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Funding Conditions: Constitutional Limits on Congress's Spending Power

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SUMMARY

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Funding Conditions: Constitutional Limits on Congress's Spending Power

The Spending Clause of the U.S. Constitution (Article I, Section 8, Clause 1) gives Congress broad power to authorize spending for the "general Welfare." The Necessary and Proper Clause (Article I, Section 8, Clause 18) supplements Congress's spending authority, allowing Congress to restrict how federal funds are used. Congress can also place requirements on the recipients of federal funds to regulate their conduct in exchange for federal funding.

While funding conditions such as these are common, they are subject to constitutional limitations. First, funding conditions must provide *clear notice* to the recipient of what actions are required in exchange for federal funds and the consequences of noncompliance. Second, funding conditions must be *related* to the purposes of the federally funded program or activity—though the required degree of connection is unsettled. Third, although Congress may incentivize states to adopt a particular policy in order to obtain specific federal funds, it may not *coerce* state participation. Congress may not, for example, tie an existing funding source on which a state has come to rely on compliance with a new kind of requirement. Fourth, the funding condition may not violate an *independent constitutional bar* or the related unconstitutional conditions doctrine. For example, Congress may not require governmental recipients, as a condition of receiving federal funds, to take an action that would violate an individual's freedom of speech or free exercise of religion.

Whether a funding recipient is a *state* or a *private* entity may affect the applicability of these four general limits on funding conditions. While federalism—that is, the division of power between the federal government and the states—is a basis for many of these constitutional limits, the Supreme Court has not squarely addressed whether each limit applies regardless of whether the recipient is a state.

Additional considerations arise when the *executive branch*, rather than Congress, imposes a funding condition. Congress often delegates the authority to administer grant programs and disburse financial assistance to federal agencies. Ultimately, however, the "power of the purse" belongs to the legislative branch, not the executive branch. Accordingly, when a federal agency places a condition on federal funding, that condition could give rise to constitutional (i.e., separation-of-powers) or statutory (e.g., Administrative Procedure Act) challenges if the condition arguably exceeds the scope of the agency's delegated authority.

Thus, while Congress's power to authorize and condition federal spending is expansive, a funding condition that exceeds the limits discussed in this report could run afoul of the Constitution.

Contents

Broad Spending Power for the General Welfare 1
Not Limited to Enumerated Powers 1
Deference to Congress's Judgment on General Welfare Needs 2
Conditions Permitted 3
General Constitutional Limits on Federal Funding Conditions 5
Clear Notice 5
Pennhurst's Clear Notice Standard 6
Private Remedies for Violations of Funding Conditions 7
Relatedness 13
Anti-Coercion 15
Independent Constitutional Bar 17
Two General Formulations 18
Unconstitutional Conditions Doctrine 19
Conditions on States Versus Private Funding Recipients 20
Conditions from the Executive Branch 23
Litigation over Byrne JAG Program Conditions 24
Litigation over HHS's 2019 Conscience Rule 27
Conclusion 30

Contacts

Author Information 30

Congress's spending power comes from the Taxing and Spending Clause of the Constitution, which gives Congress the power to spend federal funds to "provide for the common Defence and general Welfare of the United States."[1] The Supreme Court has interpreted this authority to include the power to place conditions on federal funding. The conditions need not be limited to how the funds are spent. Congress can, and often does, use its spending power to incentivize states to adopt Congress's preferred policies or practices. The focus of this report is the constitutional limit of this authority.

This report begins with a discussion of the broad reach of the Spending Clause, whose only express, textual limitation is the requirement that federal spending be in pursuit of the national defense or general welfare. Beyond that, there are four general limits on Congress's authority to condition federal funding, discussed in the second part of this report. Those limits are the requirements of: (1) clear notice; (2) relatedness; (3) anti-coercion; and (4) consistency with any independent constitutional bar. The third part of this report examines whether the four general limits on funding conditions apply equally to conditions on state and private recipients. The fourth part of the report discusses limitations on the executive branch's ability to impose federal funding conditions, including the separation-of-powers principle and the Administrative Procedure Act (APA).

Broad Spending Power for the General Welfare

In the earliest Spending Clause cases, the Supreme Court considered both whether Congress's spending power was limited to matters on which Congress had the express constitutional authority to legislate and who determines the needs of the "general Welfare."[2] As explained below, both of these questions were resolved in favor of Congress's broad spending authority. In addition, the Court has long affirmed Congress's authority to place conditions on federal funding, reasoning that the Necessary and Proper Clause allows Congress to ensure that funds are used to advance federal interests.

Not Limited to Enumerated Powers

Because the Constitution provides Congress with a limited set of enumerated powers,[3] an early debate emerged among the Framers over whether the Constitution limits Congress's spending power to areas in which Congress could legislate directly, such as matters of interstate commerce.[4] James Madison believed the Spending Clause's reference to "general Welfare" in the first clause of article I, section 8 "amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section."[5] In other words, Madison maintained that Congress could only exercise its spending power to carry out other powers that the Constitution expressly granted to Congress, such as the power to regulate interstate and foreign commerce or to establish post offices.[6] In contrast, Alexander Hamilton "maintained the clause

[1] U.S. CONST., art. I, § 8, cl. 1.

[2] *See* United States v. Butler, 297 U.S. 1 (1936); Helvering v. Davis, 301 U.S. 619 (1937).

[3] *See* U.S. CONST., art. I, § 8.

[4] *Butler*, 297 U.S. at 65.

[5] *Id.*

[6] *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *id.* § 8, cl. 7 (granting Congress the power to "establish Post Offices and post Roads").

confers a power separate and distinct from those later enumerated" and that "Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States."[7]

In the 1936 case of *United States v. Butler*, the Supreme Court settled on "the Hamiltonian position."[8] The Court held that while "the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress."[9] Thus, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[10] The *Butler* Court nevertheless cautioned that this "broader construction leaves the power to spend subject to limitations," including that federal spending be in pursuit of the "common defence" or "general welfare."[11]

Deference to Congress's Judgment on General Welfare Needs

Courts have the ultimate authority to determine whether an appropriation is "in aid of the 'general welfare'" within the meaning of the Spending Clause in light of their constitutional duty to "say what the law is."[12] However, the Supreme Court has emphasized that in deciding "whether a particular expenditure is intended to serve general public purposes, courts should defer substantially" to Congress's judgment.[13]

Helvering v. Davis, decided a year after *Butler*, illustrated this deference to Congress's judgment.[14] There, the Court upheld the Social Security Act's provision of "old age benefits," which primarily took the form of a monthly pension payable to a retiree 65 years of age or older, funded by mandatory, wage-based contributions from employees and employers.[15] The Court rejected a Tenth Amendment challenge to this statutory scheme because it came within Congress's power to spend for the general welfare.[16] Courts should not second-guess Congress's decision, the Supreme Court stated, unless its "choice is clearly wrong, a display of arbitrary power, not an exercise of judgment," such that there is "no reasonable possibility" that the "legislation fall[s] within the wide range of discretion permitted to the Congress."[17] The Court

[7] *Butler*, 297 U.S. at 65–66.

[8] *Id*. at 66.

[9] *Id*.

[10] *Id*.

[11] *Id*. (internal quotation marks and citation omitted). The *Butler* Court ultimately held that the challenged statute (the Agricultural Adjustment Act of 1933) violated the Tenth Amendment because it sought to regulate indirectly what Congress could not regulate directly: "subjects within the states' reserved jurisdiction." *Id*. at 74–75. The Court expressed concern that if it allowed the Spending Clause to be an end-run around other constitutional checks on Congress's power, Congress could "become the instrument for total subversion of the governmental powers reserved to the individual states." *Id*. at 75.

[12] Helvering v. Davis, 301 U.S. 619, 640 (1937) (quoting U.S. CONST. art. I, § 8); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[13] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[14] *Helvering*, 301 U.S. 619.

[15] *Id*. at 634–36, 641.

[16] *Id*. at 640.

[17] *Id*. at 640–41 (internal quotation marks and citation omitted).

also observed that the general welfare is not a "static" concept because "[w]hat is critical or urgent changes with the times."[18]

The Court then cited two reasons to defer to Congress's judgment with respect to the Social Security Act. First, the Court concluded that the statute was not "a display of arbitrary power": "Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare."[19] Instead, Congress had held hearings and made legislative findings showing that the "number of persons" aged 65 and older in the United States who are "unable to take care of themselves [was] growing at a threatening pace."[20] Second, the Court saw the "problem" as "plainly national in area and dimensions," and beyond the capacity of individual states to handle "effectively."[21] The Court reiterated its limited role in evaluating whether spending legislation comports with the Spending Clause: "Whether wisdom or unwisdom resides in [this] scheme of benefits … is not for us to say. . . . Our concern here, as often, is with power, not with wisdom."[22]

Thus, while the Spending Clause's reference to "general Welfare" is technically a limit on Congress's spending authority, the Supreme Court has interpreted the concept broadly and with deference to Congress's judgment.[23]

Conditions Permitted

Complementing its discretion to spend funds for a variety of purposes, Congress has "wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives."[24] This latitude is reflected in the range of spending conditions that Congress has enacted over time. For example:

- Congress has required universities receiving federal funds to provide military recruiters with the same level of campus access as other recruiters;[25]
- Congress has made it a crime to bribe officials of state and local entities that receive a certain level of federal funding;[26]

[18] *Id*. at 641.

[19] *Id*. at 640–41.

[20] *Id*. at 642.

[21] *Id*. at 644.

[22] *Id*.

[23] *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (describing the "first" limitation on Congress's spending power as originating from the "language of the Constitution itself: the exercise of the spending power must be in pursuit of 'the general welfare,'" but stating that in "considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress").

[24] United States v. Am. Library Ass'n, 539 U.S. 194, 203 (2003) (plurality opinion); *see also Dole*, 483 U.S. at 206 ("Incident to this [spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.))).

[25] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 70 (2006) (holding that 10 U.S.C. § 983 did not violate the First Amendment).

[26] Sabri v. United States, 541 U.S. 600, 602, 608 (2004) (holding that 18 U.S.C. § 666(a)(2) did not exceed Congress's authority under the Spending Clause).

- Congress has required libraries to install filtering software in order to receive federal funds to expand internet access for patrons;[27]
- Congress has prescribed milestones for the disposal of radioactive waste in exchange for money generated by federally authorized state surcharges on that waste;[28]
- Congress has incentivized states to adopt a minimum drinking age of 21 by withholding a percentage of federal highway funds;[29] and
- Congress has required state and local officials working on federally funded activities to comply with the Hatch Act's limitations on government officials' participation in political campaign activities.[30]

The Supreme Court has upheld each of these laws when challenged on Spending Clause or other constitutional grounds.[31]

Congress's authority to condition the receipt of federal funds on compliance with certain mandates stems in part from the Necessary and Proper Clause, which supplements all of Congress's legislative powers.[32] The Necessary and Proper Clause states that "Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[33] This Clause, the Court has held, authorizes Congress to attach conditions to federal funds to ensure "that taxpayer dollars appropriated under that power are in fact spent for the general welfare."[34]

In the seminal case *McCulloch v. Maryland*, the Supreme Court adopted a permissive standard for assessing whether a regulation is "necessary and proper" to carry out a federal power: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[35] While individual Justices have at times questioned whether a spending condition was "necessary and proper,"[36] the Supreme Court has

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[27] *Am. Library Ass'n*, 539 U.S. at 214 (plurality opinion) (concluding that 20 U.S.C. §§ 9134(f)(1)(A)(i) and (B)(i) and 47 U.S.C. §§ 254(h)(6)(B)(i) and (C)(i) did not violate the First Amendment rights of libraries or their patrons).

