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EXECUTIVE COMMANDEERING: HOW DELEGATION TO THE EXECUTIVE BRANCH AFFECTS STATE SOVEREIGNTY

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I. INTRODUCTION

The persistent growth of the administrative state and the consequential rise in federal executive power have altered the dynamics

of federalism.[1] As the Executive Branch has accumulated power, largely via congressional delegation, and political polarization gridlocks Congress, "the most dangerous branch"[2] has increasingly acted unilaterally.[3] One recent way that the Executive Branch has attempted to exercise this power is by compelling states to implement its policies.[4]

Consider interior immigration enforcement. For decades, some states have sought to build trust between law enforcement and undocumented residents by restricting their officials from helping federal officials enforce federal immigration laws.[5] Upon taking office, President Trump acted to prevent states from shielding undocumented immigrants from federal enforcement.[6] One tool that the Trump administration tried to use was 34 U.S.C. §§ 10151 to 10158, a statute that delegated broad power to the Executive over grants to states, which the administration claimed authorized it to withhold funding from "sanctuary" jurisdictions.[7]

The Trump administration's use of 34 U.S.C. §§ 10151-10158 and resulting litigation highlight two constitutional concerns. First, "horizontal" separation of powers issues arise when the Legislative Branch delegates its Article I legislative power over spending decisions to the Executive Branch. Second, "vertical" separation of powers

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1. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 462 (2012) ("The very growth of the federal administrative state has swept states up as necessary administrators of federal law."); *see also id.* at 466 ("[C]ommentators worry that, within [the administrative] apparatus, the President exercises outsized control.").

2. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727 (1996).

3. NATHANIEL PERSILY, *Introduction*, *in* SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 3, 8 (2015); *see also* Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2031 (2018).

4. *See* Bulman-Pozen, *supra* note 3, at 2031 (discussing the important role states play in implementing federal policy).

5. *See* City of Chicago v. Barr, 961 F.3d 882, 886–87 (7th Cir. 2020); *see also* NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 9 (2013); TOM K. WONG ET AL., HOW INTERIOR IMMIGRATION ENFORCEMENT AFFECTS TRUST IN LAW ENFORCEMENT 9 (2019).

6. *See Major Developments Relating to "Sanctuary" Cities Under the Trump Administration*, ACLU, https://www.aclu.org/other/major-developments-relating-sanctuary-cities-under-trump-administration (last updated Aug. 27, 2018).

7. *E.g.*, Press Release, Dep't of Just., Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Programs (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial [hereinafter DOJ Press Release].

problems emerge when the federal government infringes on state sovereignty by compelling states to enact or refrain from enacting its policies.[8]

These two concerns implicate strikingly different areas of constitutional doctrine. On delegation, the Supreme Court has tended to be permissive, typically requiring that Congress merely determine legislative policy before it delegates further policymaking.[9] On federalism, however, the Supreme Court has outlined an "anticommandeering doctrine" through several cases in which it invalidated congressional attempts to command states to enact or not enact certain policies.[10]

The interaction of these doctrines against the backdrop of substantial congressional delegation to the Executive Branch creates a gap in structural constitutional law. While the anticommandeering doctrine, in its current form, says that *Congress* cannot "dictate[] what . . . state[s] . . . may [or] may not do,"[11] the Supreme Court has never before decided a case in which the Executive Branch has attempted to commandeer states.[12] Moreover, recent instances of the Executive Branch asserting statutory authority to dictate state policy raise the question of whether Congress can avoid commandeering challenges by delegating. If this were constitutionally permissible, an Executive actor could use broad statutes to compel states to implement policies against the state's will.

This note argues that, in light of this gap, current anticommandeering doctrine fails to fulfill its purpose of protecting state sovereignty. A more comprehensive anticommandeering doctrine should account for Congress' broad delegation of authority to the federal executive so as to limit threats to state autonomy. Building off established canons of statutory interpretation for delegation, this note proposes an "anticommandeering canon" for courts to invalidate exercises of delegated power that threaten to dictate state policies.

8. *See, e.g.*, New York v. United States, 505 U.S. 144, 167 (1992).

9. *See* Yakus v. United States, 321 U.S. 414 (1944); *see also* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

10. Murphy v. NCAA, 138 S. Ct. 1461 (2018); *see* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997). In addition to the anticommandeering doctrine, the Supreme Court tolerates subtler federal pressure that induces states to follow its policy prerogatives. *See infra* notes 18–19 and accompanying text.

11. *Murphy*, 138 S. Ct. at 1478.

12. *See infra* Part IV.

To arrive at this proposal, this note will first lay out the current anticommandeering and delegation doctrines. Part II of this note will discuss constitutional frameworks meant to manage the vertical relationship between the federal government and states. Part III will investigate the Supreme Court decisions that frame the horizontal transfer of power from Congress to the Executive Branch through delegation. Next, Part IV will review the application of these doctrines in litigation that arose when the Trump administration imposed conditions on federal funding to the states. Part V will evaluate the Second Circuit's decision approving the Trump administration's conditions and how it fits into a broader power struggle between states and the federal government. Finally, Part VI will review options to rein in delegation that threatens state sovereignty, including this note's proposed "anticommandeering canon" and its applications.

II. FEDERALISM AND THE VERTICAL BALANCE OF POWER

In general, the Constitution "confers upon Congress the power to regulate individuals, not States."[13] While the Constitution thus sought to avoid the "federal-state conflict" that arose under the prior Articles of Confederation,[14] the Constitution also "indirectly restricts the States by granting certain legislative powers to Congress" and "provid[es] in the Supremacy Clause that federal law is the 'supreme Law of the Land . . . .'"[15] As such, the Supreme Court has sought to strike "a healthy balance of power between the States and the Federal Government [to] reduce the risk of tyranny and abuse from either front."[16]

13. *New York*, 505 U.S. at 166.

14. *See Printz*, 521 U.S. at 919 ("The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict."); THE FEDERALIST NO. 15 (Alexander Hamilton) ("[W]e must extend the authority of the Union to the persons of the citizens[]—the only proper objects of government.").

15. *Murphy*, 138 S. Ct. at 1476. In addition to the Supremacy Clause, the Constitution also provides Congress with powers under the Spending Clause. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 576 (2012) (quoting Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999)) (noting that the Court has "long recognized that Congress may use [the Spending Clause] power to grant federal funds to the States, and may condition such a grant upon the States' 'taking certain actions that Congress could not require them to take'").

16. Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991). The "healthy balance of power" that the Court described in *Gregory*, *id.* at 458, reflects a core federalism value, alternatively identified as the preservation of liberty or the prevention of tyranny. *See* THE FEDERALIST NO. 51 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a

To maintain this healthy balance, the Supreme Court has outlined some "lines of demarcation" to measure whether federal actions in relation to states are permissible or not.[17] One such line allows the federal government to issue directives that influence state policies through "'cooperative federalism' statutes[, such as] conditional spending" but disallows coercive funding conditions on states.[18] Thus, one way of distinguishing between permissible and impermissible federal directives to the states is to consider whether the federal government's technique involves *inducement* or *compulsion*.[19]

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double security arises to the rights of the people."); *see also* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 79–81 (1998); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 380–95 (1985).

Another prominent federalism value is political accountability, since states will not want to accept responsibility for an unpopular policy that the federal government coerces it to undertake. *See Murphy*, 138 S. Ct. at 1477 ("[I]f a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred."); *see also* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1061 (1995). *But see* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 828 (1998) ("The difficulty with such political accountability arguments is that they overlook the complexity inherent in any system of federalism that always has the potential to confuse voters and thereby undermine political accountability.").

Similar to political accountability, courts and scholars count fiscal accountability as an important federalism value, as voters and constituents want to know who is paying for what policies. *See* Caminker, *supra*, at 1066; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 35 (2004).

Finally, federalism can serve both geopolitical diversity and government innovation. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 2–3 (2015) (discussing how state autonomy resulted in diversity in state marijuana laws).

17. *See* Adler & Kreimer, *supra* note 16, at 81–82.

18. *Id*. at 82 (internal parentheses removed); *NFIB*, 567 U.S. at 576–77; *see also* South Dakota v. Dole, 483 U.S. 203, 211 (1987); New York v. United States, 505 U.S. 144, 176 (1992) (holding that Congress giving states "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all").

19. Caminker, *supra* note 16, at 1009 (emphasis added) (noting that "Congress may *induce* affirmative state action by attaching conditions on the receipt of federal funds, including a condition that state officials undertake particular legislative or regulatory actions"). For example, in *South Dakota v. Dole*, South Dakota challenged a federal law that "directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from states" that do not raise their legal drinking age to twenty-one years. 483 U.S. 203, 205 (1987); *see also* 23 U.S.C. § 158. The Court upheld the law, noting that "all South Dakota would lose" if it altered its legal drinking age from nineteen to twenty-one would be "5% of the funds otherwise obtainable under specified highway grant

Scholars had also perceived a distinction between the federal government imposing negative and affirmative duties on states.[20] This distinction was once thought to mark the difference between permissible preemption actions (negative duties on states) and impermissible commandeering actions (affirmative duties on states).[21] However, the recent decision in *Murphy v. NCAA* found this distinction "empty" and concluded that negative duties equally infringe on state sovereignty.[22]

Finally, in a series of "anticommandeering" decisions, the Supreme Court has struck down Congressional attempts to "dictate[] what . . . state[s] . . . may [or] may not do."[23] However, there are only three Supreme Court decisions on this modern anticommandeering doctrine and each dealt with Congress attempting to commandeer the states, not the Executive Branch.[24] The cases directly below provide a sketch of the Court's anticommandeering doctrine as it currently stands.

