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THE FEDERAL GOVERNMENT'S ROLE IN LOCAL POLICING

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For far too long, the federal government has failed to exercise its constitutional authority to mitigate the harms imposed by local policing. Absent federal intervention, though, some harmful aspects of policing will not be addressed effectively, or at all. States and localities often lack the necessary capacity and expertise to change policing, and

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many states and localities lack the will. This Article argues for federal intervention and describes what that intervention should look like.

The Article begins by describing three paradigmatic areas of local policing that require federal intervention to create real change: excessive use of force, racial discrimination, and the unregulated use of surveillance technologies. Because state and local governments are either unable or unwilling to address these problems alone, the federal government should intervene to identify and enforce minimum standards, develop best practices, collect data, and distribute resources nationwide.

Regrettably, Congress has failed to act adequately to improve local policing for the better, although it has tried to encourage reform through the use of its Spending Power. This Article argues that Congress should utilize its regulatory powers under Section 5 of the Fourteenth Amendment and the Commerce Clause to address these paradigmatic problem areas, and it explains how this can be done consistently with Supreme Court doctrine.

Alongside—or in the absence of—congressional action, the executive branch has the power and responsibility to act to address policing’s harms. The Article explains that, though indirect, the President wields considerable power to influence policing by setting policy, implementing federal programs, enforcing civil rights, and supervising federal law enforcement. Although the executive branch should use this power to promote local policing that is effective, fair, and accountable, and that minimizes harm, administration after administration has failed to do so consistently and also has failed to hold federal law enforcement to these standards. Recent executive branch efforts have improved the situation, but there still exists a gaping chasm between how the federal government should be influencing local policing and how it is doing so today.

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INTRODUCTION

23,000 > 18,000 > 50 > 1. That is the mathematics of transforming American policing. Just under 23,000 cities and counties, 18,000 police departments, 50 states.¹ And one federal government. The point seems obvious. If the goal is to change policing for the better, mustering the authority of the federal government can provide an enormous fulcrum.

Even if every one of those 23,000 cities and counties and 18,000 agencies were trying to make policing fairer and less harmful, they could not do so by themselves. Some are far too small to have the expertise or resources to do so. More than eighty-five percent of local police departments and three-quarters of sheriffs’ offices have fewer than fifty officers.² Yet, large jurisdictions struggle as well, and there is little doubt why. Most agencies lack the capacity to assess and adopt best practices without help. Or collect and share information in a consistent manner. Or attend to the interests of those most affected by policing in the face of other pressures and priorities. The simple fact is that even the most willing of states and localities cannot articulate or enforce national values and standards or coordinate easily across state lines. Only the federal government can do this.

Realistically, though, not all jurisdictions *are* focused on eliminating the harm in policing. Some are. Some states have pursued legislative or

¹ These numbers obviously are approximations and vary from year to year. See Press Release, U.S. Census Bureau, U.S. Census Bureau Reports There Are 89,004 Local Governments in the United States (Aug. 30, 2012), <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html> [<https://perma.cc/HJH6-QHV7>] (number of cities and counties in 2012 Census); Duren Banks, Joshua Hendrix, Matthew Hickman & Tracey Kyckelhahn, Bureau of Just. Stats., U.S. Dep’t of Just., National Sources of Law Enforcement Employment Data 1 (2016), <https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/6ZJW-8RCF>] (reporting that there are about 18,000 police departments).

² See Sean E. Goodison, Bureau of Just. Stats., U.S. Dep’t of Just., Local Police Departments Personnel, 2020, at 3 (2022) [hereinafter Goodison, Local Police Departments Personnel], <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/lpdp20.pdf> [<https://perma.cc/4MUQ-8KHV>]; Connor Brooks, Bureau of Just. Stats., U.S. Dep’t of Just., Sheriffs’ Offices Personnel, 2020, at 3 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sop20.pdf> [<https://perma.cc/A5NL-X8WY>]. Maria Ponomarenko has provided one of the best accounts of the challenges of small agencies. See generally Maria Ponomarenko, The Small Agency Problem in American Policing, 98 N.Y.U. L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537989 [<https://perma.cc/J3E3-K9CN>].

other changes to improve policing, and some states have done enough of this to plainly be taking the endeavor seriously.³ Overall, however, the spate of enactments since the nation's response to the murder of George Floyd tend to be piecemeal at best.⁴ Still, other jurisdictions have done less to increase fairness and reduce harm, as the horrific murder of Tyre Nichols by the “Scorpion Unit” in Memphis suggests.⁵ The fervor for police reform that began after George Floyd's murder itself has cooled, and the national narrative—accurate or otherwise—shifted to another wave of rising crime.⁶ Only the federal government has the capacity to protect constitutional rights in the face of local diffidence or recalcitrance. That is its job.

If we really care about addressing the many serious problems with policing, at least for some aspects it will be faster and more effective to

³ See, e.g., Jennifer Brown & Jesse Paul, Colorado Governor Signs Sweeping Police Accountability Bill into Law. Here's How It Will Change Law Enforcement., *Colo. Sun* (June 19, 2020, 9:53 AM), <https://coloradosun.com/2020/06/19/colorado-police-accountability-bill-becomes-law/> [<https://perma.cc/JNV4-9KM8>]; Michael Levenson & Bryan Pietsch, Maryland Passes Sweeping Police Reform Legislation, *N.Y. Times* (Apr. 10, 2021), <https://www.nytimes.com/2021/04/10/us/maryland-police-reform.html> [<https://perma.cc/JY8W-ZL89>]; Ned Oliver, Police Reforms Go into Effect in Virginia, *Va. Mercury* (Mar. 2, 2021, 12:05 AM), <https://www.virginiamercury.com/blog-va/police-reforms-go-into-effect-in-virginia/> [<https://perma.cc/V82Q-GGJK>].

⁴ See, e.g., Liz Crampton, States Passed 243 Policing Bills—and Left Activists Wanting, *Politico* (May 26, 2021, 4:30 AM), <https://www.politico.com/news/2021/05/26/states-policing-bills-490850> [<https://perma.cc/D2CW-NHCN>] (reporting activist frustration regarding limited reforms after George Floyd's murder); Mark Berman & David Nakamura, From George Floyd to Tyre Nichols, Pleas for Police Reform Meet Bleak Reality, *Wash. Post* (Feb. 2, 2023, 7:05 PM), <https://www.washingtonpost.com/national-security/2023/02/02/memphis-tyre-nichols-police-reform/> [<https://perma.cc/XUT6-R7B7>] (finding only a “patchwork series of reforms . . . scattered across some of America's thousands of local police departments” while a “comprehensive approach remains out of reach”); Denise Lavoie, Tatyana Monnay & Juliette Rihl, Some States Are Struggling to Implement Policing Reforms Passed After George Floyd's Murder, *PBS NewsHour* (Oct. 31, 2022, 11:50 AM), <https://www.pbs.org/newshour/nation/some-states-are-struggling-to-implement-policing-reforms-passed-after-george-floyds-murder> [<https://perma.cc/7KPH-PQ55>] (reporting on difficulties with implementing limited reforms).

⁵ Even calling a street policing team “Scorpion” when it is charged with making numerous traffic stops underscores the problem. See Steve Eder et al., Muscle Cars, Balaclavas and Fists: How the Scorpions Rolled Through Memphis, *N.Y. Times*, <https://www.nytimes.com/2023/02/04/us/memphis-police-scorpion.html> [<https://perma.cc/T2KX-JA2J>] (Mar. 1, 2023) (describing the aggressive tactics of the Scorpion squad).

