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Weed Whacking Through the Tenth Amendment: Navigating a Trump Administration Threat to Withhold Funding from Marijuana-Friendly States

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WEED WHACKING THROUGH THE TENTH AMENDMENT: NAVIGATING A TRUMP ADMINISTRATION THREAT TO WITHHOLD FUNDING FROM MARIJUANA-FRIENDLY STATES

*Arlen Gharibian**

The Trump administration has taken a firm stance against marijuana legalization at the state level. While an official federal policy is still pending, this Article focuses on whether the Trump administration's threats to prevent California from pursuing its duly enacted marijuana legalization law violates the Tenth Amendment. This Article then addresses how the federal government could achieve its goal while remaining within the bounds of the Constitution.

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I. INTRODUCTION

Contrary to common knowledge, marijuana's prevalence in America dates back to the colonial era.¹ In fact, the plant was so inherent to society that the Founding Fathers wrote the first two drafts of the Declaration of Independence on hemp paper.² Yet, as states today increasingly accept marijuana within their borders, the federal government grows increasingly irritated.³

On November 8, 2016, California voters approved Proposition 64, the Adult Use of Marijuana Act (AUMA), legalizing recreational marijuana use in the state.⁴ Nevertheless, marijuana legalization at the state level has received backlash from President Trump's Justice Department, indicating that states should expect to see greater enforcement of federal marijuana laws.⁵ Among this backlash is the federal government's potential threat to withhold funds from California if the state continues to support the AUMA.⁶

This conflict between California and the federal government raises Tenth Amendment concerns. Indeed, the Tenth Amendment to the United States Constitution explicitly states that "[t]he powers not

1. Rosalie Liccardo Pacula et al., *State Medical Marijuana Laws: Understanding the Laws and Their Limitations*, 23 J. PUB. HEALTH POL'Y 413, 415 (2003).

2. JOHN W. ROULAC, HEMP HORIZONS: THE COMEBACK OF THE WORLD'S MOST PROMISING PLANT 32 (1997).

3. See generally German Lopez, *The Trump Administration's New War on Marijuana, Explained*, VOX, <https://www.vox.com/policy-and-politics/2018/1/4/16849866/marijuana-legalization-trump-sessions-cole-memo> (last updated Jan. 5, 2018, 10:35 AM) ("Some legalization advocates worried that Sessions, a vocal critic of legalization, would simply take a tougher interpretation of the [Cole] memo — by, say, telling prosecutors to crack down on states that let any marijuana land in the hands of minors or across state lines (both of which are, to some extent, unavoidable no matter how strict a state is). But Sessions has gone even further, ending the Cole memo and related guidances altogether. Since marijuana is illegal at the federal level, the change will let federal prosecutors go after state-legal marijuana at their own discretion — a return to the pre-memo days.")

4. *California Proposition 64, Marijuana Legalization (2016)*, BALLOTPEEDIA, [https://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_\(2016\)](https://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_(2016)) (last visited Oct. 16, 2018); Patrick McGreevy, *Californians Vote to Legalize Recreational Use of Marijuana in the State*, L.A. TIMES (Nov. 8, 2016, 8:12 PM), <http://www.latimes.com/nation/politics/trailguide/la-na-election-day-2016-proposition-64-marijuana-1478281845-htmllstory.html>.

5. See Lopez, *supra* note 3.

6. Jacob Margolis, *What Happens if Jeff Sessions Tries Dismantling California's Pot Industry?*, 89.3 KPCC: TAKE TWO (Mar. 2, 2017), <http://www.scpr.org/programs/take-two/2017/03/02/55394/what-happens-if-jeff-sessions-tries-dismantling-ca/>.

delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁷

This Article explores two issues: (1) whether the Trump administration’s threats to prevent California from pursuing its duly enacted marijuana legalization law violates the Tenth Amendment; and (2) if so, how the Trump administration can pursue its attempt to prevent California from following through with marijuana legalization without violating the Tenth Amendment.

II. HISTORICAL TRENDS IN MARIJUANA

Before delving into the tension between Proposition 64 and the Trump administration’s enforcement priorities, it will be useful to first understand how marijuana has been classified over time, including the various positions the federal government and individual states have taken in making decisions regarding marijuana legalization.

Marijuana has been a part of American history since Jamestown settlers first introduced it in 1611, when they arrived in Virginia with the plant for use in hemp production.⁸ From the time marijuana arrived in the United States, the plant’s cultivation flourished.⁹ Physicians and pharmacists widely dispensed marijuana for a variety of illnesses, and even included marijuana in standard pharmaceutical reference works.¹⁰ Even the most notable American presidents, including George Washington and Thomas Jefferson, advocated hemp cultivation and grew marijuana themselves.¹¹

Nevertheless, in the early twentieth century, states began to oppose marijuana.¹² In 1913, California, always a trailblazer, became the first state to outlaw marijuana.¹³ Other states soon followed, and by 1931, twenty-nine states had passed laws prohibiting the use of

7. U.S. CONST. amend. X.

8. Pacula et al., *supra* note 1.

9. *Id.*

10. *Id.*

11. MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA—MEDICAL, RECREATIONAL, AND SCIENTIFIC 16, 18 (2012); Corliss Knapp Engle, *John Adams, Farmer and Gardner*, 61 *ARNOLDIA*, no. 4, 2002, at 9, 10.

12. BRUCE BARCOTT, WEED THE PEOPLE: THE FUTURE OF LEGAL MARIJUANA IN AMERICA 20 (2015).

13. *Id.*

marijuana for nonmedicinal purposes.¹⁴ This sudden backlash against marijuana was rooted not in the plant itself, but rather in the racial identities of its users.¹⁵ State after state prohibited marijuana, “usually when faced with significant numbers of Mexicans or Negroes utilizing the drug.”¹⁶ Soon, nearly every western state had passed anti-marijuana legislation.¹⁷

The federal government was not far behind and first attempted to curb marijuana use in 1937 by passing the Marihuana Tax Act.¹⁸ While the Marihuana Tax Act did not prohibit marijuana, Congress essentially endeavored to outlaw marijuana with an extremely prohibitive taxing scheme.¹⁹ Indeed, the overwhelmingly anti-marijuana environment that gave way to the Marihuana Tax Act continued to have an impact, leading to more legislation criminalizing marijuana offenses throughout the 1950s.²⁰ However, physicians could continue to legally prescribe marijuana during this time.²¹ Still, marijuana prohibition reached its peak in 1970 when Congress passed the Comprehensive Drug Abuse Prevention and Control Act, now known as the Federal Controlled Substances Act of 1970 (CSA).²²

The CSA replaced the Marihuana Tax Act and created five categories, known as “schedules,” for all controlled substances, classifying the substances “based on their relative potential for abuse as well as recognized medical usefulness.”²³ Congress characterized marijuana as a Schedule I drug, indicating that the plant “had no currently accepted medical use in the United States and making it illegal for doctors to medically prescribe.”²⁴ Indeed, marijuana’s

14. Adam Rathge, *Pondering Pot: Marijuana’s History and the Future of the War on Drugs*, ORG. AM. HISTORIANS: AM. HISTORIAN, <http://tah.oah.org/issue-5/pondering-pot/> (last visited Nov. 15, 2018).

15. BARCOTT, *supra* note 12.

16. LARRY SLOMAN, REEFER MADNESS: A HISTORY OF MARIJUANA 30–31 (1998). The first cities to perceive marijuana use as a problem were Texas border towns like El Paso and New Orleans. *Id.* African Americans began using marijuana in New Orleans around 1910, and early fears were that the vice would spread to white schoolchildren. *Id.*

17. John Caldbick, *Marijuana Legalization in Washington*, HISTORYLINK (Jan. 15, 2013), <http://www.historylink.org/File/10268>.

18. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

19. BARCOTT, *supra* note 12, at 24.

20. Pacula et al., *supra* note 1, at 416.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

Schedule I label is strict and comprehensive, classifying “any product that contains any amount of tetrahydrocannabinols (THC) to be a Schedule I controlled substance, even if such product is made from portions of the cannabis plant that are excluded from the CSA definition of ‘marihuana.’”²⁵ Congress had successfully outlawed marijuana at the federal level, making illegal the plant which had flourished in the United States even before the country’s founding.

Twenty-six years passed before California pushed back, once again asserting itself as a pioneer for change. In 1996, California voters passed Proposition 215, dubbed the “Compassionate Use Act.”²⁶ Through the Compassionate Use Act, California offered legal protection to medical marijuana users by removing state-level criminal penalties for the use and possession of marijuana by patients with a doctor’s recommendation.²⁷ Proposition 215 aimed “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes” when a physician determines “that the person’s health would benefit from the use of marijuana in the treatment of . . . [any illness] for which marijuana provides relief.”²⁸ In the twenty-two years since California’s stand against the CSA, thirty-two other states, as well as the District of Columbia, Guam, and Puerto Rico, have instituted comprehensive public medical marijuana and cannabis programs.²⁹

The federal government did not respond positively to California’s legalization of medical marijuana. Until just a few years ago, the Drug Enforcement Agency (DEA) was conducting raids on legal medical marijuana dispensaries in California.³⁰ In these raids, the DEA shut down multiple dispensaries and seized their marijuana.³¹

25. Interpretation of Listing of “Tetrahydrocannabinols” in Schedule I, 66 Fed. Reg. 51530 (Oct. 9, 2001) (to be codified at 21 C.F.R. 1308).

26. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

27. *Id.*

28. *Id.*

29. *State Medical Marijuana Laws*, NAT’L CONFERENCE OF STATE LEGISLATORS, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last visited Nov. 18, 2018).

30. See Matt Ferner, *DEA Raids 2 Los Angeles Medical Marijuana Dispensaries*, HUFFPOST (Oct. 24, 2014, 1:29 PM), http://www.huffingtonpost.com/2014/10/24/dea-raid-medical-marijuana-los-angeles_n_6038926.html; Daniel White, *DEA Must Stop Interfering with Legal Medical Marijuana Dispensaries, Federal Court Rules*, TIME (Oct. 20, 2015), <http://time.com/4080110/dea-medical-marijuana-california-ruling/>.

31. Ferner, *supra* note 30; White, *supra* note 30.

In 2014, however, Congress added the Rohrabacher-Farr amendment to the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015, an appropriations bill that funds the Departments of Commerce and Justice, as well as various other agencies.³² The amendment bars the Justice Department from using federal funding to prevent states with medical marijuana laws “from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”³³ In late-2015, Judge Charles Breyer of the United States District Court for the Northern District of California ruled that the DEA could no longer interfere with medical marijuana providers operating legally under state laws.³⁴

In May 2016, just three months after his confirmation, United States Attorney General Jeff Sessions began advocating his strong anti-marijuana sentiments to members of Congress.³⁵ Attorney General Sessions heads the Department of Justice (DOJ), which encompasses federal law enforcement agencies such as the Federal Bureau of Investigation (FBI) and DEA.³⁶ In a letter addressed to Senate Majority Leader Mitch McConnell, Senate Minority Leader Chuck Schumer, House Speaker Paul Ryan, and House Minority Leader Nancy Pelosi, Attorney General Sessions opposed the Rohrabacher-Farr amendment to the appropriations bill for the DOJ.³⁷ Specifically, Attorney General Sessions expressed his concern with regard to Congress restricting the discretion of the DOJ to fund particular prosecutions, “particularly in the midst of an [sic] historic

32. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113–235, 128 Stat 2130 (2014); Christopher Ingraham, *Federal Court Tells the DEA to Stop Harassing Medical Marijuana Providers*, WASH. POST (Oct. 20, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/20/federal-court-tells-the-dea-to-stop-harassing-medical-marijuana-providers/?utm_term=.2cbe1873dc1d.

33. Ingraham, *supra* note 32.

34. *United States v. Marin All. for Med. Marijuana*, 139 F. Supp. 3d 1039 (N.D. Cal. 2015).

35. Christopher Ingraham, *Jeff Sessions Personally Asked Congress to Let Him Prosecute Medical-Marijuana Providers*, WASH. POST (June 13, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers/?utm_term=.91d2fc1ecd5e.

36. Randy Robinson, *Jeff Sessions Hates Weed but Cannabis Lawyers Are Ready to Fight Back*, MERRY JANE (Nov. 1, 2017, 3:35 PM), <https://merryjane.com/news/jeff-sessions-hates-weed-but-cannabis-lawyers-ready-to-fight-back>.

37. Letter from Jeff Sessions, Attorney Gen., U.S., to Mitch McConnell, Senate Majority Leader, Chuck Schumer, Senate Minority Leader, Paul Ryan, House Speaker, and Nancy Pelosi, House Minority Leader (May 1, 2017) (on file with Congress); Ingraham, *supra* note 35.

drug epidemic and potentially long-term uptick in violent crime.”³⁸ He advised, “The Department must be in a position to use all laws available to combat the transnational drug organizations and dangerous drug traffickers who threaten American lives.”³⁹

Yet, despite resistance from both Attorney General Sessions and the DEA, the legalization of medical marijuana throughout more than half of the nation seemed to initiate complete recreational marijuana legalization at the state level. Since 2012, ten states and the District of Columbia have legalized marijuana for recreational use.⁴⁰ In 2012, Colorado and Washington became the first two states to legalize recreational marijuana.⁴¹ Between 2014 and 2015, Alaska, Oregon, and the District of Columbia followed suit.⁴² Finally, in 2016, California, Nevada, Maine, and Massachusetts joined the budding trend of recreational marijuana legalization.⁴³

After a proposal to legalize marijuana in California failed in 2014 due to its backers’ inability to collect sufficient signatures, Californians were adamant to succeed the second time around.⁴⁴ In 2016, tech billionaire and former Facebook president Sean Parker spearheaded another attempt to prevail in legalizing marijuana in California.⁴⁵ With the support of extensive funding, including over \$1 million in funding from Parker alone, “[b]allot-measure backers collected more than 600,000 signatures to put the initiative before voters.”⁴⁶ As a result, Proposition 64 was introduced on California’s November 8, 2016 ballot as an initiated state statute.⁴⁷

38. Letter from Jeff Sessions, *supra* note 37.

39. *Id.*

40. *State Marijuana Laws in 2018 Map*, GOVERNING THE STATES & LOCALITIES, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last updated Nov. 7, 2018).

41. Melia Robinson, *It’s 2017: Here’s Where You Can Legally Smoke Weed Now*, BUS. INSIDER (Jan. 8, 2017, 8:00 AM), <http://www.businessinsider.com/where-can-you-legally-smoke-weed-2017-1>.

42. *Id.*

43. *Id.*

44. Trevor Hughes, *California Likely to Vote on Marijuana Legalization in November*, USA TODAY (May 4, 2016, 4:37 PM), <https://www.usatoday.com/story/news/politics/elections/2016/2016/05/04/california-likely-vote-marijuana-legalization-november/83926306/>.

45. *Id.*

46. *Id.*

47. *California Proposition 64, Marijuana Legalization (2016)*, *supra* note 4.

California voters passed Proposition 64 on November 8, 2016.⁴⁸ Now, Californians who are twenty-one and older can possess, transport, buy and use up to an ounce of marijuana for recreational purposes.⁴⁹ Moreover, the proposition permits individuals to grow as many as six plants, and allows for retail sales of marijuana with a 15% tax imposed.⁵⁰ “Local governments may reasonably regulate cultivation, up to and including requiring cultivation indoors or in a greenhouse.”⁵¹ Yet, while Proposition 64 seems straightforward enough, it arrived at a time which may cause unanticipated conflicts.

