

Federal Power over Local Law Enforcement Reform: Legal Issues

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Summary

Several protests around the country regarding police use of force and a perceived lack of accountability for law enforcement officers have sparked a discussion about local law enforcement and judicial practices. In response, several Members of Congress have formulated a number of proposals designed to promote accountability and deter discrimination at the state and local levels. However, because the enforcement of criminal law is primarily the responsibility of state and local governments, the imposition of federal restrictions on such entities raises important constitutional issues: namely, the extent to which the Constitution permits the federal government to regulate the actions of state and local officers. Proposals include imposing restrictions on the receipt of federal funds as well as banning certain practices independently of a tether to federal money.

The federal government possesses limited powers. Current proposals to address local law enforcement issues at the federal level must be enacted consistent with a constitutionally enumerated power or powers supplemented by the Necessary and Proper Clause; otherwise such authority is reserved to the states. At least three constitutional provisions are often invoked to regulate state and local government under current federal laws and are likely to be relied upon by some of the current proposals.

Legislation that ties conditions to the receipt of federal funds, such as H.R. 1680, H.R. 429, and S. 1056, would likely be supported by Congress's power under the Spending Clause to provide for the general welfare. Pursuant to this authority, Congress may disperse funds to states contingent on compliance with specific conditions. These can include the adoption of policies that Congress could not otherwise directly impose on states. Conditions attached to the receipt of federal funds that regulate state and local governments must be unambiguous; relate to the federal interest in particular programs; not be barred by another constitutional provision; and not be so coercive as to compel states into participation.

In contrast, federal proposals that impose restrictions on state and local governments without a connection to federal money, such as H.R. 1933 and H.R. 2052, might be supported pursuant to the Commerce Clause or under Section 5 of the Fourteenth Amendment. Congress possesses the power to regulate foreign and interstate commerce. This includes the regulation of the channels and instrumentalities of interstate commerce, as well as activities that have a substantial relation to interstate commerce. Congressional proposals to regulate local governments passed pursuant to this power must likely be directed at economic activity that has a substantial relation to interstate commerce or be limited in application to regulating the channels or instrumentalities of interstate commerce.

Congress also possesses power to enforce the provisions of the Fourteenth Amendment and may enact "prophylactic legislation" intended to deter violations by proscribing a broader scope of conduct than barred by the Constitution. However, such legislation must be congruent and proportional to the injury to be remedied. In order to support legislation imposing restrictions on local law enforcement under this authority, Congress must likely show a widespread history of violations of the constitutional right to be protected.

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Introduction

Several protests around the country regarding the actions of local law enforcement officers have sparked a discussion about local law enforcement and judicial practices.¹ Concerns involve a variety of issues, including law enforcement tactics such as chokeholds and the use of military-style equipment. For example, in Staten Island, NY, Eric Garner died after a confrontation with police where an officer placed him in a chokehold.² In Baltimore, MD, Freddie Gray suffered a spinal cord injury in police custody and died soon thereafter.³ And the police response to protests in Ferguson, MO, included the use of armored vehicles, bulletproof vests, and military-type rifles.⁴ In addition, some have criticized the relationship between prosecutors and police departments as potentially biased, noting the seemingly low rate of prosecutions of law enforcement officers for crimes of violence.⁵ For example, in Ferguson, a grand jury declined to indict the police officer responsible for the shooting death of Michael Brown;⁶ and in Staten Island, a grand jury decided not to bring charges against the police officer who placed Eric Garner in a chokehold.⁷

Further, the enforcement of civil and criminal laws for revenue-generating purposes has received criticism for compromising the integrity of the judicial process.⁸ For example, a Department of Justice (DOJ) investigation into the Ferguson police department and municipal court found that city officials pressured the police department to maximize revenue in its code enforcement strategies and that this focus on revenue collection compromised the integrity of the city's municipal court, which used its authority to "advance the City's financial interests."⁹ Potentially

¹ See CRS Report R43904, *Public Trust and Law Enforcement—A Brief Discussion for Policy Makers*, coordinated by (name redacted).

² Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, NYTimes.com July 18, 2014, <http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html>; Al Baker & J. David Goodman, *Despite Scrutiny, Police Chokeholds Persist in New York City*, NYTimes.com, <http://www.nytimes.com/2015/01/13/nyregion/police-keep-using-chokeholds-despite-bans-and-scrutiny.html>.

³ Kevin Rector, *Prosecutors Ask Court to Limit Release of Freddie Gray Evidence—Or Post it All Online*, Baltimoresun.com, June 16, 2015, <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-mosby-protective-order-20150616-story.html#page=1>.

⁴ Thomas Gibbons-Neff, *Military Veterans See Deeply Flawed Police Response in Ferguson*, washingtonpost.com, Aug. 14, 2014, <http://www.washingtonpost.com/news/checkpoint/wp/2014/08/14/military-veterans-see-deeply-flawed-police-response-in-ferguson/>.

⁵ See e.g., Paul Cassell, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy*, The Volokh Conspiracy, washingtonpost.com, December 5, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy/>.

⁶ Eyder Peralta & Krishnadev Calamur, *Ferguson Documents: How the Grand Jury Reached a Decision*, Nov. 25, 2014, NPR.com, <http://www.npr.org/sections/thetwo-way/2014/11/25/366507379/ferguson-docs-how-the-grand-jury-reached-a-decision>.

⁷ Tom Hays & Colleen Long, *Protests Erupt as Cop Cleared; Feds to Investigate*, AP.com, Dec. 4, 2014, <http://bigstory.ap.org/article/03346b7a74b44124bbccda2d3d5abd67/lawyer-no-indictment-officer-nyc-chokehold-death>.

⁸ See, e.g., Radley Balko, *How Municipalities in St. Louis County, Mo., Profit From Poverty*, washingtonpost.com, Sept. 3, 2014, <http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>.

⁹ U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department 2-3*, Mar. 4, 2015, (continued...)

animating each of these issues is a concern that such practices effectively result in discrimination against the poor or minority groups.¹⁰

In response, several Members of Congress have formulated a number of proposals designed to promote accountability and deter discrimination by state and local law enforcement and judicial officers. However, because the “[s]tates possess primary authority for defining and enforcing criminal law,”¹¹ the imposition of federal restrictions on such entities raises important constitutional issues: namely, the extent to which the Constitution permits the federal government to regulate the actions of state and local law enforcement and judicial officers. This report will examine several constitutional principles relevant to this issue and apply them to the various legislative proposals. Before doing so, this report will first briefly survey current federal law that applies to local and state law enforcement agencies and the various types of proposals.

Federal Laws Regulating the Conduct of Local Law Enforcement

Current Provisions

As a baseline, the Constitution constrains the behavior of local law enforcement and judicial officers by protecting individual rights in a number of ways. Most provisions of the Bill of Rights are considered by the Supreme Court to be “incorporated” in the Due Process Clause of the Fourteenth Amendment and are thus applicable to the states.¹² For example the following provisions are all applicable to state and local governments:

- the Fourth Amendment’s protection against unreasonable searches and seizures;¹³
- the Fifth Amendment’s protection from being forced to produce evidence against oneself;¹⁴
- the Sixth Amendment’s requirements that criminal trials be conducted before an impartial jury and that defendants have an opportunity to confront witnesses against them and be afforded assistance of counsel if the potential sentence includes imprisonment;¹⁵ and

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available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

¹⁰ See, e.g., Matt Apuzzo, Ferguson Police Routinely Violate Rights of Blacks, Justice Department Finds, NYTimes.com, Mar. 3, 2015, <http://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html>.

¹¹ *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

¹² See *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).

¹³ U.S. CONST. amend IV; see *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁴ U.S. CONST. amend V; see *Malloy v. Hogan*, 378 U.S. 1 (1964).

¹⁵ U.S. CONST. amend VI; see *Irvin v. Dowd*, 366 U.S. 717 (1961) (impartial jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (assistance of counsel).

- the Eighth Amendment’s prohibition of excessive bail and cruel and unusual punishment.¹⁶

Otherwise, many of the rules and regulations governing local enforcement and judicial officers derive from state and local laws. While the U.S. Constitution imposes a “floor” of minimum constitutional rights, state constitutions and laws can impose greater procedural restrictions on police than are required under the U.S. Constitution.¹⁷ However, the federal government does play a role in regulating local police behavior in several areas. First, the federal government operates various spending and grant programs that provide money to local governments and police forces and condition receipt of those funds on compliance with certain requirements.¹⁸ For example, the Community Oriented Policing Statute (COPS) provides the Attorney General with authority to distribute grants to state and local governments to hire officers for community-oriented policing and to purchase equipment and provide training.¹⁹ Similarly, the Edward Byrne Memorial Justice Assistance Grant (JAG) program awards funds to state and local governments to assist in combating crime.²⁰ This funding is distributed according to a formula based on a state’s incidence of violent crime and total population.²¹ The funding can be used for a number of purposes, including law enforcement, prosecution and court programs, and prevention and education programs.²²

Law enforcement agencies that receive funding under the JAG program are barred from discriminating on the basis of race, religion, and sex in employment practices or in connection with any program or activity funded in part or in whole by these funds. Aggrieved persons may pursue private rights of action to enforce these provisions after exhausting administrative remedies and the Attorney General may bring a civil action in federal court if a state or local government receiving funds engages in a pattern or practice of violations of these provisions.²³ Under both the JAG and COPS programs, the federal government can enforce these requirements by revoking funding when the relevant conditions are not satisfied²⁴ and may bring criminal charges against agents of state or local governments involved in bribery if the relevant government entity receives more than \$10,000 of federal funds.²⁵ Further, the Death in Custody

¹⁶ U.S. CONST. amend VIII; see *Robinson v. California*, 370 U.S. 660 (1962).

¹⁷ *People v. Torres*, 74 N.Y.2d 224, 228, 543 N.E.2d 61 (NY. Ct. Appeals 1989) (“this court has demonstrated its willingness to adopt more protective standards under the State Constitution” than are provided by the U.S. Constitution).

¹⁸ See Rachel Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870 (2015); Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012).

¹⁹ See 42 U.S.C. § 3796dd. The program has distributed over \$14 billion and has contributed to the hiring of more than 125,000 officers. See U.S. Department of Justice, Community Oriented Policing Services Office, About Community Oriented Policing Services Office, <http://www.cops.usdoj.gov/Default.asp?Item=2459>.

²⁰ See Violence Against Women and Department of Justice Reauthorization Act of 2005, P.L. 109-162.

²¹ See CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, by (name redacted).

²² 42 U.S.C. § 3751(a).

²³ 42 U.S.C. § 3789d.

²⁴ 42 U.S.C. §§ 3789d, 3796dd.

²⁵ See 18 U.S.C. § 666, 42 U.S.C. § 3789d; *Porter v. Wegman*, No. 1:10-CV-01500-LJO, 2013 WL 1966537, at *7 (E.D. Cal. May 13, 2013) report and recommendation adopted, No. 1:10CV01500 LJO DLB, 2013 WL 3786463 (E.D. Cal. July 18, 2013). The Constitution also bars federal funding of unconstitutional discrimination. See *Nat’l Black Police Ass’n, Inc. v. Velde*, 712 F.2d 569, 582 (D.C. Cir. 1983) (“[T]he equal protection principles embodied in the fifth amendment only prohibit federal funding of unconstitutional discrimination. Statutory and regulatory schemes may prohibit various forms of discrimination that are not constitutionally prohibited.”).

