

Federalism Friction in the First Year of the Trump Presidency

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Over the last twelve months or so, federalism principles have been repeatedly invoked by state and local governments in a range of lawsuits and legislative proposals seeking to block or temper federal policy initiatives emanating from the new administration of President Donald Trump.¹ While federalism doctrines crafted by the Supreme Court have been successfully deployed over the past few decades to stymie liberal policies,² the most salient lawsuits and legislative innovations in 2017 were engineered by blue states and cities against the administration to challenge more conservative agenda items, such as the President's series of executive orders regarding entry into the U.S. from various foreign nations,³ the elimination of so-called

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1. While other researchers have begun to document the high number of lawsuits and other acts of state/local defiance—see, e.g., Angela Hart, *From Birth Control to the Border Wall: 17 Ways California Sued the Trump Administration in 2017*, SAC. BEE, Dec. 11, 2017, <http://www.sacbee.com/news/politics-government/capitol-alert/article188901094.html>; Jack Crowe, *New York Attorney General Has Filed 100 Acts of Resistance Against Trump*, DAILY SIGNAL, Dec. 27, 2017, <http://dailysignal.com/2017/12/27/new-york-attorney-general-has-filed-100-acts-of-resistance-against-trump/> (documenting lawsuits and acts of resistance in the two largest blue states, California and New York)—I make no empirical claim about volume here. My emphasis is on the cutting-edge issues raised in many of the most high-profile federalism battlegrounds.

2. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (striking down federal gun control law provision); *Printz v. United States*, 521 U.S. 898 (1997) (same); *United States v. Morrison*, 527 U.S. 1068 (1999) (striking down federal law provision punishing domestic violence); *New York v. United States*, 505 U.S. 144 (1992) (striking down portions of federal law dealing with nuclear waste disposal); *Shelby County v. Holder*, 570 U.S. 2 (2013) (striking down portions of federal voting rights law).

3. E.g., *Hawaii v. Trump*, No. 17-17168, 2017 WL 5343014 (9th Cir. Dec. 22, 2017) (per curiam).

sanctuary jurisdictions,⁴ the erection of a border wall,⁵ stringent enforcement of the federal Controlled Substances Act's ban on marijuana,⁶ and the refusal of President Trump to release his tax returns.⁷ In many respects, it is healthy and heartening to see federalism principles invoked by the left end of the political spectrum. Like First Amendment protections for freedom of expression, federalism doctrines are defensible in the long run only if they are applied the same way without regard to the viewpoints of the actors invoking them.

The seeming agreement on the Left that federalism's guarantees of meaningful state and local sovereignty are important tools in an era when the opposition party controls all three federal branches does not mean, of course, that modern proponents of broad subnational autonomy agree in all the particulars of what constitutional federalism means. Certainly the lower federal court judges who have ruled in some of the prominent disputes so far have differed significantly in the ways they have analyzed and applied the key federalism doctrines.

In this Essay, I hope to sketch out a few—but by no means all—of the more high-profile federalism flashpoints that have emerged over the past year or so and offer preliminary assessments of some of the decisions that lower courts (and legislative bodies) have been rendering. As we will see, there are areas of agreement and areas of divergence. Even as to some areas of agreement, there are plausible arguments to be made that the Supreme Court will (and in some cases perhaps should) see things differently as these disputes make their way up the appellate ladder in the coming months and years.

Sanctuary Skirmishes

Let us start with the clashes over so-called sanctuary jurisdictions. In particular, two noteworthy cases filed by cities and counties located in different parts of the country invoke similar and illuminating arguments challenging the Administration's efforts to curtail jurisdictions refusing

4. *E.g.*, *County of Santa Clara v. Trump*, No. 17-CV-00574-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017); *City and County of San Francisco v. Trump*, No. 17-CV-00485-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017); *City of Chicago v. Sessions*, No. 17-CV-5720, 2017 WL 3386388 (N.D. Ill. Nov. 16, 2017).

5. *See, e.g.*, Alissa Greenberg, *Berkeley, Calif. to Avoid Business with Companies Involved in Building Trump's Wall*, WASH. POST, Mar. 17, 2017, <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/17/berkeley-calif-to-boycott-companies-involved-in-building-trumps-wall>.

6. *See, e.g.*, Patrick McGreevy, *California Officials and the Marijuana Industry Prepare to Fight a Federal Crackdown*, L.A. TIMES, Feb. 25, 2017, <http://www.latimes.com/politics/la-la-pol-ca-federal-pot-crackdown-response-20170225-story.html>.

7. *See, e.g.*, Chris Morris, *Donald Trump May Be Forced to Disclose Tax Returns*, FORTUNE, Sept. 15, 2017, <http://fortune.com/2017/09/15/trump-tax-returns-2020-election>.

assistance—including informational assistance—to federal immigration enforcement efforts.⁸ Although the term “sanctuary” lacks universal legal meaning, a number of cities, counties, and states consider themselves sanctuaries, insofar as they have consciously chosen to limit their cooperation with federal immigration authorities. In many instances, their justification is the view that residents are safer and healthier if undocumented residents feel free to report crimes to local police and to avail themselves of other public resources (e.g., health clinics and schools) without fear that local authorities are actively working with the feds in deportation efforts.⁹

As far as I am aware, the first sanctuary city lawsuit brought by locals against the federal government was filed in the spring of 2017 by the City and County of San Francisco.¹⁰ (San Francisco’s complaint was later consolidated with the County of Santa Clara’s somewhat similar complaint.)¹¹ Shortly before Thanksgiving, U.S. District Judge William Orrick (Northern District of California, San Francisco) issued a permanent nationwide injunction blocking enforcement of a challenged portion of the federal Executive Order at issue.¹²

The second litigation, filed several months later in the summer of 2017 by the City of Chicago, sought to block conditions that the federal government said it would be imposing on applicants for certain federal funding.¹³ One of those proposed conditions mirrored key provisions of the Executive Order that was challenged in the Bay Area litigation. U.S. District Court Judge Harry Leinenweber in the Northern District of Illinois (Chicago) granted partial permanent nationwide injunctive relief, also shortly before Thanksgiving, to the City of Chicago, but, importantly, Judge Leinenweber rejected the particular claims that had been successfully argued in the case before Judge Orrick.¹⁴

8. The litigations are: *City of Chicago v. Sessions*, No. 17-CV-5720, 2017 WL 3386388 (N.D. Ill. Nov. 16, 2017); *City and County of San Francisco v. Trump*, No. 17-cv-00485-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017); *County of Santa Clara v. Trump*, No. 17-cv-00574-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017). In this Essay, I do not address all aspects of these cases, but only some of the key ones.

9. See, e.g., *Complaint at 14, County of Santa Clara v. Trump*, No. 17-CV-00574-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017).

10. *City and County of San Francisco*, No. 17-CV-00485-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017).

11. *County of Santa Clara*, No. 17-CV-00574-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017).

12. *Id.*

13. *City of Chicago*, No. 17-CV-5720, 2017 WL 3386388 (N.D. Ill. Nov. 16, 2017).

14. Memorandum Opinion and Order at 25–35, *City of Chicago*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Sept. 15, 2017); Memorandum Opinion and Order at 7–10 *City of Chicago*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017).

Although both lawsuits thus resulted in at least partial (and nationwide) injunctive victories for the plaintiff localities, the grounds for victory in the two litigations diverged, and the analyses of key Supreme Court cases on the merits of a central federalism doctrine—the so-called anti-commandeering principle—were quite different. To see the similarities and differences in the two district judges’ approaches, we need to delve into the specifics.