The same day that Golden State voters elected to legalize the recreational use of marijuana, Americans elected Donald Trump to become the forty-fifth President of the United States.⁵² While President Trump himself has previously suggested that he will leave marijuana legalization up to the individual states, his current administration has not taken this same *laissez faire* approach.⁵³ At the forefront of this federal stance against state-level legalization is the attorney general, Jeff Sessions.⁵⁴

Attorney General Sessions has not been shy about his thoughts on marijuana.⁵⁵ He has stated that “good people don’t smoke marijuana,” and that the effects of marijuana are “only slightly less awful” than those of heroin.⁵⁶ Indeed, Attorney General Sessions has gone so far as to say he thought the Ku Klux Klan was “okay until [he] learned they smoked pot.”⁵⁷ Nevertheless, the federal government has not yet

48. *Id.*; McGreevy, *supra* note 4.

49. *California Proposition 64, Marijuana Legalization (2016)*, *supra* note 4.

50. *Id.*

51. JEREMY DAW, *NEW RULES: CALIFORNIA’S MARIJUANA LAW EXPLAINED* 55 (2017).

52. *Donald J. Trump*, WHITE HOUSE, <https://www.whitehouse.gov/people/donald-j-trump/> (last visited Nov. 18, 2018); Elijah Wolfson & David Yanofsky, *One in Every Five Americans Is About to Get Legally High AF After this Election*, QUARTZ (Nov. 9, 2016), <https://qz.com/832370/marijuana-legalization-succeeded-in-the-2016-elections-despite-the-results-of-the-presidential-race/>.

53. Patrick McGreevy, *Weed’s Legal in California, but Activists Fear a Battle Ahead with Jeff Sessions, Trump’s Pick for Attorney General*, L.A. TIMES (Dec. 1, 2016, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-marijuana-legalization-jeff-sessions-snap-20161201-story.html>.

54. *Id.*

55. Rick Anderson, *Sessions Says He Has ‘Serious Concerns’ About Legal Marijuana. Now States Wonder What’s Next*, L.A. TIMES (Aug. 9, 2017, 7:50 PM), <http://www.latimes.com/nation/la-na-sessions-marijuana-20170809-story.html>.

56. *Id.*

57. Paul Waldman, *Why Jeff Sessions’s Marijuana Crackdown is Going to Make Legalization More Likely*, WASH. POST (Jan. 5, 2018), <https://www.washingtonpost.com/blogs/plum->

instituted an official policy change toward marijuana.⁵⁸ Attorney General Sessions has, however, threatened and attempted to withhold funding to achieve his goal of ensuring that local law enforcement officials comply with federal immigration law in “sanctuary cities.”⁵⁹ It is believed that Attorney General Sessions may use this same coercive tactic to curb marijuana’s legalization at the state level.⁶⁰

On January 4, 2018, Attorney General Sessions released a memorandum which immediately rescinded the Cole Memo, strongly suggesting a new trend in enforcement of marijuana’s federal prohibition.⁶¹ The Cole Memo, written by then Deputy Attorney General James M. Cole, laid out the Obama-era policy on the federal government’s approach to state-legal marijuana operations.⁶² The Cole Memo effectively deprioritized the use of federal funds to enforce marijuana prohibition under the CSA, instead recommending “a more laissez-faire, hands-off approach.”⁶³ Indeed, the Cole Memo noted, “the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”⁶⁴

The DOJ released Attorney General Sessions’s memo, which was addressed to all United States attorneys.⁶⁵ The memo reads, “previous nationwide guidance specific to marijuana enforcement is unnecessary

line/wp/2018/01/05/why-jeff-sessions-marijuana-crackdown-is-going-to-make-legalization-more-likely/?utm_term=.c96dab120278 (“He says that was a joke, but even so, it still says something about where he’s coming from.”).

58. Alicia Wallace, *Federal Marijuana Law Enforcement: What You Need to Know*, CANNABIST (Mar. 7, 2017, 9:20 AM), <http://www.thecannabist.co/2017/03/07/federal-marijuana-enforcement-trump-administration-experts-questions/74933/>.

59. Jessica Taylor, *Attorney General Orders Crackdown on ‘Sanctuary Cities,’ Threatens Holding Funds*, NPR (Mar. 27, 2017, 3:42 PM), <https://www.npr.org/2017/03/27/521680263/attorney-general-orders-crackdown-on-sanctuary-cities-threatens-holding-funds> (“Sanctuary cities” are “generally defined as places where local law enforcement limit their cooperation with federal authorities on immigration enforcement.”).

60. Margolis, *supra* note 6.

61. Memorandum from Attorney Gen. Jefferson B. Sessions, III to All U.S. Attorneys, (Jan. 4, 2018) (on file with U.S. Dep’t of Justice); Reid Wilson, *Sessions Will End Policy that Allowed Legalized Marijuana to Prosper*, HILL (Jan. 4, 2018, 8:53 AM), <http://thehill.com/homenews/administration/367384-sessions-will-end-policy-that-allowed-marijuana-to-prosper-report>.

62. Lisa Rough, *The Cole Memo: What Is It and What Does It Mean?*, LEAFLY (Sep. 14, 2017), <https://www.leafly.com/news/cannabis-101/what-is-the-cole-memo>.

63. *Id.*

64. Memorandum from Deputy Attorney Gen. James Cole to All U.S. Attorneys (Aug. 29, 2013) (on file with U.S. Dep’t of Justice).

65. Wilson, *supra* note 61.

and is rescinded, effective immediately.”⁶⁶ Attorney General Sessions’s action took place just three days after California’s marijuana legalization law went into effect, creating even greater uncertainty as to the future of the industry, “which [is] projected to bring in \$1 billion annually in tax revenue within several years.”⁶⁷

Attorney General Sessions’s memo received backlash and resistance from both marijuana advocates and politicians, including conservatives.⁶⁸ Senator Cory Gardner, a Republican from Colorado, tweeted that the memo “has trampled on the will of voters.”⁶⁹ Senator Gardner also spoke before the Senate, expressing his willingness to withhold DOJ nominees until Attorney General Sessions resolves this policy dispute.⁷⁰ In addition, Maria McFarland Sanchez-Moreno, executive director of the Drug Policy Alliance, opined that Attorney General Sessions wants to maintain a policy that has led to tremendous injustices and wasted significant federal resources.⁷¹ Ms. Sanchez-Moreno was not shy in voicing her opinion, stating that “[i]f Sessions thinks that makes sense in terms of prosecutorial priorities, he is in a very bizarre ideological state, or a deeply problematic one.”⁷² Accordingly, Attorney General Sessions has signaled a likely federal stance through his memo which effectively doubles down on his personal opposition to marijuana.

III. THE EVOLUTION OF TENTH AMENDMENT JURISPRUDENCE

Prior to discussing how a threat to withhold federal funds from California for legalizing marijuana might implicate Tenth Amendment concerns, the Tenth Amendment’s trends in interpretation must first be understood. This Part first outlines the development of the Supreme Court’s Tenth Amendment jurisprudence throughout various eras. It then proceeds to explain and contextualize seminal cases in which the

66. Memorandum from Attorney Gen. Jefferson B. Sessions, III, *supra* note 61.

67. Sadie Gurman, *Sessions Terminates US Policy that Let Legal Pot Flourish*, AP NEWS (Jan. 4, 2018), <https://apnews.com/19f6bfec15a74733b40eaf0ff9162bfa>.

68. *See id.*

69. Jesse Paul, *Cory Gardner Says AG Jeff Sessions’ Decision to Rescind Marijuana Policy “Has Trampled on the Will” of Colorado Voters*, DENV. POST (Jan. 4, 2018), <https://www.denverpost.com/2018/01/04/cory-gardner-jeff-sessions-marijuana-policy/>.

70. *Id.*

71. Gurman, *supra* note 67.

72. *Id.*

federal government attempted to influence state action through threatening to withhold federal funding to states.

