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Deconstructing “Sanctuary Cities”: The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement

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Deconstructing “Sanctuary Cities”: The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement

Peter Margulies*

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I. Introduction

Certain terms seem destined to obscure more than they illuminate; “sanctuary city” is a case in point. Determining which cities qualify for the label rests on the political predilections of the person making the judgment, not on law or facts.¹ Rather than compound the confusion, this Article analyzes legal issues surrounding sanctuary cities as reflecting divergent interpretations of three values: compliance, coordination, and equity. Against the backdrop of these contested values, the Article considers federal agencies’ power to impose immigration enforcement-related conditions on state and local receipts of

1. See Jane Chong, *Sanctuary 101, Part I: What Trump’s Executive Order Doesn’t Do, Cannot Do, and Has Little to Do With*, LAWFARE (Mar. 13, 2017), <https://www.lawfareblog.com/sanctuary-101-part-i-what-trumps-executive-order-doesnt-do-cannot-do-and-has-little-do> (last visited Aug. 12, 2018) (discussing the application of President Trump’s Executive Order in Miami-Dade County) (on file with Washington and Lee Law Review).

federal funds.² This Article concludes that the U.S. Department of Justice (DOJ) can condition receipt of certain federal grants on recipients’ compliance with a statute promoting information-sharing on the immigration status of criminal suspects.³ Courts, however, should read that statute against the backdrop of cooperative federalism,⁴ resulting in a narrower interpretation than the one sought by the DOJ.

Focusing on compliance, coordination, and equity helps clarify the issues regarding Attorney General Jeff Sessions’ proposed conditions on certain federal funds.⁵ The DOJ and some sub-federal entities⁶ disagree on compliance, which I define here in terms of the relationship between immigration enforcement and ordinary law enforcement. The DOJ argues that the link is invariably positive, while sub-federal entities resisting the DOJ’s conditions⁷ argue that cooperation with federal immigration

2. Several courts have considered this issue in the past year. *See, e.g.*, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 933 (N.D. Ill. 2017) (granting nationwide injunction against imposition of certain conditions on cities and states); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 614 (E.D. Pa. 2017) (narrowing scope of federal agency authority to impose conditions on cities and states); *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1019 (N.D. Cal. Mar. 5, 2018) (denying state’s request for preliminary injunction against federal agency’s delay in awarding of certain federal funds, while suggesting that as case progresses, state may be able to show that federal agency has only limited authority to impose conditions); *see also* *Steinle v. City & Cty. of San Francisco*, 230 F. Supp. 3d 994, 1015–16 (N.D. Cal. 2017) (reading narrowly a statute that purports to limit city and state efforts to curb cooperation with federal immigration enforcement).

3. *See* 8 U.S.C. § 1373 (2012) (prohibiting government officials and entities from restricting transfer of information between other officials and entities and the Immigration and Naturalization Service); *see also* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1460–62 (2006) (discussing deportation provisions).

4. *See* *Bond v. United States*, 134 S. Ct. 2077, 2094 (2014) (cabining the reach of federal statutes).

5. Federal–state interaction on immigration enforcement has long been a source of interest to federalism scholars. *See generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT’L L. 121 (1994).

6. I use the term “sub-federal entities” to describe states and their governmental subdivisions, including cities, counties, and towns.

7. I describe these entities as “resistant” to flag their opposition to DOJ’s

enforcement by the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) impedes state and local law enforcement by driving victims underground.⁸

Coordination refers both to vertical coordination between the states and the federal government and to horizontal coordination among the several states. The Supreme Court has long viewed the Constitution as making federal law supreme in the immigration realm.⁹ As Madison noted in his discussion of naturalization, disparate state regimes of immigration control could undercut the national interest and yield unintended adverse consequences—what economists call “negative externalities”¹⁰—for some jurisdictions.¹¹ On the other hand, the Framers’ vision of federalism contemplates that the states retain certain aspects of sovereignty, including the police power.¹² In that role, each state has a legitimate interest in the health and safety of its own residents, including undocumented noncitizens.¹³

efforts. The label is purely descriptive and does not imply any positive or negative normative position on these entities’ stance.

8. See Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 715–23 (2017) (arguing that aggressive deportation of criminal noncitizens would be counterproductive).

9. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (“If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (“It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”).

10. See, e.g., Lisa Grow Sun & Brigham Daniels, *Externality Entrepreneurism*, 50 U.C. DAVIS L. REV. 321, 330 (2016) (noting that in the land use arena, a landowner who destroys wetlands causes negative externalities such as increased flooding for neighbors).

11. See THE FEDERALIST NO. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961) (“The dissimilarity in the rules of naturalization has long been remarked as a fault in our system . . .”).

12. See Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 453 (2004) (“The Framers of the Constitution were rigorously consistent in referring to the ‘powers’ of government and to the ‘rights’ of the people. The Constitution refers to powers—and only powers—being delegated to government . . .”).

13. Cf. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 794 (2007) (stating that the general welfare, which

The realities of federal–sub-federal coordination with respect to immigration enforcement contrast sharply with the rhetoric from both sides. Certain sub-federal officials and entities have taken to trumpeting their separation from federal immigration enforcement, while federal officials including President Trump and Attorney General Sessions have deplored what they view as sub-federal resistance.¹⁴ In fact, virtually all sub-federal entities regularly cooperate with the federal government on immigration enforcement concerning serious crime,¹⁵ although the current polarized political climate hinders acknowledgment of this ground truth by either side.

Finally, equity has a substantial role in assessing the propriety of federal conditions requiring greater sub-federal cooperation in immigration enforcement. Equity here has a capacious meaning, including considerations of fairness, equality, and belonging.¹⁶ All levels of government have a legitimate concern in unbiased law enforcement. Resistant sub-federal entities believe that greater cooperation will lead to more profiling of their

includes social interests, is within the police power).

14. See Maria Sacchetti, *Defiance, Resistance: The Front Lines of California’s War Against the Trump Administration*, WASH. POST (Mar. 11, 2018), https://www.washingtonpost.com/local/immigration/defiance-resistance-the-front-lines-of-californias-war-against-the-trump-administration/2018/03/11/45e7833e-2309-11e8-86f6-54bfff693d2b_story.html?utm_term=.1eec3b59d437 (last visited Sept. 12, 2018) (documenting California’s battle with the Trump Administration over immigration enforcement) (on file with the Washington and Lee Law Review).

15. See *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 603–05 (“[P]olicies at issue here do not interfere with the federal government’s legal ability to deport individuals convicted of serious crimes.”). Moreover, *any* arrest by sub-federal personnel has ramifications for immigration enforcement, because biometric data gathered by sub-federal officials in the course of an arrest is communicated to federal databases, including those monitored by federal immigration officials. See Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1122–26 (2013) (“Although maintained by the FBI, most records and queries come from other law enforcement agencies, which access the system’s multiple databases millions times each day, usually with rapid responses, during routine encounters with the public and other ordinary law enforcement duties.”).

16. See Christopher N. Lasch et al., *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703, 1769 (2018) (“The diversity and inclusivity rationale is related to but distinct from the more legalistic emphasis on equality and nondiscrimination that is seen in some disentanglement policies.”).

residents, based on residents' perceived national origin or ethnicity.¹⁷ In addition, resistant sub-federal entities tend to view undocumented noncitizens as having “equity” in their U.S. residence—shared stake or membership.¹⁸ Officials in the Trump Administration, including Attorney General Sessions, disagree.¹⁹

While resistant sub-federal entities have invoked limits on the Spending Clause,²⁰ this Article argues that Spending Clause jurisprudence does not support current challenges to federal efforts. The Supreme Court has observed that conditions imposed by Congress should be related to the purpose of the grant, must provide adequate notice, and must not be coercive.²¹ However, *NFIB v. Sebelius*,²² the only modern Supreme Court decision curbing Congress's spending power, involved grants exponentially greater than the relatively modest sums at issue in the

17. See, e.g., Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA (June 8, 2018), <https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania> (last visited Aug. 1, 2018) (documenting an instance of racial profiling in immigration enforcement) (on file with the Washington and Lee Law Review).

18. See, e.g., DAVID H.K. NGUYEN, EQUITY BY DESIGN: EXAMINING LAW AND POLICY FOR UNDOCUMENTED IMMIGRANT STUDENTS THROUGH THE PK-20 PIPELINE 1–2 (2017), <https://files.eric.ed.gov/fulltext/ED580791.pdf> (citing Plyler v. Doe, 457 U.S. 202 (1982)) (explaining the education rights of undocumented students).

19. See Dara Lind, *Trump Made and Immigration Crackdown a Priority. Jeff Sessions Made it a Reality.*, VOX (May 23, 2018, 8:00 AM), <https://www.vox.com/2018/5/23/17229464/jeff-sessions-immigration-trump-illegal> (last visited Aug. 1, 2018) (“Sessions isn’t just an immigration hawk who rejects ‘amnesty’ for unauthorized immigrants who have settled in the US; he has long advocated that the federal government has an obligation to ‘end illegality’ in the immigration system, full stop.”) (on file with the Washington and Lee Law Review).

20. See Alison Frankel, *Cities Say Trump’s Sanctuary Policy is Unconstitutional*, REUTERS (Mar. 30, 2017, 5:51 PM), <https://www.reuters.com/article/us-otc-sanctuary/cities-say-trumps-sanctuary-policy-is-unconstitutional-idUSKBN171361> (last visited Sept. 16, 2018) (reporting that American cities have sued the Trump administration, arguing that an executive order limiting federal funding to those cities and states that are noncompliant with federal immigration policy violates the Spending Clause) (on file with the Washington and Lee Law Review).

21. See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (outlining the limit of Congress’s power to impose conditions on receipt of federal funds).

22. 567 U.S. 519 (2012).

immigration context.²³ Absent the “gun to the head” applied in *NFIB*, the Court seems content to leave grant conditions to the byplay between federal and sub-federal officials, mediated by each state’s representatives in Congress.²⁴ Indeed, the more interventionist approach urged by resistant sub-federal entities and some scholars would distort the necessary negotiations between federal and sub-federal officials, impairing both Congress’s flexibility in supporting favored initiatives and sub-federal innovation.²⁵ The risk of that structural spillover from the immigration context to broader federal–sub-federal relationships is reason enough to reject the wholesale constitutionalizing of federal grant-making that advocates of resistance recommend.

Similarly, the constitutional anticommandeering doctrine is a blunt instrument for addressing federal–state cooperation on immigration enforcement. As the Supreme Court indicated recently in *Murphy v. National Collegiate Athletic Association (NCAA)*,²⁶ the federal government cannot compel state legislatures to “require or prohibit” activity such as sports gambling.²⁷ Under the Tenth Amendment, Congress also cannot “conscript” state governments to administer a regulatory scheme that Congress could delegate to federal agencies.²⁸ Section 1373, the statute barring sub-federal officials’ and entities’ limiting of communication with federal officials regarding “immigration

23. See *id.* at 576 (“In light of the expansion in coverage mandated by the [Affordable Care] Act, the Federal Government estimates that its Medicaid spending will increase by approximately \$100 billion per year . . .”).

24. See *id.* at 581 (discussing that Congress’s actions were more than “relatively mild encouragement”).

25. See Lasch et al., *supra* note 16, at 1772 (“Our research reveals that sanctuary cities are pursuing affirmative policy choices that are theirs to make . . . [D]isentangle is not simply an attempt to frustrate federal policy, but an effort to ensure that local governments and the federal government can operate independently in their respective policymaking arenas.”).

26. 138 S. Ct. 1461 (2018).

27. *Id.* at 1476–77 (citation omitted).

28. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating law compelling state background checks for prospective buyers of firearms); *New York v. United States*, 505 U.S. 144, 188 (1992) (striking down statute that required states to engage in specific regulation of nuclear waste or take title to the waste themselves).

status,”²⁹ is not a conscription of state government in this sense. Read narrowly, § 1373 does not unduly interfere with sub-federal officials’ control over their employees.³⁰ Instead, § 1373 merely permits communication between different levels of government. The Court has never viewed such permissive exchanges of information as commandeering.³¹

A more promising avenue for curbing undue federal power lies in the statutory arena. The Supreme Court interprets federal statutes against the “backdrop” of federalism values.³² That backdrop narrows the scope of 8 U.S.C. § 1373,³³ in which Congress restricted sub-federal officials’ and entities’ ability to curb communication with federal officials regarding “immigration status” information.³⁴ A broad reading of § 1373 would clash with this backdrop of federalism principles, obviating sub-federal entities’ power to both supervise their employees and promote fair, effective policing practices. In particular, construing § 1373 as barring sub-federal entities from curbing communication about victims’ or witnesses’ immigration status would subvert efforts to generate information about criminal conduct. This and other

29. 8 U.S.C. § 1373 (2012).

30. Several federal district courts have disagreed with the conclusion in the text, and instead found that § 1373 constitutes impermissible commandeering. *See, e.g., City of Chicago v. Sessions*, 2018 U.S. Dist. LEXIS 125575, at *18–29 (N.D. Ill. July 27, 2018) (explaining holding that § 1373 violates the Tenth Amendment because it dragoons states into enforcement of federal immigration law).

31. *See Reno v. Condon*, 528 U.S. 141, 143–45 (2000) (describing the common practice of congressionally requiring data-sharing between federal and sub-federal agencies in the course of upholding federal law requires states and other private and public entities to implement privacy safeguards).

32. *See Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (suggesting that even clear text “must be read against the backdrop of established interpretive presumptions”).

33. 8 U.S.C. § 1373.

34. *See id.* § 1373(a) (“[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”).

byproducts of a broad reading would thus undermine equity, compliance with law, and sustainable coordination.

The better approach is a narrower reading of § 1373, stressing its protection of operational values in law enforcement. For example, consider the work of a joint federal–sub-federal task force on organized crime or drug-trafficking. The immigration status of certain suspects may give investigators useful leverage with which to secure a conspirator’s cooperation or, if necessary, incapacitate a suspect. In a fluid investigation of this kind, it may be impossible to neatly parse roles so that only federal agents address the immigration status of certain suspects. California law expressly recognizes this operational dimension, as do the practices of other sub-federal entities.³⁵

This operational conception also fits with the grant programs that the DOJ has intertwined with new enforcement-minded conditions. Consider the Edward Byrne Memorial Justice Assistance Grant (JAG) Program,³⁶ which rests on a bottom-up view of law enforcement in which innovations at the state and local level gradually transform policing.³⁷ A one-size-fits-all approach imposed by the DOJ would be antithetical to the Byrne Program’s aims. In contrast, an operational conception would leave room for useful federal–sub-federal coordination, while respecting sub-federal entities’ concerns with compliance and equity.

This approach would reject two of the DOJ’s conditions: first, requiring that sub-federal entities provide notice that is practicable of the release of any suspect flagged by federal immigration officials, and second, requiring that sub-federal entities provide federal officials with dedicated space in jails to interview all inmates.³⁸ Each of these conditions would adversely

35. See CAL. GOV’T CODE § 7284.6(b)(3) (West 2018) (prohibiting, with limited exceptions, sub-federal spending on immigration enforcement).

36. 34 U.S.C. § 10152 (2012).

37. See *The Byrne JAG Grant Program*, NAT’L CRIM. JUST. ASS’N, <https://www.ncja.org/ncja/policy/about-byrne-jag> (last visited Oct. 2, 2018), (“[S]tates and local communities are able to use the funding to address needs and fill gaps across the entire criminal justice system. This is the hallmark of the Byrne JAG program and one that is vitally important.”) (on file with the Washington and Lee Law Review).

38. See Press Release, Dep’t of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial

affect noncitizens arrested for minor crimes and those who were released without being charged with a crime, thus providing minimal benefits for compliance. Indeed, compliance would decrease, because immigrant victims and witnesses aware of adoption of these policies would be far less likely to cooperate with sub-federal authorities. Each policy would also encourage biased line-level policing. For § 1373, an operational approach would allow sub-federal entities to bar disclosure of the immigration status of victims and witnesses, as well as the addresses and release dates of minor offenders and persons not charged with a crime.³⁹

This Article proceeds in five Parts. Part II provides a history of recent federal–sub-federal cooperation and confrontation on immigration enforcement, including measures undertaken by the Trump Administration. Part III offers a path to understanding the issue of cooperation, centering on three values: compliance, coordination, and equity. Part IV considers whether the DOJ’s conditions would exceed Congress’s power under the Spending Clause. Part V proposes a statute-centered analysis of immigration cooperation. It suggests an operational approach to reading § 1373. Part VI elaborates on the statute-centered analysis, applying it to the DOJ’s conditions on Byrne Program funds.