A. Congress Cannot Compel States to Pass a Law

In *New York v. United States*,[25] the Court reviewed the Low-Level Radioactive Waste Policy Amendments Act (RWA or Act).[26] The RWA presented states with three options meant to "encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders."[27] The third option required states to either "regulat[e] pursuant to federal standards [or] tak[e] title to the waste generated within the State" (the "Take Title" option).[28] A majority

programs." *South Dakota*, 483 U.S. at 211. This, the Court reasoned, it did not meet the threshold where an act of Congress "might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). More recently, however, in *NFIB*, the Court struck down a portion of the Affordable Care Act for crossing the impermissible line of coercing states to expand Medicaid eligibility. *See NFIB*, 567 U.S. at 581–82. Specifically, since states stood to lose all of their Medicaid funding if they did not expand Medicaid eligibility as the federal government prescribed, the Court concluded that Congress had placed an unconstitutional "gun to the head" of the states. *See id.* at 581.

20. *See* Adler & Kreimer, *supra* note 16, at 89.

21. *See id.*

22. Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018).

23. *Id.*; *see also New York*, 505 U.S. at 174–83; Printz v. United States, 521 U.S. 898, 918 (1997).

24. *See infra* Sections II.A, II.B and II.C.

25. 505 U.S. 144 (1992).

26. 42 U.S.C. § 2021(b)–(j) (1988).

27. *New York*, 505 U.S. at 152.

28. *Id.* at 169; *see also* Bulman-Pozen, *supra* note 3, at 2042 (describing commandeering as the federal government "coercing a state to undertake a certain activity").

of six justices[29] held that the Take Title option amounted to a lack of choice.[30] As such, the Court concluded that "Congress . . . crossed the line distinguishing encouragement from coercion" and thus had commandeered the states.[31] Additionally, the Court noted that the Take Title provision of the RWA impermissibly targeted states, not private individuals.[32] This aspect of *New York* is critical to the commandeering line of cases, as it laid a marker that, while the federal government can regulate private individuals, it cannot similarly regulate the states.[33] The *New York* decision, therefore, recognized state autonomy as an essential federalist value,[34] even when the federal interest is compelling.[35]

B. Congress Cannot Compel State Officials to Implement Federal Law

Five years after *New York*, the Court in *Printz v. United States* reviewed a section of the Brady Handgun Violence Prevention Act that required state Chief Law Enforcement Officers (CLEOs) to perform certain investigative, communicative, and clerical duties regarding gun purchases in their jurisdiction.[36] Two CLEO's challenged these

29. Justice O'Connor wrote for the majority. *New York*, 505 U.S. at 149. Justice White, joined by Justices Blackmun and Stevens, dissented in part. *See id.* at 199 (White, J., dissenting). Justice Stevens dissented separately and offered an expansive vision of the power that the federal government holds. *See id.* at 210 (Stevens, J., dissenting). Justice Stevens stated that he "see[s] no reason why Congress may not also command the States to enforce federal water and air quality standards or federal standards for the disposition of low-level radioactive wastes." *Id.* at 211.

30. *Id.* at 174–75 (majority opinion).

31. *Id.* at 175. For more on how the Court distinguished the unconstitutional Take Title provision from the Act's other options, see *id.* at 175–76 ("Unlike the first two sets of incentives, the [T]ake [T]itle incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution."); *see also* Caminker, *supra* note 16, at 1009 ("The Supreme Court has long held that Congress may employ a variety of strategies to require or encourage state officials to promote federal objectives.").

32. *See New York*, 505 U.S. at 163–66.

33. *See, e.g.*, Caminker, *supra* note 16, at 1042 (citing *New York*, 505 U.S. at 162–66).

34. *See* Caminker, *supra* note 16, at 1004; Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1570 (1994). *But see* Hills, *supra* note 16, at 817.

35. As respondent in *New York v. United States*, the federal government argued that when "the federal interest is sufficiently important," Congress may impinge on state sovereignty. *New York*, 505 U.S. at 177–78. While the Court acknowledged a past line of cases in which the Court "stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign," it clarified that it had "more recently departed from [that] approach." *Id.* In firmly rejecting this argument, the Court stated clearly that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *Id.*

36. Printz v. United States, 521 U.S. 898, 903 (1997).

provisions of the Brady Act, arguing that it "pressed [them] into federal service" and that such "congressional action compelling state officers to execute federal laws is unconstitutional."[37]

The Court fractured, with Justice Scalia writing for a majority of five[38] that found these parts of the Brady Act unconstitutionally commandeered state executive officers.[39] Adding to its holding in *New York*, the Court in *Printz* declared that the anticommandeering doctrine prohibits Congress from requiring state officers to implement federal law.[40]

C. Congress Cannot Command States to Not Pass a Law

The Court's most recent commandeering decision, *Murphy v. NCAA*, added significantly to the Court's anti-commandeering doctrine. In *New York* and *Printz*, the Court addressed statutes that *affirmatively* told the states that they must take a certain action. The issue in *Murphy* dealt with the converse, a federal law that told the states that they must *refrain* from taking a certain action.[41]

In *Murphy*, the Court examined whether the Professional and Amateur Sports Protection Act (PASPA)[42] provision that made it

37. *Id.* at 905.

38. Justices O'Connor and Thomas filed concurrences. *See id.* at 935 (O'Connor, J., concurring); *id.* (Thomas, J., concurring). Justice Stevens dissented with Justices Souter, Ginsburg, and Breyer. *See id.* at 939 (Stevens, J., dissenting).

39. *Id.* at 933 (majority opinion).

40. *Id.* at 935 ("Congress cannot circumvent [the] prohibition [against commandeering states] by conscripting the State's officers directly."). In declaring the challenged provisions of the Brady Act unconstitutional, the majority repeated the refrain from *New York* that "the only proper objects of government" were the people and, thus, "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 919–20 (quoting *New York*, 505 U.S. at 161–66); *see also* THE FEDERALIST NO. 15 (Alexander Hamilton). In his dissent, Justice Stevens argued that the Brady Act was different from the RWA in *New York* because it was directed at individuals (CLEOs), not the States. *See Printz*, 521 U.S. at 955 n.16 (Stevens, J., dissenting). The majority responded that, while technically true that the Brady Act regulated "individuals," it did so "in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State." *Id.* at 930 (majority opinion).
For a case that addressed a statute regulating *both* states and private individuals, see Reno v. Condon, 528 U.S. 141 (2000) (upholding the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721–2725, because the Act did not solely regulate states, but instead was "generally applicable" and therefore did not violate the anticommandeering doctrine).

41. *See* Murphy v. NCAA, 138 S. Ct. 1461, 1470 (2018); 28 U.S.C. § 3702(1) (making it "unlawful for . . . a governmental entity to . . . authorize by law . . . gambling . . . on" sporting events). Until *Murphy*, scholars had perceived a distinction between the federal government issuing negative and affirmative duties on states. *See* Adler & Kreimer, *supra* note 16, at 89.

42. 28 U.S.C. §§ 3701–3704.

unlawful for states or localities to "authorize by law . . . [a] betting, gambling, or wagering scheme" involving competitive sports violated the anticommandeering doctrine.[43] In 2011, New Jersey amended its constitution to allow its legislature to enact sports gambling legislation, which did so the following year, setting up a clash between its law and PASPA.[44] New Jersey argued that PASPA was unconstitutional because it "*requires* States to maintain their existing laws against sports gambling without alteration."[45]

In analyzing whether PASPA commandeered the states, the Court had to parse the blurry line between preemption and commandeering.[46] Indeed, respondents National Collegiate Athletic Association (NCAA) and the United States, seeking to have the Court uphold PASPA, argued that PASPA's prohibiting states from enacting laws that authorize sports gambling was an example of permissible preemption because, as a negative duty, it directed states not to take a certain action and therefore did not constitute commandeering.[47]

Justice Alito, writing for a majority of seven,[48] held the distinction between negative and affirmative duties to be "empty."[49] Whether Congress affirmatively tells states they must act or negatively imposes a prohibition on states, "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies . . . ."[50] Thus, the Court concluded that PASPA violated the anticommandeering doctrine.[51]

43. *Murphy*, 138 S. Ct. at 1470; 28 U.S.C. § 3702(1).

44. *Murphy*, 138 S. Ct. at 1471.

45. *Id.* at 1473 (emphasis added).

46. For more on the line between preemption and commandeering, see Bulman-Pozen, *supra* note 3, at 2042 n.55 ("Commentators have long recognized the fraught relationship between preemption and commandeering."); Adler & Kreimer, *supra* note 16, at 89–92 (noting that while the authors "agree with other scholars that the commandeering/preemption distinction is most plausibly and sympathetically fleshed out in terms of . . . the action/inaction distinction," . . . "the distinction is a contested one"). Before *Murphy*, the weight of scholarship seemed to have centered on the view that federal policies that impose "duties of inaction" were valid preemptive measures while federal policies that imposed duties of action constituted invalid commandeering. *See* Adler & Kreimer, *supra* note 16, at 89 n.66; Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2201–02 (1998); Hills, *supra* note 16, at 870–71; Caminker, *supra* note 16, at 1054–55.