Reporting Act, signed into law in December 2014, conditions certain federal grants on states reporting to the Attorney General concerning deaths of individuals in police custody.²⁶

Similarly, Title VI of the Civil Rights Act prohibits racial discrimination in programs and activities that receive federal financial assistance.²⁷ Agencies can monitor recipients to ensure compliance and terminate funding for violations. In addition, private individuals can bring suit to enforce the statute's provisions.²⁸

Second, the federal government is authorized to bring criminal charges against any person who, "under color of any law," deprives a person of "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."²⁹ For example, the DOJ may bring a criminal charge against a local law enforcement officer who willfully uses excessive force in violation of the Fourth Amendment.³⁰

In addition to criminal liability for police officers who deprive individuals of their civil rights, the federal government may initiate a suit for injunctive relief against state and local law enforcement agencies for a pattern or practice of conduct that deprives individuals of their constitutional rights.³¹ The DOJ has done so on a number of occasions and has entered into consent decrees that require the agency to change its practices and procedures.³² For example, in 1999, the DOJ entered into a decree with the New Jersey state police that barred state troopers from relying on race or national origin in selecting individuals for routine traffic stops, required a supervisory review program of improper police conduct, and mandated the development of a management awareness program to monitor police behavior.³³ The court retained control over the case until substantial compliance with the terms of the decree was shown for at least two years. The consent decree was dissolved by the federal district court in September 2009.³⁴

²⁶ See P.L. 113-242. In addition, The Violent Crime Control and Law Enforcement Act of 1994 required the Attorney General to collect data on "the use of excessive force by law enforcement officers" and publish the findings. Violent Crime Control and Law Enforcement Act of 1994 § 210402. However, it appears that the DOJ has never received appropriated funds to do so. See Interim Report of the President's Task Force on 21st Century Policing 19 (2015).

²⁷ 42 U.S.C. § 2000d.

²⁸ See *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (noting that "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-709 (1979) ("Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy.").

²⁹ See 18 U.S.C. § 242; *Screws v. United States*, 325 U.S. 91, 93 (1945). 18 U.S.C. § 241 criminalizes conspiracy "to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

³⁰ See, e.g., *United States v. Cossette*, 593 F. App'x 28, 30 (2d Cir. 2014); *United States v. Johnstone*, 107 F.3d 200, 205, 208-09 (3d Cir. 1997) (articulating the "Fourth Amendment reasonableness standard govern[ing] claims of excessive force during arrest" and noting that "it is enough to trigger § 242 liability if it can be proved—by circumstantial evidence or otherwise—that a defendant exhibited reckless disregard for a constitutional or federal right.").

³¹ See 42 U.S.C. § 14141.

³² See U.S. Department of Justice, Civil Rights Division, Conduct of Law Enforcement Agencies, <http://www.justice.gov/crt/about/spl/police.php>.

³³ See Consent Decree, *United States v. State of New Jersey*, No. 99-5970 (D.N.J. Dec. 30, 1999) available at <http://www.justice.gov/crt/about/spl/documents/jerseysa.php>.

³⁴ See *State of New Jersey*, Office of the Attorney General, State Police Racial Profiling Consent Decree Dissolved, Sept. 21, 2009, <http://www.nj.gov/oag/newsreleases09/pr20090921a.html>.

Finally, both local and state law enforcement officers as well as municipalities and local governments are potentially subject to civil liability—including damages and injunctive relief—from private individuals deprived of their rights under the Constitution or federal law.³⁵ The extent of this liability, however, can be somewhat limited. Municipalities are liable only for “their own illegal acts,”³⁶ not the acts of their employees.³⁷ Plaintiffs must show that “action pursuant to official municipal policy” caused the constitutional injury,³⁸ such as where “the action that is alleged to be unconstitutional implements ... a policy ... officially adopted and promulgated by that body’s officers,”³⁹ or pursuant to “practices so persistent and widespread as to practically have the force of law.”⁴⁰ Likewise, individual liability can be difficult to establish, as “[q]ualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.”⁴¹

Proposals to Amend Federal Law

Following the recent focus on local law enforcement and judicial practices, a variety of potential changes to federal law have been proposed aimed at remedying police misconduct. Many proposals condition the receipt of federal funds by local law enforcement agencies on the adoption of certain policies, for example by

- establishing a federal grant program providing funds for local law enforcement agencies to acquire body-worn cameras;⁴²
- promoting the use of special prosecutors in cases of police-related shootings or fatalities by requiring recipient of federal funds to establish procedures to appoint them;⁴³
- directing law enforcement agencies that receive federal funds to conduct racial bias training for employees.⁴⁴

³⁵ 42 U.S.C. § 1983; *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (“Section 1983 by its terms confers authority to grant equitable relief as well as damages.”).

³⁶ *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986) (citing *Monell*, 436 U.S. at 665–83) (emphasis in original).

³⁷ *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011).

³⁸ *Monell v. New York City Department of Social Services*, 436 U.S. 658, 692 (1978).

³⁹ *Id.* at 690.

⁴⁰ *Connick*, 131 S. Ct. at 1359; *see also* *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989) (holding that a municipality’s failure to train its officers may be sufficient to constitute liability only when “the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact”).

⁴¹ *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

⁴² Police CAMERA Act, H.R. 1680; S. 877 114th Cong. (2015).

⁴³ Grand Jury Reform Act of 2015, H.R. 429, 114th Cong. (2015). The act conditions receipt of funds under the JAG program on compliance with its provisions.

⁴⁴ POST Act of 2015, H.R. 1065, 114th Cong. (2015). Failure to comply will result in the “not more than a 20-percent reduction of the funds that would otherwise be allocated for that fiscal year to the State under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3750 *et seq.*), whether characterized as the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs, the Local Government Law Enforcement Block Grants Program, the Edward Byrne Memorial Justice Assistance Grant Program, or otherwise.”

- providing that law enforcement officers in agencies that receive federal funds who engage in conduct constituting a crime of violence be punished for the offense under federal law;⁴⁵
- conditioning the receipt of federal funds by local law enforcement agencies on the adoption of policies that prohibit racial profiling;⁴⁶
- ending the receipt by local law enforcement of military-type weapons and equipment;⁴⁷ and
- authorizing the formation of task forces to deter discrimination in local law enforcement agencies.⁴⁸

Another category of proposals would impose requirements on local law enforcement units without a connection to federal funds. These include

- making the enforcement of criminal and civil laws for the purpose of raising revenue a civil rights violation;⁴⁹
- prohibiting racial profiling by law enforcement agents (enforceable by declaratory or injunctive relief);⁵⁰ and
- designating the use of chokeholds as a civil rights violation.⁵¹

Constitutional Limits on Congress's Power

Federalism and Enumerated Powers

The federal government possesses only limited powers. The Constitution, “rather than granting general authority to perform all the conceivable functions of government, ... enumerates ... the Federal Government’s powers.”⁵² These specific authorities encompass a variety of areas. For example, Congress has the power to collect taxes,⁵³ to regulate foreign and interstate commerce,⁵⁴ and to declare war.⁵⁵ When the federal government is not given power over an area, however, it lacks authority to act.⁵⁶ In contrast, states do not need constitutional authorization to take action.⁵⁷

⁴⁵ Police Accountability Act of 2015, H.R. 1102, 114th Cong. (2015). The act applies this provision to any public agency that receives funds under the JAG program.

⁴⁶ End Racial Profiling Act of 2015, H.R. 1933, § 301, S. 1056, 114th Cong. (2015).

⁴⁷ Stop Militarizing Law Enforcement Act, H.R. 1232, 114th Cong. (2015).

⁴⁸ Local Task Forces on 21st Century Policing Act of 2015, H.R. 2180, 114th Cong. (2015).

⁴⁹ Congressman Cleaver Announces Introduction of the Fair Justice Act, Press Release, Congressman Emanuel Cleaver, II (Mar. 9, 2015).

⁵⁰ End Racial Profiling Act of 2015, H.R. 1933, §101, 102, S. 1056, 114th Cong. (2015).

⁵¹ Excessive Use of Force Prevention Act of 2015, H.R. 2052, 114th Cong. (2015).

⁵² *National Federation of Independent Businesses v. Sebelius* (NFIB), 132 S. Ct. 2566, 2577 (2012).

⁵³ U.S. CONST., Art. I, § 8, cl. 1.

⁵⁴ U.S. CONST., Art. I, § 8, cl. 3.

⁵⁵ U.S. CONST., Art. I, § 8, cl. 11.

⁵⁶ See *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 405 (1819) (The federal government may “exercise only the powers granted to it”).

The Tenth Amendment provides that those powers not granted to the federal government are thus reserved to the states and the people.⁵⁸ States possess a “general power of governing,” often referred to as the “police power,” which enables them to accomplish many of the incidents of local government, such as regulating property relations, operating police forces, and establishing public schools.⁵⁹

Nevertheless, while the federal government is one of enumerated powers, the Constitution also bestows upon Congress authority to “make all Laws which shall be necessary and proper” to carry out those enumerated powers.⁶⁰ While not an independent source of authority,⁶¹ the Supreme Court has interpreted the Necessary and Proper Clause to “make[] clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’”⁶² When examining whether the clause permits Congress to enact a statute, the Court does not require the provision to be “absolutely necessary” to the exercise of an enumerated power;⁶³ instead, the Court asks “whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”⁶⁴

Consequently, Congress may, for example, “enact criminal laws in furtherance of ... its enumerated powers;”⁶⁵ and may “toll limitations periods for state-law claims brought in state court” in furtherance of its power to establish the lower federal courts and ensure that those courts “fairly and efficiently exercise ‘[t]he judicial Power of the United States.’”⁶⁶ However, the Supreme Court has also “carried out [its] responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution” as those laws are not “proper” legislation under the clause.⁶⁷ In other words, the Necessary and Proper Clause does not grant Congress authority to violate other constitutional principles.⁶⁸

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⁵⁷ *NFIB*, 132 S. Ct. at 2578.

⁵⁸ See U.S. CONST., X amend.

⁵⁹ *NFIB*, 132 S. Ct. at 2578.

⁶⁰ U.S. CONST., art. I, § 8, cl. 18.

⁶¹ *NFIB*, 132 S. Ct. 2566, 2591 (2012) (“Although the Clause gives Congress authority to ‘legislate on that vast mass of incidental powers which must be involved in the constitution,’ it does not license the exercise of any ‘great substantive and independent power[s]’ beyond those specifically enumerated.”) (quoting *McCulloch*, 4 Wheat. at 411, 421).

⁶² *United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (quoting *McCulloch*, 4 Wheat. (17 U.S.) at 321).

⁶³ *McCulloch*, 4 Wheat. (17 U.S.) at 413-415; *Jinks v. Richland County*, 538 U.S. 456, 462 (2003) (“[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be ‘*absolutely necessary*’ to the exercise of an enumerated power.”) (italics in original) (quotation marks removed).

⁶⁴ *Comstock*, 560 U.S. at 134; *McCulloch*, 4 Wheat. (17 U.S.) at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

⁶⁵ *Comstock*, 560 U.S. at 136.

⁶⁶ *Jinks*, 538 U.S. at 462 (quoting U.S. CONST., Art. III, § 1.)

⁶⁷ *NFIB*, 132 S. Ct. at 2591-92 (quoting *Printz v. United States*, 521 U.S. 898, 924 (1997)).

⁶⁸ See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 173 (1992).

One important limit on Congress's power is reflected in the Tenth Amendment. In general, Congress may not "commandeer" state governments, either by forcing them to enact certain laws⁶⁹ or by compelling state officials to implement federal legislation.⁷⁰

Pursuant to these foundational guidelines, current proposals to address local law enforcement issues at the federal level must be enacted consistent with a constitutionally enumerated power or powers supplemented by the Necessary and Proper Clause; otherwise such authority is reserved to the states. At least three constitutional provisions are likely to be relied upon for support by some of the current proposals, as they are often invoked to support similar provisions in current federal law.

