

**Protecting American Citizenship II:
Federalism, Sanctuary Cities, and the Rule of Law**
**Hearing Before the Senate Committee on the Judiciary
Subcommittee on the Constitution**

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Chairman Schmitt, Ranking Member Welch, and distinguished members of the Subcommittee:

Thank you for the invitation to testify before the Subcommittee today.

I've always been a fan of Justice Kennedy's explanation, in a 1995 concurrence, that "[t]he Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."¹ Indeed, the entire conceit of federalism was that by dividing power not just horizontally among the branches of government, but vertically between the federal government and the states, *all* of our liberty would be best protected against tyranny and governmental lawlessness. One needn't look very far these days to see that aspiration regularly being vindicated.

Although I couldn't deign to do justice in my testimony to the rich series of constitutional doctrines the Supreme Court has articulated to reflect this understanding, they yield three specific takeaways on which I'd like to focus today—each of which provide meaningful insight into what the federal government can (and can't) do when it comes to incentivizing and coercing activity by local and state governments.

First, of course, is the existence and recent reaffirmation of the so-called "anticommandeering" doctrine. As Justice Alito put it for the Court in 2018, "[t]he anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."²

As different decisions from the Supreme Court have repeatedly made clear over the last 35 years, that means that not even *Congress* can tell a state legislature what its policy choices must be,³ or dictate to a state executive branch which federal laws it must (and must not) enforce. Congress is free, of course, to use its enumerated powers to adopt *federal*

1. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

2. Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 470 (2018).

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

policy choices—choices that, if valid, would preempt *conflicting* state laws. But as Justice Scalia emphasized for the Court in 1997,

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.⁴

And even though the emergence of the anticommandeering doctrine in the 1990s was largely the work of the Court’s conservatives, I’ve always found it compelling—especially Justice Scalia’s explanation in *Printz* for how, were it otherwise, Congress could usurp the *President’s* discretion over federal law enforcement by compelling states to do what the President won’t.⁵ I would’ve thought that this principle would be *especially* persuasive to those whose views of executive power under Article II are even broader than mine—including some of the other witnesses this afternoon and members of this Subcommittee. Alas.

Second, the notion that the federal government cannot coerce the states on questions of federal policy is also reflected in the Supreme Court’s Spending Clause jurisprudence—and the limits the Court has long placed on the permissible conditions that Congress may impose even on money it was under no obligation to provide to local and state governments. To put the matter plainly, it is not true, and never has been true, that Congress’s greater power to not spend the money in the first place somehow implies a “lesser” power to impose whatever conditions it wants *on* that spending.

Instead, as Chief Justice Rehnquist articulated for the Supreme Court in *South Dakota v. Dole*, there are four general requirements for

4. *Printz v. United States*, 521 U.S. 898, 935 (1997).

5. *Id.* at 923 (“The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.” (citations omitted)).

spending conditions: they must be (a) clearly expressed in law; (b) related to the money; (c) not “coercive”; and (d) not in violation of any other constitutional provision.⁶ And as this Subcommittee is well aware, the Supreme Court has given the “not coercive” prong of this test teeth as recently as 2012, when a majority of the Court struck down the Affordable Care Act’s Medicaid expansion.⁷

As should hopefully be obvious, the constitutional bar on coercive spending conditions is inextricably intertwined with the constitutional bar on commandeering: The *reason* why a spending condition that isn’t truly voluntary is not permitted is because, at that point, the federal government is effectively dictating state policy—rather than giving the state a financial *incentive* to choose a specific policy. The line between choice and coercion isn’t always obvious. But it is undeniably one of constitutional significance—because it’s the line that identifies the actor that adopted the underlying policy being carried out by state officers, that is, whether it was the state or the federal government.⁸

To similar effect, what all of these cases have long made clear is that even *legitimate* conditions must be both reasonably related to the purposes of the money that is being spent *and* clearly expressed in law. That’s because one of the core purposes of these rules is, as Justice Alito put it in *Murphy*, to “promote[] political accountability.”⁹ One of the consequences of that understanding is that even *valid* conditions must come from the express language of statutes, not the whims of an executive order.

Obviously, this long-settled principle calls into question much of what the Trump administration has done to date with regard to the withholding of federal funds—virtually *none* of which has been based on any clear *statutory* conditions. Indeed, I would have thought that, given its mandate, this Subcommittee would be especially interested in the latent

6. *South Dakota v. Dole*, 483 U.S. 203, 206–12 (1987).

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

8. *See id.* at 577–78 (“Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).

9. 584 U.S. at 473.

unconstitutionality of the spending conditions that this administration has regularly sought to impose only through executive order—both in their own right and as a usurpation of *Congress’s* constitutional prerogative. Alas.

Third, and lest these principles (or my testimony) be taken out of context, neither the anticommandeering doctrine nor the limits on spending conditions allow states to *thwart* or *obstruct* federal law enforcement—and I am not aware of any state or local government that has argued (or actually acted) otherwise.

But there is a constitutionally critical (and dispositive) distinction between active obstruction and passive noncooperation—one that courts have regularly enforced in the immigration context, including in a slew of cases during the first Trump administration. I understand that there are political points to be scored in trying to *collapse* that distinction—and in trying to portray certain local and state policies, which at their core reflect a refusal to cooperate, as affirmative interference with federal law enforcement.

But if the goal of today’s hearing is to unpack what the *Constitution* has to say about this distinction, the reality is that the law on this front is particularly clear. It is clear not only that a refusal to cooperate with federal law enforcement is *not* impermissible obstruction, but that the *motives* for not cooperating with federal law enforcement are, for constitutional purposes, entirely irrelevant. Ultimately, the animating principle and promise of federalism is that states are allowed to have their own reasons for making their own choices.

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As recent events and today’s hearing (perhaps unintentionally) underscore, immigration enforcement may be the perfect lens through which to understand *why* the Constitution limits the federal government’s power to coerce local and state law enforcement. This topic is, quite obviously, a matter on which there are deep political (and, increasingly, partisan) disagreements—many of which have significant local and/or regional variations. Some localities might choose to cooperate with federal immigration efforts; and others might see such cooperation as impeding the community relationships necessary to identify and solve crimes, and/or

as otherwise threatening the liberty not just of those who *are* being targeted by these efforts, but of those who aren't (or, at least, shouldn't have been).

Ultimately, the choice as to how to devote law enforcement resources—including whether or not to use such resources to aid in federal immigration efforts—is one that has not just traditionally been left to state and local authorities; it's one that the *Constitution* commits to those authorities. Members of this Subcommittee may have vehement disagreements with the different choices that different local and state governments have made in this space; I have some disagreements with some of those choices, myself.

But those disagreements have remedies at the local and state ballot boxes—not in a congressional hearing room. Nor is any of this a new idea. Rather, it's one of the oldest, for as Justice Scalia put it in *Printz*, “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.”¹⁰

So too, here.

Thank you again for the invitation to testify today. I look forward to your questions.

10. 521 U.S. at 919.