Each of these disputes between municipalities and the Trump Administration relate to federal attempts to pressure so-called sanctuary jurisdictions into providing more enforcement assistance to federal immigration authorities. The Trump Administration believes (and Candidate Trump repeatedly argued)¹⁵ that jurisdictions that hold themselves out as sanctuaries—who promise not to provide assistance to the Immigration and Customs Enforcement (“ICE”) agency—facilitate federal, state, and local crime. (The trial—and acquittal—last fall of Jose Ines Garcia Zarate, an undocumented man accused of murdering San Francisco woman and American citizen Kate Steinle two years ago, directed a lot of publicity to the Administration’s stance.)¹⁶ Based on his views, shortly after taking office President Trump issued Executive Order 13768 (the “Executive Order” or “Order”),¹⁷ which directs relevant cabinet officers to deprive “sanctuary jurisdictions” of federal funding and to “take [additional] appropriate enforcement action” against them.¹⁸

Importantly, this Order, by its written terms at least, defines “sanctuary jurisdictions” somewhat narrowly, implying that sanctuary jurisdictions are those “that willfully refuse to comply with 8 U.S.C. 1373.”¹⁹ Section 1373, in turn, says in pertinent part that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government

15. See, e.g., Christopher Ingraham, *Trump Says Sanctuary Cities Are Hotbeds of Crime. Data Say the Opposite*. CHICAGO TRIB., Jan. 27, 2017, <http://www.chicagotribune.com/news/nationworld/ct-trump-sanctuary-city-crime-data-20170127-story.html>.

16. Sophie Tatum, *Trump Says Steinle Verdict a “Travesty of Justice”*, CNN, Dec. 1, 2017, <http://www.cnn.com/2017/11/30/politics/kate-steinle-verdict-reactions/index.html>.

17. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

18. See *id.* at § 9(a): “In furtherance of this policy, the 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. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”

19. Although the Order does not include “sanctuary” in any definitions section, § 9 reads: “Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.”

entity or official from [maintaining,] sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”²⁰ Thus, the statute seeks to prevent a state or local government from having a policy or practice that forbids maintaining or giving to the feds information on the immigration status of individuals.²¹

The Executive Order instructs cabinet officials to take enforcement action against sanctuary jurisdictions, which could include the discretionary termination of federal funding to them. In the case of San Francisco, the City receives over a billion dollars a year in federal funds, which it says represents about thirteen percent of its budget.²² Fear of losing this money is ostensibly what led San Francisco authorities to challenge the Executive Order and also the underlying statute, section 1373, even as the City maintained that it was not violating—and had no plans to violate—section 1373.²³ Notwithstanding some jurisdictional wrinkles raised by San Francisco’s assertion that it was complying with section 1373, the plaintiffs in the California litigation sought a declaration against section 1373’s validity and an injunction against its enforcement.²⁴

Section 1373 is also one of the main points of contention in Chicago’s lawsuit, which is somewhat narrower insofar as it focuses not on the Executive Order altogether, but rather one way in which the Administration has followed up on the Order in the funding arena. As noted earlier, the Executive Order directs relevant cabinet officers to consider depriving “sanctuary jurisdictions” of federal funding, and pursuant to that provision United States Attorney General Jeffrey Sessions has been trying to deny funding to sanctuary jurisdictions who seek Department of Justice (“DOJ”) grants under one program in which the City of Chicago claims a particular

20. 8 U.S.C. § 1373 (1996).

21. In the California litigation, the plaintiffs allege that the federal government also considers any jurisdiction that does not honor detention—or detainer—requests from federal officials also to be a sanctuary jurisdiction. This assertion is not supported by the text of the Executive Order, and although it was relied upon by the district judge in ruling against the federal government, I do not evaluate this reading of the Order in my analysis below.

22. Complaint at 16, *City and County of San Francisco v. Trump*, No. 17-CV-00485-WHO, 2017 WL 5569835 (N.D. Cal. Jan. 31, 2017).

23. *Id.* at 10. Santa Clara County, by contrast, did acknowledge that its policies and ordinances do instruct county officials not to provide immigration information to the feds, which would seem to violate the plain terms of § 1373. Complaint at 13–14, *County of Santa Clara v. Trump*, No. 17-CV-00574-WHO, 2017 WL 5569835 (N.D. Cal. Jan. 31, 2017).

24. Complaint at 20, *City and County of San Francisco*, No. 17-CV-00485-WHO, 2017 WL 5569835 (N.D. Cal. Jan. 31, 2017).

interest, the Edward Byrne Memorial Justice Assistance Grant Program.²⁵ Byrne Assistance grants support state and local law enforcement with money for equipment, training, and personnel.²⁶ In late summer, General Sessions announced that the DOJ would be requiring all funding applicants to: (1) provide federal agents with advanced notice of the scheduled release from state custody of certain individuals suspected of immigration violations; (2) provide these agents access to non-citizens who are being housed in state and local detention facilities; and (3) certify compliance with 8 U.S.C. § 1373.²⁷

The first two conditions (the so-called “notice” condition and the “physical access” condition),²⁸ were not implicated in the San Francisco/Santa Clara lawsuit, but the common denominator between the two litigations in the West and Midwest was the validity of section 1373. It is on that question (and also the question of nationwide relief) that I want to plumb the district courts’ analyses.

In both lawsuits, a prominent argument made by the local plaintiffs was that section 1373 and the duties it imposes fall outside the federal government’s powers as those powers are properly understood under the Tenth Amendment.

The federal government argues that it has authority to enact and insist on compliance with section 1373 pursuant to, among other things, its power under Article I of the Constitution to regulate immigration, naturalization, and foreign affairs.²⁹ As a general matter, this power is quite broad and may very well suffice to support a variety of federal dictates in the immigration realm. But states and cities have a rejoinder here—a series of cases the Supreme Court decided in the 1990s that, collectively, create a rule known as the “anti-commandeering” doctrine.³⁰ The basic idea is that, notwithstanding broad Article I powers of the federal government, the Tenth

25. Complaint at 1–5, *City of Chicago v. Sessions*, No. 17-CV-5720, 2017 WL 3386388 (N.D. Ill. Aug. 7, 2017).

26. *Id.*

27. *Id.* at 3.

28. These first two conditions were the ones on which the judge ruled in *Chicago*’s favor and granted injunctive relief, largely on the ground that Congress did not authorize these conditions. The analysis was one of statutory interpretation and separation of powers. By contrast, the analysis of 1373 in both lawsuits was undertaken on federalism terms, and the federalism doctrine’s meaning in this context is what I seek to explore in this Essay.

29. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 4 (“Congress shall have power . . . [t]o establish a uniform rule of naturalization”); art. I, § 8, cl. 3 (“Congress shall have power to . . . [t]o regulate commerce with foreign nations . . .”).

30. For general discussion, *see* Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Sub-Constitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L.J. 237, 258–59 (2011) [hereafter *The Case for Reforming Presidential Elections*].

Amendment forbids the federal government from coercing states and localities into providing affirmative enforcement assistance to federal authorities. In this setting, states and cities argue that the anti-commandeering principle prevents the feds from requiring state and local authorities to affirmatively provide information about or access to individuals who may have committed immigration law violations. They thus argue that section 1373's requirement that they provide to federal authorities "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" constitutes impermissible "commandeering." (In the California litigation, the plaintiffs also argue that the federal government seems to be applying section 1373 so as to require local jurisdictions to honor requests for detention—so-called detainer requests—as well, a reading of the statute that goes beyond its terms and that I do not address in this Essay.)

In pressing this anti-commandeering argument, the cities rely primarily on principles of federalism expounded in the seminal case of *Printz v. United States*,³¹ a 1997 Supreme Court decision holding that the federal government could not require state and local law enforcement officers to conduct background checks on gun purchasers as part of the implementation of a federal law (the Brady gun control law).³² "The Federal Government," the Court said grandly in *Printz*, "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."³³ According to the sanctuary municipalities, this is precisely what section 1373 does.

