

Federalism in a Time of Autocracy

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Federalism in a Time of Autocracy

Ian Millhiser*

INTRODUCTION

We live in dark times.

The President of the United States—Donald Trump—promised to “open up our libel laws” to punish news outlets that print coverage he does not like.¹ He threatened to jail his political opponents.² He called for certain political protesters to be stripped of citizenship.³ He pledged to kill the innocent family members of terrorists⁴—an illegal order that, according to former Air Force General Michael Hayden, could set up the untenable circumstance in which military personnel refuse to obey an order from their civilian commander-in-chief.⁵ At one point, he called for “a total and complete shutdown of Muslims

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1. Hadas Gold, *Donald Trump: We're Going To 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> [<http://perma.cc/9N6R-7MRR>].
2. Ryan Koronowski, *During Debate, Trump Blithely Says He Would Imprison Hillary If He Were President*, THINKPROGRESS (Oct. 9, 2016), <http://thinkprogress.org/trump-imprison-hillary-if-he-were-president-aae574d516do> [<http://perma.cc/7D7H-JELW>].
3. Ian Millhiser, *Trump Proposes Stripping Citizenship from Political Protesters*, THINKPROGRESS (Nov. 29, 2016), <http://thinkprogress.org/trump-citizenship-flag-40dfiefida6a> [<http://perma.cc/442H-NT83>].
4. Tom LoBianco, *Donald Trump on Terrorists: 'Take Out Their Families'*, CNN (Dec. 3, 2015, 12:19 PM), <http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/> [<http://perma.cc/W85E-DDC3>].
5. Peter Holley, *Former CIA Director: Military May Refuse To Follow Trump's Orders If He Becomes President*, WASH. POST (Feb. 28, 2016), <http://www.washingtonpost.com/news/morning-mix/wp/2016/02/28/former-cia-director-military-may-refuse-to-follow-trumps-orders-if-he-becomes-president/> [<http://perma.cc/R362-PNEK>].

entering the United States.”⁶ And he opened his campaign by labeling Mexican immigrants criminals and “rapists.”⁷

Meanwhile, his Attorney General—Jeff Sessions—prosecuted a former aide to Dr. Martin Luther King, Jr. after that aide helped black people in Alabama to vote.⁸ Sessions’ Department of Justice faces a Supreme Court that has actively dismantled much of the legal framework protecting voting rights.⁹

As the executive branch contemplates direct attacks on the foundations of liberal democracy—open debate, equal protection of the law, perhaps even the franchise itself—the legislative branch is hoping to dismantle much of the modern liberal infrastructure built over the last century.

House of Representatives Speaker Paul Ryan’s signature plan to privatize Medicare would increase seniors’ out-of-pocket health costs by as much as forty

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6. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 AM), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/> [<http://perma.cc/RB7G-VX7M>].
 7. Adam Edelman, *A Look at Trump’s Most Outrageous Comments About Mexicans as He Attempts Damage Control by Visiting with Country’s President*, N.Y. DAILY NEWS (Aug. 31, 2016), <http://www.nydailynews.com/news/politics/trump-outrageous-comments-mexicans-article-1.2773214> [<http://perma.cc/WH37-CZJ3>].
 8. Michelle Ye Hee Lee, *The Facts About the Voter Fraud Case That Sank Jeff Sessions’s Bid for a Judgeship*, WASH. POST (Nov. 28, 2016), <http://www.washingtonpost.com/news/fact-checker/wp/2016/11/28/the-facts-about-the-voter-fraud-case-that-sunk-jeff-sessions-bid-for-a-judgeship/> [<http://perma.cc/U4AG-7W2V>].
 9. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (claiming that “[t]he Voting Rights Act departs sharply” from “basic principles”). Perhaps the most ominous sign for voting rights is the Supreme Court’s brief order in *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 27 (2016). After North Carolina enacted an omnibus elections bill containing several provisions making it harder to cast a ballot, the Fourth Circuit struck it down, determining that “intentional racial discrimination animated [the state’s] action.” *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). The state legislature “requested data on the use, by race, of a number of voting practices,” and then used that data to restrict voting and voter registration in ways that “disproportionately affected African Americans.” *Id.* And yet, even under these circumstances, four Justices—the same four who were in the majority in *Shelby County*—voted to allow nearly all of the law to take effect during the 2016 election. *North Carolina*, 137 S. Ct. at 28. Ultimately, the Supreme Court chose not to give the North Carolina law a full hearing on the merits, so the state’s law is dead for the time being. Nevertheless, in a statement accompanying the Court’s denial of certiorari, Chief Justice Roberts strongly suggested that the Court only denied certiorari due to procedural and jurisdictional anomalies unique to this case. *North Carolina v. N.C. State Conf. of the NAACP*, No. 16-833, 2017 U.S. LEXIS 2947, at *3 (May 15, 2017). The four justices who voted to reinstate the North Carolina law, in other words, still appear eager to limit voting rights—and they are now joined by a fifth ally who is likely to share their desires.

percent.¹⁰ Medicaid spending under the plan stands to be cut by at least one-third, and potentially as much as one-half.¹¹ A proposal by House Social Security Subcommittee Chairman Sam Johnson “would slash benefits by as much as half for some workers over the coming decades, and by close to twenty percent for even the poorest workers.”¹² And then, of course, there is the Republican Party’s Ahab-like obsession with ending the Affordable Care Act.

