds would constitute. In *NFIB*, the states would have been forced to replace all of the federal funding for Medicaid.³³² The Court found the threatened withdrawal of Medicaid funds to be coercive because the funds to be replaced constituted more than ten percent of the various states' individual budgets.³³³ The same logic applies to sanctuary cities.³³⁴ If the federal government withdraws funds for law enforcement from San Francisco, the state of California may have to replace those funds. Thus, some may argue that the funds available to the state are the proper baseline to determine the coercive effect of the federal government's action.

Alternatively, a critic may argue that the courts should measure the replacement funds against the specific state's budget ex-

332. *Id.* at 583–85.

333. *Id.* at 582.

334. *See supra* Part I.A.

penditures for local government in general. States set aside funds for various purposes, including funding localities. Therefore, a state determines its optimal expenditure on local government in its budget. By measuring the replacement funds as a percentage of the funds a state wanted to spend, per its budget, on local government, the court can measure how coercive the federal government's threat is to the state's preference for local government financing. Critics may argue that either of these measures would be more accurate accounts of the coercive effect of the federal government's withdrawal of grants to localities than the measure proposed by the Localized Expenditure Model.

The first argument ignores the crucial fact that the harm, and thus the pressure, is concentrated in specific localities while the second argument misses the fact that not all localities will be affected by actions like EO 13768.³³⁵ Consider the San Francisco example again. If San Francisco loses one billion dollars, as it believes it will, due to EO 13768, its budget will be 13 percent lower than it would be otherwise.³³⁶ One billion dollars is, however, only one percent of California's budget.³³⁷ The funds California would have to replace are not for a statewide program nor are the harms felt across the state. Rather, the funds, and the harm caused by their withdrawal, are concentrated in San Francisco. Thus, measuring the harm relative to San Francisco's budget more accurately captures the amount of pressure California's state government will face when threatened with having to decide whether to replace San Francisco's lost funds. By measuring the federal revenues at stake relative to the targeted locality's budget, the Localized Expenditure Model more accurately measures the amount of coercion that the federal government's conditional spending impresses upon the relevant state.

The concentration of harm in one locality in this example also highlights how the critic's approach is inferior to the Localized Expenditure Model. Here, only San Francisco's budget is reduced; the budgets of the other California local governments would not change. If the courts evaluated coercion by measuring the funds

335. EO 13768 purports to enforce 8 U.S.C. § 1373, a provision with which the Administration believes sanctuary jurisdictions, and only sanctuary jurisdictions, do not comply.

336. See *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) (describing how federal funds make up \$1.2 billion of San Francisco's yearly budget of \$9.6 billion).

337. See CAL. STATE BUDGET 18 (2018), <http://bit.ly/2Gv0cFZ> [<https://perma.cc/D9ME-ERT9>] (listing the total resources available for FY 2018–2019 as approximately \$141 billion).

withdrawn from that one local government as a percentage of the total amount of money the California state government distributed to all local governments, then the court would underappreciate the coercive effect of the federal government's threat. All of the threatened harm would be concentrated in San Francisco.³³⁸ California allocated a certain sum of money to San Francisco based on what California thought was optimal. If San Francisco loses federal dollars, California would have to decide whether to recapitalize San Francisco to that optimal level. The amount of money California allocated to other localities is immaterial since California does not need to recapitalize any other city. The federal government's threat, then, only applies in the context of California's optimal expenditures on San Francisco.

For clarity, it is worth noting that the Localized Expenditure Model does not ignore the fact that localities like San Francisco have their own budgets, which are partially funded by taxes and fees they levy and debt they raise.³³⁹ That fact is not relevant, however, since the model recognizes that localities are instruments of the states that receive significant state funding. The model views localities' budgets as relevant because of the effect those budgets' have on the state budget as a whole, not because localities are political entities. In disregarding localities' political nature, the model implicitly accepts the traditional notion of federalism. Accordingly, when the federal government threatens to withhold funds from localities, it pressures the state government to make a difficult choice about its finances and the financial health of specific localities.

Although the Localized Expenditure Model adheres to the traditional notion of American federalism, it preserves local and state autonomy through the Spending Clause by using the most appropriate measure of coercion: the loss of federal dollars measured against the budget of the locality that is harmed. This model adheres to traditional American federalism by acknowledging that the state will have to decide whether to restore the locality's budget and thus recognizing that it is the state who will feel the effects of

338. See *San Francisco I*, 897 F.3d at 1237–38 (referencing the Attorney General's op-ed that specifically called out San Francisco as one of the targeted sanctuary cities).