[28] New York v. United States, 505 U.S. 144, 171–73 (1992) (holding that 42 U.S.C. §§ 2021e(d)(2)(A)–(B) did not exceed Congress's authority under the Spending Clause).

[29] *Dole*, 483 U.S. at 206 (holding that 23 U.S.C. § 158 did not exceed Congress's authority under the Spending Clause).

[30] Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 142–43 (1947) (holding that § 12(a) of the Hatch Act did not violate the Tenth Amendment).

[31] See *supra* notes 25–30 for case citations.

[32] *See New York*, 505 U.S. at 158–59 ("The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause . . . ."). *See generally* CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis.

[33] U.S. CONST. art. I, § 8, cl. 18.

[34] Sabri v. United States, 541 U.S. 600, 605 (2004).

[35] McCulloch v. Maryland, 17 U.S. 316, 421 (1819); *see also* United States v. Kebodeaux, 570 U.S. 387, 394 (2013) ("As we have come to understand these words [from *McCulloch*] and the provision they explain, they 'leav[e] to Congress a large discretion as to the means that may be employed in executing a given power.'" (quoting Lottery Case, 188 U.S. 321, 355 (1903))).

[36] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring) (positing that although the Religious Land Use and Institutionalized Persons Act (RLUIPA) "is entirely consonant with the Establishment Clause, it may well exceed Congress' authority under either the Spending Clause or the Commerce Clause," citing his

never explicitly invalidated a spending condition for failure to meet that standard.[37] However, the Court has recognized *other* constitutional provisions and principles that limit Congress's authority to condition federal spending, which are discussed in the next section.

General Constitutional Limits on Federal Funding Conditions

The Supreme Court has identified four constitutional limits on Congress's power to attach conditions to federal funding.[38] First, Congress must provide *clear notice* of the funding condition. Second, the condition must *relate* to the program or funding stream it restricts. Third, the condition may not be unduly *coercive*. And fourth, the condition may not induce the recipient to violate an *independent* constitutional provision, such as the First Amendment's Free Speech or Establishment Clauses. These four constraints on Congress's spending power generally stem from constitutional provisions outside of the Spending Clause itself, such as the Tenth Amendment, which limits Congress's legislative power vis-à-vis the states, and other principles of state sovereignty reflected in the Constitution's text and structure.[39] Because of the centrality of federalism concerns in the Supreme Court's Spending Clause cases, the discussion below frequently refers to Congress's obligations when imposing conditions on *states* in exchange for federal funding. However, as discussed later in the report, some of these restrictions may also apply to funding conditions imposed on private entities.[40]

Clear Notice

The clear notice principle requires conditions on federal funding to be unambiguous and prospective so that states have an opportunity to accept or reject the terms of the funding arrangement.[41]

concurring opinion in *Sabri v. United States* for the proposition that "for a Spending Clause condition on a State's receipt of funds to be 'Necessary and Proper' to the expenditure of the funds, there must be 'some obvious, simple, and direct relation' between the condition and the expenditure of the funds" (quoting *Sabri*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring in the judgment))).

[37] In the Commerce Clause context, however, the Court has suggested that laws that violate the principle of state sovereignty also violate the Necessary and Proper Clause because they are not a "proper" means of executing Congress's enumerated authority. Printz v. United States, 521 U.S. 898, 923–24 (1997); *cf.* Pierce Cty. v. Guillen, 537 U.S. 129, 147 n.9 (2003) (concluding that because the Commerce Clause authorized the statutory provisions at issue, the Court "need not decide whether they could also be a proper exercise of Congress' authority under the Spending Clause or the Necessary and Proper Clause").

[38] *E.g.*, South Dakota v. Dole, 483 U.S. 203, 207–08, 211 (1987).

[39] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). *See generally* CRS Report R45323, *supra* note 32, at 2 (explaining that "beyond the internal limits on Congress's powers," in the form of its enumerated powers in article I, section 8 of the Constitution, "the Constitution also imposes 'external' constraints on congressional action—that is, affirmative prohibitions found elsewhere in the text or structure of the document").

[40] See *infra* "Conditions on States Versus Private Funding Recipients."

[41] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 25 (1981). Retroactive conditions can also be coercive. *See infra* "Anti-Coercion."

Pennhurst's Clear Notice Standard

The seminal case on the clear notice standard is *Pennhurst State School and Hospital v. Halderman*.[42] In *Pennhurst*, the Supreme Court considered a statute in which Congress provided funding for states to provide services to individuals with developmental disabilities.[43] As part of the plan, states had to make "satisfactory" "assurances" that they would "protect[]" the "rights" of persons with developmental disabilities "consistent with" the findings section of the act.[44] The statute also required states to take certain other actions "as a condition" of receiving assistance.[45] The parties disagreed, however, on the scope of the conditions. A findings section in the statute provided that persons with developmental disabilities "have a right to appropriate treatment" and that such treatment "should be provided in the setting that is least restrictive of the person's personal liberty."[46] The case presented the question whether these findings stated a condition on the federal funding.

In the course of considering this question, the Court examined "the possible sources of Congress'[s] power to legislate," including the Spending Clause.[47] The Court likened spending laws with conditions to a contract:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.[48]

The Court held that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[49] Applying this rule, the Court concluded that "Congress fell well short of providing clear notice to the States" that "by accepting funds under the Act, [they] would indeed be obligated to comply with [the findings section]."[50] Viewing this section in the context of the statute as a whole, the Court reasoned that the findings reflected "general statements of federal policy, not newly created legal duties."[51] By contrast, the Court observed, in other parts of the statute, Congress used "clear terms" like "condition" when it intended to impose a requirement on a state in exchange for federal funding.[52] The Court further noted that the statute lacked the typical method of enforcing a funding condition because it did not authorize the

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[42] *Pennhurst*, 451 U.S. 1.

[43] *Id*. at 11.

[44] 42 U.S.C. § 6063(b)(5)(C) (1976 ed. & Supp. III).

[45] *See Pennhurst*, 451 U.S. at 12–13 (citing 42 U.S.C. § 6005 (requiring recipients to hire qualified individuals with disabilities); *id*. § 6009 (requiring states to submit a plan to evaluate services provided under the statute); *id*. § 6011(a) (requiring states to provide "satisfactory assurances that each [funded] program" has "a habilitation plan" in place for each person receiving services under the program); and § 6012(a) (requiring states to "have in effect a system to protect and advocate the rights of persons with developmental disabilities").

[46] 42 U.S.C. § 6010 (1976 ed. & Supp. III).

[47] *See Pennhurst*, 451 U.S. at 15.

[48] *Id*. at 17 (internal citations omitted).

[49] *Id*.

[50] *See id*. at 25.

[51] *Id*. at 23.

[52] *Id*. The Court reasoned that requiring that state plans include "assurances" that program beneficiaries would be "protected *consistent with*" the findings section "would be unnecessary if . . . all state programs were required to *fund* the rights described" in that section. *Id*. at 26 (emphasis added).

federal government to withhold funds for noncompliance with the findings section.[53] Accordingly, the Court concluded that the statute did not require states to provide for "appropriate treatment" in the "least restrictive" environment in exchange for federal funds.[54]

The *Pennhurst* Court framed the clear notice principle as a "rule of statutory construction"—that is, in interpreting funding legislation, a reader should look for a clear expression of Congress's intent to impose a condition before concluding that the statute imposes one.[55] Nevertheless, the Court suggested that the "appropriate treatment" provision would violate the Constitution if it were a condition because it provided inadequate notice to the states of their obligations in accepting federal funds.[56] It is evident from the Court's *Pennhurst* discussion and the application of the clear notice principle in subsequent cases that clear notice is a constitutional requirement, not just an interpretive aid in construing statutory language.[57]

Private Remedies for Violations of Funding Conditions

The clear notice requirement applies not only to the condition itself, but also to the *remedy* that a law imposes for a state's violation of that condition.[58] As the *Pennhurst* Court observed, "the typical remedy for state noncompliance with federally imposed conditions" is "action by the Federal Government to terminate funds to the State."[59] Some litigants, however, have argued that funding conditions may state generally applicable legal requirements that may be enforced in other ways, such as by private parties in court.

Supreme Court decisions applying the clear notice principle in the context of litigation by private parties have generally fallen into three categories. The first category involves cases where the plaintiff alleges that violation of a funding condition gives rise to a private cause of action—that is, a right to sue the violator in court to recover monetary damages or obtain injunctive relief.[60] The second category involves cases where parties dispute the scope of liability or remedies under an available private right of action. The third category involves cases where the plaintiff argues that a state has waived its sovereign immunity from suit.

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[53] *Id.* at 23. The Court further concluded that the statute's legislative history suggested that Congress intended the findings section "to be hortatory, not mandatory." *Id.* at 24.

[54] *Id.* at 27.

[55] *Id.* at 24.

[56] *Id.* at 25.

[57] *See id.* at 17 ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" (citing Steward Machine Co. v. Davis, 301 U.S. 548, 585–98 (1937); Harris v. McRae, 448 U.S. 297 (1980))); Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1079 (2010) (stating that the "*Pennhurst* canon of statutory construction took on constitutional overtones in 1987 when the Rehnquist Court set the modern boundaries for Spending Clause legislation in *South Dakota v. Dole*").

[58] *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) ("When Congress attaches conditions to the award of federal funds under its spending power, . . . we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring 'that the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'" (internal citations omitted)).

[59] *Pennhurst*, 451 U.S. at 28.

[60] *Right of Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "private right of action" as an "individual's right to sue in a personal capacity to enforce a legal claim").

Private Right of Action

Congress may create a private right of action against violators of a funding condition through *express* language in the authorizing legislation.[61] However, in the absence of express text, a court will not readily infer the existence of a private right of action. Instead, a court will ask, first, whether Congress intended to create a *private right*, and second, whether Congress intended to create a *private remedy*.[62] *Pennhurst*'s clear notice standard guides both of these inquiries when the statute at issue is spending legislation.[63]

For example, a federal statute, the Family Educational Rights and Privacy Act of 1974 (FERPA), provided that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents."[64] In *Gonzaga University v. Doe*, the Supreme Court considered whether this requirement, stated as a funding condition, would allow a student to sue a private university for the unauthorized release of his education records.[65] After overhearing allegations that the plaintiff had sexually assaulted another student, a university employee disclosed the allegations, without the plaintiff's knowledge, to state officials considering his application for a teaching certification.[66] The plaintiff sued the university for a violation of FERPA pursuant to "Section 1983"—a federal law that allows private individuals to sue persons who, acting "under color of" law, deprived them of their constitutional rights.[67]

Citing *Pennhurst*, the Court held that "unless Congress 'speaks with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983."[68] The Court acknowledged that "[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private *remedy* because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes."[69] However, such plaintiffs still have to demonstrate the existence of a private, federal *right*.[70] In the Court's view, there was "no question that FERPA's nondisclosure provisions fail[ed] to confer enforceable rights."[71] For one, the Court reasoned, the provisions "lack[ed] the sort of 'rights-creating' language" present in other laws, such as Titles VI and IX,[72] which state that "no person

[61] *See, e.g.*, 20 U.S.C. § 1415(i)(2)(A) (stating that "[a]ny party aggrieved by" certain findings and decisions under the act "shall have the right to bring a civil action ... which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy").

[62] Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

[63] Suter v. Artist M., 503 U.S. 347, 356–58 (1992).

[64] Gonzaga Univ. v. Doe, 536 U.S. 273, 279 (2002) (quoting 20 U.S.C. § 1232g(b)(1)).

[65] *Id.* at 276.

[66] *Id.* at 277.

[67] 42 U.S.C. § 1983; *see also Gonzaga*, 536 U.S. at 277.

[68] *Gonzaga*, 536 U.S. at 280.