⁶ See, e.g., David A. Graham, How Criminal-Justice Reform Fell Apart, *Atlantic* (May 26, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/george-floyd-anniversary-police-reform-violent-crime/630174/> [<https://perma.cc/4Q4A-E33M>] (describing how rising crime rattled Americans' confidence in police reform).

adopt one set of changes rather than 50, 18,000, or 24,000. If money and might are needed, the federal government has them. Yet the federal government's resources and heft too often have been badly deployed.

Here, we offer some needed direction for federal involvement in local policing. We do that for Congress, which all too rarely has exercised its authority to set national rules for policing, or even authorized the executive branch to do so. And we do it for the executive branch, which, even with the existing authority it has, could do much more. We elaborate upon the need for national standards in some areas of policing, the value of information collection, and the utility of technical assistance and training, and call for more thought about how the federal government's enforcement power is utilized. We are critical of the Supreme Court's jurisprudence, to the extent it stands in the way.

None of what we suggest here is rocket science, however, which raises the question why the federal government's performance in police reform has been so anemic. For that reason, besides putting forward an affirmative agenda, we devote substantial time to four explanations for why the federal government has not done its job. We cannot repair them all, but we can shine a light on them, offer pushback, and—at times—antidotes.

The first is a lack of political will. Federal authorities could address almost everything we suggest here, even in the face of some problematic Supreme Court jurisprudence. They simply seem not to be able to muster the wherewithal to do so. After George Floyd's murder, Congress considered important legislation.⁷ It was not unproblematic, and it was not enough, but it would have been a notable start. It went nowhere.⁸

You could think Congress failed to act because the public lost interest. Congress inevitably follows swings in public opinion.⁹ In 2020, the public

⁷ See, e.g., Alexandra Hutzler, What Is the George Floyd Justice in Policing Act?, ABC News (Feb. 2, 2023, 1:49 PM), <https://abcnews.go.com/Politics/george-floyd-justice-policing-act/story?id=96851132> [<https://perma.cc/43J5-WQZ4>] (explaining legislation proposed in Congress after George Floyd's murder that was designed to address police misconduct, racial profiling, and use of force).

⁸ George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong.

⁹ See Paul Burstein, *American Public Opinion, Advocacy, and Policy in Congress 46–49* (2014) (examining numerous research methodologies and concluding that “we find repeatedly that opinion influences policy” at both the federal and state levels).

avored police reform.¹⁰ By 2022 they were concerned about crime.¹¹ In that case, one could argue Congress’s lack of political will reflected political responsiveness. But if that is what Congress was thinking, Congress was wrong. As the public recognizes, effective and accountable policing need not be in tension. Even as crime rates rose in 2021 and 2022, support for some forms of reform—and for the Black Lives Matter movement, for that matter—remained.¹² Polling shows widespread, bipartisan, non-ideological support for using first responders rather than police to address many problems such as mental health.¹³

¹⁰ See Pew Rsch. Ctr., *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct 1* (2020), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/07/PP_2020.07.09_Qualified-Immunity_FINAL.pdf [https://perma.cc/4U3U-CZTL] (finding that “[t]wo-thirds of Americans (66%) say that civilians need to have the power to sue police officers to hold them accountable for misconduct”); Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes,’* Gallup (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> [https://perma.cc/4NUJ-79F3] (finding that “58% of Americans say policing needs major changes”).

¹¹ See John Gramlich, *Violent Crime Is a Key Midterm Voting Issue, But What Does the Data Say?*, Pew Rsch. Ctr. (Oct. 31, 2022), <https://www.pewresearch.org/short-reads/2022/10/31/violent-crime-is-a-key-midterm-voting-issue-but-what-does-the-data-say/> [https://perma.cc/GDU3-TBDS] (“Around six-in-ten registered voters (61%) say violent crime is very important when making their decision about who to vote for in this year’s congressional elections.”); Megan Brenan, *Record-High 56% in U.S. Perceive Local Crime Has Increased*, Gallup (Oct. 28, 2022), <https://news.gallup.com/poll/404048/record-high-perceive-local-crime-increased.aspx> [https://perma.cc/6EMF-PMGK] (“The 56% of U.S. adults who report an increase in crime where they live . . . is the highest . . . in Gallup’s trend dating back to 1972.”).

¹² See Justin McCarthy, *Americans Remain Steadfast on Policing Reform Needs in 2022*, Gallup (May 27, 2022), <https://news.gallup.com/poll/393119/americans-remain-steadfast-policing-reform-needs-2022.aspx> [https://perma.cc/8QQ4-YGW5] (“[H]alf of Americans (50%) support ‘major changes’ to policing in the U.S., and another 39% favor ‘minor changes.’”); Jennifer de Pinto, Anthony Salvanto, Fred Backus & Kabir Khanna, *Most Americans Think Changes to Policing Are Necessary—CBS News Poll*, CBS News (Feb. 5, 2023, 9:30 AM), <https://www.cbsnews.com/news/policing-opinion-poll-2023-02-05/> [https://perma.cc/X65Y-7ZH6] (reporting that 47% of Americans support “major changes” to police practices, and 42% support “minor changes”); Juliana Menasce Horowitz, Kiley Hurst & Dana Braga, *Support for the Black Lives Matter Movement Has Dropped Considerably From Its Peak in 2020*, Pew Rsch. Ctr. (June 14, 2023), <https://www.pewresearch.org/social-trends/2023/06/14/support-for-the-black-lives-matter-movement-has-dropped-considerably-from-its-peak-in-2020/> [https://perma.cc/P4JZ-QX93] (finding that despite decline in support, Black Lives Matter retains the support of fifty-one percent of Americans).

¹³ See Natasha Chisholm & Anika Dandekar, *Majorities of Voters Support Criminal Charges for Those Involved in Tyre Nichols’ Killing and a Range of Police Reforms*, Data for Progress (Mar. 2, 2023), <https://www.dataforprogress.org/blog/2023/3/2/majorities-of-voters-support-criminal-charges-for-those-involved-in-tyre-nichols-killing-and-a-range-of-policing-reforms> [https://perma.cc/WFS2-PTQR] (finding that Americans prefer the use of first responders for mental health issues by a fifty-three-point margin); Justine Coleman, *Most Say*

Which brings us to the second explanation. Opponents of federal reform frequently claim that principles of constitutional federalism stand in the way.¹⁴ Some argue that it is improper for the federal government to tell local police how to do their job.¹⁵ And others go further, questioning whether the federal government has power under the Constitution to set the rules for policing.¹⁶

As this Article makes clear, these views about federalism's limits on federal power are wrong. Under our federal system, and the Supreme Court's somewhat baroque federalism doctrine, Congress may have to choose with some care the right font of power to meet the particular problem. For racial discrimination and use of force, Section 5 of the Fourteenth Amendment should suffice. For surveillance technologies, resorting to the Commerce Clause in most cases would do the trick. Some approaches to regulating policing may escape Congress's grasp, but for

Police Shouldn't Be Primary Responders for Mental Health Crises: NAMI Poll, Hill (Nov. 15, 2021, 11:10 AM), <https://thehill.com/policy/healthcare/581556-majority-say-professionals-should-respond-to-mental-health-crises-instead/> [<https://perma.cc/S7QW-WATB>] (“[N]early 80 percent of respondents said mental health professionals, not police, should respond to mental health and suicide situations.”).

