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Civic Federalism as a Defense Mechanism in the Trump Era

The United States is a country of popular sovereignty—sovereignty belongs to the people, who in turn delegate it to the states and the federal government. Though the States exist within the federal government, they retain their status as sovereigns within a sovereign. As Justice Anthony Kennedy succinctly put it, “The Framers split the atom of sovereignty;” a concept unknown before its birth in the United States.\(^1\) Almost immediately after the Founding though, fault lines emerged between those who preferred a more traditional centralized form of government, and those vying for states’ rights.\(^2\) This battle has continued, albeit under different party labels, for much of the nation’s history.

In the modern era, federalism is most closely associated with conservatives whereas liberals more closely hew to the idea of a strong federal government. Consequently, Republicans have a tendency to push back against broad federal government programs, especially in areas traditionally thought to belong to the states. As a recent example, many Republican states filed suit against the Obama Administration in an attempt to halt implementation of the Affordable Care Act,\(^3\) while others pursued a policy of non-enforcement.\(^4\) However, with the dawn of the Trump Administration, there is an opportunity for liberals to use federalism as a shield. While President Trump

\(^3\) See National Federation of Independent Business v. Sebelius, 567 U.S. 519, 525 (2012) (“Twenty-six States, several individuals, and the National Federation of Independent Business brought suit in Federal District Court, challenging the constitutionality of the individual mandate and the Medicaid expansion.”)
maintains many of the deregulatory tendencies of his Republican predecessors, he seems to lean more towards broad federal mandates rather than deferring to state policies. He sees federal troops and officers as a solution to problems ranging from local crime epidemics⁵ to illegal immigration.⁶ And while he and his Administration have promised to end Common Core⁷ and repeal the Affordable Care Act,⁸ he intends to replace both with different federal programs rather than leave that decision to the States.⁹

In this new political landscape, liberals have the option to assert state sovereignty challenges as a means of opposing the current administration. Although this is usually considered the rhetoric of the Republican Party, it could be a potent weapon for Democrats in future court battles. Even though the Administration is still in its infancy, potential federalism violations have already sprung up in the areas of education and immigration. With the advent of Bond v. U.S.,¹⁰ civic federalism could provide a means of resistance for a party that controls no branch of government and has few other alternatives.

I. Federalism Principles

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¹⁰ 564 U.S. 211 (2011). As will be discussed later in the article, Bond removed prudential standing restrictions on individuals asserting state sovereignty arguments.
Originally, federalism was enshrined into the Constitution as a compromise to induce the states to join the union; it was “the means and price of the formation of the Union.”\footnote{Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 543 (1954).} At the same time, a country with too much power in the hands of the states could not be sustained—the Constitution would be destined for failure, much like the Articles of Confederation before it.\footnote{Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1, 3 (1988).} Instead, a balance was struck and a system of dual sovereignty was instituted.

But while federalism may have emerged as a political compromise, it serves many other purposes as well. It is a practical consideration given the geographical diversity of the United States.\footnote{Matthew D. Adler and Seth F. Kreimer, The New Etiquette of Federalism: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 78 (1998).} The citizens of different states live in vastly dissimilar “physical, social, [and] economic conditions.”\footnote{Id. at 78.} Rather than try to implement a system of one-size-fits-all government, it makes sense to let distinct subdivisions of the country govern themselves. Of course, this principle only goes so far; the value of uniformity sometimes outweighs geographic diversity.

Another commonly touted virtue of federalism is that it fosters laboratories of innovation.\footnote{Id.} The federal government can let individual states experiment with policies before launching them nationwide and imposing them on all states. In this way, the costs of failed policies are limited to the states that implement them and are not inflicted on the rest of the nation. Furthermore, the federal government can more quickly isolate the best systems if there are fifty different states innovating with their own programs at the same
time. As an example, the Affordable Care Act was modeled on a statewide healthcare system launched in Massachusetts in 2006.\textsuperscript{16}

The most important function of federalism for this paper though, is its protection of individual liberty.\textsuperscript{17} When power is divided between different bodies, it becomes harder for tyranny to take hold. The Founding Fathers applied this principle in two areas so that a “double security [arose] to the rights of the people:” the separation of powers, and federalism.\textsuperscript{18} As long as the federal government and the state governments exclusively retain certain powers, it would require a collaborative effort to effectively oppress individual rights. In the absence of such cooperation, the two bodies could theoretically check one another. But for this system to operate as it should, encroachment by one entity into the domain of the other has to be limited. This is less of a problem in the separation of congressional and executive power; each branch possesses political checks that it can use to prevent aggrandizement by the other. For instance, the President may veto legislation he or she disagrees with, but Congress may override that veto with the concurrence of two-thirds of each house. The state governments lack such self-help measures, and so they depend more heavily on the judiciary to maintain the balance of federalism. The courts have created a number of doctrines to accomplish this, mostly through the Tenth Amendment.\textsuperscript{19} The federal government may not impose certain

\textsuperscript{17} Adler and Kreimer, supra note 13, at 79.
\textsuperscript{18} THE FEDERALIST NO. 51 (James Madison); THE FEDERALIST NO. 21 (Alexander Hamilton) (“Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government.”)
\textsuperscript{19} 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.”)
unconstitutional conditions on federal funding,20 it may not commandeer state
governments to implement federal policy,21 and Congress may only act through its
enumerated constitutional powers.22 Furthermore, the Eleventh Amendment provides a
separate protection to states in sovereign immunity.23 This paper will discuss the first two
of these doctrines.