[69] *Id.* at 284 (emphasis added).

[70] *Id.* at 283.

[71] *Id.* at 287.

[72] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which prohibits discrimination on the basis of race, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which prohibits discrimination on the basis of sex, are two prominent examples of spending laws enacted pre-*Pennhurst* for which the Supreme Court has recognized a private right of action. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979). However, these examples do not illustrate the Court's current approach to implied rights of action, which requires clear notice of both a private right and a private remedy. *See* Alexander v. Sandoval, 532 U.S. 275, 287 (2001).

shall be subjected to discrimination."[73] Instead, the Court observed, "FERPA's provisions speak only to the Secretary of Education, directing that 'no funds shall be made available'" to an institution with a noncompliant policy, and thus lacked a focus on individual students' interests.[74] Moreover, the Court reasoned, the plaintiff was not without recourse because FERPA empowered the Secretary to investigate violations of the act and terminate funds under certain circumstances.[75]

Scope of Liability or Remedy

Even if a spending condition establishes a privately enforceable right, a court may still need to determine the scope of liability or the available remedies if that right is violated. In particular, a court may need to decide whether the law allows for compensatory damages, punitive damages, or certain costs or fees.[76] The Supreme Court has held that funding recipients' potential liability, like the condition itself, "must be set out 'unambiguously.'"[77] The reviewing court must "view the [statute] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the statute's] funds and the obligations that go with those funds."[78] The relevant consideration is "whether such a state official would clearly understand" that the state might incur the type of liability in question in the event of a statutory violation.[79] Increasingly, the Supreme Court has required the text of the statute to supply the requisite notice, particularly for laws enacted after *Pennhurst*.

In *Barnes v. Gorman*, the Court considered whether a plaintiff could recover punitive damages for discrimination in violation of certain provisions of the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973.[80] Both sets of provisions adopted the remedial scheme of Title VI of the Civil Rights Act of 1964, under which, per a prior Supreme Court decision, "a federal court may order any appropriate relief."[81] Until *Barnes*, however, the Court had not elaborated on the meaning of "appropriate relief."[82]

The *Barnes* Court reasoned that given the "contractual nature" of spending legislation, "a remedy is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature."[83] The Court stated that a "funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract,"

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[73] *Gonzaga*, 536 U.S. at 287.

[74] *Id.*

[75] *Id.* at 289.

[76] *See* CRS In Focus IF11291, *Introduction to Tort Law*, by Kevin M. Lewis (stating that "compensatory damages ... attempt to make an injured plaintiff 'whole,'" while punitive damages, which exceed compensatory damages, "punish the defendant for his conduct").

[77] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[78] *Id.*

[79] *Id.*; *see, e.g.*, Sch. Dist. v. Sec'y of the U.S. Dep't of Educ., 584 F.3d 253, 256 (6th Cir. 2009) (en banc) (asking whether, under the Spending Clause, "the obligations set forth" in the No Child Left Behind Act of 2001 "are unambiguous such that a state official would clearly understand her responsibilities under the Act").

[80] Barnes v. Gorman, 536 U.S. 181, 183 (2002) (citing ADA § 203, 42 U.S.C. § 12133, and Rehabilitation Act § 505(a)(2), 29 U.S.C. § 794a(a)(2)).

[81] Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 69 (1992).

[82] *Barnes*, 536 U.S. at 183.

[83] *Id.* at 187.

which include compensatory damages and injunctive relief, but "generally not" punitive damages.[84] Accordingly, the Court held that punitive damages were not available for violations of the nondiscrimination provisions in the ADA and the Rehabilitation Act.[85]

Three years later, in *Jackson v. Birmingham Board of Education*, the Supreme Court again suggested that "notice" to a funding recipient of its potential liability for violating a funding condition need not come from the statute alone.[86] The *Jackson* Court listed three reasons why states were on notice that they could be liable in a private Title IX action for intentional retaliation.[87] First, the Court noted that its decisions since the late 1970s apprised states that they could be liable for "diverse forms of intentional sex discrimination" in violation of Title IX.[88] Second, "regulations implementing Title IX clearly prohibit[ed] retaliation and ha[d] been on the books for nearly 30 years."[89] Third, appellate courts had ruled that Title IX covered retaliation at the time of the conduct in question in the case.[90] In these circumstances, the Court concluded, the school board "could not have realistically supposed that . . . it remained free to retaliate against those who reported sex discrimination."[91]

Although the *Barnes* and *Jackson* Courts recognized remedies not "explicitly provided in the relevant legislation,"[92] both cases involved statutes whose remedial schemes were adopted before *Pennhurst*. In contrast, the Supreme Court demanded more textual clarity in *Arlington Central School District Board of Education v. Murphy*—a case involving a post-*Pennhurst* statute that expressly provided for a private right of action.[93] In *Arlington Central*, the Court held that the Individuals with Disabilities Education Act (IDEA) did not provide "clear notice" to the states that, by accepting funds under IDEA, they might be liable for the prevailing parties' expert fees in litigation brought under IDEA.[94] The statute authorized the award of "reasonable attorneys' fees as part of the costs" to a prevailing party.[95] The Court reasoned that neither "attorneys' fees" nor "costs" clearly encompassed expert fees.[96]

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[84] *Id*. Observing that punitive damages could well exceed the amount of a recipient's funding, the Court also expressed doubt that "funding recipients would have agreed to exposure to such unorthodox and indeterminate liability" or "would even have *accepted the funding* if punitive damages liability was a required condition." *Id*. at 188.

[85] *Id*. at 189.

[86] 544 U.S. 167, 182–83 (2005).

[87] *Id*.

[88] *Id*.

[89] *Id*. at 183.

[90] *Id*.

[91] *Id*. at 183–84.

[92] *Barnes*, 536 U.S. at 187.

[93] 548 U.S. 291 (2006). Although parts of IDEA predated *Pennhurst*, Congress added the relevant cause of action in 2004. Individuals with Disabilities Education Improvement Act of 2004, P.L. 108-446, tit. I, § 101, 118 Stat. 2647, 2723.

[94] *Arlington Cent.*, 548 U.S. at 300.

[95] *Id*. at 297 (quoting 20 U.S.C. § 1415(i)(3)(B)).

[96] *Id*. at 297–300. A year later, the Court held that "IDEA grants parents independent, enforceable rights" to sue on their own behalf. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 533 (2007). While the school district argued that IDEA did not provide adequate notice of these types of actions, the Court reasoned that the case presented "a different issue" than *Arlington Central* because recognizing suits by parents did not expand "the basic measure of monetary recovery." *Id*. at 534.

While the Court cited its prior opinions on the meaning of "costs" as strong support for its interpretation,[97] it concluded that a contrary statement of congressional intent in the legislative record did not supply the requisite notice to funding recipients. Specifically, the conference committee report for IDEA stated: "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the … case."[98] "Whatever weight this legislative history would merit in another context," the Court reasoned, "it is not sufficient here."[99] The Court stated that "[i]n a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."[100]

Thus, the Court today is likely to demand explicit statutory language to indicate that Congress has authorized a particular remedy beyond agency action to terminate funding. Such questions, however, will be decided on a case-by-case basis under the principles discussed above: for example, at least one lower federal court has cited judicial decisions as putting funding recipients "on notice" of their obligations under an express, post-*Pennhurst* condition.[101]

Waiver of State Sovereign Immunity

The Supreme Court has held that under the Constitution, states retain sovereign immunity—that is, immunity from lawsuits filed by private citizens.[102] The Eleventh Amendment is "one particular exemplification of" this principle,[103] providing that courts may not entertain federal actions "commenced or prosecuted against one of the United States" by private citizens.[104] Although individual states are free to waive their sovereign immunity and consent to certain types of lawsuits, Congress can only abrogate—or remove—a state's sovereign immunity under limited circumstances.[105]

Even if *Congress* cannot waive the states' sovereign immunity for a particular purpose, it may use its spending power to incentivize *states* to waive their own immunity. Specifically, Congress may

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[97] *Arlington Cent.*, 548 U.S. at 300–303 (finding "perhaps the strongest support for" the Court's interpretation of IDEA in previous Supreme Court decisions interpreting the term "costs" to exclude expert fees); *see also* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246 (2009) (suggesting that even if the statute did not place school districts on notice that failure to provide a "free appropriate public education," a funding condition, could make them liable for private education costs in a specific factual scenario, states had "in any event been on notice" since a Court decision allowing such reimbursement in "appropriate circumstances").

[98] *Arlington Cent.*, 548 U.S. at 304 (quoting H.R. REP. NO. 99-687, at 5 (Conf. Rep.)).

[99] *Id.*

[100] *Id.*

[101] *See* Religious Sisters of Mercy v. Azar, No. 3:16-cv-00386, 2021 U.S. Dist. LEXIS 9156, at *72 (D.N.D. Jan. 19, 2021) (concluding that North Dakota "possessed sufficient notice" that Section 1557 of the Affordable Care Act, enacted in 2010, "could prohibit discrimination based on gender identity," reasoning that even though the statute prohibited "sex discrimination" without explicitly mentioning gender identity, "[b]y March 2010, a host of federal courts had determined that laws banning sex discrimination equally barred discrimination based on gender identity").

[102] *See* CRS Report R45323, *supra* note 32 ("The Eleventh Amendment and State Sovereign Immunity").

[103] FMC v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002).

[104] U.S. CONST. amend. XI. Although the text of the Eleventh Amendment bars suits only by citizens of "another State" or "any Foreign State," the broader principle of sovereign immunity encompasses suits by citizens of the defendant state. *See* CRS Report R45323, *supra* note 32.

[105] *See* CRS Legal Sidebar LSB10465, *Copyright and State Sovereign Immunity: The Allen v. Cooper Decision*, by Kevin J. Hickey.

condition the receipt of federal funds on a state's consent to be sued in certain types of actions.[106] Effectuating such a waiver requires a "clear statement from Congress and notice to the States" that, by accepting federal funds, the states agree to give up their immunity from suits by private citizens.[107] It is well settled that "the mere receipt of federal funds cannot establish that a State has consented to suit in federal court."[108] Nor does a state "necessarily consent[] to suit in federal court by participating in programs funded under the statute."[109] Instead, the Supreme Court has held that a "State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute"—consistent with *Pennhurst*'s clear notice standard.[110]

The Supreme Court applied this rule in the 2011 case *Sossamon v. Texas*. In that case, the Court considered whether an inmate at a state correctional facility could sue the State of Texas, a federal funding recipient, for money damages for alleged violations of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[111] RLUIPA grants institutionalized persons at federally funded facilities a right of action against state entities for actions that "substantial[ly] burden" their religious exercise.[112] An individual that prevails on a RLUIPA claim can "obtain appropriate relief against a government."[113]

The Supreme Court concluded that this language failed to show that Texas waived its immunity from private suits for damages.[114] Specifically, it held that "RLUIPA's authorization of 'appropriate relief against a government,' is not the unequivocal expression of state consent that our precedents require."[115] The Court described the language as "open-ended and ambiguous about what types of relief it includes."[116] In light of this ambiguity, the Court reasoned, it must apply the background rule that waivers of sovereign immunity are construed narrowly, in favor of the sovereign, and thus did not allow actions for damages.[117]

Although a state's waiver of sovereign immunity must be clear from the text of the spending law (rather than its structure or purpose), that does not necessarily mean that Congress must employ "magic words" to effect such a waiver.[118] At least two federal appellate courts have held that Congress need not use words like "condition" or "waiver" to validly effect a waiver of state sovereign immunity in spending legislation.[119] In 1999, the U.S. Court of Appeals for the Fourth Circuit held that a state university consented to waive its sovereign immunity in Title IX suits as a

[106] Gruver v. La. Bd. of Supervisors for the La. State Univ. Agric. & Mech. Coll., 959 F.3d 178, 182 (5th Cir. 2020).