A. The Development of the Supreme Court's Tenth Amendment Jurisprudence

The Tenth Amendment of the Constitution of the United States of America states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁷³ While seemingly straightforward, the Supreme Court has, over time, announced various conflicting interpretations of the Tenth Amendment’s power to impose limitations on federal authority.⁷⁴

In 1936, the Supreme Court decided *Carter v. Carter Coal Co.*,⁷⁵ in which it ruled on the constitutionality of the federal Bituminous Coal Conservation Act, which regulated prices, minimum wages, maximum hours, and fair practices of the coal industry.⁷⁶ In finding the Bituminous Coal Conservation Act unconstitutional, the Supreme Court in *Carter* reasoned that employing workers, mining coal, and setting wages, hours, and working conditions, were found to be purely part of the local process of production, separate from any regulation under the Commerce Clause.⁷⁷ Indeed, as Justice Sutherland concluded, “[e]verything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear.”⁷⁸

Despite its *Carter* decision, the Supreme Court did not invalidate a single federal statute for violating state sovereignty for close to forty years. Thus, it appeared that the Tenth Amendment was futile as an independent check upon federal power under the Commerce Clause.

73. U.S. CONST. amend. X.

74. See Gary Lawson & Robert Schapiro, *Common Interpretation: The Tenth Amendment*, NAT’L CONST. CTR.: INTERACTIVE CONST., <https://constitutioncenter.org/interactive-constitution/amendments/amendment-x> (last visited Nov. 18, 2018).

75. 298 U.S. 238 (1936).

76. See *id.*

77. *Id.* at 303–04.

78. *Id.* at 304.

1. The “*Darby* Era”

In 1941, the Supreme Court limited the *Carter* holding with its decision in *United States v. Darby*.⁷⁹ In *Darby*, Darby was charged with violating the Fair Labor Standards Act (FLSA) after he failed to comply with wage and hour requirements for his employees that were engaged in the production of goods for interstate commerce.⁸⁰ Darby challenged the FLSA’s constitutionality, claiming its regulations did not fall within the Commerce Clause.⁸¹ In a unanimous decision written by Justice Stone, the Supreme Court upheld the direct ban on interstate shipments, finding the FLSA “sufficiently definite to meet constitutional demands.”⁸²

The decision in *Darby* noted that the Tenth Amendment did not interfere with the case, stating:⁸³

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.⁸⁴

Accordingly, *Darby* solidified the Supreme Court’s position on the freedom of Congress to impose any conditions it deemed necessary upon activity which substantially affected interstate commerce.⁸⁵

2. The “*National League of Cities* Era”

The Supreme Court breathed new life into the Tenth Amendment in 1976, when it decided *National League of Cities v. Usery*.⁸⁶ In *National League of Cities*, the appellants, an association of cities, challenged the constitutionality of Congress’s 1974 amendments to

79. 312 U.S. 100 (1941).

80. *Id.* at 110–11.

81. *Id.* at 111.

82. *Id.* at 125–26.

83. *Id.* at 123.

84. *Id.* at 124.

85. *Id.* at 118–19.

86. 426 U.S. 833 (1976).

the FLSA.⁸⁷ Specifically, the National League of Cities argued that Congress did not have the power to apply federal minimum-wage and overtime rules to state and municipal employees.⁸⁸ The Supreme Court agreed, holding that the FLSA's amendments violated the Tenth Amendment by intruding upon those powers left to the states.⁸⁹

In the *National League of Cities* decision, the five-Justice plurality held that while the amended minimum-wage and overtime rules for state employees clearly affected commerce, they also violated an independent requirement of the Tenth Amendment of the United States Constitution.⁹⁰ As Justice Rehnquist noted, the Court previously found that “[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.”⁹¹ The fifth vote of the plurality in *National League of Cities* came from Justice Blackmun, who wrote in his concurrence that he was “not untroubled by certain possible implications of the Court’s opinion.”⁹²

3. The “*Garcia* Era”

In 1985, the Supreme Court again addressed the Tenth Amendment as a limit on Congress’s power in *Garcia v. San Antonio Metropolitan Transit Authority*.⁹³ In *Garcia*, Justice Blackmun now joined the four dissenting justices from *National League of Cities* to unconditionally overrule the Court’s 1976 holding.⁹⁴

There, an employee brought suit against his employer, the San Antonio Metropolitan Transit Authority, arguing that it was bound by the FLSA because its function as a transit authority was not a traditional function of state government.⁹⁵ The issue in the case was whether or not the overtime and minimum-wage provisions of the FLSA were applicable to employees of municipally-owned and

87. *Id.* at 836–37.

88. *Id.* at 837.

89. *Id.* at 839–40.

90. *See id.* at 842–43 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

91. *Id.* at 843 (quoting *Fry*, 421 U.S. at 547 n.7).

92. *Nat’l League of Cities*, 426 U.S. at 856.

93. 469 U.S. 528 (1985).

94. *See id.*

95. *See id.* at 530.

operated mass-transit systems.⁹⁶ Writing for the majority, Justice Blackmun acknowledged the difficulty in distinguishing traditional and non-traditional governmental functions, stating, “The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.”⁹⁷

Justice Blackmun went on to discuss another problem with *National League of Cities*, that of judicial subjectivity.⁹⁸ His opinion states, “Any rule of state immunity that looks to the ‘traditional,’ ‘integral,’ or ‘necessary’ nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”⁹⁹ Yet, the majority stressed that its rejection of *National League of Cities* did not dispose of the limitations upon the federal government using its powers to hinder the independence of the states.¹⁰⁰ Instead, the Court held that states were protected by “procedural safeguards” inherent in the federal system.¹⁰¹

The *Garcia* dissenters understandably disagreed, believing that the majority defeated the significance of the Tenth Amendment.¹⁰² In his dissent, Justice Powell stated that the majority’s decision “effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.”¹⁰³ It would be several years before other cases began to chip away at *Garcia*’s broad holding.

4. *South Dakota v. Dole*

With its decision in *South Dakota v. Dole*¹⁰⁴ in 1987, the Supreme Court considered the constitutional limitations on Congress’s power to withhold funding to states in an effort to encourage their compliance with federal law.¹⁰⁵ In *Dole*, the state of South Dakota challenged a

96. *Id.*

97. *Id.* at 538–39.

98. *Id.* at 546–47.

99. *Id.* at 546.

100. *Id.* at 551–52.

101. *Id.* at 552.

102. *See id.* at 528–29.

103. *Id.* at 560.

104. 483 U.S. 203 (1987).

105. *See id.*

federal law that reduced the provision of federal highway funds to states that had a minimum drinking age below twenty-one as unconstitutional.¹⁰⁶ A majority of the *Dole* Court disagreed with South Dakota and upheld the constitutionality of the federal statute, stating, “Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact.”¹⁰⁷

In the majority opinion, Justice Rehnquist noted that the statute did not apply unavoidable pressure because states which establish a minimum drinking age lower than twenty-one would lose only a relatively small percentage of federal highway funding.¹⁰⁸ While South Dakota argued that “the coercive nature of this program is evident from the degree of success it has achieved,” the *Dole* Court made clear that it could not hold a conditional grant of federal money unconstitutional “simply by reason of its success in achieving the congressional objective.”¹⁰⁹ Moreover, Justice Rehnquist indicated that the statute enforced by Congress “is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”¹¹⁰

The Supreme Court in *Dole* recognized that the federal government’s spending power is not unlimited, “but is instead subject to several general restrictions articulated in our cases.”¹¹¹ The Court ultimately prescribed a four-factor test for evaluating similar federal expenditure cuts, which represented limitations on Congress’s spending power:

The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of “the general welfare.” In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States’ receipt of federal

106. *Id.* at 205.

107. *Id.* at 211–12.

108. *Id.* at 211.

109. *Id.*

110. *Id.* at 208.

111. *Id.* at 207.

funds, it “must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated “to the federal interest in particular national projects or programs” Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.¹¹²

Accordingly, while the Supreme Court in *Dole* reiterated the power of Congress to control its spending, it also placed substantive limitations on this power which acknowledged the states’ relative autonomy.