339. See, e.g., CITY & CTY. OF S.F., MAYOR'S 2017-2018 & 2018-2019 PROPOSED BUDGET (2012) <http://bit.ly/2GqUWTL> [<https://perma.cc/YBK3-N9E9>]. It is well documented by Professor Schragger and others that local power to raise taxes and debts is limited. These limitations draw the states into the conditional spending fights between the federal government and localities since state funds will—and likely, must—replace the withheld federal funds if those funds are to be replaced.

the federal government's action. In so doing, the Localized Expenditure Model, unlike the *Hunter* Model, precludes the federal government from subverting local governments' political agency.

IV. IMPORTANCE

A. *Preservation of (Actual) Federalism*

The purpose of the conditional spending power doctrine is to safeguard federalism.³⁴⁰ Courts can only do this by applying the Decision-Maker Model or the Localized Expenditure Model.³⁴¹ Applying the *Hunter* Model, on the other hand, would not protect local governments—the third-tier of American federalism—because almost no federal inducement to a locality would be found coercive, despite the effect the inducement has on the locality that the federal government is actually soliciting.³⁴²

Consider San Francisco one last time. The city fears that EO 13768, if enforced as written, would rescind 13 percent of its budget.³⁴³ If courts apply the Decision-Maker or the Localized Expenditure models, they will likely rule that EO 13768 is coercive because a budget cut of 13 percent is higher than the ten percent cut the Supreme Court found unconstitutional in *NFIB*.³⁴⁴ Under the *Hunter* Model, however, the lost funds would be measured against California's budget.³⁴⁵ Relative to California's budget, \$1.2 billion is a loss of only one percent.³⁴⁶ Per the *Hunter* Model, the court would likely find that a one percent cut is not coercive.³⁴⁷

340. See *supra* Part I.B.

341. See *supra* Part III.A.2.

342. See *supra* Part II.B.1–2.

343. See *San Francisco I*, 897 F.3d at 1235 (describing the amount of federal funds in San Francisco's yearly budget).

344. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575–85 (2012) (finding the Medicaid expansion provision amounted to undue coercion on the state because it would rescind ten percent of the state's budget).

345. See von Spakovsky, *supra* note 310 (“What’s at stake are discretionary grants that *the states* may or may not decide to apply for, and which the Justice Department may or may not choose to grant.”) (emphasis added).

346. See CAL. STATE BUDGET, *supra* note 337, at 18 (listing \$141 billion as the total amount of resources California has for FY 2018–2019).

347. In *Dole*, the Court determined that the federal government did not coerce the state by threatening to withdraw five percent of the funds available to the state for highway construction and maintenance. *South Dakota v. Dole*, 791 F.2d 628, 632 (1986). In contrast, the Court in *Sebelius* held that the federal government did coerce the states by threatening to withdraw all of the states' Medicaid funding, which amounted to ten percent of their budgets. *Sebelius*, 567 U.S. at 582. It is highly doubtful that the Court would determine that the federal government compelled San Francisco to abandon its sanctuary city policies by threatening to withdraw less than one percent of the state's total budget.

Under the *Hunter* Model, the federal government can coerce San Francisco to adopt immigration-related law-enforcement policies it would otherwise reject, simply because the state in which it is located has a sufficiently large budget.

The *Hunter* Model, therefore, leads to an absurd result: the same grant will be coercive for one city but not for another even if those cities have equal budgets, simply because one city is in a richer state than the other. The federal government, therefore, may coerce a locality simply because the locality's state—which was neither involved in the decision to accept or reject the funds nor a part of the discussion on how to use them or implement the funds' conditions—has a sufficiently large revenue stream. Such an application of the Spending Clause would give the federal government the same power over localities that the Joint Opinion in *NFIB* refused to grant it over states.³⁴⁸ Irrespective of which model a court applies, both the Decision-Maker Model and the Localized Expenditure Model protect the political agency of localities; the *Hunter* Model does not.