[107] Sossamon v. Texas, 563 U.S. 277, 291 (2011).

[108] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246–47 (1985).

[109] *Id*. at 247.

[110] *Sossamon*, 563 U.S. at 284.

[111] *Id*. at 280–82.

[112] *Id*. at 281–82 (quoting 42 U.S.C. § 2000cc-1(a)).

[113] *Id*. at 282 (quoting 42 U.S.C. § 2000cc-2(a)).

[114] *Id*. at 285.

[115] *Id*. (internal citation omitted).

[116] *Id*. at 286.

[117] *Id*. at 285–87; *see also* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 279 (5th Cir. 2005) (en banc) (reasoning that "[w]hen the condition requires a state to waive its Eleventh Amendment immunity, *Dole*'s requirement of an unambiguous statement of the condition and its proscription on coercive inducements serve a dual role because they ensure compliance with [the Supreme Court's] requirement that waiver of Eleventh Amendment immunity must be (a) knowing and (b) voluntary").

[118] *Pace*, 403 F.3d at 281.

[119] *See id.* (calling the state's argument that "absent talismanic incantations of magic words, there can be no waiver" "little more than frivolous").

condition of receiving federal education funds under a 1986 statute.[120] The 1986 law provided that a "State shall not be immune under the Eleventh Amendment of the Constitution … from suit in Federal court for a violation of" certain federal statutes, including Title IX.[121] The Fifth Circuit, sitting en banc (i.e., as a full panel), reached a similar conclusion in 2005 when interpreting the interplay between the 1986 provision and another law that it referenced: section 504 of the Rehabilitation Act.[122] Importantly, however, both appellate cases involved laws that Congress *explicitly listed* in the 1986 provision, putting states on notice that they could be sued under those laws if they accepted federal funds. In contrast, the 1986 provision did not expressly list RLUIPA, and the Supreme Court in *Sossamon* therefore rejected the plaintiff's argument that the 1986 law had put Texas "on notice that it could be sued for damages under RLUIPA."[123]

Pennhurst's clear notice standard thus serves as the test for evaluating whether a spending law adequately apprises a state of requirements tied to that funding as well as the state's potential legal exposure for violations of those conditions. Under that standard, Congress should state expressly whether it intends for a funding condition also to create a private right of action, and such a clear and unequivocal statement is even more critical if Congress intends to authorize private suits against state governments.

Relatedness

A second consideration that a court would likely include in determining the constitutionality of a spending condition is whether the condition is *related* to the underlying purpose of the spending.

The Supreme Court has suggested that "federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs,'" but has set a relatively low bar for the relationship between the condition and the federal interest.[124] In *South Dakota v. Dole*, the Court held that Congress permissibly conditioned certain federal highway funds on states' adoption of a national minimum drinking age because the condition was "directly related" to the federal government's interest in highway safety.[125] The *Dole* Court did not need to examine the precise interests served by the individual highway grants tied to the condition, reasoning that a minimum drinking age related to "one of the main purposes for which highway funds are expended—safe interstate travel" and that "[t]his goal … had been frustrated by varying drinking ages among the States."[126]

A spending condition may also satisfy the relatedness requirement if the purpose of the condition is to ensure that federal funds are "properly spent."[127] In *Sabri v. United States*, the Supreme Court upheld a statute that prohibited the "bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds," even without specific proof of a "connection with

[120] Litman v. George Mason Univ., 186 F.3d 544, 555 (4th Cir. 1999).

[121] 42 U.S.C. § 2000d-7(a)(1).

[122] *Pace*, 403 F.3d at 281.

[123] *Sossamon*, 563 U.S. at 291.

[124] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

[125] *Id*. at 208.

[126] *Id*. at 208–09 (citing 23 U.S.C. § 101(b)).

[127] Chippewa Cree Tribe of the Rocky Boy's Reservation v. Dep't of Interior, 900 F.3d 1152, 1160 (9th Cir. 2018) (reasoning that because the American Recovery and Reinvestment Act's "whistleblower procedures are designed to ensure that stimulus funds are properly spent, they relate directly to Congress's interest in ensuring that vast quantities of federal funds are used for their intended purpose").

federal money as an element of the offense."[128] While the Court framed its discussion in terms of Congress's authority under the Necessary and Proper Clause rather than the relatedness limitation, the Court still focused on the link between the bribery offense and the government's interest.[129] The Necessary and Proper Clause, the Court reasoned, gives Congress the authority "to see to it that taxpayer dollars . . . are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars."[130]

Lower courts have extended *Sabri*'s reasoning to uphold nondiscrimination requirements in federal spending legislation against relatedness challenges. The D.C. Circuit has concluded, for example, that "Congress reasonably can insist that decisions regarding the expenditure of federal funds not be based on irrational discrimination."[131] The Third Circuit has suggested that limiting a nondiscrimination requirement to programs or activities receiving federal funds "helps ensure the waiver accords with the 'relatedness' requirement articulated in *Dole*."[132]

In practice, the relatedness requirement is a "low bar."[133] Neither before nor after *Dole* has the Supreme Court struck down a spending condition as insufficiently related to the underlying purpose of the spending.[134] While lower courts sometimes have concluded that a condition fails to satisfy the relatedness prong,[135] in general, they have not interpreted the relatedness standard to be particularly demanding.[136] For example, the Ninth Circuit has cited the Supreme Court's description of the relatedness requirement in *New York v. United States* (decided five years after *Dole*), in concluding that "the conditions need only 'bear some relationship to the purpose of the federal spending.'"[137] Other courts, such as the Tenth Circuit, have described the "required degree" of connection between the condition and the federal interest in the funded program as "one of reasonableness or minimum rationality"—a low standard in legal terms.[138] At least one

[128] Sabri v. United States, 541 U.S. 600, 602, 605 (2004).

[129] *See id.* at 605–08.

[130] *Id.* at 605. Although not every bribe would be "traceabl[e]" to federal dollars, given the fungible nature money, it was "enough" in the Court's view, that the statute "condition[ed] the offense on a threshold amount of federal dollars defining the federal interest" and on a bribe of at least $5,000 in value, which "goes well beyond liquor and cigars." *Id.* at 606.

[131] Barbour v. Wash. Metro. Area Transit Auth., 374 F.3d 1161, 1170 (D.C. Cir. 2004) (reasoning that "[s]uch discrimination 'fritters away' federal funds, just like the graft discussed in *Sabri*" (quoting *Sabri*, 541 U.S. at 605)); *see also, e.g.*, Charles v. Verhagen, 348 F.3d 601, 608 (7th Cir. 2003) (stating that "Congress has an interest in allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that infringes impermissibly upon individual liberties").

[132] Koslow v. Pennsylvania, 302 F.3d 161, 176 (3d Cir. 2002).

[133] City of Los Angeles v. Barr, 929 F.3d 1163, 1176 (9th Cir. 2019).

[134] *See id.* at 1175 (noting that "the Court has never struck down a condition on federal grants based on this relatedness prong"); CRS Report R45323, *supra* note 32, at 30–31.

[135] *See, e.g.*, Colorado v. DOJ, 455 F. Supp. 3d 1034, 1055 (D. Colo. 2020) (finding that two conditions "intended to assist federal immigration enforcement efforts" were "not sufficiently related" to the program's purpose "to assist state and local law enforcement in addressing the most urgent criminal justice matters in their own communities").

[136] *City of Los Angeles*, 929 F.3d at 1175.

[137] *Id.* (quoting New York v. United States, 505 U.S. 144, 167 (1992)).

[138] *E.g.*, Kansas v. United States, 214 F.3d 1196, 1199–1200 (10th Cir. 2000) (holding that the Temporary Assistance to Needy Families (TANF) program, which "provides financial support for low-income families," was "clearly related to the IV-D [Child Support Enforcement] program and its requirements, which assist low-income families in collecting child support from absent parents," observing, *inter alia*, that both programs were "set forth in the same subchapter of the Social Security Act, which bears the heading 'Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services'").

Supreme Court Justice, Justice Thomas, has framed the relatedness standard in a potentially more stringent way, suggesting that "there must be 'some obvious, simple, and direct relation' between the condition and the expenditure of the funds."[139] The Sixth Circuit, however, has observed that notwithstanding Justice Thomas's formulation of the standard, "*Dole* remains the controlling law on conditional grants of federal money."[140]

Anti-Coercion

The third element of judicial review of spending conditions is whether the condition is unconstitutionally *coercive*. Generally speaking, Congress can offer states "powerful incentive[s]" to carry out federal policies as long as states remain free to opt out by declining the federal funding.[141] Congress may not, however, "compel" states to adopt federal policies due to a constitutional doctrine called anti-commandeering.[142]

The anti-commandeering doctrine reflects "a fundamental structural decision" in the Constitution—"the decision to withhold from Congress the power to issue orders directly to the States."[143] Under the U.S. system of "dual sovereignty," both the federal government and the states "wield sovereign powers."[144] The Constitution allocates powers between the federal and state governments in a number of ways. The Supremacy Clause of Article VI provides that federal law "shall be the supreme Law of the Land," giving Congress the power to preempt state law.[145] At the same time, Congress's legislative authority is limited to powers enumerated in the Constitution.[146] The Tenth Amendment provides that all other legislative powers are "reserved to the States."[147] The Supreme Court developed the anti-commandeering doctrine to help preserve this structure by prohibiting Congress from commanding states to legislate or regulate—or to refrain from legislating or regulating—on the federal government's behalf.[148]

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[139] Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring). In *Cutter*, Justice Thomas opined that although the Religious Land Use and Institutionalized Persons Act (RLUIPA) was "entirely consonant with the Establishment Clause, it may well exceed Congress' authority under either the Spending Clause or the Commerce Clause." *Id*. Justice Thomas reiterated his view, first stated in *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring in the judgment), that "for a Spending Clause condition on a State's receipt of funds to be 'Necessary and Proper' to the expenditure of the funds, there must be 'some obvious, simple, and direct relation' between the condition and the expenditure of the funds." *Id*.

[140] Cutter v. Wilkinson, 423 F.3d 579, 587 (6th Cir. 2005) (finding "nothing in Justice Thomas's concurrence that alters our evaluation" of RLUIPA under *Dole*'s relatedness prong, and holding that "RLUIPA satisfies the *Dole* relatedness requirement").

[141] *Kansas*, 214 F.3d at 1203 ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer.").

[142] New York v. United States, 505 U.S. 144, 149 (1992).

[143] Murphy v. NCAA, 138 S. Ct. 1461, 1475 (2018).

[144] *Id*.

[145] U.S. CONST. art. VI, cl. 2.

[146] *See, e.g.*, U.S. CONST. art. I, § 8.

[147] U.S. CONST. amend. X; *see also Murphy*, 138 S. Ct. at 1476 ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms.").