The twin accomplishments of the twentieth century—a multiracial, open democracy and a modern welfare state—now face their greatest threat since at least the mid-1960s.

A significant challenge facing modern liberals is that these accomplishments depend on a strong central government. Programs like Social Security and Medicare, for example, are economically impossible to implement at the state level.¹³ Jim Crow fell only after the federal government took aggressive action to stop it.¹⁴

Yet the powerful national government built by men such as Franklin Roosevelt, Lyndon Johnson, and Barack Obama is now led by Donald Trump. The sheer size of this national government—evidenced by the fact that it now employs tens of thousands of law enforcement officers—enhances Trump’s ability to harass the populations of immigrants he has threatened. Even journalists and political dissidents could be facing a new existence under siege.

The federal government grew dramatically, not just in size, but also in ambition, in the last several generations.¹⁵ Liberals encouraged this growth in part because they assumed that the risk of an autocratic president was minimal

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10. Ian Millhiser, *The Republican Medicare Plan Is an Atrocity*, THINKPROGRESS (Nov. 15, 2016), <http://thinkprogress.org/the-republican-medicare-plan-is-an-atrocity-315e16ebbeof> [<http://perma.cc/Z9HW-BLSG>].
 11. Ian Millhiser, *If Republicans Get Their Way, Poor People Better Hope They Never Get Sick Again*, THINKPROGRESS (Nov. 17, 2016), <http://thinkprogress.org/paul-ryan-health-care-9476365efocd> [<http://perma.cc/ZSH2-PJNP>].
 12. Alan Pyke, *Republicans Launch Plan To Annihilate Social Security*, THINKPROGRESS (Dec. 12, 2016), <http://thinkprogress.org/republicans-social-security-369dbd5223fe> [<http://perma.cc/U5S2-D5YM>].
 13. See *infra* Section I.B.
 14. See *infra* Section I.A.
 15. Federal spending as a share of GDP grew from just under eight percent in 1932, the year President Roosevelt was elected, to nearly twenty-one percent in 2016. *Federal Net Outlays as Percent of Gross Domestic Product*, FED. RES. BANK ST. LOUIS, <http://fred.stlouisfed.org/series/FYONGDA188S> [<http://perma.cc/D4RP-F7SQ>]. During this time, the United States built a national pension system for the elderly and various health care programs to aid the poor, the aged, and, most recently, people with moderate incomes. Meanwhile, the federal government built a regulatory state providing a minimum wage, protections for unions, an entire agency devoted to environmental protection, and a web of antidiscrimination laws, among other things.

and worth taking for the benefits of a more robust central government. The 2016 election results call that assumption into question, raising disturbing questions about whether the broader liberal economic project is in tension with the need to protect against autocrats.

In our desire to defend against a potentially catastrophic presidency, however, it is important to remember that there are also heavy costs to dismantling the modern liberal state. If the Affordable Care Act is repealed, an estimated 27,000 people will die every year who would have otherwise lived.¹⁶ Before Social Security, aged workers typically either depended upon their adult children for housing and sustenance or took up residence in so-called poor houses—squalid, dehumanizing institutions where residents often received little, if any, medical care.¹⁷ The elderly poverty rate is now a third of what it was in 1966, largely because of the federal government's commitments to older Americans.¹⁸

Part I of this Essay will lay out some nonnegotiable areas that must remain the domain of the federal government. Such domains will include matters which cannot feasibly be implemented at the state level, such as safety net programs for the elderly, as well as areas where America's troubling history argues against leaving matters entirely to the states, such as civil rights.

Part II will then lay out where federalist arguments can and should be used to defend against a potentially authoritarian president. The federal government employs relatively few armed law enforcement officers, at least as compared to local and state police forces. For this reason, Trump will almost certainly need help from state employees if he wants to implement his most ambitious

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16. Ian Millhiser, *Here's How Many People Could Die Every Year if Obamacare Is Repealed*, THINKPROGRESS (Dec. 7, 2016), <http://thinkprogress.org/heres-how-many-people-could-die-every-year-if-obamacare-is-repealed-ae4bf3e100a2> [<http://perma.cc/T4FP-HWYC>]. According to the Urban Institute, approximately 22.5 million people will lose insurance if the Affordable Care Act is repealed in its entirety. Linda J. Blumberg et al., *Implications of Partial Repeal of the ACA Through Reconciliation*, URB. INST. 4 (Dec. 6, 2016), <http://www.urban.org/research/publication/implications-partial-repeal-aca-through-reconciliation> [<http://perma.cc/5948-KBJ5>]. Meanwhile, a study of mortality rates after Massachusetts implemented health reforms similar to the Affordable Care Act determined that for every 830 adults gaining insurance coverage there was one fewer death per year. Benjamin D. Sommers et al., *Changes in Mortality After Massachusetts Health Care Reform: A Quasi-Experimental Study*, 160 ANNALS INTERNAL MEDICINE 585, 585 (2014). Twenty-two point five million divided by 830 equals 27,108 deaths.
17. IAN MILLHISER, INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED 131–34 (2015).
18. Drew DeSilver, *Who's Poor in America? 50 Years into the 'War on Poverty,' a Data Portrait*, PEW RES. CTR. (Jan. 13, 2014), <http://www.pewresearch.org/fact-tank/2014/01/13/whos-poor-in-america-50-years-into-the-war-on-poverty-a-data-portrait/> [<http://perma.cc/7HBZ-GZ4Z>].