It is possible that *Printz* does not command majority support on the Court today. It was a controversial 5-4 ruling subject to much academic criticism when it issued,³⁴ and three of the five justices in its majority have left the Court.³⁵ Perhaps their three replacements³⁶ fully agree with *Printz*, but there has not been a significant case in this area in the last two decades that gives us much clear indication. Moreover, the fact that *Printz* involved gun control (at a time when many judges and scholars were beginning to think that the Second Amendment ought to be read more forcefully)

31. *Printz v. United States*, 521 U.S. 898 (1997).

32. *Id.* at 935. *Printz* itself built on *New York v. United States*, 505 U.S. 144 (1992).

33. *Printz*, 521 U.S. at 935.

34. See Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199 (1997).

35. Chief Justice Rehnquist, and Justices O'Connor and Scalia were in the *Printz* majority.

36. These three Justices were replaced, respectively, by Chief Justice Roberts, and Justices Alito and Gorsuch.

complicates matters; it is possible that some people who believe *Printz* was correctly decided might not apply it in the same way to other subject matter areas. In this vein, some Justices might be inclined to create an exception to the *Printz* principle for immigration or national security matters. On the other hand, perhaps the two remaining dissenters in *Printz* (Justices Ginsburg and Breyer) have now come to see its wisdom, or at least consider it binding precedent that ought, for the sake of *stare decisis*, to apply in this setting.

Although these factors make predictions of the Supreme Court's current stance somewhat harder, they (rightly) did not factor into the analyses of the district courts regarding section 1373. I say "rightly" because the Court has made clear that when one of its earlier rulings is, by its language and logic, on point in a dispute, but recent developments indicate the possibility that the Court may move in a new direction, lower courts are supposed to apply the prior ruling on point, and leave it to the Justices to consider whether they want to overrule or limit the prior ruling;³⁷ lower courts are not allowed to "underrule," if you will.

But even if *Printz* remains good law for the foreseeable future, the case itself is a complicated ruling whose application to the sanctuary setting is open to some argumentation. For example, in *Printz* the Court expressly reserved whether its holding should extend to federal laws "which require only the provision of information to the Federal Government."³⁸ To the extent that section 1373 is limited to information exchanges,³⁹ one could argue that 1373 does not violate *Printz*' core teachings. Also, pulling the doctrinal lens back a bit, note that section 1373 (unlike the law in *Printz*) imposes limitations not just upon state and local entities and officials, but on federal entities and officials as well. In that sense, it is not a law that targets state and local government for distinctive burdens, the way the laws in *Printz* and the major case on which *Printz* built, *New York v. United States*,⁴⁰ did.

In a related vein, supporters of the federal government in the sanctuary city lawsuits might try to argue that the key factor relied upon in *Printz* (which was also the key factor in *New York v. United States*)—the way in which federal commandeering might make it hard for citizens of a state to hold the federal government accountable for unpopular policy⁴¹—is not present in the sanctuary jurisdiction setting. In *Printz*, the Court apparently

37. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

38. *Printz*, 521 U.S. at 917–18.

39. I note again, but do not analyze, that the plaintiffs and the court in the Bay Area case read section 1373 beyond its text to include not just information but also detainer requests.

40. The law in *Printz* singled out Chief Law Enforcement Officers who were defined as state/local employees, and the law in *New York* regulated states qua states.

41. See *New York v. United States*, 505 U.S. 144, 168–69 (1992); *Printz*, 521 U.S. at 920.

worried that this concern would be implicated insofar as disappointed would-be gun purchasers might blame local sheriffs who, under the federal Brady Law, were the ones required to conduct background checks and notify people who failed that they could not buy a gun. By contrast, the argument would run, when the federal government merely commands that states and cities maintain and turn over information to federal immigration officials, it is the feds (and only the feds) who take action on that information in a way visible to the public. Indeed, no affected immigrants (or persons sympathetic to them) would ever necessarily know what, if any, information the feds received from local officials.

I find this line of argument unpersuasive. Recall that sanctuary city proponents often explain their decisions to become sanctuaries on the ground that residents are safer and healthier if undocumented residents feel free to report crimes to police and to avail themselves of other public resources (e.g., health clinics and schools) without fear that local authorities are actively working in concert with the feds in deportation efforts. If local officials are not able to publicly and credibly proclaim and publicize that they will not provide information (or other support) to the feds, undocumented persons may clam up or fail to seek health and education services (whether or not the undocumented persons know the details of any support the locals provide), and the resulting possible increases in unsolved crime and public health problems may be blamed by the body politic on local officials (because they are generally the most visible level of government as to these matters) rather than the federal architects of section 1373. Or, at least, this corruption of accountability is similarly as plausible as it was in *New York* and *Printz*.⁴²

There is another defense of section 1373—which was effectively accepted by the district court in Chicago—that bears discussion. This defense was developed in a case from the United States Court of Appeals for the Second Circuit that was decided shortly after *Printz*, in which the Second Circuit judges rejected a *Printz*-based attack (similar to those made by the California and Chicago municipalities) to section 1373.⁴³ In upholding section 1373 against the *Printz*-inspired attack in 1999, the Second Circuit reasoned that although the federal government may not compel states and localities to carry out federal programs, it may prohibit them from restricting

42. I have never found the accountability argument in these cases to be very convincing, because both *New York* and *Printz* presuppose an idiosyncratic body politic—one sophisticated enough to know which level of government is nominally responsible for an unpopular policy, but sophisticated enough to know when federal pressure or coercion may in fact be responsible for state/local actions. Indeed, does anyone think that federal threats of preemption or reduced funding (which were held in these cases not to be commandeering) are any different than outright federal commands with regard to making accountability to voters more difficult?

43. *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999).

state and local officials from “voluntarily” exchanging information with federal authorities.⁴⁴ Otherwise, the Second Circuit reasoned, states and localities could hold federal authorities hostage, and frustrate federal programs by thwarting “voluntary” cooperation.⁴⁵

The Second Circuit’s logic here is deeply flawed. The Second Circuit believes that state and municipal officials ought not to be constrained by state law from “voluntarily” cooperating with the feds. But state and municipal officials in this setting are not operating as private citizens who voluntarily get to decide how to spend their time and resources. Instead, they are operating as state government actors, whose discretion to voluntarily act while on the job is heavily circumscribed by state and local laws. The “voluntary” decision whether to devote state and local resources to federal enforcement is (or ought to be) located at the level of state or local government, not at the level of the individual state or local employees. State resources—including the time and information of state employees—are owned by the state, and not by individual employees. Thus, I find it hard to know what “voluntary” means in this setting (something neither the Second Circuit nor the Chicago district court that embraced its reasoning explained.)

To see the flaws in the Second Circuit’s reliance on the belief in an inherent authority of local officials to “voluntarily” decide to cooperate with federal officials (despite any state law that seeks to prohibit such cooperation), let us imagine a variant on the facts of the *Printz* case. *Printz* itself involved a provision in the Brady Handgun Violence Protection Act that required local law enforcement officials to conduct background checks on people seeking to buy firearms during an interim period when the federal government was in the process of setting up its own background-checking system. This was the provision the Court struck down as impermissibly interfering with local enforcement decisions and impermissibly compromising political accountability. But suppose that the Brady Act provision had instead said something such as:

No state or local government can adopt any law or policy that prevents any local law enforcement official from using public resources—including employee time and equipment—to conduct background checks to assist the federal government’s gun control efforts, if the local official voluntarily chooses to expend state and local resources for this purpose, even if such assistance to the federal government diverts enforcement resources from other areas prioritized by state law.