[148] *See New York*, 505 U.S. at 149 ("[W]hile Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so."); Printz v. United States, 521 U.S. 898, 925 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."); *Murphy*, 138 S. Ct. at 1478 ("It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded 'affirmative' action as opposed to imposing a prohibition. The basic principle—that

In the spending context, these same considerations undergird the anti-coercion analysis,[149] which essentially asks whether a state "has 'a legitimate choice whether to accept the federal conditions in exchange for federal funds.'"[150] As the Supreme Court recognized in *South Dakota v. Dole*, sometimes "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[151] On the facts of that case, the *Dole* Court concluded that Congress's incentive for states to adopt the national minimum drinking age was "relatively mild encouragement."[152] In *Dole*, non-acceptance would cost a state "a relatively small percentage of certain federal highway funds"—in South Dakota's case, "5% of the funds otherwise obtainable under specified highway grant programs."[153]

While the Supreme Court recognized the potential for coercion in *Dole*, it did not strike down a spending condition on anti-coercion grounds until its 2012 decision in *National Federation of Independent Business (NFIB) v. Sebelius*.[154] In that case, seven Justices, across two different opinions, concluded that Congress violated the anti-coercion principle by conditioning all of a state's Medicaid funds on its acceptance of Medicaid expansion in the Affordable Care Act.[155] Chief Justice Roberts authored a plurality opinion on the Spending Clause analysis on behalf of himself and Justices Breyer and Kagan, while four Justices—Justices Scalia, Kennedy, Thomas, and Alito—discussed their reasoning in a joint dissent.[156] Because the plurality concluded that the condition was invalid on narrower grounds than the joint dissent, several appellate courts have described Chief Justice Roberts's opinion as precedential.[157]

The Chief Justice highlighted the states' dependence on existing Medicaid funding and the expansion's resemblance, in the plurality's view, to a "new health care program."[158] The plurality noted that "[f]ederal funds received through the Medicaid program ha[d] become a substantial part of state budgets, … constituting over 10 percent of most States' total revenue."[159] The plurality observed, by comparison, that the highway funds at issue in *Dole* constituted less than

Congress cannot issue direct orders to state legislatures—applies in either event.").

[149] *See* Religious Sisters of Mercy v. Azar, No. 3:16-cv-00386, 2021 U.S. Dist. LEXIS 9156, at *74 (D.N.D. Jan. 19, 2021) ("The Spending Clause's coercion backstop is closely linked to the Tenth Amendment concept that the federal government may not commandeer the states to enact or administer a federal regulatory program." (internal quotation marks omitted)).

[150] New York v. DOJ, 951 F.3d 84, 115 (2d Cir. 2020) (quoting NFIB v. Sebelius, 567 U.S. 519, 578 (2012)).

[151] South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937))).

[152] *Dole*, 482 U.S. at 211.

[153] *Id*.

[154] Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 864 (2013) (stating that *NFIB* "marks '*the first time ever*' that the Court has held that a spending condition unconstitutionally coerced the states" (quoting *NFIB*, 567 U.S. at 625 (Ginsburg, J., concurring in part and dissenting in part))).

[155] NFIB v. Sebelius, 567 U.S. 519 (2012).

[156] *NFIB*, 567 U.S. at 575–89 (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.); *id*. at 671–89 (joint opinion by Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[157] *E.g.*, Mayhew v. Burwell, 772 F.3d 80, 88–89 (1st Cir. 2014); Gruver v. La. Bd. of Supervisors for the La. State Univ. Agric. & Mech. Coll., 959 F.3d 178, 185 n.5 (5th Cir. 2020); Miss. Comm'n on Envt'l Quality v. EPA, 790 F.3d 138, 176 (D.C. Cir. 2015); *see also* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)).

[158] *NFIB*, 567 U.S. at 584 (plurality opinion).

[159] *Id*. at 542 (majority opinion); *see also id*. at 581 (plurality opinion).

0.5% of South Dakota's budget.[160] Echoing the clear notice requirement, the plurality also reasoned that Congress's spending power to enact the Medicaid program did not permit it to "surpris[e] participating States with postacceptance or 'retroactive' conditions."[161]

Because the Court decided *NFIB* less than ten years ago, case law on the anti-coercion principle is limited. Lower courts have used the facts and reasoning of *Dole* and *NFIB* as guideposts in the anti-coercion analysis, asking: (1) whether a post-acceptance condition marked a change in "degree" or "kind" for the program at issue;[162] and (2) what percentage of a state's budget was at risk if the state did not comply with the condition.[163] Additionally, some lower courts have interpreted *NFIB* to say that the anti-coercion limit does not apply to conditions on how states *use* funds—as opposed to policy requirements that might otherwise violate the anti-commandeering doctrine if imposed directly. For example, the Fifth Circuit reasoned that a "direct restriction on how a state uses federal funds" is not coercive, because it simply "'ensures that the funds are spent according to [Congress's] view of the general Welfare.'"[164]

Thus, while the line between permissible incentive and unconstitutional coercion remains blurry, the anti-coercion principle is now a recognized limit on Congress's power to condition federal funding.

Independent Constitutional Bar

Spending legislation that meets the clear notice, relatedness, and anti-coercion tests is constitutional unless it violates some other "independent constitutional bar." There are two general formulations of the independent constitutional bar principle. Additionally, arguments about the constitutionality of a funding condition often implicate a cross-cutting legal doctrine called "unconstitutional conditions."

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[160] *Id*. at 580–82 (plurality opinion).

[161] *Id*. at 584 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981)) (reasoning that 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").

[162] *See, e.g.*, Mayhew v. Burwell, 772 F.3d 80, 89 (1st Cir. 2014) (holding that the "maintenance-of-effort" provision in the Affordable Care Act was not unconstitutionally coercive because "unlike the new Medicaid program expansion first appearing in the ACA, [it] is not a new program"); New York v. HHS, 414 F. Supp. 3d 475, 571 (S.D.N.Y. 2019) (reasoning that "like the Medicaid expansion at issue in *NFIB*," HHS's 2019 rule regarding compliance with federal "conscience" statutes "would substantively transform the existing regulatory regime"), *appeal filed and held in abeyance*, No. 19-4254 (2d Cir. 2019).

[163] *See, e.g.*, Gruver v. La. Bd. of Supervisors for the La. State Univ. Agric. & Mech. Coll., 959 F.3d 178, 184 (5th Cir. 2020) ("The threat of LSU losing what amounts to just under 10% of its funding is more like the 'relatively mild encouragement' of a state losing 5% of its highway funding (less than 0.5% of South Dakota's budget) than the 'gun to the head' of a state losing all of its Medicaid funding (over 20% of the average state's budget)." (quoting *NFIB*, 567 U.S. at 580–82)); New York v. DOJ, 951 F.3d 84, 116 (2d Cir. 2020) ("This case is much more akin to *Dole* than to *NFIB*. While [noncompliance] ... can result in the denial of any Byrne [JAG program] funding for that year, plaintiffs do not—and cannot—claim that such a loss represents so significant a percentage of their annual budgets as to cross the line from pressure to coercion."); *New York*, 414 F. Supp. 3d at 570 (holding that an HHS rule on penalties for noncompliance with federal "conscience" statutes was coercive, reasoning that *NFIB* was "a more apt analogy" than *Dole*, because the HHS rule "threaten[ed] not a small percentage of the States' federal health care funding, but literally *all* of it").

[164] *Gruver*, 959 F.3d at 183 (quoting *NFIB*, 567 U.S. at 580).

Two General Formulations

As articulated in *South Dakota v. Dole*, a funding condition runs afoul of an independent constitutional bar when it would require or encourage *the recipient* to violate the Constitution.[165] To use an example from *Dole*, if Congress were to condition funding for state prisons on the use of a "cruel and unusual punishment[]," the Eighth Amendment would independently bar such a condition because it prohibits states from using such forms of punishment.[166] The Supreme Court considered—and ultimately rejected—an independent constitutional bar argument of this nature in *United States v. American Library Association*.[167] In the Children's Internet Protection Act, Congress had required public libraries receiving federal assistance for internet and information services to install filtering software on library computers to block patrons' access to pornographic websites and other materials deemed "harmful to minors."[168] Challengers to the law contended that this condition required public libraries—which are governmental entities—to violate the First Amendment rights of library users.[169] Six Justices, for different reasons, concluded that the law did not induce the libraries to violate their patrons' First Amendment rights, and the condition for receiving federal funds was therefore within Congress's power.[170]

Some courts and litigants appear to take a broader view of the independent constitutional bar principle than the *Dole* formulation, treating it as a catchall for analyzing not only whether a condition induces the recipient to violate the Constitution, but also whether the condition *itself* exceeds Congress's authority. For example, according to the Eighth Circuit, this factor "requires a consideration of whether other constitutional provisions prohibit these particular conditions on federal funding."[171] States have sometimes invoked the "independent constitutional bar" language to raise federalism-based objections, such as the argument that a funding condition violates states' rights under the Tenth Amendment.[172] However, because federalism considerations are already embedded in the clear notice and anti-coercion principles,[173] some courts have concluded that the Tenth Amendment "does not apply" to otherwise "valid spending legislation" that clears these

[165] South Dakota v. Dole, 483 U.S. 203, 210 (1987) (describing "the 'independent constitutional bar' limitation" as "the unexceptionable proposition that the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional"). *See also* United States v. Hernandez, 615 F. Supp. 2d 601, 623 (E.D. Mich. 2009) (interpreting the "independent constitutional bar" discussed in *Dole* to "merely prevent[] Congress from conditioning funds on behavior that the constitution prohibits the states from engaging in on their own").

[166] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *Dole*, 483 U.S. at 210–11 (explaining that "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power").

[167] United States v. Am. Library Ass'n, 539 U.S. 194, 203, 214 (2003) (plurality opinion).

[168] *Id.* at 201 (quoting 20 U.S.C. §§ 9134(f)(1)(A)(i) and (B)(i) and 47 U.S.C. §§ 254(h)(6)(B)(i) and (C)(i)).

[169] *Id.* at 202.

[170] *See id.* at 214 (plurality opinion of Rehnquist, C.J., joined by O'Connor, Scalia, and Thomas, JJ.); *id.* at 214–15 (Kennedy, J., concurring in the judgment); *id.* at 215–16 (Breyer, J., concurring in the judgment).

[171] Van Wyhe v. Reisch, 581 F.3d 639, 651 (8th Cir. 2009) (analyzing a separation-of-powers challenge to a spending condition).

[172] *See, e.g.*, Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002) (holding that the Religious Land Use and Institutionalized Persons Act (RLUIPA) did not violate the Tenth Amendment under the "independent constitutional bar" prong of the analysis).

[173] *See* West Virginia v. HHS, 289 F.3d 281, 286–87 (4th Cir. 2002) ("If the Congressional action amounts to coercion rather than encouragement, then that action is not a proper exercise of the spending powers but is instead a violation of the Tenth Amendment.").

initial hurdles.[174] Other courts have analyzed Tenth Amendment objections as separate constitutional claims.[175]

Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine "examines the extent to which government benefits may be conditioned or distributed in ways that burden constitutional rights or principles."[176] A core principle of this doctrine is that once the government has established a benefit, it may not deny that benefit to a person "on a basis that infringes his constitutionally protected interests."[177]

The unconstitutional conditions doctrine is not unique to the funding context. In contrast to the four tests discussed above, it has developed as a constraint on Congress's authority generally, rather than the Spending Clause alone, and it has generated a large body of case law that touches on a variety of Congress's powers.[178] However, the unconstitutional conditions doctrine frequently arises in cases involving funding conditions, especially conditions that restrict or compel speech. In such circumstances, the Court generally has upheld conditions that "define the limits of the government spending program—those that specify the activities Congress wants to subsidize," but it has applied heightened scrutiny to conditions that "seek to leverage funding" in a way that burdens constitutional rights "outside the contours of the program itself."[179]

Cases applying this test illustrate why the distinction is "not always self-evident."[180] In *Rust v. Sullivan*, the Court upheld regulations prohibiting recipients of funding for family planning projects under Title X of the Public Health Service Act from providing abortion services, counseling, or referrals, or advocating for abortion through their written materials, speakers, or lobbying efforts.[181] Grantees had to maintain physical and financial separation, as defined in the regulations, between the Title X project and any prohibited abortion-related activities.[182] In the Court's view, the regulations did not amount to "suppress[ion]" of abortion-related expression, but instead prohibited "a project grantee or its employees from engaging in activities outside of the project's scope," consistent with Title X's focus on family planning rather than prenatal care.[183]

The Court also upheld a statutory funding condition against an unconstitutional conditions challenge in *American Library Association*.[184] As previously noted, that case involved a

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[174] Benning v. Georgia, 391 F.3d 1299, 1308 (11th Cir. 2004) (holding that RLUIPA did not violate the Tenth Amendment); *accord* Madison v. Virginia, 474 F.3d 118, 126–27 (4th Cir. 2006).