proposals, one of which is the deportation of “millions and millions” of immigrants.¹⁹

Yet the Supreme Court’s Anti-Commandeering Doctrine prohibits the federal government from commanding state and local officials to aid in implementing a federal policy,²⁰ and the Constitution’s enumerated powers place subject-matter limits on the federal government’s ability to enact criminal law.²¹ Both offer meaningful checks on a potentially authoritarian president.

Finally, Part III will consider how the balance of power between the federal government and the states should be reformed if liberal democracy survives the Trump administration. It proposes consolidating federal law enforcement agencies and reducing the number of federal agents, while simultaneously converting Medicaid from a federal-state partnership to an exclusively federal program similar to Medicare. Doing so will reduce the ability of an authoritarian president to use force against the polity, while simultaneously shoring up an important health care program that is currently vulnerable to attacks from both federal and state policymakers.

I. NON-NEGOTIABLES

America’s fraught racial history demonstrates that a strong federal government is necessary to provide a baseline of civil rights for all Americans. Likewise, building a social safety net for retired persons is not possible at the state level, at least so long as Americans remain free to take up residence anywhere in the United States at any time. Simply put, even as a defense against an authoritarian president, a radical devolution of power from the federal government to the states would not be feasible without triggering a humanitarian crisis.

This is a policy and moral judgment, but it also has profound constitutional implications. Social Security requires a sufficiently broad understanding of

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19. Amy B. Wang, *Donald Trump Plans To Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), <http://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/> [http://perma.cc/VB9G-2XWS].
 20. See *Printz v. United States*, 521 U.S. 898, 926 (1997) (“The Federal Government, we held, may not compel the States to enact or administer a federal regulatory program.” (quoting *New York v. United States*, 505 U.S. 144, 188 (1992) (internal quotation marks omitted))).
 21. See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 558 (6th Cir. 2011) (Sutton, J., concurring in part) (“As *Lopez* and *Morrison* suggest, a majority of the Court still appears to accept the line between regulating economic and non-economic conduct, which is why a general murder or assault statute would exceed congressional power.”).

Congress' taxing and spending powers to exist.²² Civil rights laws targeting private actors require a sufficiently broad understanding of Congress' ability to regulate commerce.²³ The Constitution does not operate at a granular level—it enumerates generally defined federal powers. That means that any theory of the Constitution which permits a modern web of civil rights laws and a safety net for the elderly will necessarily entail a federal government with broad discretion to act in many areas.

There are limits, in other words, to how far modern liberals can go in using constitutional litigation as a tool against authoritarianism without potentially triggering consequences that are no less troubling than the implications of an authoritarian president.

A. *The Problem of Race*

The Equal Protection Clause is not self-executing.

This is not a legal argument. It is the judgment of history. Congress proposed and the states ratified the Fourteenth Amendment to eradicate all vestiges of American apartheid, and many states largely ignored it for nearly a century. Indeed, even the Supreme Court's 1954 decision in *Brown v. Board of Education*²⁴ was not sufficient to foster a new birth of freedom in the South; it took Congress, acting under once-controversial understandings of its own enumerated powers, to break the back of Jim Crow.

Although desegregation moved more quickly outside of the old Confederacy, the southern states' resistance to *Brown* was wildly successful for an entire decade.²⁵ By 1959, only 40 of North Carolina's 300,000 African American students attended integrated schools. Just 42 of Nashville's 12,000 black students attended desegregated schools in 1960.²⁶ As a frustrated Justice Black wrote ten years after the *Brown* decision, "there has been entirely too much deliberation and not enough speed."²⁷

Indeed, the South's wall of resistance did not begin to crumble until after Congress got involved. The Civil Rights Act of 1964 empowered both the Justice

22. See *Helvering v. Davis*, 301 U.S. 619, 644–45 (1937) (upholding the old-age pension provisions of Social Security against a constitutional challenge).

23. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) ("Congress may—as it has—prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear.").

24. 347 U.S. 483 (1954).

25. See MILLHISER, *supra* note 17, at 178 ("[T]he first ten years of *Brown v. Board of Education* did more to demonstrate that the Supreme Court was either unable or unwilling to tear down Jim Crow than it did to establish the justices as grand defenders of civil rights.").

26. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 359 (2004).

27. *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 229 (1964).

