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Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off

ABSTRACT. This Article contends that federal agencies ought more frequently to use the threat of cutting off funds to state and local grantees that are not adequately complying with the terms of a grant statute. Scholars tend to offer four arguments to explain – and often to justify – agencies’ longstanding reluctance to engage in funding cut-offs: first, that funding cut-offs will hurt the grant program’s beneficiaries and so will undermine the agency’s ultimate goals; second, that federalism concerns counsel against federal agencies’ taking funds away from state and local grantees; third, that agencies are neither designed nor motivated to pursue funding cut-offs; and fourth, that political dynamics among state governments, Congress, the White House, and the agencies themselves make funding cut-offs difficult to achieve. This Article argues that these critiques are deeply flawed. Among other problems, the critiques fail to account for the variety of types of grants, grant conditions, and rationales for grantee noncompliance; reflect lack of a nuanced understanding of the ways in which distinct federalism concerns play different roles at different times in the development and implementation of grant programs; and unrealistically assume static and unified agency incentives and political relationships. After debunking these critiques, the Article offers a new conception of the potential benefit of funding cut-offs in the enforcement of federal grant programs: the threat of a funding cut-off may be appropriate when it can promote change by the noncompliant grantee and when it can signal to other grantees that the agency is serious about enforcement, thereby increasing grantees’ compliance. The Article concludes by assessing the implications of this argument for administrative regime design and judicial review. This work opens up new avenues for research in administrative law on the distinct features of the federal grants regime.

AUTHOR. Associate Professor, Georgetown University Law Center. For helpful comments and conversations, I thank Lisa Bressman, John DiPaolo, Lilian Faulhaber, Brian Galle, Lisa Heinzerling, Martha Minow, John Monahan, Mitt Regan, Aaron Saiger, Sasha Samberg-Champion, Miriam Seifter, Jason Snyder, David Super, David Vladeck, Tim Westmoreland, and the editors of the *Yale Law Journal*. I also benefitted from exchanges with participants in faculty workshops at the Georgetown University Law Center and at American University’s Washington College of Law, in a session at the Education Law Association annual conference, and in the Georgetown University Law Center-George Washington University Law School Junior Scholars Summer Workshop. For useful research assistance, I thank Georgetown students Tommy Ball, Kate St. Romain, and especially Sam Kramer, as well as Morgan Stoddard and her assistants at the Georgetown Law Library. I also thank Johnny Wong and Angie Villareal for ongoing administrative support.



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INTRODUCTION

The Spending Clause authorizes the federal government to spend in support of the “general Welfare.”¹ Such spending often comes in the form of statutes that authorize federal grants to state and local governments.² As a result of these statutes, grant relationships between federal agencies and their state and local counterparts are pervasive. In 2013, federal grants to state and local governments constituted almost 16% of the federal budget³ and almost one-quarter of all state and local expenditures.⁴ Every cabinet-level agency except the State Department made such grants.⁵ Approximately 80% of federal grants each year go to state and local governments.⁶ But what happens when states and localities fail to comply with the conditions placed on the funding?

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1. U.S. CONST. art I, § 8, cl. 1.
 2. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 12-1016, GRANTS TO STATE AND LOCAL GOVERNMENTS 7 (2012) [hereinafter GAO], <http://www.gao.gov/assets/650/648792.pdf> [<http://perma.cc/5Q77-CPNS>]. A grant is a “form of federal assistance consisting of payments in cash or in kind to a state or local government or a nongovernmental recipient for a specified purpose.” *Id.* at 2-3; *see also* 31 U.S.C. § 6501(4)(A)-(B) (2012) (defining a grant as “money, or property provided instead of money, that is paid or provided by the United States Government under a fixed annual or total authorization” to an eligible beneficiary).
 3. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015: ANALYTICAL PERSPECTIVES 245 tbl.15-1 (2014) [hereinafter OMB, FY15 ANALYTICAL PERSPECTIVES], <http://www.gpo.gov/fdsys/pkg/BUDGET-2015-PER/pdf/BUDGET-2015-PER.pdf> [<http://perma.cc/S739-JZ65>].
 4. *Id.*
 5. *Cf.* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2014: ANALYTICAL PERSPECTIVES 289-98 tbl.17-1 (2013) [hereinafter OMB, FY14 ANALYTICAL PERSPECTIVES] (presenting summary statistics for FY12 actual and FY13 and FY14 estimated budget authority and outlays in federal grants to state and local governments for every cabinet agency except the State Department). *Compare* LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 3 (2d ed. 2013) (listing cabinet departments), *with Prime Award Spending Data 2013*, USASPENDING.GOV, http://www.usaspending.gov/?q=explore&fromfiscal=yes&typeofview=detailssummary&fiscal_year=2013 [<http://perma.cc/ZTF8-E82B>] (listing grant amounts given by each agency). The State Department did award approximately \$1.6 billion in grants in 2013, but the recipients were largely non-profit, citizen-exchange programs, foreign governments, non-governmental organizations, and so on. *See Prime Award Spending Data 2013: U.S. Department of State*, USASPENDING.GOV, <http://usaspending.gov/advanced-search> [<http://perma.cc/QAY3-TQDX>] (search “Spending Type” for “Grants,” search “Department/Agency (Code - Name)” for “1900 - State, Department of,” and search “Fiscal Year” for “2013”; then follow “Search” hyperlink) [<http://perma.cc/3LVV-A8HR>]; *Congressional Budget Justification, Volume 1: Department of State Operations*, U.S. DEP'T STATE (2014), <http://www.state.gov/documents/organization/207266.pdf> [<http://perma.cc/9UHJ-YJS2>].
 6. *See* GAO, *supra* note 2, at 7.

This is not merely a theoretical question. In just the last few years, states have failed to comply with requirements of the food stamps grant program by improperly terminating benefits to tens of thousands of food stamp recipients and doing very little to attempt to correct the errors.⁷ States have failed to comply with requirements of the Medicaid grant program by placing limits on the number of annual emergency room visits that Medicaid recipients can make.⁸ States have failed to comply with the federal special education grant program, reducing state spending on special education below what the terms of the grant require.⁹ States have failed to implement procedures that they agreed to take on when they accepted federal education funds under Race to the Top and the State Fiscal Stabilization Fund.¹⁰ Localities have failed to comply with the terms of federal housing grants by declining to put in place antidiscrimination measures in their housing programs.¹¹ What should the federal agencies in charge of the grant money do?

If agencies and their grantees cannot reach an agreement through persuasion and other informal means, agencies have a powerful formal tool at their disposal: they can cut off funds to the offending grantee until the grantee complies.¹² This tool can be very effective. For example, it is widely understood that the use (and threatened use) of funding cut-offs played a significant role in desegregating Southern schools in the late 1960s.¹³ Notwithstanding this exam-

7. See David A. Super, *An Error Message for the Poor*, N.Y. TIMES, Jan. 3, 2014, <http://www.nytimes.com/2014/01/04/opinion/an-error-message-for-the-poor.html> [<http://perma.cc/6VNV-LJZW>].

8. See Jodie Tillman & Tia Mitchell, *Feds to Fine State over Limit on Medicaid Patients' ER Visits*, TAMPA BAY TIMES, Feb. 26, 2014, <http://www.tampabay.com/news/politics/legislature/feds-to-fine-state-over-limit-on-medicaid-patients-er-visits/2167575> [<http://perma.cc/6U3Z-3RJN>].

9. See S.C. Dep't of Educ. v. Duncan, 714 F.3d 249, 252–53 (4th Cir. 2013).

10. See Michele McNeil, *Calif. Forgoes Data Grant, Jeopardizes Other Stimulus Funds*, EDUC. WK.: POLITICS K-12 (Aug. 9, 2011, 1:57 PM), http://blogs.edweek.org/edweek/campaign-k-12/2011/08/with_browns_veto_calif_jeopard.html [<http://perma.cc/Z3KC-KKS4>]; Michele McNeil, *U.S. Dept. of Ed. Plans to Withhold Part of Georgia's Race to Top Grant*, EDUC. WK.: POLITICS K-12 (July 30, 2013, 2:57 PM) http://blogs.edweek.org/edweek/campaign-k-12/2013/07/us_dept_of_ed_plans_to_withhol.html [<http://perma.cc/FBV7-LZY8>].

11. See Peter Applebome, *Showdown for Westchester and U.S. Over Desegregation Agreement*, N.Y. TIMES, Apr. 23, 2013, <http://www.nytimes.com/2013/04/24/nyregion/us-gives-westchester-deadline-to-comply-with-housing-pact.html> [<http://perma.cc/V29W-AB53>].

12. 2 RICHARD B. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS: LAW, POLICY, AND PRACTICE § 8:04 (Supp. 1991).

13. See, e.g., MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 419 (5th ed. 2012) (“Although funding cutoffs have been rare, the threat of such cutoffs has been thought to be the strongest weapon against local officials in the effort to desegregate public schools.”); Elizabeth Cascio et al., *Paying for Progress: Conditional Grants and the Desegregation of South-*

ple, however, the funding cut-off is a controversial mechanism that is rarely employed.¹⁴ Advocates periodically call for greater agency use of the funding cut-off,¹⁵ and agencies do sometimes employ this mechanism;¹⁶ however, the funding cut-off is generally disfavored, even by those who wish for greater enforcement overall.¹⁷

Scholars tend to provide four arguments to either justify or explain the relative infrequency of funding cut-offs. First, the argument goes, the funding cut-off is a blunt tool that hurts the intended beneficiaries of the grant in question.¹⁸ Second, the argument continues, federalism concerns justifiably limit agencies' willingness to take money away from state and local grantees.¹⁹ Federalism concerns received enhanced attention after the Supreme Court held in 2012 that the Affordable Care Act's expansion of Medicaid represented an unconstitutional coercion of state governments because it threatened to cut off funds for the entire Medicaid program in states that declined to participate in the expansion.²⁰ Scholars have generally suggested that *NFIB v. Sebelius* shifted power to states and away from agencies in the grant relationship.²¹

ern Schools, 125 Q. J. ECON. 445, 449 (2010) (finding that, in the 1960s, "districts responded to financial pressure to desegregate in a historically meaningful way").

14. V.O. KEY, JR., *THE ADMINISTRATION OF FEDERAL GRANTS TO STATES* 156 (1937) (explaining that, several decades into the regime of federal grant-making, "[t]he power to withhold or suspend federal grants" is a "formidable weapon" that "has rarely been invoked"); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 409 (2008) (observing that "the threat that federal funds will be withheld is remote at best"); Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 660 (2013) (describing agency reluctance to cut off funds as "a trans-agency reality").
15. See, e.g., *Fight for the Soul of the Cities*, LAB./CMTY. STRATEGY CTR., <http://www.fightforthesoulofthecities.com/campaigns> [<http://perma.cc/E8NF-WZ49>] (calling for federal agencies to withhold grant funds under civil rights laws); *National Opportunity to Learn Campaign: Federal Recommendations*, SCHOTT FOUND. FOR PUB. EDUC. 11 (May 2009), <http://schottfoundation.org/otl/otl-federal-recommendations-final.pdf> [<http://perma.cc/UF86-RAU6>] (calling for the Department of Education to withhold education grants from noncompliant states and districts).
16. See, e.g., CAPPALLI, *supra* note 12, § 8:06 (describing early cases of such agency action); Bagenstos, *supra* note 14, at 409 n.337 (acknowledging occasional instances of agencies' cutting off funds).
17. See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 200 (critiquing funding cut-offs as a tool while lamenting the Supreme Court's restrictions on private enforcement).
18. See *infra* Part II.A.
19. See *infra* Part II.B.
20. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).
21. See, e.g., Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 921 (2013); Erin Ryan, *Environmental Law After Sebelius: Will the*

The third argument posits that agencies have little motivation or capacity to cut off funds from their grantees; this argument seeks to explain (more than justify) the paucity of such enforcement actions. Grant program offices are designed to give out money, not to take it away, and in any event they are too cash-strapped to be effective enforcers.²² The final argument, again more descriptive than normative, further asserts that the political dynamics among states, Congress, agencies, and the White House do not support robust cut-off efforts.²³

In this Article, I contend that these arguments are deeply flawed. Moreover, even if they accurately describe what agency officials believe to be the case, they rest on unsupportable premises. As I demonstrate below, funding cut-offs will not always hurt a grant's beneficiaries.²⁴ The point of the mechanism is to encourage the noncompliant grantee to comply. Beneficiaries may at times be better off if a cut-off induces greater compliance in the future, as may beneficiaries in other jurisdictions where grantees increase their compliance, having observed that the agency is serious about cutting off funds. Second, the federalism concerns about the funding cut-off are misguided.²⁵ It is more respectful of state sovereignty, not less, to hold states to their agreements. Many violations of grant conditions have nothing to do with state policy choices and more to do with poor administration. Several objectives promoted by federalism—protecting sovereignty, preventing coercion, and promoting diversity—are more relevant to the front end of grant design and initial bargaining than to back-end grant enforcement. Furthermore, the objective that is relevant to the back end of grant enforcement—promoting accountability—is actually supported, not undermined, by a funding cut-off.

As to the third argument—that agencies have little motivation or capacity to cut off funds from their grantees—some agency officials have an enforcement mindset due to their perception of their core professional obligations, so claims about limited agency motivation are overstated. Relatedly, agency officials might appreciate the increased leverage that comes from a threatened funding cut-off, benefit from future job opportunities as a result of taking a hard line on enforcement, or value acting in collusion with state or local grant-

Court's New Spending Power Limits Affect Environmental State-Federal Partnerships?, AM. CONST. SOC'Y 19 (Oct. 2013), http://www.acslaw.org/sites/default/files/Ryan-_After_Sebelius.pdf [<http://perma.cc/FTV5-PEE7>].

22. See *infra* Part II.C.

23. See *infra* Part II.D.

24. See *infra* Part II.A.

25. See *infra* Part II.B.

ees against other recalcitrant players in the system.²⁶ Claims about limited agency capacity to cut off funds insufficiently acknowledge that the alternative—private litigation against non-compliant grantees—also faces serious practical constraints.²⁷ *NFIB* does little to change the analysis.²⁸ Most grant conditions are unlikely to be found coercive, even under the new doctrine set forth in that case,²⁹ and, in any event, other forms of intergovernmental negotiation that scholars have predicted in the wake of *NFIB* are similarly time-intensive. Finally, political dynamics are complicated; multiple alignments of shifting political coalitions are possible.³⁰ The suggestion that states will always or even usually prevail in a battle with agency enforcers misses multiple layers of complexity in the relationships at issue.

In debunking these standard critiques and in suggesting the potential value of the funding cut-off, I have two goals. The first goal is to clear the brush away from the mechanism so that analysts, advocates, and agency officials may evaluate its potential use on the merits of each case rather than with doubt about or distaste for the mechanism itself. The rehabilitation of this agency enforcement mechanism is an important task, especially as the scope of intergovernmental grants is vast and has only increased over time.³¹ Although the extent of noncompliance is unknown, it is fair to say that state and local government grantees have not always complied with the conditions they agreed to when accepting federal money.³² Agency enforcement of these programs is particularly important in light of the various restrictions the Supreme Court has placed on private enforcement of federal grant regimes over the last two decades. The Court has interpreted particular grant statutes and their associated conditions narrowly, making it more difficult for private parties to es-

26. See *infra* Part II.C.1.

27. See *infra* Part II.C.2.

28. See *infra* Part II.C.3.

29. See generally Pasachoff, *supra* note 14, at 612-51 (arguing that federal education laws, the next likely target after Medicaid because of their scope, would all survive a coercion analysis under the new doctrine).

30. See *infra* Part II.D.

31. See *supra* notes 1-4 and accompanying text; *infra* notes 43-45, 52-73 and accompanying text.

32. See *supra* notes 7-11 and accompanying text; *infra* notes 139-155 and accompanying text; see also Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1226, 1228 n.90 (1999) (describing the “familiar point that state and local officials frequently . . . violat[e] conditions attached to federal funds whenever the federal government fails to monitor their compliance” and giving an example of a governor’s description of his decision to “just start[] ignoring all the federal rules”).

establish violations or bring suit at all.³³ The Court has constrained lower courts' ability to read private rights of action into grant programs.³⁴ It has limited the circumstances under which attorneys' fees may be available.³⁵ It has made civil litigation generally more difficult by, among other things, tightening pleading standards³⁶ and class action requirements.³⁷ Together, these doctrinal developments have left a significant enforcement gap surrounding the use of hundreds of billions of dollars in federal grant money each year. The other potential players in the enforcement regime are the agencies. As of yet, however, insufficient attention has been paid to the potential upsides of agency enforcement of grant programs, much less ways to design agency process and structure to capitalize on these upsides. This Article takes on that task.

The second goal of the Article is to highlight the fact that grant administration and enforcement are part of the core work of federal agencies. This work rarely appears in descriptions or analyses of the administrative state's func-

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33. See, e.g., *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (holding that the burden of proof in a challenge under the Individuals with Disabilities Education Act lies with the party seeking relief—which in most cases will be the disabled child); *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that individuals may sue under Title VI of the Civil Rights Act of 1964 only for acts of intentional discrimination, not for acts that only have a disparate impact).
 34. See, e.g., *Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1211 (2012) (declining to allow a Supremacy Clause action to enforce a provision of the Medicaid grant in light of agency action); see also *id.* at 1212 (Roberts, C.J., dissenting) (noting that he and three other Justices would reach the question the Court skirts and hold that the Supremacy Clause never provides a cause of action to enforce a grant condition where the grant statute does not provide an individual cause of action in the statute itself); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002) (holding that a law conditioned on federal grant funds may not be enforced through 42 U.S.C. § 1983 because the Family Educational Rights and Privacy Act of 1974 (FERPA) created no individually enforceable right).
 35. See, e.g., *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600, 610 (2001) (holding that attorneys' fees may be awarded under a fee-shifting provision only if the prevailing party obtained a material alteration in the legal relationship between the parties, not if the plaintiff's suit was merely a catalyst for the change the plaintiff had sought).
 36. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that Rule 8 of the Federal Rules of Civil Procedure requires that "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" (citation and internal quotation marks omitted)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (holding that, if anti-trust complaints are to survive a motion to dismiss, they must meet a "plausibility" requirement).
 37. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52, 2557 (2011) (restricting standards for certifying a class for class action litigation).

tions.³⁸ Federal grants tend to appear in the legal literature in two lines of scholarship: analyses of doctrine related to the Spending Clause³⁹ or broader discussions of federalism.⁴⁰ Neither of these sets of literature, however, attends to the unique administrative law features of grants.⁴¹ Even the recent scholarship on administrative federalism, which analyzes the relationship between federal agencies and the states, pays scant attention to the particular role of federal grants in these relationships, focusing instead on matters such as preemption, which have little relevance in the world of federal grants.⁴²

The absence of attention to federal grants as a distinct category of administrative action is surprising in light of the category's importance. Consider these

38. For example, Justice Breyer's classic administrative law casebook includes no discussion of grants in its historical survey of administrative government and law, nor does grant-making feature in the book's discussion of "What Is an Agency and What Does It Do?" STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 15-36 (7th ed. 2011). Other administrative law casebooks suffer from the same omission.

A handful of practitioner compendiums on grants exist, see KENNETH J. ALLEN, *FEDERAL GRANT PRACTICE* (2014 ed.); CAPPALLI, *supra* note 12; PAUL G. DEMBLING & MALCOLM S. MASON, *ESSENTIALS OF GRANT LAW PRACTICE* (1991); THOMPSON'S *FEDERAL GRANTS MANAGEMENT HANDBOOK* (2014), but their practice-oriented approach has not provoked much scholarship. A rare instance of a sustained discussion of grants as a distinct form of administrative action appears in Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *HARV. L. REV.* 1285, 1315-17, 1320-21 (2003), but even there, the analysis focuses on using grants to make privatized government services more public, rather than on anything specific to the grants regime itself.

39. See, e.g., Bagenstos, *supra* note 14; Bagenstos, *supra* note 21; Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 *IND. L. J.* 459 (2003); Brian Galle, *Federal Grants, State Decisions*, 88 *B.U. L. REV.* 875 (2008) [hereinafter Galle, *Federal Grants*]; Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 *CONN. L. REV.* 155 (2004); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 *GEO. L.J.* 461 (2002).

40. See, e.g., ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* 288-90 (2012); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1274-76, 1282, 1297 (2008); Hills, *supra* note 32; 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, 858-65 (1998); David A. Super, *Rethinking Fiscal Federalism*, 118 *HARV. L. REV.* 2544, 2571-93 (2005).

41. Of course, individual grant programs receive scholarly attention relating to the specifics of that statutory regime, but those analyses do not address the more general administrative law issues that accompany the grant regime writ large, as this Article begins to do. See also *infra* note 49 (describing my anticipated subsequent work in this area).

42. See, e.g., Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 *DUKE L.J.* 2023 (2008); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 *COLUM. L. REV.* 1 (2011); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 *DUKE L.J.* 2125 (2009).

facts: The cabinet agency that gives the least money in grants each year, the Treasury Department, in 2012 nonetheless provided more in grant money than did the MacArthur Foundation, a giant in American private philanthropy.⁴³ The Environmental Protection Agency, better known for its work in direct regulation than in grants, provided \$1.5 billion more in grant money in 2012 than did the Gates Foundation, the largest private grant-making institution in the world.⁴⁴ And the cabinet agency that gives the most money in grants each year, the Department of Health and Human Services, provided more grant money in 2012 than any individual state spent on its entire budget.⁴⁵ In addition, both Congress and the White House have focused on the structure of the federal grants process in recent years,⁴⁶ while the Supreme Court's increased attention to Spending Clause doctrine⁴⁷ and significant restrictions on private enforcement of federal grants⁴⁸ make the task of understanding the administrative structure of federal grants that much more critical.

Given the size of—and increased political and judicial attention to—the federal grant-making universe, the legal literature needs to develop a nuanced account of the role of federal grants in administrative practice. In attending to

43. The Treasury Department gave \$221.3 million in grants in FY 2012. See *Prime Award Spending Data*, USASPENDING.GOV, http://www.usaspending.gov/?q=explore&fromfiscal=yes&typeofview=detailsummary&fiscal_year=2012 [<http://perma.cc/K5W9-CFM5>] [hereinafter *Prime Award Spending Data 2012*]. The MacArthur Foundation provided nearly \$210 million in grants in 2012. See *The John D. and Catherine T. MacArthur Foundation*, FOUND. CTR., <https://fdo.foundationcenter.org> [<http://perma.cc/KCU3-L8TS>] (search “Grantmaker Name” for “The John D. and Catherine T. MacArthur Foundation”; then follow “MacArthur Foundation, John D. and Catherine T, The” hyperlink). I use 2012 data in this example because it is the latest year for which final figures on foundation grant-making are available.

44. The EPA gave \$4.6 billion in grants in FY 2012. *Prime Award Spending Data 2012*, *supra* note 43. The Gates Foundation gave \$3.2 billion in grants that same year. See *Bill & Melinda Gates Foundation*, FOUND. CTR., <https://fdo.foundationcenter.org> [<http://perma.cc/KCU3-L8TS>] (search “Grantmaker Name” for “Bill & Melinda Gates Foundation”; then follow “Gates Foundation, Bill & Melinda” hyperlink).

45. HHS gave \$344.4 billion in grants in FY 2012. See *Prime Award Spending Data 2012*, *supra* note 43. California, the state with the largest expenditures in FY 2012, spent \$199 billion overall. See *State Expenditure Report: Examining Fiscal 2011-2013 State Spending*, NAT'L ASS'N STATE BUDGET OFFICERS 7 (2013), <http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202011-2013%20Data%29.pdf> [<http://perma.cc/8KHM-DDU5>] [hereinafter *NASBO 2011-2013*].

46. See *infra* notes 74-79 and accompanying text.

47. See *supra* note 39 and accompanying text.

48. See *supra* notes 33-37 and accompanying text.

the particular enforcement challenges of federal grants, this Article lays the groundwork for future work in this area.⁴⁹

My argument proceeds in three parts. After describing the scope of federal grants in the contemporary regulatory state, Part I disaggregates the intergovernmental grant system, especially the distinct features of different types of federal grants, grant conditions, and rationales for grantee noncompliance, as well as the types of informal and formal mechanisms available to agencies to enforce grant conditions. In this Part, as in the rest of the Article, many of the examples used to illustrate particular points are drawn from grants overseen by the agencies that administer grants as a core element of their operations—the Department of Health and Human Services and the Department of Education. I use these examples to make the broader point that we have much to learn about administrative practice from these understudied agencies.

Part II debunks the classic critiques of the funding cut-off as a formal enforcement tool, demonstrating that all four of the critiques vastly oversimplify the interests of grant beneficiaries, the role of federalism, agency capacity and motivation, and intergovernmental and interbranch political dynamics. I argue that even if these critiques accurately explain why agencies have traditionally been reluctant to withhold funds, these explanations are difficult to defend writ large and need to be challenged to account for the variety of types of grants, grant conditions, and rationales for noncompliance, among other things.

Part III begins by developing a framework for assessing when funding cut-offs can be most useful—namely, when they can encourage change within the noncompliant state and signal to other states that the agency is serious about enforcement, increasing other states' compliance. This Part concludes by assessing the implications of this framework for administrative regime design and judicial review. In particular, I argue that the Office of Management and Budget ought to include procedures in its ongoing reform of the federal grants process to permit the public to call agencies' attention to grantee noncompliance more effectively. In addition, agencies ought to consider ways to divide their grant-making and grant enforcement personnel differently; Congress

49. In future work, for example, I will address the administrative practice that has developed around the Administrative Procedure Act's exemption of grants from notice-and-comment rulemaking, *see* 5 U.S.C. § 553(a)(2) (2012); contrast the strikingly different role that the White House's Office of Management and Budget has played with respect to centralized review of grant-making with the role that the White House's Office of Information and Regulatory Affairs (OIRA) has played with respect to centralized review of rulemaking; contrast the regulatory effects of systematic reauthorizations of most grant-making statutes with the regulatory effects of statutory regimes that are expected to exist more or less in perpetuity; and consider the extent to which administrative practice ought to treat grants to state and local governments differently from grants to non-profit organizations, for-profit organizations, and individuals.

ought to consider rationalizing directions for funding cut-offs across different statutory regimes; and courts ought to resist any effort to impose a special federalism version of hard-look review on agencies' funding cut-off decisions.

