

CONDITIONAL SPENDING AND THE NEED FOR DATA ON LETHAL USE OF POLICE FORCE

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When it wants to be, the federal government is good at counting things. It tracks average daily caffeine intake (300 milligrams per adult older than twenty-two in 2008), weekly instances of the flu (875 reported by public health laboratories in the week ending January 14, 2017), monthly production of hens' eggs (8.97 billion in December 2016), and annual bicycle thefts (204,984 in 2015). But it currently cannot provide a comprehensive count of how often police officers use lethal force against its citizens. The deaths of Michael Brown, Walter Scott, Tamir Rice, Laquan McDonald—all unarmed, black, and shot by police officers—and far too many others have forced the issue of lethal police use of force into the national consciousness. But while many recent reports have focused on the unreliability of current data, there has been relatively little consideration of how, exactly, the federal government might go about getting it. This Note seeks to fill this gap by laying out the contours within which the federal government can act to incentivize states to collect more and better data. After highlighting the need for robust data collected at the federal level and describing various issues with the current state of federal collection of law enforcement data, this Note outlines the legal landscape legislators considering such a policy must grapple with: the combination of federalism concerns that are particularly acute in the sphere of state and local law enforcement, and the Supreme Court's somewhat ambiguous conditional spending jurisprudence. Finally, it explains how the federal government might incentivize data collection without running afoul of the law, proposing a legislative scheme for federal collection of law enforcement data that combines national guidelines, conditional spending requirements, and competitive grant funding.

INTRODUCTION	2054
I. THE NEED FOR LETHAL POLICE FORCE DATA, AND WHY WE DON'T HAVE IT	2056
A. <i>Why We Need Robust Data (Collected at the Federal Level)</i>	2057
B. <i>Issues with Current Laws and Programs Related to Federal Collection of State and Local Law Enforcement Data</i>	2064
II. THE COURT'S FEDERALISM JURISPRUDENCE	2069
A. <i>Hesitance Towards a Federal Role in State and Local Law Enforcement</i>	2070

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B. <i>Anti-Commandeering and Conditional Spending</i>	
<i>Pre-NFIB</i>	2075
C. <i>The Role of Coercion in NFIB</i>	2078
III. GIVEN <i>NFIB</i> 'S PARAMETERS, WHAT CAN THE FEDERAL GOVERNMENT DO?	2084
A. <i>National Guidelines for Data Collection</i>	2084
B. <i>A Carrot-and-Stick Approach to Data Collection</i> ...	2085
CONCLUSION	2090
APPENDIX: JAG GRANTS AND TOTAL STATE ANNUAL EXPENDITURES, FY 2014.....	2092

INTRODUCTION

“We have a system currently that is almost entirely reactive, a system influenced by anecdote and emotion. . . . The beautiful thing about numbers is that they don’t lie.”

*Senator and Former California Attorney General Kamala Harris*¹

When it wants to be, the federal government is good at counting things. It tracks average daily caffeine intake (300 milligrams per adult older than twenty-two in 2008),² weekly instances of the flu (875 reported by public health laboratories in the week ending January 14, 2017),³ monthly production of hens’ eggs (8.97 billion in December 2016),⁴ and annual bicycle thefts (204,984 in 2015).⁵ But here is one number the federal government currently cannot provide: a comprehensive count of how often police officers use lethal force against its citizens. As former police officer and current University of South Carolina School of Law Professor Seth Stoughton told *NPR*, “You could probably figure out how many radishes were imported into the United States last year, but you can’t figure out how many times

¹ Aaron C. Davis & Wesley Lowery, *FBI Director Calls Lack of Data on Police Shootings ‘Ridiculous,’ ‘Embarrassing,’* WASH. POST (Oct. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html?utm_term=.61a940abe726.

² See LASZLO P. SOMOGYI, FDA, CAFFEINE INTAKE BY THE U.S. POPULATION 1 (2012), <https://www.fda.gov/downloads/aboutfda/centersoffices/officeoffoods/cfsan/cfsanfoiaelectronicreadingroom/ucm333191.pdf>.

³ *2016-2017 Influenza Season Week 2 Ending January 14, 2017*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/weekly/weeklyarchives2016-2017/Week02.htm> (last visited Sept. 26, 2017).

⁴ USDA, CHICKENS AND EGGS 4 (Feb. 28, 2017), <http://usda.mannlib.cornell.edu/usda/nass/ChicEggs/2010s/2017/ChicEggs-02-28-2017.pdf>.

⁵ FBI UNIFORM CRIME REPORTING, CRIME IN THE UNITED STATES 2015 tbl.23 (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-23>.

officers pulled their triggers. That's really embarrassing."⁶ We live in the age of big data, yet we have no comprehensive way of collecting even the most elementary data on the actions of police officers. Besides lethal use of force, we also have no comprehensive way of tracking non-lethal use of force, stops, frisks, and low-level arrests.⁷ In fact, we do not even know precisely how many police departments there are in the United States, with estimates ranging from 16,000 to 18,000.⁸

Despite the uncertainty around much police activity, current events have increased attention regarding the lack of reliable data in these areas, and calls for more data are getting louder. The deaths of Michael Brown, Walter Scott, Tamir Rice, Laquan McDonald—all unarmed, black, and shot by police officers⁹—and far too many others have forced the issue of lethal police use of force into the national consciousness. Many recent reports have focused on the unreliability of current data,¹⁰ and media sources like *The Guardian's* The

⁶ Martin Kaste, *Data Initiative Aims to Help with Police Force Transparency*, NPR (Apr. 28, 2016, 5:08 AM), <http://www.npr.org/2016/04/28/475985461/data-initiative-aims-to-help-with-police-force-transparency>.

⁷ See Tom Meagher, *13 Important Questions About Criminal Justice We Can't Answer*, MARSHALL PROJECT (May 15, 2015), https://www.themarshallproject.org/2016/05/15/13-important-questions-about-criminal-justice-we-can-t-answer?utm_medium=social&utm_campaignsprout&utm_source=twitter#.c7XyBfyNq (outlining criminal justice data the government does not have).

⁸ See Vanita Gupta, Principal Deputy Assistant Attorney Gen., Principal Deputy Assistant Attorney General Vanita Gupta Delivers Remarks at Community Policing Summit Hosted by the U.S. Attorney's Office of the District of New Jersey (Sept. 30, 2015), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-vanita-gupta-delivers-remarks-community> (referring to "16,000 to 18,000 police departments").

⁹ Jeremy Hobson, *After 9 High-Profile Police-Involved Deaths Of African-Americans, What Happened to the Officers?*, WBUR (July 17, 2014), <http://www.wbur.org/hereandnow/2016/07/11/america-police-shooting-timeline> (looking at a number of officer-involved deaths). While the vast majority of those killed by police officers are men—in 2016, for example, the *Washington Post* Fatal Force database estimated that 923 out of 963 of those killed by police were men—it should be noted that women, especially women of color, also face violence at the hands of police. See *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> (last visited Aug. 6, 2017); see, e.g., Kate Abbey-Lambertz, *These 15 Black Women Were Killed During Police Encounters. Their Lives Matter, Too*, HUFFPOST (May 26, 2016), http://www.huffingtonpost.com/2015/02/13/black-womens-lives-matter-police-shootings_n_6644276.html (noting the lack of attention given to minority women killed during encounters with police).

¹⁰ See, e.g., Reuben Fischer-Baum, *Nobody Knows How Many Americans the Police Kill Each Year*, FIVETHIRTYEIGHT (Aug. 19, 2014, 11:36 AM), <http://fivethirtyeight.com/features/how-many-americans-the-police-kill-each-year/>; Dara Lind, *The FBI Is Trying to Get Better Data on Police Killings. Here's What We Know Now.*, VOX (Apr. 10, 2015, 10:31 AM), <http://www.vox.com/2014/8/21/6051043/how-many-people-killed-police-statistics-homicide-official-black>; Jon Swaine & Oliver Laughland, *Eric Garner and Tamir Rice Among Those Missing from FBI Record of Police Killings*, THE GUARDIAN (Oct. 15, 2015,

Counted¹¹ and the *Washington Post*'s Fatal Force database¹² have cropped up in an attempt to fill the gap. But there has been relatively little consideration of how, exactly, the federal government might go about getting this data.

This Note seeks to fill this gap by laying out the contours within which the federal government can act to incentivize states to collect more and better data. Section I highlights the need for robust data collection at the federal level and describes various issues with the current state of federal collection of law enforcement data. Section II outlines federalism concerns that make the federal government wary of interfering in matters of state and local law enforcement. It also describes the Supreme Court's Spending Clause jurisprudence before and after *National Federation of Independent Business v. Sebelius* (*NFIB*)¹³ to assess the limits within which the federal government can place conditions on federal spending. Despite federalism concerns that are particularly acute in the sphere of state and local law enforcement and the Supreme Court's ambiguous conditional spending jurisprudence, this Note argues that federal-level legislation requiring states to report lethal use of police force can be crafted without running afoul of the law. Section III explains how the federal government might incentivize data collection within these limits, proposing a legislative scheme for federal collection of law enforcement data that combines national guidelines, conditional spending requirements, and competitive grant funding.

I

THE NEED FOR LETHAL POLICE FORCE DATA, AND WHY WE DON'T HAVE IT

Discussion of collection of police lethal use-of-force data typically elicits one of two responses: "Why do we need it?" or "Don't we already collect it?" This section addresses these two questions by outlining the clear need and demand for comprehensive law enforcement data, particularly on lethal use of force, and describing why existing national databases are inadequate.

5:20 PM), <http://www.theguardian.com/us-news/2015/oct/15/fbi-record-police-killings-tamir-rice-eric-garner>.

¹¹ *The Counted*, GUARDIAN, <http://www.theguardian.com/us-news/series/counted-us-police-killings> (last visited Aug. 8, 2017).

¹² *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/pb/policeshootings/> (last visited Aug. 8, 2017).

¹³ 567 U.S. 519 (2012).

A. *Why We Need Robust Data (Collected at the Federal Level)*

Discussing the sad state of federal-level data collection raises the questions: Why do we need robust data, and why should it be collected at the federal level? First, and perhaps most obviously, we need data in order to take stock of the scope and severity of the problem of police misconduct. Second, we need data in order to attain democratic ideals of transparency and accountability and to facilitate the rebuilding of community trust in policing. Moreover, data should be collected at the federal level because of inadequate incentives for states and localities to collect and publish the reliable data individually.

Despite reluctance from limited-government and tough-on-crime conservatives,¹⁴ there has been a growing counter-current of calls for increased police accountability over the past several years that indicate a desire for data collection on police use of force. The national dialogue on police violence may have been precipitated, ironically, by a non-police-related death. In 2012, Trayvon Martin—an unarmed black seventeen-year-old—was shot and killed by a neighborhood-watch captain.¹⁵ Public backlash ensued:

The news coverage of Trayvon's story was a phenomenon. For the first time in decades, a young black teen's death was the top news story in the nation. Trayvon's face was on every major news network. . . . But how many other young black men are killed every day without generating the slightest bit of notice?¹⁶

In the years that followed, increased awareness of this question coalesced with police violence. One tragic and pivotal incident was the death of Michael Brown—also black, unarmed, and a teenager—who was shot and killed by a police officer in Ferguson, Missouri.¹⁷ Brown's death provoked a national movement against police violence, powered by the Black Lives Matter movement and other grassroots activists.¹⁸ Not all police-related deaths resulted from shootings: Eric

¹⁴ See *infra* Section II.A.

¹⁵ See Charles M. Blow, *The Curious Case of Trayvon Martin*, N.Y. TIMES (Mar. 16, 2012), <http://www.nytimes.com/2012/03/17/opinion/blow-the-curious-case-of-trayvon-martin.html> (describing the circumstances of Trayvon Martin's death).

¹⁶ Benjamin Crump, *5 Years After Trayvon Martin's Death, What Has Nation Learned?*, USA TODAY (Feb. 23, 2017, 8:47 PM), <https://www.usatoday.com/story/opinion/policing/spotlight/2017/02/23/trayvon-martin-george-zimmerman-anniversary-policing-the-usa/98168962/>.