Department to file suits against segregated school systems—a role that previously had been left almost entirely to lawyers at the NAACP Legal Defense Fund—and federal officials to withhold funding from segregated schools. As a result, segregation began to buckle. The percentage of southern black children attending integrated schools increased nearly six-fold in the first two years after the Civil Rights Act took effect. Within five years, nearly a third of southern black children attended integrated schools. By 1973, that number was ninety percent.²⁸

A similar narrative played out in the voting rights context. On the day President Johnson signed the Voting Rights Act into law, Mississippi's black voter registration rate was below seven percent. Two years later, nearly sixty percent of eligible African Americans were registered to vote in Mississippi.²⁹

Admittedly, many key provisions of these laws depend upon federal enforcement to be effective, and it is unlikely, to say the least, that Attorney General Sessions will make enforcement actions against segregated school districts a high priority in his Justice Department. Nonetheless, there remains a danger in devolving power over civil rights from the federal government to the states—such a devolution would remain in effect even if Sessions is someday replaced by someone more sympathetic to civil rights enforcement. Similarly, if the Supreme Court shrinks Congress' authority under the Commerce Clause, hindering the federal legislature's capacity to curb civil rights violations, Congress will not simply get its power back because a different president appoints a different attorney general.

Attorneys general, and even presidents, come and go. But a fundamental rethinking of the federal government's authority over civil rights ought to be here to stay.

B. *The Problem of Retirement*

An even greater problem arises in the context of both explicitly old-age programs such as Medicare and Social Security, and programs such as Medicaid, which spend a large percentage of their funding on the elderly.³⁰ Although it is theoretically possible that each state could independently decide to enact robust civil rights laws, states would face potentially insurmountable economic obstacles if they attempted to recreate programs like Social Security for their residents.

28. KLARMAN, *supra* note 26, at 362–63.

29. Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 904 (2008).

30. See Nina Bernstein, *With Medicaid, Long-Term Care of Elderly Looms as a Rising Cost*, N.Y. TIMES (Sept. 6, 2012), <http://www.nytimes.com/2012/09/07/health/policy/long-term-care-looms-as-rising-medicaid-cost.html> [<http://perma.cc/T7FZ-Y2WL>] (“Over all, 31.5 percent of Medicaid’s \$400 billion in shared federal and state spending goes to long-term care for the elderly and the disabled.”).

“The ‘constitutional right to travel from one State to another’ is firmly embedded” in Supreme Court jurisprudence.³¹ For this reason, many Americans reside in (and pay taxes in) multiple states during their working careers. Many also move to warmer states in their retirements, causing those states to have a disproportionate share of the nation’s elderly population. To take just one example, 19.4% of Florida residents are over the age of sixty-five, as compared to 14.9% of national residents as a whole.³²

Free travel among states creates a mismatch between where these retirees pay the bulk of their taxes and where they would collect retirement benefits if programs like Social Security and Medicare were devolved to the states. Hundreds of thousands of people will work and pay taxes outside of retirement destination states like Florida, only to show up later in these destination states once the bulk of their income-earning days are behind them and demand expensive pensions and health benefits.³³

One possible solution would be to cut benefits to new residents who did not contribute a sufficient amount to their new state’s treasury in previously paid taxes. But even setting aside the moral implications of providing inferior health benefits to new residents, this solution is also unconstitutional. In *Saenz v. Roe*,³⁴ the Supreme Court held that a state could not discriminate between established residents and bona fide new residents when providing welfare benefits. When U.S. citizens from one state “elect to become permanent residents” of a new state, one of the privileges or immunities they enjoy as citizens is “the right to be treated like other citizens of that State.”³⁵ The same rule would apply to a state like Florida if it attempted to treat newly arrived retirees differently than longstanding residents.

So states confronted by a wave of new retirees would have only two choices: cut benefits on *all* elderly residents or raise taxes in order to meet their obligations to retirees.

The latter option risks triggering a death spiral. If taxes rise in Florida, many non-elderly residents will decide to move elsewhere. But the loss of these

31. *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)).

32. *Compare Welcome to QuickFacts: Florida*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/12> [<http://perma.cc/77X3-9DQT>], with *Welcome to QuickFacts: United States*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/> [<http://perma.cc/Y2NK-PAWK>].

33. Although only about five percent of senior Americans typically migrate to other states each year, this five percent is especially likely to migrate to just a handful of states. Between 2010 and 2013, 61,000 seniors migrated every year to Florida. Anna Robaton, *Most Retirees Stay Put—But Those Who Move Head Here*, CNBC (Nov. 6, 2015, 7:58 AM), <http://www.cnbc.com/2015/11/06/most-retirees-stay-put-but-those-who-move-head-here.html> [<http://perma.cc/MD6B-C4RJ>].

34. 526 U.S. at 489.

35. *Id.* at 500.

residents will diminish Florida's tax base even further, forcing the state to raise tax rates even more to continue to pay out the same level of benefits to retirees. Higher taxes beget fewer residents, which beget higher taxes, which beget fewer residents.

In fairness, this specific problem is only likely to arise in the handful of states that are popular destinations for retirees. That being said, *every* state would confront administrative problems if power over old age benefits were devolved from federal government control. If a person works in six different states before retirement, which state bears the responsibility of paying for this American's health insurance and retirement pension? Or should all six states contribute to these costs? If so, should each state contribute equally or on a pro-rated basis according to how much the individual paid in taxes to each of the six states? And what happens if fifty different states reach fifty different answers to these types of questions?