My defense of the funding cut-off is not meant to suggest that it is appropriate for all violations of grant conditions, or even all serious violations of grant conditions. Instead, I want to call attention to the potential positives of the mechanism so that trade-offs can be evaluated on the merits of each case within the framework I offer, rather than with a thumb on the scale in opposition to the mechanism itself. Game theory suggests that heavy-duty enforcement options can have an effect even when they are not used, because their existence induces compliance.⁵⁰ But so-called nuclear options are unlikely to have this effect when everyone knows that agencies are gun-shy.⁵¹ Only serious willingness to use the mechanism, and a move away from rhetoric about its problems and overall agency fecklessness, can make the game theory argument work. Ironically, then, an increased willingness to use the mechanism could lead to more compliance without significant loss of federal funds.

I. DISAGGREGATING THE INTERGOVERNMENTAL GRANT SYSTEM

This Part describes the scope of federal grant-making from the perspective of both the federal government and state and local grantees; explains the variety of types of grants, grant conditions, and reasons for grantee noncompliance; and presents the process by which federal agencies oversee the grants they control. While the paucity of attention to the details of federal grants in the legal literature makes this Part useful as a purely descriptive matter, this Part also illustrates a larger point: because grants, grant conditions, and rationales for noncompliance are so varied, a discussion of the merits and demerits of funding cut-offs that treats grants as a monolith will miss important nuances.

A. *The Scope of Grant-Making in the Federal Regulatory State*

Federal agencies provide vast amounts of funding in grants each year. In 2013, agencies channeled over \$540 billion in grants to state and local govern-

50. See, e.g., Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency's Arsenal*, 80 GEO. WASH. L. REV. 442 (2012).

51. See KEY, *supra* note 14, at 177 ("When conditions appearing to warrant discontinuance of grants are tolerated, the implied threat of withdrawal ceases to have potency.").

ments, totaling approximately 15.8% of the federal budget⁵² and representing about 80% of all federal grants.⁵³

This dedication of federal funds to grant programs is a relatively new story in the regulatory state.⁵⁴ In 1960, for example, federal grants to state and local governments represented 7.6% of all federal outlays and 1.3% of GDP, while by 2013, these percentages had more than doubled.⁵⁵ A great deal of this increase is attributable to Medicaid, the federal grant program passed in 1965 to assist states in providing healthcare to low-income Americans.⁵⁶ Medicaid currently represents the largest grant program by far, constituting 45% of federal grant outlays to state and local governments in 2011.⁵⁷ As a share of all federal outlays, Medicaid grants to state and local governments have tripled since 1980.⁵⁸ But even setting Medicaid aside, hundreds of billions of dollars flow each year from federal agencies to state and local governments in a wide variety of policy areas.⁵⁹

Federal grants to state and local governments expanded dramatically in absolute dollar amounts as a result of the stimulus spending in 2009 and 2010, by one estimate adding \$264 billion on top of the usual annual funding through 2013.⁶⁰ Nonetheless, the proportion of total federal outlays devoted to state and local grants has remained fairly steady over the last three decades,⁶¹ notwith-

52. See OMB, FY15 ANALYTICAL PERSPECTIVES, *supra* note 3, at 245 tbl.15-1.

53. GAO, *supra* note 2, at 7.

54. For a discussion of the rise of federal grants from the early nineteenth century through their expansion in the New Deal in the 1930s and the Great Society in the 1960s, see, for example, CAPPALLI, *supra* note 12, §§ 1:19-25 (1988); DONALD F. KETTL, GOVERNMENT BY PROXY: (MIS?)MANAGING FEDERAL PROGRAMS 50-54 (1988); KEY, *supra* note 14, at 1-26; and Bruce J. Casino, *Federal Grants-in-Aid: Evolution, Crisis, and Future*, 20 URB. LAW. 25, 29-30 (1988).

55. See OMB, FY15 ANALYTICAL PERSPECTIVES, *supra* note 3, at 245 tbl.15-1; see also CONG. BUDGET OFFICE, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS 2-7 (2013) [hereinafter CBO] (describing growth in federal grants since the mid-twentieth century). By comparison, national defense outlays in 2011 (when federal grants to state and local governments constituted 4.1% of GDP) represented 4.7% of GDP. GAO, *supra* note 2, at 7.

56. See generally FRANK J. THOMPSON, MEDICAID POLITICS: FEDERALISM, POLICY DURABILITY, AND HEALTH REFORM (2012) (describing the rise and evolution of Medicaid during recent presidential administrations).

57. GAO, *supra* note 2, at 7.

58. *Id.* at 9-10.

59. *Id.*; see also OMB, FY15 ANALYTICAL PERSPECTIVES, *supra* note 3, at 246-53 (describing the wide array of grant programs in aid to state and local governments).

60. CBO, *supra* note 55, at 3; see also NASBO 2011-2013, *supra* note 45, at 1-2 (discussing the effect of stimulus spending on state budgets).

61. GAO, *supra* note 2, at 9.

standing the (ultimately temporary) declines during the Reagan Administration.⁶²

Depending on political perspective, these amounts are either too high (a series of coercive and wasteful government boondoggles) or too low (a shameful failure to support infrastructure, safety, civic goods like education and healthcare, and the needy). But no matter the perspective, one thing is clear: to understand the federal regulatory state, it is critical to understand federal grant-making.

Grant-making is important to understand not only because it is a significant function that agencies perform, but also because it drives a good deal of the relationship between the federal government and state and local authorities. From the federal perspective, fourteen of the fifteen cabinet-level departments give grants to state and local governments.⁶³ For some cabinet departments, giving such grants is their bread and butter. The Department of Health and Human Services (HHS), for example, is the leading grant-making agency, with its largest 2013 intergovernmental grants overseen by two sub-agencies, the Centers for Medicare and Medicaid Services (including \$286.9 billion in Medicaid grants and \$8.9 billion in grants under the Children's Health Insurance Program) and the Administration for Children and Families (including \$16.7 billion in grants through Temporary Assistance for Needy Families, \$7.6 billion for Head Start, and over \$5 billion for child care assistance).⁶⁴ The Department of Education (ED) is another agency whose existence is predicated on grant-making. Its largest intergovernmental grants in 2013 came from the Office of Elementary and Secondary Education (\$13.7 billion in Title I grants under No Child Left Behind and \$2.3 billion in grants to improve teacher quality) and the Office of Special Education and Rehabilitative Services (\$10.9 billion for special education and \$3 billion for vocational rehabilitation).⁶⁵ ED is a

62. OMB, FY15 ANALYTICAL PERSPECTIVES, *supra* note 3, at 245 tbl.15-1; *see also* TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 141-69 (1998) (describing cuts in federal grants to state and local governments under President Reagan).

63. *See supra* note 5.

64. *See* OMB, FY15 ANALYTICAL PERSPECTIVES, *supra* note 3, at 253 tbl.15-3. Other operating divisions in HHS oversee grants as well. *See HHS Grants Policy Statement*, U.S. DEP'T HEALTH & HUMAN SERVS., at I-1 to -3 (2007), <http://www.hhs.gov/asfr/ogapa/aboutog/hhsgps107.pdf> [<http://perma.cc/SBE2-GG8B>]. In the case of some of these operating divisions, such as the Food and Drug Administration, grant-giving plays a subordinate role to regulation, *see What Does FDA Do?*, FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194877.htm> [<http://perma.cc/5VJP-EWQJ>], while other operating divisions focus almost exclusively on grant-giving, *see Budget*, ADMIN. FOR CHILDREN & FAMILIES, <http://www.acf.hhs.gov/about/budget> [<http://perma.cc/9ACQ-KDSR>].

65. *See* OMB, FY15 ANALYTICAL PERSPECTIVES, *supra* note 3, at 253 tbl.15-3.

grants-driven agency, with little regulatory work done outside of providing federal funds.⁶⁶

Some other cabinet-level departments give significant amounts of funding to subnational governments through grants each year, while still playing larger regulatory roles beyond grant-making. The Departments of Agriculture, Housing and Urban Development, Labor, and Transportation fall into this category.⁶⁷ For example, in Fiscal Year 2013, the Department of Transportation provided \$40 billion in highway grants, \$9 billion in transit grants, and \$3 billion in airport improvement grants,⁶⁸ while largely focusing its work on other areas (such as promoting transportation-related safety through regulation and compliance reviews).⁶⁹

The remaining cabinet-level departments give smaller but hardly negligible sums of money through grants, whether regularly or on a short-term basis, and all but the State Department fund (or have recently funded) state and local governments through grants.⁷⁰

66. See U.S. DEP'T EDUC., FISCAL YEAR 2014 BUDGET SUMMARY AND BACKGROUND INFORMATION, <http://www2.ed.gov/about/overview/budget/budget14/summary/14summary.pdf> [<http://perma.cc/ASR5-HAHS>] (describing the agency's work).

67. See OMB, FY15 ANALYTICAL PERSPECTIVES, *supra* note 3, at 253 tbl.15-3.

68. *Id.*

69. See U.S. DEP'T TRANSP., ANNUAL PERFORMANCE PLAN: FISCAL YEAR 2014 (June 18, 2013), http://www.dot.gov/sites/dot.gov/files/docs/FY2014_annual_performance_plan_o.pdf [<http://perma.cc/7MSL-VHTR>] (identifying five strategic goals, each with multiple initiatives, and identifying grant-making as only one of a variety of mechanisms to achieve the desired outcome for only a subset of the initiatives).

70. See *supra* note 5. For example, the Department of Homeland Security regularly funds state and local governments with preparedness/non-disaster grants from the Federal Emergency Management Agency (FEMA). See *Preparedness (Non-Disaster) Grants*, FED. EMERGENCY MGMT. ASS'N, <http://www.fema.gov/preparedness-non-disaster-grants> [<http://perma.cc/PP76-82DF>]. The Department of Justice regularly provides intergovernmental grants for law enforcement. See *State, Local, and Tribal Law Enforcement Assistance*, U.S. DEP'T JUSTICE, <http://www.justice.gov/jmd/2014summary/pdf/fy14-state-local.pdf> [<http://perma.cc/EW84-7MCD>]. The Department of Commerce regularly provides funding to states and localities to implement broadband through the National Telecommunications & Information Administration's State and Local Implementation Grant Program. See *Nat'l Telecomm. & Info. Admin., Grants*, U.S. DEP'T COMMERCE, <http://www.ntia.doc.gov/category/grants> [<http://perma.cc/9FJZ-R56F>]. The Department of Energy regularly provides grants through its State Energy Program, see *Office of Energy Efficiency & Renewable Energy, State Energy Program Competitive Financial Assistance Program*, U.S. DEP'T ENERGY, <http://energy.gov/eere/wipo/state-energy-program-competitive-financial-assistance-program> [<http://perma.cc/U5PQ-7NLH>], while the stimulus bill provided several billion dollars through the Energy Efficiency and Conservation grant program, see *Office of Energy Efficiency & Renewable Energy, Energy Efficiency and Conservation Block Grant Program*, U.S. DEP'T ENERGY, <http://energy.gov/eere/wipo/energy-efficiency-and-conservation-block-grant-program> [<http://perma.cc/H2Q-QVAN>]. The Department of the

Beyond the cabinet-level departments, other federal agencies give intergovernmental grants as well. Most notably, the Environmental Protection Agency's Office of Water provided around \$2.3 billion in intergovernmental grants in 2013,⁷¹ although the Agency as a whole conducted the bulk of its work through other regulatory mechanisms.⁷² Some other non-cabinet agencies, including the National Science Foundation, the National Aeronautics and Space Administration, and the National Endowment for the Arts, also provide a kind of intergovernmental grant in the form of research grants to state universities.⁷³

The last significant executive branch player in the domain of federal grants is the White House's Office of Management and Budget (OMB), which has long provided detailed interagency guidance on basic principles related to grant administration.⁷⁴ This coordinating role has recently received increased atten-

Treasury provided grants to states for low-income housing projects under a temporary program created by the stimulus bill. See Office of the Fiscal Assistant Sec'y, *Application and Terms and Conditions: Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009*, U.S. DEP'T TREASURY, http://www.treasury.gov/initiatives/Documents/LIH_application-package.pdf [<http://perma.cc/MJ7G-4UKV>]. The Department of Defense's Office of Economic Adjustment regularly provides grants to state and local governments to support either a large or a declining Defense presence. See Office of Econ. Adjustment, *Grants*, U.S. DEP'T DEF., <http://www.oea.gov/grants/information/assistance> [<http://perma.cc/EA9A-95Q2>]. The Department of the Interior regularly provides intergovernmental grants through a variety of sub-agencies, including the Bureau of Land Management, the Office of Surface Mining, the Bureau of Reclamation, the Fish and Wildlife Service, the National Park Service, and the Office of Insular Affairs. See *Grants and Payments*, U.S. DEP'T INTERIOR, <http://www.doi.gov/budget/appropriations/2014/highlights/upload/L001.pdf> [<http://perma.cc/N8AE-TD2M>]. The Department of Veterans Affairs regularly provides grants to states to build and support extended care facilities. See *FY 2015 President's Budget Request*, U.S. DEP'T VETERANS AFFAIRS 10, <http://www.va.gov/budget/docs/summary/Fy2015-BudgetRollout.pdf> [<http://perma.cc/G472-KP6N>].

71. OMB, *FY15 ANALYTICAL PERSPECTIVES*, *supra* note 3, at 253 tbl.15-3.
72. *Fiscal Year 2014-2018 EPA Strategic Plan*, ENVTL. PROT. AGENCY (2014), http://www2.epa.gov/sites/production/files/2014-09/documents/epa_strategic_plan_fy14-18.pdf [<http://perma.cc/S23W-W8GB>] (identifying five strategic goals, each with multiple objectives, and mentioning grant-making only occasionally as a strategy the agency will pursue to achieve the desired objectives).
73. See *Prime Award Spending Data 2013*, *supra* note 5.
74. See, e.g., Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78,590, 78,590 (Dec. 26, 2013) (to be codified at 2 C.F.R. ch.1, and ch.2 pts. 200, 215, 220, 225, and 230) ("provid[ing] a governmentwide framework for grants management" by "superced[ing] and streamlin[ing] requirements from [eight different] OMB Circulars") [hereinafter 2013 Uniform Administrative Requirements]; Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments, 42 Fed. Reg. 45,828, 45,828 (Aug. 24, 1977) ("promulgat[ing] standards for establishing consistency and uniformity among Federal agencies in the administration of grants to State, lo-

tion from both Congress and the President. In 2006, for example, Congress passed (across party lines) the Federal Funding Accountability and Transparency Act, which required OMB to ensure granular transparency of federal funding awards by—for the first time—making all such awards publically available in one location.⁷⁵ When President Obama (who had been a co-sponsor of that Act as a Senator⁷⁶) took office, he further directed OMB to develop reforms to the federal grants process.⁷⁷ Such reforms are currently under way, not only through OMB’s work,⁷⁸ but also through the efforts of the Council on Financial Assistance Reform, a recently created interagency working group.⁷⁹

Just as federal grants play a large role in the work of federal agencies, they are also significant in state government. Federal funds combined across many hundreds of grant programs constituted 34.8% of total state expenditures in 2010⁸⁰ (of which, as the Supreme Court noted in *NFIB*, Medicaid funding con-

cal, and federally recognized Indian tribal governments”); *see also* ALLEN, *supra* note 38, at 46–50 (describing the rise of OMB as the “lead staff” for federal grant practice).

75. Pub. L. No. 109-282, § 2(b), 120 Stat. 1186, 1187 (2006). The very useful website that resulted, <http://www.usaspending.gov>, provided the source material for some of my calculations on agency grants in this Article (although, as described *infra* note 386, the underlying data for the website is undergoing a process of review and improvement). The bill’s forty-seven cosponsors in the Senate included twenty-nine Republicans and eighteen Democrats. *See* S. 2590 (109th): *Federal Funding Accountability and Transparency Act of 2006*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/109/s2590#overview> [<http://perma.cc/X9UV-8MAN>]. It passed without controversy in both houses of Congress. *See* 152 CONG. REC. S9209-12 (2006); 152 CONG. REC. H6498-501 (2006). This Act was recently amended by the Digital Accountability and Transparency Act of 2014, Pub. L. No. 113-101, 128 Stat. 1146 (2014), which transferred responsibility for the maintenance of the website to the Department of the Treasury, *see* 128 Stat. 1147, while retaining an oversight and standard-setting role for OMB, *see* 128 Stat. 1148-51. Just as its predecessor did, the Digital Accountability and Transparency Act received bipartisan support and passed without controversy. *See* 160 Cong. Rec. S2359-61 (2014); 160 Cong. Rec. H3203-05 (2014).
76. S. 2590 (109th): *Federal Funding Accountability and Transparency Act of 2006*, *supra* note 75.
77. Exec. Order No. 13,520, 74 Fed. Reg. 66,201 (Nov. 20, 2009); *Presidential Memorandum—Administrative Flexibility*, WHITE HOUSE OFFICE PRESS SEC’Y (Feb. 28, 2011), <http://www.whitehouse.gov/the-press-office/2011/02/28/presidential-memorandum-administrative-flexibility> [<http://perma.cc/CU43-67PE>].
78. 2013 Uniform Administrative Requirements, *supra* note 74.
79. Reform of Federal Policies Relating to Grants and Cooperative Agreements; Cost Principles and Administrative Requirements (Including Single Audit Act), 78 Fed. Reg. 7282, 7284 (Feb. 1, 2013) (describing the Council on Financial Assistance Reform’s creation and replacement of two previous federal boards focusing on federal grant policy); *see also* COUNCIL ON FIN. ASSISTANCE REFORM, <https://cfo.gov/cofar> [<http://perma.cc/HGG6-SWWZ>] (describing the Council’s mission).
80. *State Expenditure Report: Examining Fiscal 2010-2012 State Spending*, NAT’L ASS’N STATE BUDGET OFFICERS 2 (2012) [hereinafter *NASBO 2010-2012*], <http://www.nasbo.org/sites>

stituted the largest share),⁸¹ down to 31.4% of total state expenditures by 2012.⁸² To be sure, this high percentage reflects both the temporary influx of grants from the stimulus spending and the state budget cuts that instigated the stimulus in the first place.⁸³ But federal funds still accounted for over a quarter of total state expenditures even before the economic crisis.⁸⁴

It is difficult to calculate exact percentages for how much federal grant money goes to local governments as opposed to state governments, as a good deal of funding to states is passed on to localities, on top of separate grants made directly to local governments or related entities.⁸⁵ Whatever the exact figure, however, it is clear that localities receive a substantial amount of funding from federal grants.⁸⁶

Given the size and scope of grant-making in today's regulatory state, then, federal grants play an important role in mediating the relationships between federal agencies and state and local governments.

B. Types of Grants, Grant Conditions, and Grantee Noncompliance

To understand the nuanced role of federal grants, it is important to tease apart the different ways federal grants are structured, for different types of grants give rise to different types of agency-grantee relationships. It is also important to understand the different types of grant conditions that may appear in federal grants, since these affect the ease of compliance and of tracking compliance, and therefore the agency-grantee relationship. Finally, it is important to understand the different rationales for grantee noncompliance, for these, too, affect the agency-grantee relationship. Unpacking these three dimen-

/default/files/StateExpenditureReport%28Fiscal2010-2012%29.pdf [http://perma.cc/6ZPR-KBKE].

81. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2603 (2012) (plurality opinion).

82. NASBO 2011-2013, *supra* note 45, at 2.

83. NASBO 2010-2012, *supra* note 80, at 2.

84. *Id.*

85. In 2011, just over 4% of local government revenues came directly from federal sources. See JEFFREY L. BARNETT & PHILLIP M. VIDAL, U.S. CENSUS, STATE AND LOCAL GOVERNMENT FINANCES SUMMARY: 2011, at 6 (2013). But close to 30% of local government revenues came from state sources, and much of this state funding itself came from federal grants. *Id.* at 1; see also Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 973 (2007) (describing local reliance on federal funding).

86. See generally PIETRO S. NIVOLA, TENSE COMMANDMENTS: FEDERAL PRESCRIPTIONS AND CITY PROBLEMS (2002) (criticizing the significant role that federal grants play in governing local governments' policy choices).

sions—the different types of grants, grant conditions, and rationales for grantee noncompliance—demonstrates the need for specificity when discussing funding cut-offs.

1. *Types of Grants*

The first dimension along which a grant can be described relates to the way the grant is funded from year to year. Mandatory programs stem from authorizing legislation that directly provides funding either indefinitely or for a specified multi-year period.⁸⁷ These programs are thus funded outside the control of the normal annual appropriations process; no further action by Congress is required for the funds to become available.⁸⁸ In contrast, discretionary programs stem from authorizing legislation that provides no funding directly but requires Congress to allocate funds through the appropriations process each year to continue the program.⁸⁹ The appropriations process allocates funds for each program within the amount authorized by each program's governing statute.⁹⁰ While the largest grant (Medicaid) and some of the best known (Temporary Assistance for Needy Families, or TANF, colloquially known as welfare, and the Supplemental Nutrition Assistance Program, or SNAP, colloquially known as food stamps) are mandatory, discretionary programs are the norm.⁹¹

A second dimension along which grants can be described relates to who may apply. As indicated above, the bulk of federal grant money goes directly to states,⁹² typically (but not always) to the state agency equivalent to the federal agency awarding the grant.⁹³ But local government entities may apply directly

87. D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL33074, MANDATORY SPENDING SINCE 1962, at 1 (2012); CBO, *supra* note 55, at 15-16; Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1564-65 (2007).

88. AUSTIN & LEVIT, *supra* note 87, at 2.

89. *Id.*; CBO, *supra* note 55, at 15-16.

90. ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 191-94 (3d ed. 2007).

91. AUSTIN & LEVIT, *supra* note 87, at 1; CBO, *supra* note 55, at 15-16.

92. See OMB, FY14 ANALYTICAL PERSPECTIVES, *supra* note 5, at 301 tbl.17-2 (showing \$544.6 billion in FY12 federal grants to state and local governments); NAT'L ASS'N STATE BUDGETING OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2011-2013 STATE SPENDING 7 tbl.1 (2013) (showing that, for FY12, state governments expended over \$516 billion in federal funds).

93. See, e.g., *Guide to U.S. Department of Education Programs: Fiscal Year 2012*, U.S. DEP'T OF EDUC. 12, 19 [hereinafter *Guide to Education Programs*], <http://www2.ed.gov/programs/gtep/gtep.pdf> [<http://perma.cc/ZU3G-TAST>] (describing applications from state educational agencies); *id.* at 10, 11 (describing applications from state governors' offices); *id.* at 8 (describing applications from a consortium of states).

for some grants,⁹⁴ and even federal grant money that flows to states often makes its way to local government entities in the form of sub-grants made by the state.⁹⁵

A third dimension along which grants can be categorized describes the extent to which the grant is competitive. If the grant is available to all states that agree to meet the program's conditions, it is a formula grant, under which funding is made available under a congressionally determined set of directions that typically takes into account state population, among other factors.⁹⁶ Formula grants are different from competitive grants, also called project grants,⁹⁷ which require states, localities, or other entities to compete for funding for a particular project.⁹⁸ Two well-known project grants of recent years are the Education Department's Race to the Top⁹⁹ and the Department of Transporta-

94. See, e.g., *id.* at 9, 14, 15 (describing applications from local educational agencies).

95. *Id.* For a specific example, see 20 U.S.C. § 1411(f) (2012), an IDEA provision that discusses sub-grants to localities, and *id.* § 1413, an IDEA provision that imposes requirements on local sub-grantees. Other grants may invite applications from non-profit organizations, occasionally from for-profit organizations, and even more occasionally from individuals. See DEMBLING & MASON, *supra* note 38, at 37; *Who Is Eligible to Submit to a Funding Opportunity?*, GRANTS.GOV, <http://www.grants.gov/web/grants/applicants/grant-eligibility.html> [<http://perma.cc/9894-WWCK>]. I focus here, however, on states and localities as the dominant set of grant recipients and the ones for whom compliance and enforcement are most contested, reserving consideration of the rest of the universe of federal grants for future work. See *supra* note 49.

96. DEMBLING & MASON, *supra* note 38, at 11; MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* 6 (1970); CBO, *supra* note 55, at 14-15; GAO, *supra* note 2, at 4.

97. DEMBLING & MASON, *supra* note 38, at 11; DERTHICK, *supra* note 96, at 6; CBO, *supra* note 55, at 15; GAO, *supra* note 2, at 4. Sometimes "competitive" and "project" grants are also called "discretionary" grants, to indicate that the agency has discretion in whether to award funds to an applicant, as opposed to the formula grants that the agency also awards. See, e.g., DEMBLING & MASON, *supra* note 38, at 11 (distinguishing between "formula grants" and "competitive/discretionary grants"); *Guide to Education Programs*, *supra* note 93, at xix (same). To avoid confusion with the distinction between mandatory and discretionary spending from an appropriations perspective, which focuses instead on the extent to which Congress has discretion in allocating funds, I will use the term "competitive" or "project" grants rather than "discretionary" grants where it is the agency's discretion, rather than Congress's, that is at issue.

98. CBO, *supra* note 55, at 14-15. In addition to formula grants and project grants, a third type of funding to the states is general revenue sharing, which provides funding to state and local governments with essentially no strings attached. See CONLAN, *supra* note 62, at 3. Such a program existed briefly during the 1970s, but the Reagan administration wound it down. *Id.* at 4.

99. See *Race to the Top Fund*, U.S. DEP'T EDUC., <http://www2.ed.gov/programs/racetothetop/index.html> [<http://perma.cc/LF38-SQZR>].

tion's Transportation Investment Generating Economic Recovery (TIGER) grants,¹⁰⁰ both developed as part of the stimulus spending of 2009.

Formula grants may be further distinguished according to the specificity of their requirements. Categorical grants impose more detailed requirements on recipients, while block grants provide only general directions relating to the subject matter for which they should be used.¹⁰¹ Categorical grants include the highly regulated Medicaid¹⁰² and the Individuals with Disabilities Education Act (IDEA),¹⁰³ for example, while block grants include the much more open-ended Child Care and Development Block Grant.¹⁰⁴

Another dimension along which a grant can be described relates to the grant's expected duration. Some grants are one-time offerings for a limited period with no expectation of renewal.¹⁰⁵ Other grants are expected to continue indefinitely, whether because they are mandatory¹⁰⁶ or because, while discretionary, they become politically or operationally entrenched.¹⁰⁷ It is more typically the case that project grants are of limited duration, while formula grants are expected to continue indefinitely,¹⁰⁸ but that alignment is not necessary. For example, the stimulus spending included several one-time formula grants,¹⁰⁹ while Head Start is a project grant that has typically involved ongoing funding.¹¹⁰

100. See *TIGER Discretionary Grants*, U.S. DEP'T TRANSP., <http://www.dot.gov/tiger> [<http://perma.cc/V36Y-RZJK>].

101. DEMBLING & MASON, *supra* note 38, at 11-12; GAO, *supra* note 2, at 3; Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297, 302-03 (1996). While these types of grants are often taken as opposites, in practice, they may better be thought of as taking place along a spectrum. See GAO, *supra* note 2, at 3; Mashaw & Calsyn, *supra*, at 300-03.