a. Taxing and Spending Clause

The Constitution explicitly grants Congress the power to “lay and collect Taxes,
Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and
general Welfare of the United States,”24 and through this, implicitly grants Congress the
power to spend the revenue it raises to advance government policy for the common
good.25 This spending power is not limited by Congress’s other enumerated constitutional
powers as listed in Article I.26

Congress may require states to abide by certain conditions to receive federal
funds.27 This is permissible so long as these conditions do not violate a set of criteria
established by the Supreme Court over a century of precedent. In South Dakota v. Dole,
the Court clearly laid out the test that federal funding conditions had to suffice to be
constitutional. First, “the exercise of the spending power must be in pursuit of “the
general welfare,” a requirement that stems out of the language of the Taxing and

23 U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any
suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another
State, or by Citizens or Subjects of any Foreign State.”)
24 U.S. CONST. art. I, § 8, cl. 1.
26 Id. at 207.
27 Id. at 206.
Spending Clause itself.28 In deciding this, courts should defer “substantially to the
judgment of Congress.”29 Second, conditions on federal funding must be communicated
“unambiguously ..., enable[ing] the States to exercise their choice knowingly, cognizant of
the consequences of their participation.”30 Third, “conditions on federal grants might be
illegitimate if they are unrelated “to the federal interest in particular national projects or
programs.”31 Lastly, “other constitutional provisions may provide an independent bar to
the conditional grant of federal funds.”32 As mentioned above, Congress’s spending
power is not restricted to the exercise of its enumerated powers in Article I, and so this is
not the type of “independent bar” that the Dole Court was referring to with this factor.
Rather, this criterion is a check to prevent Congress from “induc[ing] the States to engage
in activities that would themselves be unconstitutional,” such as “a grant of federal funds
conditioned on invidiously discriminatory state action or the infliction of cruel and
unusual punishment.”33 Near the end of its opinion, the Court also offhandedly suggests
that a condition so coercive that it reaches the point of compulsion would also be
unconstitutional.34 Without much elaboration, it concludes that a loss of five percent of
South Dakota’s highway grant funding does not meet this threshold.35

Twenty-five years after Dole, the Supreme Court revisited this idea of coercive
funding conditions and clarified at what point “pressure turns into compulsion.”36 While
the National Federation of Independent Business v. Sebelius plurality did not announce a

28 Id. at 207.
29 Id.
30 Id. (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).
31 Id. (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).
32 Id. at 208.
33 Id. at 210.
34 Id. at 211.
35 Id.
36 Id.
clear test for when conditions become too coercive, Professor Eloise Pasachoff has identified three factors that the Court relied on in making its ultimate finding.\footnote{37 Eloise Pasachoff, \textit{Conditional Spending After NFIB V. Sebelius: The Example of Federal Education Law}, 62 AM. U. L. REV. 577, 593 (2012).} First, the policy being challenged has to constitute a new, independent program that attaches conditions on pre-existing funds.\footnote{38 \textit{Id.}} In \textit{NFIB}, Chief Justice Roberts found it instructive that “[t]he Medicaid expansion . . . accomplishes a shift in kind, not merely degree.”\footnote{39 \textit{National Federation of Independent Business (NFIB) v. Sebelius}, 132 S.Ct. 2566, 2605 (2012).} He believed that the Affordable Care Act transformed Medicaid from “a program to care for the neediest among us” into “a comprehensive national plan to provide universal health insurance coverage.”\footnote{40 \textit{Id.} at 2606.} In this way, it was not an alteration of a pre-existing program, but a new, independent program. The second factor that the \textit{NFIB} plurality thought was necessary for coercion was insufficient notice to the states that their original funds would later be conditioned on participation in a new, independent program.\footnote{41 Pasachoff, \textit{supra} note 37, at 593.} This factor does not require that Congress make it clear from the outset exactly what changes will be made to a federal program in the future.\footnote{42 \textit{Id.} at 602.} Rather, it is a broader requirement that Congress provide the states with notice that federal funds may be conditioned on participation in a new, independent program at some point.\footnote{43 \textit{Id.}} The original Medicaid legislation alerted states to the possibility that Congress may “alter, amend, or repeal any provision” of that statute\footnote{44 \textit{NFIB v. Sebelius}, 132 S.Ct. at 2605 (quoting 42 U.S.C. § 1304.)}. The \textit{NFIB} plurality understood this language to mean that the program may undergo minor tweaks in the future, but not a wholesale transformation like the one brought on by the Affordable Care Act—therefore, there was insufficient
notice. The last factor the Court considered was whether or not the Medicaid expansion constituted “economic dragooning.”46 Put simply, this factor examines the magnitude of the federal funding being threatened by the potentially coercive conditions.47 Through her examination of both the plurality and dissent, Professor Pasachoff concludes that neither opinion clarifies what the focus of the economic dragooning inquiry is: the magnitude of the funds at stake relative to the total amount granted by a federal program, or the overall magnitude of the funds.48 The plurality in *NFIB* resolved that, at the very least, “[t]he threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”49

The main point of disagreement between the plurality and the joint dissent was which factors were pertinent for the purposes of coercion. While the plurality looked to three distinct considerations in making its decision, the joint dissent believed that economic dragooning alone was sufficient for coercion.50 The joint dissent also reasoned that a government program could be coercive if it imposed a heavy tax burden on citizens.51 If a state chose not to participate, its citizens would be forced to pay for the program through federal taxes anyway.52 Although the state could still set up its own program, that would require levying a second tax for a similar program—a politically unpopular notion. Given that no opinion in *NFIB* commanded a majority, lower courts may decide to adopt the joint dissent’s test instead of the plurality’s.53

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45 Id. at 2606.
46 Pasachoff, *supra* note 37, at 605.
47 Id. at 608.
48 Id.
49 *NFIB v. Sebelius*, 132 S.Ct. at 2605.
51 Id. at 606.
52 Id.
53 Id. at 594.
b. Anti-Commandeering