Fairly early in the Constitutional Convention's proceedings, the delegates endorsed a resolution providing that Congress must be able to "legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent."³⁶ If ever there was a case where the states are not competent to act separately, this is it.

Federal control over old-age benefits, in other words, is essential in a nation where every citizen enjoys a constitutional right to travel. It ensures that every American, regardless of where they work and pay taxes prior to retirement, will pay into the same treasury that will later provide them with retirement benefits. Devolving this responsibility to the states is not feasible if we want to maintain generous retirement benefits in all fifty states.

Similarly, constitutional litigation that cuts too deeply into Congress' power to regulate economic matters or provide for the general welfare will not be a fruitful way to limit autocracy at the federal level. Whatever may be gained through such lawsuits, the price will be too high.

II. CRIMINAL LAW ENFORCEMENT IS DIFFERENT

A state, as Max Weber defined it, "is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory."³⁷ A worker's boss can command him to work on the weekend. A child's parent can command her to clean her room. But only government has the legitimate authority to back its edicts with armed law enforcement officers.

This monopoly on legitimate force makes a state's police and military forces uniquely dangerous. They enable and protect governments' ability to kill civilians, and they make it possible to curtail liberties on a grand scale. And, even in a society with private gun ownership as widespread as it is in the United

36. JACK M. BALKIN, *LIVING ORIGINALISM* 144 (2011).

37. MAX WEBER, *POLITICS AS A VOCATION* 4 (1946) (emphasis omitted).

States, no non-state actor can plausibly hope to match the state's capacity to use force with equal might.

Accordingly, one of the most significant checks on a potentially autocratic president is the fact that, for the most part, law enforcement resources are not centralized. In 2016, the Federal Bureau of Investigation (FBI) employed just over 13,000 law enforcement agents,³⁸ less than half the total number of uniformed officers employed by the New York Police Department alone.³⁹

The federal government's capacity to enforce immigration law or to conduct mass deportations is similarly constrained by limited federal personnel. As the Obama administration explained in a memorandum justifying its more lenient immigration policies, "although there are approximately 11.3 million undocumented aliens in the country," Congress only appropriated enough "resources to remove fewer than 400,000 such aliens each year."⁴⁰

In other words, if Trump wants to make good on his promise to deport "millions and millions" of immigrants,⁴¹ he will need to either convince Congress to spend lavishly on this effort—deporting every single undocumented immigrant in the country would cost about \$100 billion,⁴² more than the 2016 discretionary budgets of the Departments of Energy, the Interior, Justice, Labor, Transportation, and the Treasury combined⁴³—or he will need to enlist support from state and local police forces that employ far more officers than the federal government.

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38. Fed. Bureau of Investigation, *FY 2017 Budget Request at a Glance*, U.S. DEP'T JUST. 1 (2016), <http://www.justice.gov/jmd/file/822286/download> [<http://perma.cc/G9ZY-J569>].
39. *Frequently Asked Questions: Police Administration*, N.Y. POLICE DEP'T, http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml [<http://perma.cc/5GZN-6ABN>] ("The NYPD's current uniformed strength is approximately 34,500.").
40. *The Department of Homeland Security's Authority To Prioritize Removal of Certain Aliens Unlawfully Present in the United States and To Defer Removal of Others*, 38 OPINION OFF. LEGAL COUNS. 1, 1 (2014), <http://www.justice.gov/file/179206/download> [<http://perma.cc/57HT-8DS8>].
41. Wang, *supra* note 19.
42. The Department of Homeland Security says that it costs \$8,661 to deport one immigrant. See Philip E. Wolgin, *What Would It Cost To Deport All 5 Million Beneficiaries of Executive Action on Immigration?*, CTR. FOR AM. PROGRESS (Feb. 23, 2015), <http://www.americanprogress.org/issues/immigration/news/2015/02/23/106983/what-would-it-cost-to-deport-all-5-million-beneficiaries-of-executive-action-on-immigration/> [<http://perma.cc/6PPA-HNXL>]. Applying this figure to the approximately 11.3 million undocumented immigrants within the United States would require the nation to spend about \$97.9 billion to deport every last one.
43. *Budget of the United States Government: Fiscal Year 2017*, OFF. MGMT. & BUDGET 161 (2016), <http://www.govinfo.gov/content/pkg/budget-2017-bud/pdf/budget-2017-bud.pdf> [<http://perma.cc/53T9-6BUL>].

President Trump's ability to enlist state and local law enforcement support is itself constrained, however, by the Supreme Court's declaration that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."⁴⁴ President Trump can merely ask state and local governments to aid his immigration policies, and it is likely that many of them will do so. Trump's allies in Congress can also tie some federal grant money to state and local cooperation with federal immigration enforcement.⁴⁵

There is some danger to liberals seeking to push back against Trump's immigration proposals while also maintaining a healthy welfare state. Medicaid, for example, is also a conditional grant program, so a too-narrow reading of Congress' power to attach conditions to federal grants could serve Speaker Ryan's goals even as it undermines Trump's. Thanks to the Court's novel decision in *National Federation of Independent Business v. Sebelius*,⁴⁶ which likens the Affordable Care Act's effort to expand the Medicaid program to "a gun to the head" of the states,⁴⁷ millions of Americans went without health coverage that otherwise would have been insured.⁴⁸ Nevertheless, it is likely that the Trump Administration's early efforts to conscript local police forces are, frankly, too amateurish to survive constitutional scrutiny under existing doctrines—and that the same can be said of the efforts of its allies in Congress. There is likely no need, in other words, to expand existing limits on Congress' spending power in order to thwart Trump's early efforts to enlist state and local police into a crackdown on immigrants.