Spending Power

Congress's Authority to Spend

The Constitution grants Congress power under the Spending Clause to provide for the "general Welfare."⁷¹ Pursuant to this authority, Congress may disperse funds to states contingent on compliance with specific conditions.⁷² For example, Title VI of the Civil Rights Act of 1964 bars discriminating on the basis of race, color, or national origin in any program or activity that receives federal funds.⁷³ Failure to comply with these conditions can result in a termination of funds.⁷⁴ In addition to enforcement conducted by federal agencies or the DOJ, Spending Clause legislation can also authorize private rights of action to enforce the terms of the statute,⁷⁵ including authorizing "private parties to seek monetary damages for intentional violations" of the underlying discrimination condition.⁷⁶ However, conditions imposed on federal funds do not, standing alone, necessarily create a private right of action to enforce those terms.⁷⁷ Congress must indicate its intention to do so in the underlying statute.⁷⁸

⁶⁹ See *New York v. United States*, 505 U.S. 144, 173 (1992).

⁷⁰ See *Printz*, 521 U.S. at 935 (1997).

⁷¹ U.S. CONST., Art. I, § 8, cl. 1.

⁷² See *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999).

⁷³ See 42 U.S.C. § 2000d; see also § 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794 (barring disability discrimination by recipients of federal funds); Title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681 et. seq. (barring sex discrimination by recipients of federal funds); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979) (finding that Title IX implicitly authorized a private cause of action); 42 U.S.C. §§6101 et seq. (barring age discrimination by recipients of federal funds).

⁷⁴ 42 U.S.C. § 2000d-1. Federal agencies may monitor recipients for compliance and terminate funding when appropriate. In addition, the DOJ may file suit in federal court on behalf of an agency. See *Nat'l Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983) ("Title VI clearly tolerates other enforcement schemes. Prominent among these other means of enforcement is referral of cases to the Attorney General, who may bring an action against the recipient."). If a suit for injunctive relief is filed, federal court may order the termination of funds. *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039 (5th Cir. 1984).

⁷⁵ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

⁷⁶ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005).

⁷⁷ See *id.* at 184-85 (Thomas, J., dissenting) (noting that "in cases in which a party asserts that a cause of action should be implied, we require that the statute itself evince a plain intent to provide such a cause of action").

⁷⁸ See *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001).

Congress may also, pursuant to the Necessary and Proper Clause, enact legislation to ensure that federal funds distributed to the states are properly directed toward the general welfare.⁷⁹ Section 666 of Title 18 imposes federal criminal penalties on bribery and the acceptance of bribes by officials of state and local governments that receive in excess of \$10,000 per year in federal funds.⁸⁰ In *Sabri v. U.S.*, the Supreme Court upheld the statute as a valid exercise of Congress's authority under the Spending and Necessary and Proper Clauses and rejected the contention that there must be a connection between the bribe and federal funds.⁸¹ Because of the "fungible" character of money, the Court explained, "corruption does not have to be that limited to affect the federal interest."⁸² In other words, the federal government may bring a criminal charge under the statute even if the bribe does not specifically concern a program that receives federal funds.

These conditions can include the adoption of policies that Congress could not otherwise directly impose on states. For example, the Supreme Court upheld provisions of the Hatch Act that barred local and state employees whose position was financed by federal funds from engaging in partisan political activity.⁸³ The Court explained that "[w]hile the United States is not concerned with and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed."⁸⁴ Put another way, via Spending Clause legislation, Congress may indirectly achieve objectives it would otherwise lack authority to pursue under its constitutionally enumerated powers.

Limits on the Spending Power

This power is not unlimited, however. The Court in *South Dakota v. Dole* delineated several restrictions on its use.⁸⁵ Spending power legislation must be directed to the "general welfare," and conditions attached to the receipt of federal funds must be (1) "unambiguous[]" as to the "consequences of [a state's] participation,"⁸⁶ (2) related "to the federal interest in particular national projects or programs,"⁸⁷ and (3) not barred by a separate constitutional provision.⁸⁸

The Court has made clear that "courts should defer substantially to the judgment of Congress" when determining if spending power legislation is properly directed to the general welfare.⁸⁹ Whether Spending Clause legislation imposes "unambiguous" requirements appears to arise

⁷⁹ See *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947) (upholding an order to withhold specific federal funds from the state unless a state official was removed); *United States v. City of Los Angeles*, 595 F.2d 1386 (1979) (upholding termination of funds for the Los Angeles Police Department when the Department refused to abandon certain racially discriminatory practices).

⁸⁰ 18 U.S.C. § 666.

⁸¹ See *Sabri v. U.S.*, 541 U.S. 600, 604-06 (2004).

⁸² See *id.* at 606.

⁸³ See *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947).

⁸⁴ *Id.* at 143.

⁸⁵ *South Dakota v. Dole*, 483 U.S. 203, 205-08 (1987).

⁸⁶ *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

⁸⁷ *Id.* at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 460 (1978)).

⁸⁸ *Dole*, 483 U.S. at 207-08.

⁸⁹ *Dole*, 483 U.S. at 207; see Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How A Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 464 (2003) ("The courts (and thus most litigants) have consistently viewed the first, 'general welfare,' prong as a complete throw away, consistent with the *Dole* Court's own description.").

primarily in two different legal postures. First, when private parties seek monetary damages from states for violations of conditions imposed on federal funds, the Court requires the state to have “adequate notice that they could be liable for the conduct at issue.”⁹⁰ Describing conditions on federal funds as a “contract” between the states and federal government, the Court has made clear that Congress’s power to impose conditions on states “rests on whether the State knowingly and voluntarily accepts” those terms.⁹¹ The Court has required “clear notice regarding the liability at issue” for Spending Clause legislation to authorize such suits.⁹² For example, the Developmentally Disabled Assistance and Bill of Rights Act of 1975 conditions funding for states to care for the developmentally disabled on several requirements.⁹³ In *Pennhurst State School and Hospital v. Halderman*, the Court rejected the notion that the statute’s “bill of rights” section created enforceable legal obligations on the states.⁹⁴ In reviewing that statute, the Court noted that while the act contains several explicit conditions in various sections, the bill of rights provision lacks such language.⁹⁵ In addition, the bill of rights’ language urging that treatment of the mentally disabled should occur in the “least restrictive” setting is, at least for the Court, “largely indeterminate.”⁹⁶ As a result, under *Pennhurst*, the Court generally requires conditions on state grants to be made in unambiguous terms; vague terms do not suffice.

Second, states themselves may challenge the conditions imposed on the receipt of federal funds⁹⁷ or penalties for non-compliance.⁹⁸ However, while the Court has required “clear notice” to impose conditions such as affirmative obligation on states,⁹⁹ it is unclear whether that requirement applies to determining the remedies available to the federal government when addressing state non-compliance.¹⁰⁰ In other words, whether the acceptance of federal money

⁹⁰ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005) (quoting *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999)). Whether such suits are authorized is further complicated by Eleventh Amendment Sovereign Immunity, which serves as a bar against suits against state governments by private parties absent their consent. U.S. CONST. amend. XI. Private damages actions against states must often clear this constitutional barrier to prevail. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 492 (4th Cir. 2005) (examining whether a state validly waived Eleventh Amendment immunity when it accepted federal funds).

⁹¹ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981).

⁹² *See Arlington Cent. School Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (holding that the Individuals with Disabilities Education Act does not unambiguously authorize parents prevailing in lawsuits under the act to recover fees for services rendered by experts).

⁹³ Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001 et seq.

⁹⁴ *Pennhurst*, 451 U.S. at 5.

⁹⁵ *Id.* at 22-23.

⁹⁶ *Id.* at 24-25.

⁹⁷ *Hodges v. Thompson*, 311 F.3d 316, 317 (4th Cir. 2002) (“South Carolina challenges the district court finding that Congress acted within its Spending Clause authority when it conditioned States’ receipt of federal funds under the child support enforcement program and the TANF program on compliance with the requirement that States develop and maintain automated child support enforcement systems and that such a condition was not so coercive as to violate the Tenth Amendment.”).

⁹⁸ *See Bell v. New Jersey*, 461 U.S. 773, 775 (1983) (“We hold that the Federal Government may recover misused funds, that the Department of Education may determine administratively the amount of the debt, and that the State may seek judicial review of the agency’s determination.”).

⁹⁹ *See supra* note 91.

¹⁰⁰ *See Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983) (“Moreover, *Pennhurst* arose in the context of imposing an unexpected condition for compliance—a new obligation for participating States—while here our concern is with the remedies available against a noncomplying State.”); *Arlington*, 548 U.S. at 305 (Ginsburg, J., concurring, arguing that while the clear notice requirement applies when courts examine “the educational programs IDEA directs school districts to provide,” it does not apply when courts look to “the remedies available against a noncomplying [district]”) (quoting *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983)).

imposes a particular condition upon a state may be analytically distinct from the federal government's enforcement options for state non-compliance with those conditions.

In addition, the Court has permitted conditions on the receipt of federal funds that are not strictly restrictions on the use of those funds. For example, in *South Dakota v. Dole*, the Court upheld legislation requiring states to raise their legal drinking age or lose 5% of federal highway funds.¹⁰¹ The Court ruled that although the “condition was not a restriction on how the highway funds ... were to be used,”¹⁰² the condition was permissible because it was “directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”¹⁰³ Nevertheless, Spending Clause legislation may not be used “to induce the States to engage in activities that would themselves be unconstitutional,” such as requiring states to engage in discrimination based on race.¹⁰⁴

In addition to *Dole*'s restrictions on the conditions attached to federal funds, all Spending Clause legislation must also comport with the Tenth Amendment.¹⁰⁵ As mentioned above, Congress may not “commandeer” state governments, either by forcing them to enact certain laws¹⁰⁶ or by compelling state officials to implement federal legislation.¹⁰⁷ Spending Clause legislation that coerces states into participation in a federal program can violate these principles.¹⁰⁸ The Court in *Dole* also noted that in certain situations “the financial inducements offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”¹⁰⁹ However, the Court described the threat of losing 5% of a state's federal highway funds as “relatively mild encouragement” which preserved a state's freedom to decline.¹¹⁰

In contrast, in *National Federation of Independent Businesses v. Sebelius (NFIB)*,¹¹¹ the Court, in a fractured opinion, invalidated provisions of the Patient Protection and Affordable Care Act of 2010 that required states to expand their Medicaid programs or risk losing their current Medicaid

¹⁰¹ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

¹⁰² *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (describing *Dole*, 483 U.S. at 208).

¹⁰³ *Id.* (quoting *Dole*, 483 U.S. at 208) (quotations omitted).

¹⁰⁴ *Dole*, 483 U.S. at 210; see also *U.S. v. American Library Ass'n, Inc.*, 539 U.S. 194, 214 (2003) (holding that the Children's Internet Protection Act, which requires public libraries that receive federal funds to install Internet filtering software, did not induce libraries to violate the First Amendment).

¹⁰⁵ See *Dole*, 483 U.S. at 210 (“The ‘independent constitutional bar’ limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”). *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000) (noting that “[t]he Tenth Amendment itself does not act as a constitutional bar; rather, th[is] restriction stands for the more general proposition that Congress may not induce the states to engage in activities that would themselves be unconstitutional” and concluding that the coercion theory is an analytically distinct limit from the other *Dole* restrictions on funding conditions). Accord *James Island Pub. Serv. Dist. v. City of Charleston*, S. Carolina, 249 F.3d 323, 327 (4th Cir. 2001).

¹⁰⁶ See *New York v. United States*, 505 U.S. 144, 173 (1992).