44. *City of New York*, 179 F.3d at 37.

45. *Id.*

Could anyone believe that such a law would have been allowed by the *Printz* majority? I think not. And yet such an implausible premise is precisely what undergirds the Second Circuit’s reasoning.

Let us turn now in more detail to how the two district court judges in San Francisco and Chicago resolved the competing arguments concerning the applicability of *Printz* and the non-commandeering principle to section 1373. As noted above,⁴⁶ Judge Leinenweber in the Chicago district court accepted the Second Circuit’s reasoning and upheld section 1373 (even as he granted relief to Chicago on the other two nonsection-1373 conditions on funding imposed by Attorney General Sessions).⁴⁷ By contrast, the San Francisco district judge, Judge Orrick, found section 1373 violative of the anti-commandeering principle.⁴⁸ Judge Orrick’s opinion—which covered a lot of territory quickly and did not always connect the analytic dots—relied in part on his understanding of section 1373 as going beyond information-gathering and also applying to decisions by local officials not to honor federal requests for detaining individuals.⁴⁹ This broad reading of section 1373, whether justified or not, does not seem to address the Second Circuit’s reasoning; if a local official has the power to voluntarily provide information (as the Second Circuit believed), then the official presumably has the power to voluntarily assist in detention. To be clear, Judge Orrick never mentioned or addressed the Second Circuit case, but he (unlike Judge Leinenweber) implicitly rejected the key (albeit flawed) line invoked by the Second Circuit, between “voluntary” and “involuntary” actions by local officials confronted by conflicting state and federal mandates.

If one concludes that section 1373 as written constitutes commandeering in violation of federalism principles laid out in *Printz*, then the statute itself is not a permissible exercise of the federal government’s Article I power to regulate immigration. In that event, unless, as explained in the next few paragraphs, another basis can be found for federal authority for insisting on compliance with section 1373’s requirements, the statute and the Executive Order that requires its enforcement are very vulnerable.

If one decides that section 1373 does run afoul of *Printz*, the only basis for the Executive Order’s insistence that cities comply with 1373’s substance would be federal power under the so-called Spending Clause, under which

46. See *supra* note 43 and accompanying text.

47. Memorandum Opinion and Order at 25–35, *City of Chicago v. Sessions*, No. 17-CV-5720, 2017 WL 3386388 (N.D. Ill. Sept. 15, 2017); Memorandum Opinion and Order at 7–10, *City of Chicago*, No. 17-CV-5720, 2017 WL 3386388 (N.D. Ill. Nov. 16, 2017).

48. Order Granting Motion for Summary Judgment at 22–24, *County of Santa Clara v. Trump*, No. 17-CV-00574-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017).

49. *Id.*

the federal government may sometimes achieve what it cannot directly command by creating monetary incentives for state and local governments. The Executive Order instructs federal officials to withhold significant federal funds from sanctuary jurisdictions—including federal funds that have nothing to do with immigration. This would be a calamity for San Francisco, which allegedly receives more than one billion dollars annually, for a wide variety of programs, from the federal government.⁵⁰

Fortunately for San Francisco, when the Supreme Court held in 2012 that states could opt out of the Affordable Care Act's Medicaid expansion in *National Federation of Independent Businesses v. Sebelius*,⁵¹ it laid down strict prerequisites for the withdrawal of existing federal funding of states and localities. First, the federal government must give clear notice of the conditions on the funding up front, so states and localities can choose whether they want the money enough to accept whatever strings are attached.⁵² Second, there must be a logical nexus between the federal funding in question and the strings attached, so that the federal government cannot coerce states and localities by ratcheting up the stakes by bringing in other monies.⁵³ And third, even if there is a nexus between the funds and the condition imposed, the funds cannot involve significant monies the state or locality has been relying on for so long such that there is really no choice but to accede to a new condition going forward.⁵⁴

Application of the *National Federation of Independent Businesses* (“*NFIB*”) test would likely invalidate the Executive Order in the San Francisco litigation, which is precisely what Judge Orrick ruled.⁵⁵ Even assuming that the Order fully reflects the will of Congress (a separate important question I do not address here), with respect to most if not all of the federal funding at issue, there was no clear notice to the City—at the time the funds were offered and accepted—that the funds might be contingent on compliance with section 1373. And even if that problem might be solved by reading 1373 and the Executive Order requiring compliance with it as prospective only—cutting off only future funding on account of future violations of section 1373—the key vulnerability of the Order lies in the lack of a nexus between the funding called into question by the Order, which goes

50. Complaint at 16, *City and County of San Francisco v. Trump*, No. 4:17-CV-00485-DMR, 2017 WL 412999 (N.D. Cal. Jan. 31, 2017).

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

52. *Id.* at 678–79.

53. *Id.* at 676–77.

54. *Id.* at 581–82.

55. Order Granting Motion for Summary Judgment at 22–24, *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

towards a wide variety of programs, and section 1373. Finally, and relatedly, the large size of the funding at issue—according to the city, some thirteen percent of its budget—tends to make the Executive Order’s threat look coercive, at least under the lens of *NFIB*. (It is interesting to note that the federal Medicaid funding at issue in *NFIB* amounted to about the same percentage of state budgets as the percentage involved here.)⁵⁶ Thus, the Executive Order, which threatens across-the-board funding cuts based on an immigration-specific condition, would seem to violate the rule laid down in *NFIB* and the cases on which it built.

Analysis of the Chicago case is somewhat different, because the funding conditions at issue there were specifically limited to the Byrne grants, which are focused on law enforcement, an area that has a relatively more clear nexus to section 1373. That is why Judge Leinenweber upheld section 1373 under the Spending Clause even as he also (wrongly to my mind) followed the Second Circuit’s reasoning with regard to the application of *Printz*.⁵⁷

I should add that Judge Leinenweber’s opinion (in addition to being seduced by the Second Circuit’s specious reasoning) did not seem to reflect an understanding of how various pieces of federalism doctrine fit together. In addressing Attorney General Sessions’ insistence that Chicago comply with section 1373, Judge Leinenweber conceived of the inquiry into section 1373’s constitutionality as follows:

[The AG’s insistence on] compliance [with section 1373] must be proper under the Spending Clause, and 1373 must pass constitutional muster [under the *Printz* analysis.] As the City has not argued that the compliance condition violates the Spending Clause, the Court now turns to the Section 1373 question [under the *Printz* line of cases].⁵⁸

As noted earlier, the judge concluded that section 1373 was valid under the Spending Clause, so running the statute through the *Printz* analysis did not in the end affect the judge’s bottom line. But putting aside whether the court’s rejection of the City’s *Printz* argument was convincing, my point here is that once it is conceded (as the judge says it was) that compliance with section 1373 to obtain federal money is a valid condition on funding under the Spending Clause doctrine, it is irrelevant whether 1373’s mandate—in the absence of a conditional funding scheme—would violate the *Printz* anti-commandeering rule. Passing muster under Spending Clause doctrine and

56. *See Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 581–82.

57. Memorandum Opinion and Order at 10–25, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017).

58. *Id.*

passing muster under the *Printz* doctrine are *alternative* ways for the federal government to prevail in establishing it had proper authority under Article I of the Constitution. If it wins on either the immigration power (by successfully arguing that *Printz* poses no problem) or the spending power, it wins. It need not win on both, the way the district court erroneously thought. Put another way, if a federal condition on funding is permissible under the Spending Clause doctrine, it cannot, by definition, be an impermissible commandeering, since (by hypothesis) states have an option of turning the deal down. Hence, there is no federal mandate that could be considered to be commandeering.