¹⁷ See Rembert Browne, *The Front Lines of Ferguson*, GRANTLAND (Aug. 15, 2014), <http://grantland.com/features/ferguson-missouri-protest-michael-brown-murder-police/> (describing the circumstances of Michael Brown's death).

¹⁸ See Josh Hafner, *How Michael Brown's Death, Two Years Ago, Pushed #BlackLivesMatter into a Movement*, USA TODAY (Aug. 8, 2016, 7:50 PM), <http://www.usatoday.com/story/news/nation-now/2016/08/08/how-michael-browns-death-two->

Garner, for example, was killed by a police officer who placed him in a chokehold during an arrest for allegedly selling loose cigarettes.¹⁹ Many others followed—so many, in fact, that a multimedia campaign called “Say Their Names” emerged, designed to allow the families of victims of police brutality to offer a comprehensive view of victims’ lives, a reminder that they were human beings, not just headlines.²⁰

These high-profile deaths reignited concerns about racialized policing, police violence, and police-community relations, drawing attention “to a remarkable lack of knowledge about a seemingly basic fact: how often people are killed by the police.”²¹ Policymakers were listening. Then-FBI Director James Comey delivered a speech in which he noted that after Michael Brown’s death, he asked his staff to tell him how many of those shot and killed by police in the United States were black.²² They could not provide an answer, he noted.²³ President Obama’s Task Force on 21st Century Policing published a report that contains over fifty mentions of the need for more robust data on the behavior of police.²⁴

As it stands, we do not know the extent of the issue of police misconduct—or whether backlash against such misconduct might adversely affect police officers’ ability to do their jobs.²⁵ Without

years-ago-pushed-blacklivesmatter-into-movement/88424366/ (discussing the origins and growth of the Black Lives Matter movement).

¹⁹ See Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), https://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html?_r=0 (describing the circumstances of Eric Garner’s death).

²⁰ See Demetria Irwin, *Families of Police Violence Victims Want You to ‘Say Their Names,’* EBONY (Apr. 28, 2016), <http://www.ebony.com/news-views/say-their-names-multimedia#axzz4a1K8dfM8> (describing the origins and aims of Say Their Names).

²¹ See Fischer-Baum, *supra* note 10.

²² See James B. Comey, Director of the FBI, *Hard Truths: Law Enforcement and Race* (Feb. 12, 2015), <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> (“Not long after riots broke out in Ferguson late last summer, I asked my staff to tell me how many people shot by police were African-American in this country. . . . They couldn’t give it to me.”).

²³ *Id.*

²⁴ See U.S. DEP’T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., *FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING* (May 2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [hereinafter *TASK FORCE REPORT*]. For example, the report recommends that “[p]olicies on use of force should also require agencies to collect, maintain, and report data to the Federal Government on all officer-involved shootings.” *Id.* at 21.

²⁵ In recent years, stories of police misconduct seem to have taken up more news cycle real estate. In the wake of Freddie Gray’s death in Baltimore, President Obama voiced this perception during a press conference, noting that “[s]ince Ferguson . . . we have seen too many instances of what appears to be police officers interacting with individuals, primarily African Americans, often poor, in ways that raise troubling questions. . . . And it comes up it seems like once a week now, or once every couple of weeks.” Tom McCarthy, *Barack*

accurate and comprehensive data, we have no way of understanding the scope of the problem, much less identifying and addressing its causes and effects. And a lack of context only means that police-community relations will continue to deteriorate.²⁶

Additionally, police are adversely affected by the breakdown of community trust caused by uncertainty as to the extent of police use of force. If communities do not trust police, they are both more likely to commit crimes and less likely to report crimes to law enforcement. To illustrate, a recent study published in the *American Sociological Review* found that a single episode of police violence in Milwaukee resulted in “17 percent (or 22,000) fewer [911] calls . . . than would have been likely if the attack had never happened.”²⁷ This effect, though alarming, is not altogether surprising: “Police, after all, are the most public face of government. . . . If Americans can’t trust them, they are going to question the legitimacy of a lot of what government does—and that legal cynicism can contribute to more crime.”²⁸ Academic literature on procedural justice—the idea that individuals’ regard for police is tied more to perceived fairness of the *process* of

Obama on Baltimore: ‘We as a Country Need to Do Some Soul-Searching,’ GUARDIAN (Apr. 28, 2015, 2:42 PM), <https://www.theguardian.com/us-news/2015/apr/28/barack-obama-on-baltimore-we-as-a-country-need-to-do-some-soul-searching>. However, President Obama also noted that while increased coverage of police use of lethal force might be new, the problem itself is not. Some commentators have suggested that the increase of video footage has led to increased *coverage* of police shootings, even while the number of police shootings may have remained largely constant. Elliott C. McLaughlin, *We’re Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/>. The truth is, we do not have the data to assess these claims: Quoting members of the Division of Policing of the American Society of Criminology, the Task Force report notes, “[w]hile the United States presently employs a broad array of social and economic indicators in order to gauge the overall ‘health’ of the nation, it has a much more limited set of indicators concerning the behavior of the police and the quality of law enforcement.” TASK FORCE REPORT, *supra* note 24, at 19.

²⁶ An American Journal of Public Health study notes that the perception that someone was killed by police officers or government agents has been the spark for “[a]lmost every major civil insurrection that occurred in the United States in the past century.” Colin Loftin et al., *Underreporting of Justifiable Homicides Committed by Police Officers in the United States, 1976–1998*, 93 AM. J. PUB. HEALTH 1117, 1117–21 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447919/pdf/0931117.pdf>.

²⁷ Quoctrung Bui, *Calls to 911 from Black Neighborhoods Fell After a Case of Police Violence*, N.Y. TIMES: THE UPSHOT, (Sept. 29, 2016), <https://www.nytimes.com/2016/09/29/upshot/calls-to-911-from-black-neighborhoods-fell-after-a-case-of-police-violence.html> (describing the study and interviewing its authors); see also Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 858 (2016) (discussing a study examining police violence influence on citizen crime reporting).

²⁸ German Lopez, *The Fallacy of Trump’s “Send in the Feds” Fix for Chicago*, VOX (Feb. 20, 2017, 7:30 AM), <http://www.vox.com/policy-and-politics/2017/2/20/14523828/trump-chicago-police-crime-murder>.

how they were treated rather than to perceived fairness of the *outcome*—reflects this notion, indicating that a community with more trust in its police will lead to “higher levels of public cooperation with police efforts to address crime, increased compliance with the law . . . and greater deference to police in interactions with community members.”²⁹ Transparency is key to gaining public trust, as accountability is likely to contribute to the perception that the police are acting fairly.

In interviews with the *Wall Street Journal*, police chiefs in cities with rising murder rates attributed the rise, in part, to “strained community relations.”³⁰ The adverse effects of poor police-community relations are twofold: One criminologist attributed the rising rates to both “the withdrawal of some local communities [from cooperating with police]” and “police disengagement.”³¹ Milwaukee Police Chief Ed Flynn told the *Wall Street Journal* that “a series of police-involved shootings have made officers wary of becoming the next viral video, and eroded relations in the most violent neighborhoods.”³² But police disengagement and community withdrawal is not inevitable in the wake of a police-involved shooting—the fallout depends substantially on the level of police-community trust. For example, in both New York and Los Angeles—both of which have seen public incidents of police violence—crime has not surged, and the *Wall Street Journal* notes that “[c]hiefs in both those cities point to improved neighborhood-policing efforts in recent years” as one reason why.³³

Like neighborhood policing efforts, increased transparency helps to build trust between law enforcement and the communities they serve—and increase police efficacy as a result. Take, for example, the Dallas Police Department (DPD), which has elected to take part in the Obama Administration’s Police Data Initiative, a voluntary program dedicated to “improving the relationship between citizens and police through uses of data that increase transparency, build community trust, and strengthen accountability.”³⁴ The DPD released

²⁹ DANIELA GILBERT ET AL., CAL. P’SHP FOR SAFE CMTYS., PROCEDURAL JUSTICE AND POLICE LEGITIMACY: USING TRAINING AS A FOUNDATION FOR STRENGTHENING COMMUNITY-POLICE RELATIONSHIPS (2015), <https://www.bja.gov/bwc/pdfs/Procedural-Justice-and-Police-Legitimacy-Paper-CPSC-Feb-2015.pdf>.

³⁰ Scott Calvert et al., *With Their Elevated Homicide Rates, Four Cities Stand Out*, WALL ST. J. (Feb. 20, 2017, 5:02 PM), <https://www.wsj.com/articles/with-their-rising-homicide-rates-four-cities-stand-out-1487592002>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ White House Off. of the Press Sec’y, *Fact Sheet: White House Police Data Initiative Highlights New Commitments*, WHITE HOUSE (Apr. 21, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/22/fact-sheet-white-house-police-data-initiative-highlights-new-commitments>.

officer-involved shooting data, broken down by race of both subject and officer.³⁵ David Brown, DPD Chief, explained that this effort “played a key role in engaging the public and helping to rebuild community trust,” and credited the increased data transparency for “a 67 percent reduction in excessive force complaints and a 45 percent reduction in deadly force incidents in 2015.”³⁶ Thus, data transparency could provide an effective antidote to strained police-community relations.

This much-needed data should be collected at the federal level, as there are insufficient incentives at the state and local level to collect enough data to facilitate adequate oversight and accountability. Rachel Harmon describes this incentive problem, noting that “the reality is that public actors who shape policing—from the officers themselves to local politicians—often face incentives that undermine data collection and research on policing as well as distribution of information about policing to the public.”³⁷ But, as Harmon notes, national coordination is easier to achieve at the federal level, indicating that federal efforts at data collection are likely to be more promising.³⁸ Even proponents of limited government realize that the federal government can have a role in some areas related to criminal justice, including data collection. Edwin Meese, writing for the Federalist Society, outlined this view in 1998:

[I]t is appropriate for the federal government to provide certain criminal justice services in areas where the states themselves cannot accomplish a necessary function by themselves. . . . You need a central agency for the collection of criminal justice statistics. You need technical assistance that can be provided by the federal government. That is a far cry from the federal government taking on the principal role of public safety which has always been, in our tradition, a local matter.³⁹

An alternative, state-driven approach might be more politically feasible during the current Administration: The Trump Administration is unlikely to prioritize federal-level data collection on lethal force. Though President Trump has suggested willingness to involve the federal government in some aspects of criminal justice, this will-

³⁵ Eyragon Eidam, *White House Police Data Initiative Doubles Police Data Programs in First Year*, GOV. TECH. (Apr. 22, 2016), <http://www.govtech.com/data/white-house-police-data-initiative-doubles-police-data-programs-in-first-year.html>.

³⁶ *Id.*

³⁷ Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1130 (2013).

³⁸ *Id.* at 1133.