102. See 42 U.S.C. § 1396a (2012) (setting forth requirements for state plans); *id.* § 1396b (defining formulas for state grantees).

103. See 20 U.S.C. § 1411 (2012) (defining formulas for state grantees); *id.* § 1412 (setting forth requirements for state grantees).

104. See 42 U.S.C. §§ 9858m (2012) (defining formulas for state grantees); *id.* § 9858c (setting forth requirements for state plans).

105. DEMBLING & MASON, *supra* note 38, at 38.

106. See *id.*

107. See Bagenstos, *supra* note 21, at 906-07 (discussing the concept of entrenchment with respect to Medicaid and federal education programs).

108. See ALLEN, *supra* note 38, at 243 (identifying as one difference between project grants and formula grants that the former "are funded[] for fixed or known periods").

109. See *State Fiscal Stabilization Fund*, U.S. DEP'T EDUC. (Mar. 7, 2009), <http://www2.ed.gov/policy/gen/leg/recovery/factsheet/stabilization-fund.html> [<http://perma.cc/MDF8-TKDJ>].

110. See *Ohio Head Start Ass'n v. U.S. Dep't of Health & Human Servs.*, 873 F. Supp. 2d 335, 339 (D.D.C. 2012).

Grants also vary with respect to whether their funding is prospective or retrospective. Most grants are prospective—that is, they are awarded in contemplation of future (or continuing) implementation.¹¹¹ Some grants, however, are retrospective, awarded as reimbursement for spending the states have already done.¹¹² Medicaid is the classic example of reimbursement grant funding,¹¹³ but there are others.¹¹⁴

Another way in which grants vary is with respect to the predictability of their cost. Some grants are open-ended entitlements that provide funding without an upper limit as long as certain statutory requirements are met. Medicaid is the best known of such grants, but other smaller grants fall into this category as well.¹¹⁵ All open-ended grants are those that fall into the category of mandatory grants.¹¹⁶ In contrast, most grants contain a specified upper limit of available funds. These capped grants may be either mandatory (such as the State Children's Health Program or TANF) or discretionary (such as grants under No Child Left Behind (NCLB) and the IDEA).¹¹⁷

Finally, grants may be categorized according to their purpose. Some inter-governmental grants may be characterized as compensatory, designed to assist states and localities in policy areas in which federal action has produced negative externalities.¹¹⁸ For example, Impact Aid grants to local school districts attempt to compensate for the presence of federal land removed from local tax rolls and therefore unavailable to support local schools.¹¹⁹ Other grants reflect the federal government's superior fiscal capacity, prompting aid for projects the states would be unable to undertake alone.¹²⁰ Federal assistance for state expansion of unemployment benefits during recessions is one example of such a

111. DEMBLING & MASON, *supra* note 38, at 38-39.

112. *Id.*

113. 42 U.S.C. § 1396b(a)(1) (2012).

114. *See, e.g., id.* § 1753 (National School Lunch Program).

115. *See* Vaccines for Children Program, Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13631 (codified in scattered sections of 42 U.S.C.); CBO, *supra* note 55, at 15.

116. CBO, *supra* note 55, at 15.

117. *Id.* at 15-16; Westmoreland, *supra* note 87, at 1565 n.55.

118. Super, *supra* note 40, at 2571-74. David Super's helpful typology governs the fiscal relationship between the federal government and states more generally, not simply within the context of grants, but also as applied to more general fiscal relationships. *See also* CBO, *supra* note 55, at 7-12 (discussing rationales for federal grants to states and localities).

119. *See* Office of Elementary and Secondary Education, *About Impact Aid*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/offices/list/oese/impactaid/whatisia.html> [<http://perma.cc/56N8-3V8P>].

120. Super, *supra* note 40, at 2574-77.

grant.¹²¹ Still other grants are designed along a leadership model, under which the federal government offers funding to promote particular national priorities.¹²² Grants under NCLB and the IDEA, through which the federal government seeks to change the content and delivery of educational services, are examples of this model.¹²³ Obviously, there may be overlap between these categories, so that any given grant may have multiple purposes.

As should be clear by now, the prospect of withholding grant funds might have a different texture depending on the kind of grant involved. The relationship between the agency and the recipient may be quite different depending on whether the grant in question is a project grant with no expectation of renewal offered to encourage grantees to implement national priorities, a block grant offered with expectation of annual renewal to compensate for federal externalities, a categorical grant offered under very different appropriations levels from year to year to help grantees survive difficult economic circumstances, and so on. But that is not all. The variety of grant conditions also affects the understanding of the role of withholding grant funds.

2. *Types of Grant Conditions*

As with the types of grants, the conditions attached to grants may also be categorized along different dimensions. One dimension concerns the subject matter of the conditions. Some conditions are administrative, placing certain requirements on how a program must be run: matching funds, overhead, fiscal controls, disclosure obligations, and the like.¹²⁴ Some conditions are programmatic, focusing on the substantive requirements of the particular grant: which population should be served, what the service must consist of, how the service should be coordinated, and so on.¹²⁵ Some conditions are cross-cutting, in that they apply across a wide variety of grant programs.¹²⁶ Non-discrimination requirements are the best example of this type of condition, but there are oth-

121. Unemployment Compensation Extension Act of 2008, Pub. L. No. 110-449, 122 Stat. 5014; Super, *supra* note 40, at 2576.

122. Super, *supra* note 40, at 2577-79.

123. See generally Arun K. Ramanathan, *Paved with Good Intentions: The Federal Role in the Oversight and Enforcement of the Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLB)*, 110 TCHRS. C. REC. 278 (2008) (describing the goals of these grant programs).

124. CBO, *supra* note 55, at 10-11, 16-18 (describing certain kinds of administrative conditions).

125. *Id.* at 13-14 (providing examples of programmatic conditions).

126. See DEMBLING & MASON, *supra* note 38, at 107-13; *HHS Grants Policy Statement*, *supra* note 64, at II-2 to II-6 (providing an overview of cross-cutting requirements applicable to HHS grants).

ers.¹²⁷ Finally, some conditions are cross-overs, in that they place conditions on one program based on funding given in another.¹²⁸ The Clean Air Act, which depends on federal highway funding rather than on its own funding stream, is the classic example of this type of condition.¹²⁹

Grant conditions may also vary in their level of specificity in terms of what is required. Some conditions are very general. For example, the IDEA provides that children with disabilities must receive a “free appropriate public education,” but does not define what that means.¹³⁰ Other conditions are much more specific.¹³¹ For example, the IDEA places very detailed requirements on certain procedures that schools must take when meeting with parents.¹³² Between these extremes, grant conditions vary greatly in their specificity.

Grant conditions also vary with respect to the actor on whom the burden of satisfying the requirement is placed. Some place requirements on government administrators of the grant—for example, by mandating that the administrator take particular oversight actions with respect to sub-grantees or beneficiaries.¹³³ Other conditions may place requirements on service providers paid for with grant funds—for example, by limiting the type of activity the provider might take.¹³⁴ Other conditions may place requirements on grant beneficiaries—for example, by mandating that a beneficiary accomplish some task before being eligible (or retaining eligibility for) services under the grant.¹³⁵

Grant conditions may also vary with respect to the kind of accomplishments that are required. Conditions may place requirements on inputs, outputs, or outcomes. An input requirement might specify, for example, that a

127. Cross-cutting conditions themselves may be some combination of administrative and programmatic. For example, a non-discrimination requirement may affect bureaucratic management of a grant in, say, race-neutral school assignment policies, but it may also affect substantive programmatic delivery of a grant in, say, a school’s range of sports teams to satisfy Title IX.

128. See KETTL, *supra* note 54, at 53.

129. See Bagenstos, *supra* note 21, at 916-17.

130. 20 U.S.C. § 1412(a)(1) (2012); see also *Bd. of Ed. v. Rowley*, 458 U.S. 176, 187-90 (1982) (interpreting this requirement).

131. See DERTHICK, *supra* note 96, at 133-34 (describing the length and specificity of the federal government’s directive to the states as part of the Social Security Act Amendments of 1962).

132. 20 U.S.C. § 1415(b)-(d) (2012).

133. See, e.g., *id.* § 6316(b)(14) (imposing obligations on a state educational agency overseeing local educational agencies under No Child Left Behind).

134. See, e.g., DERTHICK, *supra* note 96, at 154-55 (discussing limitations on caseworkers under the former Aid to Families with Dependent Children program).

135. See, e.g., 42 U.S.C. § 607 (2012) (imposing work requirements on prospective and current recipients of Temporary Assistance for Needy Families).

meeting between the parents of a child with a disability and the child's teachers must take place within a certain time.¹³⁶ An output requirement might specify, for example, that a particular bridge will be built or replaced.¹³⁷ And an outcome requirement might specify, for example, that all children will reach proficiency on state academic tests by a certain date.¹³⁸

Withholding funds to induce compliance with grant conditions has a different valence depending on the type of condition at stake. Specific, input-oriented administrative conditions placed on the government administrator are very different from general, outcome-oriented programmatic conditions placed on program beneficiaries, after all. But once more, that is not all. The reason for grantee noncompliance also affects the analysis.

3. *Types of Grantee Noncompliance*

Just as grants and grant conditions are not monolithic, neither are types of grantee noncompliance. Grantee noncompliance may be usefully divided into six broad categories.

First, noncompliance may be of the bumbling administrator variety. For example, through poor recordkeeping, disorganization, or misunderstanding of the grant's terms, the grantee may misspend grant funds, perhaps by directing funds to ineligible recipients,¹³⁹ overspending on eligible recipients,¹⁴⁰ using funds for purposes not covered by the grant,¹⁴¹ or spending funds outside

136. See, e.g., 20 U.S.C. § 1414 (2012) (specifying certain evaluation and meeting requirements for children with or suspected of having disabilities).

137. See CBO, *supra* note 55, at 13 (describing Transportation Investment Generating Economic Recovery grants).

138. See, e.g., 20 U.S.C. § 6311(b)(2)(F) (2012).

139. See, e.g., *Brock v. Pierce Cnty.*, 476 U.S. 253 (1986) (grantee spent funds to retrain ineligible workers); *Tangipahoa Parish Sch. Bd. v. U.S. Dep't of Educ.*, 821 F.2d 1022 (5th Cir. 1987) (grantee used federal grants for bilingual education on students who were not bilingual); *Va. Dep't of Educ. v. Sec'y of Educ.*, 806 F.2d 78 (4th Cir. 1986) (grantee spent federal funds earmarked for education of at-risk students instead for general education purposes).

140. See, e.g., *Mount Sinai Hosp. of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329 (5th Cir. 1975) (grantee overbilled Medicare for unnecessary procedures and care); *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584 (2011) (grantee improperly counted certain homes in calculating housing benefits from a federal grant).

141. See, e.g., *New York v. Riley*, 53 F.3d 520, 521 (2d Cir. 1995) (per curiam) (grantee spent grant funds improperly on salary and expenses); *Ledbetter v. Shalala*, 986 F.2d 428, 430 (11th Cir. 1993) (grantee spent more than the allowable amount of grant money on administration); *Cal. Dep't of Educ. v. Bennett*, 849 F.2d 1227 (9th Cir. 1988) (grantee improperly directed grant funds toward conferences, transportation, and student field trips).

of the designated time for the grant.¹⁴² Poor recordkeeping itself can constitute such noncompliance.¹⁴³

Second, more perniciously, noncompliance may be of the conniving administrator variety. For example, grant administrators may intentionally engage in corrupt activities such as fraud or embezzlement.¹⁴⁴ They may intentionally violate grant conditions prohibiting conduct such as nepotism¹⁴⁵ or engaging in partisan political activities¹⁴⁶ with the purpose of benefitting themselves or their families.

Third, noncompliance may result from intentional actions that the grantee undertakes out of a genuine disagreement about what constitutes compliance. For example, the grantee may take issue with the agency's interpretation of what a condition requires.¹⁴⁷ The grantee may agree with the agency's statutory interpretation but disagree with its determination of the facts.¹⁴⁸ Or the grantee may contest the agency's jurisdiction over the grantee actions at issue.¹⁴⁹

Fourth, noncompliance may be a result of intentional actions that the grantee undertakes in protest of the policy set forth in the federal grant or con-

142. See, e.g., *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1424 (D.C. Cir. 1994) (grantee did not spend its grants in a timely fashion); *City of New York v. Shalala*, 34 F.3d 1161, 1166 (2d Cir. 1994) (same); *United States v. Illinois*, 144 F. Supp. 2d 990 (C.D. Ill. 2001) (grantee spent leftover grant funding after the allowable grant period); *Appeal of the State of California*, 54 EDUC. LAW. REP. 1450 (1987), 1987 WL 124136.

143. See, e.g., *City of Newark v. U.S. Dep't of Labor*, 2 F.3d 31 (3d Cir. 1993) (grantee failed to properly document how it used federal grant funds); *Cal. Dep't of Educ. v. Bennett*, 843 F.2d 333, 335-36 (9th Cir. 1988) (per curiam) (same); *Application of N.Y. State Dep't of Educ.*, No. 90-70-R (E.D. O.H.A. 1994), 1994 WL 907419 (same); *Application of the State of Washington*, No. 89-6-R (E.D. O.H.A. 1989), <http://oha.ed.gov/cases/1989-6-r.html> [<http://perma.cc/3BGD-YEFU>] (same).

144. See, e.g., *Bd. of Cnty. Comm'rs. v. U.S. Dep't of Labor*, 805 F.2d 366 (10th Cir. 1986); *Ariz. Dep't of Educ.*, ACN 09-04-58090, No. 06-07-R (Dep't of Educ. Aug. 12, 2010), <http://oha.ed.gov/cases/2006-07-R.pdf> [<http://perma.cc/EBB5-SDZE>].

145. See, e.g., *Lehigh Valley Manpower Program v. Donovan*, 718 F.2d 99 (3d Cir. 1983), *disapproved of by Brock v. Pierce Cnty.*, 476 U.S. 253 (1986); *California Schools Chief Surrenders in Funds Case*, N.Y. TIMES, Mar. 29, 1992, <http://www.nytimes.com/1992/03/29/us/california-schools-chief-surrenders-in-funds-case.html> [<http://perma.cc/CM4H-SS2E>].

146. See, e.g., *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947).

147. See, e.g., *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 560 (4th Cir. 1997) (en banc) (per curiam) (grantee disagreed with agency's interpretation of statutory term); *Ariz. Dep't of Library, Archives, and Pub. Records*, 1995 WL 934882 (E.D. O.H.A. 1995) (same).

148. See, e.g., *S.C. Dep't of Educ. v. Duncan*, 714 F.3d 249, 252-53 (4th Cir. 2013) (grantee disagreed with agency's determination of facts); *Capistrano Unified Sch. Dist.*, 75 Ed. Law Rep. 1396 (E.D. O.H.A. 1992) (same).

149. See, e.g., *Freeman v. Cavazos*, 756 F. Supp. 1, 2 (D.D.C. 1990) (grantee refused to cooperate in an agency investigation because of a belief that agency's regulations were *ultra vires*).

dition, an expression of “uncooperative federalism.”¹⁵⁰ For example, a grantee may refuse to adopt laws or change policies required as a condition of accepting a federal grant out of a substantive disagreement with the federal requirement.¹⁵¹ A grantee may also engage in half-hearted compliance in an effort to undercut (and thereby prompt change in) the law.¹⁵²

Fifth, noncompliance may result when programmatic grant conditions are difficult to meet and the grantee is undertaking best efforts to reach compliance. For example, the grantee may have satisfied all of the input-focused conditions within its control but may nonetheless fail to meet an outcome-oriented condition.¹⁵³ Or the grantee may be making the most progress it can given capacity limitations.¹⁵⁴

Finally, noncompliance may result when programmatic grant conditions are difficult to meet but the grantee is undertaking less than satisfactory steps to reach compliance. For example, the grantee may have done very little after years of formal agency warnings or settlement agreements.¹⁵⁵

As this analysis suggests, commentators’ undifferentiated references to funding cut-offs, without discussion of the particular type of grant, grant condition, and grantee noncompliance at stake, conflate a wide variety of issues.

150. See Bulman-Pozen & Gerken, *supra* note 40, at 1271-84.

151. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (grantee failed to adopt the minimum drinking age required by acceptance of federal funds); *Pac. Legal Found. v. Costle*, 627 F.2d 917 (9th Cir. 1980) (explaining that the grantee failed to submit a plan for regulating air pollution before a deadline); *Ariz. State Dep’t of Pub. Welfare v. Dep’t of Health, Educ. & Welfare*, 449 F.2d 456 (9th Cir. 1971) (grantee’s eligibility requirements for public assistance were inconsistent with federal regulations). More generally, grantees’ refusal to comply with school desegregation mandates in the 1960s fall into this category. See, e.g., *Buford City Bd. of Educ.*, No. CR-463 (E.D. O.H.A. 1967), 1967 WL 20257; *Strong Sch. Dist. No. 83*, No. CR-303 (E.D. O.H.A. 1967), 1967 WL 20261.

152. See, e.g., Bulman-Pozen & Gerken, *supra* note 40, at 1282.

153. In 2009, for example, it became clear that every state grantee would fail to meet the requirement of No Child Left Behind that 100% of students meet proficiency standards on state tests by 2014, even though the state grantees had otherwise followed the requirements of the funding program. See generally *ESEA Flexibility*, U.S. DEP’T EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [<http://perma.cc/BRY6-U4UW>] (describing the waiver program developed to accommodate this situation).

154. See, e.g., GAO, *supra* note 2, at 27-29.

155. See, e.g., Lynn Schnaiberg, O.C.R. *Threatens Oakland with Cutoff in Federal Funding*, EDUC. WK., Nov. 24, 1993, at 3, <http://www.edweek.org/ew/articles/1993/11/24/12oak.h13.html> [<http://perma.cc/EFJ6-8BTT>] (explaining that the grantee had a seventeen-year record of failing to comply with requirements); Maribeth Vander Weele & Lynn Sweet, *Poor Treatment of Disabled Kids May Cost Schools*, CHI. SUN-TIMES, Jan. 5, 1994 (explaining that the grantee had not complied with its own recommendations after a finding of widespread non-compliance).

Before analyzing the mechanism of funding cut-offs more specifically, however, one additional piece of groundwork is necessary: we must consider how agencies oversee the grants they administer.

C. *The Agency Role in Grant Oversight*

In this Part, I explain the life cycle of grant oversight with particular attention to three components: the grant application process, as the initial moment at which agencies can shape grantee action, and the grant monitoring and enforcement processes, as the ongoing mechanisms by which agencies can shape grantee action. This explanation underscores two points. First, funding cut-offs (and threats thereof) are part of a much longer and broader sequence of interactions between agencies and their grantees. Second, while many of these interactions are informal, funding cut-offs are part of a range of agency oversight and enforcement mechanisms with formal legal procedures.

1. *Application*

The agency's initial role when a grant program is authorized or reauthorized is to develop the grant application process and requirements through the particular program office overseeing the grant. This is true even in a formula grant, although the application in that context tends to be called a "state plan."¹⁵⁶ Centralized OMB requirements govern some aspects of many grant applications;¹⁵⁷ general agency-specific (rather than grant-specific) requirements govern others;¹⁵⁸ still others may be governed by the specific grant statute at issue.¹⁵⁹ Notice of proposed application requirements and invitation to comment may be published in the *Federal Register*.¹⁶⁰

After the grant award notice goes out, the relevant state or local agencies prepare their applications or state plans. This is obviously the case for one-time competitive grants, in that states and localities will not receive the grant if they

156. See, e.g., State Plans, 34 C.F.R. § 80.11 (2014).

157. See, e.g., 2 C.F.R. § 200.101(d)(1)-(3) (identifying certain grant programs that do not follow the otherwise generally applicable pre-award requirements); *id.* § 200.200-211 (presenting the otherwise generally applicable pre-award requirements).

158. See DEMBLING & MASON, *supra* note 38, at 107.

159. See *id.*

160. See, e.g., HHS Administration for Children and Families, New Policies and Procedural Requirements for Electronic Submission of State Plans, and Program and Financial Reporting Forms, for Mandatory Grant Programs, 78 Fed. Reg. 38,989 (June 28, 2013).

do not apply,¹⁶¹ but even ongoing formula grants that states have long received require state plans to be updated as reauthorizations or other legislation or agency rules change requirements.¹⁶² Sometimes the grant application will require state legislative action¹⁶³ or encourage such action by awarding points in a competition,¹⁶⁴ and sometimes the grant program is so momentous that it requires the governor's approval,¹⁶⁵ but in the typical case, the applications largely remain within the state's bureaucratic realm. State agencies, like their federal counterparts, tend to have sub-units that reflect different federal grant programs, and it is these sub-units that are typically responsible for preparing the relevant plan or application. This organization is partly for administrative convenience (since personnel time must be allocated to particular programs in order to ensure that those programs are funded)¹⁶⁶ and partly to capitalize on substantive expertise.

The federal agency's program office then evaluates the state applications, sometimes with the help of outside experts.¹⁶⁷ Applications may be evaluated against an agency-designed rubric or against the statutory requirements them-

161. GAO, *supra* note 2, at 4-5 (describing competitive grant applications).

162. *See, e.g.*, State Plans, 34 C.F.R. § 80.11 (2011) (describing the process for submitting state plans and amendments to state plans to the Department of Education); *Medicaid State Plan Amendments*, MEDICAID.GOV, <http://www.medicaid.gov/State-Resource-Center/Medicaid-State-Plan-Amendments/Medicaid-State-Plan-Amendments.html> [<http://perma.cc/BN8V-DDUY>].

163. The Emergency Highway Energy Conservation Act, for example, required state legislatures to establish a maximum speed limit of fifty-five miles per hour in order to receive future highway grants. *See Nevada v. Skinner*, 884 F.2d 445, 449 (9th Cir. 1989) (upholding the requirement against a Spending Clause challenge).

164. The education grant competition Race to the Top, for example, considered the hospitality of state laws on charter schools among its selection criteria. RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY, U.S. DEP'T EDUC. 11 (Nov. 2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf> [<http://perma.cc/9ZQA-F3SP>].

165. The decision whether to commit state funds to an expanded Medicaid program under the Affordable Care Act is one such example. *See, e.g.*, Michael Cooper, *Many Governors Are Still Unsure About Medicaid Expansion*, N.Y. TIMES, July 14, 2012, <http://www.nytimes.com/2012/07/15/us/governors-face-hard-choices-over-medicaid-expansion.html> [<http://perma.cc/Y368-KCSH>].

166. *See, e.g.*, Grant Accountability Project, *Guide to Opportunities for Improving Grant Accountability*, U.S. DOMESTIC WORKING GRP. 18 (Oct. 2005), <http://www.ignet.gov/randp/grantguide.pdf> [<http://perma.cc/5AJ5-4WDM>] (describing time-keeping requirements for selected federal agencies' grantees).

167. *See, e.g.*, Arlen S. Fox, *A Guide to the Federal Grants Process*, NONPROFIT COORDINATING COMM. 6-7 (1997), <http://www.npccny.org/info/5001.pdf> [<http://perma.cc/3VW7-B8WL>] (describing agency process for evaluation of grant applications).

selves.¹⁶⁸ With state plans in formula programs, the federal agency may ask for revisions before approval.¹⁶⁹ Once a plan or application is approved, regular disbursements begin.¹⁷⁰

After an approved application is in place, grantees may return to the agency to request modifications to the state plan even in the absence of federal law requiring such a change, perhaps to respond to shifting factual circumstances, to respond to alterations in state law or politics, or for some other reason.¹⁷¹ Grantees may also return to the agency to request a waiver from a statutory requirement, to the extent the grant statute allows for such a possibility, and under the circumstances the grant statute's waiver provision permits.¹⁷²

No matter the form in which the grantee's obligations are set forth—whether an originally approved application, a modification to a state plan, or a waiver from an aspect of the federal regime—the federal agency then turns to the monitoring and oversight process to ensure that grantees implement the program acceptably.

2. *Monitoring and Oversight*

Agencies have several mechanisms by which they monitor implementation of their grant programs. One occurs through the program offices that are responsible for each grant.¹⁷³ The program offices typically have staff devoted not only to providing technical assistance but also to conducting site visits, reviewing grantee reports on the progress of grant implementation, and asking for changes.¹⁷⁴ These staff members tend to monitor grantees on a regular schedule, with extra periods of review for grantees as to whom a red flag has been

^{168.} *Id.*

^{169.} See, e.g., 20 U.S.C. § 6311(e)(1)(E)(i) (2012).

^{170.} 31 U.S.C. § 3335 (2012) (requiring agencies to provide for the timely disbursement of federal funds); DEMBLING & MASON, *supra* note 38, at 93; 2 GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 10-76 to 10-89 (3d ed. 2004); SCHICK, *supra* note 90, at 276-79.

^{171.} See, e.g., 34 C.F.R. § 80.11(d)(2) (2014); Medicaid State Plan Amendments, *supra* note 162.

^{172.} See, e.g., 20 U.S.C. § 7861 (2012) (creating a waiver provision under No Child Left Behind); 42 U.S.C. § 18052 (2012) (creating a waiver provision under the Affordable Care Act). For a discussion of the rise and import of waiver provisions, see David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

^{173.} See, e.g., U.S. DEP'T EDUC., HANDBOOK FOR THE DISCRETIONARY GRANT PROCESS 6, 88-100 (2009) [hereinafter ED GRANTS HANDBOOK]; HHS Grants Policy Statement, *supra* note 64, at I-1 to -3, I-5 to -6.