II. Federal Initiatives Promoting Cooperation with Sub-Federal Entities

A short primer on state, local, and federal interaction on immigration enforcement helps set the stage. Some of those interactions happen automatically, as part of the arrest process, and are mandated by federal law. Other interactions happen pursuant to agreements between federal and sub-federal entities.

Justice Assistance Grant Programs (July 25, 2017) (“From now on, the Department will only provide Byrne JAG grants to cities and states that comply with federal law, allow federal immigration access to detention facilities, and provide 48 hours’ notice before they release an illegal alien wanted by federal authorities.”) (on file with the Washington and Lee Law Review); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 861 (N.D. Ill. 2018) (detailing the DOJ’s conditions for Byrne grants).

39. See 8 U.S.C. § 1373 (2012) (prohibiting sub-federal entities from restricting the transfer of citizenship information to federal entities).

*A. Anatomy of an Arrest: The Tacit Yet Pervasive Cooperation
Built into Basic State and Local Law Enforcement*

The gap between rhetoric and reality on federal–sub-federal immigration cooperation is most pronounced in the mundane domain of every day law enforcement activity by states, cities, and counties all over the United States. In today’s polarized environment, federal officials do not acknowledge the abundant immigration-related information that ordinary law enforcement provides, because that would undercut the current Administration’s efforts to paint resisting localities as “sanctuary cities.”⁴⁰ Sub-federal entities also rarely stress this feature, because it limits the utility of immigrant-friendly policies that those entities usually highlight.⁴¹ Each side’s rhetoric has obscured the practical aspects of cooperation on immigration enforcement.

Whenever an arrest occurs in the United States, the arresting officer notifies the National Crime Information Center (NCIC) database.⁴² The NCIC developed as both Congress and law enforcement agencies at all levels of government increasingly believed that a single large, readily searchable body of data would be helpful.⁴³ Easily accessible by any law enforcement officer, NCIC handles millions of queries per day from over 90,000 law enforcement agencies.⁴⁴ The NCIC includes criminal histories of

40. See Connie Bruck, *Inside California’s War on Trump*, NEW YORKER (Mar. 26, 2018), <https://www.newyorker.com/magazine/2018/03/26/inside-californias-war-on-trump> (last visited Sept. 11, 2018) (discussing California Governor Jerry Brown’s views on the Trump Administration) (on file with the Washington and Lee Law Review).

41. See Kalhan, *supra* note 15, at 1122–26 (noting extent of state cooperation in routine law enforcement).

42. See 28 U.S.C. § 534 (2012) (requiring the Attorney General to collect arrest information via the NCIC).

43. See *National Crime Information Center (NCIC)*, FBI, <https://www.fbi.gov/services/ejis/ncic> (last visited Aug. 1, 2018) (documenting the history of the NCIC) (on file with the Washington and Lee Law Review).

44. See Laura Sullivan, Comment, *Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 584 (2009) (“Accessible in stationhouses as well as in patrol cars, the NCIC processes more than six million information requests per day for more than 90,000 law enforcement agencies.”); Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 250–51 (2017) (discussing the ramifications of including immigration-related information

millions of individuals.⁴⁵ It also includes fingerprints and information about suspected gang members, registered sex offenders, and persons subject to court orders because of incidents of domestic violence.⁴⁶ In addition, the NCIC now includes a broad range of immigration-related data, including information about noncitizens who have remained in the United States despite being subject to final orders of removal.⁴⁷ Many federal law enforcement agencies monitor the NCIC, including the DHS, which is in charge of immigration enforcement.⁴⁸

Local law enforcement officers interact with the vast NCIC database in myriad ways. If they make an arrest, they send information about the arrestee to NCIC.⁴⁹ The NCIC, however, also fields countless queries that do not involve an actual arrest. For example, a stop based on reasonable suspicion will frequently entail a check of NCIC.⁵⁰ In addition, license plate queries and automated law enforcement querying tools, such as license plate readers, interact with the NCIC database.⁵¹ Whenever DHS officials receive an NCIC hit, they have the opportunity to respond by asking local law enforcement to detain the suspected

in the NCIC); Kalhan, *supra* note 15, at 1122–26 (detailing the expansion of the NCIC).

45. See Kalhan, *supra* note 15, at 1124 (“Today, the NCIC consists of over eleven million records in twenty-one files.”).

46. See *id.* (“[T]he NCIC’s scope has expanded to include other noncriminal records, including information on suspected gang members and terrorists, registered sex offenders, and subjects of domestic violence protection orders.”).

47. See *id.* at 1125 (“In late 2001, the government began entering records concerning individuals who it has termed ‘absconders’ or ‘fugitives’: individuals with prior removal orders who are believed to remain in the United States.”).

48. See *id.* at 1108 (explaining how the federal “Secure Communities” program integrates DHS and NCIC databases).

49. See *id.* at 1122–23 (“Although maintained by the FBI, most [NCIC] records and queries come from other law enforcement agencies, which access the system’s multiple databases millions of times each day, usually with rapid responses, during routine encounters with the public and other ordinary law enforcement duties.”).

50. See *id.* (explaining how police officers can quickly access NCIC during routine encounters).

51. See *id.* at 1125–26 (“Increasingly, suspicionless license plate inquiries may be conducted by automated plate readers, which, in addition to tracking vehicle location and movements, may facilitate NCIC searches on a larger scale.”).

immigration violator.⁵² In addition, DHS can also use the information provided, which indicates the individual’s location and may include other data that local law enforcement officers enter to narrow their own NCIC queries, such as the individual’s home address or workplace.⁵³ Local law enforcement enter this information as a matter of course, even before they know or suspect anything about a particular individual’s immigration status.⁵⁴

This tacit yet ubiquitous cooperation in “street-level” law enforcement has two key effects. First, it means that *all* sub-federal law enforcement entities provide substantial assistance to federal immigration officials. Resistant sub-federal entities provide this assistance, merely by virtue of the operation of ordinary law enforcement procedures. Other policies pursued by resistant entities may limit the impact of this assistance, but do not decrease the baseline cooperation built into law enforcement at all levels of government in the United States. Second, as we shall see, at least until quite recently, the federal databases on immigration violators were often inaccurate, including high numbers of false positives—persons wrongly believed to be violators, including U.S. citizens, who by definition are subject to immigration enforcement activity.⁵⁵ Those facts are useful in assessing other types of federal–sub-federal cooperation, which I turn to below.

52. See MIGRATION POLICY INST., *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004* 12 (2005) (stating that if DHS “confirms that the individual has an immigration violation, it will issue an immigration ‘detainer notice’ requesting that the police department hold the individual”).

53. See Kalhan, *supra* note 15, at 1132–33 (discussing the “informational end run” for which DHS uses NCIC data).

54. See *id.* at 1125 (discussing sub-federal law enforcement officers’ sending “wanted person” inquiries to NCIC).

55. See, e.g., Chantal Da Silva, *ICE Accused of Wrongly Detaining Hundreds of American Citizens*, NEWSWEEK, (May 5, 2018, 9:35 AM), <https://www.newsweek.com/ice-accused-wrongly-detaining-hundreds-american-citizens-holding-some-years-906746> (last visited Sept. 12, 2018) (discussing a case where a mistake in immigration databases led to a U.S. citizen’s detention) (on file with the Washington and Lee Law Review).

B. DHS Immigration Detainers

Detainers involve a request by DHS to detain an individual who has already been arrested by state and local authorities.⁵⁶ Immigration officials ask for an additional period of detention beyond that person's expected release.⁵⁷ Using that additional time, immigration officials investigate a person's immigration status. They may also seek custody if that person is in one of two categories. First, the person might be an undocumented foreign national—an individual without lawful immigration status or any other basis for being lawfully present in the United States.⁵⁸ Undocumented people typically have either entered the country without inspection or a visa, or have overstayed after expiration of a nonimmigrant visa, such as a visa given to students or tourists.⁵⁹ Some have reentered the United States after receiving a final order

56. See 8 C.F.R. § 287.7 (2011) (“A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.”).

57. See *id.* (explaining how DHS can request that local law enforcement detain an alien for an additional period to allow DHS to gain custody of the alien).

58. The United States confers lawful immigration status in a variety of ways. Noncitizens can be lawful permanent residents (LPRs), a status typically acquired because of close relatives who are citizens or LPRs, or through a government finding that the noncitizen has unique occupational talents or skills useful in particular employment that citizens or LPRs cannot provide. Victims of crime or human trafficking are also eligible for adjustment to LPR status, as are minors abandoned by their families in their country of origin. In addition, refugees and asylum grantees are eligible for LPR status, as are winners of the diversity lottery. The United States also authorizes the entrance of millions of nonimmigrant visitors for business, pleasure, and academics. In many cases, the United States considers applicants for forms of legal status, such as asylum, to be lawfully present pending adjudication of their applications. Moreover, the United States grants temporary protected status to persons who would face a range of serious difficulties in returning to their country of origin because of political strife or natural disasters. The United States also grants deferred action to noncitizens because of various factors that would make removal unduly harsh or inefficient. A full description of the varieties of legal status and lawful presence is beyond the scope of this Article.

59. See Ron Nixon, *629,000 Overstayed U.S. Visas Last Year, Homeland Security Says*, N.Y. TIMES, (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/homeland-security-foreigners-overstayed-visas.html> (last visited Aug. 1, 2018) (documenting overstayed visas in 2017) (on file with the Washington and Lee Law Review).

of removal, which constitutes a federal felony.⁶⁰ Second, an individual might be a former or current lawful permanent resident (LPR) who is now removable or has already been ordered removed because of certain criminal convictions accrued after admission to the United States.⁶¹

Past detainees were often imprecise as to the length of time for holding persons beyond their expected release date and sometimes mistaken about whether that person was undocumented or even a foreign national, as opposed to a naturalized citizen.⁶² In part because of these problems, several courts found that compliance with the specific detainees at issue violated the Fourth Amendment.⁶³ Moreover, as we shall see, detainees often concerned low-level offenders, or even individuals whom local officers decided not to charge at all.⁶⁴ These issues contributed to the end of the Secure Communities program, under which federal

60. See 8 U.S.C. § 1326 (2012) (criminalizing reentry into the United States after having been deported).

61. See *Crimes That Will Make an Immigrant Deportable*, NOLO, <https://www.nolo.com/legal-encyclopedia/crimes-that-will-make-immigrant-deportable.html> (last visited Aug. 1, 2018) (“All immigrants, including those with green cards, can be deported if they violate U.S. immigration laws Specifically, immigrants are at risk of being deported if they are convicted of either what is called a ‘crime of moral turpitude’ or an ‘aggravated felony.’”) (on file with the Washington and Lee Law Review).

62. See *Galarza v. Szalczyk*, 745 F.3d 634, 640–41 (3d Cir. 2014) (explaining that detainer requests are not mandatory, and that custody cannot exceed forty-eight hours); *Morales v. Chadbourne*, 793 F.3d 208, 222–23 (1st Cir. 2015) (denying qualified immunity to ICE agents who had “either formulated and implemented a policy of issuing detainees against naturalized U.S. citizens without probable cause or were deliberately indifferent to the fact that their subordinates were issuing detainees against naturalized U.S. citizens without probable cause”).

63. See Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 128 (2015) (discussing a “new wave of federal cases” that have found “constitutional weakness with the way in which immigrants are taken into custody, not just with how long they are detained”). *But see* *City of El Cenizo v. Texas*, 885 F.3d 332, 354–57 (5th Cir. 2018) (finding no Fourth Amendment violation in typical federal practice of conducting immigration arrests without a judicial warrant).

64. See Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 955 (2014) (noting that detained immigrants often have low level or no convictions).

officials had sought to require local entities to hold individuals upon receipt of DHS detainers.⁶⁵

Recently, DHS has made an effort to improve its practice with respect to detainers by making detainers more tailored and precise.⁶⁶ Currently, detainers provide more specific information about the subject named, stating that the subject is subject to pending removal proceedings or a final order of removal, that the government has biometric or other information indicating that the individual is unlawfully present, or that the subject's statements or other "reliable evidence" indicate that the subject is removable.⁶⁷ Moreover, current detainers request additional detention of the subject for no more than forty-eight hours pending a transfer of custody to federal officials.⁶⁸ These changes have ameliorated some of the most egregious flaws of detainers. However, sub-federal entities are still not required by federal law to honor any detainer request.⁶⁹

65. See Kate Linthicum, *Obama Ends Secure Communities Program as Part of Immigration Action*, L.A. TIMES (Nov. 14, 2014, 4:00 AM), <http://www.latimes.com/local/california/la-me-1121-immigration-justice-20141121-story.html> (last visited Aug. 1, 2018) (documenting the replacement of the Secure Communities program with a program which targets only convicted felons) (on file with the Washington and Lee Law Review).

66. See *Immigration Detainer—Notice of Action*, U.S. DEP'T HOMELAND SEC., <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> (advising the detainee of his or her rights in the detainer process).

67. See *id.* (requiring the DHS official to list a reason creating probable cause that the suspect is a removable alien).

68. See *id.* ("DHS has requested that the law enforcement agency that is currently detaining you maintain custody of you for a period not to exceed 48 hours If DHS does not take you into custody during this additional 48-hour period, you should contact your custodian . . .").

69. Cf. *Detainer Policy*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/detainer-policy> (last updated Mar. 29, 2017) (last visited Aug. 1, 2018) ("When law enforcement agencies fail to honor immigration detainers and release serious criminal offenders, it undermines ICE's ability to protect public safety and carry out its mission.") (on file with the Washington and Lee Law Review).

C. The 287(g) Program

Congress has also enacted Section 287(g) of the Immigration and Nationality Act (INA),⁷⁰ which authorizes agreements on immigration enforcement between federal and sub-federal entities.⁷¹ Section 287(g) programs come in two varieties. The first type of program, called the task force model, contemplates cooperation in the field between federal, state, and local authorities.⁷² Agreements under this rubric are relatively rare, although task forces under other statutory authority, such as counterterrorism, are more common and more informal cooperation also occurs in the field, as the statute itself recognizes.⁷³ The more common kind of 287(g) activity is called the jail program.⁷⁴ Under the jail program, state and local officials interview inmates regarding immigration status.⁷⁵ This program has been especially effective at channeling undocumented noncitizens into the immigration system.⁷⁶ For the most part, the

70. 8 U.S.C. § 1357(g) (2012).

71. See Kalhan, *supra* note 15, at 1118–19 (“[I]n 1996, Congress adopted Section 287(g) . . . which authorizes federal authorities to enter agreements enabling state and local law enforcement officers”); RANDY CAPPS ET AL., *MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT* 8 (2011) (“Section 287(g) authorizes the Attorney General . . . to enter into written agreements with state and local officials” that authorize state and local officials to perform duties of immigration officers).

72. See Huyen Pham, *A Framework for Understanding Sub-federal Enforcement of Immigration Laws*, 13 U. ST. THOMAS L.J. 508, 516 (2017) (“[T]he task force model . . . grants broader authority to [law enforcement agencies] to conduct immigration enforcement tasks during their regular law enforcement activities in the field . . .”).

73. See 8 U.S.C. § 1357(g)(10) (explaining that the subsection does not obligate “any officer or employee of a State or political subdivision of a State” and the Attorney General to enter communication agreements).

74. See CAPPS ET AL., *supra* note 71, at 2 (“Contrary to public perception, 287(g) is almost entirely a jail program. . . . [J]ail models accounted for 90 percent of detainees issued . . .”).

75. See Pham, *supra* note 72, at 516–17 (discussing the potential drawbacks of the jail program). A related program involves DHS officials interviewing jail inmates. *Id.* at 517–19.