³⁹ Edwin Meese III, *Federalism in Law Enforcement*, FEDERALIST SOC'Y (May 1, 1998), <http://www.fed-soc.org/publications/detail/federalism-in-law-enforcement>.

ingness is selective—and unlikely to extend to data collection on police use of force.⁴⁰ Attorney General Jeff Sessions also has expressed skepticism at continuing the Justice Department’s investigations of police departments to confront civil rights abuses.⁴¹ And Sessions has espoused support for a robust view of states’ rights in various contexts, lending further support to the contention that the current Administration would be wary of interfering in state and local law enforcement.⁴² However, the Trump Administration has recently displayed a willingness to do just that in the context of immigration,

⁴⁰ President Trump signed an executive order on crime reduction that expresses a willingness to pursue a federal role in crime-related data collection. WHITE HOUSE OFFICE OF THE PRESS SEC’Y, PRESIDENTIAL EXECUTIVE ORDER ON A TASK FORCE ON CRIME REDUCTION AND PUBLIC SAFETY (2017), <https://www.whitehouse.gov/the-press-office/2017/02/09/presidential-executive-order-task-force-crime-reduction-and-public>. It establishes a Task Force on Crime Reduction, and orders the Task Force to, among other things, “evaluate the availability and adequacy of crime-related data and identify measures that could improve data collection in a manner that will aid in the understanding of crime trends and in the reduction of crime.” *Id.* But the Trump Administration probably does not have lethal use of force in mind when considering collection of “crime-related” data. Almost immediately after being sworn in on inauguration day, the White House published six issue pages on its website, including one on “Standing Up for Our Law Enforcement Community” that pledges to push back against the “dangerous anti-police atmosphere in America.” *Standing Up for Our Law Enforcement Community*, WHITE HOUSE, <https://www.whitehouse.gov/law-enforcement-community> (last visited Sept. 29, 2017). Especially given President Trump’s track record on relaying unreliable data—to take just one example, he recently repeated the false claim that murder rates are at their highest in a half-century, see Jeremy Diamond, *Trump Falsely Claims US Murder Rate Is ‘Highest’ in 47 Years*, CNN (Feb. 7, 2017, 4:04 PM), <http://www.cnn.com/2017/02/07/politics/donald-trump-murder-rate-fact-check/>, which has been repeatedly debunked, see Michelle Ye Hee Lee, *Trump’s False Claim that the Murder Rate Is the ‘Highest It’s Been in 45 Years,’* WASH. POST (Nov. 3, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/11/03/trumps-false-claim-that-the-murder-rate-is-the-highest-its-been-in-45-years/?utm_term=.eb8f4db0a9a4—it seems naïve to imagine he would prioritize robust data collection on police use of force.

⁴¹ John Fritze, *Jeff Sessions Voices Concern About Use of Consent Decrees for Police*, BALTIMORE SUN (Jan. 10, 2017), <http://www.baltimoresun.com/news/maryland/politics/blog/bal-jeff-sessions-voices-concern-about-use-of-consent-decrees-for-police-20170110-story.html>.

⁴² For example, in a 2005 floor speech honoring the late Justice William Rehnquist, Sessions noted that he “reestablished a respect for State law and State sovereignty through a number of his federalism opinions.” *Honoring Chief Justice William H. Rehnquist*, 109th Cong. 1 (2005) (statement of Sen. Sessions), <https://www.gpo.gov/fdsys/pkg/CREC-2005-09-07/html/CREC-2005-09-07-pt1-PgS9699-2.htm>. This support for states’ rights has proven to be somewhat selective, however. See, e.g., Ryan J. Reilly & Matt Ferner, *Jeff Sessions Issues Ominous Warning on State Marijuana Legalization*, HUFFPOST (Feb. 27, 2017, 8:16 PM), http://www.huffingtonpost.com/entry/jeff-sessions-marijuana-comments_us_58b4b189e4b0780bac2c9fd8 (noting that Sessions told reporters that state marijuana legalization efforts would open states up to “potential repercussions from the federal government”); Phillip Rucker & Robert Costa, *Trump’s Hard-line Actions Have an Intellectual Godfather: Jeff Sessions*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/politics/trumps-hard-line-actions-have-an-intellectual-godfather-jeff-sessions/2017/01/30/ac393f66-e4d4-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.164b961f55ab (describing Sessions’s

threatening to penalize sanctuary cities by withdrawing federal funding.⁴³ Thus, any argument from the current Administration that the federal government should avoid interfering in this area rings hollow.

Even so, given potential Trump Administration reluctance, one might argue that progressive state and local actors can make progress in this area. Heather Gerken has argued that federalism can actually be used as a tool by progressive states: “Progressives have long thought of federalism as a tool for entrenching the worst in our politics. But it’s also a tool for changing our politics. Social movements have long used state and local policymaking as . . . a testing ground for their ideas.”⁴⁴ To this end, progressive state and local officials, as well as progressive police chiefs, can make progress in establishing robust data collection practices on police use of force.

Despite the incremental progress made by some progressive actors at the state and local levels, it remains clear that action at the federal level will be necessary to maximize participation in a data collection program. Rachel Harmon’s argument that federal action is necessary because of inadequate incentives at lower levels of government can be seen in action, already, in this area. California provides an apt example of the misaligned incentives for data collection at the state level: Though the state is a leader in law enforcement data collection, it has not yet been able to get adequate lethal force data from all local police departments. California has created a first-of-its-kind “OpenJustice” database that released data from the California Department of Justice’s statewide criminal justice datasets.⁴⁵ This data includes deaths in custody, but is not limited to lethal force: It also includes crime rates, arrest rates, clearance rates, and law enforcement officers killed.⁴⁶ While the idea and structure of this database is promising—California could export its database to other states who are interested in a ground-up approach to data collection—it was not self-enforcing; the existence of the system alone could not force

critical role in the creation of an Executive Order on immigration that would penalize states who fail to cooperate with federal enforcement).

⁴³ See Rucker & Costa, *supra* note 42.

⁴⁴ Heather Gerken, *We’re About to See States’ Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017, 2:14 PM), <http://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative>.

⁴⁵ Cal. Office of the Att’y Gen., *Attorney General Kamala D. Harris Launches First-of-its-Kind Criminal Justice Open Data Initiative*, CAL. DEP’T OF JUSTICE (Sept. 2, 2015), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-launches-first-its-kind-criminal-justice-open>.

⁴⁶ Cal. Office of the Att’y Gen., *OpenJustice: Data Exploration*, CAL. DEP’T OF JUSTICE, <https://openjustice.doj.ca.gov/exploration> (last visited Sept. 20, 2017).

departments to report. As a result, the California state legislature passed a bill that would require such reporting.⁴⁷

At a more granular level, progressive police chiefs can also serve as leaders in the data collection sphere. Checking in on the White House Police Data Initiative a year after its creation, the Obama Administration quoted police chiefs from Montgomery County, MD; Chattanooga, TN; Detroit, MI; and Louisville, KY, all of whom expressed their view that data transparency on policing can help them serve their communities.⁴⁸ The Police Data Initiative, though structured at the federal level, did not involve any mandate for state participation, nor did it involve any financial incentives for states to participate. A year after the project was launched, only fifty-three jurisdictions—out of approximately 18,000 law enforcement agencies—have committed to participating.⁴⁹ The relatively limited participation in the well-intentioned initiative bolsters the claim that a law at the federal level is needed to maximize participation.

B. Issues with Current Laws and Programs Related to Federal Collection of State and Local Law Enforcement Data

The current state of federal collection of state and local law enforcement data is almost universally considered to be a mess.⁵⁰ Activist DeRay Mckesson has noted, “Any number you’ve ever heard about police violence comes from local media reports. That means if you get killed in America and no newspaper writes about it, you are not in the data set.”⁵¹ This may be a bit of an exaggeration, but it is not completely off base. While a number of national data sources on

⁴⁷ Assem. Bill No. 71, 2015, Reg. Sess., ch. 462.

⁴⁸ Clarence Wardell & Denice Ross, *The Police Data Initiative Year of Progress*, MEDIUM (Apr. 22, 2016), <https://medium.com/@ObamaWhiteHouse/the-police-data-initiative-year-of-progress-how-we-re-building-on-the-president-s-call-to-leverage-3ac86053e1a9#omaso52ec>.

⁴⁹ Tom Jackman, *Only 53 Police Agencies Participating in National Push for Use of Force Statistics*, WASH. POST (Apr. 26, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/04/26/only-53-police-agencies-participating-in-national-push-for-use-of-force-statistics/?utm_term=.8de581903fd9.

⁵⁰ See, e.g., James J. Fyfe, *Too Many Missing Cases: Holes in Our Knowledge About Police Use of Force*, 4 JUST. RES. & POL’Y (SPECIAL ISSUE) 87–102 (2002) (highlighting the inadequacy of current purported measures of lethal use of police force); David A. Klinger, *On the Problems and Promise of Research on Lethal Police Violence: A Research Note*, 16(1) HOMICIDE STUD. 78–96 (2012) (same); CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS IN THE UNITED STATES, 2003-2005 at 7 (2007), <https://www.bjs.gov/content/pub/pdf/ardus05.pdf> (same).

⁵¹ J.J. McCorvey, *What’s Next for American Prisons and Criminal Justice Reform?*, FAST COMPANY (Jan. 9, 2017), <https://www.fastcompany.com/3066375/the-fast-company-innovation-festival/whats-the-future-for-america> (summarizing activists’ recommendations about the role of data in criminal justice reform).

deaths at the hands of police officers do exist, they are notoriously unreliable. There are three federal data sets relevant to measuring lethal use of police force—FBI figures based on the Supplementary Homicide Report to the Uniform Crime Reporting Program,⁵² the Centers for Disease Control and Prevention's figures,⁵³ and the Bureau of Justice Statistics Deaths in Custody Reporting Program's figures⁵⁴—but none do so comprehensively or accurately.

The lack of a comprehensive measure of lethal use of police force is particularly surprising given that the 1994 Violent Crime Control and Law Enforcement Act (the Crime Control Act) clearly requires the Attorney General to “acquire data about the use of excessive force by law enforcement officers” and to “publish an annual summary of the data acquired under this section.”⁵⁵ However, the Department of Justice has not fulfilled this requirement in any year over the past two decades. According to criminologists, this failure is “not for lack of wanting or trying, but for lack of the resources necessary to undertake the serious and sustained program of research and development that is necessary to fulfill this mandate.”⁵⁶

Resource constraints, however, are only one of several roadblocks to comprehensive data collection. Notably, the Crime Control Act requires the Attorney General to *collect* this data but does not provide a requirement for state, local, and tribal law enforcement agencies to *submit* it.⁵⁷ Thus, reporting remains voluntary even for states and localities with adequate resources, and law enforcement agencies have little incentive to report lethal force. And even for a law enforcement agency with adequate resources that *wants* to report lethal force data, the reporting methodology for these federal databases is often tangled and confusing.

This Section will discuss these three issues—resource constraints, voluntariness, and flawed reporting methodology—and describe how

⁵² *Supplementary Homicide Report*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/nibrs/addendum-for-submitting-cargo-theft-data/shr> (last visited Aug. 5, 2017) [hereinafter FBI SUPPLEMENTARY HOMICIDE REPORT].

⁵³ *Deaths and Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/fastats/deaths.htm> (last visited Aug. 5, 2017).

⁵⁴ *Deaths in Custody Reporting Program*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=19> (last visited Aug. 5, 2017).

⁵⁵ 42 U.S.C. § 14142 (2012).

⁵⁶ Anthony Braga et al., *Recommendations to the President's Task Force on 21st Century Policing*, AM. SOC'Y OF CRIMINOLOGY (Feb. 12, 2015), https://cops.usdoj.gov/pdf/taskforce/02-14-2015/Invited_Testimony_February_14.pdf (collecting primary sources for oral and written testimony submitted to the President's Task Force on 21st Century Policing).

⁵⁷ See 42 U.S.C. § 14142(a) (2012) (“The Attorney General shall, through appropriate means, acquire data about the use of excessive force by law enforcement officers.”).

they lead to current lethal force estimates that are woefully inadequate. Combined, these issues contribute to both a lack of reporting, period, and also a failure to report data that is accurate and comprehensive.

To be sure, some departments simply do not have the resources to report lethal force data to the federal government. Unlike the NYPD, for example, which in 2008 had approximately 36,023 full-time officers, the majority of state and local law enforcement agencies are much smaller.⁵⁸ According to the Bureau of Justice Statistics (BJS), almost half of all law enforcement agencies employ fewer than ten full-time officers.⁵⁹ Despite the lack of personnel, one might wonder what is resource intensive about tracking and reporting the number of deaths at the hands of police officers. After all, what is so difficult about simply keeping a count of how many people your police department has killed in a year? For one thing, the federal government requires that this data be reported in a specific format, which complicates matters for small and large departments alike. According to the *Wall Street Journal*, both Florida and New York—two of the most populous states in the United States—currently lack adequate technology to meet the FBI’s reporting requirements.⁶⁰ To be clear, some departments in both states *do* keep track of deaths at the hands of police. But their tracking software simply does not conform to the particularized requirements of the FBI database.