This point may seem nit-picky, but it is not. It goes to the fundamental ways in which distinct yet related doctrines (in this case the Spending Clause doctrine and the anti-commandeering principle) involving federal-state relations fit together. If federal courts are going to be able to enforce the limits that federalism creates on the national government, while at the same time permit the feds to operate in their own proper sphere, judges (and their law clerks) need to understand not just nuanced technical details of various specific doctrines, but the overall federalism big picture as well.

In this spirit of trying to lay out and understand the pieces of the big federalism landscape, let us assume for a moment that—because the Second Circuit is right or because section 1373 does not impair accountability because it involves only information or because it imposes only *de minimis* burdens on states and localities—section 1373 is understood *not* to violate the anti-commandeering principle. What follows from that? If courts were to conclude that section 1373 is permissible under *Printz*, the Executive Order at issue in the San Francisco case—notwithstanding the breadth of its funding prohibitions—perhaps could be upheld. After all, if the federal government could go to court to enjoin the city from violating section 1373 (and presumably it could get an injunction if section 1373's commands are valid), and to obtain contempt sanctions if the city disobeys a court order, why should it not also be able to condition federal funding on the city's compliance? In *NFIB*, the federal government clearly could not have forced states to accept the Medicaid expansion; its only way to affect their behavior was to use the power of the Treasury. But where a state or locality actually violates a valid and enforceable federal law, it is less clear there is anything wrong with the federal government enforcing that law fiscally rather than through the courts. Some might wonder whether cities should have the option of continued defiance without having to face disastrous financial consequences (civic, rather than civil, disobedience, if you will). It is hard to know why they should; valid federal commands ought to be enforced. (If you doubt this is true with respect to sanctuary cities, ask yourself how you

feel about Alabama courts refusing to confer gay marriages; would you be bothered by a threat to withhold federal funding there?)

Another way of putting the point is that all of the three elements of the Spending Clause doctrine in *NFIB* discussed above are consciously designed to preserve some meaningful choice by states and localities about whether or not to accept conditional federal funds. But states have no legitimate choice whether to comply with valid federal commands, so arguably none of the Spending Clause protections ought to apply.⁵⁹

But does all of this mean that the federal government could announce, without notice, that a state or locality was being stripped of all federal funding just because it was violating (or had violated in the past) any of the innumerable federal laws on the books that bind it? My instinct is that even where the government has the power of direct fiscal enforcement, some measure of notice should be required before it can strip a state or locality of what may be long-established, essential federal funding. Certainly, the government has to give individuals some notice of what the consequence of violations of law will be, largely because it owes individuals due process. Does federalism require the federal government to give states the same notice, even when states have the legal obligation to comply with the federal command (just so states can lobby federal legislators or properly adjust resources to minimize the likelihood of noncompliance)?⁶⁰

Moreover, even if notice is provided, can the federal funding weapon really be completely unrelated to the state or local violation and be gigantic in size simply because the feds could enforce the law in court? Might there be some analogy to the Excessive Fines Clause of the Eighth Amendment⁶¹ (which protects persons) that limits the federal government's ability to intimidate states into steering far clear of noncompliance?

Remedial Scope

Putting aside the complicated merits questions in many of the federalism cases in the last year, a common procedural/remedial question is

59. I note as an aside that one reason the feds might prefer using funding leverage rather than seeking injunctive relief is that cities may pay more attention to the potential for loss of funds than to the specter of contempt, which may or may not cost as much depending on what sanction the judge imposes.

60. Both the San Francisco and Chicago district courts insisted that federal conditions be clear and non-vague, but such requirements follow from the contractual nature of the spending clause doctrine. The question I explore at this point is somewhat different—when states have no choice to make and are obligated by law to comply, are they still entitled to clarity as to the consequences of noncompliance?

61. U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

how broadly the relief a lower court might issue to the plaintiffs—blocking executive action—can extend. With increasing frequency, but often without extensive analysis, district courts have been issuing so-called “nationwide” or global relief, preventing various federal defendants from enforcing policies not only against the named plaintiffs in the case at hand, but also against anyone else. One example is the various “nationwide” blocks on various of President Trump’s executive orders relating to entry into the county issued by district court judges in Hawaii and elsewhere.⁶² Other examples are the two rulings discussed above in the sanctuary city setting; both Judge Orrick and Judge Leinenweber blocked proposed federal conditions on funding not just as applied to the plaintiff cities in court, but as applied to any other state or local funding applicant as well.⁶³

Put simply, in these and other cases, lower federal courts are issuing orders that offer protection not just to the plaintiffs who brought the cases at hand, but to all similar parties, including parties located in areas where other federal courts might have different views on the permissibility of the federal policies in question.

The general appropriateness of these sweeping, nationwide (or, in some instances, global) orders is something the Supreme Court needs to take up explicitly, beyond the merits of any particular dispute. To be sure, when a federal district court has jurisdiction (that is, the power to speak the law) over a particular dispute and over the defendants (including U.S. government agencies) who are being sued, the court has authority to order the defendants to act or not act. This includes the authority to issue a directive that often has effects outside the territorial jurisdiction of the court, if for no other reason than because sometimes a plaintiff operates in more than one federal judicial district, and a court needs to be able to give a plaintiff full relief—not just local relief—from a defendant’s wrongful actions.

Moreover, there is general agreement that a court is not forbidden, even outside of a class action setting, from ordering relief that in effect goes beyond the named plaintiffs to also protect other would-be plaintiffs, *if full relief cannot be given to the named plaintiffs without also necessarily regulating the defendants’ interactions with other persons*. For example, a court would be justified in ordering the police to stop enforcing a motorcycle helmet law overaggressively as to all riders—and not just as to the named

62. *E.g.*, *Hawaii v. Trump*, No. 17-17168, 2017 WL 5343014 (9th Cir. Dec. 22, 2017) (per curiam).

63. *See* Memorandum Opinion and Order at 28, *City and County of San Francisco v. Trump* No. 17-CV-00574-WHO, 2017 WL 5569835 (N.D. Cal. Apr. 25, 2017); Memorandum Opinion and Order at 41, *City of Chicago v. Sessions*, No. 17-CV-5720, 2017 WL 3386388 (N.D. Ill. Sept. 15, 2017).

plaintiffs—because highway patrol officers would have no way of distinguishing plaintiffs from non-plaintiffs before pulling someone over. Another example: If a school is ordered to desegregate its student body, then all students—and not just the named plaintiffs—will obtain the benefits of attending a desegregated institution.

But in most of the settings these days in which district judges are giving nationwide or global relief, full relief could be given to named plaintiffs without ordering the defendants to refrain from enforcing contested policies against anyone else (let alone against everybody else). And it is one thing to make sure that a plaintiff who sues gets full relief; it is another for the relief to extend beyond the parties in the case at hand for no reason having to do with the actual plaintiffs.

What could be wrong about protecting other persons who themselves did not sue? After all, if the federal government is acting illegally, shouldn't a court should tell it to stop violating the law against everyone in America (or the world), not just the parties who happened to sue? This seemingly plausible instinct fails to account for the very important fact that not all judges will necessarily agree on whether the federal government is in the wrong. And there are problems when one district judge attempts (in the absence of a certified class action, where there are complex procedures in place to make sure that all absent parties are properly represented and that the federal government is on clear notice when it chooses how aggressively to contest a case) to decide an issue for the whole country.

One difficulty with district courts making grand, sweeping legal rulings like this is that such a role doesn't align with their institutional strengths. District court judges have much less time and fewer resources than appellate courts, and the primary functions of district court judges are to manage litigation, evaluate evidence and make factual determinations (sometimes very important factual determinations), apply settled law, and also take an intelligent stab at novel legal matters so as to carefully frame or "tee up" those questions for the Court of Appeals and (in some cases) the Supreme Court. Indeed, resolving matters once and for all for the whole nation is a power we invest principally in the Supreme Court, and not any lower courts.