5. The “*New York v. United States* Era” (Present-Day Supreme Court Jurisprudence)

In 1992, the Supreme Court decided *New York v. United States*,¹¹³ which concerned the constitutionality of the Low-Level Radioactive Waste Amendments Act of 1985 (LRWAA).¹¹⁴ That statute attempted to make each individual state arrange for the disposal of radioactive waste generated within its borders.¹¹⁵ One provision of the LRWAA, the “take title” incentive, required states that did not arrange for the disposal of their waste to “take title” to that waste and be liable for damages in connection with its disposal.¹¹⁶ The state of New York objected and brought suit against the federal government, claiming that the LRWAA violated the Tenth Amendment by forcing it to regulate in a particular area.¹¹⁷

In *New York v. United States*, the majority of the Supreme Court agreed with the State’s position, and held that the “take title” provision did indeed violate the Tenth Amendment.¹¹⁸ Justice O’Connor detailed this violation, stating that the “take title” provision was either forcing states to regulate according to one federal instruction, or

112. *Id.* at 207–08 (citations omitted).

113. 505 U.S. 144 (1992).

114. *Id.* at 149.

115. *Id.* at 151–52.

116. *Id.* at 153–54.

117. *Id.* at 159–60.

118. *Id.* at 176–77.

forcing them to submit to another federal instruction.¹¹⁹ Indeed, the Court held that “[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all.”¹²⁰ Thus, the Supreme Court in *New York v. United States* affirmed that “Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”¹²¹

In 1997, the Supreme Court took its holding in *New York v. United States* a step further and held that, in addition to being limited in commandeering legislative processes, Congress also lacked the power to compel a state’s executive branch to perform specific functions.¹²² *Printz v. United States*¹²³ concerned the Brady Act, a 1993 amendment to the Gun Control Act of 1968.¹²⁴ The Brady Act required the Attorney General to establish a national background check system aimed at controlling the flow of firearms.¹²⁵ Until the Attorney General computerized this national system, the Brady Act required state and local law enforcement officers to conduct background checks before issuing permits to buy firearms.¹²⁶ Montana Sheriff Jay Printz challenged this requirement’s constitutionality, contending that the federal government did not have the authority to mandate background checks on its behalf.¹²⁷

A slim majority of the Supreme Court agreed with Sheriff Printz, adhering to the Court’s decision in *New York v. United States*, and added that Congress cannot bypass that decision by directly conscripting the state’s officers.¹²⁸ Justice Scalia delivered the opinion, writing, “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal

119. *Id.* at 176.

120. *Id.*

121. *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

122. *Printz v. United States*, 521 U.S. 898, 963 (1997) (Stevens, J., dissenting) (citing *Hodel*, 452 U.S. at 288).

123. 521 U.S. 898 (1997).

124. *Id.* at 902.

125. *Id.* at 902–03.

126. *Id.*

127. *Id.* at 904.

128. *Id.* at 935.

regulatory program.”¹²⁹ Justice Scalia went on to assert that it did not matter whether policymaking was involved, because such commands by the federal government were fundamentally unconstitutional.¹³⁰ Thus, the majority’s opinion stood firm in its belief that “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”¹³¹

In 2012, the Supreme Court decided *National Federation of Independent Businesses v. Sebelius*,¹³² reaffirming the central holdings in *New York v. United States* and *Printz*, that the Tenth Amendment is indeed an independent check on federal powers.¹³³ In *Sebelius*, the National Federation of Independent Businesses (NFIB), twenty-six states, and other businesses and individuals (collectively “Plaintiffs”) brought suit against the Department of Health and Human Services and its Secretary, Kathleen Sebelius (collectively “Defendants”).¹³⁴ Plaintiffs challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010 (ACA) enacted by Congress.¹³⁵ Specifically, Plaintiffs challenged two provisions of the ACA: (1) the individual mandate requiring American citizens to pay a penalty for failing to purchase a health insurance policy of at least minimal coverage; and (2) the Medicaid expansion provision requiring states to greatly expand the number of covered individuals or risk losing their existing federal funding.¹³⁶

The Supreme Court concluded by a slim majority that “[t]he Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”¹³⁷ Still, the majority opinion authored by Chief Justice Roberts found that while Congress had the power to levy and collect taxes, the ACA

129. *Id.*

130. *Id.*

131. *Id.* at 928.

132. 567 U.S. 519 (2012).

133. *Id.* at 578.

134. *Id.* at 520.

135. *Id.*

136. *Id.* at 519–20.

137. *Id.* at 574.

was unconstitutional with regard to the powers allotted to Congress under the Commerce Clause and the Necessary and Proper Clause.¹³⁸

Chief Justice Roberts agreed with Plaintiffs' claim that the ACA's threat to withhold existing Medicaid funds to states served "no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act."¹³⁹ Chief Justice Roberts went on to clarify that while the Supreme Court in the past had upheld the authority of Congress to condition the receipt of funds on the states' compliance with restrictions on the use of those funds, this was based on a means by which Congress could ensure that the funds were spent to promote the "general welfare."¹⁴⁰ The opinion noted,

Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When . . . such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.¹⁴¹

Chief Justice Roberts distinguished the case at hand from the Supreme Court's decision in *Dole*.¹⁴² While the *Dole* Court concluded that South Dakota was left with a "prerogative" to reject the policy proposed by Congress, the states in *Sebelius* had no such power.¹⁴³ Chief Justice Roberts described the threatened loss of over ten percent of a state's overall budget as "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."¹⁴⁴

138. *Id.* at 559–61 ("Although the [Necessary and Proper] Clause gives Congress authority to 'legislate on that vast mass of incidental powers which must be involved in the constitution,' it does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated.").

139. *Id.* at 580.

140. *Id.*

141. *Id.*

142. *Id.* at 581.

143. *Id.* at 581–82.

144. *Id.* at 582.

B. Federal Government Efforts to Control State Action and the Attempt to Influence States via the Threat of Withholding Federal Funding

The federal government has also attempted to control state action in areas other than marijuana legalization, from sports betting to sanctuary cities, via federal statutes and threats to withhold funding from states.

1. State-Sponsored Sports Betting and the Tenth Amendment

The Supreme Court agreed to hear arguments addressing the relevance of the Tenth Amendment in *Christie v. National Collegiate Athletic Ass’n*.¹⁴⁵ In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA).¹⁴⁶ With the exception of a few states, PASPA effectively banned sports betting across the country.¹⁴⁷ However, in 2011, New Jersey citizens overwhelmingly approved a state constitutional amendment that would permit sports gambling.¹⁴⁸ After Governor Chris Christie signed a measure allowing sports betting in New Jersey into law in 2012, the National Collegiate Athletic Association (NCAA), National Football League (NFL), National Hockey League (NHL), and Major League Baseball (MLB) filed suit against New Jersey, arguing that PASPA overruled state law.¹⁴⁹

The Supreme Court sought to address “[whether] a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States*.”¹⁵⁰ The Supreme Court heard oral arguments for the case on December 4, 2017,¹⁵¹ where several Justices expressed opinions seemingly favoring New

145. 137 S. Ct. 2327 (2017) (mem.).

146. 28 U.S.C. § 3701 (2000).

147. 28 U.S.C. §§ 3702–04 (2000).

148. David Sheldon, *How SCOTUS Caught New Jersey’s Hail Mary on PASPA in 2017 to Change US Sports Betting*, CASINO.ORG (Dec. 28, 2017), <https://www.casino.org/news/scotus-heard-new-jersey-on-paspa-in-2017-to-change-sports-betting>.

149. *Id.*

150. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1488–89 (2018) (Ginsburg, J., dissenting).

151. Transcript of Oral Argument, *Christie v. Nat’l Collegiate Athletic Ass’n*, 137 S. Ct. 824 (2017) (mem.) (No. 16-476).