76. See *id.* (describing the jail program as “the primary mechanism through which ICE removes people from the U.S. interior” (internal quotation omitted)).

foreign nationals affected have been persons arrested for minor crimes, not crimes involving serious violence.⁷⁷

D. Other State Efforts

In addition, some states have sought to authorize state and local law enforcement officers to cooperate with federal authorities on immigration outside the context of the programs described above. Section 287(g) permits this, under certain circumstances.⁷⁸ Some state initiatives, however, inevitably come into conflict with the discretion that the INA grants to federal officials. For example, Arizona enacted legislation that purported to give its law enforcement personnel authority to stop and detain persons upon a “reasonable suspicion” that those individuals were not lawfully present in the United States.⁷⁹ In addition, the Arizona law purported to give law enforcement officers authority to arrest LPRs whom the officers believe had committed “public offenses” that made those individuals removable under the INA.⁸⁰ The Supreme Court, in an opinion by Justice Kennedy, limited this state authority.

In *Arizona v. United States*,⁸¹ Justice Kennedy wrote for the majority, stating that law enforcement officers could only inquire about immigration status once they had made an arrest for an offense designated as criminal under Arizona law.⁸² In other

77. See Guillermo Cantor, Mark Noferi & Daniel E. Martinez, ENFORCEMENT OVERDRIVE: A COMPREHENSIVE ASSESSMENT OF ICE’S CRIMINAL ALIEN PROGRAM 1 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/enforcement_overdrive_a_comprehensive_assessment_of_ices_criminal_alien_program_final.pdf (“As a result, the program removed mainly people with no criminal convictions, and people who have not been convicted of violent crimes or crimes the Federal Bureau of Investigation (FBI) classifies as serious.”).

78. See 8 U.S.C. § 1357(g) (2012) (permitting the Attorney General to enter into enforcement agreements with state and local law enforcement agencies).

79. See *Arizona v. United States*, 567 U.S. 387, 411 (2012) (discussing the limits of the state’s provision).

80. *Id.* at 394.

81. 567 U.S. 387 (2012).

82. See *id.* at 413 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”). The Fifth Circuit interpreted a Texas statute similarly in *City of El Cenizo v. Texas*. 885 F.3d 332, 349 (5th Cir.

words, suspicion about immigration status was not in itself a valid basis for an arrest. Second, when sub-federal law enforcement officials seek guidance from federal officials about a suspect’s immigration status, sub-federal law enforcement officials must still charge or release the suspect within forty-eight to seventy-two hours.⁸³ The Court held that federal law preempted any wider reading of the Arizona law, because a wider reading would have impinged on the discretion that federal officials have to enforce immigration law, including the discretion to decline to place someone in removal proceedings or to discontinue those proceedings.⁸⁴ Third, the Court held that the “public offense” portion of the Arizona statute was preempted by federal law.⁸⁵

E. President Trump and Attorney General Sessions Enter the Fray

President Trump signaled early in his Administration that he would expect more from cities and states that had previously resisted cooperation on immigration enforcement. He issued an Executive Order (EO) which announced that the DOJ would compile information on so-called “sanctuary cities” and seek to terminate federal funding in appropriate circumstances for sub-federal entities that failed to comply with federal law.⁸⁶

President Trump’s Attorney General, former Senator Jeff Sessions, informed courts considering challenges to the EO that the Administration would not seek to terminate all the federal funding received by any city or state that the Administration determined was violating applicable federal laws. In a series of public actions culminating in revisions to the grant process and

2018).

83. *See Arizona*, 567 U.S. at 413–15 (addressing concerns of prolonged detention).

84. *See id.* at 413–14 (interpreting the Arizona law in a way that avoids preemption and prolonged detention issues).

85. *See id.* at 410 (ruling that the Arizona law allowing state and local law enforcement to engage in immigration enforcement is preempted by federal law).

86. *See* Exec. Order 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017); *see also* *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 597–98 (E.D. Pa. 2017) (discussing the issuance of the Executive Order and various jurisdictions’ reaction to it).

correspondence with federal grantees, Attorney General Sessions narrowed conditions to two federal programs: the Edward J. Byrne Justice Assistance Grant (JAG) Program (Byrne Program) and the COPS program.⁸⁷ The DOJ also announced that conditions it would impose on cities and states receiving Byrne Grant and COPS money were three-fold: 1) supplying federal officials with forty-eight-hours' notice of the release of a noncitizen whom DHS had identified as removable;⁸⁸ 2) giving immigration officials permanent space in jails to facilitate their interviews of inmates and referral of those unlawfully present to immigration court; and 3) compliance with 18 U.S.C. § 1373, which requires that city and state governments and officials not interfere with or "in any way restrict" city and state governments or employees sharing information "regarding . . . citizenship or immigration status" with the federal government.⁸⁹

Courts took a variety of approaches to these conditions. One court found that each of the conditions was inconsistent with the Byrne Grant Program⁹⁰ and with Congress's power under the

87. See *City of Philadelphia*, 280 F. Supp. 3d at 594 ("[I]n late July 2017, the Attorney General announced two new conditions on every grant provided by the JAG Program." (citing U.S. DEP'T OF JUST., BACKGROUND ON GRANT REQUIREMENTS 1 (2017), <https://www.justice.gov/opa/press-release/file/984346/download>)); see *id.* at 593–94 (describing Byrne Program, Pub. L. No. 109-162, 119 Stat. 2960, 3094 (2006)); 34 U.S.C. § 10152 (2012)); see also *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1022–23 (N.D. Cal. 2018) (discussing grants issued by Office of Community Oriented Policing Services (COPS), pursuant to Consolidated Appropriations Act of 2017, H.R. 244, Pub. L. 115–31).

88. After the initial announcement of conditions, the Attorney General informed grantees that if forty-eight-hours' notice was not possible, grantees could provide any advance notice that would be "practicable." *City of Chicago v. Sessions*, 2018 U.S. Dist. LEXIS 125575, at *7 (N.D. Ill. July 27, 2018).

89. See *City of Philadelphia*, 280 F. Supp. 3d at 595 (listing Sessions' three conditions). The Obama Administration started the requirement that sub-federal grantees certify their compliance with § 1373. See *Becerra*, 284 F. Supp. 3d at 1022–23 (discussing § 1373); cf. Michael E. Horowitz, Inspector General, U.S. Dep't of Justice, *Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients* (2016), <https://oig.justice.gov/reports/2016/1607.pdf> ("Require grant applicants to provide certifications specifying the applicants' compliance with Section 1373, along with documentation sufficient to support the certification.").

90. See *City of Philadelphia*, 280 F. Supp. 3d at 639–47 (detailing an exhaustive analysis of sub-federal law enforcement, immigration law, and the Spending Clause).

Spending Clause.⁹¹ Two courts were more reluctant—at least in the context of a sub-federal entity’s motion for preliminary relief—to find that the § 1373 certification condition was inappropriate or beyond DOJ’s authority.⁹² Two of the decisions revealed confusion about the interaction of criminal and immigration enforcement and the scope of § 1373. For example, some judges declared that immigration enforcement had no relationship to law enforcement.⁹³ That categorical assertion misses much that is important in both immigration and criminal law. Only one court intimated that readings of § 1373 might vary, with divergent implications for the statute’s constitutionality.⁹⁴ This Article seeks to clarify the issues.

III. Intergovernmental Conflict and Concord on Immigration Enforcement: Core Values

Getting beyond the rhetoric of “sanctuary cities” requires a more careful examination of the values underlying intergovernmental interaction on immigration. Three values are

91. *See id.* (discussing the Byrne Program and the Department of Justice’s conditions). To fully address the Spending Clause issue, the *Philadelphia* court analyzed each condition as if Congress had imposed it, although only 8 U.S.C. § 1373 is expressly included in legislation. The other conditions stem solely from agency decision-making. The *Philadelphia* court appeared to reason that if Congress could not impose the conditions under the Spending Clause, DOJ would also be prohibited from doing so. I follow a similar approach in this piece.

92. *Compare* *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017) (granting the city a preliminary injunction with reservations), *with* *Becerra*, 284 F. Supp. 3d at 1037 (finding that the state had not effectively demonstrated the need for an injunction).

93. *See, e.g., City of Philadelphia*, 280 F. Supp. 3d at 642 (asserting that, “the fact that immigration enforcement depends on and is deeply impacted by criminal law enforcement does not mean that the pursuit of criminal justice in any way relies on the enforcement of immigration law . . . Realistically, it does not”). *See also* *Becerra*, 284 F. Supp. 3d at 1033 (asserting that Byrne Program funds are “used for purposes unrelated to immigration enforcement, such as funding task forces focused on criminal drug enforcement, violent crime, and gang activity”).

94. *See* *Becerra*, 284 F. Supp. 3d at 1034 (noting that certification condition might be legal and constitutional, “depending on the breadth of the federal government’s interpretation” of § 1373).

paramount: compliance, coordination, and equity. This Part discusses each in turn.

A. Compliance

Federal and sub-federal entities clash about whether immigration enforcement promotes compliance with criminal law. The DOJ argues that enhanced sub-federal cooperation in immigration enforcement will deter crime and incapacitate wrongdoers.⁹⁵ Sub-federal entities that resist comprehensive cooperation with federal officials on immigration take the opposite view, asserting that increased sub-federal participation in immigration enforcement does not improve compliance with criminal law, and may in fact be counterproductive.⁹⁶

Referring to “increased” sub-federal participation in immigration enforcement clarifies issues that rhetoric can obscure. All states and cities cooperate with immigration officials regarding noncitizens who have committed serious crimes, including felonies such as murder, armed robbery, and drug trafficking, assault, and battery.⁹⁷ No sub-federal entity has enacted measures to limit cooperation on serious crimes.⁹⁸ With respect to serious crimes, few

95. See U.S. DEP’T OF JUST., BACKGROUND ON GRANT REQUIREMENTS 1 (2017), <https://www.justice.gov/opa/press-release/file/984346/download> [hereinafter DOJ BACKGROUND] (“Unfortunately, some of these jurisdictions have adopted policies and regulations that frustrate the enforcement of federal immigration law, including by refusing to cooperate with federal immigration authorities in information sharing about illegal aliens who commit crimes.”).

96. See Lasch et al., *supra* note 16, at 1761 (asserting that “entangling street-level policing with immigration enforcement erodes community trust . . . [which] is critical for effective policing”).

97. See, e.g., S.B. 54, 2017–2018 Leg. Sess., § 782.5 (Cal. 2017) (listing offenses); Alex Nowrasteh, *The Murder of Mollie Tibbetts and Illegal Immigrant Crime: The Facts*, CATO INST. (Aug. 22, 2018, 9:52 AM), <https://www.cato.org/blog/murder-mollie-tibbetts-illegal-immigrant-crime-facts> (last visited Sept. 12, 2018) (“[S]tates are not likely to turn over illegal immigrants for removal prior to convicting them of serious crimes.”) (on file with the Washington and Lee Law Review).

98. In the interest of cooperation, federal law curbs the discretion of immigration officials with respect to noncitizen state offenders. If a defendant is convicted of a serious offense in a state court and sentenced to a term of imprisonment, removal proceedings may not commence until the noncitizen has

noncitizens “fall through the cracks” and evade removal proceedings: state sentences are long enough for federal officials to ensure adequate communication with state prison authorities and provide for a timely transfer of custody.⁹⁹ Moreover, prison sentences are a matter of public record, and even state laws limiting cooperation with federal officials do not preclude state and local officials from sharing information about release dates that is available to the public.¹⁰⁰

Perhaps because federal and sub-federal entities agree on the respective roles of law enforcement and immigration proceedings for serious crimes, it is not clear that additional immigration enforcement reduces crime.¹⁰¹ The offenders affected by the

served his or her sentence. At that time, state officials will affect a transfer of custody to the federal government. *See* 8 U.S.C. § 1231(a)(4)(A) (2012) (providing that, with limited exceptions, the “Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment”).

99. Many criminal convictions that constitute a basis for removal entail sentences of at least one year. *See* 8 U.S.C. § 1227(a)(2)(A)(i)(II) (authorizing removal of foreign nationals who have committed certain crimes for which a sentence of “one year or longer” may be imposed). A period of one year or longer provides ample time for an orderly transfer of custody to federal immigration officers.

100. *See, e.g.*, S.B. 54, 2017–2018 Leg. Sess., § 7284.6(a)(1)(C) (Cal. 2017) (“Law enforcement: sharing data.”). One group that can fall through the cracks is composed of misdemeanor offenders whose offenses nonetheless render them removable. In such cases, the noncitizen may receive probation or a suspended sentence and may thus be released before it is possible to transfer custody to DHS. In these cases, a sub-federal entity’s prohibition on communication with DHS about release dates creates a potential gap in federal–sub-federal cooperation regarding offenders. The Justice Department has recently cited this gap as one basis for asserting that California’s statutes on cooperation are preempted by federal law. *See* Complaint, *United States v. California*, No. 18-264 (E.D. Ca. Mar. 6, 2018) (“These provisions violate the Supremacy Clause by, among other things, constituting an obstacle to the United States’ enforcement of the immigration laws and discriminating against federal immigration enforcement . . .”). In a related development, the Supreme Court has agreed to decide whether this group of noncitizens is subject to mandatory detention pending removal when DHS arrests them. *See* *Preap v. Johnson*, 831 F.3d 1193, 1207 (9th Cir. 2016), *cert. granted sub nom.* *Nielsen v. Preap*, 2018 U.S. LEXIS 1776 (Mar. 19, 2018) (“[T]he government may detain without a bond hearing only those criminal aliens it takes into immigration custody promptly upon their release from triggering criminal custody.”).

101. *See, e.g.*, Miles & Cox, *supra* note 64, at 970–71 (concluding that “Secure Communities” program did not reduce the overall crime rate).

additional immigration enforcement that the DOJ now seeks have committed minor crimes, at best. Indeed, studies have shown that past state–federal cooperation programs such as Secure Communities generally had a maximum impact on low-level offenders or those who were arrested but not subsequently charged.¹⁰²

However, the empirical studies done thus far do not necessarily delineate the federal government’s legitimate interest in obtaining sub-federal cooperation on immigration enforcement. First, courts generally accord a measure of deference to executive judgments about immigration.¹⁰³ That deference is not absolute, but it is also not *de minimis*. Often, empirical judgments are subject to dispute. For example, one study of the effect of additional federal immigration enforcement on crime rates concluded that its effect is minimal.¹⁰⁴ This study examined apparent decreases in serious crime rates that coincided with upturns in immigration enforcement during the Obama Administration.¹⁰⁵ According to the study, this decrease fades once one considers overall decreases in crime rates that preceded upturns in immigration enforcement.¹⁰⁶ The study concluded that those larger trends, not heightened immigration enforcement, caused the decrease that superficially seemed linked with tougher immigration measures.¹⁰⁷

However, the government might take a different view of the same statistics. The government might reason as follows. First, while some studies indicate that the undocumented immigrants commit crime at a lower rate than a demographically similar group

102. *See id.* at 957–58 (finding no decrease in crime rates from increased federal immigration enforcement after controlling for other trends).

103. *See* Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 2 n.1 (discussing the history of the Court’s deference to the executive in immigration cases).

104. *See* Miles & Cox, *supra* note 64, at 970–71 (“[T]he only index crimes for which there was even suggestive evidence of a small reduction associated with Secure Communities were the less serious property crimes of burglary and perhaps motor vehicle theft.”).

105. *Id.*

106. *Id.*

107. *Id.*

of citizens or lawfully present noncitizens,¹⁰⁸ no one disputes that undocumented persons commit some crimes, as would any demographically comparable group of human beings, such as males, age eighteen to thirty. The government would then argue that, all things being equal, removing undocumented persons would remove *some* people who commit serious crimes. That would prompt a net decrease in the overall incidence of crime, even if the differential crime rate for undocumented persons was lower than the rate for citizens or those lawfully present.