A. *Trump's Executive Order*

Federal law, 8 U.S.C. § 1373 (§ 1373), provides that state and local governments may not "prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."⁴⁹ Thus, for example, if a New

44. *New York v. United States*, 505 U.S. 144, 188 (1992); *see also* *Printz v. United States*, 521 U.S. 898, 925 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.").

45. *See* *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (laying out the circumstances under which Congress can attach conditions on receipt of federal funds).

46. 579 U.S. 519 (2012).

47. *Id.* at 581.

48. *See* Stan Dorn et al., *What Is the Result of States Not Expanding Medicaid?*, URB. INST. (2014), <http://www.urban.org/sites/default/files/publication/22816/413192-What-is-the-Result-of-States-Not-Expanding-Medicaid-.PDF> [<http://perma.cc/8N8X-2ZUF>] ("In the 24 states that have not expanded Medicaid, 6.7 million residents are projected to remain uninsured in 2016 as a result.").

49. 8 U.S.C. § 1373 (2012).

York City police officer encounters an undocumented immigrant during his official duties, neither the state nor the city may prohibit this officer from informing federal immigration officials.

Standing alone, § 1373 is constitutionally dubious. Under *Printz v. United States*,⁵⁰ the federal government is not simply prohibited from compelling states to participate in federal programs, it also may not “circumvent that prohibition by conscripting the State’s officers directly.”⁵¹ Moreover, although the NYPD officer described above may decide to provide information to federal immigration officials on his own time and using his own resources, the fact remains that the officer is aware of the presence of an undocumented person solely because of the duties he or she carried out in service to the City of New York.

Thus, although the Second Circuit upheld § 1373 against a facial challenge in *City of New York v. United States*,⁵² it also implied that the federal government could not enable municipal employees to turn over “confidential information obtained in the course of municipal business.”⁵³ So long as states and localities deem the immigration status of persons who state and local officials encounter in their official duties to be a confidential matter that cannot be disclosed generally, Congress lacks the constitutional authority to require states to dispense such information to the federal government.

Five days into his presidency, Trump attempted to work around this constitutional limitation through an executive order.⁵⁴ Under this order:

[T]he Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.⁵⁵

Yet, despite this order’s sweeping language—which at first glance suggests that states and localities could lose *all* federal grants outside of a narrowly defined category of law enforcement grants—it is far from clear that this order will have much bite at all when subjected to constitutional scrutiny.

50. 521 U.S. 898 (1997).

51. *Id.* at 935.

52. 179 F.3d 29 (2d Cir. 1999).

53. *Id.* at 36.

54. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017). After this Essay was completed, but before it was published, a federal district court preliminarily enjoined a crucial section of Trump’s executive order. *Cnty. of Santa Clara v. Trump*, No. 17-cv-00485-WHO, 2017 U.S. Dist. LEXIS 62871, at *99 (N.D. Cal. Apr. 25, 2017).

55. *Id.*

For one thing, although Congress may attach conditions to federal grants, it “must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.”⁵⁶ It is highly unlikely, to say the least, that the lawmakers who wrote existing federal laws establishing federal grant programs anticipated that, in 2017, Donald Trump would move into the White House and issue a broad executive order targeting undocumented immigrants. So it is unlikely that many, if any, federal laws provide states with clear notice that they would need to comply with Trump’s order to receive federal funds.

Moreover, even if Trump’s own order could provide states with the clear notice required under the Constitution—itself a dubious proposition—the specific order that Trump signed does not provide that notice. It only authorizes cabinet secretaries to cut off federal grant money “to the extent consistent with law.”⁵⁷

Of course, Congress could change the law to add the required clear notice into the statutes laying out various grant programs. Even then, however, the broad policy laid out in Trump’s order would remain unconstitutional under a separate limit on Congress’ power to create conditional grant programs.⁵⁸ It is not clear, moreover, that the specific lawmakers seeking to strip funding from so-called “sanctuary jurisdictions” have seriously thought through the constitutional limits that they face.

B. *Senator Toomey’s Bill*

As of this writing, the leading legislative proposal seeking to strip funding from localities that withhold their law enforcement resources from federal immigration authorities is a bill introduced by Senator Pat Toomey (R-PA) and supported by nearly every Republican senator in the 114th Congress.⁵⁹ Under the “Stop Dangerous Sanctuary Cities Act,”⁶⁰ states or localities that prohibit their officials from sharing information regarding individuals’ immigration status become ineligible for a long list of federal grants—including grants under “Section 203(a) of the Public Works and Economic Development Act of 1965,” and grants under “Title I of the Housing and Community Development Act of

56. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

57. Exec. Order No. 13768, 82 Fed. Reg. at 8801.

58. *Dole*, 483 U.S. at 207.