[175] *See, e.g.*, Hodges v. Thompson, 311 F.3d 316, 319 (4th Cir. 2002) (stating that because "the Tenth Amendment itself does not act as a constitutional bar to Congress's spending power," the court would "consider South Carolina's Tenth Amendment argument, not as a limitation related to the Spending Clause, but as an independent constitutional challenge" (internal quotation marks and citation omitted)).

[176] Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 286 (5th Cir. 2005) (en banc).

[177] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[178] *See, e.g.*, Regan v. Taxation with Representation, 461 U.S. 540 (1983) (condition on qualification for tax-exempt status was constitutional); Elrod v. Burns, 427 U.S. 347, 353 (1976) (plurality opinion) (political patronage requirement for non-policymaking government employees was unconstitutional).

[179] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013).

[180] *Id*. at 217.

[181] Rust v. Sullivan, 500 U.S. 173, 193–96 (1991).

[182] *Id*. at 180–81.

[183] *Id*. at 193–94.

[184] United States v. Am. Library Ass'n, 539 U.S. 194, 210–14 (2003) (plurality opinion).

requirement that public libraries implement filtering software in exchange for funds to improve internet services.[185] The Court concluded that the condition did not violate the libraries' First Amendment rights.[186] A plurality of the Court reasoned that, as in *Rust*, the condition defined the limits of the funded program.[187] By blocking online materials that libraries traditionally would have excluded from their print collections, the Court reasoned, filtering software helps libraries to "fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes."[188]

By contrast, the Court found it unconstitutional for Congress to require the recipients of funding for global HIV/AIDs programs to have "a policy explicitly opposing prostitution and sex trafficking."[189] The Court reasoned that the condition exceeded the program's scope because it forced grantees to "adopt—as their own—the Government's view on an issue of public concern," which necessarily required fidelity to that view inside and outside of the program.[190] It did not matter that the federal government allowed funding recipients to work with organizations that did not have the specified policy so long as the recipients retained "objective integrity and independence from any affiliated organization."[191] The Court reasoned that this approach required the recipient to either distance itself from its affiliate and the affiliate's message, or clearly identify with its affiliate while espousing the government's message "only at the price of evident hypocrisy."[192]

Thus, the independent constitutional bar principle and the related unconstitutional conditions doctrine both serve as a check on Congress's authority to condition federal funding.[193]

Conditions on States Versus Private Funding Recipients

Both governmental and nongovernmental entities may be subject to federal funding conditions,[194] but many of the cases discussed above have arisen in the context of federal funding for states and

[185] *Id*. at 199–201.

[186] *Id*. at 210–14. The Court rejected this argument without resolving whether public libraries, as governmental entities, have First Amendment rights. *Id*. at 210–11. Although only four Justices joined the main opinion, two additional Justices concurred in the Court's judgment. *Id*. at 214–15 (Kennedy, J.); *id*. at 215–20 (Breyer, J.).

[187] *Id*. at 211 (plurality opinion).

[188] *Id*. at 211–12. The plurality also reasoned that the condition did not "penalize" a recipient's decision to "provide [its] patrons with unfiltered Internet access"; it "simply reflect[ed] Congress' decision not to subsidize" such access. *Id*. at 212.

[189] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 208 (2013) (quoting 22 U.S.C. § 7631(f)).

[190] *Id*. at 218.

[191] *Id*. at 211 (quoting 45 C.F.R. § 89.3).

[192] *Id*. at 219.

[193] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547 (2001) (invaliding a condition on funding for legal services that effectively barred attorneys from arguing, on behalf of their clients, that existing welfare laws were unconstitutional, reasoning that it "distorts" the "usual functioning" of the legal system).

[194] *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 278 (2002) (observing that Congress enacted the Family Educational Rights and Privacy Act of 1974 (FERPA) "under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records" and that FERPA "directs the Secretary of Education to withhold federal funds from any public or private 'educational agency or institution' that fails to comply with these conditions" (quoting 20 U.S.C. § 1232g(b)(1))).

their political subdivisions.[195] The foregoing discussion demonstrates that some of the limits on Congress's power to impose conditions are rooted in concerns about federalism. This notion raises a question of whether each of those general, constitutional limits applies when a spending provision and its corresponding conditions are directed solely at *private*-sector entities, rather than states, or when a spending law regulates states and private entities "in an identical manner."[196]

The Supreme Court has never expressly confined the general limits on spending authority to conditions placed on states. Additionally, as discussed below, some of those limits arguably reflect or serve interests beyond those of preserving state sovereignty, such as preventing Congress from infringing the individual liberties that the Constitution guarantees to the people.

With regard to the clear notice requirement, the Supreme Court often has referred to Spending Clause legislation as akin to a "contract" between the federal government and a funding recipient.[197] The reasoning behind the contract analogy—the need for a clear offer and knowing acceptance—does not appear to depend on the recipient being a state, even if the rule is often framed in terms of federal-state funding arrangements.[198] Thus, in *Gonzaga University v. Doe*, the Supreme Court invoked the clear notice principle in rejecting a claim against a private university receiving federal funds, suggesting that, at a minimum, the clear notice requirement applies regardless of the public or private status of the funding recipient.[199]

The relatedness requirement reflects the structural decision of the Constitution to vest Congress with specific, enumerated powers, and ultimately, appears to stem from federalism concerns. The Supreme Court has reasoned that without a relatedness requirement, "the spending power could render academic the Constitution's other grants and limits of federal authority."[200] In other words, Congress already has the power to fund legislative policies that it could not enact directly because they fall outside of its enumerated powers.[201] Allowing Congress to impose conditions untethered

[195] For simplicity, this section refers to state and local governmental entities collectively as "states."

[196] Religious Sisters of Mercy v. Azar, No. 3:16-cv-00386, 2021 U.S. Dist. LEXIS 9156, at *75 (D.N.D. Jan. 19, 2021).

[197] *E.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181–82 (2005); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640 (1999); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). *But cf.* Sossamon v. Texas, 563 U.S. 277, 290 (2011) ("We have acknowledged the contract-law analogy, but we have been clear 'not [to] imply ... that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.' We have not relied on the Spending Clause contract analogy to expand liability beyond what would exist under nonspending statutes, much less to extend monetary liability against the States.... " (quoting Barnes v. Gorman, 536 U.S. 181, 188 n.2 (2002)).

[198] *See Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." (internal citations omitted)).

[199] In *Gonzaga*, the Court held that a federal statute authorizing funding to public and private educational institutions did not include a private right of action against such institutions for noncompliance. *Gonzaga*, 536 U.S. at 290. The Court reasoned that *Pennhurst* and its progeny do not "permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283. The Court also has applied the *Pennhurst* clear notice standard in cases brought by public entities involving programs with public and private funding recipients. *See Jackson*, 544 U.S. at 181–84 (Title IX).

[200] New York v. United States, 505 U.S. 144, 167 (1992).

[201] See *supra* "Broad Spending Power for the General Welfare."

to the purpose of the spending legislation could enlarge Congress's powers to a degree that encroaches on powers that the Tenth Amendment reserves to the states.[202]

The third test discussed above, the anti-coercion principle, was also developed out of the constitutional principles of federalism that apply to the relationship between Congress and the states.[203] The test relies on the principle that Congress, despite its power to compel or prohibit private behavior in some areas, cannot compel state action.[204] At least one federal court has questioned whether a private party can raise an anti-coercion claim. That case involved a challenge by private, long-term care facilities to certain Medicare and Medicaid requirements involving arbitration agreements with residents.[205] In a ruling that has been appealed, the U.S. District Court for the Western District of Arkansas concluded that the plaintiffs' asserted dependence on Medicare and Medicaid funding was of their own making, stating that "Courts of Appeals have held time and time again that the participation of private entities in Medicare and Medicaid is always voluntary."[206] The court also observed that "no part" of the *NFIB* decision "touched on the government's power to place conditions on private entities."[207] In the district court's view, the Eighth Circuit is unlikely to "conclude that private entities are protected from coercion by the federal government on the same terms as states."[208] Thus, it seems unlikely that a court would apply the anti-coercion rationale in a challenge to a spending condition that applies solely to private parties, though the Eighth Circuit may weigh in on the question.

Under the *Dole* formulation, the independent constitutional bar principle concerns conditions that induce a state or other *governmental* entity to violate the Constitution.[209] Under its broader

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[202] In *South Dakota v. Dole*, Justice O'Connor raised federalism concerns in arguing for a more rigorous relatedness requirement. 483 U.S. 203, 213 (1987) (O'Connor, J., dissenting). She posited that if "the spending power is to be limited only by Congress' notion of the general welfare, the reality ... is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'" *Id.* (quoting United States v. Butler, 297 U.S. 1, 78 (1936)).

[203] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012) (plurality opinion) ("Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism." (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937))); Sabri v. United States, 541 U.S. 600, 608 (2004) (reasoning that a funding condition was not unconstitutionally coercive because it regulated the conduct of state and local officials as individuals and was "not a means for bringing federal economic might to bear on a State's own choices of public policy").

[204] See *supra* "Anti-Coercion."

[205] Northport Health Servs. of Ark. v. HHS, 438 F. Supp. 3d 956, 963–64 (W.D. Ark. 2020), *appeal filed*, No. 20-1799 (8th Cir. 2020) (oral argument held on Jan. 15, 2021).

[206] *Id.* at 970.

[207] *Id.* Another district court did not find this feature of *NFIB* to preclude an anti-coercion argument from private parties challenging a similar rule, reasoning that whether the rule was an incentive or "economic dragooning" was relevant to the question of the agency's statutory authority to adopt the rule. Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 929 (N.D. Miss. 2016) (internal quotation marks and citation omitted). In that case, the court reasoned that the "plaintiffs' basic point still stands: that nursing homes are so dependent upon Medicare and Medicaid funding that the Rule in this case effectively amounts to a ban on pre-dispute nursing home arbitration contracts." *Id.* In concluding that the rule likely violated the Federal Arbitration Act, the court stated that the "Rule should, and likely will be, treated as what it effectively is (i.e. a *de facto* ban), in determining whether it conflicts with the FAA." *Id.*

[208] Northport Health Servs. of Ark. v. HHS, No. 5:19-CV-5168, 2020 U.S. Dist. LEXIS 76536, at *13 (W.D. Ark. Apr. 30, 2020). By comparison, another federal court rejected a state's own anti-coercion argument in circumstances where the spending condition applied equally to state and private entities. *See* Religious Sisters of Mercy v. Azar, No. 3:16-cv-00386, 2021 U.S. Dist. LEXIS 9156, at *75 (D.N.D. Jan. 19, 2021) ("'The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.' ... North Dakota offers healthcare services alongside private entities, meaning the state must accept the universally applicable regulations that follow." (quoting Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018))).

[209] South Dakota v. Dole, 483 U.S. 203, 210 (1987) (stating that Congress's spending power "may not be used to

formulation, and the closely-related unconstitutional conditions doctrine, Congress also may not use its spending power in ways that violate a *private* recipient's constitutional rights.[210] Accordingly, whether a condition violates a constitutional provision other than the Spending Clause itself is an important consideration regardless of whether the intended funding recipients are states or private entities.