Jersey's position.¹⁵² Justice Kennedy, the Supreme Court's notable swing vote, stated that PASPA "leaves in place a state law that the state does not want, so the citizens of the State of New Jersey are bound to obey a law that the state doesn't want but that the federal government compels the state to have. That seems commandeering."¹⁵³

Justice Breyer also expressed his concern with PASPA, stating that the group of provisions addresses "what kind of law a state may have, without a clear federal policy that distinguishes between what they want states to do and what the federal government is doing."¹⁵⁴ He asserted, "That's what this is about, telling states what to do, and therefore, it falls within commandeering."¹⁵⁵

A ruling from the Supreme Court is pending at the time of this Article's publication.

2. The Withholding of Federal Funding from Sanctuary Cities

Even prior to taking office, President Trump threatened to withhold federal funding from cities and counties that pursue their status as sanctuary cities.¹⁵⁶ In a speech on immigration given in August 2016, President Trump claimed, "We will end the sanctuary cities that have resulted in so many needless deaths. Cities that refuse to cooperate with Federal authorities will not receive taxpayer dollars, and we will work with Congress to pass legislation to protect those jurisdictions that do assist Federal authorities."¹⁵⁷

On January 25, 2017, just five days after assuming office, President Trump signed an executive order to start construction of a

152. The Legal Blitz, *SCOTUS Oral Arguments Suggest that America's Sports Betting Ban Could Soon End*, ABOVE THE LAW (Dec. 11, 2017, 12:59 PM), <https://abovethelaw.com/2017/12/scotus-oral-arguments-suggest-that-americas-sports-betting-ban-could-soon-end/?rf=1>; Daniel Wallach, *How the Supreme Court Could Hand a Win to New Jersey and Sports Betting*, FORBES (Dec. 11, 2017, 7:00 AM), <https://www.forbes.com/sites/danielwallach/2017/12/11/supreme-court-ncaa-christie-nj-betting/#424587556ca7>.

153. Transcript of Oral Argument, *supra* note 151, at 31.

154. *Id.* at 40.

155. *Id.*

156. Reema Khrais, *Trump Promises to Block Funding to Sanctuary Cities*, MARKETPLACE (Nov. 14, 2016, 4:10 PM), <https://www.marketplace.org/2016/11/14/elections/trump-promises-block-funding-sanctuary-cities>.

157. *President Donald J. Trump Taking Action Against Illegal Immigration*, WHITE HOUSE (June 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/28/president-donald-j-trump-taking-action-against-illegal-immigration>.

wall on the Mexican border and to cut funding to municipal governments acting as sanctuary cities for immigrants.¹⁵⁸ Nevertheless, President Trump's executive order received instant backlash from leading human rights groups, activists, and even the judiciary.¹⁵⁹ Indeed, the Trump administration's coercive ban received strong resistance from federal courts that deemed the administration's threats as unconstitutional bullying.¹⁶⁰

a. Northern District of California

In *County of Santa Clara v. Trump*,¹⁶¹ Santa Clara and San Francisco filed motions to enjoin sections of President Trump's executive order, arguing that cutting federal funding to sanctuary cities violated the United States Constitution.¹⁶² The Honorable William H. Orrick of the United States District Court for the Northern District of California agreed with the counties and placed a nationwide hold on President Trump's executive order.¹⁶³

Judge Orrick, a President Obama appointee based in San Francisco, granted Santa Clara's and San Francisco's motions, holding that President Trump's order violated the United States Constitution.¹⁶⁴ Judge Orrick found that the counties demonstrated that "losing all of their federal grant funding would have significant effects on their ability to provide services to their residents and that they may have no legitimate choice regarding whether to accept the government's conditions in exchange for those funds."¹⁶⁵ Judge Orrick noted that President Trump's executive order likely violated the Tenth Amendment because it sought to coerce states and local municipalities to enforce a federal regulatory program.¹⁶⁶ Citing *Printz, New York v. United States*, and *Sebelius*, Judge Orrick

158. David Smith, *Trump Signs Order to Begin Mexico Border Wall in Immigration Crackdown*, GUARDIAN (Jan. 25, 2017, 3:01 PM), <https://www.theguardian.com/us-news/2017/jan/25/donald-trump-sign-mexico-border-executive-order>.

159. *Id.*

160. Maura Dolan & Joel Rubin, *U.S. Judge Blocks Trump Order Threatening Funds for 'Sanctuary' Cities*, L.A. TIMES (Apr. 25, 2017, 6:10 PM), <http://www.latimes.com/local/lanow/la-me-ln-sanctuary-trump-20170419-story.html>.

161. 250 F. Supp. 3d 497 (N.D. Cal. 2017).

162. *Id.*

163. Dolan & Rubin, *supra* note 160.

164. *Id.*

165. *Trump*, 250 F. Supp. 3d at 533.

166. *Id.*

reiterated the Supreme Court's repeated holding that the federal government cannot compel, command, or coerce states to adopt federal regulatory programs and policies.¹⁶⁷ Applying these previous holdings to the case at hand, Judge Orrick noted that "[t]he Executive Order uses coercive means in an attempt to force states and local jurisdictions to honor civil detainer requests, which are voluntary 'requests' precisely because the federal government cannot command states to comply with them under the Tenth Amendment."¹⁶⁸ Judge Orrick continued to hold that while the Trump administration has the ability to incentivize states to voluntarily adopt federal programs, "it cannot use means that are so coercive as to compel their compliance. The Executive Order's threat to pull all federal grants from jurisdictions that refuse to honor detainer requests or to bring 'enforcement action' against them violates the Tenth Amendment's prohibitions against commandeering."¹⁶⁹

Thus, Judge Orrick's straightforward application of the previous Supreme Court holdings in *Printz*, *New York v. United States*, and *Sebelius* clearly illustrated the constitutional issues surrounding the federal government's threats to withhold federal funding to sanctuary cities by way of President Trump's executive order.

b. Eastern District of Pennsylvania

In July of 2017, Attorney General Sessions repeatedly threatened to withhold a \$1.5 million federal grant from Philadelphia.¹⁷⁰ The grant in question was the Edward Byrne Memorial Justice Assistance Grant, which Philadelphia has received every year since the grant's inception in 2005.¹⁷¹

Attorney General Sessions announced new requirements that Philadelphia had to satisfy in order to continue receiving the grant, including "that all jurisdictions must communicate with federal agencies and the Immigration and Naturalization Service; grant U.S.

167. *Id.*

168. *Id.* at 534.

169. *Id.*

170. Claire Sasko, *Judge: Philly "Is Not a 'Sanctuary City'"*, PHILADELPHIA (Nov. 15, 2017, 2:31 PM), <http://www.phillymag.com/news/2017/11/15/sessions-sanctuary-city-ruling/>.

171. Claire Sasko, *Here Is the Lawsuit that Philly Just Filed Against Jeff Sessions*, PHILA. (Aug. 30, 2017, 10:46 AM), <http://www.phillymag.com/news/2017/08/30/philly-sues-jeff-sessions/>.

Immigration and Customs Enforcement (ICE) access to inmates of interest in Philly’s prison system; and provide ICE with 48-hours-notice of the scheduled release of a prisoner of interest.”¹⁷² In response, Philadelphia filed a lawsuit against Attorney General Sessions, claiming that the conditions he added were contrary to law and unconstitutional.¹⁷³

On November 15, 2017, the Honorable Michael Baylson of the United States District Court for the Eastern District of Pennsylvania ruled that “Department of Justice (DOJ) law enforcement grants can’t be withheld from Philadelphia because it refuses full cooperation with federal authorities on immigration.”¹⁷⁴ In issuing a preliminary injunction to Philadelphia, Judge Baylson noted that the conditions set forth by Attorney General Sessions did not satisfy the “demanding threshold imposed by *Dole*.”¹⁷⁵ Specifically, Judge Baylson stated that Attorney General Sessions’s conditions violated the relatedness test set forth in *Dole*, holding that “[t]he important question is whether the conditions at issue related to the federal interest in the particular program they are attached to.”¹⁷⁶

Judge Baylson then held that even accepting a most generous reading of the DOJ’s argument, the DOJ’s interest would be in pursuing “criminal justice” broadly.¹⁷⁷ Accordingly, the Court held that “the fact that immigration enforcement depends on and is deeply impacted by criminal law enforcement does not mean that the pursuit of criminal justice in any way relies on the enforcement of immigration law. Realistically, it does not.”¹⁷⁸

Judge Baylson went on to note that Philadelphia clearly established that it used the grant money “for purposes much broader than the prosecution of criminals, and that adherence to the Department of Justice conditions would conflict with its justifiable policies towards non-criminal aliens.”¹⁷⁹ Accordingly, in applying the

172. *Id.*

173. *Id.*

174. Rafael Bernal, *Judge Rules DOJ Can’t Withhold Money from Philadelphia over ‘Sanctuary City’ Policies*, HILL (Nov. 15, 2017, 12:49 PM), <http://thehill.com/latino/360500-judge-rules-doj-cant-withhold-money-from-philadelphia-over-sanctuary-city-policies>.