At its core, the anti-commandeering doctrine prohibits Congress from forcing states to implement federal policy; though the exact contours of this doctrine have evolved over time.\footnote{John D. Tortorella, Reining in the Tenth Amendment: Finding a Principled Limit to the Non-Commandeering Doctrine of United States v. Printz, 28 SETON HALL L. REV. 1365, 1367 (1998).} Initially, the Court relied on the “traditional government function” test as established in National League of Cities.\footnote{Id. at 1370.} In that case, the Court ruled that Congress was not permitted to “directly displace the States' freedom to structure integral operations in areas of traditional governmental functions.”\footnote{National League of Cities v. Usery, 426 U.S. 833, 852 (1976).} Although the opinion did not provide an exhaustive list of what these traditional government functions were, Justice Rehnquist concluded that the functions implicated in the case were within that sphere: “[T]he States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation.”\footnote{Id. at 851.} This test remained the touchstone of anti-commandeering doctrine until the Supreme Court overruled it in Garcia v. San Antonio Metropolitan Transit Authority.\footnote{Tortorella, supra note 54, at 1376.} Justice Blackmun criticized the test for lacking any clear standards, and for being impossible to apply in practice.\footnote{Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 531 (1985).} Going even further, the Court completely abandoned the anti-commandeering doctrine, believing that other constitutional safeguards were sufficient to protect state sovereignty from congressional encroachment.\footnote{Id. at 550–51.}

In U.S. v. New York, the Supreme Court returned to the anti-commandeering doctrine, albeit in a more principled fashion. The case arose out of Congress’s passage of

\footnote{Justice Blackmun listed some of these safeguards as including state control over electoral qualifications and presidential elections, and equal representation in the Senate. Id. at 550–51.}
the Low-Level Radioactive Waste Policy Amendments Act, a law intended to set standards for the orderly disposal of radioactive waste by states. One way it sought to do this was through the “take title” provision that required states to “take title to and possession of [ ] waste and become liable for all damages suffered by the generator or owner as a result of the State's failure to promptly take possession.” Justice O’Connor struck this provision down as “commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”

Soon after *New York*, the Supreme Court was faced with a similar question in *Printz v. United States*—here, the Court expanded the doctrine to cover the commandeering of state and local officers as well. The case involved an interim provision in the Brady Handgun Violence Prevention Act of 1993 that required chief law enforcement officers (CLEOs) to conduct background checks on gun purchasers. Justice Scalia, writing for the plurality, held that this was unconstitutional commandeering in violation of the Tenth Amendment. Throughout the opinion, he consistently showed concern about the effect commandeering would have on liberty through its erosion of federalism and the separation of powers—the “double security” that James Madison alluded to. Without “a healthy balance of power between the States and the Federal Government,” there would be an increased risk of “tyranny and abuse

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62 *Id.* at 153.
63 *Id.* at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 288 (1981)).
64 Tortorella, *supra* note 54, at 1381.
65 *Id.* at 1381.
67 *Id.* at 922.
from either front.”68 Likewise, the separation of powers is eroded if Congress is permitted to circumvent the executive branch and have states implement their policies instead.69

Despite these restrictions, the Supreme Court did not seem to think that Congress’s ability to enact policy would be seriously hindered. The New York Court maintained that Congress still had many tools at its disposal to advance federal programs. For instance, Congress may pre-empt state laws,70 legislate against state citizens directly,71 or attach permissible conditions on federal funds.72 In addition, a few exceptions to the anti-commandeering principle exist. For one, Congress retains the ability to require state courts to enforce federal law under the Supremacy Clause.73 Also, laws of general applicability that apply equally to states and private parties are exempted from the anti-commandeering doctrine.74 With all these alternatives available to it, Congress has rarely had to resort to directly commandeering state officials to implement federal policy.75

II. Standing

Before federalism challenges can be levied, litigants first need to be able to access the court system. To do so, individuals need to be able to assert an injury stemming from federalism violations, which is sufficient to satisfy both Article III standing requirements as well as prudential standing requirements.

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68 Id.
69 Id. at 923.
70 New York v. U.S., 505 U.S. at 167 (“where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”)
71 Id.
72 Id. (“under Congress' spending power, “Congress may attach conditions on the receipt of federal funds.”) (quoting See South Dakota v. Dole, 483 U.S. 206 (1987)).
74 Id. at 932.
75 Tortorella, supra note 54, at 1381.
a. Article III Standing

The test for Article III standing was first clearly presented in *Lujan v. Defenders of Wildlife* and has three components: injury in fact, causation, and redressability. A proper injury in fact is “concrete and particularized” to the person asserting it, and is “actual and imminent” as opposed to “conjectural or hypothetical.” For there to be causation, a “causal connection” must exist “between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Lastly, redressability requires it to be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Generally, individuals alleging state sovereignty violations will have the same difficulty meeting Article III’s standing requirements that any other litigant would. So long as there is an injury to the individual bringing the claim, there is no worry that they are acting as private attorneys-general attempting to vindicate the public interest.

b. Prudential Standing

What has traditionally been more difficult for individuals bringing federalism claims to satisfy is prudential standing. While Article III standing is rooted in the constitutional “case-or-controversy” requirement, prudential standing conditions exist as judge-made restrictions. There are three factors commonly cited as part of prudential standing: (1) “the requirement that a plaintiff's complaint fall within the zone of interests

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77 Id.
80 Id.
81 Id.
protected by the law invoked,” (2) “the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches,” and (3) “the general prohibition on a litigant's raising another person's legal rights.”