47. *Murphy*, 138 S. Ct. at 1478.

48. Justice Breyer joined Justice Alito's opinion on the merits of the Tenth Amendment commandeering portion of the opinion; he and Justice Sotomayor joined Justice Ginsburg's dissent from the majority opinion on severability. *See id.* at 1488 (Breyer, J., concurring in part and dissenting in part); *id.* at 1488–90 (Ginsburg, J., dissenting).

49. *Id.* at 1478 (majority opinion).

50. *Id.*

51. *Id.* The Court also clarified what constitutes valid federal preemption by laying out two requirements. First, a provision "must represent the exercise of a power conferred on

While these cases illustrate the current anticommandeering doctrine and how it seeks to maintain balance between the states and federal government, notably absent is the dynamic that Parts IV, V, and VI discuss: delegation that purportedly authorizes the Executive Branch to dictate state policy. The next part will review delegation doctrine.

III. DELEGATION AND THE HORIZONTAL BALANCE OF POWER

Similar to the anticommandeering doctrine discussed in Part II, delegation doctrine is concerned with the balance of power.[52] Delegation doctrine, however, governs the horizontal separation of powers between the Legislative and Executive Branches.[53] Since the Constitution vests Congress with "[a]ll legislative [p]ower,"[54] courts and commentators alike are concerned with the Executive Branch exercising Congress' constitutional power through its own policymaking.[55] At the same time, some delegation is necessary to allow government to function.[56] Thus, courts must determine the extent to which Congress can transfer policymaking authority to the Executive.[57]

Congress by the Constitution." *Id.* at 1479. Second, the Court reiterated a consistent element from the anticommandeering cases that Congress can "regulate individuals, not States" and, therefore, the provision "must be best read as one that regulates private actors." *Id.* at 1478; *see also* New York v. United States, 505 U.S. 144, 166 (1992).

52. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1495 (1987) (noting that "in separating and dividing power, whether horizontally or vertically, the Federalists pursued the same strategy: Vest power in different sets of agents who will have personal incentives to monitor and enforce limitations on each other's powers.").

53. *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 5 (1999) ("[T]he history of American political development from 1789 to the present can be viewed as an attempt at a manageable arrangement that allows government to be effective yet responsive.").

54. U.S. CONST. art. I, § 1.

55. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (discussing the threat that arises when delegation allows "a single executive branch official [to] write laws restricting [people's] liberty"); Cynthia R. Farinia, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 523 (1989) ("[T]he dominance of the executive that has followed the delegation of regulatory power cannot be squared with the original commitment to separation of powers . . . .").

56. *See* THE FEDERALIST NO. 44 (James Madison) ("No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.").

57. *See* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("The whole theory of *lawful* congressional 'delegation' is . . . that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—[what] that degree shall be.").

For nearly a century, the Supreme Court has largely approved of broad Congressional delegation to the Executive.[58] As a result, the administrative state has grown and, more recently, the President has asserted greater control over the regulatory apparatus.[59] This part covers the Supreme Court's decisions that provide today's permissive delegation doctrine, as well as the related trend of greater presidential control over the administrative state.

A. Delegation Doctrine

While the Constitution solely vested Congress with legislative power, it is also apparent that Congress must be able to delegate some policymaking authority in order to govern effectively.[60] Thus, in earlier iterations of the delegation doctrine, the Supreme Court fluctuated between the hardline stance that "[C]ongress cannot delegate legislative power"[61] and the recognition that Congress could delegate policymaking authority as long as it provided its delegee with "an intelligible principle . . . ."[62]

As the administrative state began to rise, particularly in the 1930s in response to the Great Depression, the Court had to assess starker instances of Congress delegating its policymaking function.[63] Indeed, the only two times that the Supreme Court has outright invalidated a statute for delegating too much lawmaking power both occurred in 1935.[64]

In one of those cases, *A.L.A. Schechter Poultry Corp. v. United States*, the Court reviewed § 3 of the National Industrial Recovery Act of 1933.[65] Section 3 authorized trade and industrial groups to create "codes of fair

58. *See, e.g.*, *id.* at 416 (noting that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

59. *See* Bulman-Pozen, *supra* note 1, at 466. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing the current era of "presidential administration").

60. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935) (recognizing "the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly"); THE FEDERALIST NO. 44 (James Madison); *see also* U.S. CONST. art. I, § 8, cl. 18 (authorizing Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its legislative powers).

61. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

62. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

63. *See, e.g.*, Bulman-Pozen, *supra* note 1, at 466–67.

64. *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 538–42.

65. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 521–26.

competition" that would then require the President's approval.[66] The Supreme Court held that the codes were impermissibly designed to allow non-congressional actors to create "new and controlling prohibitions . . . ."[67] Specifically, § 3 allowed "[industry] proponents of a code . . . [to] roam at will, and the President [to] approve or disapprove their proposals as he see[s] fit," which the Court found to be "a delegation of legislative power . . . unknown to our law and . . . utterly inconsistent with the constitutional prerogatives and duties of Congress."[68] *Schechter* thus became the high-water mark of the nondelegation doctrine, which provides that courts should invalidate legislation that delegates too broadly to the Executive.[69]

However, in just under a decade after *Schechter*, the Court softened its approach to delegation in *Yakus v. United States*.[70] The *Yakus* standard says that Congress need not "find for itself every fact upon which it desires to base legislative action" because "[t]he essentials of the legislative function are the determination of the legislative policy . . . ."[71] The *Yakus* standard, together with the "intelligible principle" standard that the Court had previously laid down,[72] provides the framework for the current delegation doctrine.[73]

For example, in *Whitman v. American Trucking Ass'ns, Inc.*, the Supreme Court applied this framework when it reviewed § 109(b)(1) of the Clean Air Act.[74] This section "instructs the EPA to set 'ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator . . . are requisite to protect the public health.'"[75]

The Supreme Court in *Whitman* upheld § 109(b)(1), concluding that Congress did not impermissibly delegate its legislative power because the statute contained a public policy with an intelligible principle regarding

66. *Id.* at 521–22.

67. *Id.* at 535.

68. *Id.* at 537–38.

69. *See, e.g.*, Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318–19 (2000). While the nondelegation doctrine has remained dormant since *Schechter*, the possibility of a resurgence has grown in recent years, particularly with Justice Gorsuch's rise to the Supreme Court. *See infra* Part VI.A.

70. 321 U.S. 414 (1944).

71. *Id.* at 424.

72. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

73. *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 333 (1999) ("In the decades since *Schechter Poultry* . . . nondelegation challenges have been routinely repudiated.").

74. Whitman v. Am. Trucking Assocs., Inc., 531 U.S. 457, 472–76 (2001).

75. *Id.* at 472.

the necessity of regulating air pollution.[76] Specifically, the Court found that the Clean Air Act required the EPA to "'establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air.' Requisite, in turn, 'mean[s] sufficient, but not more than necessary.'"[77] This limitation—"sufficient, but not more than necessary"—sufficed as the "intelligible principle" that Congress gave to its delegee, the EPA.[78] Thus, since *Yakus*, the Supreme Court has left the nondelegation doctrine dormant and instead has permitted Congress to delegate broadly as long as it provides an intelligible principle.

B. Presidential Control of the Administrative State

While the Court's decision in *Whitman* illustrates the latitude Congress has to delegate, a related issue is where delegated power ends up and how Congress' delegee exercises its power. As Congress delegated broad policymaking authority, a competition emerged among federal actors and, in recent years, the states,[79] as to who will create policy.[80] Over the past forty years, the President has dominated this power struggle.[81]

President Reagan, for example, asserted great fiscal control over administrative policymaking in his effort to shrink the regulatory state.[82] President Clinton issued an executive order that provides "the President [with] authority to direct executive department . . . heads in the exercise of their delegated rulemaking power."[83] President George W. Bush issued signing statements to legislation that "challenged the constitutionality of various aspects of congressional acts" whenever he felt they "impinged on the executive's absolute authority."[84]

76. *Id.* at 473–74.

77. *Id.* at 473.

78. *Id.* at 472–73. In a concurrence, Justice Stevens argued that Congress was not merely providing an intelligible principle, but rather was indeed providing the EPA with "legislative power" and, further, that this was constitutionally permissible. *Id.* at 488 (Stevens, J., concurring).

79. *See* Bulman-Pozen, *supra* note 1, at 461 ("In recent years, states have . . . assumed a prominent role in challenging federal executive power.").

80. Kagan, *supra* note 59, at 2246 ("The history of the . . . administrative state is the history of competition among different entities for control of its policies.").

81. *See id.* ("We live today in an era of presidential administration.").

82. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,193–94 (Feb. 17, 1981).

83. Kagan, *supra* note 59, at 2288; *see also* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,743 (Sept. 30, 1993).

84. Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REGUL. 549, 557

Some argue that the Executive Branch's accumulation and assertion of administrative power increases the danger for abuse.[85] In addition to the constitutional concerns alluded to before, delegation critics emphasize the lack of process[86] and political accountability[87] when the Executive holds so much sway over policy. The last decade in particular has seen stark examples of the Executive Branch acting unilaterally under both Presidents Obama and Trump.[88] Thus, according to some, the efficient governance that delegation provides can simultaneously threaten democratic norms.[89]

These threats are typically framed as effecting the balance of power between the Legislative and Executive Branches, but recent scholarship has begun to recognize how Executive power can impact the states.[90] The next section covers litigation that illustrates how delegation to the Executive Branch can have federalism implications.