59. Ian Millhiser, *The GOP’s Unconstitutional Plan To Conscript Local Police into Trump’s Deportation Squads*, THINKPROGRESS (Dec. 4, 2016), <http://thinkprogress.org/the-gops-unconstitutional-plan-to-conscript-local-police-into-trump-s-deportation-squads-18c782f1f4fc> [<http://perma.cc/V8EA-DU83>].

60. S. 3100, 114th Cong. (2016).

1974.”⁶¹ Additionally, the bill prohibits various federally funded projects from being conducted within a “sanctuary jurisdiction.”⁶²

The Supreme Court’s Spending Clause decisions, however, indicate “that conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’”⁶³ That is, there must be a degree of “germaneness” between the subject-matter of the grant and the nature of the condition⁶⁴ being imposed.

Admittedly, this germaneness requirement is not especially rigid.⁶⁵ In *South Dakota v. Dole*, for example, the Court upheld a law stripping a portion of federal highway funds from states with a drinking age lower than twenty-one because “the lack of uniformity in the States’ drinking ages created an incentive to drink and drive because young persons commut[e] to border States where the drinking age is lower.”⁶⁶

Nevertheless, if any bill fails the germaneness test, Senator Toomey’s bill does. Toomey’s bill threatens a wide range of grants. For example, the bill jeopardizes some funded real estate developments that increase job prospects or otherwise benefit low-income residents and the unemployed.⁶⁷ Other grants at risk seek to reduce blight in low and moderate income communities.⁶⁸ Still others restore or preserve “properties of special value for historic, architectural, or esthetic reasons.”⁶⁹ A grant under one of the targeted programs funded a litter removal campaign in a Philadelphia neighborhood.⁷⁰

It is hard to draw a meaningful connection between many of the grants funded by these programs and either criminal justice or immigration policy. To be sure, it is possible to make an attenuated connection for virtually any grant—for example, maybe some of the litter on Philadelphia’s streets was put there by immigrants, so deporting more immigrants would lead to less litter.

But if the Supreme Court permits such attenuated connections to satisfy the germaneness requirement, it might as well dispense with the requirement

61. *Id.* § 4.

62. *Id.*

63. *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

64. *Id.* at 208.

65. See *Benning v. Georgia*, 391 F.3d 1299, 1307–08 (11th Cir. 2004) (explaining that *Dole*’s germaneness requirement establishes “a minimal standard of rationality”).

66. *Id.* at 209 (internal quotation marks omitted).

67. 42 U.S.C. § 3141 (2012).

68. *Id.* § 5301(c)(1).

69. *Id.* § 5301(c)(7).

70. Jake Blumgart, *What’s at Stake if Toomey and Trump Cut Funding to Philly?*, PLANPHILLY (Dec. 2, 2016), <http://planphilly.com/articles/2016/12/02/what-s-at-stake-if-toomey-and-trump-cut-funding-to-philly> [<http://perma.cc/HA7T-86SH>].

altogether because virtually any condition attached to a grant would be upheld under such an interpretation of the standard. An immigration crackdown could be tied to federal highway funds, because immigrants sometimes cause traffic accidents. Or it could be tied to Medicaid funds, because immigrants need healthcare. Or it could be tied to a grant funding a local park, because immigrants may enjoy sitting under trees.

The question of which conditions can be applied to which grants is likely to be a fruitful topic of litigation in the Trump administration. And it is far from clear that either the White House or its allies in Congress have given significant thought to how it can tailor its attacks on so-called sanctuary jurisdictions in order to prevail in such litigation.

Moreover, at least for the moment, there are early signs that many states and localities are not changing course because of Trump's threat to cut off federal funding. According to an early February news report, just one sanctuary jurisdiction—Miami-Dade County—ordered its law enforcement officers to assist immigration authorities. Meanwhile, “since Trump's election in November, nearly a dozen cities and counties—from progressive California to deep-red Alabama—have voted to adopt sanctuary city policies.”⁷¹

The Anticommandeering Doctrine, in other words, provides a fairly robust check on the Trump administration's ability to crack down on immigrants, or otherwise encourage law enforcement to crack down on groups disfavored by the administration. Neither Trump nor his allies in Congress, moreover, appear to have thought seriously about how this doctrine constrains their actions, or what they can do to overcome it.

III. WHAT IF TRUMPISM IS DEFEATED?

Having laid out a few thoughts about how appeals to federalism should and should not be used to thwart an illiberal president, I want to conclude this Essay with a couple of suggestions for how future governments could make it more difficult for an autocratic president to consolidate power should Trump be defeated in 2020 or otherwise removed from office.

The first is to consolidate federal law enforcement. In 2008, twenty-four different federal agencies employed at least 250 full-time personnel with the power to make arrests and carry a gun.⁷² Some of these agencies, such as the FBI, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), have overlapping missions that lead to unnecessary redundancy.