That prudential standing is not rooted in constitutional text has a couple of implications. First, Congress has the power to abrogate these limitations without running afoul of the Constitution. More importantly, the judge-made nature of prudential standing has given opponents an avenue from which to attack the doctrine. In a 1983 law review article, Justice Scalia lambasted the doctrine for “leaving unexplained the Court’s source of authority for simply granting or denying standing as its prudence might dictate.”

He finally got his opportunity to re-shape prudential standing in *Lexmark Int'l, Inc. v. Static Control Components, Inc.* Before this case, a litigant was within the “zone of interests” of a law so long as he or she was “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question;” a particularly lenient standard. The *Lexmark* court limited this interpretation of the test to cases arising under the Administrative Procedure Act (APA). It differentiated the Lanham Act as containing an “unusual, and extraordinarily helpful,” detailed statement of the statute's purposes,” and therefore, requiring “no guesswork” as to the outer boundaries of the statute’s “zone of interests.” In such a case, the “zone of interests” test is not prudential at all; it is a statutory question that asks whether the statute has

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84 *Id.* at 225 (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983)).
86 Mank, supra note 83, at 243.
88 *Id.*
granted a plaintiff with a cause of action. The *Lexmark* Court also attempted to solidify the “generalized grievance” requirement within Article III standing instead of prudential standing, a practice that the Court has inconsistently adhered to in the past.

Interestingly, the prohibition on asserting another person’s legal rights remained untouched—as *Lexmark* did “not present any issue of third-party standing,” Justice Scalia decided that “consideration of that doctrine's proper place in the standing firmament can await another day.”

The prudential requirement that prohibits third-party standing is the most relevant for the purposes of this paper. It was through this idea that individuals were barred from asserting state sovereignty interests. In dismissing such suits, courts commonly cited to *Tennessee Electric Power Co. v. Tennessee Valley Authority*, a 1939 Supreme Court case involving the question of “whether a group of private power companies could bring suit to enjoin the federally chartered Tennessee Valley Authority (TVA) from producing and selling electric power.” One of the group’s allegations was that Congress lacked the constitutional power to create the TVA, and therefore did so in violation of the Tenth Amendment. The Court dismissed this argument because the states themselves had no objection to the existence of the TVA, and even if they did, “the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment.”

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89 See Id. at 1387.
90 Id. at n.3.
91 Id.
93 Id.
94 Id. (quoting *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144 (1939)).
In 2011, the Supreme Court ruled on *Bond v. U.S.* and repudiated this prudential bar on citizens asserting state sovereignty interests once and for all. The case arose out of a challenge to the Chemical Weapons Convention Implementation Act of 1998. Carol Anne Bond was prosecuted under the statute for using “caustic substances” to injure a close friend who had engaged in an affair with her husband. In her defense, Bond contended that the law was beyond Congress’s power to enact and moved to have the charges dismissed. The District Court denied the motion and sentenced Bond to six years in prison. On appeal to the Third Circuit, Bond again challenged the statute as outside Congress’s enumerated powers. After requesting and reviewing supplemental briefs on the question of third-party standing, the Third Circuit ruled against Bond on the grounds that she lacked prudential standing to assert Tenth Amendment arguments in the absence of the state’s presence in the proceedings. Like many courts before it, the Court of Appeals relied on *Tennessee Electric.* The Supreme Court granted certiorari and reversed the ruling of the Third Circuit.

The *Bond* majority dismissed the oft-cited *Tennessee Electric* language as “inconsistent with our later precedents,” and “neither controlling nor instructive on the issue of standing.” The Court’s primary reasoning was that Bond was seeking to assert her own legal interests, and not those of the state; “[t]he individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism

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95 Id.
96 Id. at 215.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id. at 216.
103 Id. at 226.
104 Id. at 220.
defines.”105 After all, federalism has more than one function—while it exists to protect the state from encroachment by the federal government, it was also intended to “secure[] to citizens the liberties that derive from the diffusion of sovereign power.”106 To further illustrate this point, the Bond Court looked at the Court’s treatment of an analogous doctrine: the separation of powers. Just as individuals have consistently been permitted to bring separation of powers claims, so too should they be able to bring federalism claims in the absence of a state’s presence in the litigation.107 And while Bond did not involve commandeering or unconstitutional conditions on federal funding, the Court frequently cited to New York and made it clear that “[t]here is no basis to support the Government's proposed distinction between different federalism arguments for purposes of prudential standing rules.”108

To be clear, nothing in Bond excuses litigants from having to satisfy Article III standing requirements; it just removes a long-standing prudential bar to federalism cases. Plaintiffs that have an otherwise permissible injury for the purposes of standing can now allege that it was borne out of a violation of federalism principles.109 The majority makes sure to reaffirm that “[i]ndividuals have “no standing to complain simply that their Government is violating the law.””110 Although the independent requirements of Article

105 Id.
108 Id. at 225.
109 Id.
110 Id. (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)).
III may sometimes mean that only the state has a valid injury, *Bond* has unquestionably opened the door to a much larger set of litigants than was possible before.

**III. General applications of civic federalism**

Outside of its theoretical importance, *Bond* could have a huge practical effect, especially against the Trump Administration. There are many situations where states may be reluctant to initiate litigation against the federal government, and consequently, where state citizens can do so instead.

It may be prudent to begin by listing the cases where this doctrine will not be of much help: in solidly Republican states with Republican governments. Even if an individual were to launch a federalism claim and succeed on the merits, the state government would be free to re-implement whatever federal program was invalidated in the litigation. And it would pay no political price in doing so given that the state’s citizenry was probably largely in agreement with the nullified government program.