¹⁰⁷ See *Printz v. United States*, 521 U.S. 898, 935 (1997).

¹⁰⁸ See *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2602-03 (2012).

¹⁰⁹ See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹¹⁰ *Id.*

¹¹¹ *NFIB*, 132 S. Ct. at 2566.

funding.¹¹² The Court rejected the argument that the new conditions were simply permissible modifications of the existing program, noting that the Medicaid expansion “accomplishes a shift in kind, not merely degree.”¹¹³ Pointing to the requirement that conditions on funds must be unambiguous, the Court held that states could not be expected to anticipate that amending Medicaid “included the power to transform it so dramatically.”¹¹⁴ The Court held that conditions on federal funds in “the form of threats to terminate other significant independent grants ... are properly viewed as a means of pressuring the States to accept policy changes.”¹¹⁵ While the threatened loss of funds in *Dole* preserved the states’ voluntary choice, the threat of losing “over 10 percent of a State’s overall budget ... is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”¹¹⁶ The Court characterized this condition as a “gun to the head” that left states without the freedom to decline.¹¹⁷

Proposals to Regulate Local Law Enforcement via Conditions on Federal Funds

As mentioned above, there are a number of proposals to regulate local law enforcement entities by attaching conditions on the receipt of federal funds. Because *Dole*’s requirement that funds be directed to the “general welfare” is substantially deferential to Congress,¹¹⁸ and conditioning the receipt of particular funds via restrictions on the use of the funds themselves likely satisfies the requirement that conditions be related “to the federal interest in particular national projects,”¹¹⁹ several of these proposals are unlikely to raise concerns regarding Congress’s use of its Spending Clause power. For example, providing new funds for local law enforcement entities to purchase body-worn cameras, without a concomitant threat to eliminate some other funding stream, is unlikely to risk undue coercion of the states.¹²⁰ Likewise, authorizing the establishment of task

¹¹² Patient Protection and Affordable Care Act, 124 Stat. 119 (2010). The Court permitted states to voluntarily to participate in the program. Before passage of the act, Medicaid required states to cover only specific categories of the needy; the act, however, required states to extend coverage to all individuals under 65 whose incomes fall below 133% of the poverty line or risk losing all their existing Medicaid funding. *NFIB*, 132 S. Ct. at 2601.

¹¹³ *NFIB*, 132 S. Ct. at 2605.

¹¹⁴ *Id.* at 2606.

¹¹⁵ *Id.* at 2604. Seven justices voted to invalidate the provision of the law that required states to expand their Medicaid programs or lose current Medicaid funding. See *NFIB*, 132 S. Ct. at 2667-68 (“Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional. See Part IV–A to IV–E, *supra*; Part IV–A, *ante*, at 2598 – 2607 (opinion of ROBERTS, C.J., joined by BREYER and KAGAN, JJ.).”). A different group of justices agreed that this provision was severable and the Medicaid expansion was permissible on a voluntary basis. See *NFIB*, 132 S. Ct. at 2607-08 (opinion of Roberts, C.J.) (joined by Breyer, J., and Kagan, J.); *id.* at 2630-31 (Ginsburg, J., joined by Sotomayor, J., concurring in part and dissenting in part). Chief Justice Roberts’s opinion, joined by Justices Breyer and Kagan, appeared to rest on both the transformation of Medicaid into a new and independent program and the relative size of the Medicaid expansion. The four dissenting justices who also invalidated the provision appeared to look primarily at the size of the federal grant compared to state expenditures. *NFIB*, 132 S. Ct. at 2662-67 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting); see Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 GEO. L.J. 861, 868-71 (2013) (arguing that Chief Justice Roberts’s analysis found coercion, at least in part, because the Medicaid extension constituted an entirely new program that states had to accept in order to continue participation in an already existing program, while the four dissenters appeared to focus more closely on the size and scope of the Medicaid funding alone).

¹¹⁶ *Id.* at 2605.

¹¹⁷ *Id.* at 2604-05.

¹¹⁸ See *South Dakota v. Dole*, 483 U.S. 203, 205-06 (1987); *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937); *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000).

¹¹⁹ See *Dole*, 483 U.S. at 208-09.

¹²⁰ Police CAMERA Act, H.R. 1680; S.877 114th Cong. (2015).

forces to study and identify methods of cooperation between local law enforcement officers and communities¹²¹ would not impose affirmative restrictions on states' use of existing federal funds and thus does not seem to implicate *Dole*'s principles for conditions on Spending Power legislation.¹²²

Similarly, the Supreme Court has not made clear what the "relationship" requirement of *Dole* must entail, other than noting that conditions must "bear some relationship" to the underlying purposes of the funds,¹²³ and has never invalidated legislation under the Spending Clause "on relatedness grounds."¹²⁴ Without further judicial guidance on the limit to this relatedness test, a number of proposals that condition the receipt of existing federal funds by local law enforcement agencies on certain new requirements appear to be sufficiently related to the federal interest. For example, one proposal would require law enforcement agencies that receive federal funds to conduct racial bias training for employees.¹²⁵ Another would condition the receipt of federal funds on the adoption of policies that prohibit racial profiling.¹²⁶ And yet another would require recipients of federal funds to establish procedures to appoint special prosecutors in cases of police-related shootings.¹²⁷ In the former two cases, Congress's purpose (preventing federal dollars from being used to racially profile suspects) might be sufficiently related to its chosen means (requiring racial bias training or barring racial profiling) to pass *Dole*'s relatedness requirement. Likewise, while perhaps a closer question—requiring the appointment of a special prosecutor in cases where death results from the use of force by a police officer—might fare similarly, depending on the level of generality a court uses to discern Congress's purpose. If that aim is to prevent federal dollars from being used by prosecutors to refuse to enforce the law impartially against police officers, then the chosen means appears related to that end.

Alternatively, these proposals might be challenged as financial inducement from Congress that is unconstitutionally coercive.¹²⁸ The proposals seeking to impose new conditions on federal funds provide for several different penalties for non-compliance, including the loss of up to 20% of a

¹²¹ Local Task Forces on 21st Century Policing Act of 2015, H.R. 2180, 114th Cong. (2015).

¹²² Proposals to amend the Department of Defense program that provides surplus property to local law enforcement agencies by eliminating discretion to do so for counterterrorism activities, see Stop Militarizing Law Enforcement Act, H.R. 1232, 114th Cong. (2015), are also unlikely to raise constitutional issues. Congress has plenary power over federal property. U.S. Const. art. IV, § 3, cl. 2; *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987).

¹²³ *New York v. United States*, 505 U.S. 144, 167 (1992).

¹²⁴ *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004).

¹²⁵ POST Act of 2015, H.R. 1065, 114th Cong. (2015).

¹²⁶ End Racial Profiling Act of 2015, H.R. 1933, Section 301, S. 1056, 114th Cong. (2015).

¹²⁷ Grand Jury Reform Act of 2015, H.R. 429, 114th Cong. (2015).

¹²⁸ One might question whether requiring the appointment of a special prosecutor in certain cases is an improper intrusion into the decisional independence of state or local governments. However, the Supreme Court's coercion analysis under the Spending Clause has not focused on whether specific spending conditions intrude on independent decisionmaking and has instead addressed the size of spending programs and whether that size is being leveraged to coerce a state to accept new programs. See *NFIB*, 132 S. Ct. at 2604-05; *Dole*, 483 U.S. at 206-07. Further, the Court has upheld a federal agency order to a state to either remove an officer or suffer revocation of federal funding. See *Oklahoma v. U.S. Civil Service Com'n*, 330 U.S. 127, 142-44 (1947). That said, the Court in *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632 (2011), hinted that one could conceivably challenge Congress's exercise of its spending power by "forcing" a state to create an independent agency permitted to bring suits against the state itself or designating how a state independent agency must be structured, but did not reach those questions because they were not at issue in the case. See *id.* at 1644 (Kennedy, J., concurring) *accord id.* at 1641 n.7 ("We have no occasion to pass on other questions of federalism lurking in this case, such as whether the DD or PAIMI Acts are a proper exercise of Congress's enumerated powers.").

state's funds under the JAG program,¹²⁹ all of its funds under that program,¹³⁰ and all of its funds under both the JAG and COPS programs.¹³¹ As an initial matter, it is unclear whether the new conditions would simply be an adjustment of the original JAG and/or COPS programs. In *NFIB*, Chief Justice Roberts seemed to indicate that past adjustments to the Medicaid program had been permissible¹³² but concluded that the new expansion was a “transform[ation] ... so dramatic[]” as to constitute a “shift in kind, not merely degree” that ran afoul of the requirement that conditions be made “unambiguously.”¹³³ Having concluded the conditions were not a mere modification of the program, but the enactment of a new federal program, he inquired whether the Medicaid expansion was a financial inducement that constituted coercion.

The proposals at issue here would appear to impose new conditions on the future receipt of funds under the JAG and COPS programs, although some do so by penalizing non-compliance with the loss of a portion, rather than all, of a state's funds. On the one hand, proposals to require racial bias training or bar racial profiling might be considered adjustments to the existing federal programs at issue, similar to the Medicaid adjustments Chief Justice Roberts found permissible in *NFIB*. Recipients of funds under the JAG program are already barred from discriminating on the basis of race,¹³⁴ and while the COPS program does not appear to contain a similar restriction, Title VI bars racial discrimination by recipients of federal funds.¹³⁵ Such proposals might be seen as simply implementing these requirements. On the other hand, the imposition of training obligations or the banning of specific police tactics might be considered a surprise to recipients of federal funds, as these conditions impose broader requirements than required in the past. In addition, the condition that state and local governments appoint a special prosecutor in the case of a violent crime by a police officer might also be considered a new condition unanticipated by recipients of federal funds.

In any case, even if the new conditions on federal funds are not deemed to be simple modifications, but the enactment of new federal programs, the funds at risk for non-compliance under the JAG and COPS programs appear closer to *Dole*'s permissible “mild encouragement” than the coercive “gun to the head” of *NFIB*. In *NFIB*, the Court explained that because of the size of the existing Medicaid program, Congress could not “penalize States that choose not to participate in that new program by taking away their existing Medicaid funding” because it left states with no real choice in the matter to refuse to participate in the new program.¹³⁶ In contrast, here states likely retain a voluntary choice as to whether to accept these new conditions and continue receiving federal funds. The total amount of federal funds at risk if every state declined the federal conditions in *Dole* amounted to \$614.7 million of federal highway funds, while the *NFIB* joint dissent noted that the federal government dispersed \$233 billion in 2010 to states under the Medicaid program.¹³⁷ With regards to the money at stake in these proposals, in FY2014 the federal government distributed approximately \$280 million to states and local governments

¹²⁹ End Racial Profiling Act of 2015, H.R. 1933, Section 301, S. 1056, 114th Cong. (2015).

¹³⁰ Grand Jury Reform Act of 2015, H.R. 429, 114th Cong. (2015).

¹³¹ End Racial Profiling Act of 2015, H.R. 1933, Section 301, S. 1056, 114th Cong. (2015).

¹³² *NFIB*, 132 S. Ct. at 2604-06.

¹³³ *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

¹³⁴ 42 U.S.C. § 3789d(c).

¹³⁵ See *supra* note 26.

¹³⁶ *Id.* at 2607.

¹³⁷ *NFIB*, 132 S. Ct. at 2664 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

under the JAG program¹³⁸ and slightly under \$140 million under the COPS program.¹³⁹ Together, the programs constituted approximately \$420 million of federal funds dispersed to the states, a lower sum than the “mild encouragement” of *Dole*.¹⁴⁰ In other words, due to the smaller size of the federal funds offered under the JAG and COPS programs in comparison to that of the Medicaid expansion in *NFIB*, states retain a real choice whether to adopt the new conditions and continue receiving those funds, rendering it unlikely that Congress has imposed a financial inducement that is unduly coercive of the states.