IV. CASE STUDY: EXECUTIVE COMMANDEERING IN ACTION

In 2017, the Department of Justice (DOJ) under then-Attorney General Jefferson B. Sessions announced new conditions for state governments[91] applying for law enforcement funding from the Edward Byrne Memorial Justice Assistance Grant.[92] One condition required applicants to certify compliance with 8 U.S.C. § 1373.[93] Section 1373 provides that state governments cannot prohibit their employees from communicating with federal immigration authorities.[94] Several states challenged these conditions, arguing, inter alia, that the DOJ acted outside the scope of the funding statute and unconstitutionally

(2018); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 55 (2009).

85. *See* Farinia, *supra* note 55, at 523; William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 506 (2008). *See also* Mashaw & Berke, *supra* note 83, at 557–58.

86. *See, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 239–40 (2000).

87. *See* Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (remarking that delegation prevents "the sovereign people . . . [from] know[ing], without ambiguity, whom to hold accountable for the laws they would have to follow").

88. *See generally* Bulman-Pozen, *supra* note 3; Mashaw & Berke, *supra* note 83.

89. *See* Farinia, *supra* note 55, at 523; Marshall, *supra* note 84, at 506; *see also* Mashaw & Berke, *supra* note 84, at 557–58.

90. *See* Bulman-Pozen, *supra* note 3, at 2031.

91. This Note uses "state" to encompass state and local governments. *See* Adler & Kreimer, *supra* note 16, at 72 n.6.

92. DOJ Press Release, *supra* note 7.

93. *See id.*

94. *See* 8 U.S.C. § 1373(a).

commandeered the states by requiring compliance with § 1373.[95] The First, Third, Seventh, and Ninth Circuits held that the DOJ conditions were invalid.[96] The Second Circuit upheld the conditions, concluding that Congress delegated the authority to the DOJ to set the conditions.[97]

A. Background: Byrne JAG Program and Sanctuary Cities

In 2006, Congress codified the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program at 34 U.S.C. §§ 10151 to 10158 to provide funding for state law enforcement.[98] The Byrne JAG program conferred significant authority to the Attorney General, including the ability to specify the "form" characteristics that grant applicants must satisfy to receive funding.[99]

Separately from the Byrne JAG program, some states have created policies that prohibit cooperation between their officials and federal immigration enforcement.[100] These governments, deemed "sanctuary jurisdictions,"[101] did so to improve cooperation between law enforcement and undocumented residents.[102]

In 1996, Congress passed 8 U.S.C. § 1373 to curtail state efforts to establish sanctuary jurisdictions.[103] Specifically, § 1373 disallows state

95. *See* New York v. U.S. Dep't of Just., 343 F. Supp. 3d 213, 225 (S.D.N.Y. 2018). There, the plaintiffs also argued that the conditions were ultra vires under the Administrative Procedure Act (APA), not in accordance with the APA, and arbitrary and capricious under the APA. *Id.*

96. *See* City & Cnty. of San Francisco v. Barr, 965 F.3d 753, 766 (9th Cir. 2020); City of Chicago v. Barr, 961 F.3d 882, 931 (7th Cir. 2020); City of Providence v. Barr, 954 F.3d 23, 45 (1st Cir. 2020); City of Philadelphia v. Att'y Gen., 916 F.3d 276, 293 (3d Cir. 2019).

97. *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 123–24 (2d Cir. 2020).

98. *See* 34 U.S.C. §§ 10151–58. The Byrne JAG program derives from the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

99. 34 U.S.C. § 10153(a).

100. *See, e.g.*, N.Y.C. Exec. Order No. 124 (Aug. 7, 1989).

101. *See, e.g.*, Bulman-Pozen, *supra* note 3, at 2043 (noting that such state and local governments have been "colloquially but imprecisely labeled 'sanctuary' jurisdictions . . . .").

102. *See* City of Chicago v. Barr, 961 F.3d 882, 886–87 (7th Cir. 2020); *see also* THEODORE, *supra* note 5, at 3, 17–18; WONG ET AL., *supra* note 5, at 9.
While sanctuary jurisdictions have barred cooperation between their law enforcement officers and the federal government, other jurisdictions have *mandated* such cooperation. *See, e.g.*, Bulman-Pozen, *supra* note 1, at 484 n.94 (detailing five states that enacted mandatory cooperation between state officials and federal immigration enforcement). Such divergent policymaking among states encapsulates how federalism manifests geopolitical diversity and government innovation. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous [S]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

103. New York v. U.S. Dep't of Just., 951 F.3d 84, 96 n.8 (2d Cir. 2020).

governments from "prohibit[ing], or in any way restrict[ing], any government entity or official from sending to, or receiving from"[104] federal immigration enforcement "information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[105] During hearings where Congress discussed § 1373, several Senators proposed conditioning federal funding to states and localities on those governments complying with what would become § 1373.[106] These efforts failed, and despite the passage of § 1373, states continued to restrict their officials from cooperating with federal immigration officials.[107] Congress would subsequently consider legislation to condition funding on compliance with § 1373 but failed each time.[108]

B. Byrne JAG Program Conditions

From the beginning of President Trump's tenure, he and Attorney General Sessions sought to deprive sanctuary cities and states of federal funding.[109] On July 25, 2017, Attorney General Sessions announced that applicants for the Byrne JAG program would have to satisfy certain DOJ conditions to receive funding, including certifying compliance with § 1373 (the Certification Condition).[110]

104. 8 U.S.C § 1373(a). Section 1373 refers to the Immigration and Naturalization Service (INS), but Congress eradicated the INS in 2002 when it created the Department of Homeland Security (DHS). *See* 6 U.S.C. § 291. The INS' responsibilities were split between three divisions of DHS: the United States Citizenship and Immigration Service, the Immigration and Customs Enforcement Service, and the Customs and Border Protection Service. *See* 6 U.S.C. §§ 111, 211, 251–52, 271.

105. 8 U.S.C. § 1373(a).

106. *New York*, 951 F.3d at 96–97 (citing *The Impact of Immigration on the United States and Proposals to Reform U.S. Immigration Laws: Hearing Before the Subcomm. on Immigr. & Refugee Affs. of the Comm. on the Judiciary*, 103d Cong. 45 (1994) (statement of Sen. Alan K. Simpson) ("I believe cooperation has to be [a] condition[] for any Federal reimbursement.")).

107. *See* New York v. U.S. Dep't of Just., 951 F.3d at 98.

108. *See* Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. § 4 (2016); Stop Dangerous Sanctuary Cities Act, S. 3100, 114th Cong. § 4 (2016); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. § 3 (2015); Mobilizing Against Sanctuary Cities Act, H.R. 3002, 114th Cong. § 2 (2015); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. § 3(a) (2015); Stop Sanctuary Cities Act, S. 1814, 114th Cong. § 2 (2015); *see also* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 553 n.87 (2017) (describing the proposed legislation and the failed attempts to pass it).

109. *See Major Developments Relating to "Sanctuary" Cities Under the Trump Administration*, *supra* note 6. For a timeline of the Trump administration's efforts to cut funding to sanctuary jurisdictions, see *id.*

110. *See* DOJ Press Release, *supra* note 7. In addition to the Certification Condition, the Department of Justice included two other requirements for grant applicants. *Id.* First, applicants would have to, "upon request[] . . . give advance notice to the Department of

The announcement triggered a series of lawsuits around the country, with states seeking to enjoin the conditions and release the funding.[111] Five district courts held that Congress did not give the DOJ the authority to impose the conditions;[112] three also found that § 1373 was facially unconstitutional.[113] On appeal, the First, Third, Seventh, and Ninth Circuits each held that the DOJ did not have the authority to issue these conditions.[114] The Second Circuit, however, found that the Byrne JAG statute authorized the DOJ to impose the conditions and that the Certification Condition did not violate the anticommandeering doctrine.[115]

C. Second Circuit Delegation Analysis

The Second Circuit panel first assessed the Byrne grant statutory text to see whether Congress had provided the Attorney General with the authority to impose conditions on Byrne JAG applicants.[116] The panel concluded that 34 U.S.C. § 10153(a) gave the Attorney General "considerable [statutory] authority" because "Byrne grant applicants [had] to submit [their] application[s] to [the] Attorney General 'in such form as the Attorney General may require,' including statutorily required certifications . . . ."[117]

Homeland Security . . . of the scheduled release date and time of aliens housed in state or local correctional facilities (the 'Notice Condition')." New York v. U.S. Dep't of Just., 343 F. Supp. 3d 213, 222 (S.D.N.Y. 2018). Second, applicants would have "to give federal agents access to aliens in state or local correctional facilities in order to question them about their immigration status (the 'Access Condition')." *Id.*

111. *See New York*, 343 F. Supp. 3d. at 224–26.

112. *See id.* at 231; City of Los Angeles v. Sessions, No. CV 17–7215–R, 2018 U.S. Dist. LEXIS 226842, at *7 (C.D. Cal. Sept. 13, 2018); City of Providence v. Barr, 385 F. Supp. 3d 160, 164 (D.R.I. 2019); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 296 (E.D. Pa. 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 873–76 (N.D. Ill. 2018).

113. *See City of Philadelphia*, 309 F. Supp. 3d at 329–30 (finding that, in light of the Supreme Court's decision in *Murphy*, § 1373 violated the Tenth Amendment's anticommandeering principle and was therefore unconstitutional); *City of Chicago*, 321 F. Supp. 3d at 872; *New York*, 343 F. Supp. 3d at 237.