However, the state may have to proceed without the benefit of federal funding. On the other side of the political spectrum, solidly Democratic states with Democratic governments would also be unlikely to have any need for federalism suits by individuals. The state government probably has plenty of incentive to launch its own suit against the federal government, and is likely to have more resources to do so than an individual citizen.

Where civic federalism might be useful is in a Democratic state with a Republican government. While such an administration would likely be fairly moderate in order to have won election in a Democratic state, it is still quite a leap for a Republican state government to openly challenge a Republican president and Congress. In such a situation,
state citizens can commence litigation in lieu of the state. Should they succeed on the merits, there are a couple of facts that would disincentivize the state from re-implementing the dissolved program on its own accord. Since it is likely to be politically moderate in the first place, it may not have the motivation to independently re-institute a conservative federal program. As a follow-up to this point, a state government in this position also has to worry about limited political capital. It is easy to blame the federal government for an unpopular program if the state can claim it had no choice in implementing it. Should it choose to re-institute the program on its own terms though, it would be directly accountable for any ill effects. Consequently, the state government may decide to expend its political capital elsewhere.

The same line of reasoning would also translate to swing states with Republican governments. Lastly, Democratic governments in swing states or Republican states may also be too moderate or too worried about political capital to initiate a suit against the federal government. Again, individual citizens would have a role to play in this environment. In general, allowing individuals to sue could bring about fundamental change because they are not subject to the same political influences and constraints that elected state governments are. At the very least, having to deal with countless individual suits in addition to state suits will drain the federal government’s resources.

IV. Specific applications of civic federalism

The Trump Administration’s penchant for consolidating power leaves it open to attacks on federalism grounds. Although we are still in the early days of his presidency, some proposed government programs have already potentially overstepped the boundaries of state sovereignty. Shortly after his inauguration, President Trump signed
into law an executive order that restricted the ability of sanctuary cities to receive federal grants. On its face, the order could possibly implicate both unconstitutional funding conditions and anti-commandeering doctrine.

The President has also repeatedly called for a federal school choice program. Although he has yet to implement anything concrete, there is reason to believe that the bulk of the funding would come from existing funds for low-income schools, an action that could give rise to unconstitutional funding conditions.

a. Sanctuary Cities

Under a new executive order targeted at sanctuary cities, states must comply with Section 1373, a federal law prohibiting states from “interfering with the voluntary reporting of immigration violations by state and local employees to federal officials.” Should they refuse to do so, they would lose eligibility to “receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.” Furthermore, the order directs the Attorney General to undertake “enforcement action” against any entity that “has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.” The executive order seems to threaten federal grants in general without specifying particular programs; and up to this point, the Administration has yet to clarify which funds would be at stake.

115 Id.
The order immediately brings to mind the possibility of a coercion suit under \textit{NFIB}. The first hurdle is whether this is a new, independent program imposing conditions on funds granted under separate pre-existing programs. This factor would appear to be met considering \textit{all} federal funds granted to states are at risk here, and not just those related to immigration or law enforcement. If the order were limited to immigration-related funds, one could contend that this is not a new program at all; rather, as Attorney General Jeff Sessions reasons, it could be framed as the continuation of a policy implemented by the Obama Administration in July 2016.\textsuperscript{117} In a letter to the Chairman of the House Appropriations Committee, an Assistant Attorney General in the Obama Administration explained that recipients of Edward Byrne Justice Assistance Grants (JAG) and State Criminal Alien Assistance Program (SCAAP) funding were required to comply with Section 1373.\textsuperscript{118} The funding for both programs was intended for law enforcement purposes, and in the case of SCAAP, specifically to defray the costs of detaining non-citizens.\textsuperscript{119} Therefore, tying compliance with Section 1373 to funding from these programs is unlikely to constitute the type of wholesale transformation needed in an \textit{NFIB} analysis. Certainly, it is a far cry from the ACA’s modifications of Medicaid.

Whether or not states had sufficient notice also turns on whether the funds being withdrawn are just those related to law enforcement, or all federal funds in general. After all, it is not unthinkable that federal law enforcement funds would be conditioned on compliance with federal immigration law at some point. This argument proves too much

\textsuperscript{117} Merica and Kopan, \textit{supra} note 116.
\textsuperscript{118} Memorandum from Peter J. Kadzik, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Congressman John A. Culberson, Committee on Appropriations, House of Representatives.
when applied to the litany of federal programs under which states receive money from the federal government though, most of which have nothing to do with immigration.

What could be the lynchpin in this analysis is economic dragooning. A loss of JAG and SCAAP funding would be difficult to categorize as economic dragooning—in 2015, Congress appropriated $246.5 million to JAG in total, with California receiving the most money at $17 million, whereas total SCAAP grants “varied between $200 million and $600 million per year since 1995.” By any measure, this is more akin to the facts of *Dole* than it is to *NFIB*. On the other hand, if the order is construed to give the Administration discretion to withdraw all federal funding, it is plausible that a court might find the economic dragooning criterion satisfied. Given the amount of federal funding most states receive, this is a noteworthy sum by any measure. For instance, federal money made up ten percent of New York City’s $85 billion dollar budget in 2015. If most states receive approximately the same amount of federal funding that New York City does, it becomes easy to see how federal grants could play a significant role in the day-to-day operation of states. After all, the *NFIB* plurality explicitly concluded that a loss of Medicaid funding constituted economic dragooning because it made up ten percent of the overall budget of most states. And while economic dragooning would not be sufficient for coercion on its own under the plurality’s test in *NFIB*, it would be adequate for the joint dissent.