One other proposal would provide that conduct constituting a crime of violence by law enforcement officers in agencies that receive “federal justice assistance” is an offense under federal law.¹⁴¹ Federalizing crimes of violence by such officers might stretch the boundaries of legislation justified under the Spending Clause. As an initial matter, one might argue that such a requirement would not constitute a “condition” imposed on states in return for compliance with federal goals under the Court’s test in *Dole*. In *Sabri*, the Court examined a statute that criminalized bribery by officials of state and local governments that received federal funds greater than \$10,000 per year and determined that this was not properly viewed as a condition on the receipt of federal funds because the statute “is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain, not a means for bringing federal economic might to bear on a State’s own choices of public policy.”¹⁴² Instead, Congress was “licensing federal prosecution in an area historically of state concern.”¹⁴³ In other words, Congress possesses power under the Spending Clause to impose conditions on the use of federal funds by states, but a statute that criminalizes as a federal offense the behavior of third parties, even if they are officials of entities that receive federal funds, is not such a condition. On the other hand, the statute in *Sabri* criminalized the conversion of public funds into personal gain. One might argue that a proposal to regulate crimes of violence by police officers might be distinguished as regulation of law enforcement officials in their official capacity. If so, subjecting police officers to federal criminal liability might be considered a condition on the use of federal funds.

If a federal statute criminalizing behavior by state and local officials is not considered a condition on the receipt of federal funds, it might therefore require separate constitutional authority other than the Spending Clause itself. In *Sabri*, the Court noted that Congress possessed authority under the Spending Clause to disperse funds for the general welfare and “corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away.”¹⁴⁴ Congress thus has power to “safeguard the integrity of the state, local, and tribal recipients of federal dollars.”¹⁴⁵ This

¹³⁸ See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance Programs, <http://grants.ojp.usdoj.gov:85/selector/office?po=BJA&fiscalYear=2015&defaultYear=Y>.

¹³⁹ See U.S. Department of Justice, Community Oriented Policing Services, Grant Award Packages, <http://www.cops.usdoj.gov/Default.asp?Item=2738>.

¹⁴⁰ These sums appear to have decreased since 1998. See CRS Report RS22416, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, by (name redacted); CRS Report R40709, *Community Oriented Policing Services (COPS): Current Legislative Issues*, by (name redacted).

¹⁴¹ Police Accountability Act of 2015, H.R. 1102, 114th Cong. (2015).

¹⁴² See *Sabri*, 541 U.S. at 608.

¹⁴³ *Id.* at 608 n.* (starred footnote in original).

¹⁴⁴ *Id.* at 605.

¹⁴⁵ *Id.*

principle might not extend to federalizing crimes of violence by local and state officers because such a statute does not appear to be directed at protecting those funds.

Alternatively, if such a proposal is properly considered a condition on the receipt of federal funds, then analysis of its constitutionality would presumably turn on whether the condition is related to the federal interest in the use of the funds. One might argue that, similar to its interest in banning discrimination, the federal government has an interest in ensuring that federal funds are not used for committing crimes of violence against individuals. Congress has passed legislation barring discrimination based on race, sex, disability, and age by recipients of any federal funds.¹⁴⁶ Since *Dole*, the Supreme Court has not made clear what the “relationship” must entail other than noting that conditions must “bear some relationship” to the underlying purposes of the funds¹⁴⁷ and has never invalidated legislation under the Spending Clause “on relatedness grounds.”¹⁴⁸ In several cases that predate *Dole*, the Court upheld Spending Clause legislation barring recipients of federal funds from engaging in race¹⁴⁹ and sex¹⁵⁰ discrimination and cited the former case favorably in *Dole* itself.¹⁵¹

In addition, as mentioned above, in *Sabri* the Court found that Congress has power under the Necessary and Proper Clause to “see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft.”¹⁵² Analogizing this principle to Spending Clause legislation barring recipients of federal transportation funds from disability discrimination,¹⁵³ the U.S. Court of Appeals for the D.C. Circuit has ruled that disability discrimination by recipients of federal money similarly “‘fritter[s] away’ federal funds.”¹⁵⁴ The court found that, in congruence with three other circuits,¹⁵⁵ Congress’s goal of ensuring transportation funds not be used “to facilitate disability discrimination” and its method of doing so—waiving an entity’s sovereign immunity from suit—satisfies *Dole*’s “relatedness requirement” for Spending Clause legislation.¹⁵⁶ Consequently, a proposal to federalize crimes of violence by police officers is more likely to be upheld if it is considered a condition on state and local government use of federal funds than if a court views it as independent regulation of third parties.

¹⁴⁶ See e.g., *supra* note 26; 42 U.S.C. § 3789d (barring recipients of federal funds from the Department of Justice from discriminating on the basis of race, religion, or sex).

¹⁴⁷ *New York v. United States*, 505 U.S. 144, 167 (1992).

¹⁴⁸ *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161, 1168 (D.C. Cir. 2004).

¹⁴⁹ See *Lau v. Nichols*, 414 U.S. 563, 569 (1974).

¹⁵⁰ See *Grove City Coll. v. Bell*, 465 U.S. 555, 574 (1984).

¹⁵¹ *Dole*, 483 U.S. at 206-07. See also *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002) (observing that “§ 504 of the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding [and its] provisions are enforceable through private causes of action”).

¹⁵² *Sabri v. United States*, 541 U.S. 600, 605 (2004).

¹⁵³ See Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d.

¹⁵⁴ *Barbour*, 374 F.3d at 345 (quoting *Sabri*, 541 U.S. at 605). Chief Justice Roberts was on the panel that heard this case when he was on the D.C. Circuit Court of Appeals. Though he ruled with the majority, he did not write the majority opinion.

¹⁵⁵ *Id.* (citing *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003) (“As to the third [*Dole*] requirement, § 2000d-7 is manifestly related to Congress’s interest in deterring federally supported agencies from engaging in disability discrimination.”); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 243 (3d Cir. 2003) (same); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) (same)).

¹⁵⁶ *Id.* at 343-44.

Commerce Clause

While most proposals to regulate local law enforcement appear to do so under the Spending Clause or Congress's power to enforce the Fourteenth Amendment, legislation found to exceed Congress's authority in those areas might instead be supported by the Commerce Clause.

As an initial matter, states possess primary authority to criminalize local conduct, and the Supreme Court has made clear that "Congress cannot punish felonies generally."¹⁵⁷ Behavior that occurs "wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.'"¹⁵⁸ The Constitution does, however, grant Congress the power to regulate foreign and interstate commerce.¹⁵⁹ The Supreme Court has identified three areas that Congress may regulate under this authority. First, Congress may regulate the "channels" of interstate commerce.¹⁶⁰ For example, in the criminal context, federal law has done so by banning the interstate transportation of stolen property and the interstate transportation of kidnap victims.¹⁶¹ Second, Congress may regulate the "instrumentalities" of interstate commerce or things and people in interstate commerce.¹⁶² Under this authority, Congress has criminalized the theft of property in interstate shipment.¹⁶³ Third, Congress may regulate activities that have a "substantial relation to interstate commerce"¹⁶⁴ and intrastate economic activity that substantially affects interstate commerce in the aggregate.¹⁶⁵

Pursuant to this third category, the Court has upheld Congress's power to criminalize the local cultivation of controlled substances.¹⁶⁶ In *Gonzales v. Raich*, the Court considered whether Congress could criminalize the intrastate cultivation and possession of marijuana.¹⁶⁷ The Court noted that Congress is authorized under the Commerce Clause to "regulate purely intrastate activity ... if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."¹⁶⁸ Permitting the cultivation and consumption of marijuana "outside federal control would frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety."¹⁶⁹ Therefore, "the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption ... has a substantial effect on supply and demand in the national market."¹⁷⁰

¹⁵⁷ *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 428 (1821).

¹⁵⁸ *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

¹⁵⁹ U.S. CONST., Art. I, § 8, cl. 3.

¹⁶⁰ *U.S. v. Lopez*, 514 U.S. 549, 558 (1995).

¹⁶¹ 18 U.S.C. § 2314 (transportation of stolen property), 1201 (kidnapping).

¹⁶² *Lopez*, 514 U.S. at 558.

¹⁶³ 18 U.S.C. § 659 (theft from interstate shipments).

¹⁶⁴ *Lopez*, 514 U.S. at 558-59.

¹⁶⁵ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁶⁶ *Gonzales v. Raich*, 545 U.S. 1 (2005); 21 U.S.C. 841, 844.

¹⁶⁷ *Id.* at 15-31. See Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*

¹⁶⁸ *Id.* at 18 (citing *Wickard*, 317 U.S. at 127-28).

¹⁶⁹ *Id.* at 19.

¹⁷⁰ *Id.*

On the other hand, the Supreme Court has imposed some important limits on this power. In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act of 1990,¹⁷¹ which criminalized the knowing possession of a firearm in a school zone as beyond Congress's authority under the Commerce Clause.¹⁷² The government argued that violent crime affected the national economy by deterring travelers and also imposed a threat to school environments, which, in turn, could result in a less educated population, which would negatively affect the economy.¹⁷³ The Court, however, observed that the statute had nothing to do with economic activity and noted the lack of any "jurisdictional element which would ensure ... that the firearm in question affects interstate commerce."¹⁷⁴ The Court ultimately rejected the government's arguments, observing that under its theories "it is difficult to perceive any limitation on federal power."¹⁷⁵ Accepting the government's argument, the Court reasoned, would require it to "pile inference upon inference" to find a substantial effect on interstate commerce and would result in congressional usurpation of the states' police power.¹⁷⁶

Similarly, in *United States v. Morrison*, the Court invalidated a provision of the Violence Against Women Act of 1994, which authorized the victims of gender-motivated violence to sue the perpetrator for damages,¹⁷⁷ as exceeding Congress's authority under the Commerce Clause.¹⁷⁸ The Court noted that Congress did support the legislation with congressional findings indicating the effect of gender-motivated violence on interstate commerce but concluded that Congress was relying on a "but-for causal chain from the initial occurrence of violent crime to ... every attenuated effect upon interstate commerce."¹⁷⁹ This reasoning "would allow Congress to regulate any crime so long as the nationwide" impact affected interstate commerce.¹⁸⁰ The Court thus ruled that Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."¹⁸¹

The Court has also narrowly construed statutes to avoid confronting whether Congress exceeded its Commerce Clause authority.¹⁸² For example, in *Jones v. United States*, the federal government prosecuted an individual for arson of a private residence not used for commercial purposes.¹⁸³ The underlying statute criminalized the destruction by fire of a building "used" in interstate commerce.¹⁸⁴ Noting the "constitutional questions" that would arise if the Court interpreted the statute to criminalize "traditionally local ... conduct,"¹⁸⁵ the Court read the "used" language to

¹⁷¹ See Gun-Free School Zones Act of 1990, P.L. 101-647.

¹⁷² U.S. v. Lopez, 514 U.S. 549, 567-68 (1995).

¹⁷³ *Id.* at 563-64.

¹⁷⁴ *Id.* at 561-62.

¹⁷⁵ *Id.* at 564.

¹⁷⁶ *Id.* at 567.

¹⁷⁷ See Violence Against Women Act of 1994, § 40302, 108 Stat. 1941-1942.

¹⁷⁸ U.S. v. Morrison, 529 U.S. 598, 617 (2000).

¹⁷⁹ *Id.* at 615.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 617.

¹⁸² See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) ("We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.").

¹⁸³ 529 U.S. 848, 851 (2000).