The four circuit courts that invalidated the DOJ's Certification Condition did not need to reach a decision on the constitutionality of § 1373 because each rejected the DOJ's claimed authority to impose the Certification Condition based on statutory construction reasons. *See* City of Chicago v. Barr, 961 F.3d 882, 911–12 (7th Cir. 2020); City of Providence v. Barr, 954 F.3d 23, 36–39 (1st Cir. 2020); City of Philadelphia v. Att'y Gen., 916 F.3d 276, 288–91 (3d Cir. 2019); *see also* City & Cnty. of San Francisco v. Barr, 965 F.3d 753, 761–64 (9th Cir. 2020) (holding that 8 U.S.C. § 1373 does not conflict with California's sanctuary laws).

114. *See City & Cnty. of San Francisco*, 965 F.3d at 753; *City of Chicago*, 961 F.3d at 931; *City of Providence*, 954 F.3d at 45; *City of Philadelphia*, 916 F.3d at 293.

115. *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 123 (2d Cir. 2020).

116. *Id.* at 100–01.

117. *Id.* at 103 & n.18.

While acknowledging that the Attorney General's power to determine qualifications for Byrne JAG applicants was not limitless, the panel reasoned that Congress prescribed the qualifications broadly and left it to "the Attorney General to delineate the rules and forms for them to be satisfied."[118]

In assessing the Certification Condition, the panel found that "[t]he Attorney General's statutory authority . . . derives from 34 U.S.C. § 10153(a)(5)(D)," which requires Byrne grant applicants to certify that they "will comply with all provisions of this part *and all other applicable Federal laws*."[119] For the Second Circuit, this included federal laws outside of the chapter pertaining to the Byrne JAG program.[120] In turn, the panel concluded that § 10153(a)(5)(D) authorized the Attorney General to require applicants to certify compliance with § 1373.[121]

D. Second Circuit Commandeering Analysis

Having found that the Attorney General had the authority to require compliance with § 1373, the question remained whether § 1373 was constitutional. If § 1373 was unconstitutional, then it could not be considered an "applicable [f]ederal law" under § 10153(a)(5)(D).[122]

The plaintiff states in *New York* contended that 8 U.S.C. § 1373 unconstitutionally commandeered states and thus "drops out of the possible pool of applicable federal laws requiring § 10153(a)(5)(D) certification."[123] Since the Second Circuit had previously upheld that a facial Tenth Amendment challenge to § 1373 arose in *City of New York v. United States*,[124] the District Court relied on subsequent Supreme Court precedent in *Murphy v. NCAA* to arrive at its ruling.[125]

Murphy, the District Court reasoned, effectively overruled the circuit's prior holding in *City of New York* when it characterized "the distinction . . . between affirmative obligations and proscriptions" as "empty."[126] As such, the District Court concluded that § 1373 violated the Tenth Amendment on its face since it "unequivocally dictates what a state legislature may . . . not do."[127]

118. *Id.* at 104.
119. *Id.* at 104–06 (internal quotation marks omitted).
120. *Id.* at 105.
121. *Id.* at 105–08.
122. *See id.* at 111.
123. *Id.*
124. 179 F.3d 29, 31 (2d Cir. 1999).
125. New York v. U.S. Dep't of Just., 343 F. Supp. 3d 213, 233–34 (S.D.N.Y. 2018).
126. *Id.* at 234–35.
127. *Id.* (citing Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018)).

The Second Circuit panel conceded that "*Murphy* may . . . have clarified that prohibitions as well as mandates can manifest impermissible commandeering," but refuted "the conclusion that § 1373, on its face, violates the Tenth Amendment . . . ."[128] Emphasizing that immigration is a matter of federal policy, the court reasoned that there was no power reserved for the states and, hence, no valid Tenth Amendment challenge.[129]

Turning to its "as applied" analysis, the Second Circuit first noted that, since Congress can "fix the terms on which it shall disburse federal money to the [s]tates," it can also "influenc[e] a State's policy choices."[130] Under this conditional spending view, the Second Circuit concluded that "there is no commandeering of reserved State power so long as the State has 'a legitimate choice whether to accept the federal conditions in exchange for federal funds.'"[131] Accordingly, the court determined that the Byrne JAG applicants had sufficient choice, since awards represented relatively small portions of the plaintiff state's budgets and states could therefore accept the funds with the conditions or not.[132] With that, the Second Circuit reversed the District Court's holding that the Certification Condition unconstitutionally commandeered the states.[133]

V. DELEGATION AND THE BALANCE OF POWER BETWEEN THE STATES AND THE FEDERAL GOVERNMENT

The Second Circuit's decision in *New York v. United States Department of Justice* illustrates how courts reflexively approve delegation and the potential dangers therein. Until recently, the fallout from this permissive approach to delegation was thought to primarily affect the allocation of power between the Executive and Legislative Branches.[134] However, the Second Circuit's decision shows how delegation can upset the balance of power between the states and federal

128. *New York*, 951 F.3d at 113.

129. *Id.* at 113–14. While the Second Circuit relied on immigration being a matter of federal policy to find that there was no Tenth Amendment violation, this seems to contradict the Supreme Court's holding in *New York v. United States* that Congress cannot dictate state policy "[n]o matter how powerful the federal interest involved." 505 U.S. 144, 177–78 (1992).

130. New York v. U.S. Dep't of Just., 951 F.3d at 114 (internal quotation marks omitted) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); New York v. United States, 505 U.S. 144, 166 (1992)).

131. *Id.* at 115 (quoting Nat'l Fed'n Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 578 (2012)).

132. *Id.* at 115–16.

133. *Id.* at 116.

134. *See supra* notes 84–88 and accompanying text.

government and, therefore, can implicate both horizontal and vertical separation of powers concerns.

Further, these concerns fit into a backdrop of a broader power struggle between the states and federal government that has flared dramatically during the past two presidencies.[135] As hyper-partisanship largely gridlocked Congress, both of the two most recent presidents acted unilaterally to enact domestic policy and were "resisted by ideologically opposed states."[136]

The Second Circuit's decision throws another ingredient into this dynamic—executive commandeering by delegation—which tilts the scales towards the Executive Branch.[137] To better understand the nature of this problem, this part will critique the Second Circuit's delegation and commandeering analysis and sketch the implications of its decision for the balance of powers among Congress, the Executive, and the states.

A. Critiquing the Second Circuit's Decision

The Second Circuit's delegation analysis was flawed because it misconstrued the authority that Congress provided the Attorney General. To begin, the Second Circuit should not have accepted the Attorney General's broad reading of 34 U.S.C. § 10153(a) for authority to impose conditions on Byrne JAG program applicants.[138] This provision required applicants to the Byrne JAG program to submit their applications "in such form as the Attorney General may require . . . ."[139] As the First and Seventh Circuits rightly pointed out, § 10153(a)(5) gave the Attorney General the authority to determine only "the *form* of the certification, not [its] *content* . . . ."[140] By accepting this broad interpretation, the Second Circuit cleared the way for the Attorney General to impose conditions on funding.

Next, the Second Circuit erred in finding that 34 U.S.C. § 10153(a)(5)(D) authorized the Certification Condition. This subsection required applicants to certify that they will "comply with all provisions of this part and *all other applicable Federal laws*."[141] The Byrne JAG statute did not define what constitutes an "applicable Federal law[]." As

135. *See generally* Bulman-Pozen, *supra* note 3 (discussing the role states currently play in federal policymaking through support or resistance).

136. *Id.* at 2031.

137. *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 103–04 (2d Cir. 2020).

138. *See id.*

139. *Id.* at 103 n.18.

140. City of Chicago v. Barr, 961 F.3d 882, 906 n.6 (7th Cir. 2020); *see* City of Providence v. Barr, 954 F.3d 23, 39 (1st Cir. 2020).

141. 34 U.S.C. § 10153(A)(5)(D) (emphasis added).

such, the Second Circuit purported to rely on a plain reading of the statute and concluded that an applicable law is "one pertaining either to the State or locality seeking a Byrne grant or to the grant being sought."[142] This meant that the Attorney General could require compliance with laws outside the scope of the grant application, including 8 U.S.C. § 1373.[143]

Again, the First, Third, Seventh, and Ninth Circuits correctly reached the opposite conclusion and determined that this reading was inconsistent with the text and structure of § 10153(A)(5)(D).[144] As the Seventh Circuit put it, "[t]he most natural reading of . . . 'all other applicable' laws refers to the many federal laws that apply specifically to grants or grantees," not every law that appears in the United States Code.[145] In addition to this being the most natural reading of the statutory text, the legislative history shows that Congress considered conditioning federal funding on compliance with § 1373 but explicitly did not do so.[146] Finally, as the Seventh Circuit noted, "the Attorney General's interpretation [of § 10153(A)(5)(D)] would vest the executive branch with unbridled power to identify select federal laws and impose them as a precondition for the receipt of federal grant money allocated by Congress."[147] This, the Seventh Circuit concluded, "would allow the targeting of states or policy issues if the Attorney General chose to do so," a power that is inconsistent with states' "equal sovereignty" under the Constitution.[148]

The Second Circuit tacitly approved such targeting when it next held that the Attorney General's Certification Condition did not commandeer the states.[149] On the anticommandeering challenge, the Second Circuit ultimately concluded that the Certification Condition was akin to a cooperative federalism scheme, in which the federal government validly

142. *New York*, 951 F.3d at 106.