A challenge under the four *Dole* factors may be easier to satisfy in this situation. Specifically, it is questionable whether this order is in line with *Dole*’s command that

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120 Id. at 139–40.
conditions be unambiguous so that States can “exercise their choice knowingly, cognizant of the consequences of their participation.” 123 While the language of the order itself is fairly clear, that may not be relevant; notice is only useful if it comes on the face of statute itself, and not executive direction at some later point. As one legal commentator argued, “few if any federal grants to sanctuary cities are explicitly conditioned on compliance with Section 1373.” 124 Therefore, “the executive cannot simply make up new conditions on its own and impose them on state and local governments.” 125 States made their choice to allow sanctuary cities based on the understanding that they would not be financially penalized for doing so—a conclusion they came to by examining the conditions on their various federal grants. In this case, states did not exercise their choice knowingly, and they were not cognizant of the consequences of their participation when accepting the federal grants. A court might also rule that the conditions being levied are unrelated to the threatened funds, but this will depend on where the money being used as an incentive is coming from. Certainly this would be the case if all federal funding were at issue.

The executive order may also violate the anti-commandeering doctrine by directing state law-making apparatus to implement federal programs. Under the executive order, states must allow their officials to report immigration violations to federal officers. 126 A possible defense to this allegation is that it is unclear whether the anti-commandeering doctrine applies to ministerial reporting requirements; in her concurrence

123 Id. (quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981)).
125 Id.
to Printz, Justice O’Connor commended the Court for “appropriately refrain[ing] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.”

Ilya Somin, a Professor at the George Mason School of Law, believes that there is no principled basis for excluding information sharing requirements from the anti-commandeering doctrine, and that the executive order therefore constitutes a violation of the Tenth Amendment. Even legal scholars that disagree with the doctrine as a whole concede that its reasoning must logically extend to reporting requirements. Ultimately, such requirements are still forcing state and local officers behave in a certain way. If a court agrees with this line of thought, the executive order may be in danger of violating the anti-commandeering doctrine.

A lawsuit filed by San Francisco in January makes many of these same allegations. It attacks the funding conditions as “impos[ing] new funding conditions on existing federal funds that go beyond the statutory conditions imposed by Congress,” as “not germane to the purpose of the funds,” and as being so severe as to “cross the line distinguishing encouragement from coercion.” The complaint categorizes the conditions as coercive because they “threaten[] a significant percent of San Francisco’s overall budget, including virtually the entire funding stream for critical programs to its residents, such as Medicaid. Furthermore, it claims that the order is also in violation of

128 Somin, supra note 124.
129 Tortorella, supra note 54, at 1390
130 Id. (“Because purely ministerial reporting requirements nonetheless command state and local officials to act, it is unclear under what theory such mandates might be saved from the rule in Printz.”).
132 Id. at 13.
133 Id.
the Tenth Amendment because it “commandeers state and local governments by, inter
alia, compelling them to enforce federal law under threat of legal action.” Using Bond, state citizens could bring their own suits in other jurisdictions—the Trump Administration would have to expend resources defending against attacks from multiple fronts.

A potential retort to these federalism challenges is that they are being levied in the context of immigration law—an area that the executive branch should receive a lot of leeway in. But there are a couple of problems with this proposition. First, it ignores the direction of the Court’s precedent over the past couple of decades. This logic is more comparable to the traditional government function test of National League of Cities than it is to more recent opinions like Printz and New York. Second, the Printz majority specifically noted that the federal interests at stake are irrelevant when it comes to federalism. As the Court reasoned, “such a “balancing” analysis is inappropriate,” and “no comparative assessment of the various interests can overcome that fundamental defect.” While Printz specifically involved anti-commandeering and not unconstitutional funding conditions, its logic was explicitly directed towards violations that “compromise the structural framework of dual sovereignty” and not any particular federalism doctrine.

Even if there is a federalism violation in the Trump Administration’s executive order against sanctuary cities, there needs to be an individual with standing to bring litigation for Bond to have any effect. An obvious candidate would be an illegal

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134 Id. at 14.
136 Id.
137 Id.
immigrant living in a sanctuary city. That state and local officials can report immigration violations to federal officials would inflict a concrete and particularized injury on illegal immigrants: they would be subject to federal penalties up to and including deportation. There would be causation because a self-professed sanctuary city probably would not have allowed its officers to report immigration violations had it not been coerced into doing so by the federal government. Lastly, the nullification of the executive order, at least as against the state the illegal immigrant is living in, would redress this injury.

A more interesting question is whether an illegal immigrant would be barred from bringing such a suit on account of his or her status. In *National Coalition of Latino Clergy v. Henry*, a district court in Oklahoma decided to bar such litigation on prudential standing grounds.\(^{138}\) Although the case did not implicate any of the traditional prudential standing doctrines, the District Court felt that “[a]n illegal alien, in willful violation of federal immigration law, is without standing to challenge the constitutionality of a state law, when compliance with federal law would absolve the illegal alien's constitutional dilemma particularly when the challenged state law was enacted to discourage violation of the federal immigration law.”\(^{139}\) In the court’s opinion, the proper remedy for the plaintiffs was “simple compliance with federal immigration law.”\(^{140}\) On the other hand, the Third Circuit came to the opposite conclusion in *Lozano v. City of Hazelton*.\(^{141}\) The majority stressed that although a person may enter the country illegally, they are still entitled to court access.\(^{142}\) The Court directly repudiated *Henry* as “the unpublished

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\(^{139}\) *Id.* at 9.

\(^{140}\) *Id.* at 10.