¹⁸⁴ 18 U.S.C. § 844(i).

¹⁸⁵ *Jones*, 529 U.S. at 857-58 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

require “active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce.”¹⁸⁶ Because the home burned by the defendant was not used in this way, the Court read the statute not to apply and vacated the conviction.¹⁸⁷

Proposals to federalize crimes of violence by local and state police officers without a jurisdictional hook to interstate economic activity might not be upheld as valid legislation under the Commerce Clause. The Court has noted that drawing a clear line between economic and non-economic activity can sometimes be difficult¹⁸⁸ but has explained that “[e]conomics” refers to “the production, distribution, and consumption of commodities.”¹⁸⁹ As mentioned above, the Court has upheld a statute that criminalized the local cultivation and use of marijuana, “commodities for which there is an established, and lucrative, interstate market,” because “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”¹⁹⁰ In contrast, the Court has made clear that neither the “possession of a gun in a school zone”¹⁹¹ nor gender-motivated violence¹⁹² are properly considered economic activity. Consistent with these cases, crimes of violence committed by law enforcement officers might not be considered economic activity either. Further, the criminalization of local crimes of violence does not appear to be “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”¹⁹³ Just as the Court in *Morrison* refused to allow Congress to regulate non-economic, violent conduct based solely on its aggregate effect on the economy, proposals to do so with regard to violent crimes committed by police officers might be constitutionally infirm.

Consequently, in order to pass constitutional muster, such proposals likely require a jurisdictional element that would limit their application to crimes that have a connection with or affect interstate commerce. As mentioned above, a number of federal statutes criminalize behavior that concerns the channels or instrumentalities of interstate commerce.¹⁹⁴ In addition, the Racketeer Influenced and Corrupt Organizations Act criminalizes certain activities “engaged in” or affecting interstate commerce.¹⁹⁵ A proposal that was limited in application to these areas might be on firmer constitutional ground. Likewise, proposals to enact a federal ban on racial profiling or the use of chokeholds by law enforcement agents—without a connection to federal funds or pursuant to Congress’s power under the Fourteenth Amendment—seem susceptible to the same objection: Neither one is an economic activity, and regulation of non-economic activity based on its aggregate effect on interstate commerce is generally impermissible.

On the other hand, whether Congress has power under the Commerce Clause to ban municipalities from enforcing criminal or civil laws for the purpose of raising revenue might be a

¹⁸⁶ *Id.* at 855.

¹⁸⁷ *Id.* at 857-59.

¹⁸⁸ *Lopez*, 514 U.S. at 566.

¹⁸⁹ *Raich*, 545 U.S. at 25 (quoting Webster’s Third New International Dictionary 720 (1966)).

¹⁹⁰ *Id.* at 25-26.

¹⁹¹ *Id.* at 567.

¹⁹² See *United States v. Morrison*, 529 U.S. 598, 621 (2000).

¹⁹³ *Lopez*, 514 U.S. at 561.

¹⁹⁴ See *supra* notes 159-62.

¹⁹⁵ 18 U.S.C. § 1962.

closer question. As an initial matter, Congress might limit the application of the law to practices that concern the channels or instrumentalities of interstate commerce. Otherwise, assuming a proposal lacks such a limitation, it must be justified as a regulation of economic activity that substantially affects interstate commerce. One might argue that, in contrast to the possession of a gun in a school zone, the operation of a municipality's revenue stream, which can be used to buy goods and services as well as pay the salaries of local government officials and employees, is properly considered economic activity. If so, a court would then presumably inquire whether Congress has a "rational basis" for concluding that such activity has a substantial effect on interstate commerce.¹⁹⁶ When the underlying activity to be regulated is economic in character, the Court has sometimes been deferential to Congress's determination that the activity has a connection to interstate commerce. For example, in *Perez v. United States*, the Court upheld a federal criminal statute that outlawed loan sharking activities.¹⁹⁷ The defendant argued that application of the law to him exceeded Congress's power under the Commerce Clause because the activity occurred in one state and he was not a member of an interstate organized crime ring. The Court upheld the law and accepted Congress's conclusion that even intrastate loan sharking affected interstate commerce.¹⁹⁸

Nonetheless, even if Congress possesses authority to regulate a particular activity under the Commerce Clause, it may not intrude on state sovereignty in violation of the Tenth Amendment.¹⁹⁹ As mentioned above, Congress may not "commandeer" state governments, either by forcing them to enact certain laws²⁰⁰ or by compelling state officials to implement federal legislation.²⁰¹ While the Supreme Court has rejected commandeering challenges when federal legislation regulates states directly—rather than imposing requirements on a state's regulation of its own citizens²⁰²—a federal law banning state and local officials from executing the law in a particular manner appears distinct from that situation. Proposals to bar state and local officials from enforcing the law in a manner intended to raise revenue have been discussed in the media, and some have announced that corresponding bills will be introduced in the 114th Congress.²⁰³ However, it does not appear that a bill has yet been formally introduced. Consequently, a comprehensive analysis of such a proposal is premature. To the extent that a federal law directs state officials to enforce a federal law against its own citizens, the anti-commandeering principle might be violated.

Section 5 of the Fourteenth Amendment

Several congressional proposals would address police misconduct by imposing civil or criminal liability on individuals who engage in the prohibited conduct. Without a tether to federal funds, such legislation might be supported by Congress's power under Section 5 of the Fourteenth

¹⁹⁶ See *Lopez*, 514 U.S. at 557; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964).

¹⁹⁷ 402 U.S. 146, 156-57.

¹⁹⁸ *Id.*

¹⁹⁹ See *Reno v. Condon*, 528 U.S. 141, 149 (2000).

²⁰⁰ See *New York v. United States*, 505 U.S. 144, 173 (1992).

²⁰¹ See *Printz v. United States*, 521 U.S. 898, 935 (1997).

²⁰² *Reno v. Condon*, 528 U.S. 141, 143 (2000); *South Carolina v. Baker*, 485 U.S. 505, 511 (1988).

²⁰³ Congressman Cleaver Announces Introduction of the Fair Justice Act, Press Release, Congressman Emanuel Cleaver, II (Mar. 9, 2015).

Amendment. The Fourteenth Amendment bars states and local governments from “depriv[ing] any person of life, liberty, or property, without due process of law [or] deny[ing] to any person ... the equal protection of the laws” and grants Congress the “power to enforce, by appropriate legislation” those provisions.²⁰⁴ Congress has done so in at least two areas: (1) imposing criminal and civil liability on individuals who, “under color of law,” deprive a person of rights or privileges “secured or protected” by the Constitution or U.S. law;²⁰⁵ and (2) enacting “prophylactic legislation” intended to deter violations of rights guaranteed under the Fourteenth Amendment by prescribing a broader scope of conduct than explicitly mentioned in the text.²⁰⁶

In addition, Congress’s enforcement power under Section 5 differs from its power under other constitutional provisions in at least one important respect. The Eleventh Amendment bars suits for damages against states unless the state has waived its sovereign immunity or Congress legislates pursuant to a constitutional power to subject states to suit.²⁰⁷ The Supreme Court has held that Congress may abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment²⁰⁸ but may not do so under its Article I power, which includes the Commerce Clause.²⁰⁹

Deprivation of Rights Under Color of Law

Congress has provided for civil liability for deprivations of rights under the Constitution or federal law via 42 U.S.C. § 1983.²¹⁰ That statute “is not itself a source of substantive rights,” but offers “a method for vindicating federal rights elsewhere conferred.”²¹¹ Likewise, its “criminal analogue,” 18 U.S.C § 242, imposes criminal liability for deprivations of federal rights, but is not

²⁰⁴ U.S. CONST. amend. XIV, §§ 1 & 5.

²⁰⁵ See 18 U.S.C. § 242 (criminal liability); 42 U.S.C. § 1983 (civil liability); *Screws v. U.S.* 325 U.S. 91, 98-100 (1945) (noting that both statutes were enacted to “enforce the Fourteenth Amendment”). While § 1983 was enacted to enforce the Fourteenth Amendment and its attendant federal laws, the Supreme Court has ruled that individuals may bring actions under § 1983 to offer a “remedy ... against all forms of official violation of federally protected rights,” *Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 700 (1978), not just those related to “civil rights or equal protection.” *Dennis v. Higgins*, 498 U.S. 439, 434-45 (1991). But see *Blessing v. Freestone*, 520 U.S. 329, 340-46 (1997) (articulating when a federal statute creates a legally enforceable right).

²⁰⁶ *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 727 (2003).

²⁰⁷ See *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011).

²⁰⁸ See, e.g., *Lane*, 541 U.S. at 517-522.

²⁰⁹ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996).

²¹⁰ Section 1983 claims can invoke a variety of complex procedural hurdles and remedies. These issues, however, are beyond the scope of this report. In § 1983 actions for damages against individuals, for example, the defense of qualified immunity may be available. *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982). That doctrine is inapplicable, however, to a “suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding.” *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 243 (2009) (discussing the doctrine of qualified immunity with respect to Fourth Amendment violations); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (“Because vicarious liability is inapplicable to *Bivens* [*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)] and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.”); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-13 (1983) (addressing the doctrine of “equitable standing” to obtain injunctive relief); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (noting that, in the context of a § 1983 action to enjoin a local police department’s disciplinary affairs, “principles of equity militate heavily against the grant of an injunction except in the most extraordinary circumstances”).

²¹¹ *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) (“§ 1983 by itself does not protect anyone against anything.”).

itself a substantive source of criminal liability.²¹² These statutes, “in lieu of describing the conduct [they] forbid[] ... incorporate constitutional law by reference.”²¹³ In both contexts, “if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision.”²¹⁴ In other words, the violation that animates civil liability under Section 1983 or criminal liability under Section 242 lies in the deprivation of separate constitutional rights.²¹⁵

Several proposals to address police misconduct appear to single out particular practices as civil rights violations under 18 U.S.C. § 242, including the use of chokeholds²¹⁶ and the enforcement of criminal and civil laws for the purpose of raising revenue.²¹⁷ However, because these statutes incorporate other constitutional and statutory substantive rights “by reference,” such proposals would presumably require their own constitutional authority to withstand constitutional challenge. Put another way, the validity of proposals to add specific substantive content to 42 U.S.C. § 1983 and 18 U.S.C. § 242 will ultimately turn on whether the proscribed conduct itself violates a federal statutory right, the Fourteenth Amendment’s Due Process or Equal Protection Clauses, or another substantive right incorporated in the Fourteenth Amendment as a “fundamental right.”²¹⁸

As a threshold matter, aspects of certain proposals may already be protected by the Constitution and may be currently challenged via Section 1983 or Section 242 litigation. Both individual and class action claims are available—in certain circumstances—under Section 1983 against police officers using chokeholds as a violation of the Fourth Amendment right to be free from excessive force,²¹⁹ as well as claims alleging racial profiling as violations of the Equal Protection Clause.²²⁰

²¹² *Butler v. Morgan*, 562 F. App’x 832, 835 (11th Cir. 2014) (“Only the United States as prosecutor can bring a complaint under 18 U.S.C. §§ 241 and 242, the criminal analogue of 42 U.S.C. § 1983.”); *see generally* *United States v. Cobb*, 905 F.2d 784, 788 n. 6 (4th Cir. 1990) (“Because 18 U.S.C.A. § 242 is merely the criminal analog of 42 U.S.C.A. § 1983, and because Congress intended both statutes to apply similarly in similar situations, our civil precedents are equally persuasive in this criminal context.”).

²¹³ *United States v. Lanier*, 520 U.S. 259, 265 (1997).