It is for that reason that conventional doctrine often says something like: "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the [actual] plaintiffs."⁶⁴ Related to this is the traditional admonition that when exercising its equitable powers to issue an injunction, a court must be "mindful of any effect its decision

64. *Califano v. Yamaski*, 442 U.S. 682, 702 (1979).

might have outside its jurisdiction [insofar as c]ourts ordinarily should not award injunctive relief that would cause substantial interference with another court's sovereignty."⁶⁵ A leading casebook puts things this way: "a [federal district] court can enjoin [a] defendant only with respect to the defendant's treatment of plaintiffs actually before the court, either individually or as part of a certified class."⁶⁶

A contrary approach would, in the words of one Supreme Court case describing a similar concept—non-mutual collateral estoppel against the federal government—"substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."⁶⁷ If and when the issue makes its way to the Supreme Court, overly broad district court (or circuit court) injunctions that prevent other courts from hearing cases and weighing in could "deprive [the] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before [the] Court grants certiorari";⁶⁸ this process is sometimes referred to as lower court "percolation."⁶⁹

Thus, especially (though not only) when another court has already issued a contrary pronouncement on the same question, issuing a nationwide injunction causes substantial interference with the power of other courts, and with the process of helping refine issues that might ultimately be taken up by the Supreme Court.

A related problem is that nationwide injunctions under such circumstances also encourage what lawyers call "forum shopping"—that is, picking a particular place to sue not because of the convenience of the parties or the location of the witnesses or evidence (which are legitimate factors for choosing a particular venue), but because of a predicted outcome.

To be fair to district court judges, the Supreme Court has not clearly and definitively laid out precisely when a district court injunction can extend beyond the named plaintiffs outside the context of a certified class action. This absence of clear guidance from the Supreme Court (especially given the discretion that normally exists with regard to equitable relief like injunctions) in part explains the many ambitious decisions by district court judges over the last decade to provide nationwide (or global) relief. Indeed,

65. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952).

66. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 217 (Concise 4th ed. 2010).

67. *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

68. *Id.*

69. See Vikram David Amar & Courtney G. Joslin, *The Problem with the Texas Federal Court's Nationwide Order Regarding Bathroom Access for Transgender Students*, JUSTIA, Sept. 9, 2016, <https://verdict.justia.com/2016/09/09/problem-texas-federal-courts-nationwide-order-regarding-bathroom-access-transgender-students>.

such broad injunctions were increasingly common even before President Trump was elected and his policies began to be litigated in district courts. And judges used such ambitious injunctions to promote both conservative and liberal legal results. On the conservative side, consider a ruling in 2016 in which a Texas federal district court issued a nationwide injunction blocking the Obama administration from implementing a controversial interpretation of Title IX, a federal statute banning sex discrimination in schools.⁷⁰

On the liberal side, consider an instance in which a few same-sex couples sued California officials several years ago to obtain marriage licenses even though state law in effect at the time, California Proposition 8, limited marriage in California to a union between a man and a woman. The district court judge issued what, on its face, appeared to be a statewide ban on California officials applying Proposition 8 to any same-sex couples, not just the plaintiffs before him.⁷¹ After that ruling came down, I suggested (relying on the legal principles discussed above) that, absent class action certification (which might have been plausible but was not sought), the district court's remedy should have been limited to the plaintiffs in the case.⁷²

Nor are the district judges in some of these cases even spending much time carefully thinking about how broadly their injunctive relief ought to be permitted to extend. In the thirty-eight-page ruling in the Texas Title IX case mentioned above, the district court discussed the propriety of nationwide relief in just a sentence or two, and cited only one case—a Supreme Court case in which nationwide relief was upheld, but where there was a class action that had been certified in which the plaintiff class was itself nationwide.

And in the recent Chicago case involving sanctuary cities, Judge Leinenweber's decision to apply the injunction nationwide was grounded primarily on his belief "there is no reason to think that the legal issues presented in this case are restricted to Chicago" and also on his understanding that the Supreme Court had recently failed to dissolve a nationwide injunction when it had a chance, as well as on the fact that "[a]n injunction more restricted in scope would leave the Attorney General free to continue enforcing . . . likely invalid conditions."⁷³ As to the first reason, it is breathtakingly broad and would mean district judges could decide issues for the whole country anytime purely legal issues were involved. As to the

70. Texas v. United States, No. 7:16-cv-00054 (W.D. Tex. 2016).

71. Order at 136, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

72. Vikram David Amar, *Musings on Some Procedural, But Potentially Momentous, Aspects of the Proposition 8 Case as it Goes to the Ninth Circuit*, FINDLAW, Aug. 13, 2010, <http://supreme.findlaw.com/legal-commentary/musings-on-some-procedural-but-potentially-momentous-aspects-of-the-proposition-8-case-as-it-goes-to-the-ninth-circuit.html>.

73. Memorandum Opinion and Order at 41, *City of Chicago v. Sessions* (Sept. 15, 2017); Memorandum Opinion and Order, *City of Chicago v. Sessions* (Oct. 13, 2017).

second reason, the Supreme Court when it leaves lower court relief intact in the context of a request for extraordinary interlocutory review, it does not affirmatively uphold the nationwide injunction, but simply does not take the extraordinary step of dissolving it prior to a full consideration of the case on the merits. And as to the third reason, the obvious counterpoint is the possibility (described above) that other courts may not end up agreeing with the judge that the conditions are probably invalid.

Judge Orrick's decision to issue nationwide relief was even more cavalier. The analysis of remedy was less than one short paragraph, and the judge cited to a Supreme Court case for the proposition that "[t]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff," failing to mention that in that case (unlike the case before him) there had been a nationwide class certified, and thus the Court was simply explaining why nationwide class treatment was warranted.⁷⁴ Moreover, and more carelessly still, Judge Orrick's ruling cited the case as "*California v. Yamaski*," when the actual case, involving former Secretary of Health, Education and Welfare, Joseph Califano, was *Califano v. Yamaski*.⁷⁵

I mention this variety of settings and relative dearth of analysis because procedural rules like the breadth of injunctive relief are supposed to be trans-substantive. When they seem result-oriented (as they sometimes do, given the cursory analyses offered by district courts), the result is suspicion about the judicial system.

As noted earlier, I don't fully blame the district court judges; the Supreme Court is the body that must address this problem and the cynicism it generates. Again, the Court has not spoken completely clearly, and that has opened the door to some debatable district court actions. If the Court wants to move away from the traditional approach and permit more nationwide injunctions against the federal government even in the absence of class certification, it should do so explicitly. And if it wants to adhere to the conventional approach that most analysts see implicit in past Supreme Court rulings, it should elevate that approach to the level of clear, binding doctrine.