175. *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 644 (E.D. Pa. 2017).

176. *Id.* at 642.

177. *Id.*

178. *Id.*

179. *Id.* at 644.

Dole test to the case at hand, Judge Baylson underscored the way in which Attorney General Sessions's repeated threats to withhold federal funding to Philadelphia violated the Supreme Court precedent established in *Dole*.¹⁸⁰

IV. THREATS TO WITHHOLD FEDERAL FUNDING FROM LOCAL JURISDICTIONS THAT LEGALIZE MARIJUANA IMPLICATE TENTH AMENDMENT CONCERNS

While the Trump administration has not yet announced a specific policy regarding marijuana legalization in California and other states, legal scholars have suggested that any future policy may likely feature a threat to withhold federal funding in an effort to compel these states to abandon their legalization efforts.¹⁸¹ In response to being asked whether California could challenge federal enforcement of marijuana prohibition, Loyola Law School Professor Karl Manheim responded, “[T]hat scenario isn’t likely. They can protest, but in response, the federal government can threaten to withhold certain funding.”¹⁸²

Sam Kamin, Vicente Sederberg Professor of Marijuana Law and Policy at the University of Denver’s Sturm College of Law, also commented on the uncertainty of how the spending power might be tactically used against states that legalize marijuana by the Trump administration.¹⁸³ Referencing the *Sebelius* holding that Congress could use its spending power as an inducement but not a threat, Professor Kamin noted, “It’s not clear what the outer borders of [the decision] are.”¹⁸⁴ Still, Professor Kamin stated, “I don’t see why the

180. *Id.* at 649, 654.

181. Melina Delkic, *How Jeff Sessions Plans to End Marijuana Before the Year Is Over*, NEWSWEEK MAG. (Nov. 24, 2017, 7:50 AM),

<http://www.newsweek.com/will-jeff-sessions-medical-marijuana-718676> (“‘He’s old fashioned and very conservative,’ said Philip Heymann, a Harvard Law School professor and former Justice Department official for the Kennedy, Johnson, Carter and Clinton administrations. ‘Literally seven years ago, maybe eight years ago, marijuana was thought to be a very dangerous drug. Why would he focus on this issue? Because he’s seven years out of date.’”); Michael Roberts, *Three Ways Trump Could Shut down State-Legal Marijuana*, WESTWORD (Dec. 1, 2016, 6:38 AM), <http://www.westword.com/news/three-ways-trump-could-shut-down-state-legal-marijuana-8550568>; Margolis, *supra* note 6.

182. Margolis, *supra* note 6.

183. Roberts, *supra* note 181.

184. *Id.*

federal government might not try to say, ‘We’re going to withhold some federal funds unless a state adopts or retains prohibition.’”¹⁸⁵

Indeed, Attorney General Sessions’s recent memo rescinding the Cole Memo suggested that the DOJ has no intention of maintaining the status quo set forth by President Barack Obama’s administration to refrain from interfering with state-level marijuana legalization efforts.¹⁸⁶ To the contrary, Attorney General Sessions made clear his plans to “return to the rule of law.”¹⁸⁷ To the extent that the federal government were to pursue such a course of action, a court might very well find a Tenth Amendment violation.

If the Trump administration follows through on a policy of threatening to withhold funding similar to its threats to sanctuary cities, this policy would likely fail under the standard set forth in *Dole*. Indeed, any policy would have to involve spending that promotes the “general welfare” while remaining noncoercive and constitutional in nature.¹⁸⁸ If the potential policy on marijuana mirrored Trump’s executive order on the issue of sanctuary cities, federal courts across the country would take issue with its strong-armed, threatening position.

Moreover, because the Trump administration has not taken an official position on withholding funding to states that legalize marijuana, the specific grants which may be threatened remain unclear. Scholars have indicated that grants to local law enforcement agencies that fail to cooperate with federal anti-marijuana law enforcement efforts may face cuts, as may grants allocated for federal education spending on schools with drug use statistics above the national average.¹⁸⁹ Similar to the course of action the Trump administration has already taken with regard to sanctuary cities, it seems more likely that any federal fund withholding would come in the form of cutting grants to state and local anti-crime agencies.

185. *Id.*

186. *Read: Attorney General Jeff Sessions's Memo Changing Marijuana Policy*, HILL (Jan. 4, 2018, 1:28 PM), <http://thehill.com/homenews/administration/367441-read-attorney-general-jeff-sessions-memo-changing-marijuana-policy?rnd=1515090571>.

187. *Id.*

188. *South Dakota v. Dole*, 483 U.S. 203, 207–08, 211 (1987).

189. Robert McVay, *What Would Federal Marijuana Enforcement Look Like?*, HARRIS BRICKEN: CANNA L. BLOG (Feb. 27, 2017), <https://www.cannalawblog.com/what-would-federal-marijuana-enforcement-look-like/>; Wallace, *supra* note 58.

V. PROPOSED SOLUTIONS THAT WOULD ALLOW THE TRUMP
ADMINISTRATION TO ACHIEVE ITS GOALS WITHIN THE BOUNDS
OF THE LAW

To satisfy the Supreme Court's interpretation of the Constitution, the Trump administration should institute a policy which:

1. Specifically promotes the general welfare by reducing the sale and consumption of marijuana across the nation, thereby proportionally reducing marijuana-related offenses and violence;

2. Explicitly withholds anti-crime funding from law enforcement agencies engaged in preventing drug related offenses. Moreover, this policy should only withhold funding proportional to the total funding received by law enforcement agencies in individual counties throughout each state. Finally, the percentage of funds withheld should remain below five percent of each county's total funding for anti-crime practices specifically geared towards regulating drug-related crime and violence; and

3. Directly corresponds with the Controlled Substances Act and relates to the federal government's position on the illegality of marijuana.

Accordingly, if the Trump administration proceeds to institute a policy aimed at withholding federal funding from those states that have and that wish to pursue the legalization of marijuana, the administration will have to do so in a manner which complies with *Dole's* four-step framework. To do otherwise would present constitutional concerns by ignoring the substantive limitations placed by the Supreme Court on the federal government's power to interfere with states' rights.¹⁹⁰

VI. JUSTIFICATIONS: APPLYING THE *DOLE* TEST WILL ALLOW A
POTENTIAL FEDERAL POLICY OF WITHHOLDING FUNDING TO PASS
CONSTITUTIONAL MUSTER

Reiterating the framework developed in *Dole*, the Trump administration would need to present a policy which satisfies the following requirements: (1) the policy must be in pursuit of the general welfare; (2) if Congress wishes to apply conditions to states receiving federal funds, it must do so unambiguously and enable the states to

190. *Dole*, 483 U.S. at 203.

knowingly exercise their choice; (3) conditions on federal funds must be related to the federal government's interest in a particular national project or program; and (4) other provisions of the United States Constitution may act as independent bars to Congress's wishes to conditionally grant certain federal funds.¹⁹¹

A. Pursuing the General Welfare

The United States Constitution states that Congress may spend money in aid of the general welfare.¹⁹² In determining whether spending falls into the category of general welfare, the Supreme Court has held, “[D]iscretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law.”¹⁹³ The Supreme Court in *Helvering v. Davis*¹⁹⁴ went on to note, “Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.”¹⁹⁵

As the Court in *Dole* noted:

Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare.¹⁹⁶

Thus, to pass constitutional muster, the Trump administration would need to frame any withholding of federal funds as a means chosen to advance the general welfare.