¹⁴ Much literature is devoted to parsing the federalism concerns raised as a result of congressional regulation of policing. See, e.g., W. Paul Koenig, Does Congress Abuse its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with “Megan's Law”?, 88 *J. Crim. L. & Criminology* 721, 741 (1998).

¹⁵ See, e.g., 166 *Cong. Rec.* H2460 (daily ed. June 25, 2020) (statement of Rep. John H. Rutherford) (“We cannot be so eager to make major policing reforms on the Federal level that we overcorrect and prevent good officers on the street from being able to do their jobs.”); Kathleen F. Brickey, The Commerce Clause and Federalized Crime: A Tale of Two Thieves, 543 *Annals Am. Acad. Pol. & Soc. Sci.* 27, 38 (1996) (noting that the National Association of Attorneys General and the National Conference of State Legislatures “have urged Congress to recognize that primary responsibility for criminal law enforcement belongs to the states”); William Parlett, Criminal Law and Cooperative Federalism, 56 *Am. Crim. L. Rev.* 1663, 1665–66 (2019) (describing how cooperative prosecution programs concentrate too much power in the hands of federal executive branch officials and rob state and local communities of their “voice”).

¹⁶ See, e.g., Manu Raju, Clare Foran & Ted Barrett, GOP and Democrats Clash Over Police Reform in Congress as Pressure for Action Mounts, CNN (June 16, 2020, 8:28 PM), <https://www.cnn.com/2020/06/16/politics/police-reform-senate-republicans/index.html> [<https://perma.cc/KX7M-ZDNM>] (reporting then-Senate Majority Leader Mitch McConnell's opposition to federal police reform efforts as “overreach” and an attempt to “federalize all of these issues”); see also Richard A. Epstein, The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 *Harv. L. Rev.* 4, 45–46, 104 (1988) (raising concerns that Congress will use its spending powers to subvert the Twenty-First Amendment and Tenth Amendment such that “a presumption of distrust should attach to all government action”).

the most part, Congress has ample constitutional power to step in where it would be helpful to do so. And, of course, national standards and approaches do not eliminate state variation; they simply provide a floor.

The best evidence that federalism-based objections have little to support them is that the federal government already intervenes in deeply consequential ways to shape policing. It empowers local officers by deputizing them to federal ends. It pushes local agencies to pursue national public safety priorities, whether they be street-level drug enforcement, gun crime, or something else.¹⁷ It provides local police with militarized equipment and tools for surveillance and incorporates their work into federal databases.¹⁸ It trains officers to engage in deleterious practices like widespread pretextual traffic stops.¹⁹ The federal government meddles aplenty in local law enforcement without much objection from those who worry aloud about the federal government interfering in local policing. It seems only to rouse disagreement if the suggestion is the federal government should work to make policing more responsive to policed communities, more equitable, and less harmful. That one-way ratchet rests on an implausible account of “Our Federalism.”²⁰

¹⁷ See Roger J. Miner, *The Consequences of Federalizing Criminal Law*, 4 *Crim. Just.* 16, 18 (1989) (describing expansion of federal jurisdiction to crimes including robbery, extortion, loan-sharking, and drug trafficking); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 *Annals Am. Acad. Pol. & Soc. Sci.* 39, 42 (1996) (“Congress enacted a series of federal crimes that targeted violence against private individuals . . . to assert jurisdiction over an increasingly broad range of conduct clearly within the traditional police powers of the states.”); Partlett, *supra* note 15, at 1663 (“Cooperative federalism is now commonplace in the prosecution of street-level drug and gun crime . . . , [which] . . . weakens the ability of states to function as political entities that can hold their law enforcement officers accountable in an area of traditional state police power.”).

¹⁸ See Allison McCartney, Paul Murray & Mira Rojanasakul, *After Pouring Billions into Militarization of U.S. Cops, Congress Weighs Limits*, *Bloomberg* (July 1, 2020), <https://www.bloomberg.com/graphics/2020-police-military-equipment/> [<https://perma.cc/C7V9-JUNF>]; Jay Stanley & Bennett Stein, *FOIA Documents Reveal Massive DEA Program to Record Americans’ Whereabouts with License Plate Readers*, *ACLU*, <https://www.aclu.org/news/smart-justice/foia-documents-reveal-massive-dea-program-record-americans-whereabouts-license> [<https://perma.cc/ZZ8D-UKDT>] (Jan. 28, 2015) (explaining that the Drug Enforcement Administration (“DEA”) partners with state and local law enforcement agencies around the country to collect license plate location data for its database).

¹⁹ See Farhang Heydari, *The Invisible Driver of Policing*, 76 *Stan. L. Rev.* (forthcoming 2024) (manuscript at 1–2) [hereinafter Heydari, *The Invisible Driver of Policing*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4369747 [<https://perma.cc/5FYF-MZFW>].

²⁰ *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“[T]he notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a

The federal government's already ample role in local policing highlights the third explanation for why it has not done what is needed to transform policing for the better, which is that some parts of the federal government themselves are resistant to change—to the point that the federal government is complicit in many of policing's problems. When it comes to policing, there is a deep tension within the federal government as to what its role should be. On one hand, it has an obligation to protect civil rights and racial equality, a special role in preserving privacy, and the sole power to promote values such as democratic accountability and transparency at a national level. Some elements of the federal government pursue these ends, such as the Civil Rights Division and its Special Litigation Section.²¹ On the other hand, the federal government operates an enormous law enforcement apparatus, with dozens of agencies that depend on state and local cooperation.²² That law enforcement apparatus does not seem particularly reform-minded; indeed, some federal agencies such as the Drug Enforcement Administration, Customs and Border Protection, and Immigration and Customs Enforcement are themselves particularly concerning.²³ Federal law enforcement has too often pursued its public safety priorities, such as the wars on crime and terrorism, and

Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways... is referred to by many as 'Our Federalism' . . .").

²¹ See Special Litigation Section, U.S. Dep't of Just.: C.R. Div., <https://www.justice.gov/crt/special-litigation-section> [<https://perma.cc/268W-7983>] (last visited Sept. 24, 2023).

²² See Law Enforcement, Bureau of Just. Stats. (Feb. 18, 2021), <https://bjs.ojp.gov/topics/law-enforcement#recent-faqs-how-many-full-time-federal-law-enforcement> [<https://perma.cc/NJQ7-WNLX>] (estimating that in 2020, there were 137,000 full-time federal law enforcement officers); see also Lisa M. Seghetti, Cong. Rsch. Serv., RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 3 (2009), https://www.everycrsreport.com/files/20090311_RL32270_a7bbe8763684424b48f0d4b1d61c92412ac50d0c.pdf [<https://perma.cc/N5AR-EBMB>] (providing examples of cooperation between federal and local law enforcement on immigration); Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 UDC/DCSL L. Rev. 83, 139 (2004) (detailing high level of federal-local law enforcement cooperation).