The government would couple this with a deeper dive into the statistical analysis of scholars skeptical about the impact of increased immigration enforcement. The government could argue that the period the scholars studied—2008–2012—coincided with the Great Recession.¹⁰⁹ The government might contend that during this period, a sharp decrease in economic opportunities prompted a net undocumented immigrant outflow from the United States.¹¹⁰ Viewed in this light, increased immigration enforcement and the larger trend preceding it might be part of the same phenomenon—a net decrease in the population of undocumented immigrants. This approach would support the compliance value of increased immigration enforcement. As a further point in the government’s favor, consider that empirical studies demonstrate that increased immigration enforcement lowers rates of nonviolent property crime.¹¹¹ Given the disparate analyses possible for empirical results, a deferential court could rule for the government.

Moreover, whatever the results of statistical analysis, immigration laws that make commission of various crimes grounds

108. See Morales, *supra* note 8, at 716 (noting that studies have shown lower crime rates among immigrants compared to the rest of the population).

109. See Miles & Cox, *supra* note 64, at 954 (“The data set is a panel of monthly, county-level observations from 2004 to 2012.”).

110. See generally David Nakamura, *Number of Illegal Immigrants in U.S. Dropped During Recession, Study Finds*, WASH. POST (Sept. 23, 2013), https://www.washingtonpost.com/politics/number-of-illegal-immigrants-dropped-during-recession-study-finds/2013/09/23/db760fa0-2459-11e3-b3e9-d97fb087acd6_story.html?utm_term=.81d5ba3f984a (last visited Aug. 19, 2018) (on file with the Washington and Lee Law Review).

111. See Miles & Cox, *supra* note 64, at 968–69 (discussing rates for car theft and burglary).

for removal may still have an overarching deterrent impact on behavior in immigrant communities. LPRs weighing sanctions triggered by commission of a crime will surely consider the prospect of removal.¹¹² Given the extreme consequences of removal, common sense would dictate this calculus.¹¹³ A similar calculus will also play out for many undocumented immigrants. Unlike LPRs, undocumented immigrants are already removable, because they have no visa or other basis for remaining in the United States legally.¹¹⁴ Nevertheless, commission of a crime will make it more likely that immigration officials become aware of their presence, thus increasing the probability of removal. For this group, as well, immigration laws will tend to promote compliance with criminal law.¹¹⁵ In addition, as we shall see in the next section, using immigration enforcement in a targeted operational way, as part of a suite of approaches in dealing with gang-related crime or other organized illegality, may also be helpful.

My point here is not to give credence to the DOJ's broadest claims about the benefits of immigration enforcement. Rather, this subsection has sought to demonstrate that the legal default rule may be dispositive. On constitutional issues, judicial deference to federal executive decisions may yield a result favoring the government. On the other hand, as we shall see, courts may evaluate statutory issues against the backdrop of "our federalism," suggesting greater deference for sub-federal decisions. Those legal defaults will carry more weight than empirical analyses, which are inherently subject to challenge.

112. See Morales, *supra* note 8, at 716–17 (noting that the "shame" of deportation is a potential reason for lower crime rates among immigrants).

113. See *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (describing deportation as a "drastic measure . . . the equivalent of banishment or exile").

114. See 8 U.S.C. § 1181 (2012) (setting out the document requirements for admission of immigrants into the United States); *id.* § 1227(a) (allowing removal of any alien in "violation of this chapter").

115. See Morales, *supra* note 8, at 716–17 (discussing the impact of potential conviction on immigrants).

B. Coordination

The next value relevant to federal–sub-federal interaction on immigration enforcement is coordination. Coordination between different actors and interests is a necessary condition of a “workable government,” as the Framers knew.¹¹⁶ The Framers acted against the backdrop of collective action problems caused by individual state governments furthering their own interests at the expense of the nation.¹¹⁷ Forging a process for prioritizing those national interests, such as the interest in compliance with treaties, was a central preoccupation of the Framers.¹¹⁸ However, the system the Framers proposed also carved out space for the individual states to use their authority, for example through the exercise of the police power.¹¹⁹

The Constitution’s ceding of power over naturalization to Congress illustrates the Framers’ concern about collective action problems.¹²⁰ Explaining this decision, Madison urged the importance of a “uniform rule” for naturalization throughout the United States.¹²¹ Because of the right to travel among the states, empowering each jurisdiction to set its own naturalization rules would yield negative externalities. In this bleak scenario, one state’s haste in admitting persons prone to bad conduct would

116. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”).

117. See NOAH FELDMAN, *THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 95–97* (2017) (discussing Madison’s view of the vices of state power during the Articles of Confederation period).

118. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) (discussing the Framers’ view of the importance of international law).

119. See *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (“It has long been settled, for example, that we presume federal statutes do not abrogate state sovereign immunity, impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, or preempt state law.” (internal citations omitted)).

120. See U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have the power . . . establish an uniform Rule of Naturalization . . .”).

121. See THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961) (“The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.”).

harm other states.¹²² The Framers perceived a legitimate national interest in addressing these challenges.¹²³

Different state policies on cooperation with federal immigration enforcement can also raise coordination problems. All things being equal, the Framers' scheme favors uniform policy across the states on matters of federal concern.¹²⁴ In areas such as federal criminal law, food safety, and antitrust, it would be unworkable if different jurisdictions within the United States produced substantially different policy outcomes: food should be as safe to consume in Massachusetts as it is in Montana or Mississippi.

While federal criteria for removal are set by the INA and therefore the same across the United States, street-level implementation of those criteria may be more or less intense, depending on sub-federal treatment of undocumented persons whom state and local law enforcement officers arrest for minor

122. See *id.* at 270 (warning that if the states regulated naturalization, a state aiming to attract more residents could set low naturalization standards that would obviate more rigorous standards in other states, establishing citizenship for persons with records of “obnoxious” conduct). While Madison addressed the naturalization issue, the Framers’ views about immigration resist facile characterization. The same can be said for immigration in practice during America’s first 100 years. Compare James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 385 (2010) (“As early as 1782, James Madison argued for the creation of a uniform rule of naturalization.”), and Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1901 (1993) (“[I]t seems fair to say that ‘illegal aliens,’ even vis-à-vis the nation, have always existed in the United States. They are not a new phenomenon that could not have been contemplated by the Framers of the Constitution, or of the Fourteenth Amendment.”), with Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.–C.L. L. REV. 1, 9 (2010) (“There exists neither an explicit constitutional basis for a federal immigration power nor any evidence that the Framers contemplated one.”).

123. See Pfander & Wardon, *supra* note 122, at 385 (“The combined effect of competition among states and interstate mobility created a sort of de facto national citizenship that laid the foundation for a national constitutional standard.”).

124. See *id.* at 388 (noting that a uniform federal rule prevents states from regulating matters of federal concern, while also imposing limitations on federal regulations).

crimes.¹²⁵ Even in resistant states, federal immigration officers have full authority under the INA to make arrests on their own.¹²⁶ However, arresting undocumented people in the community is more difficult and time-consuming than arresting undocumented people who are already in state custody.¹²⁷ This difference in cost and comparative difficulty can produce substantial disparities in immigration arrests among different states: arrests are likely to be higher in Texas, which has enacted a state law requiring local cooperation with immigration officials, than in California, which has enacted laws limiting that cooperation.¹²⁸ The negative effects of these disparities should figure in debates about federal power to persuade or compel sub-federal entities’ cooperation.

First, manifest disparities between states can trigger foreign relations problems.¹²⁹ Disparities can spur anger in other nations that their nationals find at least partial protection from removal in resistant states, while encountering a more hostile reception in cooperative states.¹³⁰ Anger about such disparities frustrates the Framers’ intention that the nation speak with one voice in dealings with the rest of the world.¹³¹ Admittedly, this problem is far more

125. See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1829 (2011) (arguing that state and local law enforcement have broad discretion in making an arrest, and that arrests are critical to immigration enforcement).

126. See 8 U.S.C. § 1373 (2012) (detailing the powers of immigration officers and employees).

127. See ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT 1 (2017) (“Detainers also allow ICE immigration officers to avoid the risks to public safety and officer safety associated with arrests outside the custodial environment.”).

128. See Kartikay Mehrotra et al., *A Tale of Two Sanctuary States in the Age of Trump*, BLOOMBERG (Feb. 2, 2018), <https://www.bloomberg.com/news/articles/2018-02-02/a-tale-of-two-sanctuary-states-in-the-age-of-trump> (last updated Mar. 8, 2018) (last visited Aug. 7, 2018) (stating that while the entire state of California has sanctuary status, the Texas legislature imposed criminal penalties on officers who do not comply with federal immigration directives) (on file with the Washington and Lee Law Review).

129. See *Arizona v. United States*, 567 U.S. 387, 408–10 (2012) (explaining that state discretion over removal would negatively impact foreign policy).

130. See *id.* at 408 (stating that inconsistent policies could lead to unnecessary harassment of aliens).

131. See *id.* at 409 (“A decision on removability requires a determination

acute when states favoring immigration enforcement seek to exceed more circumspect federal policy.¹³² Compared with enforcement-minded states, resistant states generate less severe problems.¹³³ Nevertheless, when juxtaposed with states that embrace cooperation with immigration officials, resistant states produce disparities in immigration enforcement that make federal policy seem haphazard.¹³⁴ A patchwork of policy outcomes does not nurture global alliances.

Disparate state immigration enforcement can also generate negative externalities between different jurisdictions which raise legitimate concerns for both the federal government and the states involved. First, consider that “gateway” states¹³⁵ for unlawful migration accrue additional costs because of the need to provide services such as education and health care to the undocumented population.¹³⁶ Federal law may require that a state provide such services.¹³⁷ Resistant states may be happy to provide the funds to

whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice.”).

132. See *Hines v. Davidowitz*, 312 U.S. 52, 65–66 (1941) (“Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens . . . bears an inseparable relationship to the welfare and tranquillity [sic] of all the states, and not merely to the welfare and tranquillity [sic] of one.”).

133. See Melissa Keaney & Alvaro M. Huerta, *Restrictionist States Rebuked: How Arizona v. United States Reins in States on Immigration*, 3 WAKE FOREST J.L. & POL’Y 249, 262 (2013) (explaining that a California employment law that affected immigration was not preempted by federal immigration law).

134. See *Arizona*, 567 U.S. at 410 (stating that unilateral state action on immigration defeats the need for cooperation with federal immigration directives).

135. See Spiro, *supra* note 5, at 124 (“[T]he phenomenon of border-region concentration is historically evident in immigration patterns into the United States.”).

136. States also incur costs in incarcerating undocumented noncitizens. See Kathleen Sebelius & Ned Sebelius, *Bearing the Burden of the Beltway: Practical Realities of State Government and Federal-State Relations in the Twenty-First Century*, 3 HARV. L. & POL’Y REV. 9, 23 (2009) (noting that former Arizona Governor and future Secretary of Homeland Security Janet Napolitano regularly billed the federal government for hundreds of millions of dollars that Napolitano linked to costs of imprisoning undocumented offenders).

137. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (requiring states to make a showing of substantial state interest in denying undocumented children an education).

meet this obligation. However, cooperative jurisdictions¹³⁸ may favor immigration enforcement to reduce their total spending—if immigration enforcement deters unlawful migration or removes undocumented persons, then a state will end up paying less money overall to serve the undocumented noncitizens that remain.¹³⁹ The federal government has a legitimate interest in minimizing those expenditures.

That interest increases because the federal government will reimburse states for certain outlays to serve undocumented noncitizens.¹⁴⁰ Additional federal outlays mean either a higher federal deficit, increased federal taxes, or cuts in other worthy programs.¹⁴¹ If a resistant state attracts higher levels of unlawful migration or increases the probability that undocumented residents of that state will not be removed, federal outlays will rise.¹⁴² The effect is particularly acute if the resistant state is a populous one, such as California.¹⁴³ The federal government has a legitimate interest in avoiding these adverse effects, which are felt

138. This Article uses the term “cooperative” to describe jurisdictions that wish to assist the federal government with immigration enforcement. As with the term “resistant” the usage does not imply any particular normative connotation.

139. See Sebelius & Sebelius, *supra* note 136, at 24 (noting that states bear the financial burden of immigration enforcement).

140. Federal reimbursement is partial, but not negligible. See *id.* at 23 (noting that DHS has the authority to “determine the level of reimbursement each state will receive, based on a variety of factors”).

141. My point here is not to argue that federal or state spending on undocumented noncitizens and their families is bad policy. There are strong reasons sounding in fairness and equity to support such spending. Moreover, experts disagree on whether undocumented noncitizens are a net benefit to the national economy, because many pay into the Social Security system, or are a net minus. My only point here is that courts cannot *assume* that unlawful migration is costless for both the states and the federal government. Indeed, courts are likely to defer to federal cost calculations on a matter of federal concern, such as immigration. If there are costs, paying for those costs will have a budgetary impact on both the state and federal level.

142. See Spiro, *supra* note 5, at 126 (highlighting additional costs involving education, emergency medical services, and incarceration).

143. See ELIZABETH C. MCNICHOL & IRIS J. LAV, CTR. ON BUDGET & POLICY PRIORITIES, 29 STATES FACED TOTAL BUDGET SHORTFALL OF AT LEAST \$48 BILLION IN 2009 2–3 (2008) (demonstrating that California, the nation’s largest state, faces larger budget gaps than other states).

in any jurisdiction whose residents are subject to federal taxation.¹⁴⁴

In some cases, a resisting state can also increase crime in cooperative jurisdictions because of the constitutional right to travel.¹⁴⁵ Suppose, as studies suggest, that some fraction of undocumented noncitizens regularly commit minor crimes such as burglary or car theft.¹⁴⁶ Consider how this fraction figures into relationships between resistant and cooperative states. Posit cooperative State A and resistant State B.¹⁴⁷ Noncitizens who commit minor crimes in State B can leave that state and move to State A, because the Constitution forbids internal travel barriers among the states.¹⁴⁸ State A may then have to cope with minor criminal conduct that the federal government could have addressed through removal if State B had cooperated with immigration officials.¹⁴⁹ In this scenario, State B's decision imposes a negative externality on State A. State A has a stake in minimizing this adverse impact and federal immigration officials have an interest in helping State A realize this goal. Achieving that

144. See *id.* at 3–4 (stating that when faced with a significant budget deficit, states are forced to either cut services or increase taxes).

145. See *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (providing that the right to travel protects the right of a citizen to enter and to leave another state, the right to be treated as a welcome visitor, and the right for elected permanent residents to be treated like other citizens of that state).

146. See Miles & Cox, *supra* note 64, at 969 (“[E]stimates provide some support for the conclusion that the detention of immigrants under Secure Communities reduced two categories of property crime: burglary and motor vehicle theft.”). As noted above, my example does not hinge on the assertion that undocumented persons commit a *disproportionate* share of such offenses. My only point is that, because humans are inherently imperfect, in any large group, *some persons* will commit such crimes. Undocumented immigrants are no exception to this admittedly mundane statistical observation.

147. See *supra* Part II.C (discussing the different approaches states may take to immigration enforcement).

148. See *Saenz*, 526 U.S. at 500 (“[The right to travel] protects the right of a citizen of one State to enter and to leave another State . . .”).

149. Of course, noncitizens who engage in such conduct may acquire information on the enforcement environments in each state, and elect to stay in State B. That said, people move for a myriad of reasons, and those calculations may not be absolutely determined by immigration law. Some cohort of undocumented persons that commits crimes in cooperative states may have moved from resistant states. The cohort may be small, but for a deferential court the magnitude of the effect will matter less than its theoretical possibility.

objective efficiently entails State B’s cooperation with federal immigration enforcement. While that dependence on State B’s cooperation is not dispositive, it is a factor in assessing the scope of federal power.

United States constitutionalism addresses issues of federal–sub-federal coordination through a number of doctrines. Consider the Spending Clause.¹⁵⁰ The Supreme Court has held that Congress may impose conditions on federal grants to states if those conditions contribute to the general welfare, provide clear notice to sub-federal entities, relate to federal interests in the grant program, and are not unduly coercive.¹⁵¹ The Court has viewed relatedness broadly. For example, the Court has held that Congress could condition receipt of federal highway money on states’ prohibition of alcohol sales to persons under twenty-one.¹⁵² Indeed, the Court has invalidated a condition only when the enormous volume of current federal aid tied to accepting the additional condition rendered the condition coercive.¹⁵³

In addition, the federal government under the Tenth Amendment cannot “commandeer” state implementation of a federal regulatory scheme.¹⁵⁴ If Congress wishes to regulate an

150. U.S. CONST. art. I, § 8, cl. 1.

151. See *NFIB v. Sebelius*, 567 U.S. 519, 537 (2012) (recognizing that Congress may grant federal “funds to the States, and may condition” such a grant upon the states taking certain actions). See generally Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *YALE L.J.* 248 (2014) (arguing for more vigorous federal enforcement of grant conditions).