Increasing resources for state and local law enforcement agencies, though, is not a panacea. The federal government’s lethal use-of-force data has proven to be unreliable particularly because participation by local police departments is voluntary,⁶¹ such that even sufficient resources would likely not overcome the incentives law enforcement agencies have to not report. The incentive problem is easy to diagnose: “[I]t’s not hard to imagine why a police department might want to edit or distort data about how it uses force, or even suppress it

⁵⁸ BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 4 (2011), <https://www.bjs.gov/content/pub/pdf/cslea08.pdf> (summarizing employment data from state and local law enforcement agencies).

⁵⁹ *Id.* at 1.

⁶⁰ Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Uncounted in Federal Stats*, WALL STREET J. (Dec. 3, 2014, 11:26 AM), <https://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504>.

⁶¹ Police departments themselves acknowledge the problematic nature of voluntary data in the context of data collection on police officer injuries. See, e.g., TASK FORCE REPORT, *supra* note 24, at 67 (“The Police Foundation, with the support of a number of other law enforcement organizations, launched an online Law Enforcement Near Miss Reporting System in late 2014, but it is limited in its ability to systematically analyze national trends in this important data by its voluntary nature.”).

altogether—especially if the data shows patterns of bias based on race or income.”⁶² The ACLU notes that “police departments don’t often volunteer any of this data, even if they’re collecting it, because they’re concerned with their image and liability.”⁶³ According to the *New York Times*, “[i]n private discussions, some police leaders told the Justice Department that they were reluctant to turn over data that the department could use to vilify them.”⁶⁴ As a result, only a tiny fraction of police departments in the United States report lethal use-of-force data to the federal government. In 2014, for example, only 224 out of the country’s nearly 18,000 police departments elected to report lethal use-of-force data to the FBI.⁶⁵ Much of the criticism of the current systems of data collection is focused on this voluntary nature. A group of sixty-seven criminal justice and civil rights organizations writing to the Department of Justice on the lack of reliable data in this area focused on the fact that “voluntary reporting programs on police-community encounters have failed.”⁶⁶ Voluntariness also may lead to reporting bias, wherein “more responsible agencies—those least likely to use force in the first place—are more likely to report, and less responsible agencies are less likely to report.”⁶⁷

Besides the voluntary nature of the FBI data, there are other, more granular issues regarding collection methodology. For example, the FBI collects information only on *justifiable* homicides at the hands of police; there is no governmental effort at all to collect the number of *unjustifiable* homicides committed by police officers.⁶⁸ And the categories by which departments report officer-involved homicides in the

⁶² Alexander Howard, *White House Police Data Initiative Could Lead to Reform—If The Public Demands It*, HUFFPOST (Aug. 21, 2015, 4:43 PM), http://www.huffingtonpost.com/entry/white-house-police-data-initiative_us_55d4ddd0e4b0ab468d9f9144 (highlighting the inadequacy of current purported measures of lethal use of police force).

⁶³ *Police Mandatory Reporting*, ACLU, (Oct. 13, 2016), <https://action.aclu.org/secure/we-need-data> (arguing the Department of Justice should mandate police departments to collect and share data).

⁶⁴ Matt Apuzzo & Sarah Cohen, *Data on Use of Force by Police Across U.S. Proves Almost Useless*, N.Y. TIMES (Aug. 11, 2015), https://www.nytimes.com/2015/08/12/us/data-on-use-of-force-by-police-across-us-proves-almost-useless.html?_r=0 (highlighting the inadequacy of current purported measures of lethal use of police force).

⁶⁵ Swaine & Laughland, *supra* note 10.

⁶⁶ Press Release, The Leadership Conference on Civil and Human Rights, 67 Organizations Urge Justice Dept. to Improve Data Collection Mandate on Deaths in Police Custody (Aug. 30, 2016), <http://archives.civilrights.org/press/2016/Death-in-Custody-Reporting-Act-DOJ-Regulations.html>.

⁶⁷ Richard Florida, *Where More Americans Die at the Hands of Police*, CITYLAB (Aug. 25, 2014) (internal quotation marks omitted), <http://www.citylab.com/crime/2014/08/where-more-americans-die-at-the-hands-of-police/379067/> (mapping the geography of U.S. police killings).

⁶⁸ Fischer-Baum, *supra* note 10 (highlighting the inadequacy of current purported measures of lethal use of police force).

Uniform Crime Reporting Program's Supplementary Homicide Report (SHR) are inherently flawed. Currently, the structure of the SHR is such that departments only have one option for coding officer-involved homicides: "Felon Killed by Police Officer."⁶⁹ The SHR calls for departments to code homicides in one of thirty-two categories (which include categorizations as detailed as "Child Killed by Babysitter" and "Lovers' Triangle"), but only one of these categories—"Felon Killed by Police Officer"—mentions officer-involved deaths.⁷⁰ The "Felon Killed by Police Officer" designation is automatically treated as a justifiable homicide and, by definition, excludes all victims who are not in the process of committing a felony.⁷¹ As a result, departments are forced to fit those non-felon victim deaths into other categories within the general homicide and manslaughter metrics, none of which mention that a law enforcement officer is the one who perpetrated the homicide. Thus, even those departments that do have adequate infrastructure may well measure use of force differently from one another for the purposes of reporting, making an apples-to-apples comparison impossible.

These issues lead to all three current federal databases containing flawed and unreliable estimates of lethal use of force. A recent *Wall Street Journal* investigation collected data from 105 police departments, then compared its count to the FBI's and found that the FBI was missing several hundred deaths. "Justifiable police homicides from 35 of the 105 large agencies contacted by the Journal didn't appear in the FBI records at all. Some agencies said they didn't view justifiable homicides by law-enforcement officers as events that should be reported."⁷² A considerable amount of media attention and academic literature is dedicated to the unreliability of current measures.⁷³ Even the government's own self-assessments show that data is lacking: A 2015 BJS study seeking to evaluate the efficacy of the BJS and FBI measures estimated that the databases miss *more than half* of all people killed by police.⁷⁴

⁶⁹ FBI SUPPLEMENTARY HOMICIDE REPORT, *supra* note 52; see Jaeah Lee, *Cops Kill Many More Americans Than the FBI's Data Shows*, MOTHER JONES (Oct. 16, 2015, 6:48 PM), <http://www.motherjones.com/politics/2015/10/police-shootings-fbi-data-missing-errors> (describing difficulties with the FBI reporting system).

⁷⁰ See FBI SUPPLEMENTARY HOMICIDE REPORT, *supra* note 52 (providing aggregate data on homicides in the United States).

⁷¹ See *id.*

⁷² Barry & Jones, *supra* note 60.

⁷³ See, e.g., sources cited *supra* notes 10 and 52.

⁷⁴ DUREN BANKS ET AL., BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS PROGRAM ASSESSMENT: TECHNICAL REPORT 1 (2015), <https://www.bjs.gov/content/pub/pdf/ardpatr.pdf>.

In September of 2015, the FBI announced plans to reform collection of data involving officer-involved homicides, but these plans fail to address key issues with the current data. Then-FBI Director Comey recognized that “we need more law enforcement agencies to submit their justifiable homicide data so that we can better understand what is happening across the country” and noted that the FBI planned to “collect more data about shootings (fatal and nonfatal) between law enforcement and civilians, and to increase reporting overall.”⁷⁵ However, as commentators have noted, because the FBI’s data collection will remain voluntary, Comey’s comments do not amount to much more than a “welcome rhetorical nod towards better reporting.”⁷⁶ And the reformed data collection would do nothing to increase funding for resource-strapped departments: “[T]housands of departments will need to equip themselves with the software to properly track and report the data.”⁷⁷ Comey himself noted that he did not “have the power to require people to supply [the FBI] with data,” explaining that it might be possible for Congress “to tie federal funds to the reporting requirements, so that law enforcement agencies that failed to report their data wouldn’t have access to federal grants.”⁷⁸

II

THE COURT’S FEDERALISM JURISPRUDENCE

The difficulty in structuring a federal program to collect lethal use-of-force data comes from the confluence of two issues: federalism concerns that are particularly acute in the sphere of state and local law enforcement, and the Supreme Court’s somewhat ambiguous conditional spending jurisprudence. First, due to historic emphasis on the state control of police powers, any involvement of the federal govern-

⁷⁵ Jim Comey, *Message from the Director*, FED. BUREAU OF INVESTIGATION (2015), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/resource-pages/message-from-director#disablemobile>.

⁷⁶ Jon Swaine & Oliver Laughland, *FBI Resists Calls to Reform Voluntary Reporting System for Police Killings*, THE GUARDIAN (Sept. 28, 2015, 2:14 PM), <https://www.theguardian.com/us-news/2015/sep/28/fbi-police-killings-voluntary-reporting-system> (noting that “the FBI director has no power to implement a mandatory reporting program himself”).

⁷⁷ Kimberly Kindy et al., *Fatal Shootings by Police Are Up in the First Six Months of 2016, Post Analysis Finds*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/national/fatal-shootings-by-police-surpass-2015s-rate/2016/07/07/81b708f2-3d42-11e6-84e8-1580c7db5275_story.html?utm_term=.Aae2af5d2d3e (noting that “widespread compliance with the FBI’s initiative” is not expected to occur until 2019 due to process of obtaining “unanimous consent from numerous police groups” and the voluntary nature of reporting).

⁷⁸ Ryan J. Reilly, *FBI Director Says He Can’t Force Police to Provide Shooting Data*, HUFF. POST (Oct. 1, 2015, 3:45 PM), http://www.huffingtonpost.com/entry/fbi-police-shooting-data-james-comey_us_560d7252e4b0af3706dfd8c3.

ment into matters of state and local law enforcement is likely to be viewed with some level of suspicion by both the courts and some legislators. Second, the Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius* (*NFIB*)⁷⁹—which gave teeth to a once-toothless coercion doctrine—left a somewhat confusing path for government actors and lower courts trying to interpret how to structure conditional spending without running afoul of the doctrine. Any federal proposal that has to do with spending in the area of law enforcement will have to grapple with ambiguity caused by both of these issues.

Anti-commandeering and conditional spending are two related concepts that determine “the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.”⁸⁰ Taken together, they establish guidelines for how to go about incentivizing states to act in accordance with a federal mandate.

This Section provides an outline of the Supreme Court's anti-commandeering and conditional spending jurisprudence as a means to show that the Court has set out the contours—albeit vague ones—that must be navigated to establish legislation for effective data collection on lethal use of force.

A. *Hesitance Towards a Federal Role in State and Local Law Enforcement*

This Section provides an overview of federalism as it relates to law enforcement—in the contexts of both as a matter of law and policy—in order to highlight the particular sensitivity of federal action in this sphere.

Federalism, the principle that divides governmental power between central government at the national level and its constituent parts at the state level, was the Framers' attempt to “split the atom of sovereignty.”⁸¹ Despite the centrality of this principle, the word “federalism” is nowhere to be found in the text of the Constitution. Still, the roots of this division of responsibility run deep. Consider *The Fed-*

⁷⁹ 132 S. Ct. 2566 (2012).

⁸⁰ *New York v. United States*, 505 U.S. 144, 161 (1992) (noting that Congress could encourage a state to conform to federal legislative choices by way of Congress's spending power or by offering the choice to regulate activity according to federal standards and preempting contrary state law by federal regulation).

⁸¹ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation's own discovery. . . . It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

eralist Papers: Much of the ink spilled writing those eighty-five essays concerns the distribution of power between the national and state governments.⁸² The Supreme Court has characterized the question of “discerning the proper division of authority between the Federal Government and the States” as one that is “as old as the Constitution.”⁸³

Though “[t]here is no ‘federalism clause’ in the Constitution,”⁸⁴ various provisions of the Constitution implicate federalism concerns. Most relevant for the purposes of this Note are the Spending Clause and the Tenth Amendment. The Spending Clause grants Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”⁸⁵ The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁸⁶ Together, these two provisions describe an important but ambiguous divide: The federal government is permitted to use the power of the purse to exert power over the states, until it is not. Beyond the potential limits of the Spending Clause, power resides with the states.⁸⁷

⁸² See, e.g., THE FEDERALIST NO. 9, at 44 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power.”); THE FEDERALIST NO. 10, at 51 (James Madison) (Clinton Rossiter ed., 1961) (“The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the state legislatures.”); THE FEDERALIST NO. 17, at 88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“There is one transcendent advantage belonging to the province of the State governments . . . —I mean the ordinary administration of criminal and civil justice.”); THE FEDERALIST NO. 45, at 260 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

⁸³ *New York*, 505 U.S. at 149.