²³ See, e.g., US Records Show Physical, Sexual Abuse at Border, Hum. Rts. Watch (Oct. 21, 2021, 7:00 AM), <https://www.hrw.org/news/2021/10/21/us-records-show-physical-sexual-abuse-border> [<https://perma.cc/Z97M-W5F5>] (reporting on abuse by Customs and Border Protection officers, Border Patrol agents, and Immigration and Customs Enforcement officials); Stan Wilson, Daniel Chong, *Forgotten in DEA Cell, Settles Suit for \$4.1 Million*, CNN (Aug. 1, 2013, 7:38 AM), <https://www.cnn.com/2013/07/30/justice/california-dea-settle-ment/> [<https://perma.cc/B9XE-EP9P>] (finding that DEA agents detained a student in a windowless cell with no food or water for five days).

federal immigration enforcement, with little attention to the harms it causes. In short, while some parts of the federal government encourage reform, other parts of the federal government work against it.

The federal government—and many federal agencies—bear responsibility for many of the harms of policing. The federally driven War on Drugs garnered little in the way of success while shredding constitutional liberties and contributing to mass incarceration.²⁴ Today, asset forfeiture drives unjustifiable policing practices, yet federal agencies have done little to curtail it and much to promote it.²⁵ Tyre Nichols’s murder brought widespread public attention to the problem of pretextual traffic stops, but the federal government has and continues to promote them, causing harm and racial disparities.²⁶ The militarization of domestic policing is deeply troubling in a free society, and the federal government has driven that. Technology-driven surveillance is itself a threat to democracy and individual rights, and very much on the rise, and yet again federal agencies promote, supply, and fund these technologies with few guardrails on their use.²⁷ One could go on and on.

To be clear, our claim here assuredly is not that the federal government should not help state and local governments in crime fighting. Small communities need help to be effective in addressing crime, all departments benefit from federal expertise about what works, and there are elements of crime that are both national and transnational. Each of

²⁴ See Aaron Morrison, *50-Year War on Drugs Imprisoned Millions of Black Americans*, PBS NewsHour (July 26, 2021, 12:55 PM), <https://www.pbs.org/newshour/nation/50-year-war-on-drugs-imprisoned-millions-of-black-americans> [<https://perma.cc/DZV2-H4DR>] (noting that the federal government’s policies pursuant to the War on Drugs resulted in the mass incarceration of millions of Americans and undermined their access to voting and gun rights).

²⁵ See Jennifer McDonald & Dick M. Carpenter II, *Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims*, Inst. for Just. (Sept. 28, 2021), <https://ij.org/report/frustrating-corrupt-unfair/> [<https://perma.cc/US2N-2YLE>] (“Most states across the country, not to mention the federal government, continue to enforce civil forfeiture laws that offer few due process protections and promote policing for profit.”).

²⁶ See generally Farhang Heydari, *Rethinking Federal Inducement of Pretext Stops*, 2024 Wis. L. Rev. (forthcoming) [hereinafter Heydari, *Rethinking Federal Inducement of Pretext Stops*] (cataloguing the ways in which federal agencies promote pretextual traffic stops); Heydari, *The Invisible Driver of Policing*, supra note 19 (calling attention to the National Highway and Traffic Safety Agency as a proponent of pretextual traffic stops).

²⁷ See Chris Baumohl, *Two Years In, COVID-19 Relief Money Fueling Rise of Police Surveillance*, Elec. Priv. Info. Ctr. (Mar. 9, 2023), <https://epic.org/two-years-in-covid-19-relief-money-fueling-rise-of-police-surveillance/> [<https://perma.cc/5VLG-Z5RM>] (explaining that the expansion of surveillance technologies results from “federal funding, which lowers the cost of acquisition at the state and local level”).

these provides a classic justification for federal involvement in primarily local enterprises. It may well be warranted beyond that. Our claim, rather, is that the federal government must be concerned both with ensuring public safety from crime and ensuring public safety from the harms of policing. The simple fact is that policing is unlikely to be effective over time unless it also is fair, harm-minimizing, and accountable—and even if it could remain unaccountable, that simply is inconsistent with this nation’s broader democratic values. The War on Drugs and federally supported asset forfeiture are indicative of a distorted sense of balance, if not one altogether missing.

Which brings us to the final explanation, and one on which we have a great deal to say, which is that the federal government has over-relied on an approach to addressing the harms of policing that rests in conditions on grants and civil rights enforcement, while undervaluing other approaches such as standard setting and regulation, or even ensuring that the federal government’s policing strategy is internally coherent. Do not get us wrong—enforcement is essential to ensuring the rules of the road obtain adherence. But what the federal government has done for too long is not set out the rules of the road, relying instead on the minimalist notion of policing regulation set out in the Supreme Court’s constitutional jurisprudence.²⁸ Yet, as every first-year law student learns, the Constitution is a floor; it indicates what *must* be done, but often lacks any notion of aspiration or best practices.

The federal government’s lackluster role in improving policing is in part a result of its piecemeal, reactive approach. When bad things in policing happen, for example, the Civil Rights Division prosecutes individual officers. Or it investigates and sues some deeply troubled departments.²⁹ Enforcement is important, though it could be done more strategically.³⁰ But litigating our way out of policing’s problems is a

²⁸ But see *Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*, Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32961 (May 25, 2022) (requiring the Attorney General to develop standards for accreditation of police departments by independent credentialing agencies and to determine if discretionary grants should depend on accreditation).

²⁹ See C.R. Div., U.S. Dep’t of Just., *The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994–Present*, at 3 (2017) [hereinafter C.R. Div., *Police Reform Work: 1994–Present*], <https://www.justice.gov/crt/file/922421/download> [<https://perma.cc/LQN3-RME7>] (describing the work of the Special Litigation Section).

³⁰ See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 *Stan. L. Rev.* 1, 22, 26–27, 57–58 (2009) [hereinafter Harmon, *Promoting Civil Rights*] (arguing that the use of consent decrees, which frequently include certain requirements, such

doomed enterprise. The Department of Justice (“DOJ”) only can target a few troubled agencies or officers. The federal government also encourages some reform through grant programs and their conditions. But these efforts lack coherence, consistency, and comprehensiveness. They do far less than they ought.

Simply put, the federal government in the main has failed to set rules and standards that local policing agencies either must meet, or at least should aspire to meet.³¹ It has not collected or even made possible uniformity in data so that we can identify problems in local policing, and their solutions. If anything became clear in the aftermath of the killing of George Floyd—and should have been clear long before—it is that policing needs to be regulated with clear front-end rules, or at least provided with coherent guidance. As we indicated, states have taken up some of the work, but in piecemeal fashion. The federal government could and should—and indeed must—do more to bring needed cohesion and real progress.

There is no gainsaying that President Biden’s May 2022 Executive Order (“EO”) on policing was a step in the right direction.³² It announced some efforts to bring federal agencies into line with best practices, some leadership in promoting nationwide accountability, and some effort to identify and promote best practices for local police departments. Even if radically incomplete, it was the most the nation ever has seen aspirationally about addressing real harms in policing. But orders are not action: a reform-oriented Trump order on policing had almost no effect.³³ Only time will tell if the Biden Executive Order accomplishes what it set

as training and policies on use of force, can incentivize other agencies to adopt such reforms); Allison T. Chappell, Consent Decrees and Police Reform: A Piece of the Puzzle or a Puzzling Policy, 16 *Criminology & Pub. Pol’y* 571, 572 (2017) (finding that consent decrees can lead to policy change because police departments seek to avoid DOJ scrutiny).

³¹ President Biden’s Executive Order (“EO”) has a provision fostering accreditation of policing agencies, which could be the beginning of standard setting, although those accreditation standards as adopted by DOJ were insufficiently demanding. See *infra* notes 354–55 and accompanying text.

³² Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, Exec. Order No. 14,074, 87 Fed. Reg. 32945 (May 25, 2022).

³³ See Jon Schuppe, Trump Says His Policing Order Is a ‘Big Step.’ Activists Call It ‘Breadcrumbs.’, NBC News (June 17, 2020, 10:35 AM), <https://www.nbcnews.com/news/us-news/trump-says-his-policing-order-big-step-activists-call-it-n1231269> [https://perma.cc/PR9G-ZQYR] (noting that Trump’s executive order concerning policing after George Floyd’s murder was “paltry”).

out to do.³⁴ And even if it does—there is plenty more to be done, as the EO itself acknowledges.³⁵

This Article argues the federal government can and should foster change in policing and provides guidance as to what the federal government should do. The federal government has ample constitutional power to address the problems of local policing—sometimes acting alone and sometimes in collaboration with state and local authorities. We at times suggest a regulatory approach, best achieved by setting rules and standards that guide local policing. We show how, when regulation would be inappropriate or ineffective, the federal government should use its other powers to achieve change. We strongly urge the federal government to adopt a coherent approach to policing—that, above all else, the federal government should stop using the power that it has in deleterious ways, exacerbating the problems of local policing even while claiming a desire to address them.

Part I of this Article is addressed to the question of need—where and why is federal intervention in local policing needed, and what should that federal role look like? It frames up three paradigmatic areas in which there is widespread consensus policing needs to change: excessive force by the police, racial discrimination in policing, and the use of surveillance technologies. It shows that state and local governments often are incapable of, or unwilling to, address the problems alone, thereby highlighting the vital role the federal government has to play. And it begins an exploration of what it is the federal government should do.

Part II turns to regulation and the role Congress should play in requiring better local policing. It sets out a minimal agenda for Congress in the three paradigmatic problem areas. But one cannot discuss

³⁴ One year in, the federal government released a long list of the actions it had taken, and we do not mean in any way to minimize their import. See Fact Sheet: Biden-Harris Administration Highlights Accomplishments on Anniversary of Historic Executive Order to Advance Effective, Accountable Policing and Strengthen Public Safety, White House (May 25, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/25/fact-sheet-biden-harris-administration-highlights-accomplishments-on-anniversary-of-historic-executive-order-to-advance-effective-accountable-policing-and-strengthen-public-safety/> [<https://perma.cc/U4HM-WNPR>] (highlighting actions taken under EO 14,074, including the creation of the “National Law Enforcement Accountability Database,” the adoption of new federal law enforcement use of force policies, and grants to local law enforcement “to adopt and implement best practices” in policing). Every step in the right direction is a step in the right direction. Still, much of that list itself was a down payment on enormous work yet to be done.

³⁵ See Exec. Order No. 14,074, 87 Fed. Reg. at 32945.

congressional action without discussing constitutional power as well, thus implicating the Supreme Court. Part II acknowledges that Supreme Court precedent poses challenges to the exercise of federal power and critiques the doctrine accordingly. Still, it demonstrates that Congress has more than ample power to address what needs to be done. It explains how Congress could use this power to mitigate those problems of excessive force, undue surveillance, and racial injustice in policing.

Part III turns to the executive branch. If Congress does not act, or even if it does, the executive branch could do much with its discretion to set a national agenda, to enforce civil rights law, to implement federal programs, and to run federal law enforcement agencies to make policing better. The executive branch needs to promote a consistent, coherent approach to policing, one that supports policing that is fair, harm minimizing, and accountable as well as effective. But it also needs to stop doing things that make policing less equitable, less effective, and more harmful. Part III lays all this out.

The federal government is not going to fix everything that needs to be remedied around policing. But it could act to do less harm and reform policing substantially, even as it promotes effective efforts to address crime. It is time for federal officials at the legislative and executive level to take seriously their power and responsibility to address the harms of local policing.

I. THE NEED FOR FEDERAL INTERVENTION

This Part explains the need for federal intervention in local policing. It begins in Section I.A by identifying three exemplary, or paradigmatic, problems of policing, which we use throughout the Article to illustrate what federal authority could accomplish. Central to Section I.A is our description of the ways recent state-level efforts to address these problems—primarily through legislation—have fallen short.³⁶ Although recent state efforts are laudable in that elected officials have for too long

³⁶ See generally Brandon L. Garrett, *The Laws that Regulate Police: The Wilson Center's Policing Legislation Database* (2023), <https://wcsj.law.duke.edu/wp-content/uploads/2023/05/Policing-Database-Report-May-2023.pdf> [<https://perma.cc/KRE8-6X5F>] (providing a record of more than 3,800 policing bills that were proposed in states from 2018 to 2022, of which only ten percent have been enacted); *Legislative Responses for Policing—State Bill Tracking Database*, Nat'l Conf. of State Legislatures, <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx> [<https://perma.cc/G7XX-EKMB>] (last updated Apr. 6, 2023) (cataloguing state policing bills by topic).

failed to do their job regulating the police,³⁷ at best they have proven episodic and scattershot. Worse, too many jurisdictions have proven unwilling to address the state of policing in the United States.³⁸

In focusing on the role of states and localities, we do not mean to minimize the federal government's own complicity either in fostering the problems of policing or failing to address them. As many have observed, the federal government is a source of intrusive and harmful policing practices.³⁹ Part III in particular describes many of these problematic practices and discusses what must be done to address them.

Still, as Section I.B makes clear, for better or for worse, many of the necessary interventions only can be accomplished at the national level. In particular, we outline four types of actions that the federal government is best positioned to implement: (1) identifying and enforcing minimal standards; (2) developing best practices; (3) collecting data; and (4) distributing resources. These federal tactics are levers to improve policing directly but also serve as a foundation upon which states and localities can build.⁴⁰

³⁷ See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1827 (2015) (observing “[o]f all the agencies of executive government, those that police . . . are the least regulated”); Samuel Walker, *The New World of Police Accountability* 8 (1st ed. 2005) (arguing most elected officials know little about policing and are reluctant to try and provide guidance).

³⁸ See Colleen Slevin, *States Diverge on Police Reforms After George Floyd Killing*, PBS NewsHour (Dec. 30, 2021, 12:41 PM), <https://www.pbs.org/newshour/nation/states-diverge-on-police-reforms-after-george-floyd-killing> [<https://perma.cc/K44Y-UDL3>] (explaining that some states after George Floyd's murder actually passed legislation expanding police officers' rights); see also Garrett, *supra* note 36, at 10 (reviewing policing legislation since 2018 and concluding “[m]ost states did not enact any such bills, regardless of their politics”).

³⁹ See, e.g., Heydari, *Rethinking Federal Inducement of Pretext Stops*, *supra* note 26 (manuscript at 21–23) (describing how the federal government promotes the widespread use of pretextual traffic stops); Bridget A. Fahey, *Data Federalism*, 135 Harv. L. Rev. 1007, 1012 (2022) (describing the federal government's role in promoting mass data collection and sharing); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. Rev. 870, 875–76 (2015) [hereinafter Harmon, *Federal Programs*] (describing the ways that federal programs distort local policing).

⁴⁰ We focus here on the federal government's role as a regulatory floor, which would still allow states to experiment and adopt greater regulatory controls. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Denial of the right to experiment may be fraught with serious consequences to the Nation.”).