152. See *South Dakota v. Dole*, 483 U.S. 203, 205 (1987) (reviewing the constitutionality of withholding a percentage of federal highway funds).

153. See *NFIB*, 567 U.S. at 576–84 (referring to the limitations of Spending Clause legislation as critical to ensuring that the status of states as independent sovereigns in the federal system is not undermined).

154. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (striking down law requiring state background checks for prospective firearms purchasers); *New York v. United States*, 505 U.S. 144, 188 (1992) (striking down statute that required states to take title to radioactive waste if they could not arrange for safe disposal within specified time); see also 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, 824 (1998) (discussing the impact of the anticommandeering doctrine); 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, 1202 (1999) (reviewing the delegation of powers

area within its constitutional purview, Congress can set up a federal regulatory apparatus to serve that purpose.¹⁵⁵ Dragooning the states into playing a substantial role is problematic for a number of reasons. First, requiring state implementation of a federal regulatory scheme disrupts the orderly coordination of power among the political branches of the federal government by allowing Congress to sidestep working with the executive branch.¹⁵⁶ Second, commandeering disrupts accountability for federal programs, by complicating oversight.¹⁵⁷ Congress can readily exercise oversight of federal programs because it holds the purse-strings,¹⁵⁸ but oversight of state programs not funded by the federal government is more challenging. This will likely also confuse voters who need to know whom to blame if programs fail.

A recent Supreme Court decision, *Murphy v. NCAA*,¹⁵⁹ illustrates the Court's sensitivity to congressional efforts to compel state legislatures to "require or prohibit" activity by private actors.¹⁶⁰ In *Murphy*, the Court struck down a federal law barring states from authorizing sports gambling. Justice Alito's opinion for the Court conceded that Congress had the power to prohibit sports gambling directly.¹⁶¹ However, Congress could not confuse lines of accountability by "conscript[ing] state governments as its agents."¹⁶² Congress's attempt to substitute coerced state regulation for direct federal control of sports gambling blurred the lines of government accountability and failed to respect the states'

to nonfederal governmental institutions).

155. See *Printz*, 521 U.S. at 924–33 (providing an overview of the constitutional separation of state and federal regulatory authority).

156. See *id.* at 947–48 (stating that "state judicial and executive branch officials may be required to implement federal law where the National Government acts within the scope of its affirmative powers").

157. See Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1643 (2006) (analyzing the federal costs of commandeering, including accountability costs).

158. See *NFIB*, 567 U.S. at 576–78 (addressing Congress's power under the Spending Clause).

159. 138 S. Ct. 1461 (2018).

160. *Id.* at 1476–77 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

161. *Id.* at 1477.

162. *Id.* (citing *New York v. United States*, 505 U.S. 144, 178 (1992)).

sovereign interest in determining fit subjects of state regulation. In this sense, the measure that the Court struck down in *Murphy* resembled the federally mandated state firearms background checks that the Court had invalidated in *Printz v. United States*.¹⁶³

When these considerations are not applicable, the Court has been more deferential. For example, Congress may impose requirements on states regarding the use or transfer of certain information when that use or transfer might intrude on consumers’ privacy.¹⁶⁴ Anticommandeering doctrine may also permit efforts to ensure that sub-federal entities do not block federal receipt of immigration-related information.

C. Equity

Equity is arguably the most nuanced component of the cooperation calculus. Equity can sound in the key of rights or membership.¹⁶⁵ The following paragraphs examine equity’s nuances.

State and local involvement in immigration enforcement can compound inequality. Law enforcement officials sometimes engage in racial or ethnic profiling.¹⁶⁶ Deputizing state and local law

163. 521 U.S. 898 (1997).

164. See *Reno v. Condon*, 528 U.S. 141, 143–45 (2000) (reviewing the implementation of information sharing between federal and sub-federal agencies).

165. See Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 32 (2016) (“Concerns about the use of immigration detainees also manifested in reports about the program’s morality insofar as it meets independent standards of policy soundness or fits with a state or counties’ substantive values.”); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 288–90 (2016) (“[I]ntegration-framed criminal justice policy debates have focused on whether the federal government is in fact deporting criminals, or whether the crimes committed by deportee are in fact serious.”); Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 566 (2017) (“The process of criminalization is deeply dehumanizing; immigrants are reduced to the sum of their so-called transgressions and their existence deemed undesirable.”).

166. See Motomura, *supra* note 125, at 1857

The gatekeeper problem raises deeper concerns in the context of negative priorities. These are factors that it is a federal priority not to consider, but which may influence state and local

enforcement for immigration duty can exacerbate reliance on invidious criteria such as appearance and accent.¹⁶⁷ Moreover, some state and local law enforcement personnel will compound this problem with biases of their own.¹⁶⁸ While combining immigration and ordinary law enforcement functions did not create this problem, it compounds the risks.¹⁶⁹

States and their subdivisions have an interest in curbing this brand of inequity: ensuring the fair administration of criminal law is an integral aspect of the police power.¹⁷⁰ Moreover, states and cities have a legitimate interest in promoting equality and signaling that discrimination is out of bounds.¹⁷¹ Not every state or city perceives its interest in this way.¹⁷² Some may believe that

governments in making arrests and thus identifying candidates for federal immigration enforcement The most prominent and most disturbing factors are race and ethnicity.

167. *See id.* (providing that the labeling of immigrants as “criminal” promotes racial targeting).

168. *See id.* (“[The criminalization of migrants] makes it easy to forget that a state or local decision to base any arrest or prosecution on race or ethnicity would be reprehensible even if those targeted were concededly guilty of very serious crimes.”).

169. *See* Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1011 (2016) (“[P]alpable fears of deportation and separation from family, friends, and community, may lead to dangerous—even deadly—situations for police, crime suspects, and the general public when noncitizens seek to evade or resist arrest.”); Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532, 542–48 (2017) (criticizing the Priority Enforcement Program (PEP) for failing to address critical issues of bias). Some scholars have taken a more radical view of racial disparities in the criminal justice system, linking resistance to federal immigration enforcement to wholesale changes in state and local law enforcement and to revisions of crime-related grounds for removal. *See* Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 608–12 (2016) (discussing collateral consequences of the integration of the immigration and criminal justice systems). It is useful to note that resistant cities and states continue to tacitly aid immigration enforcement, because all arrests entail alerts to federal databases that immigration officials can access. *See* Chacón, *supra* note 44, at 250–51 (describing the fingerprint databases used in the Secure Communities program and Priority Enforcement Program).

170. *See* Lai & Lasch, *supra* note 165, at 604 (discussing the effects of sanctuary policies).

171. *See id.* at 604–05 (providing examples of social campaigns against discrimination in Philadelphia and Chicago).

172. *See* Ken Paxton, *Providing Sanctuary to the Rule of Law: Sanctuary*

enforcing immigration should take precedence.¹⁷³ Others may believe that in addition to countering immigration enforcement’s contribution to inequality, they should add other robust checks on law enforcement discretion.¹⁷⁴ Even resistant sub-federal entities may have much work to do to reform policing practices. Because immigration enforcement often starts with an initial arrest and inputting information into NCIC as a routine part of the arrest process, the decision to arrest is an appropriate locus of concern.¹⁷⁵ Nevertheless, even states and cities with more to do on the home front to promote equality can legitimately argue that the perfect is the enemy of the good, and that minimizing cooperation with federal immigration enforcement is a useful step.¹⁷⁶

Finally, equity can also refer to state and local attitudes toward the membership of immigrants in communities.¹⁷⁷ Some cities and states may wish to promote undocumented persons’ equity in this sense, expanding their stake in state and local civil, social, and economic life.¹⁷⁸ That aim can transcend instrumental concerns about fostering trust of law enforcement and become a constitutive vision of a more just, inclusive community.¹⁷⁹

Policies, Lawlessness, and Texas’s Senate Bill 4, 55 HARV. J. ON LEGIS. 237, 239 (2018) (arguing that sanctuary cities pose a threat to the rule of law).

173. *See id.* at 245–47 (detailing Texas’s decision to end sanctuary jurisdictions).

174. *See* Rosenbaum, *supra* note 169, at 563 (advocating for a larger shift in the vocabulary of enforcement).

175. *See* Motomura, *supra* note 125, at 1842 (“Using the term prosecutorial discretion imprecisely as a loose synonym for enforcement discretion can mislead if it suggests that the prosecution phase is the locus of discretion in immigration enforcement.”).

176. *See id.* at 1848–49 (discussing the impact of state and local arrests on federal immigration enforcement).

177. *See* Chen, *supra* note 165, at 29–32 (reviewing different jurisdictions’ approach to fair and equitable treatment of immigrants).

178. *See id.* at 33 (noting that one unintended consequence of detention is the erosion of community trust).

179. *See id.* at 34 (“The illegitimacy of a law enforcement operation motivated by racial profiling or unable to stick to its stated enforcement priorities could raise substantive moral concerns as well as procedural ones.”).

*IV. The Spending Clause and Tailoring DOJ's Conditions: A
Blunt Instrument Unsuitable to the Task*

With these values on the table, we can now analyze each of the DOJ's conditions under the Spending Clause. This inquiry will clarify the issues at hand. If the DOJ's conditions are inconsistent with the Spending Clause, then the overall conclusion is simple: because Congress would have lacked authority to impose the conditions, the DOJ also lacks this power.¹⁸⁰ If, on the other hand, any or all of the conditions are consistent with the Spending Clause, the next question is whether any or all of those conditions are consistent with Congress's plan as a matter of statutory interpretation.¹⁸¹

*A. Overarching Concerns: Avoiding Intrusive Policing of the
Spending Power*

The Spending Clause is a blunt instrument for curbing federal conditions. An unduly high threshold for the constitutionality of federal conditions would impair the coordination the Framers sought.¹⁸² Particularly when conditions affect relatively small grants, sub-federal entities have a straightforward option available to them if the condition appears to be unduly onerous: simply opt not to participate in the grant program.¹⁸³ In this vision of grant conditions as a component of a "contract" between Congress and sub-federal entities, constitutional limits on Congress would often unduly intrude on negotiations between political officials at the state, local, and federal level. An excessively rigorous approach would deter Congress from making

180. See *NFIB v. Sebelius*, 567 U.S. 519, 576–78 (2012) (detailing the limits of Congress's authority under the Spending Clause).

181. See *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (citing need for "[r]eliance on context and structure in statutory interpretation").

182. See *NFIB*, 567 U.S. at 576–77 (describing the Framers' intent for authority under and limitations on the Spending Clause).

183. See *id.* at 583–85 (explaining that the huge amount of federal money that states stood to lose if they declined to expand Medicaid under the Affordable Care Act made a state's decision to expand Medicaid involuntary).

money available to states for shared federal and state purposes.¹⁸⁴ This result would gravely impair Congress’s efforts to promote coordination *and* equity in federal programs.

Often, Congress prods the states toward greater equality, as in the nondiscrimination provisions that federal law imposes on spending.¹⁸⁵ Immigration, like civil rights, is a longtime federal concern.¹⁸⁶ Curbing Congress’s authority to attach immigration-related conditions would inevitably spill over into other areas, hamstringing Congress’s efforts to ease socio-economic inequality and combat discrimination in federally funded programs.¹⁸⁷ This structural spillover would be severe collateral damage in the current dispute over cooperation in immigration enforcement.

A case on point is the modern Supreme Court’s sole decision invalidating conditions on federal spending. In *NFIB v. Sebelius*,¹⁸⁸ the Court struck down the Affordable Care Act’s Medicaid expansion provisions, which had leveraged billions of dollars in existing federal Medicaid funding to prod states to cover more of the working poor.¹⁸⁹ Chief Justice Roberts, writing for the Court, emphasized what he viewed as the coercive nature of these legislative conditions.¹⁹⁰ He characterized Congress’s threat to

184. *See id.* at 624 (Ginsburg, J., dissenting) (arguing that even the relatively narrow test for involuntariness in *King v. Burwell*, 135 S. Ct. 2480 (2015), would introduce unwelcome rigidity into “Congress’s efforts to empower States by partnering with them in the implementation of federal programs”).

185. *See, e.g.*, 42 U.S.C. § 2000d (2012) (barring discrimination in any “program or activity” receiving federal funds); *see also* Pasachoff, *supra* note 151, at 333 (defending vigorous federal policing of such provisions, including threats of funding cut-offs).

186. *See* *Arizona v. United States*, 567 U.S. 387, 395 (2012) (“The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.”).

187. *See id.* (noting the widespread effects of perceived mistreatment of aliens in the United States).

188. 567 U.S. 519 (2012).

189. *See id.* at 542 (providing an overview of the Affordable Care Act’s Medicaid expansion provisions).

190. *See id.* at 582 (“The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real

withhold this enormous pool of federal funds as a “gun to the head” of state recipients.¹⁹¹ The Court’s decision stripped Congress of its most effective tool for remedying the plight of uninsured Americans.¹⁹²

Scholars critiquing DOJ’s proposed immigration conditions on constitutional grounds may not agree with the Court’s decision in *NFIB*.¹⁹³ However, the scholars’ position on immigration conditions would spill over into similar results in health care, antidiscrimination, and other areas where Congress seeks to enhance coordination to address pervasive inequities.¹⁹⁴ Ignoring this prospect, scholars have allowed their disdain for these conditions as a policy matter to obscure the adverse consequences of sweeping restrictions on Congress’s power under the Spending Clause.¹⁹⁵ The discounting of consequences that would disproportionately affect subordinated people living in poverty in the United States is yet another effect of the rhetorical hall of mirrors that our current polarized discourse has constructed.

A more considered analysis of the Supreme Court’s Spending Clause jurisprudence would suggest that immigration-related conditions like those proposed by DOJ would almost certainly pass

option but to acquiesce in the Medicaid expansion.”).

191. *See id.* at 581 (“In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”).

192. *See id.* at 624–27 (Ginsburg, J., dissenting) (critiquing the majority’s analysis).

193. *See* Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1286 (2013) (critiquing the Court’s rationale that the Medicaid expansion was coercive as “highly dubious”); Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL’Y 71, 74 (arguing that the Court’s decision in *NFIB* significantly departed from its holding in *South Dakota v. Dole*, 483 U.S. 203 (1987)).

194. *See supra* notes 185–192 and accompanying text (discussing the interconnectedness of Congress’s federal immigration initiatives to other federal priorities).

195. *Cf.* *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 625–42 (E.D. Pa. 2017) (finding that DOJ conditions, if imposed by Congress, would exceed Congress’s power under Spending Clause); Lai & Lasch, *supra* note 165, at 573–75, 581–83 (suggesting that the Spending Clause may limit immigration enforcement conditions sought by DOJ, while acknowledging that courts have often been deferential in past cases on grant conditions).

constitutional muster. Under the Supreme Court’s Spending Clause jurisprudence, the most relevant factors are coercion and relatedness.¹⁹⁶ In *NFIB*, Congress sought to encumber state receipt of funds far more substantial than the modest money claimed by sub-federal entities under the Byrne Program.¹⁹⁷ That pronounced distinction suggests that the DOJ immigration-related conditions on Byrne grants are not coercive.

In addition, the Court has displayed great deference in analyzing the relatedness factor. For example, the Court held in *South Dakota v. Dole*¹⁹⁸ that Congress could condition receipt of certain state highway funding on state adoption of a law setting the legal drinking age at twenty-one.¹⁹⁹ This condition had a colorable relationship to federal highway funding, but the nexus was hardly ironclad.²⁰⁰ The Court posited that Congress budgeted highway funds to keep highways safe.²⁰¹ This was literally true—Congress certainly has never deliberately appropriated money to render roads unsafe—but relied on an attenuated reading of Congress’s rationale.²⁰² Federal highway funds go to construction and maintenance of roads, to ensure that those roads

196. See Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 865 (“A majority of Justices evidently believed it important that the coercion doctrine impose real limits on the conditional spending power.”); *id.* at 903 (noting that conditional spending must be “sufficiently related to the purpose of the federal grant”).