Regardless of which model courts apply, the Supreme Court should provide Congress and the executive branch clarification as to whom the federal government is actually bargaining with when it offers financial inducements. Doing so will minimize the risk that the courts will need to invalidate acts of Congress.³⁴⁹ In order for Congress to design financial inducements that are not coercive, Congress needs to know whom it is seeking to persuade. With this knowledge, Congress can determine the optimal amount of financial inducement and remain fairly confident that the offer will not be considered coercive. Without this knowledge, Congress will be perpetually unsure whether its financial inducement will be considered coercive. The current lack of clarity over this issue has already resulted in significant litigation.³⁵⁰ More will follow if the Supreme Court does not provide a clear answer.

348. Cf. *Sebelius*, 567 U.S. at 580–85 (describing how allowing the federal government to coerce states into accepting grants of federal funds threatens federalism).

349. Federal courts widely apply the controversial “canon of constitutional avoidance” to avoid invalidating federal legislation. See, e.g., Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 334–35 (2015).

350. See *supra* notes 55–86 and accompanying text (describing the recent lawsuits related to EO 13768 and the different responses of various states).

B. Spatially Polarized Politics

Applying the *Dole-NFIB* framework directly to localities when localities bargain with the federal government is also essential in light of America's increasingly spatially polarized politics. Cities are dominated by members of the Democratic Party while Republicans represent most non-urban districts.³⁵¹ As of August 2017, 33 of the 50 most populous cities in the United States had Democratic mayors whereas only 14 of those cities had Republican mayors.³⁵² Of the ten most populous cities in America, only one—San Diego—is led by a Republican; eight of the others are led by Democrats.³⁵³ Most non-urban districts and most states, however, align with the Republican Party. Of the 3,100 counties in the United States, 2,600 voted for Donald Trump in the 2016 presidential election.³⁵⁴ It is clear that the majority of these counties were non-urban because Hillary Clinton won 88 of the 100 largest counties in the election, but only won 500 counties in total.³⁵⁵

As a result of the severity of urban-nonurban political polarization, the country is divided into red states and blue cities.³⁵⁶ While Democrats control eight of the ten largest cities, four of those cities—San Antonio, Dallas, Houston, and Phoenix—are in states with Republican governors.³⁵⁷ Of the 50 largest cities, 22 are in

351. Robert O'Connor et al., *US Local Government and Mayors of Largest Cities*, CITY MAYORS, <http://bit.ly/2GAVIOm> [<https://perma.cc/527P-4QCZ>]; see also Sara Burnett, *Election Results Offer More Evidence of Urban-Rural Divide*, U.S. NEWS & WORLD REP. (Nov. 9, 2018), <http://bit.ly/2GnbRqi> [<https://perma.cc/TL7G-LVQX>]; David Montgomery, *In These Outlier Congressional Districts, Density Doesn't Equal Democrats*, CITYLAB (Nov. 1, 2018), <http://bit.ly/2R2EJYZ> [<https://perma.cc/F6N2-VT33>].

352. O'Connor et al., *supra* note 351 (listing the 50 most populated cities in the country and the political affiliations of their mayors).

353. *Id.* Ron Nirenberg, mayor of San Antonio, was not elected as a candidate of any political party because municipal elections in Texas are non-partisan contests. Gromer Jeffers, Jr., *Taking Cue from Democrats, Texas Republicans Moving to Influence 'Nonpartisan' Elections*, DALLAS NEWS (July 2017), <http://bit.ly/2R2FscF> [<https://perma.cc/46DH-H9FW>].

354. See Zeke J. Miller & Chris Wilson, *See a Map That Shows Exactly How Donald Trump Won*, TIME (Dec. 1, 2016), <http://bit.ly/2GqJQo3> [<https://perma.cc/9NMY-AE2K>].

355. David A. Graham, *Red State, Blue City*, ATLANTIC (Mar. 27, 2017), <http://bit.ly/2Gsrnmx> [<https://perma.cc/S4FN-CLYR>]; Sydney Schaedel, *Clinton Counties*, FACTCHECK.ORG (Dec. 9, 2016), <https://bit.ly/2SchkNi> [<https://perma.cc/L8MJ-U8MW>] (stating Clinton won at least 487 counties in the 2016 election).

356. Graham, *supra* note 355.

357. See O'Connor et al., *supra* note 351 (listing the 50 most populated cities in the country and the political affiliations of their mayors); *Current Governors*, NAT'L GOVERNORS ASS'N, <http://bit.ly/2GpPfpA> [<https://perma.cc/AV2V-6CTG>] (providing a database of the current governors of the 50 U.S. states).