²¹⁴ *Id.* at 272 n.7; *Graham v. Connor*, 490 U.S. 386, 395 (U.S. 1989). While the required “culpable intent” can vary between the criminal (§ 242) and civil (§ 1983) contexts, as well as “according to the particular constitutional right infringed,” “the actionable conduct is deprivation of rights secured by the Constitution or laws of the United States” for suits under § 1983 and criminal liability under § 242. *United States v. Bigham*, 812 F.2d 943, 948 (5th Cir. 1987); *United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993) (“There is thus nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge. The protections of the Constitution do not change according to the procedural context in which they are enforced—whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights. Thus, the Supreme Court’s explanation of the right to be free from excessive force during arrest does not somehow lack authority here merely because it was set forth in a section 1983 case.”).

²¹⁵ *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (“We agree with the Court of Appeals that the attachment of Hope to the hitching post under the circumstances alleged in this case violated the Eighth Amendment.”); *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981) (eighth amendment); *United States v. McRae*, 702 F.3d 806, 832 (5th Cir. 2012) (“Again, 18 U.S.C. § 242 prohibits the willful deprivation of constitutional rights under color of law. The right at issue for this conviction is the Fourth Amendment.”); *United States v. Langer*, 958 F.2d 522, 524 (2d Cir. 1992) (fourth amendment); *United States v. Cobb*, 905 F.2d 784, 787 (4th Cir. 1990) (substantive due process).

²¹⁶ Excessive Use of Force Prevention Act of 2015, H.R. 2052, 114th Cong. (2015).

²¹⁷ *See* Congressman Cleaver Announces Introduction of the Fair Justice Act, Press Release, Congressman Emanuel Cleaver, II (Mar. 9, 2015).

²¹⁸ *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (“[A] provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.”).

²¹⁹ *See, e.g., Hamilton v. City of Jackson, Alabama*, 261 F. App’x 182, 186 (11th Cir. 2008); *Marshall v. W.*, 559 F. (continued...)

Further, the Supreme Court has made clear that in certain circumstances, injunctive relief may be available to enjoin an unlawful police practice,²²¹ although doing so may be difficult under the Court's "equitable standing" doctrine.²²²

Prophylactic Legislation

Leaving aside the specific behavior addressed in various proposals that is *already* incorporated in constitutional rights, Congress's power to enforce the provisions of the Fourteenth Amendment is not limited to simply proscribing unconstitutional conduct.²²³ Pursuant to its enforcement power, Congress may "remedy and deter violations of rights guaranteed" under the amendment "by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Constitution's text."²²⁴ Put another way, "Congress may enact so-called prophylactic

(...continued)

Supp. 2d 1224, 1244 (M.D. Ala. 2008).

²²⁰ See, e.g., *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003) ("To withstand a motion for summary judgment, a plaintiff in a § 1983 suit challenging alleged racial discrimination in traffic stops and arrests must present evidence from which a jury could reasonably infer that the law enforcement officials involved were motivated by a discriminatory purpose and their actions had a discriminatory effect."); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002) ("Therefore, if the plaintiffs can show that they were subjected to unequal treatment based upon their race or ethnicity during the course of an otherwise lawful traffic stop, that would be sufficient to demonstrate a violation of the Equal Protection Clause."); *Daniels v. City of New York*, 198 F.R.D. 409, 412 (S.D.N.Y. 2001) (granting class certification to black and Hispanic males in § 1983 action for relief from alleged constitutional violation by the Street Crime Unit of NYPD for conducting repeated stops and frisks based on improper racial profiling), *Daniels v. City of New York*, 138 F. Supp. 2d 562 (S.D.N.Y. 2001) (denying defendant's motion for a stay pending appeal). Litigation in *Daniels* resulted in a settlement "that required the City to adopt several remedial measures intended to reduce racial disparities in stops and frisks." *Floyd v. City of New York*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012) (granting class certification to "all persons who have been or in the future will be unlawfully stopped in violation of the Fourth Amendment, including all persons stopped on the basis of being Black or Latino in violation of the Fourteenth Amendment").

²²¹ *Allee v. Medrano*, 416 U.S. 802, 815 (1974) ("Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate."); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527 (1939) ("[T]he individual respondents are plainly authorized ... to maintain the present suit in equity to restrain infringement of their rights.").

²²² In order to establish Article III standing to obtain prospective injunctive relief, a "plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (citations and quotation marks omitted). In order to do so, the plaintiff must show that he or she is "likely to suffer future injury" by the illegal policy. *Id.* at 105. See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. Rev. 17, 92 (2000) ("The greatest obstacle facing § 1983 litigants who seek injunctive relief is the concept of 'equitable standing,' articulated most recently by the Supreme Court in *City of Los Angeles v. Lyons*.").

²²³ See also *United States v. Georgia*, 546 U.S. 151, (2006) (holding that Title Ii of the Americans with Disabilities Act is valid Section 5 legislation that abrogates state sovereign immunity by "creat[ing] a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment") (italics in original).

²²⁴ *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 727 (2003). Supreme Court analysis of Congress's power to impose prophylactic legislation is often predicated on whether Congress has properly abrogated state sovereign immunity. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 517-22 (2004). The Eleventh Amendment bars suits against states unless the state has waived immunity or Congress legislates pursuant to a constitutional power to subject states to suit. See *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). The congressional proposals to regulate law enforcement officers and agencies span a range of possible remedies, including the authorization of suits against local and state officers for violations of federal law, which are not barred by sovereign immunity. See *Ex parte Young*, 209 U.S. 123 (1907). Nor does sovereign immunity protect local municipalities and their officers against damages actions in their official capacities. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”²²⁵

However, this authority is subject to several limitations. First, Congress may regulate only state and local governments under this authority, not private persons.²²⁶ Second, Congress may not enact prophylactic measures that alter the substantive content of the underlying right being enforced. In other words, enforcement of the right does not include “the power to determine what constitutes a constitutional violation.”²²⁷ For example, Congress may not exercise this enforcement power to afford broader protection for religious expression than that provided by the First Amendment.²²⁸ The Court has explained that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²²⁹ Without this limitation, “legislation may become substantive in operation and effect.”²³⁰

The Supreme Court has examined several factors under its congruence and proportionality analysis. Of particular importance is a court’s initial “identif[ication of] the constitutional right or rights that Congress sought to enforce.”²³¹ It is easier for Congress to establish congruence and proportionality when Congress seeks to enforce constitutional protections “subject to more searching judicial review”²³² than those subject to rational basis review. In other words, if the underlying right sought to be enforced by Congress is already more closely guarded by the courts, then the courts will be more likely to find congruence and proportionality between the right protected and the remedy provided.

After determining the scope of the constitutional right in question,²³³ courts next look to whether “the States’ record of unconstitutional participation in, and fostering of ... discrimination ... is weighty enough to justify the enactment of prophylactic § 5 legislation.”²³⁴ Without a record of “widespread and persisting deprivation of constitutional rights,”²³⁵ prophylactic legislation risks becoming “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”²³⁶ For example, in *South Carolina v. Katzenbach*, the Court ruled that the “unprecedented remedies” at issue were

²²⁵ *Id.* at 727-28.

²²⁶ *See* *United States v. Morrison*, 529 U.S. 598, 621 (2000) (pointing to the “time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.”).

²²⁷ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

²²⁸ *Id.* at 534-35.

²²⁹ *Id.* at 520.

²³⁰ *Id.*

²³¹ *Tennessee v. Lane*, 541 U.S. 509, 522 (2004).

²³² *Id.* at 522-23 (2004). Compare *Kimel v. Florida Board of Regents*, 528 U.S. 62, 89 (2000) (invalidating legislation geared to remedy age-based discrimination—a classification subject to rational basis review—as exceeded Congress’s authority under § 5) with *Hibbs*, 538 U.S. at 736 (upholding legislation directed at remedying gender-based discrimination, a classification subject to heightened scrutiny) and *Lane*, 541 U.S. at 522-24 (upholding remedial legislation aimed at prohibiting irrational disability discrimination—subject to rational basis review, as well as right of access to the courts—subject to more searching judicial review).

²³³ *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 368 (2001) (“Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States.”).

²³⁴ *Hibbs*, 538 U.S. at 735.

²³⁵ *Boerne*, 521 U.S. at 526.

²³⁶ *Id.* at 532.

justified because of the “widespread and persisting deprivation of constitutional rights resulting from this country’s history of racial discrimination” by the states.²³⁷ In contrast, in *Kimel v. Board of Regents*, the Court invalidated a provision of the Age Discrimination in Employment Act that permitted suits against states due in part to “Congress’ failure to uncover any significant pattern of unconstitutional discrimination here [which] confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.”²³⁸

While the Court has not clearly indicated the necessary quantum of evidence sufficient to sustain particular legislation, generally speaking the greater the evidence of widespread violations of a particular constitutional right, the more likely the record will be found to support prophylactic legislation. For example, a record demonstrating a “long and extensive history” of unconstitutional conduct by the states,²³⁹ a national survey demonstrating persistent constitutional violations,²⁴⁰ and judicial decisions identifying “unconstitutional treatment”²⁴¹ have all been harnessed to support prophylactic legislation. In contrast, studies of violations in a single state,²⁴² isolated examples that fail to demonstrate nationwide violations,²⁴³ dated or untimely evidence,²⁴⁴ and a lack of specific findings indicating that activity of the state led to a violation²⁴⁵ can all be insufficient to support prophylactic legislation. Nonetheless, a clear standard governing the quantum of evidence required to support prophylactic legislation remains elusive. Fair-minded applications of the “congruency and proportionality” can generate contrary conclusions, leaving it extraordinarily difficult to make definitive conclusions about a proper legislative record in close cases.²⁴⁶

In addition, the validity of prophylactic legislation under Section 5 depends in part upon the relationship between the severity of the constitutional violation at issue and the nature of the

²³⁷ 383 U.S. 301 (1966). *Katzenbach* involved “Congress’s parallel power to enforce the provisions of the Fifteenth Amendment,” *Boerne*, 521 U.S. at 518, which is “virtually identical to § 5 of the Fourteenth Amendment,” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001).

²³⁸ *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000).

²³⁹ See *Nev. Department of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003).

²⁴⁰ *Id.* (“As the FML’s legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies.”); see also *Tennessee v. Lane*, 541 U.S. at 527 (“A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities.”).

²⁴¹ *Lane*, 541 U.S. at 524-25.

²⁴² *Kimel*, 528 U.S. at 90.

²⁴³ See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999); see also *Garrett*, 531 U.S. at 369 (noting only a “half a dozen examples from the record that did involve States”).

²⁴⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997) (noting that much of the discussion in hearings “centered upon anecdotal evidence” and “mention[ed] no episodes [of religious persecution] occurring in the past 40 years”); *accord* *Shelby County v. Holder*, 133 S. Ct. 2612, 2629-30 (2013) (“If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time.”).

²⁴⁵ See *Coleman v. Ct. of Appeals*, 132 S. Ct. 1327, 1335 (2012).