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71. Alice Miranda Ollstein, *Donald Trump Tried To Punish 'Sanctuary Cities.' It's Backfiring*, THINKPROGRESS (Feb. 2, 2017), <http://thinkprogress.org/donald-trump-tried-to-punish-sanctuary-cities-it-s-backfiring-fdb2b8be26fc#.xi13vbi2m> [http://perma.cc/AG4R-7AJ6].
72. Brian A. Reaves, Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2008*, U.S. DEP'T JUST. 1 (2012), <http://www.bjs.gov/content/pub/pdf/fleo08.pdf> [http://perma.cc/H9L9-7MDN].

Consider, for example, the FBI and ATF. As Chelsea Parsons and Arkadi Gerney explain:

There exists considerable overlap between the work and resources of ATF and the FBI in the areas of guns, explosives, and violent crime. For example, the FBI has a well-established anti-gang initiative that targets violent street gangs across the country. But ATF has also targeted violent gangs for investigation because of their use of guns in crimes and often works with local law enforcement to bring gang-related cases to federal court. The FBI operates the National Instant Criminal Background Check System used for gun sales by federally licensed dealers, but ATF operates the regulatory system that issues those licenses and the database for tracing crime guns. Both agencies have extensive training programs for explosives forensics and investigations, and both agencies operate numerous forensic laboratories that process evidence from violent crime scenes. Both agencies have specially trained response teams to handle emergencies such as hostage-taking, serious explosive-related incidents, and large-scale special events such as the Super Bowl.⁷³

Although a full review of the two dozen federal law enforcement agencies is beyond the scope of this Essay, consolidating some of these agencies within the FBI would surely have several beneficial effects. First, the consolidation would eliminate redundancies and reduce costs. It would enable the Justice Department to make thoughtful decisions about how to deploy law enforcement resources—rather than devoting thousands of agents to drug enforcement simply because there happens to be an agency set up for this purpose. And it would also enable the federal government to shrink the overall number of federal employees who carry a badge and a gun—thereby giving an autocratic president fewer officers under his or her control.

My second proposal is to look for opportunities to federalize programs that are currently set up as federal-state partnerships, especially Medicaid. Under our current system, programs like Medicaid can be disrupted either by federal officials or by state governments that refuse to cooperate—just ask the millions of Americans denied health insurance because their state governments would not participate in the Affordable Care Act's Medicaid expansion. Converting Medicaid into a fully federalized program similar to Medicare will prevent state governments from undermining it.

This plan to federalize Medicaid may seem like a counterintuitive proposal to include in an Essay warning about how the president could abuse federal power, but there is another benefit to fully federalizing federal-state

73. Chelsea Parsons et al., *The Bureau and the Bureau: A Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives and a Proposal To Merge It with the Federal Bureau of Investigation*, CTR. FOR AM. PROGRESS 10 (May 19, 2015, 6:45 AM), <http://www.americanprogress.org/issues/guns-crime/reports/2015/05/19/111386/the-bureau-and-the-bureau/> [http://perma.cc/4NXX-8JL5].

partnerships. Currently, liberals who care both about warding off autocracy and maintaining a robust welfare state must trim their sails, avoiding too-aggressive federalism arguments that could weaken important safety net programs even as they rein in the White House. A Supreme Court decision limiting the Trump administration's ability to crack down on "sanctuary jurisdictions" could potentially include language limiting Congress' ability to attach conditions to Medicaid funds. Indeed, some justices might view a case attacking a Trump administration program as a politically ideal vehicle to make changes to federalism doctrine favored by conservatives.

There are, of course, limits to how far the federal government can go in fully federalizing programs that are currently administered through conditional grants to the states. It would not be practical, for example, for the federal government to build an entire network of public schools and universities to displace the network of schools currently operated by the states (and funded, at least in part, by federal grants). But converting Medicaid into a federally administered program similar to Medicare would reduce the impact of a Supreme Court decision shrinking Congress' power under the Spending Clause, and is well within the competence of a national government that, thanks to Medicare, already knows something about how to administer a single-payer healthcare system.

In offering these two proposals, I am fully aware of their smallness compared to the dangers presented by an autocratic president. Our system of government places the president at the apex of our military's command chart⁷⁴ and makes him the chief administrator of a welfare and regulatory state that millions of lives depend upon. These features of our government cannot be changed without fundamentally rethinking America's role in the world and its obligation to serve its people. And, as I have explained above, the cost of betraying this latter obligation is at least as great as the potential cost of an autocratic president.

The price of freedom cannot be a return to the era of poorhouses—or a return to the era when men and women died because they could not obtain health insurance.

And so we are, in many ways, trapped between our moral obligation to provide good governance and the now imminent threat of a malignant government. In the long run, this threat can only be mitigated by clever lawyers or by good judges. Only smart decisions at the ballot box can completely ward off the threat of an autocratic president.⁷⁵ As Chief Justice John Roberts warned

74. U.S. CONST. art. II, § 2.

75. Though eliminating the Electoral College would surely help! See Ian Millhiser, *It's Official. Clinton Won the Popular Vote by 2,864,974*, THINKPROGRESS (Dec. 20, 2016), <http://thinkprogress.org/clinton-won-popular-vote-45ca997fedb1> [<http://perma.cc/8SVR-PN24>].

us, it is not his job “to protect the people from the consequences of their political choices.”⁷⁶

76. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012).