Republican-controlled states.³⁵⁸ Overall, Republicans govern 27 states.³⁵⁹

This stark geographic political divide creates an adversarial federal-local government dynamic that is also divided along party lines. The conditional spending power has been and will continue to be a potent weapon for federal officials of one party to restrict the policy preferences of local officials of the other party. Sanctuary cities are a case-in-point. EO 13768 and the various sanctuary-cities bills attempt to use federal funds to alter localities' immigration-related policies.³⁶⁰ It is no surprise these policies will, if implemented, disproportionately penalize Democratic cities.

When the Democratic Party regains control of the White House and Congress, it may seek to pressure suburban and rural localities through the Spending Clause as well. For example, future Democratic presidents and congressional majorities may tie various federal funds to the adoption of more stringent firearm policies.³⁶¹ Alternatively, Democratic representatives and presidents may add new conditions to community-development grants requiring localities to promote integrated communities or increase the affordable housing stock.³⁶² Many suburban and rural communities would

358. See O'Connor et al., *supra* note 351; *Current Governors*, NAT'L GOVERNORS ASS'N, *supra* note 357.

359. See *Governors*, REPUBLICAN GOVERNORS ASS'N, <http://bit.ly/2R3wrA5> [<https://perma.cc/AJV7-CNJ3>] (providing a database of the 27 Republican governors).

360. See EO 13768, *supra* note 2, at 8799 ("Ensure that jurisdictions that fail to comply with applicable Federal law do not received Federal funds, except as mandated by law . . .").

361. Over the last few years, Democrats have voiced strong support for tightening gun control measures. See James Arkin, *Democrats Push for Gun Control as a Campaign Issue*, REALCLEAR POL. (Feb. 20, 2018), <http://bit.ly/2R2xErW> [<https://perma.cc/F583-U9YD>]; see also Sara Shayanian, *House Democrats Pushing Gun Control After Las Vegas Mass Shooting*, UPI (Oct. 4, 2017), <https://bit.ly/2Ra2dvg> [<https://perma.cc/NH8S-QRF7>]; Richard Cowan, *Senate Democrats Push for New Gun Control Measures*, REUTERS (June 13, 2016), <https://reut.rs/2R35BYT> [<https://perma.cc/DA5Y-DM3E>]. Democrats also blocked from the 2018 omnibus budget bills a provision that would have allowed public schools to purchase firearms with federal funds. See Perry Bacon, Jr., *Gun Policy Is Already Changing in the Wake of Parkland*, FIFTYTHREEEIGHT (Mar. 29, 2018), <https://53eig.ht/2R2zb0K> [<https://perma.cc/F3GL-H344>].

362. These are important policies to the Democratic Party. See Press Release, U.S. House Comm. on Fin. Servs., *Waters Introduces Bill to Restore Fair Housing Protections Eliminated by Secretary Carson* (June 26, 2018), <http://bit.ly/2GBOE42> [<https://perma.cc/FE8C-CBX6>] ("The Department of Housing and Urban Development (HUD) is supposed to create strong communities; expand access to affordable housing; and enforce fair housing rights."); see also Althea Arnold, *Senate Democrats Unveil Infrastructure Plan with Support for Affordable Housing*, NAT'L COUNCIL ST. HOUSING AGENCIES (Mar. 9, 2018), <http://bit.ly/2GrDU87>

likely oppose such conditions, just as cities like Chicago and San Francisco oppose the Trump Administration's immigration-related conditions.³⁶³ A clear judicial determination of the application of the *Dole-NFIB* framework to local governments is essential to address the current federal-local showdown over sanctuary cities, and for the federal-local battlegrounds to come.

CONCLUSION

In 2012, the Court demonstrated its willingness to use the Spending Clause to invalidate federal grant programs to the states. In *NFIB*, the Court reaffirmed the foundations of its Spending Clause jurisprudence, revamped its earlier views on coercion, and incorporated new concerns into the Spending Clause analysis. In *NFIB*, the Court cemented its view of how courts can preserve federalism, considering the number of negotiations that occur directly between the federal and state governments. The Court's decision, unsurprisingly, sparked significant debate among the public and the legal community, resulting in numerous articles examining a variety of the decision's aspects. The Court and most scholars, however, have not addressed what has become and what will continue to be a core concern of the Spending Clause: how does the Spending Clause apply to federal-local financial bargains?