A. Paradigmatic Policing Problems

Three issues in local policing are illustrative of both the range of serious problems in law enforcement and the need for significant change: (1) police use of force; (2) police surveillance and data acquisition; and (3) disparate burdens on people of color. In the Subsections below, we describe the problems and discuss the states' inadequate responses.

1. Use of Force

Nothing characterizes policing more than the authority to use force.⁴¹ And nothing makes policing more consequential in the eyes of the public. An officer's decision to use force can greatly enhance public safety or threaten it. Lives can be saved or shattered.

Police use of force must be constitutional. But policing should be more than merely legal; given the harms it imposes, to be justifiable, it also should be equitable, effective, and "harm-efficient."⁴² Under this view, even force that is constitutionally reasonable may be excessive if it is unnecessary, disproportionate, or unfairly distributed, or, if in the aggregate, it compromises community wellbeing.⁴³ The excessive use of force can undermine the public safety goals policing is intended to promote—it can discourage witnesses and community members from cooperating with police, making future police investigations all the more difficult.⁴⁴

Although difficult to quantify precisely, police use of deadly force appears widespread and often unnecessary. Over the last several years,

⁴¹ See Egon Bittner, *The Functions of the Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models* 46 (1970) (describing policing as "a mechanism for the distribution of non-negotiably coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies" (emphasis omitted)).

⁴² Rachel A. Harmon, *The Problem of Policing*, 110 Mich. L. Rev. 761, 792 (2012) [hereinafter Harmon, *The Problem of Policing*] ("Regulation of the police should promote harm-efficient policing—that is, policing that imposes harms only when, all things considered, the benefits for law, order, fear reduction, and officer safety outweigh the costs of those harms.").

⁴³ See *id.* at 776–81.

⁴⁴ See Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 Minn. L. Rev. 2397, 2434–35 (2017). In one study, a high-profile use of force incident dramatically reduced crime reporting across Black neighborhoods in the year that followed. Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 Am. Socio. Rev. 857, 870 (2016).

national attention has been fixed all too often on police killings of unarmed members of the public, predominantly people of color. Best available data indicates police officers kill around 1,000 people every year, but this figure is merely an estimate.⁴⁵ Young people, people of color, and people with mental illness bear the disproportionate brunt of these killings.⁴⁶ U.S. police killings far outpace those in other Western democracies.⁴⁷ In 2019, our nation accounted for over thirteen percent of global deaths due to police conflict, though we are only about four percent of the global population.⁴⁸

Nonlethal force is far more widespread.⁴⁹ Survey data from 2018 indicates that about two percent of Americans who had contact with police experienced threats of, or use of, force.⁵⁰ Although two percent is a modest fraction, it represents over one million police encounters every year—over 3,400 per day.⁵¹ This figure has increased by more than

⁴⁵ Jennifer Jenkins et al., *Fatal Force*, Wash. Post, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/3LAK-PMZV>] (last visited Sept. 24, 2023).

⁴⁶ Anthony L. Bui, Matthew M. Coates & Ellicott C. Matthey, *Years of Life Lost Due to Encounters with Law Enforcement in the USA, 2015–2016*, 72 *J. Epidemiology & Cmty. Health* 715, 715 (2018) (concluding that police violence disproportionately impacts young people and that the young people affected are disproportionately people of color); Andrew Selsky & Leah Willingham, *How Some Encounters Between Police and People with Mental Illness Can Turn Tragic*, PBS NewsHour (Sept. 2, 2022, 2:26 PM), <https://www.pbs.org/newshour/health/how-some-encounters-between-police-and-people-with-mental-illness-can-turn-tragic> [<https://perma.cc/9MQJ-S84P>] (“[P]eople with untreated mental illness are 16 times more likely to be killed during a police encounter than other people approached by law enforcement . . .”).

⁴⁷ Alexi Jones & Wendy Sawyer, *Not Just “A Few Bad Apples”: U.S. Police Kill Civilians at Much Higher Rates Than Other Countries*, Prison Pol’y Initiative (June 5, 2020), <https://www.prisonpolicy.org/blog/2020/06/05/policekillings/> [<https://perma.cc/SUC2-9XKZ>]; Jamiles Lartey, *By the Numbers: US Police Kill More in Days than Other Countries Do in Years*, Guardian (June 9, 2015, 6:00 AM), <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries> [<https://perma.cc/BF8W-YMRA>].

⁴⁸ Fablina Sharara & Eve E. Wool et al., *GBD 2019 Police Violence US Subnational Collaborators, Fatal Police Violence by Race and State in the USA, 1980–2019: A Network Meta-Regression*, 398 *Lancet* 1239, 1239 (2021), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2821%2901609-3> [<https://perma.cc/ZH3Q-EBMG>].

⁴⁹ Although we cite some data regarding nonlethal force in U.S. policing, use of force data collection is notoriously inadequate. See Michael D. White, *Transactional Encounters, Crisis-Driven Reform, and the Potential for a National Police Deadly Force Database*, 15 *Criminology & Pub. Pol’y* 223, 223–24 (2015).

⁵⁰ Erika Harrell & Elizabeth Davis, U.S. Dep’t. of Just., *Contacts Between Police and the Public, 2018—Statistical Tables 1, 5 tbl.3* (rev. ed. 2023), <https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf> [<https://perma.cc/SD8Q-GMPB>].

⁵¹ *Id.*

twenty-five percent since 2015.⁵² And over half of those who experienced threats or use of force during their most recent contact felt the force was excessive.⁵³ Importantly, as described below, force is deployed disproportionately along racial lines. And this data likely underestimates significantly those who have experienced force because the surveys exclude incarcerated individuals and people experiencing homelessness—both groups that disproportionately interact with police.⁵⁴

Although nonlethal force often escapes public notice because it typically occurs during arrests where few are watching, the country witnessed how injurious and delegitimizing nonlethal force can be during police use of force against demonstrators—including tear gas, rubber bullets, and batons—in summer 2020’s protests following George Floyd’s murder.⁵⁵

⁵² *Id.*

⁵³ *Id.* at 6 tbl.4.

⁵⁴ *Id.* at 8; Sarah Gillespie, Samantha Batko, Ben Chartoff, Zach VeShancey & Emily Peiffer, *Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It*, Urb. Inst. (Sept. 16, 2020), <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it> [<https://perma.cc/9NNJ-N2TU>] (“Experiencing unsheltered homelessness increases people’s interactions with the justice system.”).