^{174.} See, e.g., U.S. DEP'T EDUC., *supra* note 173, at 88-100; HHS Grants Policy Statement, *supra* note 64, at I-5 to -6.

raised in a previous site visit, upon a review of data, or after a private party's complaint.¹⁷⁵

A second oversight mechanism lies in agencies' Inspector General (IG) offices.¹⁷⁶ These offices are tasked with preventing fraud and waste within agencies' programs (as well as in the federal administration of those programs).¹⁷⁷ IG offices may investigate allegations of misconduct, including fraud, but may also investigate substantive program implementation.¹⁷⁸ These investigations may be triggered by a complaint from a program beneficiary, a grantee's employee, or a public interest group.¹⁷⁹ Relatedly, the results of a grantee's own audit or system of internal review may provoke additional oversight.¹⁸⁰

Third, agency offices that oversee cross-cutting conditions, such as antidiscrimination guarantees, may review grantees' compliance with these conditions separately from the grant program office's review of administrative and programmatic compliance.¹⁸¹ Here, too, complaints by a private party may provoke review, as can the office's review of suggestive data.¹⁸²

175. See, e.g., 45 C.F.R. § 96.50 (2014); ED GRANTS HANDBOOK, *supra* note 173, at 119-29; HHS Grants Policy Statement, *supra* note 64, at I-82 to I-88.

176. See Inspector General Act of 1978, 5 U.S.C. App. § 3(a) (2012).

177. *Id.* § 4(a)(3).

178. *Id.* §§ 4(a), 5.

179. See, e.g., Office of Inspector Gen., *El Paso Independent School District's Compliance with the Accountability and Academic Assessment Requirements of the Elementary and Secondary Education Act of 1965*, U.S. DEP'T EDUC. 8-9 (June 2013), http://extras.mnginteractive.com/live/media/site525/2013/0614/20130614_095948_episd_audit_report.pdf [<http://perma.cc/Au5U-CLSB>] (describing complaints by state officials and grantee employees that prompted review).

180. Federal law requires many grantees to conduct an audit each year. 31 U.S.C. § 7502(a)(1) (2012); 2 C.F.R. §§ 200.501-.504 (2013). Some federal programs even require the existence of a state investigation arm (to ensure program integrity) that is run separately from the state agency that implements the grant program. See, e.g., 42 U.S.C. § 1396b(q) (2012) (requiring the creation of a state Medicaid fraud control unit).

181. See generally U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, HELPING TO ENSURE EQUAL ACCESS TO EDUCATION (2012) [hereinafter ED OCR, EQUAL ACCESS] (describing their investigation of civil rights violations by recipients of federal funds); DEP'T HEALTH & HUMAN SERVS., OFFICE FOR CIVIL RIGHTS, JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES (2012) [hereinafter HHS OCR, JUSTIFICATIONS] (describing the work of the parallel office in HHS).

182. See, e.g., ED OCR, Equal Access, *supra* note 181, at 3; HHS OCR, JUSTIFICATIONS, *supra* note 181, at 3-4.

3. Enforcement

When an agency finds something unsatisfactory in the grantee's implementation, the first step is typically an effort to resolve the matter through technical assistance and/or informal negotiation.¹⁸³ A more formal version of such action, available to some agencies, is to enter into a compliance agreement with the grantee.¹⁸⁴ The compliance agreement is a type of regulatory settlement in which the grantee agrees to make particular changes over a specified period.¹⁸⁵

If the problem is that the grantee has spent federal funds on activities not permitted under the grant's requirements, the agency may seek recoupment of the misspent funds, whether by requiring actual repayment by the grantee¹⁸⁶ or by reducing a subsequent year's allocation to the grantee by the amount in question.¹⁸⁷ Some programs permit an additional fiscal penalty to be levied if the grantee's misuse of federal funds was an intentional violation.¹⁸⁸ Relatedly, the agency may "[d]isallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance."¹⁸⁹ In such a circumstance, the agency does not actually seek to recover misspent federal funds but simply requires the grantee to spend its own money on the activity in question and therefore to reallocate budgetary responsibility for it.

For egregious or ongoing violations or more systemic problems internal to the grantee's organization, the agency may declare the grantee "high risk," a legal term of art that requires special conditions and restrictions on the grant award.¹⁹⁰ For example, the agency might require the grantee to submit quarterly financial and performance reports (instead of simply annual reports), to obtain technical or management assistance, or to submit requests for reimburse-

183. See, e.g., DEMBLING & MASON, *supra* note 38, at 137; KEY, *supra* note 14, at 173-74; Paul T. Hill, *Enforcement and Informal Pressure in the Management of Categorical Programs in Education*, RAND CORP. CTR. ED. FIN. & GOVERNANCE (1979).

184. See, e.g., 20 U.S.C. § 1234f (2012).

185. See *id.*

186. See *id.* § 1234a.

187. See 42 U.S.C. § 609(a)(1)(A) (2012).

188. See *id.* § 609(a)(1)(B).

189. 2 C.F.R. § 200.338(b) (2014); see 34 C.F.R. § 80.43(a)(2) (2014); DEMBLING & MASON, *supra* note 38, at 138-39.

190. See 2 C.F.R. § 200.207 (2014); 34 C.F.R. § 80.12(a) (2014); see also DEMBLING & MASON, *supra* note 38, at 125-36 (describing the "not unusual" process of adding "special conditions to the grant to deal with the special risks that are seen" in such instances); ED GRANTS HANDBOOK, *supra* note 173, at 97 (describing considerations for high-risk grantees); HHS Grants Policy Statement, *supra* note 64, at II-55, B-6 (same).

ment for particular costs instead of fully providing federal funds up front.¹⁹¹ The agency must inform the grantee of the actions the grantee must take to remove the special conditions or restrictions, and the agency must specify a time frame for compliance.¹⁹²

Many times, one of these enforcement options will be the end of the matter. But if the grantee declines to comply or simply fails to comply over time, the agency may decide to take further enforcement action. Two sets of options remain.

First, agencies may file a cease-and-desist complaint with the agency's office of administrative law judges, giving rise to a hearing at which the agency seeks to establish the grantee's noncompliance with the grant requirements and to secure an order demanding change in a problematic practice, policy, or procedure.¹⁹³ Agencies may also refer a matter of noncompliance to the Department of Justice for litigation.¹⁹⁴ The goal of such a referral is a judicial version of the administrative cease-and-desist option.

Second, under an OMB rule common to all grant-making agencies, agencies may withhold grant funds to noncompliant grantees—what is popularly understood as a funding cut-off.¹⁹⁵ In the common understanding, a funding

191. See 2 C.F.R. § 200.207; 34 C.F.R. § 80.12(b) (2014); ED GRANTS HANDBOOK, *supra* note 173, at 121-23; DEMBLING & MASON, *supra* note 38, at 125-36.

192. 34 C.F.R. § 80.12(c) (2014).

193. See 20 U.S.C. § 1234(e) (2012) (ED provision permitting cease-and-desist complaints); CAP-PALLI, *supra* note 12, § 8:51 (discussing role of agency Assistance Dispute Boards generally).

194. See, e.g., 20 U.S.C. § 1416(e)(3) (2012) (Individuals with Disabilities Education Act (IDEA)); 7 C.F.R. § 276.5 (2013) (food stamps); Office for Civil Rights, *Case Processing Manual*, U.S. DEP'T EDUC. § 402 (2010), http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html#IV_2 [<http://perma.cc/8AZR-TAE9>] (antidiscrimination cross-cutting conditions); cf. 34 C.F.R. § 80.43(a)(5) (2014) (A-102 common rule providing that agencies seeking to enforce grant conditions against grantee noncompliance may “[t]ake other remedies that may be legally available”). Few grant-making agencies have their own litigating authority. See generally Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345 (2000) (considering the possible effects of DOJ's litigation control and cautioning that DOJ must act as the agency's lawyer, not its board of directors).

195. See 2 C.F.R. § 200.338 (2014). While this OMB rule is common to all grant-making agencies, the rule exempts a subset of programs from a variety of otherwise generally applicable requirements, including this withholding rule. See 2 C.F.R. § 200.101(d) (2014) (identifying certain grant programs that need not follow a selection of otherwise generally applicable pre-award requirements, including the elements of Subpart D—Post Federal Award Requirements, the subpart in which the withholding rule falls). This is not to say that the agencies overseeing those exempted grant programs may not withhold funds, but only that withholding for those programs is governed by more specific statutory guidelines. See, e.g., 42 U.S.C. § 9858g(b)(2)(A)-(B) (specifying types of withholding that are permissible under that grant program in the case of grantee noncompliance); 2 C.F.R. § 200.101(d)(4) (2014)

cut-off suggests that the entire grant must be terminated, but in actuality, agencies' options are more nuanced. Under the OMB common rule, agencies have three withholding options: to "[t]emporarily withhold cash payments pending correction of the deficiency"; to "[w]holly or partly suspend or terminate the Federal award"; and/or to "[w]ithhold further Federal awards for the project or program."¹⁹⁶ Different statutory regimes may further specify the extent to which funding may be withheld and under what circumstances. For example, instead of 100% of a grant, a smaller percentage of funds may be at stake—or perhaps only the amount allocated for a particular disputed activity.¹⁹⁷ Similarly, only one entity of a number that make up the grantee may be subject to funding cut-offs.¹⁹⁸

Both the cease-and-desist and the withholding options involve formal administrative processes.¹⁹⁹ (Referral to DOJ leads to judicial process, of course, to the extent DOJ decides to pursue the case.²⁰⁰) These are not merely agency decisions by fiat. The processes typically require formal written notice of the preliminary departmental decision and provide an opportunity for the grantee to respond in writing or to request a hearing before an agency hearing officer or board.²⁰¹ If a hearing ensues, discovery may be permitted, including document production, written interrogatories, and depositions.²⁰² At the hearing, the rules of evidence do not apply, but the hearing officer may exclude evidence that is irrelevant or immaterial, among other things.²⁰³ Agency officials as well as grantee officials may be called to testify.²⁰⁴ At the conclusion of the presentation of evidence, the hearing officer issues a formal written opinion, which may

(exempting awards under the Child Care and Development Block Grant from the otherwise generally applicable requirements).

196. 2 C.F.R. § 200.338(a), (c), (e) (2014).

197. See, e.g., 20 U.S.C. §§ 1416(3)(B), 1417(h) (2012) (IDEA); 42 U.S.C. § 609 (2012) (TANF); 7 C.F.R. § 276.1(a)(4) (2011) (food stamps).

198. See, e.g., Civil Rights Div., *Title VI Legal Manual* § XI.C.2, U.S. DEP'T JUSTICE (Jan. 11, 2001), <http://www.justice.gov/crt/about/cor/coord/vimannual.pdf> [<http://perma.cc/ZU3G-TAST>] [hereinafter *Title VI Manual*] (discussing the pinpoint provision).

199. CAPPALLI, *supra* note 12, at §§ 8-65 to -91; DEMBLING & MASON, *supra* note 38, at 161-70; KEY, *supra* note 14, at 157-59.

200. See Herz & Devins, *supra* note 194, at 1366-67 (noting that DOJ does not bring every enforcement action referred by other agencies).

201. ALLEN, *supra* note 38, at 938-39 (describing a typical agency dispute process).

202. See, e.g., 20 U.S.C. § 1234(g) (2012).

203. See *id.*

204. *Id.*

be subject to appeal within the agency.²⁰⁵ The final agency decision is typically subject to review by a district court²⁰⁶ or the court of appeals with jurisdiction over the grantee.²⁰⁷

To sum up, federal grants vary across different dimensions of their design; grantee rationales for noncompliance are similarly varied; and agency funding cut-offs are part of a broader set of grantee-agency interactions and agency procedures. The typical account of funding cut-offs does not engage with these realities. The next Part demonstrates how this lack of engagement renders the typical account inadequate.

II. DECONSTRUCTING THE CASE AGAINST FUNDING CUT-OFFS

For almost as long as the federal government has provided grant funds to states and localities,²⁰⁸ the possibility of withholding those funds in the event of noncompliance has existed. In 1890, for example, Congress included in the second Morrill Act (one of the first statutes to provide ongoing federal funding) a provision permitting the Secretary of the Interior to withhold funds from the land-grant colleges of each state; the Secretary attempted to exercise this authority the following year.²⁰⁹ In the 1930s, as federal grants expanded during the New Deal, the newly created Social Security Board sought to withhold funds from several states that were not in compliance with the Aid to Dependent Children welfare grant, and the Board used the threat of withholding funds to induce compliance in others.²¹⁰ In the 1960s, the Department of Health, Education, and Welfare used its authority under Title VI of the 1964 Civil Rights Act to order fund termination to numerous school districts throughout the South that were refusing to desegregate their schools;²¹¹ the

205. See, e.g., 20 U.S.C. § 1234d(e)-(f) (2012) (ED grants generally); 7 C.F.R. § 276.7 (2013) (SNAP); 45 C.F.R. § 96.52 (2013) (Child Care and Development Block Grant).

206. See, e.g., 42 U.S.C. § 610(c) (2012) (TANF); 7 C.F.R. § 276.7(j) (2013) (SNAP).

207. See, e.g., 20 U.S.C. § 1234g(b) (2012) (ED grants generally); 42 C.F.R. § 430.38(b)(1) (2013) (Medicaid); 42 C.F.R. § 457.208(b)(1) (2013) (CHIP).

208. See *supra* note 54 and accompanying text (referencing the rise of federal grants around the start of the twentieth century).

209. See KEY, *supra* note 14, at 156-57, 161-62. In the decades that followed, grant legislation replicated the Morrill Act's statutory language on withholding, and agency officials overseeing federal grants for research, forestry, employment, and public roads sought to withhold those funds several times. *Id.* at 157-73.

210. DERTHICK, *supra* note 96, at 98-115.

211. See, e.g., *In re Strong Sch. Dist. No. 83 & State Bd. of Educ.*, No. CR-303 (E.D. O.H.A. 1967), 1967 WL 20261; *In re Buford City Bd. of Educ. & State Bd. of Educ.*, No. CR-463

implicit threat of fund termination was also useful in promoting desegregation.²¹² In subsequent decades, agencies have continued to use the funding cut-off, or the threat of funding termination, from time to time.²¹³ It is therefore not surprising that, as OMB promulgated rules governing the administration of federal grants in the 1970s and updated them in the years since, the office has included the possibility of withholding as an enforcement mechanism.²¹⁴

At the same time, while agency efforts to withhold funds have persisted over time to some extent, use of this enforcement mechanism has generally remained rare,²¹⁵ and expressions of significant discomfort have surrounded the mechanism. This discomfort tends to be expressed not by way of sustained analysis of funding cut-offs but rather as part of some other discussion—for example, the coercive aspects of the intergovernmental grant system or the waning of private enforcement regimes.²¹⁶ In the discussions that exist, however, it is possible to tease out four types of critiques of funding cut-offs that purport to explain why funding terminations are rare, why they *should* be rare, or both.

The first critique posits that funding cut-offs should be disfavored because funding cut-offs hurt the beneficiaries of the grant and are thus counterproductive.²¹⁷ This critique is at once normative, because it seeks to condemn the mechanism, and descriptive, because it seeks to explain why agency officials are (justifiably) reluctant to pursue it.

The second critique again posits that funding cut-offs should be disfavored, but this time takes the perspective of the grantees, not the beneficiaries: funding cut-offs undercut the central goals of federalism and should therefore be avoided.²¹⁸ Like the first critique, this critique is at once normative and de-

(E.D. O.H.A. 1967), 1967 WL 20257; *In re Clarke Cnty. Bd. of Educ. & State Bd. of Educ.*, No. CR-243 (E.D. O.H.A. 1967), 1967 WL 21738; *In re Jefferson Cnty. Bd. of Educ. & Miss. Bd. of Educ.*, No. CR-61 (E.D. O.H.A. 1966), 1966 WL 19384.

212. See, e.g., YUDOF ET AL., *supra* note 13; Cascio et al., *supra* note 13, at 445-49.

213. See, e.g., CAPPALLI, *supra* note 12, § 8:06; Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in RACIAL INEQUITY IN SPECIAL EDUCATION 219, 224-28 (Daniel J. Losen & Gary Orfield eds., 2002).

214. See 2013 Uniform Administrative Requirements, *supra* note 74, at 78,637 to 78,638; 53 Fed. Reg. 8,034, 8,102 (Mar. 11, 1988); 42 Fed. Reg. 45,828, 45,844 (Sept. 12, 1977); 39 Fed. Reg. 35,787, 35,792 (Oct. 4, 1974).

215. See *supra* note 14.

216. See, e.g., Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 292 (1996); Ronald F. King, *The Politics of Denial: The Use of Funding Penalties as an Implementation Device for Social Policy*, 20 POL'Y SCI. 307, 326, 331 (1987).

217. See *infra* Part II.A.

218. See *infra* Part II.B.

scriptive; to the extent that agency officials believe that federalism concerns surround funding cut-offs as a normative matter, it will help explain why funding cut-offs are uncommon.

The third critique shifts gears away from the normative and toward the descriptive. Even if funding cut-offs are desirable, this critique runs, they can never be a truly useful tool because, as a factual matter, agencies have little motivation or capacity to cut off funds.²¹⁹ Grant-making agencies are designed to give money away, not take it away, and they cannot police every instance of noncompliance.

The fourth critique follows this descriptive line of thinking: even if funding cut-offs are desirable, political interactions among states, agencies, Congress, and the White House make funding cut-offs almost impossible to achieve.²²⁰ According to this critique, the utility of the enforcement mechanism is therefore extremely limited.

Do these critiques accurately describe the actual beliefs of agency officials? It is difficult to say, as the literature has offered these critiques without much in the way of empirical evidence. Future empirical work interviewing agency officials about these questions will be useful. What it is possible to say now, however, is this: whether or not these critiques describe the beliefs of agency officials, the critiques are vastly oversimplified and often wrong. In other words, even if the critiques help explain why funding cut-offs are relatively rare, the critiques rest on unsupportable assumptions that ought to be challenged.

This Part shows why. It assesses each of the four critiques and demonstrates why each is unconvincing when seen in light of the disaggregation of grant-making offered in Part I. The work in this Part therefore sets the stage for the argument in Part III that certain circumstances call for serious consideration of funding cut-offs and that different institutional design arrangements can help promote the appropriate use of this mechanism.

A. Hurting Grant Beneficiaries

The first critique is that funding cut-offs are a “blunderbuss weapon,”²²¹ a sledgehammer instead of a scalpel, that ends up defeating the very purposes of the grant.²²² If a grant is supposed to help a certain population receive particu-

219. See *infra* Part II.C.

220. See *infra* Part II.D.

221. Karlan, *supra* note 17, at 200.

222. See, e.g., CAPPALLI, *supra* note 12, § 8:20; DERTHICK, *supra* note 96; KEY, *supra* note 14, at 176; 1 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 7:14 (West 2014); Daniels, *supra* note 50, at 455-56, 464-65; Hills, *supra* note 32, at 1227-28, 1260; Key, *supra* note 216, at 292-93;

lar benefits, the argument goes, and the grantee is not fully complying with the conditions of the grant, it would be foolhardy for the federal agency to withhold funds for the entire grant, which would presumably hurt the beneficiary population even more than the grantee's noncompliance.

Unpacking this claim, however, demonstrates that the realities are a little more complicated. The claim that funding cut-offs should be avoided because they hurt grant beneficiaries fails to account for the variety of limitations on withholding funds; fails to account for the variety of types of grants; insufficiently specifies a meaningful baseline of beneficiary welfare; insufficiently compares withholding to other available compliance mechanisms; and does not account for other responses to program noncompliance that may hurt beneficiaries more than withholding funds does.

1. *The Variety of Limitations on Withholding*

Underlying the "hurting beneficiaries" critique is the assumption that the entire grant is always at issue. But as I demonstrated above, grants often contain restrictions on just how much can be withheld for noncompliance—for example, by limiting to a specific percentage or a range of percentages the amount that may be withheld for a particular set of violations, by establishing the precise entity within the grantee's purview from which funds may be withheld, or by clarifying the specific activity that the grantee may lose funding for.²²³ Even where no specific statutory limitation is in place, OMB rules common to many federal grant programs provide that agencies may withhold funds in whole or in part to remedy noncompliance.²²⁴ This type of withholding actually looks more like a scalpel than a sledgehammer.

Moreover, because the point of withholding funds is to induce compliance, agencies do not (at least in the first instance) cut off funds to their grantees with an instruction never to return; instead, many grant statutes, regulations, and cut-off orders themselves state that the funds will be withheld until the grantee takes or ceases a particular action.²²⁵ Beneficiaries may therefore end up

King, *supra* note 216, at 326, 331; Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-In-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 631 (1972); Sam Bagenstos, Douglas and the Underenforcement of Federal Spending Conditions, PRAWFSBLAWG (May 3, 2012, 10:32 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/05/douglas-and-the-underenforcement-of-federal-spending-conditions.html> [http://perma.cc/VKD7-GTR8].

223. See *supra* notes 195-198 and accompanying text.

224. See 2 C.F.R. § 200.338 (2013).

225. See, e.g., Capistrano Unified Sch. Dist., 75 Ed. Law Rep. 1396, 1447 (E.D. O.H.A. 1992) (reciting stock language that "[t]his termination and refusal to grant or continue Federal finan-

coming out ahead in the long run as a result of an agency's decision to withhold funds, if the grantee improves its compliance in response.

In addition, sometimes funds are withheld from the direct grantee but not sub-grantees. So, for example, where state administration of a grant is the problem, the agency may be able to withhold certain administrative funds from the state agency and distribute those same funds directly to local grantees.²²⁶ In this circumstance, although there is surely value in state administration, it is harder to make the case that the beneficiaries are actually harmed; there is no loss of money overall, and the money is distributed closer to the beneficiaries.

It may also be the case that the federal agency could withhold grant funds from the government grantee and provide the service directly to beneficiaries or provide funds to private providers.²²⁷ This action may often be more difficult as a matter of capacity and politics, but it is another way in which the claim that funding cut-offs necessarily hurt grant beneficiaries is overstated.

None of this is to say that beneficiaries will never be hurt by withholding or the threat of withholding. Even a temporary or narrow loss of funding may eliminate or suspend administrators' or service providers' jobs, for example, which may in turn negatively affect the grant's substantive implementation. But, of course, agencies only act to cut off funds once they have determined that what the state grantee is doing or failing to do is not in the beneficiaries' best interests. If the grantee ends up complying after a cut-off, then the beneficiaries of the grant will come out ahead. Claims that beneficiaries will be hurt thus must be supported by specific analysis of what is at issue in any given case of withholding and by a comparison to the alternatives to agency action.

2. *The Variety of Types of Grants*

The extent to which grant beneficiaries may suffer from a funding cut-off also likely differs depending on the type of grant at issue. For example, the loss of a short-term project grant likely affects beneficiary welfare differently than the loss of a long-term formula grant; there are fewer reliance interests at stake in the former, and the grant may be less entrenched in the structure of the

cial assistance shall remain in force until [grantee] corrects its noncompliance" and assures future compliance); 49 C.F.R. § 384.403(b) (2013) (Department of Transportation regulation providing that in certain circumstances withheld funds may be returned to a previously noncompliant state grantee once the state has come into "substantial compliance").

226. See, e.g., *State of California*, No. 09-05-R, Order re Assistant Secretary's Motion to Dismiss the Application, Nov. 4, 2009, at 3.

227. See, e.g., KEY, *supra* note 14, at 161, 172-73, 176; Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 585-86 (2011); Pasachoff, *supra* note 14, at 661 n.530.

grantee's administration. Similarly, the loss of a grant designed to compensate for federal externalities likely affects beneficiary welfare differently than the loss of a grant designed to promote certain national priorities that might be less of a priority within the state or local jurisdiction that receives funds; beneficiaries may care more about, and therefore suffer more from the loss of, the former than the latter. Whether and how beneficiaries will suffer as a result of withholding depends in part on the structure and goals of the type of grant at issue.

3. *The Baseline*

Another way of framing the “hurting beneficiaries” critique of withholding is that it takes as an acceptable baseline for measuring beneficiary welfare the current state of affairs, ignoring the question of whether this is the appropriate baseline. This assumption is counterproductive. Game theory suggests that serious enforcement tools such as funding cut-offs may play a powerful role in inducing compliance even if they are never used because of the threat that they might be.²²⁸ But the key to this assumption is that the other side must think that there is a chance that the serious enforcement tools may be used.²²⁹ If grantees know that the federal agency is reluctant to withhold funds on the theory that it wants to avoid hurting beneficiaries, grantees may go as close to the compliance line as possible. An agency's demonstrated disinclination to withhold funds can end up holding the beneficiaries hostage to the grantee's current noncompliance and may therefore have destructive long-term consequences that work against the stated goal of helping beneficiaries.

Two parallel issues in grant implementation shed further light on this assumption. One is the question of the appropriate balance between the breadth and depth of service provision in a given grant—or, put another way, between quantity and quality.²³⁰ The other is the question of the appropriate balance between spending on grant administration and enforcement, on the one hand, and service provision, on the other.²³¹ In both of these cases, the balance is ap-

228. See, e.g., Daniels, *supra* note 50, at 446.

229. *Id.* at 490-91.

230. See, e.g., DAVID M. BLAU, THE CHILD CARE PROBLEM: AN ECONOMIC ANALYSIS 12 (2001) (discussing the “quality-quantity trade-off”).

231. Compare Reform of Federal Policies Relating to Grants and Cooperative Agreements, *supra* note 79, at 7283 (discussing the need to “allow recipients of Federal awards to re-orient efforts spent on compliance with complex requirements towards achievement of programmatic objectives”), with *Federal Grants: Improvements Needed in Oversight and Accountability Processes: Testimony Before the H. Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform*, 112th Cong. (2011) (statement of Jeanette M. Franzel, Managing Director of GAO, Financial Management and Assurance), <http://www.gao.gov/new.items>

propriately seen as a series of tradeoffs. The debate over withholding funds ought to take the same shape, acknowledging case-specific tradeoffs without assuming that the current state of affairs is the proper baseline.

The argument that beneficiaries suffer when funds are withheld makes other assumptions about the proper baseline as well—for example, by assuming that the beneficiaries currently served by the grantee are the only beneficiaries to consider. However, there are circumstances in which withheld funds may be redistributed to other grantees, rather than being kept from grantee use at all.²³² In these cases, beneficiaries served by other grantees come out ahead. It is thus not that beneficiary welfare is reduced overall across all grantees, but that the distribution of welfare has shifted away from the noncompliant grantee and toward compliant grantees. One may prefer as a normative matter that grant funds be distributed equally across all jurisdictions, but a heavier concentration of funds in some grantees is not the same thing as an undifferentiated claim that a cut-off will hurt the beneficiaries. (And given the current political dynamics of grant funding formulas, it is already not the case that grant funds are distributed in equal shares across all jurisdictions.²³³)

4. Comparisons to Other Compliance Mechanisms

The claim that withholding hurts beneficiaries also fails to situate withholding within the context of other available compliance mechanisms. For example, as I explained earlier, agencies may seek to recoup funds spent for improper purposes or without sufficient documentation.²³⁴ It is rarely claimed that recoupment is improper. But beneficiaries can also be hurt by recoupment. The agency might lower its future grant payments as a way of recovering what it is owed; the grantee might have to find other funds in its budget to repay the

/d11773t.pdf [http://perma.cc/L98T-LVBE] (discussing the need to provide more oversight in the management of federal grants).