143. *Id.* at 107–08 (approving such a broad interpretation of *all applicable laws* such that the Attorney General could "condition the locality's receipt of a Byrne grant on its certified willingness to comply with . . . environmental laws").

144. *See City of Chicago*, 961 F.3d at 899; *City of Providence*, 954 F.3d at 39; City of Philadelphia v. Att'y Gen., 916 F.3d 276, 291 (3d Cir. 2019). The Ninth Circuit's decision in *City & County of San Francisco v. Barr* did not outright reject the notion that the Attorney General could condition funding on certification of compliance with § 1373. *See* City & Cnty. of San Francisco v. Barr, 965 F.3d 753, 763–64 (9th Cir. 2020). Instead, the Ninth Circuit relied on its precedent that narrowly interpreted § 1373 such that San Francisco's prohibition against using municipal funds to assist in federal immigration did not violate § 1373. *Id.*

145. *City of Chicago*, 961 F.3d at 899.

146. *See* sources cited *supra* note 106.

147. *City of Chicago*, 961 F.3d at 903.

148. *Id.* at 905.

149. New York v. U.S. Dep't of Just., 951 F.3d 84, 116 (2d Cir. 2020).

induced states to follow its preferred policies rather than an impermissible command to the states.[150] To arrive at this conclusion, the Second Circuit relied on precedent that affirms Congress's ability to "fix the terms on which it shall disburse federal money to the States."[151] Here, the Second Circuit cited to *National Federation of Independent Business v. Sebelius* (*NFIB*) to support the notion that "Congress [can] place[] conditions on a State's receipt of federal funds—whether directly*, or by delegation of clarifying authority to an executive agency* . . . ."[152] The problem with this analysis is that *NFIB* does not stand, in any way, for the proposition that Congress can delegate the authority to impose conditions on federal funding to the States.[153] Indeed, as the Second Circuit rightly notes in this part of its discussion, *Congress'* ability to impose conditions derives from the Spending Clause found in Article I, § 8, clause 1 of the Constitution.[154] While the delegation doctrine allows Congress to delegate policymaking authority, surely the separation of powers principle disallows Congress from delegating to the executive the powers that the Constitution directly confers on it.[155]

Finally, even if the Second Circuit were correct that Congress could delegate its Spending Clause power to allow the Executive Branch to impose funding conditions on states unilaterally, it incorrectly held that requiring compliance with § 1373 did not constitute commandeering.[156] On its face, § 1373 targets states by contravening the principle that Congress can regulate individuals, not states, as laid down by the Supreme Court in *New York* and *Printz*.[157] Moreover, it is clear that

150. *Id.* at 114–16.

151. *Id.* at 114 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

152. *Id.* at 115 (emphasis added) (citing Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 578 (2012)).

153. The language in *NFIB* to which the Second Circuit appears to refer remarks that Congress cannot use its spending power to command the states, which "is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *NFIB*, 567 U.S. at 578. This is fundamentally different from what the Second Circuit says about *NFIB*—that it stands for the proposition that Congress can place conditions on the states "whether directly[] *or by delegation of clarifying authority to an executive agency* . . . so long as the State has a 'legitimate choice . . .'" *New York*, 951 F.3d at 115.

154. *New York*, 951 F.3d at 114.

155. *See* City of Chicago v. Barr, 961 F.3d 882, 892 (7th Cir. 2020) ("[T]he power to wield the purse to alter behavior rests squarely with the legislative branch. Congress has thus far refused to pass legislation that would do precisely what the Attorney General seeks to do here.").

156. *See New York*, 951 F.3d at 116.

157. *See supra* notes 31–35, 39 and accompanying text.

§ 1373 provides precisely the type of negative command to the States that *Murphy* forbids.[158]

In *Murphy*, the Court held that the Professional and Amateur Sports Protection Act (PASPA), which tells states that they may not "authorize by law . . . betting" on competitive sports,[159] violated the anticommandeering doctrine because it "dictates what a state legislature . . . may not do."[160] Similarly, § 1373 disallows state governments from "prohibit[ing], or in any way restrict[ing]" any of its officials "from sending to, or receiving from" federal immigration enforcement "information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[161] As such, § 1373 prohibits "states and localities from restricting their officials from communicating with immigration authorities" which "constitutes a 'direct order[]' to states and localities in violation of the anticommandeering rule."[162] Thus, the Second Circuit erred when it found § 1373 to be an applicable law because it is an unconstitutional law.[163]

B. Political Context

The Second Circuit's decision takes place against a political backdrop in which "states are at once principal implementers and leading opponents of federal executive policy."[164] As such, the horizontal and vertical separation of powers concerns that arise from the Second Circuit's decision fit into a broader power struggle between the states and federal government.[165] In affirming the source and exercise of the Attorney General's power in the *New York* case, the Second Circuit has added a twist to that dynamic—executive commandeering by delegation—which tilts the scales in favor of the federal government.[166]

158. *See* City & Cnty. of San Francisco v. Sessions, 349 F. Supp. 3d 924, 951 (N.D. Cal. 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 329–30 (E.D. Pa. 2018); *see also* Bulman-Pozen, *supra* note 3, at 2046 n.68; Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018).

159. 28 U.S.C. § 3702; *see Murphy*, 138 S. Ct. at 1470.

160. *Murphy*, 138 S. Ct. at 1478.

161. 8 U.S.C. § 1373(a).

162. New York v. U.S. Dep't of Just., 343 F. Supp. 3d 213, 235; *see also City & Cnty. of San Francisco*, 349 F. Supp. 3d at 951; *City of Chicago*, 321 F. Supp. 3d at 873; *City of Philadelphia*, 309 F. Supp. 3d at 329–30.

163. *See* City of Chicago v. Barr, 961 F.3d 882, 898 (7th Cir. 2020).

164. Bulman-Pozen, *supra* note 3, at 2031.

165. *See id.*

166. *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 115 (2d Cir. 2020) (addressing constitutionality "where Congress places conditions on a State's receipt of federal funds—whether directly, or by delegation of clarifying authority to an executive agency").

While the Supreme Court dismissed the petition to review the Second Circuit's decision after President Biden's Justice Department altered course on Byrne JAG program funding conditions,[167] the case may nonetheless establish a playbook for other forms of executive commandeering. Indeed, the Obama era was replete with the same hyper-partisanship that resulted in political skirmishes where Republican states repeatedly challenged federal policies.[168] For its part, the Biden Administration has signaled it is willing to condition federal funding on compliance with Title VI and the Omnibus Crime Control Act.[169] Had the Second Circuit's decision stood during the Obama administration, its logic would have provided a blueprint to circumvent the structural limits on executive power merely by conditioning funding on state adherence to its initiatives.

For example, immigration policy also stoked rivalries between the states and federal government during President Obama's tenure. In one instance, having failed to get Congress to take up immigration reform,[170] President Obama's Department of Homeland Security issued a directive that created the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).[171] The directive announced its intention

167. *See* New York v. U.S. Dep't of Just., 951 F.3d 84 (2d Cir. 2020), *petition for cert. dismissed*, No. 20-795 (Mar. 4, 2021); *see also* Mashaw & Berke, *supra* note 83, at 551 (noting "a general lack of durability for presidential policy actions" when an incoming administration is of a different political party than its successor).

168. *See generally* Bulman-Pozen, *supra* note 3 (discussing how political polarization and the resulting gridlock in Congress drove increases in unilateral executive actions that affected the states); *see also* Mashaw & Berke, *supra* note 84, at 563–68, 579–84, 588–97 (detailing President Obama's administrative actions on immigration, the environment, and the administrative state generally).

169. Memorandum from Vanita Gupta, Associate Attorney General, to Kristen Clark, Assistant Attorney General, Civil Rights Division, et al. (Sept. 15, 2021), https://www.justice.gov/asg/page/file/1433211/download [hereinafter Gupta Memo]; *see also* Katie Benner, *Justice Dept. to Review Enforcement of Civil Rights Protections in Grants*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/09/16/us/politics/justice-department-civil-rights-protections.html.

170. Press Release, White House Off. of the Press Sec'y, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration (discussing how gridlock in Congress on immigration legislation compelled the executive action creating DAPA); *see also* Mashaw & Berke, *supra* note 84, at 565 n.96.

171. *See* Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., USCIS et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.

to make undocumented residents eligible to be considered lawfully present in the United States.[172]

Texas, along with over twenty-five other states led by Republicans, challenged this executive action in federal court.[173] Pertinent to this discussion, the states argued that providing lawful presence would "allow otherwise ineligible aliens to become eligible for state-subsidized driver's licenses" and, further, that "DAPA recipients would also become eligible for unemployment insurance."[174] In other words, the states claimed that the executive action required them to implement policies to provide public benefits to undocumented residents against the states' wills.[175]

In enjoining the DAPA program, the court determined that "DAPA affects the states' 'quasi-sovereign' interests by imposing substantial pressure on them to change their laws . . . ."[176] Under the Second Circuit's reasoning, however, the Obama Administration could have argued that Congress authorized it to enact such immigration policies, even if the policies affect those of a sovereign state.[177]

DAPA was by no means the only clash between the federal government and states on national policy,[178] let alone immigration policy during President Obama's tenure.[179] Moreover, the partisanship that drove such conflicts between the federal government and the states under

172. *Id.* at 3–4. In the memo introducing DAPA, Department of Homeland Security Secretary Jeh Johnson stated that "[a]lthough deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes." *Id.* at 2.