⁵⁵ See, e.g., Kim Barker, Mike Baker & Ali Watkins, *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. Times, <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html> [<https://perma.cc/MDR9-A6TQ>] (June 28, 2021); Tobi Thomas, Adam Gabbatt & Caelainn Barr, *Nearly 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protests*, Guardian (Oct. 29, 2020, 11:00 AM), <https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest> [<https://perma.cc/4CKA-B3U5>] (“At least 950 instances of police brutality against civilians and journalists during anti-racism protests have occurred in the past five months . . .”); Press Release, Off. of N.Y. State Att’y Gen., Attorney General James Files Lawsuit Against the NYPD for Excessive Use of Force (Jan. 14, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-files-lawsuit-against-nypd-excessive-use-force> [<https://perma.cc/8DSE-X8HR>] (announcing a New York Attorney General lawsuit against NYPD alleging unconstitutional force against protestors); Talia Buford, Lucas Waldron, Moiz Syed & Al Shaw, *We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here’s What We Found.*, ProPublica (July 16, 2020), <https://projects.propublica.org/protest-police-tactics/> [<https://perma.cc/5UWB-58JV>]; Press Release, Amnesty Int’l, USA: Law Enforcement Violated Black Lives Matter Protesters’ Human Rights, Documents Acts of Police Violence and Excessive Force (Aug. 4, 2020), <https://www.amnesty.org/en/latest/press-release/2020/08/usa-law-enforcement-violated-black-lives-matter-protesters-human-rights/> [<https://perma.cc/6T3Q-LUHJ>] (describing “widespread and egregious human rights violations by police officers against protesters, medics, journalists and legal observers who gathered to protest the unlawful killings of Black people by the police and to call for systemic reform in May and June of 2020”). Force was used disproportionately against those on the left, or those protesting policing, as compared with those on the right. Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters*, Data Finds, Guardian (Jan. 14, 2021, 1:00 AM), www.theguardian.com/

Sparked in part by those incidents, states have over the last few years taken a variety of approaches to address excessive and unnecessary police uses of force. Some laws impose new standards for police use of force, beyond the constitutional minimum.⁵⁶ Others limit specific types of force, such as the use of chokeholds.⁵⁷ Some laws focus on improving police training relating to use of force, such as a required de-escalation training.⁵⁸ Still others focus on improving police accountability for inappropriate force, such as by strengthening oversight or limiting qualified immunity.⁵⁹

Overall, however, these interventions are coming up short in three respects. *First*, many of the changes tend to be pinprick—bans on a specific use of force tactic, for example.⁶⁰ *Second*, and more problematically, even after years of sustained attention on policing, most states have not enacted meaningful legislation addressing police use of force.⁶¹ The result is that on the whole, despite hundreds of new laws (and even more local effort) devoted to the use of force and to increasing accountability, estimates of deaths at the hands of officers have remained

us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right [https://perma.cc/5BNG-CL93].

⁵⁶ See, e.g., Act of Dec. 31, 2020, ch. 253, 2020 Mass. Acts 892 (creating detailed use of force rules and requirements); 720 Ill. Comp. Stat. 5/7-5.5 (2021) (restricting acceptable police use of force).

⁵⁷ See, e.g., Act of Sept. 30, 2020, ch. 324, § 1, 2020 Cal. Stat. 92, 92; Act of Oct. 28, 2020, ch. 35, § 1, 2020 Va. Acts 63, 63–64; see also Cris Barrish, Should Police Shoot at Suspects in Moving Cars? Delaware Attorney General Wants It Restricted, WHYY (Jan. 9, 2022), https://whyy.org/articles/should-police-shoot-at-suspects-in-moving-cars-delaware-attorney-general-wants-it-restricted/ [https://perma.cc/T7AL-JSSZ] (discussing proposed restrictions by Delaware Attorney General to limit police firing at moving vehicles).

⁵⁸ See, e.g., Act of Oct. 28, 2020, ch. 37, § 9.1-102, cl. 38, 2020 Va. Acts 68, 73.

⁵⁹ See, e.g., Leslie Herod & Mari Newman, Colorado Took a Revolutionary Step to Reform Policing. Here's How We Did It., USA Today (Nov. 4, 2021, 6:59 PM), https://www.usatoday.com/story/opinion/2021/10/28/colorado-hold-cops-accountable-qualified-immunity/6101915001/ [https://perma.cc/525K-A97Q] (describing Colorado's "elimination of qualified immunity"); Curtis Segarra, New Mexico's Civil Rights Act Stands for Now, KRQE News (Feb. 6, 2023, 2:56 PM), https://www.krqe.com/news/politics-government/legislature/new-mexicos-civil-rights-act-stands-for-now/ [https://perma.cc/FM4J-KMMB] (describing New Mexico's Civil Rights Act, which would prevent police from using qualified immunity as a legal defense).

⁶⁰ See, e.g., Act of June 30, 2021, ch. 73, § 7, 83 Del. Laws 76, 82 (2021) (clarifying that chokeholds are a form of deadly force); Act of June 22, 2021, § 2, 2021 Wis. Sess. Laws 112, 112 (same); Act of June 12, 2020, § 2(1), 2020 Iowa Acts 68, 68–69 (same).

⁶¹ See supra note 36.

steady or increased slightly in recent years.⁶² (Although the overall number has changed little, it appears the distribution of police killings is changing—decreasing in major metro areas, where public scrutiny and limits on police use of force are more common, and increasing in suburban and rural areas, where reform is not taking hold.⁶³) *Third*, some states even have taken steps to further insulate police uses of force. Georgia, for example, strengthened protections for officers facing misconduct investigations while also preempting localities from imposing more rigorous use of force standards.⁶⁴ Florida exempted some body camera footage from public records requests and created new infractions and enhanced penalties for public disorder-related offenses (although the latter legislation is still blocked in court).⁶⁵

In short, although constraining police use of force has been a priority in some locations, in others it remains a nonstarter, meaning those most impacted by policing remain unable to change it in certain states and localities. And even where force laws have been enacted, they hardly are comprehensive.⁶⁶

⁶² Sam Levin, 'It Never Stops': Killings by US Police Reach Record High in 2022, *Guardian* (Jan. 6, 2023, 6:00 AM), www.theguardian.com/us-news/2023/jan/06/us-police-killings-record-number-2022 [<https://perma.cc/C4XV-3NUP>].

⁶³ See Samuel Sinyangwe, *Police Are Killing Fewer People in Big Cities, But More in Suburban and Rural America*, *FiveThirtyEight* (Aug. 27, 2020, 2:58 PM), <https://fivethirtyeight.com/features/police-are-killing-fewer-people-in-big-cities-but-more-in-suburban-and-rural-america/> [<https://perma.cc/R6Z8-5LJ3>] (finding that police killings decreased in America's largest cities and increased in suburban and rural areas); see also Alysia Santo & R.G. Dunlop, *Where Police Killings Often Meet with Silence: Rural America*, *N.Y. Times* (Sept. 25, 2021), <https://www.nytimes.com/2021/08/13/us/police-shootings-rural.html> [<https://perma.cc/3LWF-946C>] (highlighting the lack of attention on police killings in rural areas).

⁶⁴ Jessica Szilagyi, *Georgia Legislatures [sic] Passes 'Peace Officers Bill of Rights,' AllOnGeorgia* (June 24, 2020), <https://allongeorgia.com/georgia-state-politics/georgia-legislatures-passes-peace-officers-bill-of-rights/> [<https://perma.cc/7HKP-LZ58>] (recounting enactment of an updated police officer bill of rights with additional protections for officers under investigation); Ga. Code Ann. § 17-4-20(d) (2023) (establishing the use of force preemption).

⁶⁵ Jackie Kelly, *New Florida Law Allows Some Police Body Camera Footage to Be Kept Confidential*, *WWSB* (Oct. 4, 2020, 5:31 PM), <https://www.wtv.com/2020/10/04/new-florida-law-allows-some-police-body-camera-footage-to-be-kept-confidential/> [<https://perma.cc/LX64-XXE5>]; Valerie Crowder, *Florida's Controversial Anti-Riot Law Remains Temporarily Blocked*, *WFSU Pub. Media* (Jan. 24, 2023, 6:35 PM), <https://news.wfsu.org/state-news/2023-01-24/controversial-anti-protest-bill-temporarily-blocked> [<https://perma.cc/43QR-B4ZN>].