232. See, e.g., Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 1514, 127 Stat. 198, 425 (providing for the reallocation of education funds); 384 C.F.R. § 401 (federal highway funds); Reallotment of FY 2013 Funds for the Low Income Home Energy Assistance Program (LIHEAP), 79 Fed. Reg. 2446 (Jan. 14, 2014) (providing notice of determination about reallotment of unused funds under the Low Income Home Energy Assistance Program); Notice on Reallotment of Workforce Investment Act (WIA) Title I Formula Allotted Funds for Dislocated Worker Activities for Program Year (PY) 2012, 78 Fed. Reg. 19,736 (Apr. 2, 2013) (same for funds under the Workforce Investment Act).

233. See, e.g., Frances E. Lee, *Geographic Politics in the U.S. House of Representatives: Coalition Building and Distribution of Benefits*, 47 AM. J. POL. SCI. 714, 722 (2003); Frances E. Lee, *Representation and Public Policy: The Consequences of Senate Apportionment for the Geographic Distribution of Federal Funds*, 60 J. POL. 34, 46 & tbl.2 (1998).

234. See *supra* notes 187-188 and accompanying text.

agency.²³⁵ Either way, beneficiaries would at some level be better off if the grantee could simply apologize for the misspent funds and move on. Yet agencies act to recoup funds on the understanding that beneficiaries will at another level be better off if grantees are encouraged to spend their money on the purposes of the grant. The same logic applies to withholding as a tool to promote broader compliance.

Nor is it necessarily the case that alternative compliance mechanisms—such as an administrative cease-and-desist order, referral to the Department of Justice for litigation, or even a private lawsuit—are preferable to withholding because they hurt beneficiaries less, in theory by accomplishing the same substantive outcome on behalf of grant beneficiaries without posing any loss of federal dollars.²³⁶ An administrative cease-and-desist order needs some enforcement backstop to ensure that it is followed—indeed, one of the mechanisms by which cease-and-desist orders can be enforced is through a funding cut-off.²³⁷ The risk of funding loss therefore remains.

As for DOJ referral, a court order has its own compliance mechanism built in: contempt proceedings.²³⁸ But a contempt order is generally enforced through the threat of financial penalties.²³⁹ Given this threat, it is not clear why referral would be better for beneficiaries than the threat of withholding funds through the agency's own funding cut-off procedures. A private lawsuit for damages, as permitted by some grant regimes, carries the same financial risks.²⁴⁰ Such a lawsuit could also be said to hurt grant beneficiaries overall, even if it benefits the individual private plaintiff, to the extent that the grantee has to use funding allocated for service provision to pay the award—or to the extent that the grantee provides fewer services to pay insurance premiums against litigation risk.

235. *See id.*

236. This is not to say that these other compliance mechanisms should be disfavored; they also serve useful roles in an overall enforcement regime. The point is simply that it is not clear that these other compliance mechanisms are superior with respect to avoiding harm to beneficiaries.

237. *See* 20 U.S.C. § 1234e(e) (2012) (describing mechanisms to enforce an administrative cease-and-desist order).

238. FED. R. CIV. P. 70(e).

239. *See* *Horne v. Flores*, 557 U.S. 433, 441-42 (2009) (describing contempt proceedings, including a financial penalty, against a state that refused to comply with a federal court order).

240. *See, e.g.,* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644-45 (1999) (defining the scope of a damages remedy in certain lawsuits brought under Title IX); *see also id.* at 680-81 (“[S]chool liability in one peer sexual harassment suit could approach, or even exceed, the total federal funding of many school districts.”) (Kennedy, J., dissenting).

Moreover, any of these mechanisms carries the risk that the grantee will choose to walk away from the grant as opposed to comply with its terms.²⁴¹ Because withholding poses no greater risk on this front, the choice from the perspective of helping grant beneficiaries is not between withholding and the other mechanisms, but between undertaking any enforcement action and permitting the grantee to continue in a state of noncompliance. Alternatively, just as a grantee may decide to comply with a declaratory judgment or an injunction without risking contempt penalties, or may achieve a private settlement without incurring damages, so too may a grantee decide to comply with grant requirements in light of an administrative law judge's order that failure to do so will result in immediate withholding. An agency's taking any enforcement action, even moving to withhold funds, might therefore well induce compliance without the grantee's losing any funds in the end at all.

5. *Other Consequences of Program Noncompliance*

As a comparison to withholding, it is helpful to think about collateral consequences of official action in response to program noncompliance in other grant-related contexts. With regard to welfare payments, for example, Temporary Assistance for Needy Families (TANF) places certain requirements on the individual beneficiary, such as attending work or school,²⁴² fulfilling child support obligations,²⁴³ or even, in some states, passing a drug test.²⁴⁴ If the individual beneficiary fails to meet these requirements, TANF benefits may be re-

241. When faced with a court order to comply with the conditions on a federal grant to serve homeless children, in a lawsuit brought by private parties, for example, the District of Columbia simply decided to stop taking funds for the program. See *Lampkin v. District of Columbia*, 886 F. Supp. 56, 62-63 (D.D.C. 1995); JoAnn Grozuczak Goedert, *The Education of Homeless Children: The McKinney Act and Its Implications*, 140 ED. L. REP. 9, 16-17 (2000) (discussing the aftermath of *Lampkin v. District of Columbia*, 879 F. Supp. 116 (D.D.C. 1995)).

242. See, e.g., 42 U.S.C. § 607(e) (2012) (work requirements); *id.* § 608(b) (“[i]ndividual responsibility plans”); see also GENE FALK, CONG. RESEARCH SERV., RL32748, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A PRIMER ON TANF FINANCING AND FEDERAL REQUIREMENTS 14-18 (2013).

243. 42 U.S.C. § 608(a)(2) (2012).

244. See, e.g., 21 U.S.C. § 862b (2012) (permitting states to “test[] welfare recipients for use of controlled substances” and to “sanction[] welfare recipients who test positive for use of controlled substances”); *Drug Testing for Welfare Recipients and Public Assistance*, NAT'L CONFERENCE STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/drug-testing-and-public-assistance.aspx> [<http://perma.cc/37N3-7K58>] (explaining that at least eleven states have imposed such requirements on beneficiaries and that at least eighteen additional states are considering such requirements in 2014).

duced or terminated.²⁴⁵ In these circumstances, the collateral consequences of agency action for noncompliance are even more extreme than in the context of withholding funds for grantee noncompliance, in that specifically identifiable innocent third-party dependents will suffer from the absence of cash support and other corollary losses (such as the loss or decrease in food stamps that may accompany a sanction under TANF).²⁴⁶ These consequences can be even harsher than the consequences of withholding funds for grantee noncompliance. For example, after a sanction, the food stamps statute requires a waiting period before the beneficiary regains eligibility for the benefit, and a resumption of eligibility is not typically accompanied by back payments.²⁴⁷

There are a host of political reasons (lying beyond the scope of this Article) that explain why individual benefit cut-offs are a robust part of the American enforcement conversation and yet agency funding cut-offs are not.²⁴⁸ Moreover, one might object to the individual benefit cut-offs I just described on multiple grounds, both constitutional and policy-related, that also lie beyond the scope of this Article.²⁴⁹ I simply use this comparison as another way to show the substantive weakness of the generic “hurting beneficiaries” argument against funding cut-offs: our enforcement system already permits such

245. See 42 U.S.C. §§ 607(e), 608(a)(2), 608(b)(3) (2012); 21 U.S.C. § 862b; FALK, *supra* note 242, at 15.

246. See 7 U.S.C. § 2015(d)(1)(A) (2013) (declaring individuals ineligible for food stamps if they refuse employment, refuse to provide employment information to a state agency, or quit without good cause); *id.* § 2015(d)(1)(B) (permitting states to make the entire household ineligible for food stamps for a parent’s failure to meet work requirements); *id.* § 2015(i) (permitting states to disqualify an individual from participating in the food stamps program if that individual was similarly disqualified from another means-tested program).

247. See 7 U.S.C. § 2015(d)(1)(B)-(C); see also 7 C.F.R. § 273.7(f)(2), (5) (2012) (defining disqualification periods); *id.* § 273.17(a) (2012) (limiting circumstances under which state agencies may restore lost household benefits).

248. The political power of state governments as compared to that of people in poverty may be one such reason, as Michael Katz’s assessment of the 1996 welfare reform demonstrates vividly. See MICHAEL KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 300-34 (tenth anniversary ed. 1996). Another possible explanation might stem from the contrast between the longstanding American traditions of (on the one hand) treating individual welfare recipients as those to be “pitied but not entitled” and attempting “to make the poor less poor by making them more virtuous” and (on the other hand) the equally longstanding political concerns about federalism. On the former, see generally, for example, LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935* (1994); and JOEL SCHWARTZ, *FIGHTING POVERTY WITH VIRTUE: MORAL REFORM AND AMERICA’S URBAN POOR, 1825-2000*, at xv (2000). On the latter, see, for example, *infra* Part II.B.

249. See, for example, the ACLU’s ongoing coverage of drug testing and benefits. *Drug Testing Welfare Recipients*, ACLU: BLOG OF RIGHTS, <https://www.aclu.org/blog/tag/drug-testing-welfare-recipients> [http://perma.cc/7AAT-6T7F].

consequences in the context of benefit cut-offs, and the system therefore should take more seriously the prospect of holding state and local grantees accountable, especially when accountability is designed to improve the lot of beneficiaries rather than to punish grantees.

B. Undercutting Federalism

The second critique of funding cut-offs is rooted in federalism concerns. This argument suggests that, as both a constitutional and a policy matter, federal agencies should operate with a light touch in enforcing conditions against states and localities. In scholarship and doctrine, this argument is usually framed as one that challenges the constitutionality and desirability of laws that offer a grant in exchange for compliance with the attached conditions, rather than as one that challenges agency use of funding cut-offs *per se*.²⁵⁰ In practice, however, grantees sometimes respond to actual or potential threats of funding cut-offs with federalism rhetoric, without considering the question of whether the grant itself raises federalism problems.²⁵¹

250. See Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2602-05 (2012) (plurality opinion); *id.* at 2663-64 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); Va. Dep't of Educ. v. Riley, 106 F.3d 559, 569-70 (4th Cir. 1997) (en banc) (Luttig, J., dissenting); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 36-42 (2001); James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011-2012 CATO SUP. CT. REV. 67, 107-08; Somin, *supra* note 39, at 462-63. Politicians have also employed the rhetoric of federalism to object to giving agencies funding cut-off authority in the first place. See, e.g., Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 191 n.178 (2011) (describing the reluctance of President Kennedy and his congressional counterparts to embrace what became Title VI of the 1964 Civil Rights Act, viewing it "as an affront to localism in education, and as a potentially dangerous accumulation of federal power").

251. See, e.g., Melody Gutierrez, *Jerry Brown Pushes School Testing Delay Despite Federal Threats*, SACRAMENTO BEE, Sept. 11, 2013, <http://www.mercedsunstar.com/2013/09/11/3215525/jerry-brown-pushes-school-testing.html> [<http://perma.cc/E9UV-8QEG>] (quoting the state superintendent of instruction's response to the Education Department's threat to withhold funds for noncompliance with the testing regime: "I'm disappointed someone in Washington would want to interfere in the legislative process in California."); see also *Riley*, 106 F.3d at 562 (Luttig, J., dissenting) ("Bringing the full weight of the Federal Government to bear against the Commonwealth's educational policy decision . . . the Department of Education has, in the first such enforcement action ever against a state, withheld Virginia's entire [special education] grant until the Commonwealth capitulates to the Department's demands . . ."); KEY, *supra* note 14, at 177 (positing that the Vocational Education Division "apparently fears that drastic action would give substance to the unfounded but recurrent charges of 'federal dictation' over a function historically locally controlled").

Because the case against funding cut-offs on federalism grounds is closely related to the case against conditional spending, it is worth teasing out the ways in which the traditional federalism argument applies – and does not apply – in the funding cut-off context, after Congress has designed a federal grant program and the grantee has already accepted the grant. Taken seriously, and articulated more than is typical, an argument against funding cut-offs based on federalism concerns has four components: protecting sovereignty and autonomy, preventing coercion, promoting diversity, and enhancing accountability. None of these rationales can withstand the weight that needs to be put upon it in opposing funding cut-offs.²⁵²

1. *Protecting Sovereignty and Autonomy*

The project of American federalism is based on the idea that the Framers “split the atom of sovereignty” in our constitutional democracy.²⁵³ The sovereignty aspect of the federalism case against funding cut-offs argues that agencies should not threaten to withhold funds from states because to do so would upset the states’ prerogative to make policy decisions about their own internal structure and for their own citizens.²⁵⁴ As a formal matter, sovereignty is a concept that is limited to the states; “[l]ocalities occupy a quasi-constitutional nether realm”²⁵⁵ instead of constituting “anything approximating coequal sovereigns.”²⁵⁶ But a longstanding tradition of local autonomy in both law and rhetoric gives rise to arguments against cutting off grant funds to local gov-

252. For the purposes of this section, I accept these values of federalism as normatively desirable, seeking to show only that funding cut-offs need not undercut them, while leaving questions about their normative desirability to others. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 446, 453 (1990) (describing local autonomy as “normatively ambiguous” and a potential “obstacle to efforts to reduce inequality and ameliorate class and race antagonisms”); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008) (arguing that a focus on subnational diversity has failed to produce substantively good outcomes in the area of antipoverty law).

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

254. See *Riley*, 106 F.3d at 564 (Luttig, J., dissenting) (rejecting an agency’s effort to cut off funds because nothing “in the purpose of [the grant statute] suggest[s] that the State is required to succumb to the Federal Government’s demands”); cf. *NFIB*, 132 S. Ct. at 2659 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (discussing the potential of the spending power to “permit[] the Federal Government to set policy in the most sensitive areas of traditional state concern”); Somin, *supra* note 39, at 482 (arguing that federal grants generally lead to “loss of control over the executive and legislative machinery of state government”).

255. Davidson, *supra* note 85, at 977.

256. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 390 (2001).

ernments; these arguments bear a strong resemblance to the sovereignty argument against cutting off grant funds to states.²⁵⁷

One of the justifications for “[o]ur [f]ederalism,”²⁵⁸ however, and one of the values behind protecting state sovereignty and local autonomy against the encroachment of federal authority is to protect citizens against government abuses; it is not simply to protect sovereignty or autonomy as a good in and of itself.²⁵⁹ To the extent that state or local grantees are causing injury to grant beneficiaries by not complying with the terms of the grant, this liberty-enhancing end of federalism is served, rather than undercut, by federal enforcement against the grantees.²⁶⁰

Moreover, a shared interest in sovereignty and autonomy need not point in the same direction for all states and localities at the same time. For example, while one state or locality that is out of compliance with its water pollution control grants may not want EPA interference with its decisions on water management, a neighboring state or locality suffering from pollution spillovers may well want federal enforcement against the offending grantee to preserve the ability of the neighboring state or locality to take advantage of its own sover-

257. See, e.g., Applebome, *supra* note 11 (quoting a county official’s response to the Department of Housing and Urban Development’s threat to withhold funds for noncompliance with antidiscrimination requirements connected to federal grants: “Washington bureaucrats, who you will never see or meet, want the power to determine who will live where and how each neighborhood will look. . . . What’s at stake is the fundamental right of our cities, towns and villages to plan and zone for themselves.”). On local autonomy more generally, see, for example, Barron, *supra* note 256, at 393-97; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Briffault, *supra* note 252; and Davidson, *supra* note 85, at 994-98.

258. *Younger v. Harris*, 401 U.S. 37, 44 (1971); see also Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1553-56 (2012) (discussing a variety of interests related to state sovereignty and autonomy).

259. As Justice Kennedy recently wrote for a unanimous court in *Bond v. United States*, “Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” 131 S. Ct. 2355, 2364 (2011) (internal quotation marks and citations omitted); see also *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (describing as “[p]erhaps the principal benefit of the federalist system . . . a check on abuses of government power” in order “to ensure the protection of our fundamental liberties,” and quoting Alexander Hamilton and James Madison in support of this point (internal quotation marks omitted)).

260. This is not to suggest that federalism would support all federal intrusions any time states or localities harm individuals, but merely that if one value of vertical federalism is to “enhance[] freedom . . . by protecting the people,” *Bond*, 131 S. Ct. at 2364, federal enforcement of intergovernmental grants enhances rather than undercuts this value.

eignty or autonomy.²⁶¹ One jurisdiction may object on autonomy grounds to HUD's efforts to withhold funds for noncompliance with antidiscrimination mandates in housing grants, but neighboring jurisdictions may find their own autonomy compromised unless HUD takes action, given externalities in regional housing markets.²⁶² Judge Barron states more generally a point that also applies specifically to funding cut-offs: "The intuitive notion that freedom from central command protects local autonomy obscures the way in which a central law may (re)distribute local autonomy."²⁶³

The sovereignty and autonomy argument against withholding funds is further limited by the fact that there are many reasons why state or local government grantees may be out of compliance with grant conditions. Many of these reasons—such as mismanagement and bureaucratic inadequacy—have nothing to do with state or local policy choices.²⁶⁴ There is no need for special solicitude for states and localities when no state or local policy choice is actually at issue.

On the other hand, when state or local policy choices actually are at issue, bringing to a head conflict between the agency and the grantee over the substance of the noncompliance may actually be valuable from the state's or locality's perspective. Somewhat counterintuitively, such a public conflict permits the subnational governments to set the agenda; it gives them the opportunity to attempt to reshape the substance of the law both within the agency and within Congress.²⁶⁵

Furthermore, nothing about the sovereignty or autonomy argument is unique to withholding as opposed to other mechanisms of ensuring grant compliance. For example, there is no reason for a state or local grantee to prefer agency referral to DOJ for litigation or a private plaintiff's lawsuit; appearing in court and appearing in the agency are both intrusive, from the grantee's per-

261. See, e.g., *Water Pollution Control Program Grants (Section 106)*, ENVTL. PROT. AGENCY, http://water.epa.gov/grants_funding/cwf/pollutioncontrol.cfm [<http://perma.cc/VJ74-52AT>] (describing such grants); Barron, *supra* note 256, at 387, 416-19 (discussing interstate conflicts over pollution); David S. Beckman, *The Threats to Our Drinking Water*, N.Y. TIMES, Aug. 6, 2014, <http://www.nytimes.com/2014/08/07/opinion/the-threats-to-our-drinking-water.html> [<http://perma.cc/79P2-2NQ2>] (noting upstream water pollution problems negatively affecting different communities downstream).

262. See, e.g., Applebome, *supra* note 11 (describing one county's objection to HUD's decision to withdraw grant funds for such noncompliance); Briffault, *supra* note 257, at 41 (describing interjurisdictional spillovers of individual localities' exclusionary housing decisions).

263. Barron, *supra* note 256, at 415-16.

264. See *supra* notes 139-155 and accompanying text.

265. See Bulman-Pozen & Gerken, *supra* note 40, at 1287, 1292-93. I address the political aspect of funding cut-offs *infra* Part II.D.

spective, and both are designed to get the grantee to do something that it would prefer not to do. In addition, the grantee can end up in federal court either way, from a court injunction or from a petition for review of an agency decision to cut off funds, and there is no obvious reason why the former would be preferable. The sovereignty and autonomy arguments against withholding are thus not really about withholding at all, but instead are arguments against compliance—or cover for arguments opposing the federal grants regime overall.

From this perspective, the sovereignty and autonomy arguments against withholding are hard to justify. After the state or locality has already accepted the grant, it is more respectful of states and localities, not less, to treat them as valid contracting partners.²⁶⁶ To eschew efforts to keep states and localities to their side of the bargain places them in the position of an incompetent who needs to be protected from a deal and therefore whose contracting decisions should not be upheld as a matter of public policy.²⁶⁷ The point is slightly less forceful in the context of federal grants to localities that come via state-run formula sub-grants rather than via competitive grants for which localities have applied directly; localities tend to exercise their autonomy more in applying for the latter, receiving the former simply by dint of their role as constituent parts of the state.²⁶⁸ But even as to localities' more passive receipt of sub-grants, an autonomy-based argument against withholding is less about withholding as a mechanism than it is a challenge to the system of intergovernmental grants as a whole; it is not the withholding of grants that arguably limits local autonomy, after all, but the obligation to accept and comply with the grants. The autonomy concern is valid, but it should not be confused with an attack on funding cut-offs.

2. Preventing Coercion

As the Supreme Court recently underscored in *NFIB v. Sebelius*, expansive though the spending power may be, it does not permit coercion of states into following federal dictates.²⁶⁹ The doctrinal case against funding cut-offs is thus

266. *Cf.* *Bell v. New Jersey*, 461 U.S. 773, 790 (1983) (“Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty.”).

267. *See, e.g.*, *Super*, *supra* note 40, at 2584 (calling such treatment of states “extreme and, indeed, quite insulting”).

268. *Davidson*, *supra* note 85, at 973-74 (referencing these two kinds of federal-local interactions).

269. 132 S. Ct. 2566, 2602 (plurality opinion); *id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

that agency action to withhold funds for grantee noncompliance is unconstitutionally coercive.²⁷⁰

While the Court's introduction of the new coercion doctrine in *NFIB* was hardly a model of clarity, the best reading of the case is that the doctrine has three parts: for a condition to be unconstitutionally coercive, (1) the condition must "threaten to take away funds for a program that is separate and independent from the program to which the condition in question is attached"; (2) states must not have had "sufficient notice at the time they accepted funds for the first program that they would also have to comply with the second program"; and (3) "the amount of funding at stake" must be "so significant that the threat to withdraw it constitutes what the [*NFIB*] plurality calls 'economic dragooning.'"²⁷¹ Put more thematically, the doctrine sets forth an "anti-leveraging principle," under which a condition is unconstitutionally coercive "when Congress takes an entrenched federal program that provides large sums to the states and tells states they can continue to participate in that program only if they *also* agree to participate in a separate and independent program."²⁷²

Against this background, the doctrinal case against funding cut-offs begins to disintegrate. First, because the Supreme Court rooted the rationale for coercion in the states' existence as sovereigns,²⁷³ and because (as explained above) the law does not treat localities as sovereigns,²⁷⁴ the coercion doctrine seems limited to the protection of state governments, not local governments, at least as a formal matter.²⁷⁵ It is not inconceivable that the doctrine could be extended to apply to local governments as well,²⁷⁶ but for both constitutional reasons

270. See, e.g., *id.* at 2602 (plurality opinion); *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 569-71 (4th Cir. 1997) (en banc) (Luttig, J., dissenting); see also Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1322 (2013) ("[G]overnment may not withhold benefits it would otherwise provide for the purpose either of discouraging agents from exercising their constitutional rights or of punishing them for doing so."); *id.* at 1329-33 (arguing that the Supreme Court's pre-*NFIB* coercion case, *South Dakota v. Dole*, 483 U.S. 203 (1987), was "wrongly decided" because the threatened loss of 5% of a state's federal highway grant for failure to raise the drinking age was coercive).

271. Pasachoff, *supra* note 14, at 583.

272. Bagenstos, *supra* note 21, at 865.

273. See Pasachoff, *supra* note 14, at 652-53 (citing the *NFIB* Court's repeated references to the constitutional status of the states in crafting the coercion doctrine).

274. See *supra* notes 255-256 and accompanying text.

275. See Pasachoff, *supra* note 14, at 652-53.

276. See Davidson, *supra* note 85, at 983-84 (discussing the Supreme Court's conflation of local governments with states in certain instances).

(that is, states have a constitutional status that local governments do not)²⁷⁷ and practical reasons (that is, the ambiguity of the proper denominator against which to measure the significance of the amount of funding at stake),²⁷⁸ the extension seems unlikely.²⁷⁹ Any coercion argument against withholding funds from local grantees thus seems doomed.

Second, the coercion argument seems to be limited to formula grants and inapplicable to project grants. Project grants are typically much smaller than formula grants; their conditions are typically tied clearly to the funding offered; and grantees typically have clear expectations about the length of the project and any intermediate metrics to meet, or steps to follow, in order to release subsequent sums of project money.²⁸⁰ These characteristics do not overlap with the *NFIB* Court's concerns.

Even when the coercion argument is limited to state governments' formula grants, the argument is no stronger. The coercion claim is not really about the act of withholding funds, after all, but about the constitutionality of the underlying statute. At bottom, the argument challenges the offer of funds in the first place, not the act of moving to take them away; Congress's action matters, not the agency's.²⁸¹ The *NFIB* Court made this clear by focusing on the statutory text permitting the Secretary of Health and Human Services to withhold all Medicaid funds for a state not participating in the Medicaid expansion, even though there was no indication that the Secretary actually would have used that authority.²⁸² This distinction between coercion in the context of agency action and coercion in the context of congressional action makes sense. Given the

277. See *id.* at 976-77 (discussing complicated constitutional status of localities); *id.* at 990-1000 (discussing broader disaggregation of states and local governments).

278. See Pasachoff, *supra* note 14, at 652-55 (arguing that, in contrast to state budgets, which provide a logical denominator against which to measure the coercive effect of the loss of federal funds, the denominator is less clear when local agencies' funds are being threatened, because there are logical reasons to select the local agency's budget, the broader local jurisdiction's budget, or the state budget as a whole, and observing that the answer might vary by jurisdiction even if one denominator is selected).

279. Cf. Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 378-79 (predicting that the new coercion doctrine will have limited staying power and that lower courts will find lines of retreat).

280. See *supra* notes 96-104 and accompanying text.

281. Indeed, in keeping with this insight, most scholarship on coercion under the spending power addresses the constitutionality of the federal grants regime as a whole, not particular instances of agency threats to withhold funds. See Bagenstos, *supra* note 14, at 372-80 (assessing this scholarship); *supra* note 250 and accompanying text.

282. See *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2659-60 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *id.* at 2641 n.27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

substantive and procedural protections for participants in the withholding process,²⁸³ an agency action to withhold funds is simply not the right subject of a coercion challenge, even though an action challenging the constitutionality of the underlying statute might be. (Nor would a coercion challenge brought in response to agency withholding likely be successful on the merits, as I discuss in Part II.C, where I explain why agencies ought not fear the prospect of a coercion challenge to the grant statutes they implement.)