⁸⁴ Seth P. Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 U. KAN. L. REV. 141, 142 (2002) (noting that while the Constitution does not include a “federalism clause,” the Supremacy Clause and the Tenth Amendment are two provisions most directly implicating the doctrine, and, when put together, provide that the States retain power where the Constitution does not expressly afford power for Congress and the President to act).

⁸⁵ U.S. CONST. art. I, § 8.

⁸⁶ U.S. CONST. amend. X.

⁸⁷ While other provisions—such as the Fourteenth Amendment, the Eleventh Amendment, the Commerce Clause, and the Supremacy Clause—are highly relevant to federalism in general, this Note explores the doctrinal boundary of the Spending Clause in particular to determine where it runs out of steam and the Tenth Amendment reigns.

Federalism concerns have been particularly acute when it comes to federal involvement in state matters in the context of law enforcement.

[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.⁸⁸

Recognition of the “historic police powers of the States”⁸⁹ indicates that federal encroachment into law enforcement matters should be limited.

The Supreme Court’s repeated struggle to define how the Constitution distributes responsibility over matters of police powers⁹⁰ can be exemplified by a series of Commerce Clause cases. The Court’s first modern move to limit expansive congressional power in areas that could be considered to bump up against state police power came in 1995, with its decision in *United States v. Lopez*.⁹¹ In *Lopez*, the Court struck down the Gun-Free School Zones Act on the grounds that it exceeded Congress’s power under the Commerce Clause, noting that to hold otherwise would “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”⁹² The Court made similar pronouncements about the unique role of state police power in subsequent Commerce Clause cases. In *United States v. Morrison*, the Court struck down a provision of the Violence Against Women Act that created a civil remedy for victims of gender-motivated crimes as outside the scope of Congress’s power to regulate commerce.⁹³ In so doing, the Court noted that there was “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the

⁸⁸ *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting) (explaining the extent to which Congress can exercise its Spending Clause power to “pursue objectives outside of . . . [the] ‘enumerated legislative fields’” set forth in Article I).

⁸⁹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting that because Congress legislated “in a field which the States have traditionally occupied,” there is an “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”).

⁹⁰ See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109(4) MICH. L. REV. 519, 521 (2011) (noting that the Court “has wrestled repeatedly with the issue of how the Constitution allocates criminal power between the federal government and the states”).

⁹¹ 514 U.S. 549 (1995).

⁹² *Id.* at 567.

⁹³ 529 U.S. 598, 602 (2000).

suppression of violent crime and vindication of its victims.”⁹⁴ Though the Court seemed to reverse course in *Gonzales v. Raich*, upholding the Controlled Substances Act against a challenge that it exceeded Congress’s commerce power,⁹⁵ the majority made no mention of state police power. The *Gonzales* dissent, however, asserted that because “States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens,” the majority’s decision was “irreconcilable” with *Lopez* and *Morrison*.⁹⁶ Though these cases occur outside the scope of the Spending Clause, they provide a clear look at the Court’s hesitance towards federal action in matters of state and local law enforcement.

Reluctance to involve the federal government in matters of state and local law enforcement is not limited to the courts. Two often-interrelated concepts—a preference for limited government, and a “tough on crime” mentality—combine with this judicial hesitance to encroach on state police powers to create a uniquely delicate policy area.

A preference for limited government leads many conservative lawmakers to prefer a hands-off approach from the federal government when it comes to law enforcement issues. “For the past 30 years, the Right has been sounding the alarm about the growth of government and the federalization of crime,” per the Cato Institute, which also expressed concern that the Department of Justice’s budget has been “on upward trajectory for many, many years.”⁹⁷

In the context of Department of Justice investigations into police departments for a pattern or practice of unconstitutional policing, for example, “[m]any conservatives and police departments have resented the investigations and deemed them an example of government of [sic] overreach.”⁹⁸ In the introduction to a 2008 report published by the Alabama Police Institute, Attorney General Jeff Sessions expressed concern about the consent decrees the Department of Justice often reaches with police departments as the result of these inves-

⁹⁴ *Id.* at 618.

⁹⁵ *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

⁹⁶ *Id.* at 42–43 (O’Connor, J., dissenting).

⁹⁷ Tim Lynch, *Trump’s Executive Orders on Crime*, CATO INST. (Feb. 10, 2017), <https://www.cato.org/blog/trumps-executive-orders-crime> (noting that “supporters of limited, constitutional government ought to be concerned” about the Trump administration’s apparent inclination to expand the federalization of crime).

⁹⁸ Danny Vinik, *7 Big Areas Where Jeff Sessions Could Change Policy at DOJ*, POLITICO (Nov. 18, 2016, 8:01 PM), <http://www.politico.com/agenda/story/2016/11/7-big-areas-where-jeff-sessions-could-change-policy-at-doj-000234> (noting that conservatives and police departments would “applaud Sessions if he [chose] to limit” the investigations into police misconduct).

tigations: “One of the most dangerous, and rarely discussed, exercises of raw power is the issuance of expansive court decrees. Consent decrees have a profound effect on our legal system as they constitute an end run around the democratic process.”⁹⁹ While not specific to data collection on police use of force, these comments indicate that any increased federal role in law enforcement oversight will be met with wariness from limited-government conservatives.

A “tough on crime” mentality shared by many conservative lawmakers also leads to suspicion of any federal involvement that could be seen as interfering in local law enforcement efforts to fight crime. Proponents of a tough-on-crime mentality make a logical leap to conclude that the government should stay out of law enforcement’s way: Increased oversight leads to demonization of police, which leads to police reluctance to fight crime, which leads to increased crime. In the context of Department of Justice investigations, for example, “[s]ome law enforcement officials believe those investigations have produced onerous new restrictions and an intrusive level of oversight that they say has stripped the police of their ability to react instinctively to potentially dangerous encounters.”¹⁰⁰ Increased scrutiny on police, the argument goes, has “undermined law enforcement authority at the local level by demonizing police.”¹⁰¹ As Radley Balko points out, though, in the context of police shooting investigations, this argument is nonsensical when drawn to its logical conclusion: “To argue that accountability . . . will lead to hesitation . . . is to argue that we can’t have any accountability for any killing by a police officer, because it may cause other officers to hesitate before shooting people.”¹⁰² Still, tough on crime framing is effective, Balko notes, particularly “because it’s so easy to stir up the fear of crime.”¹⁰³

⁹⁹ Michael E. DeBow et al., *Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures*, ALA. POL’Y INST. (2008) (introduction by Senator Jeff Sessions), <http://www.alabamapolicy.org/wp-content/uploads/API-Research-Consent-Decrees.pdf>.

¹⁰⁰ Jonathan Easley, *Law Enforcement Sees Sessions as ‘Police-First’ AG*, HILL (Jan. 9, 2017, 1:41 PM), <http://thehill.com/homenews/administration/313337-law-enforcement-see-sessions-as-police-first-ag-pick> (noting the Obama administration’s focus on investigating police practices, particularly in minority communities).

¹⁰¹ *Id.*

¹⁰² Radley Balko, *The Increasing Isolation of America’s Police*, WASH. POST (May 11, 2015, 5:54 PM), https://www.washingtonpost.com/news/the-watch/wp/2015/05/11/the-increasing-isolation-of-americas-police/?utm_term=.85a8bf26f16b (analyzing the police force’s isolation from accountability caused in part by police officers’ ability to frame a one-sided debate about the use of force and also by the pressure exerted by police unions on politicians).

¹⁰³ *Id.*

The federalism concerns outlined in this Section illustrate why the federal government might be particularly wary of getting involved in the area of state and local law enforcement. This wariness, combined with the doctrinal uncertainty around conditional spending discussed in the next section, provides the context for any proposal attempting to incentivize states to collect data on police use of force.

B. Anti-Commandeering and Conditional Spending Pre-NFIB

Because of the Supreme Court's anti-commandeering principle, the federal government cannot simply pass legislation directing states and localities to participate in a federal scheme to collect data on lethal use of force. Well-established Tenth Amendment jurisprudence categorically bans the commandeering of state and local officials, meaning that the federal government cannot "compel the States to implement, by legislation or executive action, federal regulatory programs."¹⁰⁴ The Supreme Court first announced the anti-commandeering principle in *New York v. United States*,¹⁰⁵ holding that Congress could not direct states "either to regulate low-level radioactive waste in accordance with federal instructions or to take title to the waste"¹⁰⁶ under the Low-Level Radioactive Waste Policy Act. Five years later, the Court reaffirmed this principle in *Printz v. United States*, holding that Congress could not oblige state officials to conduct handgun background checks under the Brady Act.¹⁰⁷ The Court in *Printz* explicitly affirmed and expanded the anti-commandeering principle: "We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly."¹⁰⁸

The Court has only ever invalidated two statutes on anti-commandeering grounds¹⁰⁹—the ones at issue in *New York* and *Printz*—likely because Congress has rarely sought to legislate in this

¹⁰⁴ *Printz v. United States*, 521 U.S. 898, 925 (1997) (holding that provisions in the Brady Handgun Violence Prevention Act requiring state law enforcement officials to conduct handgun background checks were unconstitutional based on historical constitutional practice, the structure of the Constitution, and the Court's prior jurisprudence).

¹⁰⁵ 505 U.S. 144 (1992).

¹⁰⁶ Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1631 (2006) (describing the Court's holding in *New York*).

¹⁰⁷ *Printz*, 521 U.S. at 933.

¹⁰⁸ *Id.* at 935.

¹⁰⁹ Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. §§ 2021b–2021j (2012)); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

fashion. This is partially due to the fact that the Court has outlined an alternative to commandeering in its anti-commandeering jurisprudence that allows the federal government to incentivize states into action: conditional spending. In *New York*, the Court noted that under the Constitution's Spending Clause, which authorizes Congress "to pay the Debts and provide for the . . . general Welfare of the United States,"¹¹⁰ the federal government may incentivize state action by "attach[ing] conditions on the receipt of federal funds."¹¹¹

While the boundaries of the anti-commandeering principle are clear, the Court's conditional spending jurisprudence is rather muddled. Until *NFIB* was decided in 2012,¹¹² the Court's limits were thought to be relatively toothless, granting Congress broad discretion regarding the structure of conditional spending legislation.¹¹³ Commentators have noticed this seeming contradiction, describing a "tension between the Court's historically deferential treatment of the spending power and its stringent application of the anti-commandeering principle recognized in *New York* and reaffirmed in *Printz*."¹¹⁴

In its 1987 decision in *South Dakota v. Dole*, the Court provided guidance for determining the constitutionality of Congress's offers of federal funds to states.¹¹⁵ *Dole* involved a federal law that conditioned states' receipt of federal highway funding on the adoption of a minimum drinking age of twenty-one.¹¹⁶ It was challenged by South Dakota (which permitted drinking at the age of nineteen), who argued that the federal statute exceeded Congress's spending power.¹¹⁷ In upholding the statute, the Supreme Court nonetheless made clear that federal grants could violate the federalism guarantees of the Constitution. The Court established a four-part test to analyze conditions on grants, noting that conditions must: 1) benefit the general welfare;¹¹⁸

¹¹⁰ U.S. CONST. art. I, § 8, cl. 1.

¹¹¹ *New York v. United States*, 505 U.S. 144, 167 (1992) (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1986)).

¹¹² 132 S. Ct. 2566 (2012).

¹¹³ Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 116, 117 n.18 (2001) (describing *Dole* as "toothless").

¹¹⁴ Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 345. See also *Printz v. United States*, 521 U.S. 898, 960–61 (1997) (Stevens, J., dissenting) (highlighting the tension between the broad leeway granted by conditional spending jurisprudence and strict application of the anti-commandeering principle).

¹¹⁵ *Dole*, 483 U.S. at 207.

¹¹⁶ *Id.* at 205.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 207 ("[T]he exercise of the spending power must be in pursuit of 'the general welfare.'").