197. See *NFIB v. Sebelius*, 567 U.S. 519, 542 (2012) (“If a State does not comply with the Act’s new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.”).

198. 483 U.S. 203 (1987).

199. See *id.* at 211–12 (“[E]nactment of such laws remains the prerogative of the States Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power.”).

200. See *id.* at 211 (“Congress . . . offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose.”).

201. See *id.* at 208 (“[T]he condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”).

202. See *id.* at 214 (“Congress wishes that the roads it builds may be used safely, that drunken drivers threaten highway safety, and . . . young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21.”).

are paved properly and prevent unsafe conditions associated with physical deterioration of the road way's surface.²⁰³ Occasional hazardous driving by a particular demographic cohort does not appreciably affect a road's physical condition. The *South Dakota v. Dole* Court stretched to find a relationship between the drinking age and highway safety.²⁰⁴ In so doing, the Court signaled that a narrower conception of relatedness would interfere with negotiations about matters of common concern that are best left to political officials, including each state's representatives in Congress. The capacious conception of relatedness advanced in *South Dakota v. Dole* informs analysis of the DOJ's proposed immigration conditions.

B. Specific DOJ Conditions

1. Giving Federal Officials Dedicated Space in Jails to Interview Inmates

The DOJ requirement that grantees make space available in jails to interview inmates meets the deferential Spending Clause relatedness test.²⁰⁵ The jail program's premise is that federal officials' questioning will identify a cohort of inmates who are removable.²⁰⁶ Suppose that some portion of this cohort has committed property crimes such as car theft or burglary. If the

203. See *Understanding Federal Highway Administration (FHWA)*, U.S. DEPT. TRANSP., <https://www.transportation.gov/transition/FHWA/Understanding-FHWA> (last updated Jan. 31, 2017) (last visited Aug. 17, 2018) (noting that one of the main goals of the FHWA is to repair and maintain public roads to ensure the well-being of those who travel on them) (on file with the Washington and Lee Law Review).

204. See *Dole*, 483 U.S. at 214 (discussing how the Court believed a uniform drinking age of twenty-one would decrease the frequency in which younger people would drink and drive).

205. See Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Educational Law*, 62 AM. U. L. REV. 577, 585 (2013) (noting that for Congress to condition the receipt of federal funds, "the conditions must be related 'to the federal interest in particular national projects or programs'").

206. See *Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/criminal-alien-program> (last updated Jan. 3, 2018) (last visited Sept. 11, 2018) (explaining the purpose and goals of the jail program) (on file with the Washington and Lee Law Review).

government ultimately succeeds in removing these individuals, the noncitizens removed will be unable to re-offend in the United States. Moreover, federal questioning about immigration status may be useful in gaining suspects’ cooperation in a small number of cases involving serious crime.²⁰⁷ In those cases, agreements to defer or temper immigration sanctions may produce valuable information about gangs or other criminal enterprises.

The Court has traditionally deferred to the executive branch on matters at the intersection of immigration and national security.²⁰⁸ This deference is not unlimited.²⁰⁹ However, it is sufficient to demonstrate a link between the jail program condition and the purpose of the funds at issue.

The counterarguments on the Spending Clause issue are unconvincing. While the data suggests that linking immigration and criminal enforcement largely nets either those with no criminal record or those who have committed minor, nonviolent crimes,²¹⁰ that data is open to debate.²¹¹ When views of statistics clash on an immigration issue in the constitutional area, the federal government will usually prevail.²¹² Moreover, every city and state cooperates with immigration officials on transferring custody of noncitizens who have been convicted of serious

207. See Kittrie, *supra* note 3, at 1485 (observing that undue state constraints on cooperation with federal law enforcement on immigration can “undermine other important federal policy goals, including the war against terrorism [and] . . . the fight against criminal activity by . . . gangs”).

208. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952) (reviewing the dangers posed by Communist infiltrators).

209. See *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir. 2000) (“That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy. Executive agencies must comply with the procedural requirements imposed by statute.”).

210. See Miles & Cox, *supra* note 64, at 943 (explaining that between 1994 and 2000 “the vast majority of deportees . . . had no criminal convictions”).

211. See *id.* at 970 (calling into question “the long-standing assumption that deporting noncitizens who commit crimes is an effective crime-control strategy”).

212. See *infra* Part III.A (explaining that because empirical studies are subject to differing interpretations, courts often defer to the federal government’s interpretation of a study affecting immigration laws when considering constitutional issues).

crimes.²¹³ At least above a certain threshold, sub-federal and federal entities agree that linking immigration and ordinary law enforcement is sensible.²¹⁴ That agreement is enough to rebut arguments that the jail program condition fails the Spending Clause test.

If that argument were not enough, consider also that effecting an orderly transfer of custody is safer and more efficient for federal officers. Apprehending an individual in the community takes more time and may require larger numbers of agents to secure the area around the arrest. In contrast, the risk of injury is minimal during a transfer of an individual noncitizen already in custody in a city or county jail. When Congress assists sub-federal law enforcement personnel through the Byrne Program, the Constitution does not require that Congress remain indifferent to the safety and efficiency of federal law enforcement personnel. Congress could reasonably view increasing the safety and efficiency of federal agents as a “cross-cutting condition” related to federal funds assisting sub-federal criminal justice efforts.²¹⁵

2. The Practicable Notice Provision

The arguments for the relatedness of the practicable notice provision are similar. Take the case of low-level property crime, such as burglary or car theft. If federal immigration officials can

213. See Jennifer C. Critchley & Lisa J. Trembly, *Historical Review, Current Status and Legal Considerations Regarding Sanctuary Cities*, 306-JUN N.J. LAW. 32, 32 (2017) (“Sanctuary cities have . . . been described as municipalities that have adopted laws or policies that limit government employees, particularly local police officers, from inquiring or disseminating information about the immigration status of immigrants whom they encounter, *except in the case of a serious criminal offense.*” (emphasis added) (citations omitted)).

214. See George Joseph, *Where ICE Already Has Direct Lines to Law-Enforcement Databases with Immigrant Data*, NPR (May 12, 2017, 1:44 PM), <https://www.npr.org/sections/codeswitch/2017/05/12/479070535/where-ice-already-has-direct-lines-to-law-enforcement-databases-with-immigrant-d> (last visited Sept. 12, 2018) (“[L]aw enforcement in hundreds of jurisdictions nationwide, including major sanctuary cities like Seattle, Washington, D.C. and Los Angeles, are feeding information into regional databases that can be combed through by ICE.”) (on file with the Washington and Lee Law Review).

215. Cf. Pasachoff, *supra* note 151, at 271–74 (discussing cross-cutting conditions, while not commenting specifically on immigration-related conditions).

arrange an orderly transfer of an individual noncitizen, that promotes safety and efficiency. Moreover, the removal of low-level offenders will provide at least a marginal benefit for crime rates.²¹⁶ These factors are not compelling, but the Supreme Court’s Spending Clause jurisprudence requires only a modest nexus.²¹⁷

3. Section 1373 and Curbing Restrictions on Sub-Federal Communication

Section 1373 presents a more complex question under the Spending Clause. Much depends on how one reads the provision. A narrow reading will almost certainly be constitutional. A broad reading may not be.

To illustrate this point, first consider a broad reading, under which a sub-federal entity loses the ability to direct how an employee spends his or her time. Under this broad reading, a sub-federal entity would have no recourse if an employee chose to spend all of his or her time communicating with federal officials. After all, under a broad reading, any attempt to dial back the time the employee spent in this activity would be a “restrict[ion]” that would violate the statute.²¹⁸ This reading would be manifestly unreasonable. Congress cannot reasonably expect a sub-federal entity to give up the authority to direct its employees’ activities. Such a surrender would skew accountability across different levels of government and unduly discount sub-federal entities’ interest in running orderly and productive workplaces.

However, a narrower reading of the statute would not raise problems under the Spending Clause. Suppose that one read the statute as simply allowing sub-federal employees to contact federal officials with immigration status information if the employee reasonably believed this communication provided accurate information to federal officials and might promote an orderly transfer of custody. In that event, complying with § 1373 would

216. *See supra* notes 101–107 and accompanying text (discussing the impact of illegal immigrants on crime rates).

217. *See infra* notes 230–238 and accompanying text (explaining the Supreme Court’s nexus jurisprudence).

218. 8 U.S.C. § 1373 (2012).

promote the same goals as the conditions described above. Spending Clause jurisprudence requires no more.

C. Summary

In sum, resistant states and their allies in the academy have vastly overstated the “bite” of Spending Clause jurisprudence on the DOJ’s immigration conditions. Those conditions generally stay on the right side of the Constitution, regardless of their merit as policy or their fit as a matter of statutory interpretation. It is to that statutory domain that we now turn.

V. A Statute-Centered Approach: Reading Section 1373 Against the Backdrop of “Our Federalism”

If the Constitution does not preclude the DOJ’s conditions, the next step is the more prosaic but often fruitful path of statutory interpretation. The first step in this inquiry is a matter alluded to above: the scope of § 1373. After determining § 1373’s scope, it will be useful to consider the propriety of conditioning Byrne Program grants on certification of compliance with § 1373 and on the two other conditions set by the DOJ.

A. Section 1373 Nested in a Federalism Context

Properly interpreting § 1373 requires consideration of its overall context.²¹⁹ That includes overarching values such as federalism. A needlessly broad interpretation of § 1373 that runs roughshod over federalism values fails the test of context.

As Justice Frankfurter commented over seventy years ago, interpreting a statute “demands awareness of certain

219. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”).

presuppositions.”²²⁰ Congress “legislates against the backdrop” of overall understandings about the structure of American governance.²²¹ One key “background principle[]” is federalism.²²² Before the courts infer that Congress has sought to “radically readjust[] the balance of state and national authority,” they should require a clear statement from Congress.²²³

This interpretive caution is particularly apt when a federal statute addresses “areas of traditional state responsibility.”²²⁴ Core matters concerning the “punishment of local criminal activity”²²⁵ are integral to this essential state domain. In *Bond*, the Supreme Court held that “basic principles of federalism”²²⁶ counseled against a “boundless reading” of a federal statute implementing the Chemical Weapons Convention.²²⁷ The broad reading the Court avoided would have supplanted state responsibility for certain garden-variety criminal prosecutions.²²⁸ Rejecting this interpretation, the Court opted for a more modest reading of the federal statute that preserved state responsibility over such matters.²²⁹

B. Section 1373 Through an Operational Prism

Section 1373 does not literally address matters of state prosecution and punishment of crime. However, it cuts very close to those core state functions, particularly on a broad reading of its

220. *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

221. *Id.*

222. *Id.*

223. *Id.* at 2089 (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40 (1947)).

224. *Id.* at 2088.

225. *Id.*

226. *Id.* at 2090.

227. *Id.*

228. *See id.* at 2091 (discussing the potential ramifications of an overly broad reading of the statute).

229. *See id.* at 2093–94 (“Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.”).

text. As noted above, a broad reading would suggest that a sub-federal employer cannot control the terms of employment for its personnel. In addition, the DOJ's reading of § 1373 would apparently apply not merely to information about suspects, but also to information about witnesses and victims. This reading would clash with state judgments about how to nurture state residents' cooperation with law enforcement. Judgments about the optimal circumstances for effective deterrence, investigation, and prosecution of crime are integral to sub-federal law enforcement. Reading § 1373 to interfere with these judgments would trench on time-honored canons of statutory interpretation.

A reading of § 1373 tailored to these canons would stress an "operational nexus" between the grant at issue and the administrative condition that the agency seeks to impose. The attenuated conception of relatedness that suffices under the Spending Clause does not fit this test.²³⁰ An operational nexus requires a more concrete link between the condition specified and the regular activities underwritten by the grant program.²³¹

As a good example of an operational link, consider the agency condition upheld by the Supreme Court in *Lau v. Nichols*.²³² In *Lau*, the Court, in an opinion written by Justice Douglas, found that the Secretary of the cabinet department then known as Health, Education, and Welfare (HEW)²³³ could require that school districts receiving federal money take steps not merely to eliminate intentional discrimination, but to eliminate practices with discriminatory effects.²³⁴ The statute at issue, known as Title

230. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 208–09 (1987) (discussing the concept of relatedness).

231. See *id.* at 2013 ("Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program."); see also *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 532 (N.D. Cal.) ("[F]unds conditioned on compliance with Section 1373 must have some nexus to immigration enforcement."), *reconsideration denied*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), *appeal dismissed as moot sub nom. City & Cty. of San Francisco v. Trump*, No. 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018).

232. 414 U.S. 563 (1974).

233. These departments were separated after *Lau* into Health and Human Services and Education, respectively.

234. See *Lau v. Nichols*, 414 U.S. 563, 568 (1974) ("It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful

VI of the 1964 Civil Rights Act,²³⁵ declared only that, “No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination” in any “program or activity” receiving federal funds.²³⁶ HEW had construed Title VI to prohibit not merely acts taken by a federal grantee with a discriminatory purpose, but also acts with discriminatory effects.²³⁷ Under HEW’s construction of Title VI, a grantee’s mere omission—the failure to act affirmatively to aid a group—could be discriminatory, because it would “[r]estrict an individual . . . in the enjoyment of any advantage or privilege enjoyed by others receiving any service” funded by federal dollars.²³⁸

In *Lau*, HEW had interpreted its regulation to require that school districts address the need for children from other countries to learn English in order to benefit from education in the substantive subjects in the curriculum.²³⁹ The Court upheld this interpretation.²⁴⁰ Justice Douglas cited the legislative history of Title VI, which reinforced the operational link between HEW’s condition and the statute’s language.²⁴¹ According to Senator Hubert Humphrey, one of the primary sponsors of Title VI, “Simple justice requires that public funds . . . not be spent in any fashion

opportunity to participate in the educational program—all earmarks of the discrimination banned by the regulations.”).

235. 42 U.S.C. § 2000d (2012).

236. *Id.*

237. *See Lau*, 414 U.S. at 563, 568 (citing a regulation prohibiting any act or omission that had “the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin”).

238. *Id.* at 567 (citing 45 C.F.R. § 803(b)(1)(iv)).

239. *Id.* at 568.

240. The Court did not require a specific mode of language instruction, such as English as a Second Language (ESL) or bilingual education. Particular modes of instruction have been controversial. *See Horne v. Flores*, 557 U.S. 433, 471–72 (2009) (reversing decision upholding denial of relief to state that had argued that changed circumstances warranted modification of decree requiring certain kinds of remedial language instruction).

241. *See Lau*, 414 U.S. at 568 (“Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency.”).

which encourages, entrenches, subsidizes, or results in racial discrimination.”²⁴² Senator Humphrey’s use of the term, “entrenches,” seems to best capture the concern of both HEW and Justice Douglas: if school districts received federal funds, they entered into a contract.²⁴³ In that contractual arrangement, the consideration for the receipt of federal funds was a commitment on the school district’s part to use that money in a fashion that eliminated historic effects of discrimination and allowed schoolchildren with limited knowledge of English to benefit from the educational benefits provided to others.²⁴⁴ According to this analysis, that construction best captured Congress’s intent: permitting programs to receive federal dollars without making such a commitment would have impaired both coordination and equity values.²⁴⁵

Another operational link may reside in the sense that requiring recipients of federal funds to identify, monitor, and address the results of discrimination would make it harder for recipients to create “plausible deniability” of discriminatory intent.²⁴⁶ Rather than remain shielded by plaintiff’s difficulty in showing intent, school districts and other recipients of federal funds would have to make an affirmative showing that they were actually doing something about discrimination.²⁴⁷ Because recipients of financial aid have superior access to information

242. *Id.* at 569.

243. *Id.*

244. *Cf.* Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291, 311–15 (2014) (discussing mobilization around this issue in minority and civil rights communities).

245. *See* *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974).

246. *See id.* at 568 (Stewart, J., concurring) (describing the San Francisco school district’s “laissez-faire” attitude towards non-English speaking students).