3. *Promoting Diversity*

State and local government diversity is one of the values that the American system of federalism is supposed to protect. In Justice Brandeis's famous metaphor, each state is a "laboratory" of democracy that may "try novel social and economic experiments without risk to the rest of the country."²⁸⁴ The contemporary version of this principle posits that subnational governmental entities should be encouraged to experiment, both because different policies will work differently in different places and because experimentation may lead to a better understanding of what programs work and should be replicated more broadly.²⁸⁵ The federalism-as-diversity case against agency funding cut-offs holds that agencies should not act to cut off federal funds from noncompliant grantees—states and localities alike—because to do so would suppress valuable diversity in the service of less optimal uniformity.²⁸⁶

Like the sovereignty argument, however, the diversity argument erroneously assumes that grantee noncompliance reflects substantive policy disagreements rather than mismanagement, insufficient effort, or some other reason not in keeping with the value of policy diversity.²⁸⁷ The diversity argument also erroneously assumes that any move to withhold funds would be for non-

283. See *supra* notes 195–207 and accompanying text.

284. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

285. See, e.g., Davidson, *supra* note 85, at 1007, 1013–14; Somin, *supra* note 39, at 464–68. *But cf.* Super, *supra* note 252 (arguing that "democratic experimentalism" connected to policy diversity has produced "laboratories of destitution," rather than laboratories of democracy, in the field of antipoverty law).

286. See, e.g., *Va. Dep't of Educ. v. Riley*, 86 F.3d 1337, 1356 (4th Cir. 1996) (Luttig, J., dissenting); Applebome, *supra* note 11; Gutierrez, *supra* note 251; Michele McNeil, *Ed. Sec. Duncan's Policy Leverage May Be Put to Test*, EDUC. WK., Oct. 9, 2013, http://www.edweek.org/ew/articles/2013/10/09/07leverage_ep.h33.html [<http://perma.cc/T8HH-4XC6>] (quoting Georgia's Superintendent of Schools, who objected to the Education Department's plan to revoke grant funds for noncompliance: "[T]he heavier the stick, the more the states are going to pull back. We do not want to be forced into directions that we may or may not agree with.").

287. See *supra* notes 139–155 and accompanying text.

compliance with a uniform federal policy. That is far from the case. States can be found out of compliance with their own state plans in formula grants,²⁸⁸ for example, and all grantees may be found out of compliance with their own specific applications in competitive grants.²⁸⁹

Moreover, even when the possibility of withholding is due to noncompliance with a uniform federal policy, the diversity argument is better directed toward the initial design of the uniform federal policy than to the back end of grant enforcement. The diversity argument does not meaningfully speak to whether grantees that have accepted federal funds to do something—even something arising from a one-size-fits-all policy—should be relieved of the obligation to comply.

It is possible, however, that agency reluctance to cut off funds could be seen as relevant to policy diversity if the decision to continue providing funds is a substitute for this front-end design change. In other words, if it is easier for advocates to persuade an agency not to cut off funds to grantees that are engaging in impermissible program variance than to persuade Congress to redesign a grant program in a way that furthers policy diversity, then the former choice makes more sense. Although I am not aware of any evidence that this is true as a descriptive matter, it is a plausible story.

As a normative matter, however, if agency reluctance to cut off funds for noncompliance is traceable to agency interest in furthering policy diversity even when the statute does not permit it, such action (or inaction) is destructive, rather than something to celebrate. Justice Brandeis also wrote in praise of openness and transparency, after all: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”²⁹⁰ Our system relies on the existence of laws that are public. If the law on the books—the federal conditions—is without force because agency enforcers are encouraged to look away for unrelated policy reasons, our democracy suffers. In such a context, it would be better for the agency to grant a waiver (publicly, on the record) than to fail to enforce grant conditions.

In any event, regardless of whether the story is true, the diversity case against funding cut-offs seems to be a cover for a broader objection to the federal grant regime, and so should be taken in that light.

288. See, e.g., 42 C.F.R. § 430.35(b) (2013) (identifying the possibility of withholding Medicaid funds if a state is not in compliance with its own state plan).

289. See, e.g., *Georgia in Doghouse on Race to Top*, EDUC. WK., Aug. 7, 2013, <http://www.edweek.org/ew/articles/2013/08/07/37policy.h32.html> [<http://perma.cc/7FGC-ENPN>] (describing the Department of Education’s decision to withhold part of Georgia’s Race to the Top funds because of the state’s efforts to walk away from commitments made in its applications for the grant money).

290. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

4. *Enhancing Accountability*

Another value the system of federalism promotes is political accountability.²⁹¹ Under this principle, intergovernmental relations should be structured so that voters know which level of government to hold accountable for each political decision. Unlike the previous federalism arguments, the accountability version of the argument is relevant at the back end of grant enforcement as well as at the front end of grant design and acceptance. The argument is that the state or locality wants to do *X*, but the conditions in the federal grant require it to do *Y*. To get the federal funds (at the front end) or avoid losing them (at the back end), the state or locality does *Y*, thereby blurring the lines of accountability, in that voters may blame state or local officials for doing *Y* when it is really the federal government that should be held to account for choosing *Y* as the appropriate action.²⁹² This argument is sometimes framed as one particular to the states, but not always, and the accountability principle applies to devolution to sub-national governments more generally.²⁹³

There are at least three problems with the accountability argument against funding cut-offs. First, at some level, it makes sense to hold the grantee accountable for choosing to do *Y*, even in response to an agency threat to withhold funds.²⁹⁴ If *Y* is truly a bad decision, then the grantee should not have agreed to do it in the first place. If the grantee has agreed, then it is fair for voters to express their dissatisfaction with the grantee.²⁹⁵

Second, recall that grantee noncompliance is not always linked to a competing policy choice but instead can be rooted in bureaucratic mismanagement, insufficient effort, or other problems.²⁹⁶ Where a funding cut-off brings to vot-

291. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2660-61 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); Blumstein, *supra* note 250, at 99-100; Bulman-Pozen & Gerken, *supra* note 40, at 1289-91; Somin, *supra* note 39, at 484-87.

292. See Somin, *supra* note 39, at 484-87. This is typically framed as a story about needing to blame the right set of officials for their poor choices, but, of course, we might also want to make sure that the right set of officials gets praised for their good choices. See Pasachoff, *supra* note 14, at 592 & n.91 (noting the *NFIB* plurality's apparent failure to consider this latter point).

293. See Davidson, *supra* note 85, at 1008-17.

294. Galle, *Federal Grants*, *supra* note 39, at 920.

295. If the state is coerced into making the decision to accept the grant and associated conditions, that is another story. But as I explain below, the coercion argument is not promising for most federal grant programs. See *infra* notes 337-342 and accompanying text. If it is just a hard choice for the state to make, there is no reason not to hold the state responsible for it, just as the state is held responsible for other hard decisions it routinely has to make outside the context of federal grants.

296. See *supra* notes 139-143 and accompanying text.

ers' attention instances of this kind of noncompliance, accountability is actually increased.

Third, a threat to withhold funding can be a perfect moment to clarify lines of accountability. Jessica Bulman-Pozen and Heather Gerken have made the more general point that uncooperative federalism – that is, states' resistance to federal control even as they participate in federal programs – invites more accountability, not less, as disagreement produces information that may be relevant to citizens assessing whom to hold responsible for a policy problem.²⁹⁷ The following scenario demonstrates why this is the case in the context of disputes over compliance with federal grant programs. Imagine a state grantee that, perhaps in consultation with the governor's office, disagrees with the policy choice in the federal grant, but nonetheless thinks the federal money at stake is too important to lose. A sensible political response is a loud and public objection to explain to the voters what is going on and to enlist the voters' help in changing the policy. This course of action was easy enough in an era of press releases and TV commercials, but it is even easier in today's era of social media: "We [Arizonans, Hoosiers, Californians, etc.] know that *X* is the right course of action for our state. But they [Congress, President Obama, the federal government] want to take it away from us. Call/email/tweet/text/'Like'/post on Tumblr to let them know: we want to do it our way."²⁹⁸ With a similar response from the federal players and with advocacy groups chiming in on either side, it is implausible that the threat of a funding cut-off will keep lines of accountability hidden.²⁹⁹

Withholding funds may also promote political accountability within the federal agency more than the alternative of making low-level bureaucratic judgments. Because withholding is such a serious action, it must be discussed and approved among more senior political players than the civil service grant program officers who make run-of-the-mill, day-to-day oversight decisions.³⁰⁰ Where agency officials receive pushback on their withholding efforts because of challenges to the policy or the agency's interpretation of the policy, the agency may decide to revise or clarify its policy or interpretation, again making the decision more public (and often providing an opportunity for public involve-

297. See Bulman-Pozen & Gerken, *supra* note 40, at 1290-91.

298. Of course, even technologically easy action is not costless, but the point is that funding cut-offs need not obscure accountability, not that efforts to publicize which level of government is responsible are costless.

299. To be sure, voters could get lost in competing arguments about which side to blame. But in light of the First Amendment's support of a thriving marketplace of ideas, in which the antidote to disfavored speech is more speech, it would be odd to think that too much speech is a negative associated with limited political accountability.

300. See *infra* Part II.D.

ment through notice and comment or some other mechanism). Withholding funds may also permit Congress to weigh in on the substance of the dispute by revising the law, whether in support of the agency's wishes or the grantee's. Either way, withholding can lead to elected officials' claiming ownership of the issue. Far from undercutting accountability, then, withholding funds can actually enhance it.

C. The Limits of Agency Motivation and Capacity

The next two critiques accept that withholding might be desirable as a normative matter but contend that practical considerations nonetheless render withholding an ineffective tool. The first iteration of this critique suggests that agencies have both limited motivation and capacity to make withholding effective.³⁰¹ Both elements of this critique are overstated.

1. Motivation

The argument that agencies have little motivation to withhold funds asserts that grant program offices are designed to give money away, not take it away. Agencies provide training and technical assistance and sometimes ask for modifications to state plans or discretionary grant applications, but the instinct of their personnel is not enforcement-oriented. Instead, agency personnel are motivated by the development of professional relationships with grantee staff, joined in a common cause relating to implementation of the program at issue; often, there is even potential for a revolving door between federal and state or local administration.³⁰² Agency personnel may also be reluctant to withhold funds if they think that grantees are underfunded to begin with.³⁰³

Further, the argument continues, it is in the agency's best interest to be involved in the grantee's program, and terminating the grant means that the agency has no more leverage over the policy area in question.³⁰⁴ On the personnel side, it is typically the grantees that are the strongest advocates for the

301. See, e.g., DERTHICK, *supra* note 96, at 208; Key, *supra* note 216, at 292-93; King, *supra* note 216, at 330-31; Tomlinson & Mashaw, *supra* note 222, at 620.

302. See, e.g., KEY, *supra* note 14, at 175-76; Casino, *supra* note 54, at 59-60.

303. See, e.g., Kathleen Sebelius, *The Numbers Are In: Sequestration Cuts 57,000 Kids from Head Start*, DEP'T HEALTH & HUMAN SERVS. (Aug. 19, 2013), <http://www.acf.hhs.gov/blog/2013/08/the-numbers-are-in> [<http://perma.cc/K7R5-EY93>] (blog post from the Secretary of the Department of Health and Human Services decrying budget cuts to Head Start).

304. KEY, *supra* note 14, at 161, 171-72; Tomlinson & Mashaw, *supra* note 222, at 620.

program in the state, and so any action that threatens grantees may be more dangerous for the longevity and success of the program.³⁰⁵

Again, however, the story is more complicated. For example, this story seems to encompass only certain kinds of officials, only certain kinds of conditions, and only certain kinds of grants. That is, some agency personnel actually are enforcement-oriented—for example, Inspector General offices, whose mission is in part to investigate and correct problems in grantee service provision and administration,³⁰⁶ or agencies’ civil rights offices, whose mission is to enforce applicable civil rights laws.³⁰⁷ Even grant program offices routinely enforce administrative conditions, especially financial conditions, which tend to be subject to a more routine auditing process.³⁰⁸ Federal officials may well be motivated differently based on the institutional norms and perspectives of their offices.³⁰⁹ And the story seems also to describe competitive grants less well than formula grants, as it may be easier for program officers to see how shifting short-term project grant funds from a noncompliant, unsuccessful grantee to an already successful or an up-and-coming grantee could promote the goals of the program as a whole.

Moreover, the story of capture suggested by the revolving door sits in tension with other plausible explanations of agency action, including tunnel vision about the grant’s mission and aggrandizement of the program’s substantive goals.³¹⁰ It also ignores the potential for a revolving door between agency staff and non-profit advocacy organizations that might align themselves with federal enforcement over state or local implementation.³¹¹

305. See Tomlinson & Mashaw, *supra* note 222, at 620; see also DERTHICK, *supra* note 96, at 202-14; Hill, *supra* note 183, at 14.

306. See, e.g., *supra* notes 176-178 and accompanying text.

307. See, e.g., *supra* notes 181-182 and accompanying text.

308. See, e.g., *supra* note 175 and accompanying text.

309. Cf. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324-25 (2006) (discussing competing perspectives on the same issue offered by different agencies); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It,”* 96 MINN. L. REV. 194, 228-51 (2011) (analyzing legal offices that focus on international law compliance across different federal agencies and demonstrating that “these agencies balance the dictates of law and policy in different ways based on their particular perspectives”).

310. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1351-53 (2013) (describing these claims as part of a broader discussion of a “wide range of factors that can influence agency behavior”); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1925 (2013) (describing these claims while noting that agencies are “complicated organizations” with competing instincts).

311. See, e.g., Carl F. Kaestle, *Federal Education Policy and the Changing National Polity for Education, 1957-2007*, in TO EDUCATE A NATION: FEDERAL AND NATIONAL STRATEGIES OF SCHOOL

As for reluctance to withhold funds out of a concern that grantees have insufficient funding, noncompliance may emerge from multiple factors that have nothing to do with grantee capacity.³¹² Relatedly, it is surely not uniform federal policy to excuse grantees from compliance with expensive conditions, as it is not uncommon for the United States to file amicus briefs in private litigation supporting increased grantee compliance, even where compliance is costly.³¹³

On the question of leverage, the account ignores the real possibility that only part of the grant will be at stake,³¹⁴ so withholding need not mean that the agency has lost its ability to influence the program. And since funding cut-offs begin as temporary withholdings of funds until the condition in question is met,³¹⁵ an action to withhold even 100% of a grant does not eliminate all leverage. To the contrary, the agency's leverage is perhaps at its strongest the moment the agency demonstrates its willingness to enforce the grant conditions. The absence of leverage arises only if the state refuses to comply and is willing to give up the entire grant. But even in that circumstance, the agency's willingness to withhold funds in one state may increase its leverage in all the other states watching what is happening.

The idea that the state agency program personnel are typically the program's strongest supporters also bears unpacking. To the extent that it is true, it could actually increase the federal agency's apparent willingness to withhold funds in a kind of collusive action to provide political cover for strong action desired by the state agency personnel; in other words, state agency personnel wishing to implement the federal program fully but facing resistance from the state legislature or governor may encourage the federal agency to take steps toward withholding funds in order to gain a powerful ally.³¹⁶ But the idea that state agency program personnel are the program's strongest supporters surely is not always true. Just as federal agency heads may vary through administra-

REFORM 17, 30-33 (Carl F. Kaestle & Alyssa E. Lodewick eds., 2007) (describing interest groups relevant to the machinery of federal education grants).

312. See *supra* notes 139-145 and accompanying text.

313. See, e.g., *Educational Opportunities Cases*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/edu/documents/classlist.php> [<http://perma.cc/PD74-GKTR>].

314. See *supra* notes 197-198 and accompanying text.

315. See *supra* note 196 and accompanying text.

316. DERTHICK, *supra* note 96, at 193-218 (describing methods of federal influence); KEY, *supra* note 14, at 175 (explaining that "many of the instances in which withdrawals have occurred have heartily been concurred in by the staff of the state agency affected"); cf. *Horne v. Flores*, 557 U.S. 433, 448-49 (2009) (describing public officials "under fiscal and political constraints" who "frequently win by losing" institutional reform lawsuits, thereby being forced to make the change they actually desired all along) (citing ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 170 (2003)).

tions in the strength or type of commitment to particular projects they oversee, so, too, must this be the case for state agency officials. There may be times when the agency personnel oppose a given project, and other state players in the governor's office or the state legislature may have more leverage.

Overall, then, an exploration of the nuances of grant administration weakens the explanatory power of the critique of withholding rooted in a description of agency motivation. Alternatively, to the extent that the critique does accurately describe agency officials' beliefs, those beliefs ought to be challenged as insufficient, and alternative options that redesign agencies to encourage officials to see withholding as a serious tool ought to be explored, as I discuss below.³¹⁷

2. Capacity

Another aspect of this critique is the observation that agencies have resource limitations that constrain their ability to oversee grantees' work, much less engage in a time-intensive withholding process. The number of grantee policy and implementation decisions for each program officer to review is vast, and agencies simply do not have the resources to police them all.³¹⁸ Moreover, agency capacity may vary from administration to administration, as different Presidents may prioritize different programs or have different attitudes about agency enforcement overall.³¹⁹

It is certainly true that agencies have limited capacity. But this is not unique to the remedy of withholding funds; it is a fact that describes essentially all law enforcement.³²⁰ The assumption that the relevant enforcement goal is a comprehensive review of all violator wrongdoing is similarly unsupported; it ignores the possibility of the effectiveness of more strategic³²¹ (or even randomized)³²² enforcement. And the observation that agencies have limited capacity, and that agency officials may feel constrained by that limited capacity, does not answer the question whether agencies could be redesigned to make use of their limited capacity more efficiently.³²³

317. See *infra* Part III.B.

318. See, e.g., Bagenstos, *supra* note 222; Hill, *supra* note 183, at 10-11; Hills, *supra* note 32, at 1226.

319. See, e.g., BRESSMAN ET AL., *supra* note 5, at 711-13; YUDOF ET AL., *supra* note 13, at 538.

320. See, e.g., Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9, 13-14 (2010).

321. See, e.g., *id.*

322. See, e.g., Robert J. Jackson, Jr. & David Rosenberg, *A New Model of Administrative Enforcement*, 93 VA. L. REV. 1983 (2007).

323. See *infra* Part III.B (considering design alternatives).

But the more relevant question is: *compared to what* do agencies have limited capacity? The capacity argument is usually offered in contrast to the value of once-flourishing private enforcement of grant conditions, in order to demonstrate that agencies cannot possibly seek to compensate for the decline in private litigation as a result of the Supreme Court's cutbacks. A more realistic version of this argument, however, would account for potential benefits of agency enforcement and potential drawbacks of heavy reliance on private enforcement.

One upside of agency enforcement is that agencies overseeing grant programs already have a mechanism for involvement in grant oversight and implementation. The state plans or applications and the monitoring roles of agency employees mean that agencies already have a way of obtaining knowledge about and making change in every aspect of a grantee's operation.³²⁴ Private parties can support agencies' oversight work by raising complaints to the agency about the grantee's conduct where necessary,³²⁵ but the burden of ensuring appropriate grantee implementation need not fall entirely on private parties, given the efficiencies associated with agencies' ongoing monitoring work. In addition, since agency capacity varies from administration to administration, there are certain times when agency capacity is at a peak. If levels of private enforcement are constant across time, agency enforcement may sometimes be the better option.

But even outside the current doctrinal limitations on private enforcement, it is important to recognize that some aspects of private enforcement can lead to underenforcement. Even where private rights of action exist, lawyers and advocacy groups are not evenly geographically dispersed, so there are areas where no one is likely to bring a lawsuit (but that are nonetheless subject to federal oversight through the grant process).³²⁶ Information about potential violations is often within the grantees' own control and is difficult for private parties to obtain (but is often nonetheless subject to federal review).³²⁷ Even

324. See *supra* Part I.C; see also Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law*, 90 B.U. L. REV. 2323, 2365-67, 2377 (2010) (discussing agencies' informational capacities to detect potential violators).

325. See *supra* note 179 and accompanying text.

326. See, e.g., Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1424-30 (2011); Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 381-82 (1988).

327. See, e.g., Pasachoff, *supra* note 326, at 1437-39, 1458 (describing the informational asymmetries in the special education context).

where private parties are aware of violations, they are often reluctant to sue.³²⁸ Limitations in the attorneys' fee regime and restrictions on publicly funded legal services create other barriers.³²⁹ Furthermore, some grant programs are designed in such a way that even robust private enforcement of the substance of the program will lead to systemic underenforcement for more vulnerable beneficiaries (but where public enforcement can play an equalizing role).³³⁰ Since both private and public enforcement of grant programs have capacity limitations, one might want to find ways to enhance each. Plenty of scholarly attention is given to the former, which is why my task here is to rehabilitate the latter.

3. *Motivation, Capacity, and the Special Case of Coercion*

A new version of the motivation and capacity critique of withholding has emerged after the Supreme Court's decision in *NFIB*. In the wake of the decision, many commentators suggested that the new coercion doctrine would lead to a bevy of lawsuits challenging a wide variety of federal grant programs as unconstitutionally coercive.³³¹ Commentators also suggested that the primary function of the new coercion doctrine would be to strengthen states' hands in negotiations with agencies over the contents of state plans.³³² If agencies refused to approve state plans or to grant states waivers from particular conditions, the argument went, states would threaten to bring a lawsuit challenging the grant program as coercive. Then agencies, wishing to avoid the danger of losing or simply the hassle of a lawsuit, would permit noncompliance. This argument is related to the threat of funding cut-offs, as an agency with incentives to approve inadequate state plans and grant inappropriate waivers in an effort to avoid a coercion challenge is surely not going to cut off funds.

328. See, e.g., Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1202 (2011); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 699 & n.2 (2011).

329. See, e.g., Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62 (2014); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007).

330. Pasachoff, *supra* note 326, at 1488-92.

331. See, e.g., Pasachoff, *supra* note 14, at 580-81 (describing commentators' predictions on this front); Ilya Shapiro, *Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 TEX. REV. L. & POL. 1, 7-10 (2013).

332. See, e.g., Bagenstos, *supra* note 21, at 920; Ryan, *supra* note 21, at 19.

An agency's decision to give in to a state's demands is a choice, however, not a necessity, and not at all an obvious one.³³³ An executive could surely decide that it is preferable to make the better substantive policy decision and face the possibility of a lawsuit. A lawsuit, after all, can helpfully clarify exactly what the constitutional parameters of the grant program are. The agency might therefore rationally prefer to know what is possible rather than act under the fear that little is. Moreover, an agency could rationally want to signal to other states that it is not going to cave in to all state requests on the theory that a hard line can be more effective than a slippery slope.

Indeed, some months after the Court handed down *NFIB*, the Education Department refused to grant a waiver to California, the largest state by population, from the Department's most heavily funded grant program, No Child Left Behind (NCLB).³³⁴ California did not sue. Nor did Iowa sue after the Education Department denied its NCLB waiver request the week before the decision in *NFIB* was announced, notwithstanding the potential new ground for a legal challenge.³³⁵ The pundits' predictions, therefore, tell an incomplete story. I think this is so for two reasons.

First, politics matter. It is impossible to tell a story about incentives in state-agency-Congress negotiations without contextualizing the actual on-the-ground politics at the moment of the telling. In the abstract, therefore, it is plausible to tell a story of why Iowa should have received its waiver, potentially related to the presidential primaries of 2016 or to the Democratic Governor's party-line connection to President Obama's administration. But in actuality, the Democratic Governor and Lieutenant Governor issued statements placing the blame for the waiver decision on the state legislature, not on the Obama Administration.³³⁶ Understanding the negotiations around compliance with grant conditions after *NFIB* thus requires a more fine-grained political analysis than the typical account imagines. I discuss the need for nuance in analysis of the politics of withholding at more length in Part II.D.

333. Pasachoff, *supra* note 14, at 659-62.

334. Sharon Noguchi, *California Fails to Win Waivers from Restrictive No Child Left Behind Education Law*, SAN JOSE MERCURY NEWS, Dec. 25, 2012, http://www.mercurynews.com/ci_22255903/california-fails-win-waivers-from-restrictive-no-child [<http://perma.cc/5HXM-54Q5>].

335. Alyson Klein, *Iowa Turned Down for ESEA Waiver*, EDUC. WK.: POLITICS K-12, (June 21, 2012, 7:35 PM), http://blogs.edweek.org/edweek/campaign-k-12/2012/06/iowa_turned_down_for_esea_waiv.html [<http://perma.cc/SH65-D7ZL>].

336. Press Release, Office of the Governor of Iowa Terry Branstad, Branstad and Reynolds Release Statements on Denial of Iowa's No Child Left Behind Waiver (June 21, 2012), <https://governor.iowa.gov/2012/06/branstad-and-reynolds-release-statements-on-denial-of-iowa%E2%80%99s-no-child-left-behind-waiver> [<http://perma.cc/KVV8-YHVF>].

Second, the legal case for coercion in federal grant programs writ large is just not that strong. The structure of the Medicaid expansion that so troubled the *NFIB* Court essentially describes no other grant program.³³⁷ Most conditions on grant programs, even with respect to modifications of grant programs through reauthorization, easily qualify as merely governing the use of the funds to which they are attached, not as leverage for a separate program, thus ending the inquiry at the first stage of the new coercion doctrine.³³⁸ Even if the second stage were at issue, some conditions arguably tying independent programs together were done with the now-requisite notice.³³⁹ But even in those circumstances where the first two conditions might not be met, there is no federal grant program that comes anywhere close to Medicaid in size.³⁴⁰ (And, it should be noted, no *NFIB* opinion suggested that Medicaid itself was so large as to be unconstitutionally coercive,³⁴¹ while the joint dissent seemed to suggest that litigants seeking to establish coercion must demonstrate that the “coercive nature of an offer is unmistakably clear” and “plain[.]”³⁴²) Agencies need not broadly fear that the grant programs they oversee will be declared coercive should an action to withhold funds prompt such a lawsuit.

For that matter, as I explained above, the Supreme Court found the expansion of Medicaid unconstitutionally coercive based purely on the statutory existence of a funding cut-off remedy, even in the absence of any agency move toward withholding funds.³⁴³ It therefore seems that, as long as withholding authority remains textually available, an agency could face a coercion challenge, no matter what it does. For an agency to avoid withholding funds simply because it is trying to avoid a coercion challenge thus seems both ill-advised and short-sighted.