2) provide clear notice to states as to what they are accepting;¹¹⁹ 3) be sufficiently related to the program at issue;¹²⁰ and 4) not violate any other constitutional provisions.¹²¹

Ironically, what might have mattered most to the legal analysis under *Dole*—and certainly mattered most to the later legal analysis in *NFIB*—was a factor that was not even part of its four-part test: coercion. Looking beyond its four factors, the *Dole* Court stated, “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”¹²² However, the Court concluded in *Dole* that the federal law at issue—which threatened to reduce a noncompliant state’s federal highway funding by five percent—was not so coercive as to cross the line between “pressure” and “compulsion.”¹²³ While the Court found that this law was not coercive, it failed to suggest the percentage of conditional funds that might be found to cross this line.¹²⁴ In *Dole*’s wake, the “doctrinal terrain” of Congress’s spending powers—particularly with respect to coercion—remained mostly dormant for more than two decades.¹²⁵

Thus conditional spending, in many cases, provides an attractive workaround for the anti-commandeering principle: “*Dole* allows Congress to accomplish indirectly much of what it cannot achieve directly.”¹²⁶ While “the Court has held that Congress may not order states to enact, to administer, or to enforce a federal regulatory program . . . *Dole* allows Congress to condition grants of related federal funds on the agreement of states to perform any of those roles.”¹²⁷ Commentators understood *Dole* to be deferential to Congress’s spending power: “The consensus view of commentators, supported by

¹¹⁹ *Id.* (“[I]f Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))).

¹²⁰ *Id.* (“[C]onditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion))).

¹²¹ *Id.* at 208 (“[O]ther constitutional provisions may provide an independent bar to the conditional grant of federal funds.”).

¹²² *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Neil S. Siegel, *Dole’s Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. 165, 167 (2008) (“For two decades now, the Court has studiously avoided the doctrinal terrain of the spending power.”).

¹²⁶ *Id.* at 168.

¹²⁷ *Id.* at 168–69.

twenty-five years of decisions following *Dole*, was that the decision represented a blank check to Congress.”¹²⁸

After *Dole*, a split emerged in the academic literature on conditional spending about whether taking advantage of this blank check would provoke judicial backlash. Some commentators argued for aggressive use of conditional spending, characterizing “the leverage provided by federal dollars as a potent tool left undisturbed by current law, one that Congress should employ robustly to pursue national objectives.”¹²⁹ Others expressed concern that overly aggressive use of conditional spending could backfire, asserting that “the strategy urged by these commentators is a risky one that might provoke the Court to abandon *Dole* in favor of something much less hospitable to congressional power.”¹³⁰ Still, until *NFIB*, “the coercion theory found essentially no approval in the courts.”¹³¹

C. *The Role of Coercion in NFIB*

Whether or not aggressive use of conditional spending spurred the Court into action, there is little doubt that the Court to some degree reconceptualized its jurisprudence in 2012 in *NFIB*. Though the legislative framework of the challenged health care law is complex, for the purposes of conditional spending the takeaway is as follows: The Affordable Care Act (ACA) would require states to participate in an expansion of the Medicaid program in order to remain eligible to receive *any* federal Medicaid funding.¹³² “A State that opts out of the Affordable Care Act’s expansion in health care

¹²⁸ Coan, *supra* note 114, at 348.

¹²⁹ Siegel, *supra* note 125, at 169; *see also* Sylvia A. Law, *In the Name of Federalism: The Supreme Court’s Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 391 (2002) (“Even though the Court has sharply constrained the power of Congress to act under the Commerce Clause and under Section 5, many of the goals Congress seeks to achieve may still be pursued through the federal spending power.”); Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 51–52 (2003) (encouraging use of the Spending Clause in response to the Court’s federalism decisions).

¹³⁰ Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003) (noting the “many commentators” who “have proposed that Congress should respond to the Rehnquist Court’s states’ rights decisions by using the spending power to circumvent those limitations on congressional power”).

¹³¹ Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 590 (2013) (concluding the *NFIB*’s coercion inquiry is unlikely to lead to much else being found unconstitutional).

¹³² HENRY J. KAISER FAMILY FOUND., A GUIDE TO THE SUPREME COURT’S DECISION ON THE ACA’S MEDICAID EXPANSION 1 (2012) (emphasis added) (noting that “the Court found the ACA’s Medicaid expansion unconstitutionally coercive because . . . all of a state’s existing federal Medicaid funds potentially were at risk for non-compliance”).

coverage thus stands to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it.”¹³³

In *NFIB*, the Court—for the first time ever—invalidated an offer of federal funds to the states on the grounds that it was unconstitutionally coercive.¹³⁴ However, “[t]he *NFIB* Court did not settle on a single coercion analysis.”¹³⁵ Though seven Justices agreed that the ACA’s Medicaid expansion violated the Spending Clause by coercing the states into accepting its terms, they reached this conclusion in two separate opinions.¹³⁶

Although both the plurality and the joint dissent elevated the coercion language from *Dole* to the forefront in finding that the ACA’s Medicaid expansion was unconstitutional, the standard each group employed to reach this conclusion is murky, at best. As Gillian Metzger has noted, the Court was willing “to hold that Congress had transgressed fundamental constitutional boundaries without offering a clear account of what those boundaries are.”¹³⁷ The question, then, is to what extent *NFIB* changed the Court’s conditional spending jurisprudence from what many commentators viewed as a “blank check to Congress” set down in *Dole*.¹³⁸ In order to attempt to answer this question, it is necessary to examine, in turn, the conditional spending analysis undertaken by the plurality and the joint dissent.

¹³³ *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012) (plurality opinion) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

¹³⁴ *See id.* at 625 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“THE CHIEF JUSTICE therefore—for the first time ever—finds an exercise of Congress’s spending power unconstitutionally coercive.”); Coan, *supra* note 114, at 343 (“Prior to *NFIB*, the Supreme Court had never struck down an exercise of the conditional spending power as unduly coercive of state governments.”).

¹³⁵ Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 4 GEO. L.J. 861, 866 (2013) (contending that Chief Justice Roberts’s opinion in *Sebelius* is best read as adopting an anti-leveraging principle).

¹³⁶ Chief Justice Roberts’s opinion (hereinafter “the plurality”), joined by Justices Breyer and Kagan, concluded that denying states all Medicaid funding if they refused the ACA’s expansion would be unduly coercive. *See NFIB*, 567 U.S. at 581–82 (plurality opinion). Justice Scalia wrote separately (hereinafter “the joint dissent”), joined by Justices Kennedy, Thomas, and Alito, also concluding that the Medicaid expansion was constitutionally infirm. *See id.* at 648 (Scalia, J., dissenting).

¹³⁷ Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 98 (2012).

¹³⁸ Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 1–2, 11 (2015) (contending “both commandeering and coercive conditional spending transfer control of state governments from their constitutionally designated electoral constituencies to Congress”); *see also* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 355 (2008) (“None of [*Dole*’s] direct limitations on the spending power has had any real bite in the cases.”); Baker, *supra* note 113, at 113 n.18 (repeatedly describing *Dole* as “toothless”).

The plurality set up a two-step inquiry to determine when federal conditions amount to a permissible incentive versus an impermissible coercion. The plurality began by making clear that coercive spending conditions violate the Court's established anti-commandeering principle: "[W]hether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own," both means of requiring states to regulate are unconstitutional.¹³⁹

The plurality first asks whether the conditions at issue are simply conditions on the federal funds being offered or whether they are conditions that "take the form of threats to terminate other significant independent grants."¹⁴⁰ In the ACA context, the plurality concluded that the Medicaid expansion would fall into the latter category, because "the expansion provisions did not simply change the existing Medicaid program but leveraged states' desire to remain in that program to induce them to agree to participate in an importantly distinct and independent program."¹⁴¹

This first step, then, can be seen as expanding on the relatedness prong of *Dole*, going beyond whether a condition is simply related to the funding at issue to ask whether it is so inherently related that it governs the use of the funds to which it is attached. In *Dole*, though, the condition at issue—a drinking age of twenty-one—was sufficiently related to "one of the main purposes for which highway funds are expended—safe interstate travel."¹⁴² Still, the *NFIB* plurality noted, because "the condition was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used," the *Dole* Court "accordingly asked whether 'the financial inducement offered by Congress' was 'so coercive as to pass the point at which pressure turns into compulsion.'"¹⁴³ This discussion of *Dole* makes clear that "the determination that Congress has threatened 'to terminate . . . significant independent grants' is the *trigger* for conducting a coercion analysis, not the *conclusion* of that analysis."¹⁴⁴

Additionally relevant for the plurality was their conclusion that the states had insufficient notice that they would have to comply with

¹³⁹ *NFIB*, 567 U.S. at 578 (plurality opinion) (emphasis added).

¹⁴⁰ *Id.* at 580.

¹⁴¹ Bagenstos, *supra* note 135, at 867.

¹⁴² *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

¹⁴³ 567 U.S. at 580 (plurality opinion) (quoting *Dole*, 483 U.S. at 211).

¹⁴⁴ Bagenstos, *supra* note 135, at 869 (quoting *NFIB*, 567 U.S. at 580).

the new program's conditions.¹⁴⁵ This clear notice question is inexorably linked with the first question: whether conditions are a threat to an independent grant.¹⁴⁶ In other words, if the conditions at issue are simply conditions on the federal funds being offered, states are more likely to have clear notice of what those conditions are. In contrast, if conditions at issue threaten to terminate other independent grants, states are less likely to have had clear notice when they agreed to participate in the grant being threatened.

Only for the category of conditions that threaten significant, independent grants, then, the plurality asks whether the condition at issue is unduly coercive: whether it leaves states a real choice, "not merely in theory but in fact."¹⁴⁷ In so doing, the plurality expressly relies on *Dole*, distinguishing the "relatively mild encouragement"¹⁴⁸ in *Dole* to the "gun to the head" in *NFIB*.¹⁴⁹ The Court seemed to find relevance both in the percentage of federal funding lost and in the amount of a state's budget the federal funds at issue would affect. As to the percentage of federal funding, the Court notes that "[a] State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but all of it," in contrast to the loss of only five percent of state highway funds in *Dole*.¹⁵⁰ And as for implications for state budgets, the Court notes that while "the federal funds at stake [in *Dole*] constituted less than half of one percent of South Dakota's budget at the time. . . . Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs."¹⁵¹ The Court concludes:

It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a "prerogative" to reject Congress's

¹⁴⁵ Compare Bagenstos, *supra* note 138, at 394 (characterizing this clear notice requirement as a means by which to determine whether states had been coerced), with Pasachoff, *supra* note 131, at 593 (characterizing the clear notice requirement as the second, sequential, step in the plurality's analysis that would follow a finding that the funding was aimed at a new program and precede the question of whether the funding was unduly coercive).

¹⁴⁶ Bagenstos classifies this as part of the Court's coercion analysis. See Bagenstos, *supra* note 135, at 871 ("Third, in determining whether a state has a real choice, the Chief Justice found it significant that the new conditions were attached to continued participation in an entrenched and lucrative cooperative program.").

¹⁴⁷ *NFIB*, 567 U.S. at 581 (plurality opinion) (quoting *Dole*, 483 U.S. at 211–12).

¹⁴⁸ *Id.* (quoting *Dole*, 483 U.S. at 211).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

desired policy, “not merely in theory but in fact.” The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.¹⁵²

In sum, the plurality first focuses on whether the condition at issue governs the use of the funds to which it is attached. Then, and only then, do they reach the question of whether such conditions amount to unconstitutional coercion.