Thus, while open questions remain, there are at least some grounds for a court to conclude that the clear notice and independent constitutional bar limits apply to spending legislation that imposes conditions on states, private recipients, or both. In contrast, because of the centrality of federalism concerns to the relatedness requirement and the anti-coercion principle, it is less clear whether those principles may limit the kinds of conditions that Congress imposes on funding to private parties. However, some case law suggests that private funding recipients or beneficiaries may have standing to raise a federalism-based objection under some circumstances.[211]

Conditions from the Executive Branch

In many of the cases discussed above, Congress has imposed a spending condition by statute, and courts have considered whether that condition is constitutional. A spending condition may also come from the executive branch—for example, from a federal agency in the course of administering a federal program. In such cases, the courts may consider whether the executive branch has statutory authority from Congress to impose the condition, and if so, whether that condition is consistent with federal statutes and with the Constitution.

Because Congress alone holds the "power of the purse," the executive branch cannot unilaterally authorize spending or impose conditions on federal funding.[212] To do so would violate the constitutional separation of powers.[213] A funding condition from the executive branch is considered constitutional only if Congress has "delegated authority" to the executive branch to impose that condition.[214]

induce the States to engage in activities that would themselves be unconstitutional").

[210] *See, e.g.*, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013) (holding that the funding condition violated the First Amendment rights of domestic nonprofit organizations compelled to speak the government's message).

[211] In *Bond v. United States*, the Supreme Court held that a person indicted for violating a federal statute had standing to challenge the statute's validity on the basis that it exceeded Congress's constitutional authority and violated the Tenth Amendment. 564 U.S. 211, 214 (2011). The Court stated that an "individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.* at 222 ("Fidelity to principles of federalism is not for the States alone to vindicate."). At least one federal court has extended *Bond*'s reasoning to allow an individual governor to challenge a spending condition on federalism grounds. Jindal v. Dep't of Educ., No. 14-CV-534, 2015 U.S. Dist. LEXIS 23356, at *26–27 (M.D. La. Feb. 26, 2015) (holding that the Governor of Louisiana had standing to challenge a Department of Education funding condition as unduly coercive, based, in part, on *Bond*).

[212] Unlike some other areas of the Constitution, "[w]hen it comes to spending, the President has none of 'his own constitutional powers' to 'rely' upon." City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1233–34 (9th Cir. 2018) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). As to federal agencies, their power comes from Congress. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it.").

[213] *See, e.g.*, *City & Cty. of San Francisco*, 897 F.3d at 1235.

[214] Oakley v. DeVos, No. 20-cv-03215, 2020 U.S. Dist. LEXIS 106092, at *20–21 (N.D. Cal. June 17, 2020) (internal quotation marks and citation omitted).

As a practical matter, challenges to an agency's decision to adopt or enforce a particular funding condition often arise under the APA instead of, or in addition to, a separation-of-powers challenge. Under the APA, courts have jurisdiction to set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations."[215] Challenges to an agency's authority to impose a funding condition therefore may be resolved on statutory, rather than constitutional grounds, based on the APA and the underlying statute that established the spending program. Some case law, however, has suggested that when an agency imposes a spending condition that Congress has not authorized, it violates not only the underlying statute but also the Constitution.[216]

Other disputes over funding conditions may arise without any basis for direct statutory review under the APA, and in such cases, constitutional considerations may be foremost. For example, on January 25, 2017, President Donald Trump issued an executive order concerning "sanctuary jurisdictions" that "willfully violate Federal law in an attempt to shield aliens from removal from the United States."[217] The order directed the Attorney General and the Secretary of the Department of Homeland Security to "ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes."[218] The referenced statute, Section 1373, prohibited state and local officials from "in any way restrict[ing]" the exchange of information regarding an individual's immigration status with federal immigration authorities. In a constitutional challenge to the order, the Ninth Circuit found that the Executive Order concerned "funding that Congress ha[d] not tied to compliance with § 1373."[219] "Because Congress did not authorize withholding of funds," the court held, "the Executive Order violate[d] the constitutional principle of the Separation of Powers."[220]

In 2019 and 2020, courts around the country adjudicated separation-of-powers and APA challenges to funding conditions in two, separate sets of cases. The first set of legal challenges involved immigration-related conditions on state and local criminal justice funding under the Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG Program). The second set of cases involved a Department of Health and Human Services (HHS) rule regarding grantee noncompliance with federal "conscience" statutes. These cases illustrate the challenges of discerning whether Congress has authorized an agency generally charged with administering a program to impose conditions on program funds.

Litigation over Byrne JAG Program Conditions

The Edward Byrne Memorial Justice Assistance Grant Program is "the primary source of federal criminal justice funding available to state and local governments."[221] Administered by the Department of Justice (DOJ), the program provides federal grants to states and localities "to

[215] 5 U.S.C. § 706(2)(C).

[216] *E.g.*, City of Chicago v. Barr, 961 F.3d 882, 931 (7th Cir. 2020); Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 946 (N.D. Miss. 2016) ("Congress did not enact the Rule in this case; a federal agency did, and therein lies the rub. As sympathetic as this court may be to the public policy considerations which motivated the Rule, it is unwilling to play a role in countenancing the incremental 'creep' of federal agency authority beyond that envisioned by the U.S. Constitution.").

[217] Exec. Order No. 13768, § 1, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017).

[218] *Id*. § 9, 82 Fed. Reg. at 8801.

[219] City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1234 (9th Cir. 2018).

[220] *Id*. at 1235.

[221] City of Chicago v. Barr, 405 F. Supp. 3d 748, 752 (N.D. Ill. 2019), *aff'd*, 961 F.3d 882 (7th Cir. 2020); *see* P.L. 109-162, § 1111, 119 Stat. 2960, 3094 (2006) (codified as amended at 34 U.S.C. §§ 10151–10158).

provide additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice" in eight program areas.[222] While a statutorily prescribed formula dictates the amount of funding that each state receives, states still must apply for Byrne JAG funding.[223] The application must include, among other items, a "certification, made in a form acceptable to the Attorney General" that "the applicant will comply with all provisions" of the Byrne JAG statute[224] and "*all other applicable Federal laws*."[225]

The Byrne JAG cases discussed in this section concerned grant conditions that the Attorney General adopted for fiscal years 2017 and 2018.[226] One of the challenged conditions—the certification condition—required grantees to certify their compliance with 8 U.S.C. § 1373.[227] As noted in the previous section, Section 1373 prohibits states and localities from restricting the exchange of information about an individual's citizenship or immigration status with federal immigration authorities.[228] In the litigation, DOJ argued that the Byrne JAG statute authorized the condition because the statute itself requires applicants to certify compliance with "applicable Federal laws" and, in DOJ's view, Section 1373 was one such law.[229]

The First, Third, and Seventh Circuits disagreed, holding that DOJ's grant condition was inconsistent with the underlying Byrne JAG statute.[230] They construed "applicable Federal laws" to refer to laws that apply to Byrne JAG grant *programs*, rather than all laws that apply to Byrne JAG *applicants*.[231] Because Section 1373 generally applied to state and local governments and officials without referencing grant programs or federal funding, the courts reasoned that it was

[222] 34 U.S.C. § 10152.

[223] *Id*. §§ 10153, 10156.

[224] *Id*. §§ 10151–10158.

[225] *Id*. § 10153(a)(5)(D) (emphasis added).

[226] Agency-imposed grant conditions may vary from year-to-year, or from Administration to Administration. *See, e.g.*, CRS Report R41360, *Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Law and Policy*, by Luisa Blanchfield (describing how various Administrations reinstated, expanded, or rescinded the "Mexico City Policy" concerning abortion-related conditions on foreign assistance funding).

[227] *See, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM: FY 2017 STATE SOLICITATION 23–24 (2017). The FY2018 conditions also required certification with 8 U.S.C. § 1644, whose language tracks § 1373. In the Byrne JAG litigation, DOJ "concede[d] that the two compliance conditions are equivalent" and that a court's "disposition as to one [would] control as to the other." City of Chicago v. Barr, 961 F.3d 882, 889 (7th Cir. 2020). The litigation also involved four other conditions on Byrne JAG grants. The certification condition is discussed in this section for purposes of illustration.

[228] *See* 8 U.S.C. § 1373(a) ("Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.").

[229] *See City of Chicago*, 961 F.3d at 897 ("Under the Attorney General's reasoning, Congress itself incorporated § 1373 into the Byrne JAG program by requiring compliance with 'all other applicable federal laws.'").

[230] City of Providence v. Barr, 954 F.3d 23, 45 (1st Cir. 2020); City of Philadelphia v. U.S. Att'y Gen., 916 F.3d 276, 291 (3d Cir. 2019); *City of Chicago*, 961 F.3d at 909.

[231] *See, e.g.*, *City of Providence*, 954 F.3d at 39 ("We hold that 'applicable Federal laws' . . . are federal laws that apply to state and local governments in their capacities as Byrne JAG grant recipients."); *City of Philadelphia*, 916 F.3d at 289–90 ("[I]t would be reasonable to view 'all other applicable Federal laws' to refer specifically to laws that apply to operations relating to the grant, not to require the City to certify compliance with every single law that might apply to it."); *City of Chicago*, 961 F.3d at 909 ("[B]ased on the language, structure, and purpose of the Act, the reference to 'all other applicable federal laws' in § 10153 should be read as referencing any federal law that by its terms applies to federal grants or grantees in that capacity.").

not an "applicable" federal law.[232] Accordingly, these three circuits held that the Attorney General exceeded his statutory authority in imposing the certification condition.[233]

One court, the Seventh Circuit, also characterized this as a constitutional violation. The Seventh Circuit expressly held that, because of the lack of statutory authorization, "the Attorney General's decision to attach the conditions to the FY 2017 and FY 2018 Byrne JAG grants violated the constitutional principle of separation of powers."[234]

In contrast, in a lawsuit filed by New York City, the Second Circuit held that the Attorney General neither exceeded his statutory authority nor violated the constitutional separation of powers by imposing the certification condition.[235] The court reasoned that the Byrne JAG statute authorized the Attorney General to identify "other applicable Federal laws" for purposes of the compliance certification by mandating certification in a "form acceptable to the Attorney General."[236] In the court's view, "form" embraced both format and content.[237] The court also construed the phrase "applicable Federal laws" to refer to laws applying to the grant program *and* laws applying to the applicant.[238] The court concluded that Section 1373 applied to the plaintiff-states and localities that had applied for Byrne JAG grants.[239] Even if Congress did not make the condition explicit, therefore, DOJ's condition fell within the discretionary authority that Congress had given to DOJ to specify certification requirements for the Byrne JAG program.

The Second Circuit then rejected a *Pennhurst*-based Spending Clause challenge to the certification condition, holding that the plaintiffs had adequate notice of the certification condition.[240] "To be sure," the court observed, "that notice was provided by DOJ rather than Congress."[241] However, the court did not find this distinction to be dispositive, pointing to cases where the Supreme Court recognized that "Congress cannot always 'prospectively resolve every possible ambiguity concerning particular applications of the [program's statutory] requirements.'"[242]

Lastly, the Second Circuit rejected a Tenth Amendment, anti-coercion challenge to the certification condition.[243] Specifically, the court interpreted *NFIB* to focus on the "amount of funding that a State would lose by not acceding to the federal conditions," asking whether that amount "is so significant to the [state's] overall operations as to leave it with no real choice but to agree."[244] For "most grant conditions," the court posited, the potential "funding loss" does "not

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[232] *City of Providence*, 954 F.3d at 39; *City of Philadelphia*, 916 F.3d at 289; *City of Chicago*, 961 F.3d at 901.