In reality, the consequences of withholding local law enforcement funding could result in a substantial disservice to the general welfare of states that pursue marijuana legalization. Withholding law enforcement funding could significantly inhibit local law enforcement's ability to enforce not only drug related offenses, but

191. *Id.*

192. U.S. CONST. art. I, § 8.

193. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

194. 301 U.S. 619, 640 (1937).

195. *Id.* at 641.

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

other crimes as well. Ironically, reducing law enforcement funding would therefore create the risk of negatively impacting the general welfare of states, irrespective of the Trump administration's intentions behind administering and enforcing such a policy.

However, per the proposed policy set forth above, the Trump administration could reason that its aim was to reduce the substantial presence and impact of marijuana at the state level. This would thus promote the general welfare by reducing marijuana-related offenses and violence, thereby supporting the overall well-being of the public at large. Similar to Congress's position in *Dole* that increasing the drinking age would reduce the number of young individuals driving inebriated, the Trump administration policy could aim to deter marijuana-related crimes by reducing the availability of the drug throughout the several states.¹⁹⁷ With the power of discretion at its side, the Trump administration would not likely face significant challenges to this first restriction articulated in *Dole*.

B. Unambiguous Conditions and State Freedom to Exercise Choice

The Supreme Court in *Dole* held that the government can only withhold federal funding via a federal policy that offers "mild encouragement" and where the ultimate decision to abide "remains the prerogative of the States."¹⁹⁸ The *Sebelius* Court distinguished its holding from its earlier decision in *Dole*.¹⁹⁹ In *Sebelius*, Chief Justice Roberts noted that "[a] State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but *all* of it."²⁰⁰

Chief Justice Roberts went on to assert that "the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."²⁰¹ Thus, *Sebelius* reaffirmed in part the standard presented in *Dole* that in order to remain within the bounds of the United States Constitution, Congress is not permitted to withhold funding simply as a coercive measure to

197. *See id.*

198. *Id.* at 211–12.

199. Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 567 U.S. 519, 580–82 (2012).

200. *Id.* at 581.

201. *Id.*

intimidate the States to comply with the federal government's wishes.²⁰²

In *Pennhurst State School and Hospital v. Halderman*,²⁰³ the Supreme Court likened the federal government's spending power to a contract, stating that "in return for federal funds, the States agree to comply with federally imposed conditions."²⁰⁴ The Court expanded on this idea, noting that "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"²⁰⁵ Justice Rehnquist reasoned that a state could not knowingly accept such a "contract" if the state is unaware of the conditions being imposed on it and is unable to ascertain federal expectations.²⁰⁶ Accordingly, the Court concluded, "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."²⁰⁷

Just as the conditions in *Dole*, which "could not be more clearly stated by Congress," the proposed policy would need to unambiguously set forth the specific terms by which federal funding would be withheld from states.²⁰⁸ Moreover, the proposed percentage of funds to be withheld represents a specific subsection of anti-crime grants targeting the prevention of marijuana-based offenses and violence. As the *Sebelius* Court pointed out in its analysis of *Dole*, the five percent of highway funds that would be withheld from South Dakota "constituted less than half of 1 percent of South Dakota's budget at the time."²⁰⁹ Here, because the proposed policy's five percent cap only pertains to the narrower subsection of marijuana prevention, the actual percentage of total state anti-crime funding would be similarly unsubstantial.

202. *Id.* at 580.

203. 451 U.S. 1 (1981).

204. *Id.* at 17.

205. *Id.*

206. *Id.*

207. *Id.* (footnote omitted) (citations omitted).

208. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

209. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–81 (2012).

The Trump administration could therefore successfully employ the proposed policy because it is far less coercive than the policy which the federal government attempted to institute with regard to sanctuary cities. Rather than attempting to withhold large amounts of grant funding from states, the proposed policy reflects a noncoercive nudge against California and other states attempting to pursue marijuana legalization. Accordingly, the proposed policy would likely satisfy the second step of the *Dole* standard requiring unambiguous conditions and state freedom to exercise choice.

C. *The Trump Administration's Interest in Marijuana Legalization*

The third restriction set forth by the Supreme Court in *Dole* requires conditions on federal funds to be related “to the federal interest in particular national projects or programs.”²¹⁰

Indeed, almost thirty years prior to *Dole*, the Supreme Court ruled that “the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.”²¹¹

In *Dole*, South Dakota did not seriously challenge the notion that the federal government’s withholding of funds was unrelated to a national interest.²¹² To the contrary, the condition imposed by Congress was “directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”²¹³

The memo released by the DOJ on January 4, 2018, begins to present Attorney General Sessions’s position on the federal government’s national interest in state-level marijuana legalization. The memo reads:

In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. It has established significant penalties for these crimes. These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the

210. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)) (noting that the Supreme Court’s previous cases did not provide significant elaboration as to determining federal interest in national programs).

211. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958), *overruled on other grounds* by *California v. United States*, 438 U.S. 64 (1978).

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

213. *Id.*

money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. These statutes reflect Congress’s determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.²¹⁴

The proposed policy calls for a narrower approach to withholding funds—only targeting marijuana-related anti-crime funding—than that which the Trump administration attempted with sanctuary cities. In addition, Attorney General Sessions’s policy is directly related to the federal government’s position that marijuana should not be legalized pursuant to the Controlled Substances Act.²¹⁵ The Trump administration has repeatedly expressed the federal interest in keeping the cultivation, sale, and possession of marijuana illegal.²¹⁶ In addition to significant penalties for the crimes associated with growing and selling marijuana, Attorney General Sessions has further claimed that its dangers create additional crimes in the areas of money laundering and fraud.²¹⁷ Thus, the proposed policy merely reflects the Controlled Substances Act and the federal government’s interest in preventing the various crimes that arise with the increased presence of marijuana across the country. Accordingly, such a policy would presumably satisfy the national interest requirement set forth in *Dole*.

D. Other Potential Constitutional Bars

The final restriction presented in *Dole* asserts that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”²¹⁸ In interpreting the independent constitutional bar, the *Dole* Court held that this limitation was not “a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly.”²¹⁹ Instead, Chief Justice Rehnquist held that the Supreme Court’s earlier decisions stood for “the unexceptional proposition that the power may not be used to

214. Memorandum from Attorney Gen. Jefferson B. Sessions, III, *supra* note 61 (citations omitted).

215. *Id.*

216. *Id.*; Lopez, *supra* note 3; Robinson, *supra* note 36; Rough, *supra* note 62.

217. See Memorandum from Attorney Gen. Jefferson B. Sessions, III, *supra* note 61 (asserting that growing and selling marijuana may also “serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act”).

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

219. *Id.* at 210.

induce the States to engage in activities that would themselves be unconstitutional.”²²⁰

The *Dole* Court then provided examples of what may constitute such inducement, stating that “a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.”²²¹ Accordingly, the Court concluded that even if South Dakota were to “succumb to the blandishments offered by Congress and raise its drinking age to 21, the State’s action in so doing would not violate the constitutional rights of anyone.”²²²

Thus, should the proposed Trump administration policy of withholding federal funds from states that legalize marijuana satisfy the first three restrictions announced in *Dole*, the Tenth Amendment will not interfere as an independent constitutional bar.

VII. CONCLUSION

If the Trump administration pursues a policy threatening to withhold funding from California and the other states that seek to legalize marijuana, it must present a federal policy consistent with the Supreme Court’s framework set forth in *Dole*. If the federal government instead attempts to impose such a threat with the intent to simply coerce and punish noncompliant states, such a threat would constitute a violation of the powers otherwise reserved to the States under the Tenth Amendment of the United States Constitution.

220. *Id.*

221. *Id.* at 210–11.

222. *Id.* at 211.