²⁴⁶ See *id.* at 1338 (2012) (Scalia, J., concurring) (“The plurality’s opinion seems to me a faithful application of our ‘congruence and proportionality’ jurisprudence. So does the opinion of the dissent. That is because the varying outcomes we have arrived at under the ‘congruence and proportionality’ test make no sense.”).

remedies imposed.²⁴⁷ For example, in *Tennessee v. Lane*, the Court upheld legislation directed at ensuring access to judicial proceedings for individuals with disabilities, noting the “limited” nature of the remedy imposed—requiring states to “accommodate persons with disabilities in the administration of justice”²⁴⁸—in comparison with the importance of the fundamental right of access to the courts and the history of discrimination against disabled individuals.²⁴⁹

Ban on the Use of Chokeholds

Proposals to ban the use of chokeholds by law enforcement officers and subject violations to federal criminal liability appear intended to deter the use of excessive force in violation of the Fourth Amendment right to be free from unreasonable seizures.²⁵⁰ As mentioned above, courts reviewing prophylactic legislation first look to the scope of the constitutionally protected right Congress seeks to protect. Fourth Amendment excessive force claims in the context of arrests and investigatory stops are subject to an “objective reasonableness standard,” considered from the perspective of a reasonable officer on the scene and accounting for the need of police to make split-second decisions about the proper amount of force required.²⁵¹

Congress potentially faces a difficult burden in proving a history of constitutional violations. As noted above, establishing a widespread pattern of constitutional violations is rendered more difficult when the underlying right is not subject to heightened judicial scrutiny. Evidence of long-term and widespread use of chokeholds in violation of the Fourth Amendment’s prohibition against excessive force at the state and local level would presumably be required to sustain the legislation. The congressional record would likely have to demonstrate a definite relationship between the use of chokeholds by police and widespread constitutional violations.²⁵²

Further, depending on the record of violations, the remedy of subjecting the use of chokeholds to criminal liability must be in proportion to the “supposed remedial or preventive object.”²⁵³ Barring the use of chokeholds might be considered over-inclusive as a prophylactic remedy, as it completely bars police tactics that can sometimes be constitutional and arguably necessary to respond to certain situations. The nature of the remedy itself might also factor into the proportionality test. Subjecting police officers to criminal liability harnesses the most severe governmental tool available.²⁵⁴ Given the alternative means to effectuate a ban on chokeholds, such as damages or declaratory and injunctive relief,²⁵⁵ the severity of criminal liability as a

²⁴⁷ See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (“Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”).

²⁴⁸ *Lane*, 541 U.S. at 533.

²⁴⁹ *Id.* at 531-33.

²⁵⁰ See *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985). In addition, a proposal to make crimes of violence by law enforcement officers a federal offense might conceivably be enacted as remedial legislation pursuant to Section 5 of the Fourteenth Amendment as well. Similar to a ban on chokeholds, such a proposal would also be drawn to protect individuals’ right to be free from excessive force under the Fourth Amendment.

²⁵¹ *Id.*

²⁵² See *Garrett*, 531 U.S. at 964-68; *Florida Prepaid*, 527 U.S. at 645-46.

²⁵³ *Lane*, 541 U.S. at 532.

²⁵⁴ *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 133 S. Ct. 2096, 2103-04 (2013) (describing the “coercive” nature of “the hammer of the criminal law ... available to no private party”).

²⁵⁵ See *Steffel v. Thompson*, 415 U.S. 452, 466 (1974) (“Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction.”); *id.* at 470-471; *id.* at 481-485 (Rehnquist, J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 124 (1971) (Brennan, J., concurring and dissenting). But see *Screws v. United States*, 325 (continued...)

remedial measure may not be congruent and proportional to the nature and extent of violations of individuals' Fourth Amendment rights.

Bar on Enforcing Civil or Criminal Laws to Raise Revenue

Barring the enforcement of civil or criminal laws for the purpose of raising revenue might be viewed as protecting the right to due process or equal protection of the laws. The Constitution imposes less procedural protections in civil cases than in criminal matters.²⁵⁶ But the Court has made clear that, even in civil proceedings, the Due Process Clause requires procedures that are “fundamentally fair.”²⁵⁷ The Court has recognized a due process protection for the impartial administration of justice that can be violated by a personal or official interest in the outcome of adjudication.²⁵⁸ For example, the Court has held that due process was violated by the imposition of criminal fines by a judge whose compensation derived from those fines, and the city budget—which he was responsible for in his position as mayor—depended on those fines.²⁵⁹ In contrast, due process was not violated by a similar fine imposed when the mayor was not so compromised by a direct pecuniary interest in the matter.²⁶⁰ Due process can be violated when the decisionmakers' position is such that it “offer[s] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true,”²⁶¹ although it appears that whether particular situations constitute violations of this principle are largely fact-specific.

Given this protection under the Due Process Clause, Congress must demonstrate that its chosen remedy is congruent and proportional to the violation it seeks to remedy. This likely requires a showing in the congressional record of a widespread pattern of unconstitutional enforcement of laws by individuals with a personal or official interest in the outcome. In addition, barring the enforcement of any law for the purpose of raising revenue appears to cover a much larger scope of state and local practices than is constitutionally prohibited, calling into question whether Congress's chosen remedy might not be congruent and proportional to the constitutional violation it is directed toward.²⁶² For example, the Court has rejected a due process challenge to the imposition of fines where the funds were used to generate revenue for the village and the mayor was paid a salary out of those funds.²⁶³ The Court reasoned that because the mayor's salary did

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U.S. 91, 101 (1945) (requiring that officers have the specific intent of depriving a person of their civil rights in order to establish criminal liability under 18 U.S.C. § 242).

²⁵⁶ *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 637-38 (1988) (noting that a statute requiring an individual to “carry the burden of persuasion on a criminal offense ... [i]f applied in a criminal proceeding, ... would violate the Due Process Clause because it would undercut the State's burden to prove guilt beyond a reasonable doubt. If applied in a civil proceeding, however, this particular statute would be constitutionally valid.”).

²⁵⁷ *Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁵⁸ *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (examining factors that merit recusal by a trial judge because the context “offer[s] a possible temptation” to adjudicate improperly) (quoting *Ward*, 409 U.S. at 60).

²⁵⁹ *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927). Likewise, the Court has held that the imposition of fines for traffic offenses when imposed by a mayor who was responsible to account to the village council for local finances—and the village generated a substantial portion of its funds from fines imposed in that court—violated due process. *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 58 (1972).

²⁶⁰ *Dugan v. Ohio*, 277 U.S. 61 (1928).

²⁶¹ *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).

²⁶² *See Boerne*, 521 U.S. at 520.

²⁶³ *Dugan*, 277 U.S. at 65.

not change based upon whether the individual was convicted or not, the mayor did not have an improper interest in the outcome of the case.²⁶⁴ Proposals to entirely ban fines imposed to raise revenue would extend even to this situation, potentially calling into question the use of innumerable fines imposed by local and state governments. Consequently, the scope of such a proposal may be “out of proportion to [the legislation’s] remedial or preventive objectives.”²⁶⁵

Proposals to ban the enforcement of laws for revenue-raising purposes might also be directed at protecting the right to equal protection of the law. “[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.”²⁶⁶ To prove a violation of the Equal Protection Clause, “plaintiffs must prove that the defendants’ actions had a discriminatory effect and were motivated by a discriminatory purpose.”²⁶⁷ Selectively directing enforcement activity at minority communities could thus constitute a violation of the Equal Protection Clause. And barring enforcement of the law in order to raise revenue might be a remedy imposed by Congress in order to protect the right to equal protection of the law.

As mentioned above, however, Congress would need to show a history of constitutional violations in order to support prophylactic legislation in this area. Because discrimination based on race is subject to heightened judicial scrutiny, the burden of doing so might be lower than when Congress seeks to protect rights subject to rational basis scrutiny.²⁶⁸ However, the record must show a relationship between the remedy imposed and the targeted constitutional right to be protected.²⁶⁹ In other words, Congress must show a link between the enforcement of laws in order to raise revenue and widespread instances of selective enforcement of the law in violation of the Equal Protection Clause. In addition, a proposal that bans such enforcement of the law when directed against minorities is a narrower remedy than one that bans all such enforcement. In the latter case, one might challenge the scope of such a remedy as disproportional to the legislation’s objectives, as a large amount of fines imposed by local governments could be implicated. Consequently, a narrow remedy is more likely to be considered proportional to the constitutional violation at issue.

Bar on Racial Profiling by Law Enforcement Officers

Legislation barring racial profiling by law enforcement officers might also implicate rights under the Fourteenth Amendment.²⁷⁰ As discussed above, the Court has made clear that the

²⁶⁴ *Id.*

²⁶⁵ *Boerne*, 521 U.S. at 509.

²⁶⁶ *Whren v. United States*, 517 U.S. 806, 813 (1996).

²⁶⁷ *Chavez v. Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001); *Johnson v. Crooks*, 326 F.3d 995, 1000 (8th Cir. 2003) (noting that the plaintiff must prove that the defendant “exercised his discretion to enforce the traffic laws on account of her race, which requires proof of both discriminatory effect and discriminatory purpose”); *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000) (“Selective enforcement claims are judged according to ordinary Equal Protection standards, which require a petitioner to show both a discriminatory purpose and a discriminatory effect.”); *see also* *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“The requirements for a selective-prosecution claim draw on ‘ordinary equal protection standards.’ The claimant must demonstrate that the federal prosecutorial policy ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’”) (quoting *Wayte v. United States*, 470 U.S. 598, 608(1985)).

²⁶⁸ *See supra* notes 230-31.

²⁶⁹ *See Garrett*, 531 U.S. at 964-68; *Florida Prepaid*, 527 U.S. at 645-46.

²⁷⁰ *See* CRS Report RL31130, *Racial Profiling: Legal and Constitutional Issues*, by (name redacted). Courts have examined the extent to which race can be relied upon as a factor in constituting reasonable suspicion to justify an investigatory (continued...)

“Constitution prohibits selective enforcement of the law based on considerations such as race.”²⁷¹ However, in order to prove a violation, plaintiffs must generally show that the application of the law had a discriminatory effect and was motivated by a discriminatory purpose.²⁷²

One proposal would ban law enforcement agents and agencies from relying on race, gender, gender identity, and sexual orientation in selecting individuals for investigation except in certain circumstances.²⁷³ The congressional record would likely need to demonstrate a history of constitutional violations with respect to each classification. Additionally, because the various classifications may be subject to varying degrees of scrutiny, it may be necessary to demonstrate more widespread violations for some classes than would be necessary for others.²⁷⁴ The proposal bars “any” reliance on race (absent evidence linking a person with a particular characteristic) and provides that proof of a “disparate impact” constitutes *prima facie* evidence of a violation.²⁷⁵ As courts require evidence both of disparate impact and a discriminatory purpose to constitute a violation of the Equal Protection Clause in this context, the provision could be viewed as enlarging the scope of rights guaranteed under the Equal Protection Clause, rather than as a prophylactic measure meant to proscribe otherwise constitutional conduct that leads to an unconstitutional result.²⁷⁶ If so, the remedy’s scope may be disproportional to the underlying constitutional violation. Resolution of the issue will ultimately depend on the record amassed by Congress.

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stop, *see, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), but the Supreme Court has indicated that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Whren v. United States*, 517 U.S. 806, 813 (1996). Accordingly, such proposals are likely best read as seeking to protect rights under the Equal Protection Clause.

²⁷¹ *Id.*

²⁷² *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272–74 (1979); *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–66 (1977); *Washington v. Davis*, 426 U.S. 229, 239–42 (1976).

²⁷³ End Racial Profiling Act of 2015, H.R. 1933, Sections 101, 102, S. 1056, 114th Cong. (2015).

²⁷⁴ *See Lane*, 541 U.S. at 522–23.

²⁷⁵ End Racial Profiling Act of 2015, H.R. 1933, Sections 101, 102, S. 1056, 114th Cong. (2015).

²⁷⁶ *See Boerne*, 521 U.S. at 519–20; *United States v. Travis*, 62 F.3d 170, 174 (6th Cir. 1995) (“Consequently, when officers compile several reasons before initiating an interview, as long as some of those reasons are legitimate, there is no Equal Protection violation.”); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977) (holding that when a teacher was fired for various reasons, and one reason considered alone would constitute a constitutional violation, there is no violations if the other reasons are legitimate).

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