Building the Wall

One important legal line that runs through many of today's federal-state disputes is that between nonassistance and affirmative interference. Properly and narrowly understood, the decision of sanctuary jurisdictions to decline

74. Memorandum Opinion and Order at 28, *City and County of San Francisco v. Trump* (Nov. 20, 2017).

75. *Id.*

to lend certain kinds of enforcement assistance to federal immigration authorities might, as I argued earlier,⁷⁶ very well be protected by the so-called anti-commandeering principle reflected in *New York v. United States* and *Printz v. United States*, as long as those cases remain good law and assuming they apply in full force to the immigration enforcement setting. But even under the broadest readings of *New York* and *Printz*, state and local authorities have no right to interfere with federal immigration enforcement, say, by harboring individuals sought by federal authorities, impeding access to such individuals by federal officials, or providing false information to federal agents.⁷⁷

In a similar vein, consider California Chief Justice Cantil-Sakauye's complaints about what she saw as federal overreaching with regard to federal immigration enforcement officials positioning themselves outside state courts.⁷⁸ Chief Justice Cantil-Sakauye was well within her rights (and acting well within the tradition of the political safeguards of federalism) to voice such complaints. But if state court marshals were to interfere with or tried to block federal officials in public areas in and around state courthouse facilities, such action by state officials would not be protected, and indeed would conflict with the Constitution's command that federal law (and enforcement of permissible federal enactments) be supreme and respected by all state officials.⁷⁹

Another emerging subject that brings up this line between permissible non-participation and impermissible interference is President Trump's announced plan to erect a wall along the U.S.-Mexico border. Over the last

76. See *supra* notes 31–50 and accompanying text.

77. In this regard, it is hard to understand how California officials think they can validly defend the so-called "Sanctuary State" law, which took effect at the beginning of 2018 and which purports to punish individual employers who choose to provide information about the immigration status of their employees to the feds. See, e.g., Angela Hart, 'We Will Prosecute' Employers Who Help in Immigration Sweeps, *California AG Says*, SAC. BEE, Jan. 18, 2018, <http://www.sacbee.com/news/politics-government/capitol-alert/article195434409.html>. If an employer voluntarily chooses to cooperate with federal officials carrying out lawful federal policies, it is hard to see how a state could punish such an employer, just as a state could not punish persons who choose to tell federal officials about civil rights violations. See *infra* notes 84–90 and accompanying text.

78. See generally, Angela Hart, *Speaking Out Against Immigration Raids is Her Duty*, *California Justice Says*, SAC. BEE, Aug. 22, 2017, <http://www.sacbee.com/news/politics-government/capitol-alert/article168714487.html>.

79. See U.S. CONST. Art. VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to contrary notwithstanding."); U.S. CONST. Art. VI, § 3 ("The . . . members of the several State legislatures, and all executive and judicial officers . . . shall be bound by oath affirmation to support this Constitution . . .").

year, various state and local entities have begun asserting power to push back against any such wall. Putting aside the cost and logistical feasibility (to say nothing of the advisability) of the president's plan, what is new and noteworthy is that various state and local legislative bodies have proposed or enacted legislation to "divest" from businesses involved with the construction of any such border wall. In March of 2017, Berkeley, California, reportedly became the first city in the nation to enact such a measure.⁸⁰ The Berkeley version instructs local authorities to identify companies involved in funding, or building the wall, and to end any contracts the city has with such entities as soon as practical. How will this enactment and similar laws passed at the state or local level fare in court? Like all unripe legal questions, the answer to this one depends on several factors. But assuming that any federal program to actually build a wall receives the required approvals from Congress, my view is that state and local governments should not be permitted to target entities or individuals who are assisting the federal government in the program.

It is true, of course, that state and local governments have tremendous control over their own fiscs. State and local governments have more leeway with regard to their spending than with regard to their regulatory power, which is why they can give preference to local businesses in public procurement decisions even as they cannot subject non-local businesses to discriminatory regulations.⁸¹ (Thus, it would be obviously illegal if a city were to say that companies that do business with the federal government on the wall or more generally cannot do business in, as opposed to with, the city.)⁸² But even as to spending discretion (and putting to one side any First Amendment type of claim that a federal contractor might make that it is being discriminated against by state or local authorities based on viewpoint), the Supreme Court has, I think, clearly suggested that federal supremacy principles would override local autonomy here.

The basic test as to whether a state or local measure is displaced on Article VI Supremacy Clause grounds is whether there is any actual conflict between state and federal laws, or—of crucial importance here—whether "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸³ And "[w]hat [constitutes] a

80. See Mary Papenfuss, *Berkeley Becomes First City to Divest from Border Wall Companies*, HUFF. POST, Mar. 17, 2017, https://www.huffingtonpost.com/entry/berkeley-border-wall-contrac-tors_us_58cc7f57e4b0be71dcf50d7b.

81. See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1979).

82. See *supra* note 77 and accompanying text.

83. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”⁸⁴

It was under this test that a unanimous Supreme Court in *Crosby v. National Foreign Trade Council*⁸⁵ at the turn of the century struck down a Massachusetts law that prohibited the state from doing business with companies that themselves did business in Myanmar, presumably as an attempt to pressure Myanmar into human rights reforms. The problem with this law, said the Court, is that it effectively made it harder for the president, pursuant to authority given by the Constitution and congressional enactment, to negotiate with Myanmar and have the nation speak in a single voice.⁸⁶ And this was true even though Massachusetts was in some respects acting “passively” by merely selectively withholding its dollars, and even though Massachusetts, generally speaking, has broad discretion as to its business partners.

I think the same analysis would likely doom the Berkeley law and similar enactments. Assuming, again, that the federal wall is something as to which the president has lawful authority from Congress and/or the Constitution, there is no doubt that the efforts of cities and states to deter individuals and companies from working with the federal government would stand as a nontrivial obstacle to the accomplishment and execution of the full purpose of erecting the wall. Indeed, one of the very reasons Berkeley and other jurisdictions are considering these measures is precisely to make it harder for the wall to be built. In this respect, the Berkeley law seems easier to invalidate than the Massachusetts law; in *Crosby*, the state could at least make the argument that its goals were generally in alignment with those of the federal government.

Taking a step back, I think this result makes big-picture federalism sense. In *McCulloch v. Maryland*,⁸⁷ Chief Justice John Marshall’s opinion for the Court struck down a tax Maryland targeted at a valid federal entity, the Bank of the United States, observing that the “power to tax involves the power to destroy.”⁸⁸ But the power to regulate, employ, and provide benefits also involves such a power. Imagine that *McCulloch* had instead involved a state law that prohibited any persons employed by the Bank of the United States from ever being eligible to attend public schools, be employed by state or local government, or receive other public benefits in the state. Certainly, Maryland could not attack the Bank indirectly by attacking its people/employees. And if a state can’t attack employees of the federal

84. *Crosby*, 530 U.S. at 373.

85. *Id.* at 363.

86. *Id.* at 364.

87. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

88. *Id.* at 431.

government, neither should it be free to attack contractors, who are in effect substitutes for federal employees themselves.

That leaves us with fiscal discretion as the only possible basis for state authority in this realm. But as the *Crosby* case shows, spending power discretion, while broad, is not immune from a supremacy-focused inquiry into the potential state spending decisions have for seriously impeding federal objectives. When state and local governments create policy discriminating against federal contractors, they are not simply withholding assistance to the feds, but instead are affirmatively trying to make it harder for the feds to find third parties to implement national programs.

More generally, I think whether we are talking presidential election reform or federal-state relations, we should always remember that the rules and doctrines we forge must apply equally well regardless of which political party or ideology is in control in the White House. The federalism doctrine, if it is to have integrity, should take federal supremacy just as seriously as when the feds seek (whether wisely or not) to build walls as when they seek to tear walls down, say, by ending racial segregation or facilitating marriage equality.

Tax Return Disclosure

The final topic on which I shall touch are recent proposals—in states like California and New York—to enact state legislation that seeks to prevent presidential candidates who fail to disclose tax returns for the five most recent years prior to the election from having their names appear on the state's November ballot in 2020 and beyond. The California effort in 2017 has been patterned on a similar proposal being pushed by some legislators in New York state. The proposal there, dubbed the Tax Returns Uniformly Made Public (or TRUMP) Act, would require each presidential candidate to disclose tax returns prior to fifty days before the November election, else his/her name will not appear on the ballot and the state's electors will be prohibited by state law from casting their votes for him/her in the so-called electoral college.⁸⁹ While many voters (and certainly many journalists) seem to want access to candidates' tax return information (to see possible conflicts of interest, levels and directions of charitable giving, relative aggressiveness in seeking to minimize tax burdens, and so forth) before presidential elections are held (and were disappointed that Mr. Trump departed from modern tradition in declining to produce his returns), state legislative proposals like the TRUMP Act—whose enactment, I should observe, is still speculative⁹⁰—raise a number of legal and policy issues.