The joint dissenters focus almost exclusively on coercion, bypassing the plurality’s focus on the program’s independence and on clear notice. In fact, the joint dissent seems to imply that the Medicaid expansion is just that—an expansion—as Justice Ginsburg’s dissent concludes, and not a new federal program, as the plurality does. The joint dissent presents the question as whether Congress’s spending power “permits the conditioning of a State’s continued receipt of all funds under a massive state-administered federal welfare program upon its acceptance of an expansion to *that program*.”¹⁵³ The joint dissent would not seem to place any import at all on whether the conditions at issue are conditions on the federal funds being offered or whether they are conditions that threaten an independent grant. Consequently, they would undertake a coercion analysis in each and every case of conditional spending. Bagenstos explains the implications of this focus:

[T]he size of a federal grant—and the tax burden the grant presumably places on a state’s residents—is what makes the conditions attached to the grant coercive. And that is true whether the conditions are new strings attached to a preexisting federal program or are terms imposed for the first time in an entirely new program.¹⁵⁴

Thus, the joint dissent proceeds by focusing wholly on the size of the grant. They contend that “if States really have no choice other than to accept the package, the offer is coercive.”¹⁵⁵ In determining whether states “really have [a] choice,”¹⁵⁶ the joint dissent emphasizes that the larger the grant at issue, the less likely states will be able to say no, “not merely in theory but in fact.”¹⁵⁷ In the Medicaid context, the joint dissent has “no doubt” that the expansion is unduly coercive: “If the anticoercion rule does not apply in this case, then there is no

¹⁵² *Id.* at 581–82 (quoting *Dole*, 483 U.S. at 211–12).

¹⁵³ *Id.* at 647 (Scalia, J., dissenting) (emphasis added).

¹⁵⁴ Bagenstos, *supra* note 135, at 872.

¹⁵⁵ *NFIB*, 567 U.S. at 679 (Scalia, J., dissenting).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (quoting *Dole*, 483 U.S. at 211–12).

such rule.”¹⁵⁸ The joint dissent highlights the program’s size in a number of different ways: They note that “Medicaid has long been the largest federal program of grants to the States”¹⁵⁹ and that “States devote a larger percentage of their budgets to Medicaid than to any other item.”¹⁶⁰

Neither the plurality nor the joint dissent draw any explicit lines regarding at what point the amount of federal funds offered becomes coercive, leaving a puzzle for lower courts to solve. The plurality refuses to “‘fix the outermost line’ where persuasion gives way to coercion,” instead concluding that “wherever that line may be, this statute is surely beyond it.”¹⁶¹ As does the joint dissent, instead noting that while “[w]hether federal spending legislation crosses the line from enticement to coercion is often difficult to determine,” the coercion in this case was “unmistakably clear.”¹⁶² Justice Ginsburg’s dissent highlights the confusion this may cause:

When future Spending Clause challenges arrive . . . how will litigants and judges assess whether “a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds”? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State’s budget at stake? And which State’s—or States’—budget is determinative: the lead plaintiff, all challenging States . . . or some national median?¹⁶³

Because it is unclear which analysis lawmakers and lower courts¹⁶⁴ consider when assessing how to structure federal spending programs in *NFIB*’s wake, this Note proceeds by considering both the plurality’s and the joint dissent’s analytical focus when assessing the contours of potential federal legislation.

¹⁵⁸ *Id.* at 681.

¹⁵⁹ *Id.* at 682.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 585 (plurality opinion) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 591 (1937)).

¹⁶² *Id.* at 681 (Scalia, J., dissenting).

¹⁶³ *Id.* at 643 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁶⁴ Lower courts have not satisfactorily addressed the issue. In one of the few cases that cites *NFIB*, the D.C. Circuit considered whether a provision of the Clean Air Act was unduly coercive, specifically noting that in the wake of *NFIB* the court is uncertain as to what is “sufficient to trigger a coerciveness inquiry.” *Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 177–78 (D.C. Cir. 2015).

III

GIVEN *NFIB*'S PARAMETERS, WHAT CAN THE FEDERAL GOVERNMENT DO?

Given the legal contours of *NFIB*, what can the federal government do? This Section outlines legislative remedies available to encourage states to report lethal force data without running afoul of the Court's coercion concerns. This Note proposes that in order to maximize state participation in federal data collection programs, policymakers put forth legislation that would take a carrot-and-stick approach by: 1) simplifying and streamlining federal data collection requirements, 2) creating a new, competitive grant program for states who are at the forefront of implementing best practices in data collection and reporting, and 3) penalizing states that refuse to comport with these requirements.

A. National Guidelines for Data Collection

First, any legislation on federal collection of data on lethal use of force must address issues with data collection methodology. In order to address inconsistent reporting and remedy some of the granular issues with the FBI database—like the questionable “Felon Killed by Police Officer” designation—any legislation should first direct the DOJ to set clear and comprehensive national standards for data collection methodology. As part of these guidelines, the DOJ should outline the type of data to be collected, including the age, gender, race, and ethnicity of the victim and the officer, as well as whether the victim was armed and a short description of the circumstances leading to the shooting.

While opponents of any national database on use of force may assume it will villainize police officers, national guidelines would actually provide a fuller picture that may well show police acted appropriately in the majority of incidents. As noted above, a “simple body count” is insufficient in attempting to formulate an appropriate response to lethal use of force: “To go beyond a collection of anecdotes, in order to know what policy solutions make sense, we need to know what happened in each shooting incident.”¹⁶⁵ National guidelines would not implicate federalism concerns, since they alone do not require or encourage states to take any action—they simply guide states who have already chosen to participate.

¹⁶⁵ Peter Moskos & Nick Selby, *Just Counting People Killed by Police Won't Fix Problems. We Need Better Data.*, WASH. POST (Jan. 15, 2016), https://www.washingtonpost.com/posteverything/wp/2016/01/15/just-counting-people-killed-by-police-wont-fix-problems-we-need-better-data/?utm_term=.d7e90196437c.

Both a new grant program and a penalty for states that refuse to comply with data collection requirements, however, must be viewed through the lens of the Court's *NFIB* decision. The following Section will describe these different approaches to incentivizing states to report data to the federal government, address potential legal issues raised by each, and suggest a combination of the two for maximum state participation.

B. A Carrot-and-Stick Approach to Data Collection

Comparing two pieces of legislation—one passed into law, one introduced but not yet passed—that encourage state and local law enforcement agencies to submit data to the federal government provides an outline of two different approaches to collecting this data: the carrot (a financial incentive) and the stick (a financial penalty). Together, these two pieces of legislation provide a jumping-off point for a federal model for collecting data on lethal use-of-force data. This section suggests a carrot-and-stick approach to data collection, addressing potential concerns from opponents of financial penalties and proponents of data collection who have been disappointed by the failure of current data-collection efforts.

Congress could offer positive financial incentives—the carrot—for states to report data through a competitive grant program. The Police Reporting Information, Data, and Evidence Act of 2015 (PRIDE Act) provides a model of this approach of offering positive financial incentives for states to report data.¹⁶⁶ Introduced in the Senate and referred to the Senate Judiciary Committee, the PRIDE Act would allow the Attorney General to distribute new grant funding to states who comply with a number of conditions, including: 1) making their use-of-force policy publicly available,¹⁶⁷ and 2) reporting on

any incident involving the shooting of a civilian by a law enforcement officer . . . [or] the shooting of a[n] . . . officer by a civilian [and on] any incident in which the use of force by a[n] . . . officer against a civilian[, or the] use of force by a civilian against a[n] . . . officer[,] results in serious bodily injury or death.¹⁶⁸

For the *NFIB* plurality, whose interpretation likely will guide lower courts, a new competitive grant program with conditions attached would not be problematic—in fact, the plurality would not

¹⁶⁶ Police Reporting Information, Data, and Evidence Act of 2015, S. 1476, 114th Cong. (2015).

¹⁶⁷ *Id.* § 2(b)(1)(B).

¹⁶⁸ *Id.* § 2(b)(2)(A)(i)–(iv).

even reach the question of coercion for such a program. Because the conditions would govern the use of the new funds to which they are attached—as opposed to the Medicaid expansion’s conditions that “[took] the form of threats to terminate other significant independent grants”¹⁶⁹—the plurality would simply end the inquiry. For the plurality, coercion analysis is only appropriate where Congress’s conditions on new grant funding would threaten other, separate funding. Thus, a competitive grant program of any size that conditions receipt of federal funds on compliance with data collection conditions would be unproblematic.

Even for the joint dissent, which *would* undertake a coercion analysis, a new competitive grant program is unlikely to be found coercive. For the joint dissent, it is irrelevant whether data collection conditions are attached to a new competitive grant program or to a preexisting and separate federal program: The only thing that matters is the size of the grant. While the joint dissent does not draw clear lines about what size would amount to coercion, its discussion of a hypothetical education grant is instructive. The joint dissent assumed that if “Congress enacted legislation offering each State a grant equal to the State’s entire annual expenditures for primary and secondary education,” such an offer would be coercive.¹⁷⁰ The joint dissent would likely not find even a substantial competitive criminal justice grant coercive: State expenditures for primary and secondary education are second only to their spending on Medicaid.¹⁷¹ And it is highly unlikely that Congress would suggest a grant program that would amount to the entirety of a state’s criminal justice expenditures.

Those wary of interfering in state and local criminal enforcement might argue that a positive financial incentive alone is sufficient, and a penalty for failure to report is an unnecessary affront to police. But is a competitive grant alone likely to be effective policy? Such a competitive grant program would be most effective at encouraging participation in states with progressive law enforcement leaders that might be interested in reporting data, but lack the resources or technical capacity to do so. The Police Data Initiative shows that while there might be interest from law enforcement in exploring increased data collection and reporting, there may be little uptake without financial incentives. The initiative sought to encourage agencies “to better use

¹⁶⁹ *NFIB*, 567 U.S. at 580 (plurality opinion).

¹⁷⁰ *Id.* at 680 (Scalia, J., dissenting).

¹⁷¹ *See id.* at 683 (“The States are far less reliant on federal funding for any other program. After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States . . . and equals only 6.6% of all state expenditures combined.”).

data and technology to build community trust,” but the program is not supported by appropriations and relies on volunteer technology experts to help participating jurisdictions.¹⁷² However, this initiative yielded limited participation—only fifty-three police departments of roughly 18,000 opted to participate.¹⁷³ Additionally, the fate of the initiative is uncertain in the Trump Administration.

The Obama Administration’s Race to the Top program provides a case study of how a successful competitive grant program allows the federal government to spur policymaking in an area in which it might not traditionally exercise much power.¹⁷⁴ The program is widely considered to be a success: A study by William Howell of the University of Chicago found that “Race to the Top had a meaningful impact on the production of education policy across the United States.”¹⁷⁵ There are obvious, and important, distinctions between Race to the Top and a competitive grant program intended to incentivize collection of lethal use-of-force data: The political incentives for providing good education are very different from those for implementing robust data collection on police activity. After *NFIB*, when the Medicaid expansion was contingent only on new Medicaid funding, a number of Republican-led states refused to participate for political reasons.¹⁷⁶ Similarly, some states might refuse to take a (likely much smaller) grant to provide lethal use-of-force data that they feel is in their best interest to keep under wraps.

Thus, it is simply naïve to think that a positive financial incentive alone will solve this problem. If the federal government wants the

¹⁷² Megan Smith & Roy L. Austin, Jr., *Launching the Police Data Initiative*, WHITE HOUSE (May 18, 2015), <https://obamawhitehouse.archives.gov/blog/2015/05/18/launching-police-data-initiative>.

¹⁷³ See Press Release, White House, FACT SHEET: White House Police Data Initiative Highlights New Commitments (April 21, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/22/fact-sheet-white-house-police-data-initiative-highlights-new-commitments> (providing most recent count of participating agencies).

¹⁷⁴ As part of the American Recovery and Reinvestment Act of 2009 (ARRA), roughly \$4 billion was set aside to create Race to the Top, a competitive grant program designed to encourage states to support education innovation. Press Release, White House, Remarks by the President on Education (July 24, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-department-education>. In a speech announcing the program, President Obama explained that “rather than divvying it up and handing it out, we are letting states and school districts compete for it. That’s how we can incentivize excellence and spur reform and launch a race to the top in America’s public schools.” *Id.*

¹⁷⁵ William G. Howell, *Results of President Obama’s Race to the Top*, 15 EDUCATION NEXT 58 (2015), http://educationnext.org/files/ednext_XV_4_howell.pdf.