\(^{142}\) *Id.* at 194.
decision of a lone federal district court,” and supported its holding by citing to Plyer v. Doe. A case where the Supreme Court “considered judicial challenges brought by persons lacking lawful immigration status . . . even when “compliance with federal law” would have absolved “the illegal alien's constitutional dilemma.” The Third Circuit also believed that the Henry rule was bad policy; if illegal immigrants were prohibited from suing to vindicate harms related to their status, Congress could take advantage of this loophole and “tie any consequence of their choosing to unlawful status and never face judicial review.”

In Lucas v. Jerusalem Café, LLC, the Eighth Circuit came to a similar conclusion. The plaintiffs in the case were unauthorized aliens working for less than minimum wage and without overtime pay. They launched suit alleging that their employer willfully violated the Fair Labor Standards Act (FLSA) by imposing these conditions on them. The district court dismissed the suit for a lack of standing—it “contend[ed] the FLSA does not apply to employers who illegally hire unauthorized aliens.” The Eighth Circuit found that the workers plainly had standing as they were “employees” under the FLSA definition of the term, and were alleging violations of the statute. It is true that unlike Lozano, the Lucas Court was trying to determine whether the statute granted the plaintiffs the right to sue, and not whether there was a general

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143 Id. at 193
144 Id. at 194.
145 Id. Although Lozano was later partially overruled, this was on grounds unrelated to the question of standing. The court noted that it had previously held that “at least one Plaintiff had standing to challenge the employment and housing provisions of the Hazleton ordinances generally” but as “Hazleton did not seek review of these holdings in its petition for a writ of certiorari, and did not raise these issues in its supplemental briefing following remand . . . these portions of our earlier decision are not at issue here.”
147 Id. at 930.
148 Id. at 939.
prudential bar applicable to all such suits. But by allowing the suit to continue, the Eighth circuit implicitly assented to the idea that illegal immigrants have standing to vindicate harms related to their status. The injury in this case likely stemmed from the fact that unauthorized aliens are willing to work for less than minimum wage, a fact that the court itself conceded.\footnote{Id. at 936 ("Holding employers who violate federal immigration law and federal employment law liable for both violations advances the purpose of federal immigration policy by “offset[ting] what is perhaps the most attractive feature of [unauthorized] workers—their willingness to work for less than the minimum wage.”")} Notwithstanding the district court’s opinion in \textit{Henry}, the weight of precedent seems to weigh in favor of the idea that illegal immigrants have standing to assert injuries related to their status. However, as the Supreme Court has yet to directly rule on this issue, there is no binding national precedent on the question.

\textbf{b. School Choice}

While the Trump Administration has yet to fully flesh out its proposed school choice mandate, the details that have emerged suggest there may be a coercion problem. Throughout his campaign, President Trump frequently reiterated his preference for a federal school choice program.\footnote{Stephanie Saul, \textit{Where Donald Trump Stands on School Choice, Student Debt and Common Core}, N.Y. TIMES (Nov. 21, 2016), \url{https://www.nytimes.com/2016/11/21/us/where-trump-stands-on-school-choice-student-debt-and-common-core.html}.} It would provide states with $20 billion dollars of federal funds that they could use to help low-income students attend certain private or charter schools.\footnote{Id.} Though this alone would be permissible, the problem surfaces when we consider the potential source of the money. As of now, the Administration has not explicitly stated where these funds would come from, but a Republican Congressmen and the head of the Congressional School Choice Caucus has proposed that $15 billion dollars could be re-directed from existing Title I funding.\footnote{Id.} Many journalists and
commentators also believe that this is likely to be the source of the funding.\textsuperscript{155} Perhaps most materially, the Administration’s recently released budget seems to indicate that it would be willing to go this route as well. The budget includes a $1.4 billion outlay towards school choice programs—$1 billion of which would come from an increase in Title I for the purposes of “encouraging districts to adopt a system of student-based budgeting and open enrollment.”\textsuperscript{156} This amount is slated to ramp up to the promised $20 billion dollars in the long run.\textsuperscript{157} As these funds will come from Title I, states will presumably have the choice of complying with the school choice program or losing the funds altogether: a potentially unconstitutional funding condition. Although this is not necessarily what will happen, it would defeat the purpose of the program if states were allowed to keep the funding without implementing the program.

If the Trump Administration were to move forward by siphoning funds from Title I, there may be an unconstitutional funding condition problem. Under the NFIB framework, we would first discern whether President Trump’s proposed school choice plan constitutes a new program independent from Title I. Broadly speaking, both seek to help low-income students receive a quality education, but their means of doing so differ drastically. Title I tries to achieve this goal by providing funds to improve “low-income student-populated schools.”\textsuperscript{158} School choice takes a completely different approach and

\textsuperscript{156} OFFICE OF MANAGEMENT AND BUDGET, AMERICA FIRST, A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN, 17 (Mar. 13, 2017).
\textsuperscript{157} Id.
funds student efforts to attend schools that are already doing well.159 Chief Justice Roberts saw the Medicaid Expansion as a fundamental overhaul of Medicaid because it changed the focus of the legislation from “four particular categories of the needy” to “the entire nonelderly population with income below 133 percent of the poverty level.”160 The school choice program that the current administration is proposing would similarly change the focus of Title I funding from schools with low-income students to the entire population of schools that low-income students may want to attend.

There is also a good argument that states receiving Title I funding had insufficient notice that the program would turn into a school choice mandate somewhere down the line. Given that Title I was intended to help improve the quality of schools populated by low-income students, states would be forgiven for not envisioning a program that encouraged students to leave those very same schools and go elsewhere. In fact, the loss of Title I funding and the exodus of students attending these schools could eventually force them to close down. This is the very essence of what the NFIB plurality thought “deserve[d] closer scrutiny.” When the federal government tries to “pressur[e] the States to accept policy changes”161

The economic dragooning analysis could be a roadblock for a potential suit though. In 2009, Title I grants made up two percent of total spending on elementary and secondary education—and less than one percent of the average state’s budget.162 On the other hand, federal education funding is the second largest use of federal money to states

161 Id. at 2604.
162 Pasachoff, supra note 37, at 622.
after Medicaid. So unless we accept that only Medicaid funding could ever satisfy the economic dragooning test, there must be some lower threshold sufficient for the purposes of coercion.