89. S.B. 26, 2017 Leg., 2017-2018 Sess. (N.Y. 2017).

90. See, e.g., Morris, *supra* note 7.

Certainly a big threshold question is whether states have legal authority to impose such a requirement on presidential candidates as a condition for the candidates' names appearing on the ballot or their being eligible to be voted for by the state's electoral college contingent. The *New York Times* published an editorial last year expressing its belief—and quoting leading constitutional scholar Laurence Tribe of Harvard—that laws like the ones being discussed in New York and California should be upheld in court.⁹¹ To be sure, there are arguments in favor of state authority here (because states have broad leeway to regulate so-called “ballot access”), but there are also arguments on the other side, such that prediction is dicey. (And the quote from Professor Tribe did not indicate anything more than that a state “might be able” to impose the kinds of tax-return-disclosure requirements being considered.)⁹²

One possible line of constitutional attack against TRUMP Act-like laws is based on a 1983 Supreme Court case, *Anderson v. Celebrezze*,⁹³ in which the Court struck down an Ohio law that required any independent (i.e., nonmajor-party) candidate for president to file a statement of candidacy and nominating petition with state election officials by March 20 in order to be eligible for inclusion on the November ballot. The Court weighed the state's interest in having an early filing deadline against the associational interests of independent candidates and their supporters, especially in the context of national election where a state's actions can influence a national outcome. As the Court observed:

[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus, in a Presidential election, a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders.⁹⁴

A second line of attack might be premised on *United States Term Limits v. Thornton*,⁹⁵ a 1995 case in which the Court struck down a state law that prevented congressional candidates who had already served a certain number of terms in Congress from appearing on congressional election ballots in the

91. Editorial, *An Antidote to Donald Trump's Secrecy on Taxes*, N.Y. TIMES, Dec. 12, 2016, <https://www.nytimes.com/2016/12/12/opinion/an-antidote-to-donald-trumps-secrecy-on-taxes.html>.

92. *Id.*

93. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

94. *Anderson*, 460 U.S. at 781.

95. *United States Term Limits v. Thornton*, 514 U.S. 779 (1995).

state, holding that states had no authority to impose additional requirements beyond those mentioned in the Constitution for the office of U.S. Representative or Senator, and that preventing the names of long-serving federal legislators from appearing on the ballot amounted to an additional requirement for congressional office holding. The same kind of argument might be made about the TRUMP Act.

But things are not so simple; popular elections for members of the House and Senate are constitutionally required, but perhaps not so for the offices of the president and the vice president. For this reason, states may have much less leeway to regulate congressional elections than they do presidential selection procedures.

In this regard, it bears noting that seventeen years after *Anderson v. Celebrezze* and five years after *Thornton*, the Court decided *Bush v. Gore*,⁹⁶ in which several justices seemed to recognize a much broader authority of states to administer the presidential selection process. Some of the justices seemed to indicate that states did not even need to hold elections to gather popular input before selecting representatives to the so-called electoral college, and that as long as states were not treating votes from different parts of the state or for different candidates in a nonuniform way (and a tax-return-disclosure requirement would apply equally to all candidates and their supporters), states continue to have broad latitude.

Perhaps *Thornton* means—whether or not popular elections for presidential electors are required the way popular elections for members of Congress are—that, however a state’s electoral college contingent is selected, the state’s electoral collegians themselves cannot be required to observe qualifications for the office of president that go beyond the bare minima laid out in Article II (age, natural-born citizenship, etc.).⁹⁷ But that does not really resolve the question of the information that a state might require presidential candidates to provide prior to the selection of presidential electors themselves. Imagine, for example, a state said: “The state legislature will honor the wishes of the state electorate and choose electors pledged to support the candidate who receives the most popular support by statewide voters on Election Day, provided that candidate has disclosed his or her tax returns (in particular ways elsewhere defined). If the candidate with the most popular support has not disclosed his/her tax returns, then the state legislature is free to select electors pledged to vote for a

96. *Bush v. Gore*, 531 U.S. 98 (2000).

97. This assumes that electoral collegians are constitutionally entitled to independence, a question that I think is not as easy as many assume. See Vikram David Amar, *Fixing the Problem of Faithless Electors*, JUSTIA, Nov. 18, 2016, <https://verdict.justia.com/2016/11/18/fixing-problem-faithless-electors>.

different presidential candidate.” It is not clear to me states lack the power to adopt such a scheme under the reasoning of at least many of the Justices in *Bush v. Gore*, and if I’m right about that, then a great deal turns on how cleverly states implement a *de facto* requirement of tax return disclosure.

Moving beyond legal validity, are laws like the TRUMP Act a good idea? That too, depends. If only blue states like New York and California adopt such laws, then only Democratic candidates will have meaningful pressure on them to disclose their tax returns. To be blunt, nothing in the presidential election in 2016 would have changed if the name of Donald Trump (or of electors pledged or inclined to support him) had not appeared on California’s or New York’s November ballots. And that fact was known from the beginning of the election cycle. So, as with so many presidential election reforms, for this one to have any beneficial real-world effect, it would have to be embraced by either a mix of blue and red states or at least a number of swing states where neither party can feel assured of a victory. Or it would have to be implemented at the primary election stage, when fewer candidates could ignore it.

And ballot access regulations such as the TRUMP Act could themselves complicate other well-intentioned and viable reform efforts, like the National Popular Vote (“NPV”) Compact plan about which I have written a great deal in on-line and academic commentary.⁹⁸ For any effort by a group of states to collectively allocate their electors to the national popular vote winner (regardless of who got more votes within each of the signatory states) to work, we need some reliable way of discerning voter preferences in all fifty states (and District of Columbia), so that the nominal national popular vote winner is indeed the choice of the greatest number of American voters. But if voters in some states are effectively prevented from registering their preferences (because of something like the TRUMP Act), then the title of national popular vote winner is deprived of much of its democratic legitimacy. (For example, imagine that Mr. Trump’s name did not appear on the New York and California ballots in 2020, and that he was beaten in the national popular vote tally by a relatively narrow margin; surely no one could think he meaningfully “lost” the national popular vote, since he no doubt would have received several millions of votes in California and New York, even though he was likely to lose those states, had he been on the ballots there.)

98. See, e.g., Vikram David Amar, *Oregon May Become the First State to Use Direct Democracy to Join the National Popular Vote Agreement Plan*, JUSTIA, June 1, 2017, <https://verdict.justia.com/2016/11/18/fixing-problem-faithless-electors>; *The Case for Reforming Presidential Elections*, *supra* note 30.

I have written in a 2011 *Georgetown Law Journal* article⁹⁹ that if enough states do adopt the National Popular Vote plan such that states might begin allocating electors according to the plan, then Congress has the power to and should adopt a law providing for more national uniformity to discern a meaningful national vote tally. Proposals like the TRUMP Act convince me all the more of the importance of federal legislation in this realm if and when states making up 270 or more electors sign onto the NPV plan.

Conclusion

Federalism is important and complicated stuff. And it is likely to become more so, on both fronts, as the disputes I have addressed here continue to make their way up the legislative, executive, and judicial ladders. Scholars and jurists would do well to bone up on the basics, and also the nuances, of federalism theory and doctrine.

99. *The Case for Reforming Presidential Elections*, *supra* note 30.