173. *See* Texas v. United States, 809 F.3d 134, 134, 146 (5th Cir. 2015).

174. *Id.* at 149.

175. While the anticommandeering doctrine was not directly raised by plaintiff states in the DAPA litigation, the Fifth Circuit's discussion on standing did invoke several elements that the Tenth Amendment and the doctrine contain. *See id.* at 153.

176. *Id.*

177. *See supra* note 170.

178. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 575 (2012); Bulman-Pozen, *supra* note 3, at 2035–38 ("[H]ealthcare policy . . . has been shaped principally by cooperation and contestation between the federal executive branch and different groups of states."); Mashaw & Berke, *supra* note 84, at 562–607 (providing case studies of President Obama's use of executive authority). In *NFIB*, the Court reviewed Congress's requirement that "States . . . expand their Medicaid programs" or risk losing all of their Medicaid funds. 567 U.S. at 575–76, 579–80. The Court invalidated the Medicaid expansion for impermissibly compelling states to accept Congress's terms because the policy amounted to an unconstitutional "gun to the head" of the states since "[a] state that opts out of the Affordable Care Act's expansion in health care coverage . . . stands to lose . . . *all* of [its existing Medicaid funding]." *Id.* at 577–81.

179. *See* Arizona v. United States, 567 U.S. 387, 392–94 (2012) (reviewing state legislation that sought to compel the federal government to enforce immigration laws more stringently); Bulman-Pozen, *supra* note 1, at 484–86.

President Obama persisted into the Trump administration,[180] and has continued into President Biden's tenure.[181]

For example, in September 2021, President Biden's Administration ordered a review of state and local compliance with nondiscrimination requirements in federal laws "to ensure that public funds are not being used to finance illegal discrimination."[182] Specifically, the Biden Justice Department's review assesses whether recipients of federal funding are in compliance with the nondiscriminatory requirements in both Title VI and the Omnibus Crime Control Act.[183] In executing this action, the Biden Justice Department is also aligning its review with President Biden's Executive Order *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*.[184] Thus, the Biden Administration's steps to root out noncompliance with nondiscriminatory requirements in federal law mirror the Trump Administration's directives that resulted in the circuit split described in Part IV: the Biden Administration first issued an Executive Order advancing updated definitions and policies and followed it with the Justice Department announcement that calls federal funding into question for noncompliant states.

Other similarly controversial issues that may present executive commandeering concerns during the Biden presidency include COVID responses, environmental protection, healthcare, and drug laws.[185] Regardless of which issue, though, the same possibilities for abuse that stem from the Second Circuit's decision in *New York* continue to exist: federal policymakers that seek to exert power over states but are unable or unwilling to achieve their objectives through Congress make an end-run around the legislative process by claiming Congress already delegated the authority that allows them to achieve their objective.

180. *See, e.g.*, Bulman-Pozen, *supra* note 3, at 2031 ("In an age of polarization, states are at once principal implementers and leading opponents of federal executive policy.").

181. *See, e.g.*, Harry Enten, *How Partisanship is Already Hurting Biden in the Polls*, CNN POLITICS (Jan. 31, 2021, 12:03 PM), https://www.cnn.com/2021/01/31/politics/biden-approval-rating-analysis/index.html.

182. Gupta Memo, *supra* note 169; *see also* Benner, *supra* note 169.

183. Gupta Memo, *supra* note 169 ("Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating against any person on the basis of race, color, or national origin. 42 U.S.C. §2000d. The nondiscrimination provisions of the Omnibus Crime Control and Safe Streets Act are modeled on Title VI and prohibit discrimination on the basis of race, color, national origin, religion, and sex in connection with any program or activity funded with specific law enforcement assistance funds.").

184. *See* Gupta Memo, *supra* note 169; Federal Regulation, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

185. *See* Bulman-Pozen, *supra* note 3, at 2033, 2035, 2042–43.

In this context, the Second Circuit's approval of the Trump administration's imposition of funding conditions against sanctuary cities and states reveals its true threat. The concern with the decision is not simply that it allows a specific example of federal commandeering. Rather, if the decision stands, and if federal agencies follow the playbook that it provided, executive authority would be dangerously expanded, giving the federal government a powerful tool to dictate state policies. This concern demands that courts apply a cogent approach to mitigate such risk.

VI. THE ANTICOMMANDEERING CANON

While federal agencies claiming authority from broad statutory provisions is not a new phenomenon,[186] the trend of the President asserting control of the administrative state affects the horizontal balance of power.[187] Moreover, the Executive Branch's recent use of this power to influence state policies has altered the vertical separation of powers.[188]

The litigation discussed in Part IV reveals a gap that exists in the interaction of the delegation and anticommandeering doctrines. This gap would allow Congress to delegate authority that would then permit the executive to dictate state policy. Thus, courts must therefore equip themselves to limit this type of delegation.

In this part, I argue that the best response to this risk is an anticommandeering canon. I first discuss the difficulties with direct judicial enforcement of the constitutional prohibition of Congress delegating its legislative power—the nondelegation doctrine.[189] I then describe a more tempered approach, nondelegation canons, that courts have recognized in other contexts and explain how the same considerations that motivate those canons apply to the problem of executive commandeering.

186. *See* Bulman-Pozen, *supra* note 1, at 466 ("Since the New Deal, administrative agencies have carried out vast amounts of highly discretionary policymaking under broad delegations from Congress.").

187. *See* Kagan, *supra* note 59, at 2246.

188. *See, e.g.*, Bulman-Pozen, *supra* note 3, at 2031 (arguing that as domestic policy increasing "has nearly nothing to do with Congress . . . we should shift much of our focus from the national legislature to the fifty states").

189. *See, e.g.*, Sunstein, *supra* note 69, at 321–28 (discussing the "[p]roblems, [i]nstitutional and [o]therwise" with the conventional nondelegation doctrine).

A. Nondelegation Doctrine and Its Critics

As mentioned in Part III, there is significant debate as to the extent to which courts should restrict delegation. One option is the nondelegation doctrine, exemplified by *Schechter*, where courts invalidate statutes if Congress fails to state its intention with sufficient clarity.[190] Nondelegation doctrine proponents commonly note that the Constitution assigns Congress, and only Congress, the ability to legislate.[191] Further, the structural argument against delegation emphasizes the effectiveness of Congress' bicameral structure in establishing a deliberative legislative process.[192] This process, along with the implicit fact that its members of Congress are elected representatives, serves to "ensure that national governmental power may not be brought to bear against individuals without a consensus . . . ."[193] Broad delegation, the argument goes, erases these safeguards by placing policymaking decisions in the hands of unelected bureaucrats and political appointees.[194] Finally, the political argument against delegation stresses accountability, as delegation prevents "[t]he sovereign people . . . [from knowing], without ambiguity, whom to hold accountable for the laws they would have to follow."[195]

Justice Gorsuch is the main proponent of the nondelegation doctrine currently on the Supreme Court, with his dissent in *Gundy v. United States* amounting to a call to arms to revivify the doctrine.[196] In *Gundy*,

190. *See generally* Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (excavating and compiling the constitutional, doctrinal, and scholarly history that leads to the conclusion that overly broad delegation is "extraconstitutional").

191. *Id.* at 2133–35. *But see* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) ("A statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power.").

192. *See, e.g.*, Manning, *supra* note 85, at 239–40.

193. Sunstein, *supra* note 69, at 320.

194. *Id.* at 319; DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 90–93 (1993); City of Chicago v. Barr, 961 F.3d 882, 892 (7th Cir. 2020) ("The authority to pass laws and the power of the purse rest in the legislative not the executive branch. The composition of the legislature—with elected representatives and dual chambers—provides institutional protection from the abuse of such power."). *But see* Posner & Vermeule, *supra* note 191, at 1751 (asserting that "constitutional values . . . are *formally* protected because the delegatory statute itself must go through bicameralism and presentment").

195. *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

196. *See id.* at 2131–48. Justice Gorsuch's concurrence in the Court's recent decision striking down an emergency rule by the Occupational Safety and Health Administration to require employers to implement vaccine mandates is the latest iteration of his commitment to the nondelegation doctrine. *See* Nat'l. Fed. Ind. Bus. v. OSHA, 595 U.S. ___, No. 21A244, slip op. at 4 (Gorsuch, J., concurring) (2022).

a plurality affirmed 34 U.S.C. § 20913(d) of the Sex Offender Registration and Notification Act, which authorized the Attorney General to "prescribe rules for the registration of . . . sex offenders . . . ."[197]

In his dissent in *Gundy*, Justice Gorsuch raised each of the familiar nondelegation critiques discussed above in articulating a far more restrictive vision of delegation than the contemporary delegation doctrine that the plurality in *Gundy* upheld.[198] On his preferred standard, Justice Gorsuch would find the contested provision constitutionally invalid because it allowed the Attorney General to "write a criminal code rife with his own policy choices . . . ."[199] Under his view, Congress may delegate only by "assign[ing] the executive and judicial branches certain non-legislative responsibilities," as long as it "set[s] forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[200]

While Justice Gorsuch is gathering allies for his nondelegation doctrine on the Supreme Court,[201] many have effectively criticized it.[202] Foremost among these criticisms is that the nondelegation doctrine's efforts to better enunciate a clear separation of powers collapses on itself as it requires the *judiciary* to "rewrit[e] statutes[] and thus engag[e] in their own legislation."[203] Further, some suggest that the text and structure of the Constitution does not support the nondelegation doctrine.[204] Finally, requiring the specificity that nondelegation proponents clamor for would result in inefficient policymaking that, in turn, favors special interests.[205]

197. *Id.* at 2122–23, 2129 (plurality opinion) (holding that the statute provided a sufficient "intelligible principle" when it "conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible").