As for the idea that coercion lawsuits will, like other lawsuits, be resource-intensive, and so the agency is justified in attempting to avoid using its limited capacity on their defense, granting waivers and negotiating with states about

337. Pasachoff, *supra* note 14, at 582.

338. *Id.* at 581-82, 617-21, 633-37, 644-47; Bagenstos, *supra* note 21, at 910-12.

339. Pasachoff, *supra* note 14, at 621, 637-39, 647-48.

340. GAO, *supra* note 2, at 8 fig.2; *see also* Ryan, *supra* note 21, at 17 (suggesting that the Clean Air Act, although possibly the hardest case under the new coercion doctrine, could nonetheless survive a coercion challenge because, among other reasons, “federal funding provides a much smaller role in state transportation regulation than it does in state Medicaid implementation” and the withholding structure for noncompliance is much more narrowly tailored than the Medicaid withholding structure is).

341. Pasachoff, *supra* note 14, at 623.

342. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2661-62 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

343. *See id.* at 2607 (plurality opinion).

modifications to their plans are also time- and resource-intensive. The agency might invite fewer requests for questionable modifications and suspect waivers if it seems likely to prospective requesters that such requests will be denied. Resources spent defending a coercion challenge may actually lead to resource savings in other areas.

Again, then, the *NFIB*-related account of agency reluctance to withhold funds claims too much. Alternatively, once more,³⁴⁴ to the extent agency actors really do feel further constrained by *NFIB*, the assumptions that underlie such sentiments ought to be challenged.

D. *The Limits of Politics*

The final critique of the funding cut-off suggests that, regardless of the tool's normative desirability, political dynamics limit its potential.³⁴⁵ The story goes something like this: The congressional delegation from the jurisdiction to which the funds are directed is likely to respond to lobbying pressure on behalf of the jurisdiction.³⁴⁶ The delegation can therefore gain some political capital at home by working to resolve a constituent problem. Congress possesses a number of tools to influence agency action,³⁴⁷ among them the annual appropriations process, which—entirely separate from the amount of funding to be allocated through grant programs—can affect the agency's own administrative budget. Congress can also call in the agency head for a hearing to defend any decision to cut off funds, potentially weakening the agency head's reputation or the President's political standing. Moreover, Congress can change the terms of the legislation authorizing the grant program, whether in favor of the complaining grantee on this particular issue or to constrain agency discretion more generally. Because these activities can happen in both houses and in different committees in each house, the grantee has multiple pressure points to enlist Congress's help against agency action.

Similarly, the story continues, agency officials are subject to political pressures from the White House and other agencies. Even if an agency wishes to cut off funds for a particular program in a state, other agencies may protest based on their own programs in that state, and the White House's response may balance those competing interests.³⁴⁸ A less high-minded version of this

344. See *supra* notes 317 & 323 and accompanying text.

345. See, e.g., DERTHICK, *supra* note 96, at 195-99 (describing political constraints on funding conditions); KEY, *supra* note 14, at 161-62, 174 (same).

346. See DERTHICK, *supra* note 96, at 207-08.

347. See, e.g., BRESSMAN ET AL., *supra* note 5, at 703-25.

348. See, e.g., *id.* at 702-03.

interaction would involve responding to lobbying by political donors from the jurisdiction whose funds are at issue (rather than balancing competing policies).³⁴⁹ The President may also be sensitive to the political optics of cutting off grant funds to a state from which his or her party needs votes in the next election cycle.

The articulation of the incentives in this description holds some appeal, but the story is too simplistic to have real explanatory power. In particular, the story says little that is unique to withholding; it fails to acknowledge the different politics that may surround different types of grants; and it fails to account for the complexities of political alignment within the state-agency-Congress relationship.

1. *General Applicability of the Critique*

The standard account of the political failures of withholding similarly applies to other enforcement mechanisms at the federal government's disposal. It is not easy for the Department of Justice to sue a state or locality, for example, or for any agency to sue or fine private corporations.³⁵⁰ The state can enlist the support of Congress and the White House in stopping a lawsuit, after all; private corporations can do the same with respect to a lawsuit, fines, or any other compliance mechanism. It is no answer that funding cut-offs have a political flavor that lawsuits do not. Agencies must set priorities when they decide which lawsuits to pursue, and those decisions vary according to the political preferences of each Administration.³⁵¹ Both kinds of actions are embedded in a complicated political environment. At the same time, both kinds of actions have a legal, as opposed to purely political, basis; just as with decisions to pursue a lawsuit, decisions to cut off funds are the result of noncompliance with statutory requirements and made through administrative legal channels.³⁵² The political critique of withholding does not explain why the tool is weaker than any other tool of federal enforcement.

The description of the way in which politics stymies withholding could even describe many other political problems in Washington, including the pas-

349. See, e.g., Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1100 (2013).

350. See generally BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* (1997) (describing political challenges to the Civil Rights Division's enforcement); JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES* (1995) (describing political challenges to the EPA's enforcement).

351. See, e.g., LANDSBERG, *supra* note 350, at 100, 102; MINTZ, *supra* note 350, at 41-42.

352. See *supra* notes 124-138 and 199-207 and accompanying text.

sage of any piece of legislation. To be sure, this particular moment of partisan gridlock is an inauspicious time to suggest that anything can get through Congress. But American history is full of seemingly impossible political outcomes prevailing when certain players decide they want to try to change the politics to achieve some desired substantive policy. The real question is whether individual political players at any given time think that withholding is a good idea on the merits. If that is the case, then particular political strategies to achieve this end can be designed with nuance.

2. *Distinctions Among Grants and Grant Types*

The standard account assumes that all grants are embedded in the same political context. This is simply not true. Grant programs vary in the breadth and depth of their interest group support,³⁵³ and the power of different interest groups varies over time.³⁵⁴ Congress may object more or less to agency efforts to cut off funds depending on the likely public response and the importance of interest groups' reactions to individual members' political futures.³⁵⁵

Grant programs also vary in the perceived worthiness of their beneficiaries.³⁵⁶ Congress may not object to agency efforts to cut off funds to less sympathetic populations, just as Congress may find it easier to cut budgets for these programs in the first place.

Beyond the political variations with respect to individual grant programs, different types of grants are also subject to different political forces.³⁵⁷ For example, Congress is likely to object less to agency efforts to withhold funds from one-time, short-term project grants than ongoing formula grants. Even within formula grants, Congress may be more likely to thwart funding cut-offs for an entire state than for a locality because more constituents may object and more members of Congress will be affected—although the size of the program likely matters, such that Congress may be more likely to look the other way when an

353. See, e.g., JEFFREY M. BERRY & CLYDE WILCOX, *THE INTEREST GROUP SOCIETY* (5th ed. 2008) (discussing the varying strengths of different interest group sectors).

354. See, e.g., CONLAN, *supra* note 62, at 278-79 (describing the unusual power of the intergovernmental lobby during the negotiations leading to the 1996 welfare reform); ELIZABETH H. DEBRAY, *POLITICS, IDEOLOGY, AND EDUCATION: FEDERAL POLICY DURING THE CLINTON AND BUSH ADMINISTRATIONS 9-10* (2006) (describing the rise in the 1990s of "new kinds of interests" that were previously not part of the conversation around federal education policy).

355. See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 5 (1990).

356. See, e.g., CONLAN, *supra* note 62, at 290.

357. Cf. ARNOLD, *supra* note 355, at 136-39 (discussing various political issues surrounding different types of grants in the context of appropriations decisions and decisions to repeal programs); CONLAN, *supra* note 62, at 42-43 (same).

agency threatens to withhold funds from a smaller state-wide program than a larger one. Furthermore, Congress may be more likely to object to efforts to withhold funds from mandatory programs than discretionary ones because states may have high expectations that they will receive mandatory grants, while discretionary grants are subject to regular reauthorization and annual appropriation battles.

3. *Complexities of Political Alignment*

The stylized version of politics in the standard account ignores the potential complexities in alignments across the 535 members of Congress, 1,100 Senate-confirmed agency political appointees,³⁵⁸ and innumerable politicians and bureaucrats in all levels of government across the fifty states.

To begin, Congress is a “they,” not an “it.”³⁵⁹ For every home state Senator wishing to defend her state’s particular grant funding, there may be another who wishes to distance herself from what she takes to be her state’s inadequate implementation of the grant program, especially when the Senator is from a different political party than the state program administrator.³⁶⁰ For every home state Senator who calls in an agency head to embarrass him for withholding funds, there may be another Senator who will use the hearing to highlight her own state’s successful implementation of the program or critique the use of federal funds in a poorly run state. Even a home state Senator wishing to intervene in an agency’s withholding decision may win the political points she desires simply by attempting to intervene, regardless of the strength, seriousness, or success of her intervention.³⁶¹ Furthermore, the interests of Congress as a body vary over time along with its membership and its members’ interests.

The state, too, is a “they,” not an “it.”³⁶² The grantee agency, governor, and state legislature (itself comprised of multiple competing political players) may not share the same interest in preventing federal withholding if one entity can

358. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 917 (2009).

359. Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

360. See KEY, *supra* note 14, at 162–63 (describing such an instance).

361. Cf. STUART SHAPIRO & DEBRA BORIE-HOLTZ, *THE POLITICS OF REGULATORY REFORM* 129 (2013) (discussing the potential political advantages of taking a stand, whether or not it has the effect the politician purports to call for).

362. KEY, *supra* note 14, at 175; Bulman-Pozen & Gerken, *supra* note 40, at 1272–73; Hills, *supra* note 32, at 1201.

use withholding against another in the state for political advantage.³⁶³ Similarly, grantees at the local level may not always find their interests protected in Washington from a unified state-level government or from other local grantees; for example, a state agency may wish to protect its own reputation for good administration by agreeing with the federal agency that a local grantee ought to lose funds, while other local grantees may wish to protect their own reputations for good grant implementation or even obtain the offending grantee's share of the funds.³⁶⁴

Interest groups complicate political alignments as well. Members of Congress and the White House may face pressure from non-state interest groups in support of increased federal enforcement—sometimes the same groups that might have brought a private lawsuit in support of increased grantee compliance in a different doctrinal era.³⁶⁵

Nor can agency officials be reduced to one predicted set of incentives across all agencies, all administrations, and all times. For example, an agency head could reasonably decide that taking a hard line on one grant might actually encourage the state to make more progress on another grant, just the reverse of the political critique told above—but another agency head in a different agency, or the same agency at a different time, might make a different call. Relationships matter, and one agency head may be able to convince the White House that withholding in a particular case is a good idea, while another agency head could not.³⁶⁶ Different facts will also play out differently across different political alignments. Imagine some grantee conduct that most people could agree was plainly improper—say, taking the grant and then refusing to spend it for the purpose of the grant but instead paying for some other purpose at odds with federal policy. Even if the state were to activate its political supporters in D.C., one could imagine that the agency might carry through with a withholding action on the principle that the public good should triumph (and/or that it will be politically good for those who advocate that principle).

363. See Hills, *supra* note 40, at 859 n.164 (describing instances of intra-state competition over federal grant funds); see generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (arguing that partisan politics helps explain instances of conflict between states and the federal government).

364. See, e.g., Hills, *supra* note 32, at 1229 & nn.95-96 (describing such a situation).

365. See, e.g., KEY, *supra* note 14, at 177 (identifying certain interest groups that “become immediately aware of improper maintenance of highways” and public sentiment that opposes “graft in public works” that could make a reality of the Bureau of Public Roads’ “use of the power to withdraw funds”).

366. See, e.g., Hehir, *supra* note 213, at 224-26 (describing the strategic decision among senior officials in the Clinton Department of Education to send a particular Assistant Secretary, who used a wheelchair, to convince the President that the IDEA should be revised so as to justify the Department’s previous decision to withhold funds from a state for noncompliance).

Moreover, even separate from the internal complexities of each set of players, the political dynamics of interactions among the sets of players will change depending on who is in the White House, who controls each house of Congress, and who is in power in different states. These dynamics may also change over the course of an administration as priorities shift. Additionally, they may change differently for different issues at different times.

Finally, to the extent that the political critique is accurate—in other words, that the relevant players in Washington stymie agency efforts to treat withholding as a viable enforcement tool—the real question is: what are the underlying normative conclusions that drive political opposition to a given withholding action? If political opposition to a potential agency withholding action is rooted in concerns about hurting the program’s beneficiaries and protecting federalism values, then we have come full circle, and the substance of political opposition may be assessed using the analysis in Parts II.A and II.B above.

III. RETHINKING FUNDING CUT-OFFS

In the previous Part, I argued that the funding cut-off is a more appropriate tool than is commonly understood. In this Part, I sketch the circumstances that most (and least) invite serious consideration of funding cut-offs. I then consider implications of this argument both for administrative regime design and for judicial review.

A. *Circumstances Most (and Least) Inviting Funding Cut-Offs*

To determine the circumstances that might best support agency action to withhold funds, it is important to establish the justifications for withholding in the first place. As withholding is part of an agency’s enforcement regime, punishment theory is helpful in this analysis, just as punishment theory has led to insights into agencies’ use of civil penalties against regulated entities.³⁶⁷ Incapacitation and retribution, two common rationales for imposing punishment, are not appropriate justifications for withholding.³⁶⁸ Part of the rhetoric against funding cut-offs discussed above implicitly assumes that these are the only

367. See generally Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853 (2012) (discussing potential rationales for penalties levied by agencies as they enforce compliance with the statutes under their purview, and reviewing literature); see also, e.g., King, *supra* note 216 (describing the withholding of grant funds as “funding penalties”).

368. See, e.g., JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 33-36, 57-79 (4th ed. 2012); Hugo Adam Bedau & Erin Kelly, *Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/spr2010/entries/punishment> [<http://perma.cc/9D3G-J3WR>] (describing theories of punishment).

purposes of cut-offs. For example, the argument that withholding hurts beneficiaries maps onto distaste for incapacitating grantees from serving beneficiaries, while the argument that federalism concerns counsel against withholding maps onto distaste for being retributive against sovereign states that exercise their own policy choices. The underlying suggestion is that, because incapacitation and retribution are not legitimate in this context, neither is withholding funds at all.

But one can agree that these purposes are not legitimate³⁶⁹ without rejecting the funding cut-off mechanism entirely. This is where punishment theory provides a different, more helpful lens. Rehabilitation and deterrence, two possible purposes of a punishment regime,³⁷⁰ are appropriate rationales for withholding funds. In other words, the purpose of withholding funds should be to induce future compliance to better serve the program's beneficiaries (that is, to rehabilitate a previously noncompliant grantee) and to signal to other grantees that the agency takes grant violations seriously (that is, to deter other grantees from engaging in acts of noncompliance).

To properly incentivize and deter grantees, some kind of proportionality principle would be helpful, under which funding cut-offs are targeted to serious, rather than minor, violations, and under which cut-offs can be circumscribed according to the type of violation at issue, rather than always putting the whole grant at risk.³⁷¹ After all, if the agency is seen to take steps disproportionate to the violation, backlash rather than increased compliance is likely. Put more generally, adopting the framework offered by E. Thomas Sullivan and Richard Frase for non-retributive but deterrent and rehabilitative punishment goals, withholding may be disproportionate when "the costs and burdens of [withholding] (or the added costs and burdens compared to a lesser penalty) may outweigh the likely benefits (or added benefits) produced by [withholding]" and/or when the same goals may be achieved via "less costly or burdensome means."³⁷²

Against this background, it becomes clear that certain types of grantee non-compliance and violations of certain types of conditions better justify withholding than others. In contrast, withholding is no more or less appropriate

369. See Minzner, *supra* note 367, at 904-13 (questioning agency legitimacy, as well as agency competence, to impose retributive punishment on entities that agencies regulate).

370. See KAPLAN ET AL., *supra* note 368, at 39-57; Bedau & Kelly, *supra* note 368.

371. Cf. E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 149-53 (2009) (discussing the need for coherent proportionality principles "for the nonretributive (deterrent) purposes served by fines, forfeitures, and civil penalties").

372. See *id.* at 162-66.

based on the type of grant itself, but the agency interest in withholding may nonetheless vary according to context.

1. *Rationales for Grantee Noncompliance*

Of the six types of grantee noncompliance I identified above,³⁷³ withholding programmatic funds is likely an inappropriate response to three and possibly appropriate for the three others.

When noncompliance is of the bumbling administrator variety,³⁷⁴ withholding substantive programmatic funds seems to do little to induce compliance—and instead seems to be a disproportionate response. Heightened administrative requirements such as those associated with becoming a high-risk grantee³⁷⁵ seem more in keeping with the scope of the violation, although targeted withholding of administrative funds might eventually be a proportional response³⁷⁶ (if that response better induces compliance).

When noncompliance is the result of a conniving administrator's actions,³⁷⁷ withholding substantive programmatic funds again seems the wrong response. If criminal conduct is at issue, an individual criminal prosecution seems in order;³⁷⁸ if non-criminal misconduct is at issue, a response targeted to the individual who engaged in the misconduct again seems better matched to the violation.³⁷⁹ If the failures of an administrative system permitted the individual violations to happen, then high-risk grantee requirements or (eventually) targeted withholding of administrative funds might be appropriate, but no more.

A move to withhold funds for a grantee's failure to meet difficult conditions that the grantee is working toward in good faith³⁸⁰ would be similarly unreasonable, as such a move will neither induce compliance nor act as a useful signal to other grantees. But it also does not seem appropriate for the agency to merely tolerate grantee noncompliance, as that could send the wrong signal about the agency's tolerance of noncompliance more generally. In these cir-

373. See *supra* notes 139-155 and accompanying text.

374. See *supra* notes 139-143 and accompanying text.

375. See *supra* notes 190-192 and accompanying text.

376. See *supra* note 226 and accompanying text.

377. See *supra* notes 144-146 and accompanying text.

378. See DEMBLING & MASON, *supra* note 38, at 144-46 (describing the possibility of criminal prosecution for individual wrongdoing in the grant context).

379. See *id.* at 150 (describing the process of suspension and debarment of individuals from receiving grants).

380. See *supra* notes 153-154 and accompanying text.

cumstances, a public call to Congress to modify the conditions or a transparent move to grant waivers seems like a better idea.

On the other hand, more substantive kinds of noncompliance may justify withholding funds—at least if the agency believes that withholding is likely to induce compliance. For example, to the extent that the agency determines that a grantee’s continued failure to comply is not due to insufficient funds, a funding cut-off might be appropriate if the grantee fails to comply out of a seeming inability to implement the program effectively,³⁸¹ especially over time. A threatened cut-off can indicate to public officials that a management overhaul is needed, while officials in other jurisdictions might well take notice and make similar changes in their own management.

Similarly, if there is a disagreement between a grantee and an agency about what compliance requires,³⁸² then a funding cut-off effort, with its administrative process followed by judicial review, may be an appropriate way to resolve the question while providing the grantee with a formal means to contest the action. Such an effort can also crystallize the issue for congressional consideration, again protecting both the agency’s interest in proper implementation of the grant and the grantee’s interest in attempting to influence what proper implementation looks like.

Finally, when a grantee refuses to comply because of a policy disagreement,³⁸³ a move to cut off funds may also be an appropriate response. If grantees were unsuccessful in setting the terms of the agreement both in Congress and in the agency (at the regulatory stage), they should not be able to effectively modify the law through noncompliance without consequence; they should not get a second (or third) bite at the apple. Once more, agency process, potentially followed by judicial process, potentially followed by congressional process, can protect both sides’ interests.

2. *Types of Conditions*

Violations of some types of conditions are more appropriate for withholding funds than violations of other types. With respect to the subject matter of the condition, violations of programmatic, cross-cutting, and crossover conditions seem well suited to withholding of substantive program funds. Withholding may induce compliance and may act as a signal to other grantees; these substantive conditions relate to the central purpose of the grant regime, and compliance with them is the whole point of giving away money. In contrast,

381. See *supra* note 155 and accompanying text.

382. See *supra* notes 147–149 and accompanying text.

383. See *supra* notes 150–152 and accompanying text.

administrative conditions seem less well suited to substantive withholding, essentially for the same reasons that withholding for noncompliance due to a bumbling administrator is inappropriate. But after repeated violations of administrative conditions (that is, when administrative controls are not working), targeted cut-offs of administrative funds (rather than programmatic funds) might both induce compliance and act as a signal to other grantees. It would also be a proportional response.³⁸⁴

As to the actor on whom the burden of complying with the condition is placed, withholding funds might be more appropriate when the conditions being violated are placed directly on the grantee or its agents rather than on the beneficiaries. If a funding cut-off is designed to induce agency compliance, then it should be used to encourage agencies to abide by conditions that are within their control.

As to the kinds of accomplishments that the grant conditions require, withholding funds is more likely to be appropriate when the violated conditions are input- or output-oriented rather than outcome-oriented. It is easier to redirect efforts and produce desired results when the task is tightly within the control of the grantee or its agents. In contrast, because many outcome-oriented conditions are really policy goals that no one quite knows how to meet or accurately measure, funding cut-offs for failure to achieve policy goals will in most circumstances do nothing to encourage compliance, but will instead be merely punitive.

The appropriateness of withholding should not vary according to whether a grant condition is specific or general, however. Withholding in either context can effectively induce compliance and signal seriousness of agency purpose to other grantees.

3. *Types of Grants*

Of the dimensions along which I categorized grant types above—including whether a grant is mandatory or discretionary, whether it is a formula grant or a project grant, whether it is a categorical grant or a block grant, and the like³⁸⁵—none clearly distinguishes appropriate withholding from inappropriate withholding. No matter where a grant falls along any of these dimensions, an action to withhold funds could usefully promote compliance and act as a signal to other grantees.

However, the agency's interest in withholding funds may vary depending on the context. For example, because a block grant is supposed to give maxi-

³⁸⁴. See *supra* note 372 and accompanying text.

³⁸⁵. See *supra* notes 87-123 and accompanying text.

num flexibility to grantees, perhaps the grantor agency will be only moderately interested in ensuring that grantees are stringently following federal conditions. On the other hand, perhaps because of that very grantee discretion, the grantor agency might place great weight on compliance with the few federal conditions that are in place.

Similarly, because withholding for noncompliance with an ongoing categorical grant may jeopardize longstanding reliance interests or place at risk a vast number of beneficiaries, an agency may be reluctant to withhold funds. On the other hand, an agency might take compliance more seriously because beneficiaries will otherwise suffer without end as a result of the grantee's poor implementation. An agency might be reluctant to withhold funds from a project grant of limited duration because of the time and expense of ensuring enforcement when the problem will go away of its own accord. On the other hand, an agency might find it more important to withhold funds in this context to avoid the appearance or actuality of the grant's being a slush fund; the agency might also find it easy to locate willing and eager new grantees to whom the funds can be transferred.

The appropriateness of withholding cannot be reduced to a scientific formula. Context matters. But agencies ought to consider the type of noncompliance at issue and the type of grant condition that is violated when they consider whether withholding is appropriate.

B. Administrative Regime Design

If withholding can play a useful role in grant enforcement, several recommendations present themselves in response to the critiques discussed in Part II. One set of recommendations is directed to OMB and implicates its reform of the federal grants process. A second set is directed to agency grant program offices and addresses organizational design. A final set is directed to Congress and concerns fine-tuning the funding cut-off mechanisms in different grant programs.

1. OMB

First, OMB should include in its grant reform agenda mechanisms to better permit the public to call to agencies' attention grantee noncompliance. This inclusion can serve as a way to bolster agency capacity to detect and assess noncompliance.

One possibility would be for OMB to require that agency evaluations of grantee performance be linked to the information about government spending

available on USASpending.gov, the website OMB created pursuant to the Federal Funding Accountability and Transparency Act.³⁸⁶ In that Act, Congress gave OMB authority to specify “any other relevant information” (in addition to such basic information as the amount of funding given, the entity to which it was given, and that entity’s location) that could help the public track relevant information about federal spending.³⁸⁷ OMB apparently declined this opportunity.³⁸⁸ As a result, if a watchdog group, advocacy organization, or individual wants to find out information about a grantee’s compliance (as opposed to merely its receipt of federal funds), separate searches of individual grant program websites are necessary. These searches are difficult to do, and the relevant compliance information is not always readily available.³⁸⁹

386. See *supra* note 75 and accompanying text. The data underlying USASpending.gov have received criticism for a lack of consistency, completeness, and timeliness. See *Show Me the Money: Improving the Transparency of Federal Spending: Hearing Before the S. Comm. on Homeland Sec. and Gov’t Affairs*, 112th Cong. (2012) (statement of Gene L. Dodaro, Comptroller Gen. of the United States), <http://www.gao.gov/assets/600/592592.pdf> [<http://perma.cc/TB3X-8DHH>]; *Data Transparency: Oversight Needed to Address Underreporting and Inconsistencies on Federal Award Website*, GOV’T ACCOUNTABILITY OFFICE (June 2014) [hereinafter *Data Transparency*], <http://www.gao.gov/assets/670/664536.pdf> [<http://perma.cc/NK8R-PAKD>]; *Keeping Tabs on USASpending.gov*, SUNLIGHT FOUND., <http://sunlightfoundation.com/clearspending> [<http://perma.cc/W6DU-QGSN>]. The website holds great promise, however, and OMB both continues to direct users to the website, see OMB, FY15 ANALYTICAL PERSPECTIVES, *supra* note 3, at 252, and has ordered specific steps for agencies to undertake to improve their presentation of the data on the website, see Jason Miller, *OMB Sets New Deadlines to Improve Data on USASpending.gov*, FED. NEWS RADIO, June 20, 2013, <http://www.federalnewsradio.com/513/3364282/OMB-sets-new-deadlines-to-improve-data-on-USASpendinggov> [<http://perma.cc/LV76-TC6X>]. Congress, too, has committed to ensuring the success of this website, through its recent amendments to the Federal Funding Accountability and Transparency Act. See *supra* note 75 and accompanying text. Although the recent amendments shifted operational control to the Treasury Department, OMB retains authority to work with Treasury to set the requirements and provide guidance to agencies on the submission of data to the website. See *id.*; see also *Data Transparency*, *supra*, at 28-29 (making recommendations to OMB in its ongoing oversight of the website).

387. Pub. L. No. 109-282, § 2(b)(1)(A)-(F), 120 Stat. 1186 (2006).

388. See *Learn About USASpending.gov*, USASPENDING.GOV, <http://www.usaspending.gov/learn?tab=About%20the%20Site> [<http://perma.cc/U5R7-SUNM>] (listing only the statutorily required aspects of the information on the website and not mentioning OMB’s discretionary authority to specify other information).