EO 13768 has brought this fundamental question to the forefront of constitutional law. The implications of this executive order and the way the Court applies the *Dole-NFIB* framework to evaluate EO 13768's application are massive; billions of dollars are at stake, and the political fights are protracted. At the heart of the Court's *Dole-NFIB* framework is political agency. The framework prevents the federal government from coercing the states into implementing its policy preferences, thus compromising federalism by ensuring that the states' political agency is maintained during and after the bargaining process. To date, this framework has overlooked the political agency of local governments, which has been engrained in American federalism for decades.

Local governments are not mere administrative agencies of their states; they are representative political entities that exercise police powers on behalf of their geographically defined constituen-

[<https://perma.cc/86L7-F6Z3>] (highlighting Senate Democrats' proposal for providing federal funding to localities for affordable housing).

363. Peter Whoriskey, *Space for Employers, Not for Homes*, WASH. POST (Aug. 8, 2004), <https://wapo.st/2R3DUzj> [<https://perma.cc/TNH6-CMS8>]; Ana Beatriz Cholo, *Why Affordable Housing Doesn't Get Built*, HUFFINGTON POST (Feb. 25, 2016), <http://bit.ly/2R4bsgt> [<https://perma.cc/E42T-5XQB>].

cies. They are “mini-sovereigns” and have been viewed as such by state governments, the federal government, and the courts in a variety of contexts for many years. The reality is that American federalism has three tiers: federal, state, and local. Accordingly, federal inducements negotiated by and given directly to local governments raise the same federalism concerns advanced by the Court in its Spending Clause cases. The *Dole-NFIB* framework needs to be applied to such inducements directly, just as it is when the federal governments bargains with the state at-large.

It is not necessary to believe that local governments are the third-tier of federalism, however, to believe that the *Dole-NFIB* framework needs to be applied in the same manner. While the traditional notion of American federalism is as a two-tiered structure, meaningful localism has been an accepted component of state government for at least a century. State governments promote local governments within their territories by allocating funds for them from statewide revenues. These funds represent the state government’s preferred level of statewide spending on local government in general, but also the state’s preferred level of financial support for specific localities. When the federal government threatens to withhold funds from specific localities, its threat has two effects. First, the threat saddles the localities’ state with a difficult choice: recapitalize specific localities or allow those localities to operate with suboptimal funding. Second, it threatens a specific jurisdiction within the state, rather than the state as a whole. Thus, the coercion that the *Dole-NFIB* framework is designed to invalidate is concentrated on specific localities rather than the state as a whole; the state is pressured to make financial decisions about specific localities, and those localities, not others, bear the cost of the state’s decision. Accordingly, the most accurate measure of the federal government’s targeted coercion is the targeted locality’s budget, not the state’s total budget.

To properly apply the Spending Clause to federal-local grant programs, the courts should adopt either the Decision-Maker Model or the Localized Expenditure Model. The Decision-Maker Model is based on a localist view of federalism, recognizing that local governments are, in many contexts, “mini-sovereigns.” Accordingly, this model directs the courts to apply the *Dole-NFIB* framework to localities in the same manner it would to states in cases where the local government is empowered to make the final decision over whether to accept federal funds. The Localized Expenditure Model is based on the traditional, bilateral conception of federalism. However, this model still requires the courts to apply

the *Dole-NFIB* framework to localities directly because it recognizes that the federal government pressures states to decide whether to recapitalize specific localities when they offer federal funds to specific localities. In so doing, the model preserves states' authority to govern their territory through politically representative local governments. Either model would ensure that the *Dole-NFIB* framework preserves federalism by preserving state and local officials' agency when they contract with the federal government.

The United States is becoming more and more politically polarized, and that polarization is becoming increasingly defined by geography. As a result, the United States is a country where many of its largest cities are islands of blue in a sea of red counties and states. This trend has and will continue to intensify federal-local conflict over policies, particularly in the areas of immigration, law enforcement, housing, and community development. Moving forward, Republican presidents and congresses will use the spending power to push their agenda onto Democratic cities; meanwhile, Democratic presidents and congresses will use that power against red states. Applying the *Dole-NFIB* framework to localities when they are empowered to accept federal funds, through either the Decision-Maker Model or the Localized Expenditure Model, is essential to preserve federalism in this era of spatially concentrated political polarization.