[233] *City of Providence*, 954 F.3d at 39; *City of Philadelphia*, 916 F.3d at 291; *City of Chicago*, 961 F.3d at 931. The Ninth Circuit issued a narrower ruling. It affirmed an injunction barring DOJ from enforcing the certification condition against the City and County of San Francisco, reasoning that the localities' "respective sanctuary laws comply with 8 U.S.C. § 1373." City & Cty. of San Francisco v. Barr, 965 F.3d 753, 764 (9th Cir. 2020), *petition for cert. filed and later dismissed sub nom*. Wilkinson v. City & Cty. of San Francisco, 141 S. Ct. 1292 (2021).

[234] *City of Chicago*, 961 F.3d at 931.

[235] New York v. DOJ, 951 F.3d 84, 111 (2d Cir. 2020).

[236] *Id*. at 104–05 (quoting § 10153(a)(5)).

[237] *Id*. at 105.

[238] *Id*. at 105–09.

[239] *Id*. at 111.

[240] *Id*. at 110.

[241] *Id*.

[242] *Id*. at 110 (quoting Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 666, 669 (1985)).

[243] *Id*. at 114–16.

[244] *Id*. at 115.

raise such coercion concerns."[245] The court found the certification condition at issue to be "much more akin to *Dole* than to *NFIB*" because loss of the 2017 Byrne award would affect "less than 0.1%" of New York's annual budget—less than the percentage loss at issue in *Dole*.[246] While New York City initially petitioned the Supreme Court for a writ of certiorari to resolve the circuit split, the parties agreed to dismiss the case on March 4, 2021, after DOJ, under the Biden Administration, reportedly "agreed to remove the challenged conditions" from Byrne JAG grants.[247]

Litigation over HHS's 2019 Conscience Rule

States also raised Spending Clause challenges after HHS issued a rule regarding steps that it would take to enforce a range of "Federal conscience and antidiscrimination laws" (the 2019 Conscience Rule).[248] One of the central issues in these cases was whether HHS could terminate *all* HHS funding to a grant recipient for noncompliance with certain statutes.

In 2008, HHS issued a rule designating its Office for Civil Rights (OCR) to receive complaints of alleged violations of three "federal health care conscience protection statutes" commonly referred to by their sponsors' names.[249] The first statute, the Church Amendments, prohibits any entity that receives funding under the Public Health Service Act from discriminating in the form of firing or other employment actions against health care workers who perform or assist in the performance of lawful abortions or sterilization procedures, or who refuse to do so on religious or moral grounds.[250] The second statute, the Coats-Snowe Amendment, prohibits federal funding recipients from discriminating against health care entities that refuse to perform abortions or provide training on abortion procedures, or individuals whose medical education did not include such training.[251] The third statute, the Weldon Amendment, is a provision that Congress has included in every Labor-HHS appropriations act since 2004.[252] The Weldon Amendment prohibits the disbursement of federal funds to agencies, programs, or states that discriminate against health care entities (including individual providers) because they do not "provide, pay for, provide coverage of, or refer for abortions."[253]

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[245] *Id*.

[246] *Id*. at 116.

[247] Press Release, *Attorney General James Secures the Restoration of Over $30 Million in Public Safety Grants* (May 4, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-secures-restoration-over-30-million-public-safety-grants; *see also* City of New York v. DOJ, 141 S. Ct. 1291 (2021); Sarah Lynch, *Justice Department Ends Trump-Era Limits on Grants to Sanctuary Cities*, REUTERS (Apr. 28, 2021), https://www.reuters.com/world/us/exclusive-us-justice-department-ends-trump-era-limits-grants-sanctuary-cities-2021-04-28/.

[248] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,170 (2019) [hereinafter 2019 Conscience Rule].

[249] Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072, 78,101 (2008) [hereinafter 2008 Rule]; *see generally* California v. Becerra, 950 F.3d 1067, 1079 (9th Cir. 2020) (describing the origins of the Church, Coats-Snowe, and Weldon Amendments).

[250] 42 U.S.C. § 300a-7(c)(1).

[251] *Id*. § 238n.

[252] *See* Washington v. Azar, 426 F. Supp. 3d 704, 712 (E.D. Wash. 2019) ("The Weldon Amendment was added to the annual 2005 health spending bill and has been included in subsequent appropriations bills.").

[253] *E.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, P.L. 115-245, Div. B., § 507(d).

The 2008 rule required grantees to certify compliance with these nondiscrimination provisions when applying for or renewing a grant, contract, or other funding instrument.[254] In 2011, HHS issued a new rule that "partially rescind[ed]" the 2008 rule by removing the certification requirement.[255] The 2011 rule retained OCR's authority to "coordinate the handling of [discrimination] complaints with the Departmental funding component(s) from which the entity" named in the complaint "receives funding," but did not specify the penalty for noncompliance.[256]

The 2019 Conscience Rule amended the 2011 rule to state expressly that HHS could enforce compliance with more than 30 federal "conscience" provisions (including the Church, Coats-Snowe, and Weldon Amendments) through the denial, temporary withholding, or termination of HHS-administered federal funds.[257] By its terms, the 2019 Conscience Rule was broad enough to include the complete termination of *all* HHS funding, including Medicaid funds.[258] The rule also specifically authorized OCR to "[c]onduct investigations," "[s]eek voluntary resolutions of complaints," "utilize existing regulations for involuntary enforcement," and "coordinate other appropriate remedial action."[259] If, following an investigation or compliance review, OCR found that an entity violated a conscience provision, the rule allowed OCR to coordinate with the relevant HHS funding component to "effect[]" compliance through laws governing contracts, grants, and other funding arrangements.[260]

Three different district courts considered challenges to the conditions and the newly-stated penalties in the 2019 Conscience Rule, and all three held those conditions to be invalid based on the principles discussed above. First, on November 6, 2019, the U.S. District Court for the Southern District of New York held that the 2019 rule violated both the APA and the Constitution. As to the APA claim, the court concluded that the Church, Coats-Snowe, and Weldon Amendments did not authorize HHS to promulgate substantive regulations, either expressly or by implication.[261] The court held that no statute authorized HHS to withhold or terminate *all* HHS funding to noncompliant recipients—the rule's termination penalty.[262] The latter conclusion also formed the basis for the court's separation-of-powers analysis because, the court reasoned, an "agency may not withhold funds in a manner, or to an extent, unauthorized by Congress."[263] By

[254] 2008 Rule, at 78,098–99.

[255] Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9,968, 9,973–74 (2011).

[256] *Id*. at 9,976–77 (codified at 45 C.F.R. § 88.2 (2011)).

[257] 2019 Conscience Rule, 84 Fed. Reg. at 23,272.

[258] *See id*. at 23,272 (stating that compliance "may be effected" through "[t]erminating Federal financial assistance *or other Federal funds from the Department, in whole* or in part" (emphasis added) (codified at 45 C.F.R. § 88.7(i)(3)(iv)); New York v. HHS, 414 F. Supp. 3d 475, 532 (S.D.N.Y. 2019) (reasoning that "[o]n its face, § 88.7(i)(3)(iv) allows HHS to terminate *all* of a recipient's HHS funding," including "Medicaid and Medicare reimbursements").

[259] 2019 Conscience Rule, 84 Fed. Reg. at 23,271 (codified at 45 C.F.R. § 88.7(a)(3), (5), (7)–(8)).

[260] *Id*. at 23,271–72 (codified at 45 C.F.R. § 88.7(i)(2)–(3)).

[261] *New York*, 414 F. Supp. 3d at 532. As a threshold matter, the court rejected HHS's argument that the rule was a "housekeeping" statute authorized by the Secretary's authority to "prescribe regulations for the government of his department," 5 U.S.C. § 301; to "issue orders and directives ... necessary to carry out" a regulation on public buildings, property, and works, 40 U.S.C. § 121(c); or to issue "regulations necessary to the administration of the [Public Health] Service," 42 U.S.C. § 216. *See New York*, 414 F. Supp. 3d at 527 (calling the 2019 Conscience Rule "heavily substantive" and concluding that it "cannot be justified based on HHS's authority under housekeeping statutes").

[262] *New York*, 414 F. Supp. 3d at 534.

[263] *Id*. at 562.

adopting the termination penalty without statutory authority, the rule "aggrandize[d] the Executive Branch at Congress's expense" in violation of the separation of powers.[264]

The district court also held that the termination penalty violated the clear notice and anti-coercion principles from the Supreme Court's Spending Clause jurisprudence. In particular, citing *NFIB*, the court expressed concern that a state that had "organized its programs (*e.g.*, its Medicaid program) in anticipation of a promised outlay" would have "no way to know at the time it accepted such funds that HHS would later claim the right to close these spigots based on a breach of a Conscience Provision."[265] The court found coercion because of the "scale of funding" at stake and the "new standards of conduct" the rule imposed.[266] However, the court concluded that the rule did not violate the relatedness principle or another independent constitutional bar.[267]

Second, on November 19, 2019, the U.S. District Court for the Northern District of California held, consistent with the Southern District of New York, that HHS exceeded its authority in issuing the 2019 Conscience Rule "by adding expansive definitions in conflict with the statutes and imposing draconian financial penalties."[268] Because the court vacated the rule on APA grounds, it declined to reach the constitutional claims presented.[269]

Third, on November 21, 2019, the U.S. District Court for the Eastern District of Washington expressly adopted the Southern District of New York's conclusions, holding that the 2019 Conscience Rule exceeded HHS's authority and violated the Constitution.[270]

Appeals from the New York, California, and Washington cases are pending before the Second and Ninth Circuits.[271] The appellate courts have postponed oral arguments at the government's request so that new leadership at HHS can evaluate the government's position in the litigation.[272]

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[264] *Id*.

[265] *Id*. at 568.

[266] *Id*. at 571.

[267] *Id*. at 571–72.

[268] City & Cty. of San Francisco v. Azar, 411 F. Supp. 3d 1001, 1024 (N.D. Cal. 2019).

[269] *Id*. at 1025.

[270] Washington v. Azar, 426 F. Supp. 3d 704, 720 (E.D. Wash. 2019).

[271] New York v. HHS, No. 19-4254 (2d Cir. 2019); City & Cty. of San Francisco v. Becerra, No. 20-15398 (9th Cir. 2020) (consolidated with Washington v. Becerra, No. 20-35044; County of Santa Clara v. Becerra, No. 20-15399; and California v. Becerra, No. 20-16045).

[272] *See* Order, *New York*, No. 19-4254 (2d Cir. Feb. 5, 2021), ECF No. 435 (adjourning oral argument, holding the appeal in abeyance, and directing the appellants to file stay status letters every 30 days); Order, *City & Cty. of San Francisco*, No. 20-15398 (9th Cir. Jun. 2, 2021), ECF No. 117 (granting the government's motion to keep the cases in abeyance for an additional 60 days and requiring a status report by August 2, 2021).

As the litigation over the Byrne JAG certification condition and the 2019 Conscience Rule illustrates, an agency that imposes a new condition on federal funding or an enhanced penalty for grantee noncompliance must have express or implied statutory authority from Congress to take those actions. Otherwise, the challenged action may violate the APA or the Constitution's separation of powers.

Conclusion

Congress has broad constitutional authority to authorize spending for the general welfare. In exercising that authority, Congress may place conditions on federal funding given to states and private entities. However, courts reviewing the constitutionality of a condition generally assess whether the condition meets these four general constitutional limits: (1) the statute provides clear notice of the condition; (2) the condition is related to the purposes of the underlying spending; (3) the condition does not coerce state or local governments; and (4) the condition does not violate any independent constitutional bar, or the related unconstitutional conditions doctrine. While many of these principles are rooted in federalism concerns (i.e., states' rights), taken together, they cabin Congress's authority to condition funding to states and private entities. Lastly, the specificity with which Congress has addressed a spending condition in a statute, and the degree of discretion it has accorded to the executive branch, likely will affect the legality of an executive order, agency rule, or other executive branch action that imposes or enforces a requirement as a spending condition.

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