As a comparison, we can look to *Jindal v. U.S. Dept. of Education*, a suit challenging Common Core as being unduly coercive in violation of the Tenth Amendment. The roots of Common Core date back to 2001 when Congress enacted the No Child Left Behind Act of 2001 (NCLB), a law that “obligated a state to develop its own grade-level standards and standards-aligned assessments independent from the other states.” In 2010, Common Core built on this foundation by “establish[ing] an agreed-upon set of standards for students in all of the states that adopted them.” As an incentive, states that adopted Common Core were eligible to apply for Race to the Top (RTT) grants, and could receive waivers from certain NCLB policies through the ESEA Flexibility Waiver program.

In 2010, Louisiana willingly committed to adopting Common Core; but by 2015, Governor Bobby Jindal initiated litigation on the grounds “that the RTT program unlawfully coerced the State into adopting [Common Core].” The District Court for the Middle District of Louisiana denied Governor Jindal’s motion for a preliminary injunction on the grounds that he “failed to establish the threat of irreparable injury or

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163 *Id.* at 612.
166 *Id.*
167 *Id.* at 610–11. Adoption of Common Core was a necessary, but not sufficient requirement for the RTT grant program; that being said, it “it represent[ed] only fourteen percent of the total points on the scoring rubric.” *Id.*
that there is a substantial likelihood of success on the merits.”\textsuperscript{169} A fact that the court found significant was that Louisiana \textit{voluntarily} adopted Common Core.\textsuperscript{170} Not only did “Jindal knowingly and enthusiastically commit[] the State to [Common Core] assessments, with full knowledge of [its] purposes, in order to receive federal RTT dollars,” but “[n]o existing federal funding was conditioned on applying for, or obtaining, a RTT grant.”\textsuperscript{171} And even if Louisiana were to withdraw from Common Core, it is not clear that it would lose its RTT grant money as “at least three States that received RTT awards discontinued [Common Core] with no reduction in award money.”\textsuperscript{172} Given these facts, the court did not think it plausible that Louisiana was coerced into implementing Common Core.\textsuperscript{173} Governor Jindal was also rebuffed on his claim that the ESEA flexibility conditions were not related to a “federal interest in national projects or programs.”\textsuperscript{174} NCLB’s stated purpose is to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.”\textsuperscript{175} The ESEA flexibility conditions are related to this goal in that they “encourag[e] states to adopt “college and career ready” standards and aligned assessments, in lieu of sanctions provided for under the NCLB.”\textsuperscript{176} The court also found the flexibility conditions to not be coercive as they protect NCLB funding, not take it away, and because many states that do not use Common Core still benefit from the waivers.\textsuperscript{177} The \textit{Jindal} court’s singular focus on Louisiana’s voluntary adoption of Common Core is puzzling given the inquiry that lies at

\textsuperscript{169} Id. at 16.
\textsuperscript{170} Id. at 12.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 13.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 14.
\textsuperscript{177} Id.
the heart of coercion analysis: whether the state was capable of making an actual choice given its alternatives. For this reason, the doctrine’s emphasis is on the substance of the conditions themselves and not how states react to those conditions.

Putting aside the deficiencies in Jindal’s analysis, a potential suit against the Trump Administration’s proposed school choice program might be different on a couple of fronts. First, the money is being taken from a pre-existing program in Title I—the funding is not coming from new grant programs specifically created to entice states into adopting school choice. Second, it is unclear at this juncture whether states would be given the option of withdrawing from the school choice program and still keeping the money.

The pool of plaintiffs that can realistically bring a suit challenging this program is certainly smaller than those who could do so against the executive order threatening sanctuary cities. One would naturally think that a child attending a low-income school that receives Title I funding would be a good candidate. The child would suffer an injury as his or her school is losing money it desperately needs and as a consequence, the quality of the child’s education is affected. But it is conceivable that a court may dismiss this as a generalized grievance—after all, that specific child is not being harmed any more than countless other children attending such schools. Nonetheless, this is still a possibility. A public school that receives Title I funding may have a stronger case. It would be directly injured through a loss of funding and a nullification of the school choice program could redress this harm. While this would be useful, it is not as helpful as having illegal immigrants sue to invalidate the executive order against sanctuary cities. For one, these public schools are subject to many of the same political constraints that the
state itself is; they are, after all, a part of the government. Second, the amount of public schools that are in this situation are much less numerous than illegal immigrants living in sanctuary cities. Still, it is an improvement over the pre-\textit{Bond} days where only the state, a singular body, could sue.

V. Conclusion

For a long time, individuals had been denied the ability to vindicate harms stemming from federalism violations. This seems especially perverse when one considers that federalism was partially intended to secure the freedom of those very same individuals. Now that \textit{Bond} has changed the landscape, citizens have the power to bring suits to protect that liberty. Given the historic precipice that the Democratic Party now finds itself in with the election of Donald Trump, civic federalism may be one of the few remaining instruments that Democrats have to resist the new Administration. The President may have already encroached on state sovereignty with his executive order on sanctuary cities, and may soon do so again with his proposed school choice program. And considering that we are still in the very early days of this new era, individuals must be prepared to carry the mantle of federalism that the founders thought so crucial to the maintenance of a free and just society.