¹⁷⁶ See Kimberly Leonard, *Opposing Medicaid Expansion*, USA TODAY (Dec. 4, 2015), <https://www.usnews.com/news/the-report/articles/2015/12/04/opposing-medicaid-expansion> (“Of the 20 states that have refused to expand Medicaid, 17 are led by Republican governors and 18 have legislatures controlled by Republicans.”).

data collected, it is going to have to employ a stick. In contrast to the PRIDE Act, the Death in Custody Reporting Act (DICRA) takes a punitive approach. DICRA was first passed in 2000, but expired in 2006 and was not revived until 2013.¹⁷⁷ DICRA requires states that receive funding under certain provisions of the Omnibus Crime Control and Safe Streets Act of 1968 to report information regarding the death of any person who is detained, under arrest, in the process of being arrested, incarcerated, or en route to be incarcerated.¹⁷⁸ Unlike the Crime Control Act discussed above,¹⁷⁹ which only directs the Attorney General to collect data but does not direct states to report it, DICRA directly requires states to report the relevant data to the Attorney General.¹⁸⁰ States that fail to comply with DICRA can, at the discretion of the Attorney General, be subject to up to a ten percent penalty of funds that would otherwise have been allocated to the state under the Omnibus Crime Control and Safe Streets Act of 1968.¹⁸¹ However, as of publication, this penalty has never been used—much to the chagrin of commentators who contend that the use of the penalty is necessary to encourage states to report.¹⁸² A statute modeled after DICRA could incentivize reluctant states. But, data collection advocates might ask, why would a statute modeled after DICRA work where DICRA failed? This Note proposes that any financial penalty be mandatory, not discretionary, in order to address DICRA's failures. Moreover, to placate opponents of penalizing states, any funds withheld under the penalty provision should be

¹⁷⁷ 42 U.S.C. § 13727 (Supp. II 2014); see Hunter Schwarz, *Congress Decides to Get Serious About Tracking Police Shootings*, WASH. POST (Dec. 11, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/12/11/congress-decides-to-get-serious-about-tracking-police-shootings/?utm_term=.82bab9006a5b (recounting DICRA's history).

¹⁷⁸ *Id.* § 13727(a).

¹⁷⁹ See *supra* notes 55–57 and accompanying text.

¹⁸⁰ *Id.* (“[T]he State shall report to the Attorney General. . .”).

¹⁸¹ *Id.* § 13727(c)(2). The Edward Byrne Memorial Justice Assistance Grant (JAG) Program, administered by the Bureau of Justice Assistance, is the leading source of federal justice funding to state and local jurisdictions. The Bureau of Justice Statistics calculates, for each state and territory, a minimum base allocation which, based on the congressionally mandated JAG formula, can be enhanced by (1) the state's share of the national population and (2) the state's share of the country's Part 1 violent crime statistics. Once the state funding is calculated, sixty percent of the allocation is awarded to the state and forty percent to eligible units of local government. JAG recipients are required to submit quarterly performance metrics reports. See *Reporting Requirements for JAG*, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/Funding/JAG_Reporting.pdf (last visited Aug. 14, 2017).

¹⁸² See, e.g., Bryan Schatz & Allie Gross, *Congress Is Finally Going to Make Local Law Enforcement Report How Many People They Kill*, MOTHER JONES (Dec. 17, 2014, 7:00 AM), <http://www.motherjones.com/politics/2014/12/death-custody-reporting-act-police-shootings-ferguson-garner> (noting that “reporting has never been enforced”).

rerouted to states that *do* comply, providing further financial incentive.

A DICRA-like statute raises two questions under the *NFIB* plurality's analysis: First, is DICRA separate and independent from the Omnibus Crime Control Act?

If so, does the threatened reduction in funding leave states with a real choice to refuse to comply with data collection requirements? First, the plurality would ask whether DICRA governs the use of the funds to which it is attached. This type of program—one that would not offer any federal funds itself, but rather condition receipt of existing federal funds on compliance with a federal data collection program—does not fit neatly into an answer to this question. Bagenstos describes these as “‘cross-over conditions’ that threaten to ‘withdraw future funds provided under some specific preexisting grant program’ if a state does not ‘enact some new federally mandated regulation.’”¹⁸³ Under this test, DICRA would likely be considered a separate program: It does not govern how states should use grant funding received under the Crime Bill, but rather regulates something—law enforcement data—that is related to one of the purposes of the Crime Bill.¹⁸⁴ Because a DICRA-like program would likely be considered an independent program, the plurality would next ask whether it leaves states a real choice for whether to participate.¹⁸⁵

Thus, a DICRA-like program would be subject to coercion analysis both under the *NFIB* plurality's analysis and the joint dissent's. The question then becomes how great a penalty Congress could enact without crossing the line from acceptable inducement to unacceptable coercion, under both tests. While neither the plurality nor the joint dissent saw fit to “‘fix the outermost line’ where persuasion gives way to coercion,”¹⁸⁶ it is unlikely that even a substantial reduction in states' grant funding would be found coercive—even a 100% penalty provision for federal criminal justice grants would arguably be unproblematic. As Justice Ginsburg points out in dissent, it is unclear

¹⁸³ Bagenstos, *supra* note 135, at 916–17 (quoting Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 865–66 n.184 (1998)) (proposing that *NFIB* establishes an anti-leveraging principle finding federal spending conditions coercive and unconstitutional where they are attached to large sums of federal funds, change the terms of participation in longstanding programs, and combine separate programs into package deals).

¹⁸⁴ *See id.* (applying the cross-over condition concept to funding provided under the Clean Air Act and the EPA's regulation of State Implementation Plans).

¹⁸⁵ *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012) (plurality opinion) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987)).

¹⁸⁶ *Id.* at 585 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 591 (1937)).

whether lower courts should “measure the number of dollars the Federal Government might withhold for noncompliance” or “[t]he portion of the State’s budget at stake.”¹⁸⁷ Here, though, federal funding to states for Medicaid dwarfs funding on criminal justice, indicating that heavily restricting such funding as a condition of law enforcement data collection would not be unduly coercive.¹⁸⁸

To ensure maximum participation, both a carrot and a stick are necessary. For both the competitive grant program and penalty for noncompliance, what conditions should be imposed? Beyond the streamlined data collection methodology and increased context for lethal use-of-force incidents described above, states should also be required to submit data collection plans, which could “aid the Department in assisting states that are seeking to improve their collection plans and help the Department evaluate the reliability of all data collected.”¹⁸⁹ And the proposed penalty, whatever the amount, should not be at the discretion of the Attorney General, but rather should be mandatory—otherwise, it runs the risk, like DICRA, of never being enforced.

CONCLUSION

Despite concerns with federal involvement in state and local law enforcement and ambiguity in the Supreme Court’s Spending Clause jurisprudence after *NFIB*, this Note argues that there are ways to legislate an effective scheme for incentivizing lethal-force data reporting without running afoul of the law. The state of criminal justice data is widely considered to be a mess, and an increased federal role in coordinating and encouraging robust data collection could help to clean it

¹⁸⁷ *Id.* at 643 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁸⁸ Data on the amount of federal grants to states under the Byrne Grant program from FY 2014 and data on the total FY 2014 state expenditures from the National Association of State Budget Officers show that each state’s Byrne Grants make up a negligible percentage of total state expenditures (the highest is 0.038%). See NAT’L ASS’N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2014–2016 STATE SPENDING (2016), [https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State%20Expenditure%20Report%20\(Fiscal%202014-2016\)%20-%20S.pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State%20Expenditure%20Report%20(Fiscal%202014-2016)%20-%20S.pdf) (examining state expenditures on categories ranging from transportation to healthcare); BUREAU OF JUSTICE STATISTICS, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2014, <https://www.bjs.gov/content/pub/pdf/jagp14.pdf> (examining the size of justice assistance grants allocated on a state-by-state basis). See also Appendix. Recall that the federal funds at stake in *Dole* amounted to less than half of one percent of South Dakota’s budget, and the Medicaid funds found unduly coercive in *NFIB* “account[ed] for over 20 percent of the average State’s total budget.” 567 U.S. at 581.

¹⁸⁹ DEP’T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL TO CONGRESS PURSUANT TO THE DEATH IN CUSTODY REPORTING ACT (2016) (on file with author).

up. “Everybody gets why it matters,” then-FBI Director Comey told the House Oversight Committee, discussing a national database on police use of lethal force.¹⁹⁰ These numbers may seem like dry statistics, but they encompass individual human lives cut short. Legislation that combines national guidelines, conditional spending requirements, and competitive grant funding would incentivize states to report this vital data and encourage much-needed transparency and accountability in law enforcement.

¹⁹⁰ *FBI Director: Database Coming on Police Use of Deadly Force*, ASSOCIATED PRESS (Sept. 28, 2016, 10:46 AM), <http://www.chicagotribune.com/news/nationworld/ct-police-deadly-force-database-20160928-story.html>.

APPENDIX
BYRNE GRANTS AND TOTAL STATE ANNUAL
EXPENDITURES, FY 2014

<i>State</i>	<i>Byrne Grant Amount</i>	<i>Total State Expenditures</i>	<i>Byrne Grant as Percentage of Total Expenditure</i>
AK	\$956,413	\$11,400,000,000	0.008%
AL	\$3,458,325	\$24,992,000,000	0.014%
AR	\$2,377,974	\$22,763,000,000	0.010%
AZ	\$3,949,270	\$35,911,000,000	0.011%
CA	\$20,434,999	\$215,393,000,000	0.009%
CO	\$2,898,670	\$31,346,000,000	0.009%
CT	\$2,088,017	\$28,141,000,000	0.007%
DE	\$1,046,230	\$9,608,000,000	0.011%
FL	\$11,756,815	\$68,033,000,000	0.017%
GA	\$5,922,502	\$43,445,000,000	0.014%
HI	\$982,290	\$12,607,000,000	0.008%
IA	\$2,042,410	\$19,531,000,000	0.010%
ID	\$1,235,066	\$6,865,000,000	0.018%
IL	\$7,697,089	\$61,189,000,000	0.013%
IN	\$3,716,878	\$27,260,000,000	0.014%
KS	\$2,091,483	\$14,723,000,000	0.014%
KY	\$2,446,467	\$27,833,000,000	0.009%
LA	\$3,510,654	\$27,271,000,000	0.013%
MA	\$4,318,196	\$56,330,000,000	0.008%
MD	\$3,829,013	\$38,036,000,000	0.010%
ME	\$1,093,168	\$8,088,000,000	0.014%
MI	\$6,248,139	\$49,656,000,000	0.013%
MN	\$3,075,078	\$33,451,000,000	0.009%
MO	\$4,257,312	\$23,158,000,000	0.018%
MS	\$2,008,350	\$18,467,000,000	0.011%
MT	\$1,054,241	\$6,188,000,000	0.017%
NC	\$5,673,898	\$43,793,000,000	0.013%
ND	\$525,295	\$9,416,000,000	0.006%

NE	\$1,348,304	\$10,541,000,000	0.013%
NH	\$2,190,707	\$5,146,000,000	0.043%
NJ	\$4,859,128	\$53,155,000,000	0.009%
NM	\$1,881,275	\$16,093,000,000	0.012%
NV	\$2,190,707	\$9,409,000,000	0.023%
NY	\$10,437,049	\$137,526,000,000	0.008%
OH	\$6,115,370	\$61,222,000,000	0.010%
OK	\$2,870,905	\$22,301,000,000	0.013%
OR	\$2,311,186	\$32,383,000,000	0.007%
PA	\$7,401,984	\$68,136,000,000	0.011%
RI	\$921,820	\$8,944,000,000	0.010%
SC	\$3,668,112	\$22,040,000,000	0.017%
SD	\$544,312	\$4,108,000,000	0.013%
TN	\$5,099,410	\$30,702,000,000	0.017%
TX	\$14,765,262	\$112,250,000,000	0.013%
UT	\$1,728,125	\$12,184,000,000	0.014%
VA	\$3,836,132	\$45,857,000,000	0.008%
VT	\$546,759	\$5,271,000,000	0.010%
WA	\$3,791,351	\$36,867,000,000	0.010%
WI	\$3,176,152	\$44,892,000,000	0.007%
WV	\$1,446,302	\$15,818,000,000	0.009%
WY	\$575,129	\$7,546,000,000	0.008%