247. Other scholars have advanced an analogous systemic approach as a justification for affirmative action in employment that makes race or other attributes a “plus factor” in employment decisions. *See* Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385, 1396 (2003) (“Where employees understand that merit criteria predominate in decision making and that race and gender are simply ‘plus’ factors or tie-breakers, affirmative action programs are more likely to be viewed as fair . . .”).

about any intent to discriminate on their part, flipping the presumptions was both appropriate and efficient.

In the immigration context, a full acknowledgment of operational nexus entails acknowledging the overlap between immigration and ordinary law enforcement. While immigration enforcement does not inevitably intersect or overlap with ordinary enforcement, areas of overlap are significant. For example, take joint federal, state, and local efforts targeting the criminal gang, MS-13.²⁴⁸ In joint task forces, law enforcement officials at the federal, state, and local level work together to address drug trafficking, violent crime, and other offenses committed by MS-13 members.²⁴⁹ As the Supreme Court explained in *Muehler v. Mena*,²⁵⁰ joint task forces addressing such issues may also have occasion to inquire about an individual suspect’s immigration status.²⁵¹ Sometimes that status will provide leverage over the suspect, who is either undocumented or an LPR whose status

248. The threat posed by MS-13 may be exaggerated. The Article assumes only that MS-13 members on occasion commit crimes, regardless of the overall volume of such offenses.

249. See *Anne Arundel County Leaders Launch Joint Task Force to Target Gang Violence*, CBS BALT. (Sept. 28, 2017, 6:18 PM), <https://baltimore.cbslocal.com/2017/09/28/anne-arundel-county-gang-violence-ms13-joint-task-force/> (last visited Aug. 18, 2018) (noting that local law enforcement will be working with the FBI) (on file with the Washington and Lee Law Review); cf. *Marsh v. United States*, 29 F.2d 172, 173 (2d Cir. 1928) (citing “universal practice of police officers in New York to arrest for federal crimes, regardless of whether they are felonies or misdemeanors”); Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. (forthcoming 2018) (manuscript 57) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3141086 (noting that, “[s]ince the time of the Founding, Congress has looked to state and local law enforcement to help enforce federal criminal laws”) (on file with the Washington and Lee Law Review). *Marsh* does not stand for the proposition that states have inherent power—even in the absence of federal authorization—to enforce federal law, including civil immigration law. See Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 279–82 (2011) (critiquing broad reading of *Marsh*). This Article cites *Marsh* only to demonstrate the long history of express and implicit federal designation of state law enforcement officers as federal agents.

250. 544 U.S. 93 (2005).

251. See *id.* at 96 (observing that local police asked immigration officers to aid them in conducting a search of a suspected gang safehouse, because police were “aware that the . . . gang was composed primarily of illegal immigrants”).

would be jeopardized by a criminal conviction.²⁵² In other situations, a suspect may have reentered the United States after receiving a removal order, thus violating the criminal prohibition in the INA.²⁵³ On those occasions, it would be unwieldy to prohibit state and local officials from inquiring about immigration status or informing federal officials about what they know. A tailored reading of § 1373 would bar sub-federal entities from restricting their employees' communication in this context.²⁵⁴

Reading § 1373 as only applying to task forces would have several benefits. Viewed as applying only to the work related operation of task forces, § 1373 would not unduly burden sub-federal entities in a fashion that would conflict with Congress's

252. See Jazmine Ulloa, *Here's Why Law Enforcement Groups Are Divided on Legislation to Turn California into a 'Sanctuary State'*, L.A. TIMES (Mar. 12, 2017, 12:05 AM), <http://www.latimes.com/politics/la-pol-sac-police-sanctuary-state-20170312-story.html> (last visited Aug. 18, 2018) (“[T]he legislation raises questions about their involvement in task forces, where local and state officers can serve as translators for federal immigration officials, help carry out immigration arrests and leverage information on immigration status during interrogations.”) (on file with the Washington and Lee Law Review).

253. See 8 U.S.C. § 1326(a) (2012), cited in S.B. 54, 2017–2018 Leg. Sess., § 7284.6(b)(1), (b)(3) (Cal. 2017) (conducting “investigative duties” associated with a joint law enforcement task force, including “sharing of confidential information”); cf. *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 603 (E.D. Pa. 2017) (finding that city “will continue to cooperate with federal authorities in investigating and apprehending immigrants suspected of criminal activities” and will share information necessary for such cooperation).

254. Some courts have asserted that § 1373 is insufficiently related to law enforcement because it also requires that sub-federal entities and officials do not restrict information regarding citizenship status. See *City of Philadelphia v. Sessions*, 280 F. Supp. 3d at 622. For these courts, inquiries about U.S. citizenship are per se irrelevant to law enforcement. However, this argument is an unduly literal reading of § 1373's use of the term “citizenship.” That term needs to be read in conjunction with the term, “immigration status.” The most logical reading of the term is that it allows sub-federal entities or officers to share information about whether or not a given individual is a foreign national or a U.S. citizen. If the individual is a foreign national, the range of immigration law remedies comes into play; some may be helpful, depending on law enforcement's need for leverage against that person. Indeed, that is the only logical meaning of the term in context. A law enforcement officer will have no need to ever communicate to federal officials that an individual is a U.S. citizen, except where a question has arisen over whether his citizenship status can provide leverage, in the event that the individual is a foreign national. Beyond this situation, a gratuitous communication to federal officials that an individual is a U.S. citizen would serve no purpose at all. Congress should not be presumed to intend a nullity.

background understanding of “our federalism” or with anticommandeering doctrine.²⁵⁵ State and local law enforcement would not have to tolerate employees who spent entire working days on communications with federal officials that distracted from their assigned duties. This operational construction would optimize compliance with the criminal law—at least in the area of major crimes—and preserve coordination between state and federal law enforcement agencies. Moreover, viewed in this narrower frame, § 1373 would be consistent with equity. Sub-federal entities could still monitor and discipline employees who applied invidious criteria such as accent or appearance to target individuals for arrest. Section 1373 would merely ensure that state and local officials could participate in joint task forces without interference from state and local laws purporting to limit such cooperation.

While two district courts have interpreted the Court’s decision in *Murphy v. NCAA* as indicating that § 1373 violates the anticommandeering doctrine,²⁵⁶ that view reads *Murphy* too broadly. Compared with § 1373, the statute that the Court invalidated in *Murphy* was a far more direct and comprehensive dragooning of state sovereign processes. The statute at issue in *Murphy* forced states to prohibit sports gambling instead of asserting direct federal control over wagering in that sphere.²⁵⁷ In

255. See generally *Printz v. United States*, 521 U.S. 898 (1997) (discussing federalism principles under Tenth Amendment); *New York v. United States*, 505 U.S. 144 (1992)

256. *City of Chicago v. Sessions*, No. 17-C-5729, 2018 U.S. Dist. LEXIS 125575, at *18–29 (N.D. Ill. July 27, 2018); see also *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 327–34 (E.D. Pa. 2018) (finding that § 1373 violated Tenth Amendment, but also noting alternative holdings that § 1373 did not require compliance with the Attorney General’s notice or jail-access conditions and that city was in substantial compliance with those conditions); cf. *United States v. California*, 314 F. Supp. 3d 1077, 1099–1104 (E.D. Ca. 2018) (in denying in pertinent part federal government’s request for preliminary injunction against various state laws, finding that § 1373 raises concerns under Tenth Amendment but then holding that narrow interpretation of § 1373 does not clash with state provisions challenged by federal government); Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2045–47 (2018) (arguing that § 1373 is invalid under anticommandeering doctrine).

257. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1465 (2018) (“The Professional and Amateur Sports Protection Act (PASPA) makes it unlawful for a State . . . ‘to sponsor, operate, advertise, promote, license, or authorize by law or compact’

contrast, § 1373 deals only with the far more limited realm of contingent information-sharing by state and federal officials. Section 1373 does not require that a state or state official share information. It merely provides that if state officials possess information about immigration status, state or local law cannot restrict sharing of that information with federal authorities. The federal government still has responsibility for arresting and detaining foreign nationals under the INA, determining whether those individuals are removable, and then effecting their removal from the United States. Unlike the schemes struck down in *Printz* and *New York*, § 1373 does not require states to administer a federal enforcement program. Unlike the statute that the Court invalidated in *Murphy*, § 1373 does not mandate that the state legislature prohibit a wide swath of activity engaged in by private individuals. The provision's contingent impact on information-sharing is consistent with the Court's precedents upholding federal constraints on states' information practices.²⁵⁸ Moreover, when read in the narrow fashion suggested in this Article, § 1373 does not appreciably affect sub-federal entities' control over their employees. For example, under § 1373, a sub-federal entity is free to prohibit its employees from inquiring about an individual's citizenship or immigration status. A sub-federal entity is limited only by the bar on restricting sharing of information on immigration status that happens to be possessed

. . . competitive sporting events But PASPA does not make sports gambling itself a federal crime." (citations omitted)).

258. See *Reno v. Condon*, 528 U.S. 141, 141 (2000) (upholding federal statute requiring states and other entities to adopt privacy safeguards); see also *Printz*, 521 U.S. at 918 (reserving issue of constitutionality of statutes that "require only the provision of information to the Federal Government"). In *Murphy*, the Court noted that *Condon's* upholding of the statute at issue in that case rested on the law's applicability to both state and private actors. *Murphy*, 138 S. Ct. at 1478–79. Even under this more limited view of *Condon*, § 1373 passes muster. While § 1373 does not expressly bar states from restricting private individuals' sharing of immigration status information with federal officials, state attempts at such restrictions would clash with both the INA and the First Amendment. See *Arizona v. United States*, 567 U.S. 387, 399–400 (2012) (observing that preemption doctrine invalidates state laws that serve as an "obstacle" to the execution of federal law) (citation omitted). Section 1373 merely clarifies that prohibitions on state interference with private individuals' sharing of information with the federal government also apply to state interference with sub-federal officials' information-sharing.

by sub-federal officials. Restricting the sharing of such information would hinder joint federal–sub-federal law enforcement operations that even resistant states such as California recognize as vital.²⁵⁹ Section 1373’s contingent prohibition, enacted against the backdrop of federal–state cooperation on criminal law enforcement and broad, ongoing federal responsibility for regulation of immigration, does not constitute impermissible commandeering.²⁶⁰

259. See CAL. GOV’T CODE § 7284.6(b)(3) (West 2018) (permitting performance of “investigative duties” for a joint law enforcement task force, including “sharing of confidential information” related to immigration).

260. For the same reason, courts should narrowly interpret President Trump’s Executive Order on sanctuary cities. See Exec. Order 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017). While the Ninth Circuit asserted that the avoidance canon did not apply to Executive Orders, that view is shortsighted. See *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) (“In contrast to the many established principles for interpreting legislation, there appear to be few such principles to apply in interpreting executive orders.”). An unduly broad reading of an executive order triggers structural risks for both the judiciary and the executive branch. For the courts, an unduly broad reading sacrifices judicial economy, which Justice Brandeis recognized as a key benefit of the avoidance canon. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (“The Court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress . . .” (citations omitted)). Courts save themselves the needless institutional stress and strain of a constitutional adjudication if they can read an executive order more narrowly and thus avoid the issue. In addition, read narrowly, an executive order may serve entirely legitimate goals. For example, an executive order may articulate the President’s policy views. The bully pulpit is a traditional appurtenance of presidential leadership; courts should hesitate long and hard before chilling the President’s ability to wield this effective rhetorical weapon. Admittedly, much of President Trump’s rhetoric has been both outrageous and polarizing. However, the Framers did not envision the federal courts as policing presidential rhetoric. Indeed, in the travel ban case, which involved rhetoric far more disturbing and blatantly biased than anything in the sanctuary cities Executive Order, the Supreme Court warned that courts should be wary of the “delicate” task of parsing presidential statements. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (recalling other instances when Presidents have spoken to citizens in significant ways). The Supreme Court may have gone too far with this warning, insulating even invidious presidential rhetoric off the table in the adjudication of intent. Cf. Peter Margulies, *The Travel Ban and the Twilight of Judicial Craft: Taking Statutory Context Seriously* 8–17 (Roger Williams Univ. Legal Studies, Paper No. 183, 2018), <https://ssrn.com/abstract=3238087> (discussing treatment of campaign and presidential statements in travel ban case). Nevertheless, as a tribunal obliged to follow Supreme Court precedent, the Ninth Circuit should have paid more heed to the Court’s caution. Cf. *City & Cty. of San Francisco*, 897 F.3d at 1245–50 (Fernandez, J., dissenting) (faulting majority for unduly broad reading of

VI. DOJ Conditions and the Byrne Program

In making available grants to sub-federal entities through the Byrne Program, Congress did not intend to promote a “one size fits all” model of criminal justice.²⁶¹ The Byrne Justice Assistance Grant Program arose from the merger of two previous programs: the Edward Byrne Memorial State and Local Law Enforcement Program and Local Law Enforcement Block Grants.²⁶² Congress set up a formula that allocated grants, based on a state’s population, for a range of purposes, including law enforcement, prosecution and court, prevention and education, and assistance—other than compensation—to crime victims and witnesses.²⁶³

Innovation and equity are twin pillars of the Byrne Program.²⁶⁴ Congress wished to underwrite what Brandeis called “laboratories of federalism”: sites in which state and local officials closer to the people could try out new solutions and share best practices.²⁶⁵ Moreover, the legislative history and saga of congressional oversight suggest that Congress wished to reduce bias in policing.²⁶⁶ The DOJ’s conditions would frustrate

President Trump’s Executive Order).

261. See *Byrne JAG Spending Data: National Byrne JAG Spending in 2016 by Project Type*, NAT’L CRIM. JUST. ASS’N, <https://www.ncja.org/ncja/byrne-jag-investments-and-impact/expenditures-by-project-type> (last visited Oct. 3, 2018) (documenting over seventeen different categories of criminal justice related funding) (on file with the Washington and Lee Law Review).

262. See generally Pub. L. No. 109-162, 119 Stat. 2960, 3094 (2006).

263. See *id.* at 3095 (providing that states awarded funding may use the grant to partner with neighborhood and community groups).

264. See H.R. REP. NO. 110-729, at 2 (2008) (“These innovations [in crime control] demonstrate that the best crime policy incorporates programs that help at-risk youth avoid criminal behavior, and prepares prisoners for reentry into society so they have meaningful and productive alternatives to crime when they return home.”).

265. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous state, may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

266. See *infra* notes 273–88 and accompanying text.

Congress’s intent on the first point and exacerbate its concerns on the second issue.

Before exploring this issue, it is worthwhile to consider the statutory authority for the DOJ’s imposition of conditions. DOJ contends that its § 1373 certification condition is authorized as an “applicable law[]” with which a Byrne grantee must comply.²⁶⁷ It argues that the forty-eight-hour notice and jail space conditions are authorized as “special conditions” to set priorities under formula grants.²⁶⁸ The most logical reading of “all other applicable laws” is construing it as a reference to laws “outside” the Byrne Program that govern interactions between sub-federal entities and the federal government.²⁶⁹ The meaning of “special conditions” is less clear, because that appears in a different part of the statute establishing DOJ funding programs.²⁷⁰ For that reason, courts have found that the “special conditions” provision does not authorize conditions—such as the forty-eight-hour notice or jail space conditions—not already enacted into law.²⁷¹ However, the “special conditions” provision may be more capacious, because it authorizes the Assistant Attorney General heading the Criminal Division to place such conditions on “all grants.”²⁷² This broad language resists judicial cabining. To fully explore possible judicial outcomes, this Article will assume that each of DOJ’s conditions meet at least one of these threshold tests. However, that still leaves the matter of determining whether any of the conditions is substantively compatible with the Byrne Program.

267. See 34 U.S.C. § 10153(a)(5)(D) (2012) (providing application deadlines); see also *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 943–45 (N.D. Ill. 2017) (discussing the Byrne JAG application requirements).

268. See 34 U.S.C. § 10102(a)(6) (explaining duties of the Attorney General); see also *City of Chicago*, 264 F. Supp. 3d at 941–42 (reviewing the extent of executive authority under the Byrne JAG statute).