389. For example, information about states’ compliance with the IDEA is buried in a non-obvious location under the Education Department’s website for the Office of Special Education Programs, and even there, the compliance information appears only in formal letters to each state that do not permit easy comparison between grantees. See *Part B State Performance Plans (SPP) Letters and Annual Performance Report (APR) Letters*, U.S. DEP’T EDUC., <http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html> [<http://perma.cc/K95K-RYU6>]. This compliance information is easier to find than that for food stamps or welfare,

Requiring links to actual information about compliance would help effectuate the accountability and transparency goals of the Act, goals Congress reiterated in its recent amendments to the Act.³⁹⁰ It would also be in keeping with a recent presidential memorandum directing agencies to provide “[g]reater disclosure of regulatory compliance information” as a mechanism to “foster fair and consistent enforcement of important regulatory obligations” by “encouraging the public to hold the Government and regulated entities accountable.”³⁹¹ To that end, including compliance information on the government’s main repository for grant spending information could also end up galvanizing cut-offs where appropriate, if the public uses the compliance information to express interest in further federal enforcement. That is, to the extent that agencies are not taking steps to withhold funds because they think the public would object, or because they are in a technical assistance mode rather than in an enforcement mode, it might be a useful development for agencies to hear other voices encouraging them to take stronger action.³⁹²

however. Nowhere on the homepage of the Food and Nutrition Service at the Agriculture Department is there an obvious location to click to locate state compliance with SNAP. See Food & Nutrition Serv., *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP’T AGRIC., <http://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap> [<http://perma.cc/4YYM-L273>]. The website for the Office of Family Assistance in HHS’s Administration for Children & Families includes a link to a page presenting caseload data, expenditure data, work participation rate data, and some other information by state, but there is no apparent information on state compliance. See Office of Family Assistance, *Data & Reports*, ADMIN. CHILDREN & FAMILIES, <http://www.acf.hhs.gov/programs/ofa/programs/tanf/data-reports> [<http://perma.cc/G3BZ-YUTD>]. Now imagine overlaying compliance with cross-cutting requirements on this grantee information. The Education Department’s Office for Civil Rights has recently begun putting online a selection of its resolution agreements with individual grantees, see Office for Civil Rights, *Recent Resolutions*, U.S. DEP’T EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html> [<http://perma.cc/VVV2-4UEM>], but this information is limited. Moreover, every agency has its own Office for Civil Rights, see Eloise Pasachoff, *Advocates, Federal Agencies, and Special Education Law*, 29 OHIO ST. J. ON DISP. RESOL. 461, 473 n.74 (2014); Federal Coordination and Compliance Section, *Agency-Specific Civil Rights Information*, U.S. DEP’T JUST., <http://www.justice.gov/crt/about/cor/fedagencies.php> [<http://perma.cc/Y44U-64RW>], and there is no easy way to track civil rights violations across all agencies by grantee.

390. See Digital Accountability and Transparency Act of 2014, Pub. L. No. 113-101, 128 Stat. 1146 (2014).

391. Memorandum on Regulatory Compliance, 2011 DAILY COMP. PRES. DOC. 32 (Jan. 21, 2011); see also Andrias, *supra* note 349, at 1105 (urging construction of a similar kind of database to track and make public corporate compliance with direct regulatory efforts).

392. Cf. Hehir, *supra* note 213, at 231-37 (discussing the value of the public’s engagement with agency oversight of special education grants to prompt further agency action); Pasachoff, *supra* note 389, at 471, 486-87 (expanding on this argument).

Another possibility would be for OMB to require that agencies provide an opportunity for the public to comment on grant applications, particularly on states' submission of proposed state plans under formula grants. Despite the importance and extent of these programs, there is no formalized government-wide mechanism for citizens to voice concerns about states' implementation of grants and provide feedback to federal grant offices about whether to approve new state plans or ask for revisions, much less whether stronger federal enforcement via funding cut-offs or otherwise is desired. Currently, some individual grant programs require that each state submit its proposed plan to the public for comment,³⁹³ but there is no requirement that states pass comments on to the federal agency, that federal agencies have a mechanism to receive such public comments directly, or that organizations in other states have the opportunity to address best practices and compliance problems across states.

This is again a lost opportunity for federal agencies to receive important information about grantee compliance at a moment when withholding of federal funds could be particularly effective. Mechanisms for feedback need not be as formal as the requirements of notice-and-comment rulemaking,³⁹⁴ so reviewing feedback would likely not tax agencies or delay their decision-making to the same extent that the notice-and-comment process is often thought to.³⁹⁵ Instead, agencies could simply expand their use of social media, whether welcoming blog comments, requesting Facebook posts, creating a wiki for collaborative editing, or some other means, to invite direct comments from beneficiaries and the general public about the grantees' proposals. Many agencies are already using these tools,³⁹⁶ and the Administrative Conference of the United

393. See, e.g., 42 U.S.C. § 300x-51 (2012) (specifying public comment at the state level for state plans under a federal block grant for community mental health programs).

394. Indeed, as indicated *supra* note 49, the APA specifically exempts the category of grants from these requirements. Although many agencies have, to different degrees, waived this exemption, see, e.g., 20 U.S.C. § 1232(d) (2012); 36 Fed. Reg. 2531 (Feb. 5, 1971), others have revoked that waiver, see, e.g., 78 Fed. Reg. 64194 (Oct. 28, 2013).

395. See, e.g., Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012) (challenging Yackee and Yackee's conclusion that ossification is not serious or widespread); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414 (2012) (reviewing literature suggesting that the notice-and-comment process contributes to the ossification of agency rules and delays in action, and challenging that literature).

396. See, e.g., Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers*, ADMIN. CONF. U.S. 15-20 (2013), <http://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf> [<http://perma.cc/XSU5-6EFZ>] (describing agencies' use of social media more generally). For two examples of the Department of Education's solicitation of feedback as it develops grant priorities, see *Additional Public Comment Sought for Preschool Development Grants Competition*, U.S. DEP'T EDUC.: HOMEROOM

States has promoted their use in rulemaking;³⁹⁷ a directive from OMB on the grant-making front would bring these tools into further use and provide helpful information to agencies on whether enforcement action would be useful and well-received.³⁹⁸

2. Agency Grant Program Offices

Second, agencies ought to consider ways to restructure their internal controls to improve their capacity and motivation to enforce. If grant program officers feel reluctant to take money away, rather than give it away,³⁹⁹ one possibility is to redesign grant program offices so that, instead of dividing responsibilities only by geographic area, responsibilities are split by task—separating out grant administration and technical assistance on the one hand from review and enforcement on the other. Internal agency separation of powers can mimic some of the values of checks and balances that are promoted by the Constitution’s separation of the three branches of government.⁴⁰⁰ In fact, Congress has at times recognized the importance of the distinction between programmatic implementation on the one hand and investigation and enforcement on the other. The rise of Inspector General offices effectuates this distinction.⁴⁰¹ So does the creation of state Medicaid fraud investigation offices

(Mar. 24, 2014), <http://www.ed.gov/blog/2014/03/additional-public-comment-sought-for-preschool-development-grants-competition> [<http://perma.cc/XE3H-LFSH>]; and *Results Driven Accountability Effort*, U.S. DEP’T EDUC.: HOMEROOM, <http://www.ed.gov/blog/2012/07/results-driven-accountability-effort> [<http://perma.cc/SR9T-PJND>].

397. *Administrative Conference Recommendation 2013-5: Social Media in Rulemaking*, ADMIN. CONF. U.S. (Dec. 5, 2013), http://www.acus.gov/sites/default/files/documents/Social%20Media%20Rec_Final_12_9_13.pdf [<http://perma.cc/KK7-QYKD>].

398. Of course, OMB should encourage agencies to be thoughtful as they design and implement programs to solicit feedback. See, e.g., Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012) (offering principles for balancing “‘more’ and ‘better’ participation” in “‘Rulemaking 2.0’ civic engagement systems”); Herz, *supra* note 396, at 89-92 (summarizing recommendations for best practices in agency use of social media in rulemakings).

399. See *supra* notes 302-305 and accompanying text.

400. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895-906 (2009) (advocating the redesign of prosecutors’ offices to separate tasks that might be seen as investigative from tasks that might be seen as adjudicative, in order to avoid prosecutors’ becoming invested in pursuing cases that ought not be pursued).

401. See generally Inspector General Act of 1978, 5 U.S.C. app. § 2 (2008) (establishing “independent and objective units” to “conduct and supervise audits and investigations” in federal agencies’ programs); PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL*

run separately from the state agencies that are tasked with implementing Medicaid.⁴⁰²

Another complementary possibility is to tweak the professional incentives for grant program officers so that taking steps toward cutting off funds is not disfavored as a matter of course. This recommendation responds to the suggestion that there are no current professional incentives for grant program officers to move forward with serious enforcement actions.⁴⁰³ One can imagine changing these incentives to support the possibility of funding cut-offs, however. Separating out enforcement tasks from technical assistance and support is one step in this direction, as changing the job description changes the metrics for success on the job. Other changes are also plausible, including agency awards, positive stories in the agency employee newsletter, or formal notations in performance reviews relating to the seriousness of a program officer's enforcement efforts.

This is not to say that measures of funds taken away would be an appropriate metric; that would promote destructive incentives. My defense of funding cut-offs is not designed to suggest that the mechanism should be used cavalierly. But program officers' investigations and recordings of grantee violations, written evaluations of the pros and cons of moving to a funding cut-off in any given situation, and the like ought to be part of the officers' job responsibilities.

Such heightened enforcement attention should not weaken program officers' or political appointees' future job prospects should they seek to move to state agencies.⁴⁰⁴ If the federal government steps up enforcement efforts, the people with inside familiarity with those efforts are exactly the people the states should want to hire.⁴⁰⁵

Notably, neither of these recommendations for restructuring grant program offices and internal agency incentives requires any influx of financial

AND THE SEARCH FOR ACCOUNTABILITY (1993) (discussing the history and value of Inspectors General).

402. 42 U.S.C. § 1396b(q) (2012).

403. See *supra* notes 302-303 and accompanying text.

404. See *supra* note 302 and accompanying text.

405. Cf. Ben Protess, *Slowing the Revolving Door Between Public and Private Jobs*, N.Y. TIMES: DEALBOOK (Nov. 11, 2013, 1:35 PM), <http://dealbook.nytimes.com/2013/11/11/slowing-the-revolving-door-between-public-and-private-jobs> [<http://perma.cc/HGS-PCUS>] (noting the fact that “[t]he last six S.E.C. enforcement chiefs have moved on to top corporate firms and big banks” as an example of the broader phenomenon of former federal regulators going to work for the “institutions they once policed”).

support.⁴⁰⁶ The first proposal relies on the same number of program officers but simply divides up their responsibilities differently, and the second proposal does not involve any monetary incentives. While I believe that increased federal appropriations would be desirable, both for enforcement purposes and for the substance of many grants, in the current economic and political climate, such an influx is not likely forthcoming. Reliance on internal agency restructuring therefore seems like a more realistic and achievable suggestion.

3. Congress

Third, Congress should codify the proportionality principle I recommended in Part III.A in order to make the funding cut-off a more palatable tool. That is, where not otherwise specified in a given grant statute, Congress should consider specifying the percentage of funds that might be lost for particular violations. Congress can impose a series of intermediate financial penalties, restricting the scope of the program that would be affected by a cut-off or adopting other options that might make the threat of a funding cut-off more realistic. As an initial matter, the Administrative Conference of the United States (ACUS) might take on the task of reviewing and categorizing types of statutory funding cut-offs and recommending a series of best practices,⁴⁰⁷ just as earlier in its history the Administrative Conference offered a series of intermediate steps that agencies should take before imposing a funding cut-off.⁴⁰⁸

One might question why such intricate specificity will be useful, given agencies' general authority under OMB requirements to withhold in part for most grant programs,⁴⁰⁹ as well as the statutory limitations on withholding that already exist in others.⁴¹⁰ As to the first point, guidance from Congress would provide a more bounded context within which agencies may feel em-

406. *Contra* Moncrieff, *supra* note 324, at 2380-81 (arguing that agencies need "bigger staffs and more funding" to enforce their statutes more effectively). As Samuel Bagenstos has noted, Abigail Moncrieff's solution may be "wholly unrealistic." Bagenstos, *supra* note 222.

407. See Paul R. Verkuil, *What the Return of the Administrative Conference of the United States Means for Administrative Law*, 1 MICH. J. ENVTL. & ADMIN. L. 17, 23-25 (2012) (describing recommendations adopted by ACUS based on empirical studies).

408. See *Recommendation 71-9: Enforcement of Standards in Federal Grant-in-Aid Programs*, ADMIN. CONF. U.S. 4 (1971), <http://www.acus.gov/sites/default/files/documents/71-9.pdf> [<http://perma.cc/GF73-LHJN>]; see also Tomlinson & Mashaw, *supra* note 222 (providing rationales for ACUS recommendations).

409. See *supra* notes 195-196 and accompanying text.

410. See *supra* notes 197-198 and accompanying text.

powered to make use of their discretion.⁴¹¹ As to the second point, thoughtful deliberation about how to target across programs would make sense as a matter of policy. Why should some provisions give no guidance to agencies on when and how much to cut off funds,⁴¹² while others are very precise⁴¹³ or in the middle?⁴¹⁴ Further, why are other agency withholding decisions limited only by judicial interpretation, not statutory language?⁴¹⁵ Program-by-program examination of cut-off provisions can shed useful light on policy prioritization, again promoting accountability in the use of federal funds.

One might also question why such a limitation is desirable, given the premise of my argument that funding cut-offs can be a useful tool to induce grantee compliance. Why weaken the very tool I am promoting? The answer is that such a limitation would not weaken the tool at all. The point of more narrowly targeting what is at stake in a funding cut-off would be to make it a less draconian and therefore more desirable mechanism for agencies to use. Grantees will feel that the mechanism is both less punitive and more likely to be used; the grantees may therefore be more likely to comply with the conditions at issue.

It is, of course, possible that grantees may decide that, with fewer funds at stake, non-compliance is more desirable. In other words, grantees might treat a partial withholding as a fine and simply incorporate the potential fines into the cost of doing business. Narrowing the scope of the funding at stake would nonetheless be beneficial on the whole. If the agency does move forward to cut off the more narrowly focused funds, there will be less fallout for innocent beneficiaries in that state (to the extent the concern about innocent beneficiaries has merit), since more of the grant funding will remain intact.

In addition, it is already the case that grantees may decide to avoid compliance with particular conditions, either by seeking waivers from the agency for the conditions with which they would rather not comply or by simply not complying and assuming that there will be no repercussions. The first of these options does not always result in a granted waiver, as I explained above, and

411. Cf. Hehir, *supra* note 213, at 229-30 (arguing that a grant office's new statutory authority to withhold partial funding makes actual withholding more likely).

412. See, e.g., 20 U.S.C. §§ 7101-7165 (2012) (providing no guidance on enforcement of the Safe and Drug-Free Schools and Communities grant).

413. See, e.g., 42 U.S.C. § 609 (2012) (specifying in detail which violations of state block grants for Temporary Assistance for Needy Families are subject to particular degrees of withholding).

414. See, e.g., 20 U.S.C. § 1416(e) (2012) (specifying, with much discretion left to the Secretary, a set of general circumstances in which certain amounts of withholding might be an option under the IDEA).

415. See *Title VI Manual*, *supra* note 198, § XI.C.2 (discussing the pinpoint provision).

frequently grantees will have to decide whether to elect the second of these options, which does not promote political accountability at all. To shift the burden to Congress to articulate different levels of possible funding loss would instead return some of the focus to that politically accountable body.

C. Judicial Review

What, then, of judicial review of agency decisions to cut off funds? Courts tend to review such decisions under the arbitrary and capricious standard of section 706 of the Administrative Procedure Act, unless the particular grant program specifies otherwise.⁴¹⁶ This standard is notoriously capacious.⁴¹⁷ If agencies were to commence a more serious program of inducing state and local grantee compliance through funding cut-offs, protesting state grantees might well begin to develop an argument for heightened judicial review of such actions on federalism grounds—a type of super-hard-look review that seems congruent with the federalism clear statement rules now in vogue in statutory interpretation⁴¹⁸ and with scholarly suggestions that courts review agency decisions that burden state interests with greater scrutiny.⁴¹⁹ Local grantees might attempt to make this case as well, either through their roles as sub-grantees of states⁴²⁰ or by claiming direct applicability of federalism-based arguments to local governments.⁴²¹

416. See, e.g., *City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007) (using this standard for the Federal Highway Administration’s decision to withdraw federal highway funds from a city project); *Massachusetts ex rel. Exec. Office of Health & Human Servs. v. Sebelius*, 701 F. Supp. 2d 182, 196–97 (D. Mass. 2010) (discussing arbitrary and capricious review of the HHS Secretary’s decision to disallow federal Medicaid funds that the state had already spent). For an example of a grant regime specifying another standard of review, see 7 C.F.R. § 276.7(j) (2014), which provides for de novo review of decisions to withhold funds from state agencies that oversee the food stamp program.

417. See, e.g., Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1818–20, 1823–29 (2012).

418. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619–29 (1992); see also Gluck, *supra* note 227, at 601–13 (discussing the idea of a “Chevron for the states”).

419. See, e.g., Metzger, *Administrative Law as the New Federalism*, *supra* note 42, at 2104–07; see also Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 1023–25 (2014) (identifying and criticizing this trend on other grounds).

420. Cf. *Sch. Dist. v. U.S. Dep’t of Educ.*, 584 F.3d 253 (6th Cir. 2009) (involving school districts that raised a clear statement challenge as sub-grantees of state recipients of federal funds).

421. Cf. *supra* notes 255–257, 274–279 and accompanying text (discussing the application of federalism doctrines to localities and not just states).

Above, I suggested three rationales for grantee noncompliance that might support an agency's decision to withhold funds: recurring failure to comply out of an apparent inability to implement the program effectively; disagreement between a grantee and an agency about how to define compliance; and refusal to comply in protest of the federal policy at issue.⁴²² Heightened judicial review on federalism grounds would be inappropriate in all three contexts (even setting aside the question of whether local grantees are justified in attempting to claim the argument for themselves).⁴²³

As to the first rationale, if an agency's decision to withhold funds is due to the grantee's ineffective management, no real federalism issue is at stake at all. Where the grantee has made no policy choice but simply fails to use best efforts to satisfactorily implement terms it has willingly accepted, there is no reason for a court to review the agency's decision with a thumb on the scale in support of the noncompliant grantee.

As to the second rationale, if an agency's decision to withhold funds is due to disagreement over what constitutes compliance, the federalism clear statement rules, particularly the notice requirement placed on federal funding conditions, will already provide adequate protection for federalism values. The premise of the notice requirement is that "legislation enacted pursuant to the spending power is much in the nature of a contract," and that states should not be held responsible for complying if they did not "voluntarily and knowingly accept[] the terms of the 'contract.'"⁴²⁴ Courts have been quite expansive in determining the scope of the notice requirement, requiring, among other types of notice, that grantees have notice of how the substantive rule applies to particular facts.⁴²⁵ Courts have also been quite restrictive in determining which details provide the requisite notice. The Supreme Court, for example, has rejected even a clear statement in a congressional report as providing state grantees with adequate notice of their obligations because the statutory text itself could accommodate another reading.⁴²⁶ The breadth of the notice requirement means that interpretive ambiguities over what grantees must do to satisfy their grants

422. See *supra* notes 374-383 and accompanying text.

423. See *supra* notes 255-257, 274-279 and accompanying text.

424. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2602 (2012) (plurality opinion) (relying on *Pennhurst*).

425. See, e.g., *Bagenstos*, *supra* note 14, at 397-401 (discussing the pre-*NFIB* notice requirement); *Pasachoff*, *supra* note 14, at 600-05 (analyzing the notice requirement in *NFIB*).

426. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006).

will likely be resolved against the agency.⁴²⁷ If the grantee's understanding of what constitutes compliance is reasonable, then, any move to withhold its funds cannot be sustained, even without any heightened federalism-inflected arbitrary-and-capricious review.

As to the third rationale, if an agency's decision to withhold funds is due to the grantee's decision not to comply in protest of the policy, federalism concerns are both implicated and not already protected by the federalism clear statement rules. But a federalism-inflected version of arbitrary-and-capricious review is still not appropriate. The point of more heavily scrutinizing agency decisions that burden state interests is to ensure that agencies adequately take these interests into account.⁴²⁸ In the context of a withholding decision, however, the grantee's interest will have already been taken into account. In part this is a result of the distinction between rulemaking, the administrative context in which calls for heightened judicial review in the service of federalism are usually made,⁴²⁹ and adjudication, the administrative context in which withholding decisions take place. That is, there is little chance that grantees will not appear and press their case, most likely through counsel, in the process of the agency hearing, not to mention the much earlier process of negotiating over compliance. This situation contrasts the generalized process for agency rulemaking, in which state interests are merely one voice among the many the agency must take into account. In the adjudicatory context of withholding, the grantee's voice is the key voice. Ordinary arbitrary-and-capricious review permits assessment of the agency's action without any special federalism-based rule of judicial review.

Beyond the distinction between adjudication and rulemaking, however, states (and local governments) are in a different posture when they are the regulated entities than when federal policy simply implicates their interests. Because federal policy in the former instance depends on state and local grantees for implementation, they play a critical role in the legislative process, setting the terms of the grant statute; in the regulatory process, further developing those terms; and in the grant application and compliance process, commenting on the application requirements, submitting and revising applications, and working regularly with federal officials who have responsibility for grant oversight.⁴³⁰ This is not to suggest that states and localities always get their way—

427. See *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 294 (6th Cir. 2009) (en banc) ("If there is textual ambiguity and a plausible state-friendly way to read the statute, that ends the matter.").

428. See Metzger, *Administrative Law as the New Federalism*, *supra* note 42, at 2100-01.

429. See *id.* at 2100-07.

430. See RYAN, *supra* note 40, at 316-31; Gluck, *supra* note 227, at 595-96.

nor would that be possible, even under heightened judicial review on federalism grounds—given the multiplicity of inter- and intra-state (and -locality) interests involved,⁴³¹ but merely that there is little need to place additional burdens on agency withholding decisions to better protect federalism values.

Finally, recall the politics of withholding decisions. I made the case above that the critique of funding cut-offs based on the limits of politics is overstated,⁴³² but that is not to discount the ways in which grantees may attempt to lobby members of Congress and the White House to temper agency efforts to withhold funds and to attempt to change the substantive policy in question. A formal agency decision to withhold funds likely has survived significant political pressures against it. One need not accept the argument that politics generally provides an adequate safeguard for federalism⁴³³ or that agencies are able to protect federalism values as a general matter⁴³⁴ to accept the more limited argument that the interests of federalism will be adequately protected in any given case of withholding in light of the broader decisional context.

Any argument in favor of heightened review of withholding decisions on federalism grounds ignores the way in which federalism values are already protected throughout the entire process leading to withholding.

CONCLUSION

Funding cut-offs can be an enormously effective tool to induce compliance. Yet while agencies have long been reluctant to cut off funds for noncompliance with grant conditions, the rationales used to explain or defend their reluctance are insufficient. Where a funding cut-off will encourage change in the non-compliant grantee and act as a signal to other grantees that they ought to increase their own compliance with grant conditions, a funding cut-off can be a force for good without interfering with federalism values. Under these circum-

431. See *supra* notes 358-366 and accompanying text.

432. See *supra* notes 345-366 and accompanying text.

433. Compare, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that courts need not police the boundaries of federalism because the political process is sufficient to do so), and Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (accepting Wechsler's claim but offering a different take on which political processes provide sufficient protection), with, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 115-16 (2001) (suggesting that judicial review of federalism questions may be valuable).

434. See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1971-74 (2008).

stances, when informal enforcement mechanisms are not working, agencies can, and should, take the possibility of funding cut-offs much more seriously.

The funding cut-off as enforcement mechanism is not the only aspect of the federal grants regime that deserves more attention in legal scholarship. The grants regime differs from more commonly studied aspects of the regulatory state in a number of ways.⁴³⁵ For example, as to the legislative process, a large subset of grant statutes, unlike most other statutes, are subject to regularly scheduled reauthorizations and modification.⁴³⁶ As to the regulatory process, grants are categorically exempted from the Administrative Procedure Act's requirements for notice-and-comment rulemaking,⁴³⁷ while grants are nonetheless implemented through agency action that includes regulation.⁴³⁸ As to centralized executive oversight, grant regulations receive less scrutiny from OMB's Office of Information and Regulatory Affairs than do traditional regulations,⁴³⁹ while other offices within OMB, such as the Office of Federal Financial Management, play a heightened role.⁴⁴⁰ Understanding and evaluating the rationales for as well as the effects and implications of these legal distinctions are subjects worthy of further study. In 1991, lawyers affiliated with the American Law Institute and American Bar Association wrote a practice guide on federal grants, explaining that "the grant institution is little understood."⁴⁴¹ The

435. See *supra* note 49.

436. See, e.g., Bill Heniff Jr., CONG. RESEARCH SERV., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS 1 (2012) (discussing the authorization and reauthorization of federal spending programs); cf. Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1002 (2011) (discussing the unusual increase in tax legislation enacted with sunset provisions, in contrast to the default of "lasting legislation").

437. See 5 U.S.C. § 553(a)(2) (2012). Some agencies have waived that exemption, see, e.g., 20 U.S.C. § 1232(d) (2012) (Department of Education), but at least one agency that had a waiver has recently revoked it, see 78 Fed. Reg. 64194 (Oct. 28, 2013) (Department of Agriculture).

438. See, e.g., 7 C.F.R. pts. 271-275 (2014) (food stamp regulations); 23 C.F.R. pt. 1200 (2014) (State Highway grants regulations); 34 C.F.R. pt. 300 (2013) (IDEA regulations); 45 C.F.R. pt. 1301 (2013) (Head Start regulations).

439. See, e.g., Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 ADMIN. L. REV. 179, 181, 183, 187-88, 197 (2011) (explaining that "transfer regulations," or those "that define[] how the federal government will spend or collect money," including via federal grant programs, receive less stringent analysis from OIRA than non-transfer, or "prescriptive," regulations).

440. See, e.g., 2013 Uniform Administrative Requirements, *supra* note 74, at 78590 (describing the purpose of this new final OMB guidance on grants and referring questions to contacts at OMB's Office of Federal Financial Management).

441. See DEMBLING & MASON, *supra* note 38, at ix.

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statement remains true today. It is long past time to bring this institution squarely into the field of administrative law and understand it better.