198. *See id.* at 2134–37 (Gorsuch, J., dissenting).

199. *Id.* at 2144.

200. *Id.* at 2136–37.

201. *See id.* at 2130–31 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken . . . [to delegation], I would support that effort.").

202. *See, e.g.*, Posner & Vermeule, *supra* note 191, at 1759; *see also* Sunstein, *supra* note 69, at 321.

203. Posner & Vermeule, *supra* note 191, at 1759; *see also* Sunstein, *supra* note 69, at 327 ("[J]udicial enforcement of the [nondelegation] doctrine would produce ad hoc, highly discretionary rulings, giving little guidance to lower courts or to Congress itself.").

204. *See, e.g.*, Posner & Vermeule, *supra* note 191, at 1729 (asserting that the Vesting Clause does not address "whether an otherwise valid statutory grant of authority can ever 'amount to' a delegation of legislative authority").

205. *See* Sunstein, *supra* note 69, at 325–26 nn.55–57.

B. The "Nondelegation Canons"

Beyond Justice Gorsuch's conventional nondelegation doctrine, canons of statutory construction provide an attractive, tempered alternative to enforcing the conventional nondelegation doctrine.[206] Among the various modes of statutory construction meant to address delegation issues are the "nondelegation canons."[207]

Cass Sunstein, who coined the term, conceptualized the delegation problem as assessing "the authority of agencies to act when Congress has not spoken clearly."[208] Courts have consistently used these canons[209] to narrowly interpret statutes and restrict impermissible agency interpretations.[210] As Sunstein explained in a later publication, these canons "operate as a kind of . . . brake on agency interpretations" and are "designed to forbid agency action unless it is explicitly authorized by the national Legislature."[211] When these canons are successfully invoked, "agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions . . . ."[212]

One of the three nondelegation canons that Sunstein describes is the constitutional canon.[213] Under this view, "agencies will not be permitted to construe statutes in such a way as to raise serious constitutional doubts."[214] For example, in *Kent v. Dulles*, the Court reviewed the act of Secretary of State John Foster Dulles denying two passport applications pursuant to a congressional Act that allowed the Secretary to limit the

206. Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 82 n.15 (2017) (discussing scholarship that "identif[ies] canons of statutory construction that substitute for underenforcement of non-delegation doctrine").

207. *See generally* Sunstein, *supra* note 69; *see also* Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1606 (2016) ("[S]cholars have long invoked certain 'nondelegation canons' to deal with normative issues raised by broad delegations to agencies.").

208. Sunstein, *supra* note 69, at 329.

209. Posner & Vermeule, *supra* note 191, at 1759 (noting the trend of courts "discourag[ing] delegation by narrowly interpreting statutes that make broad delegations").

210. Sunstein, *supra* note 69, at 330; *see also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion) (explaining that courts should avoid interpreting statutes in a way that permits a "sweeping delegation of legislative power").

211. Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1674 (2019).

212. Sunstein, *supra* note 69, at 330; *see also* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960–61 (discussing several cases where the Court opted to narrowly construe a statute to avoid a constitutional question).

213. Sunstein, *supra* note 69, at 330.

214. *Id.* at 331; *see also* Sunstein, *supra* note 211, at 1675 (explaining that the avoidance canon "means that statutes will be construed so as to stay away from the terrain of constitutional doubt").

issuance of passports to Communist sympathizers.[215] In reviewing this provision, the Court remarked that it conflicted with the liberty interest inherent in the fundamental right to travel.[216] As the case pertained to "an exercise by an American citizen of an activity included in constitutional protection," i.e., the right to travel, the Court was not willing to "readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it."[217] The Court "[did] not reach the question of constitutionality" so as to invalidate the statute, but instead concluded that the statutes "[did] not delegate to the Secretary the kind of authority exercised here."[218]

C. The Anticommandeering Canon

I propose an anticommandeering canon to achieve similar results in addressing the problem of executive commandeering. Under this approach, courts will invalidate federal executive actions that appear to commandeer the states unless Congress has expressly granted the federal executive with such authority. As is the case with the other nondelegation canons, "[s]o long as the statute is unclear, and the [commandeering] question serious, Congress must decide to raise that question via explicit statement."[219] In practice, when an Executive Branch actor enacts a policy that appears to commandeer the states, and subsequently asserts that Congress authorized him or her to do so, courts will assess whether Congress intended to raise the constitutional issue of commandeering. If the statute is unclear on conferring that authority, courts will invalidate the executive action.

Notably, under this approach, courts will not need to reach constitutional questions regarding separation of powers or federalism, and can narrow their holdings to the Executive Branch actor's impermissible exercise of authority. This is preferable for two reasons. First, it follows the constitutional avoidance approach to statutory interpretation that courts favor.[220] Second, when courts disallow broad

215. 357 U.S. 116, 124 (1958).

216. *Id.* at 125.

217. *Id.* at 129.

218. *Id.*; *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09, 212–13 (1988) (invalidating an agency interpretation that a statute applied retroactively in part because "the Due Process Clause forbids retroactive application of law" (quoting Sunstein, *supra* note 69, at 332)).

219. Sunstein, *supra* note 69, at 331.

220. *See, e.g.*, City of Chicago v. Barr, 961 F.3d 882, 898 (7th Cir. 2020) (citing Pearson v. Callahan, 555 U.S. 223, 241 (2009)) (invoking the "long-time practice of 'constitutional avoidance,' where courts do not pass on questions of constitutionality unless such adjudication is unavoidable").

delegations that would authorize the Executive to commandeer the states, they simultaneously tell Congress to speak clearly[221] and take accountability for its actions.[222]

Consider the Certification Condition at issue in *New York v. United States Department of Justice*, where the Attorney General conditioned federal funding on an applicant's certified compliance with § 1373 and argued that Congress authorized him to place this condition on Byrne JAG program applicants.[223] Under the anticommandeering canon, plaintiff states would need to make an initial showing that § 1373 threatens state sovereignty. Plaintiffs could make this case, since § 1373 contravenes the core federalist principle from the anticommandeering cases that the federal government can regulate private individuals but not the states.[224] More, § 1373 contains the type of negative command to states that *Murphy* rendered impermissible.[225] Upon such a showing from plaintiff states, the anticommandeering canon would have courts look to see if Congress explicitly wanted to give the executive the authority to condition federal funding on compliance with a separate statute that appears to threaten state sovereignty. Since neither the text of the Byrne JAG statute or § 1373, nor the legislative history of either statute connote such congressional intent, the anticommandeering canon would interrupt the Attorney General's exercise of power immediately at the point where he conditioned funding on compliance with § 1373.

Again, a court employing the anticommandeering canon will not necessarily need to outright invalidate § 1373 or any part of the Byrne JAG statute. Since it is clear enough that § 1373 impermissibly commands states not to enact legislation,[226] the Certification Condition would trigger and courts would invalidate the condition. As was the case in *Kent v. Dulles*, courts using the anticommandeering canon can simply hold that Congress did not delegate the authority that the executive claims allows him or her to dictate to states.[227]

221. Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 251 & n.123 (2007) ("Congress . . . should exercise its powers to decide critical issues of policy, lest important federalism values fall by the wayside.").

222. *See* Sunstein, *supra* note 69, at 332 ("Congress must make [disfavored] choice[s] explicitly and take the political heat for deciding to do so.").

223. *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 105 (2d Cir. 2020).

224. *See, e.g.*, New York v. United States, 505 U.S. 144, 166 (1992) ("In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."); *see also supra* notes 31–34, 39 and accompanying text.

225. *See supra* Part II.C.

226. *See supra* Part II.C.

227. Kent v. Dulles, 357 U.S. 116, 129 (1958).

Under this approach, courts will be able to preserve the "healthy balance of power between the States and the Federal [g]overnment" that the Supreme Court has sought to achieve in its anticommandeering line of cases by preventing delegation that would allow the executive to dictate to the states.[228] More, by limiting executive authority in this fashion, courts will require Congress to speak with a clear voice if it wants a policy that raises constitutional questions.[229] The anticommandeering canon, therefore, presents a viable remedy to the Second Circuit's decision that threatened to further tilt the scales of power to the federal executive.

VII. CONCLUSION

The upshot of the Second Circuit's opinion in *New York v. United States Department of Justice* is that unmitigated delegation poses significant risks to state autonomy.[230] The factors that resulted in the Trump administration imposing the Byrne JAG conditions—greater executive control of the administrative state,[231] congressional gridlock, and the rising influence states have over national policy—[232] are likely to persist into the Biden administration. While delegation doctrine is traditionally permissive, courts should be wary that the Executive Branch has used power that Congress delegated to it to dictate state policy. To mitigate the danger that exists in the gap where the delegation and anticommandeering doctrines intersect, courts should consider the anticommandeering canon.

228. Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991).
229. *See* Sunstein, *supra* note 69, at 331.
230. *See supra* notes 34–35 and accompanying text.
231. *See* Kagan, *supra* note 59, at 2246.
232. *See* Bulman-Pozen, *supra* note 3, at 2031.