269. *City of Chicago*, 264 F. Supp. 3d at 943–45.

270. See generally U.S. DEPT JUSTICE, DOJ GRANTS FINANCIAL GUIDE (2017).

271. See *City of Chicago*, 264 F. Supp. 3d at 941–42 (analyzing allowable and substantive conditions on grants).

272. 34 U.S.C. § 10102(a)(6) (emphasis added).

A. *The Byrne Program's Guiding Premises*

To understand the objectives that Congress took to heart in crafting the Byrne Program, a look at legislative history is helpful. A 2008 House Judiciary Committee Report recommending continuation of Byrne JAG funding through 2012 emphasized the program's reliance on local "innovations."²⁷³ That same report also stressed the need for a "collaborative" relationship between federal and state entities in reducing biased policing.²⁷⁴

The 2008 House Judiciary Report revealed a healthy skepticism about a monolithic approach based on coercion or punishment.²⁷⁵ The House Report highlighted the successes of community-based alternatives to incarceration, including "drug courts, gang prevention strategies, and prisoner re-entry programs," explaining that "the best crime policy . . . help[s] at-risk youth avoid criminal behavior" and ensures that prisoners, once released, have "meaningful and productive alternatives to crime."²⁷⁶ In a telling reference, the Judiciary Committee Report noted that Byrne Program funds supported at least one task force—in Tulia, Texas—where a rogue officer arrested a substantial number of African-Americans on false drug charges.²⁷⁷ In addition, the Committee discussed a number of instances in which Byrne funds had supported task forces oriented toward "low-level drug arrests," and indicated displeasure with this particular allocation of federal funds.²⁷⁸

Earlier oversight efforts on a predecessor to the Byrne Program underline the importance of *local* flexibility and the counterproductive nature of federal mandates. A congressional hearing in 1994 on the Byrne Grants that Congress later combined with another funding stream to assemble the current program

273. See H.R. REP. NO. 110-729, at 2 (2008) ("Nationwide, the Byrne-JAG grant program has resulting in major innovations in crime control, including drug courts, gang prevention strategies, and prisoner re-entry programs, all which provide proven and highly effective crime prevention.").

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

provides a flavor of Congress’s sentiment.²⁷⁹ When the Clinton Administration proposed replacing the Byrne Grant Program with a new program that would reflect federal priorities, Congress pushed back.²⁸⁰ In a hearing called to contest this move, the Chair of the House Subcommittee conducting oversight cast the Byrne Program as consistent with the Clinton Administration’s overall approach, which the Chair described as aiming to “empower communities” through approaches that “respect bottom-up initiatives rather than top-down requirements.”²⁸¹ In his prepared statement, the Chair asked whether the proposed replacement to the Byrne Program would be sufficiently “flexible” to meet local needs.²⁸² Providing an example, the Chair cited the Byrne Grant Program’s role in helping local law enforcement address immigrants’ concerns.²⁸³ According to the Chair, a California county used Byrne funds to hire a “South East Asian Gang suppression officer to work within the Hmong immigrant community.”²⁸⁴ A tailored approach that entailed listening to immigrant communities’ concerns was thus part and parcel of the Byrne Program, per its congressional overseers.

The ranking minority member—a Republican—of the House Subcommittee conducting the 1994 Hearing echoed the Chair’s concerns.²⁸⁵ In a slap at the Clinton Administration’s proposal to replace the Byrne Grant Program with one that was driven more by specific federal priorities, the ranking member cautioned about

279. See generally *Federal Assistance to State and Local Law Enforcement: The Proposed Elimination of the Byrne Block Grant: Hearing Before the Subcomm. on Info., Justice, Transp., & Agric. of the H. Comm. on Gov’t Operations*, 103d Cong. (1994).

280. See *id.* at 2 (statement of Rep. Gary Condit, Chairman, H. Subcomm. on Info., Justice, Transp., & Agric. of the H. Comm. on Gov’t Operations) (explaining that some of the members of the committee had “concerns” about the potential elimination of the Byrne Program).

281. *Id.* at 2.

282. *Id.* at 4.

283. *Id.*

284. *Id.*

285. See *id.* at 5 (statement of Rep. Craig Thomas, Ranking Minority Member, H. Subcomm. on Info., Justice, Transp., & Agric. of the H. Comm. on Gov’t Operations) (stating that “terminating the Byrne formula grant program is not the solution”).

the “one-fits-all pattern” of many federal programs and highlighted the importance of programs that are “flexible enough . . . [to] deal with problems that are unique” at the local level.²⁸⁶ Warming to his theme in a way that reflected the bipartisan nature of support for the Byrne Program’s flexible style, the ranking member assured his audience that “law enforcement folks have a better idea of how these funds can be spent than do people here in Washington.”²⁸⁷ The ranking member described the Byrne Program’s flexibility and ability to let local law enforcement “adjust these funds to meet their changing needs” as “critical.”²⁸⁸

B. Assessing DOJ’s Conditions in Light of the Byrne Program’s History and Purpose

With this background, we can more readily evaluate whether the DOJ’s conditions harmonize with the Byrne Program’s history and logic. The operational view of § 1373 meets this test. Notably, however, virtually every relevant sub-federal entity substantially complies with this narrow reading of § 1373.²⁸⁹ In contrast, both the forty-eight-hour notice and jail space conditions are inconsistent with the Byrne Program’s local focus.

1. Section 1373 Certification

For the reasons stated earlier, an operational view of § 1373 matches the logic and history of the Byrne Program. Tailored to the operational needs of joint task forces investigating gang activity or other concerted lawbreaking, § 1373 honors sub-federal interests in compliance and equity. At the same time, the

286. *Id.*

287. *See id.* (“Our law enforcement officials know what the problems are, and they are telling us that flexibility is the key to combatting violent crime and drug enforcement issues.”).

288. *Id.*

289. *See City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 613 (E.D. Pa. 2017) (“Any lack of strict compliance is *de minimis*, as Philadelphia policies provide no safe harbor nor sanctuary for any criminal alien.”).

operational view ensures baseline coordination, meeting federal needs.

In the main, sub-federal entities already comply with § 1373. For example, California law tracks § 1373’s language, expressly disclaiming any effort to, “prohibit or restrict any governmental entity or official from sending to, or receiving from, federal immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of an individual”²⁹⁰ In addition, California law expressly exempts “[c]onducting enforcement or investigative duties” arising from a joint law enforcement task force, including “sharing . . . confidential information,” as long as the task force’s “primary purpose” is something other than immigration enforcement.²⁹¹ Even outside the task force setting, California law also permits disclosure of release date information, as long as that information is “available to the public.”²⁹² In addition, California cooperates in all respects with federal immigration enforcement regarding transfer of custody of offenders convicted of serious crimes.²⁹³ When immigration officials wish to interview a jail inmate to ascertain whether that individual is a noncitizen who may be removable, California expressly permits this access, although it also ensures that inmates have relevant information about the purpose and consequences of such interviews.²⁹⁴ Most other sub-federal entities make comparable undertakings regarding compliance with § 1373.²⁹⁵

290. S.B. 54, 2017–2018 Leg. Sess. § 7284.6(e) (Cal. 2017).

291. *Id.* § 7284.6(b)(3).

292. *Id.* § 7284.6(a)(1)(C); *see also id.* § 7284.6(a)(1)(D) (authorizing release of personal information, such as home or work address, if that information is “available to the public”).

293. *Id.* § 7282.5(a).

294. *Id.* § 7284.6(b)(5). However, California law bars provision of the regular, dedicated jail space that immigration officials seek and DOJ wishes to require as a condition of receipt of Byrne Program grants. *Id.* § 7284.6(a)(5).

295. *See generally* Jane Chong, *Sanctuary 101, Part II: What is a “Sanctuary Jurisdiction”? Let’s Stop Mystifying the Answer*, LAWFARE (Mar. 14, 2017, 9:00 AM), <https://lawfareblog.com/sanctuary-101-part-ii-what-sanctuary-jurisdiction-lets-stop-mystifying-answer> (last visited Sept. 11, 2018) (on file with the Washington and Lee Law Review).

However, California is not in compliance with the broader view of § 1373 adopted by the DOJ. On this view, § 1373 includes a categorical bar on sub-federal rules limiting disclosure of both release dates and personal information, such as home and work addresses.²⁹⁶ That broader view is problematic for several reasons. First, it stretches the language of the statute, which only protects communications “regarding” immigration status.²⁹⁷ Immigration status is a legal term dependent on judicial and administrative findings in a particular case; it has no inherent relationship to either a suspect’s release date or his or her personal information.²⁹⁸ The statute does not expressly designate such data as information “regarding” immigration status.²⁹⁹ Moreover, the federalism canon outlined earlier would counsel against this broad interpretation.³⁰⁰ The DOJ’s position would unduly intrude on sub-federal entities’ police powers, including their ability to promote compliance by building trust in immigrant communities and ensure equity by limiting officers’ reliance on invidious criteria. Moreover, federal immigration officials already have access to a vast amount of personal information through the NCIC database that sub-federal officers trigger with every arrest.³⁰¹ In addition, sharing release dates for suspects from pre-trial facilities is often impracticable, because release is often contingent on a court setting bail on short notice.³⁰²

In sum, the operational view of § 1373 fits with the Byrne Program. Most sub-federal entities already comply. The broader view advanced by DOJ would adversely affect the compliance and

296. See *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1024 (N.D. Cal. 2018) (addressing the state’s statutory provisions).

297. 8 U.S.C. § 1373 (2012).

298. See *Steinle v. City & Cty. of San Francisco*, 230 F. Supp. 3d 994, 1015 (N.D. Cal. 2017) (“Nothing in 8 U.S.C. § 1373(a) addresses information concerning an inmate’s release date. The statute, by its terms, governs only ‘information regarding the citizenship or immigration status, lawful or unlawful, of any individual.’” (quoting 8 U.S.C. § 1373(a))).

299. *Id.* at 1015–16.

300. See *supra* Part IV.

301. See *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 611 (E.D. Pa. 2017) (noting that ICE “has no need for the City to designate individuals who are subject to a specific release date”).

302. *Id.* at 608.

equity values discussed above. Furthermore, it would give immigration officials little additional usable information.³⁰³

303. In addition to the provisions on law enforcement cooperation described above, California has also enacted laws regulating private employers and authorizing the California Attorney General’s access to records of certain immigration detention facilities. *See* *United States v. California*, 314 F. Supp. 3d 1077, 1092–98 (E.D. Ca. 2018) (describing various California regulations surrounding employer conduct and information access). California’s authorization of Attorney General investigations of facilities run by the private sector or state governmental subdivisions, CAL. GOV’T CODE § 12532(c) (West 2017), is not the kind of “obstacle” that triggers preemption. *Cf.* *Arizona v. United States*, 567 U.S. 387, 399–400 (2012) (discussing the “obstacle” theory of preemption). Nor is a violation of the intergovernmental immunities doctrine under the Constitution’s Supremacy Clause. The California statute does not give the Attorney General the power to preclude such private or governmental units from operating detention facilities. Instead, it merely authorizes access to records. Those records could be useful in serving legitimate state purposes, including determining whether state personnel improperly profiled individuals who ended up in detention. That legitimate state purpose is sufficiently compelling for the measure to survive preemption and intergovernmental immunity analysis. In addition, California has imposed three significant limits on employers, barring voluntary consent to immigration searches, CAL. GOV’T CODE §§ 7285.1, 7285.2 (West 2018); requiring notice to employees of pending federal record checks, CAL. LAB. CODE § 90.2 (West 2018); and barring employers from reverifying employees’ permission to work. *Id.* § 1019.2. Each of these provisions is problematic under preemption doctrine. The consent requirement is an obstacle to enforcement of federal immigration law, because it precludes employers from providing consent, even though federal law imposes no such requirement. Although a district court has found that the notice requirement passes muster, that holding rests on a cramped view of federal law. *United States v. California*, 314 F. Supp. 3d 1077, 1097 (E.D. Ca. 2018). Requiring notice to employees obviously undermines federal enforcement efforts, because employees who have submitted fraudulent identification documents will presumably leave the employer quickly after they have received such notice, rather than remain on the job for a federal investigation that will probably discover their unlawful status. If such out-of-status employees leave prior to a federal search, that will also deprive investigators of one valuable source of evidence regarding employer compliance with federal law. As for the reverification bar, that measure impedes employers from acting on a reasonable suspicion that an employee submitted false documents. *Id.* at 1098. While the California provision has a savings clause that permits reverification when this task is required by federal law, employers may still be confused about their respective liability under state and federal law, leading to a failure to inquire even when such inquiries stem from a reasonable suspicion. *Id.* That disincentive clearly impedes the enforcement of federal law and is thus preempted.

2. Notice Provision

In contrast, the two other DOJ conditions do not fit the Byrne Program's logic or purpose. The initial requirement of forty-eight-hour notice amounts to a kind of detainer mandate. That mandate is unduly onerous, because it may require holding an individual after the person posts bail or charges are dropped.³⁰⁴ Like the Secure Communities program discussed earlier, the forty-eight-hour notice provision would sweep in many petty offenders or those never charged with a crime.³⁰⁵ These results could alienate immigrant communities, drying up cooperation with law enforcement while achieving only minimal improvements in crime prevention. Such consequences would undermine the Byrne Program's goals.

3. Jail Space Program

The same can be said for DOJ's jail space condition. The jail program's primary utility is finding low-level offenders, such as drunk drivers. The Byrne Program's preference for local flexibility is inconsistent with federal mandates on low-level offenders. Here, too, sub-federal entities will pay a compliance price through the increased alienation of immigrant communities whose cooperation is necessary for effective law enforcement. Conditioning receipt of

304. See Eagly, *supra* note 165, at 272 (“[Detainer is] a written request to hold the immigrant for up to forty-eight hours beyond the regular scheduled release from criminal custody (e.g., after posting bond, having a criminal case dismissed, or completing a sentence) so that immigration officials have time to transfer the person into immigration detention.”).

305. See *supra* notes 64–65 and accompanying text. The Attorney General's subsequent change to requiring only notice that is “practicable” does not materially change this analysis. *City of Chicago v. Sessions*, No. 17-C-5720, 2018 U.S. Dist. LEXIS 125575, at *7 (N.D. Ill. July 27, 2018). Admittedly, requiring only notice that is practicable does not impliedly require holding individuals after they have posted bail or sub-federal officials have dropped charges. In this respect, the amended notice condition is less of a burden on the liberty of such individuals and on sub-federal entities, which will not have to foot the bill for additional confinement or find space to hold individuals flagged by federal officials. Nevertheless, *any* notice to federal officials regarding the release of petty offenders or those not charged at all will adversely affect community cooperation with sub-federal law enforcement and hinder accomplishment of the Byrne Program's objectives.

Byrne funds on an award of dedicated jail space for immigration officials would undermine the community-centered approach at the heart of the grant program.

VII. Conclusion

Uncovering reality in the current debate about sanctuary cities is difficult. Rhetoric is a formidable camouflage. Nevertheless, concentrating on the reality can clarify issues that rhetoric obscures.

Unpacking the values of compliance, coordination, and equity is a good start. Armed with those values, we can distinguish between constitutional and statutory analyses of DOJ conditions regarding law enforcement funding. On the constitutional level, a deferential approach is most appropriate. This approach would leave most bargaining about congressionally imposed conditions to political officials, where it belongs. An unduly intrusive judicial role policing Congress’s spending power would impair coordination, as well as the equity values that Congress pursues through nondiscrimination mandates. That structural spillover from immigration to other vital federal purposes would be a cure worse than the disease of current DOJ spending conditions.

Fortunately, a statutory approach provides a better option. This approach would turn on the background appreciation for federalism values that courts regularly attribute to Congress. Against this backdrop, courts should interpret 8 U.S.C. § 1373—the provision at the center of federal/sub-federal disputes—in an operational light. That tailored reading best reconciles coordination, compliance, and equity. In contrast, the DOJ’s broader reading undermines those values, as does its insistence on the notice and jail space conditions. Courts should adopt an operational reading of § 1373. They should disallow the other DOJ conditions as threats to the fabric of our federal system.