⁶⁶ Virginia, for example, enacted a law prohibiting neck restraints in certain circumstances. Act of Oct. 28, 2020, ch. 35, § 1, 2020 Va. Acts 63, 64. Arkansas merely implemented a

2. Surveillance and Data Acquisition

Police increasingly rely on intrusive surveillance technologies and sensitive personal data in their investigations. For example, automated license plate readers (“ALPRs”) are cameras, either stationary or affixed to mobile police cars, that capture (“read”) the license plates of passing vehicles.⁶⁷ The license plate reads are time-stamped and geo-located.⁶⁸ ALPRs are used to compare the license plate to a “hot list” of vehicles the police are after.⁶⁹ And reads are often stored to track an individual or see who was near the location of a crime.⁷⁰ ALPRs once were so costly that even major metropolitan police departments could afford only a few and therefore directed those they had toward serious crimes involving vehicles.⁷¹ Now, any security camera—every dash cam, body cam, and CCTV—can be used as an ALPR.⁷² While properly used ALPRs can assist in finding stolen vehicles and those driving away from serious crimes, the technology has become so widespread that it also allows police to issue citations *en masse* for expired registration or lapsed

requirement that officers complete an annual training regarding their duty to intervene when observing another officer’s use of excessive force. Act of Apr. 20, 2021, 2021 Ark. Acts 3676, 3677. Compare this with examples of comprehensive model use of force legislation. See, e.g., An Act Regulating the Use of Force by Law Enforcement Officers, N.Y.U. Sch. of L. Policing Project, <https://www.policingproject.org/s/Comprehensive-Use-of-Force-Statute> [<https://perma.cc/LN72-P4FW>] (last visited Sept. 24, 2023).

⁶⁷ Catherine Crump et al., ACLU, You Are Being Tracked: How License Plate Readers Are Being Used to Record Americans’ Movements 4 (2013), <https://www.aclu.org/files/assets/071613-aclu-alprreport-opt-v05.pdf> [<https://perma.cc/Z6WV-WJQU>].

⁶⁸ *Id.* at 5.

⁶⁹ *Id.*

⁷⁰ See Ángel Díaz & Rachel Levinson-Waldman, Automatic License Plate Readers: Legal Status and Policy Recommendations for Law Enforcement Use, Brennan Ctr. for Just. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/automatic-license-plate-readers-legal-status-and-policy-recommendations> [<https://perma.cc/H2T6-3Z3X>].

⁷¹ Tom Simonite, AI License Plate Readers Are Cheaper—So Drive Carefully, WIRED (Jan. 27, 2020, 8:00 AM), <https://www.wired.com/story/ai-license-plate-readers-cheaper-drive-carefully/> [<https://perma.cc/V3CW-7UDQ>] (discussing the high cost of ALPRs before recent innovations); ALPR Working Grp., Major Cities Chiefs Ass’n, Automated License Plate Reader Technology in Law Enforcement: Recommendations and Considerations 1 (2023), <https://majorcitieschiefs.com/wp-content/uploads/2023/02/MCCA-Automated-License-Plate-Reader-Technology-in-Law-Enforcement.pdf> [<https://perma.cc/ND2Z-RT6T>] (discussing early use of ALPR technology in London’s “ring of steel” network, meant to thwart bombing attacks).

⁷² For example, Rekor, a leading ALPR vendor, has developed a software program which “enables accurate automatic license plate and vehicle recognition on nearly any IP, traffic, or security camera.” Rekor Scout, OpenALPR, <https://www.openalpr.com/software/scout> [<https://perma.cc/PU53-PH2Z>] (last visited Sept. 24, 2023).

insurance.⁷³ Some agencies use ALPRs to track “gang-affiliated” license plates, enabling pretextual traffic stops to target those vehicles.⁷⁴ Smaller agencies and jurisdictions geo-fence their communities, creating a log of all incoming and outgoing traffic.⁷⁵ Much of this occurs with little regulation or express democratic authorization.⁷⁶

Beyond ALPRs, dozens of agencies across the country now operate real-time crime centers that bring together public and private surveillance feeds.⁷⁷ As more private devices come online, gathering data about all aspects of our lives, law enforcement increasingly can gain access to that data. Youth are surveilled through social media, and their names added to gang databases.⁷⁸ Artificial intelligence (“AI”)-powered algorithms—like facial recognition and AI analysis of big data—give government insight into our movements and lives that were previously unimaginable.⁷⁹

Like force, one can evaluate this explosion in police use of technology and data under a variety of standards. As the Supreme Court interprets it, the Constitution provides little safeguard against surveillance at present: a variety of doctrines exclude much of this data gathering from

⁷³ See, e.g., Okla. Stat. tit. 47, § 7-606.1 (2017) (authorizing use of ALPRs to enforce state compulsory insurance law); see also Oklahoma Selects Rekor Systems to Mitigate Uninsured Motorists, Rekor (Nov. 9, 2020), <https://www.rekor.ai/post/oklahoma-selects-rekor-systems-to-mitigate-uninsured-motorists> [<https://perma.cc/HC5P-S3E4>] (describing Oklahoma’s Uninsured Vehicle Enforcement Diversion Program).

⁷⁴ Diaz & Levinson-Waldman, *supra* note 70.

⁷⁵ Flock Safety, another ALPR vendor, markets this capability to communities as a “virtual gate.” Flock Safety Secures This South Carolina “Beautiful Peninsula” with a Virtual Gate, Flock Safety (Mar. 10, 2020), <https://www.flocksafety.com/articles/tega-cay-virtual-gate> [<https://perma.cc/9L8D-A4AU>].

⁷⁶ See generally Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. Rev. 1143 (2022) (noting the current lack of regulation regarding many forms of police surveillance and arguing that a regulatory scheme and legislative authorization are constitutionally required before police deploy surveillance, including ALPRs).

⁷⁷ Zac Larkham, *The Quiet Rise of Real-Time Crime Centers*, WIRED (July 10, 2023, 7:00 AM), <https://www.wired.com/story/real-time-crime-centers-rtcc-us-police/> [<https://perma.cc/7VNR-V4HY>]. DOJ’s Bureau of Justice Assistance has become a major proponent of these centers. See *The Mission of a Real Time Crime Center*, U.S. Dep’t of Just., <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/RealTimeCrimeCenterInformation.pdf> [<https://perma.cc/A8ZS-HRD3>] (last visited Sept. 24, 2023).

⁷⁸ Megan Behrman, *When Gangs Go Viral: Using Social Media and Surveillance Cameras to Enhance Gang Databases*, 29 Harv. J.L. & Tech. 315, 324 (2015).

⁷⁹ See Will Knight, *Clearview AI Has New Tools to Identify You in Photos*, WIRED (Oct. 4, 2021, 7:00 AM), <https://www.wired.com/story/clearview-ai-new-tools-identify-you-photos/> [<https://perma.cc/VC3J-SUWM>].

constitutional review altogether.⁸⁰ Federal statutes constrain some forms of surveillance by law enforcement, such as wiretaps and pen registers, but leave other common technologies, such as cell-site simulators and license-plate readers, unregulated.⁸¹ But even beyond legality, one should judge the impact of these developments by the social costs they impose, and on whom they impose them.⁸²

In the case of technology-enhanced surveillance, these costs have proven stark. Before such technologies became widespread, resource constraints encouraged police departments to use privacy-intrusive techniques only where they mattered most, for serious crimes.⁸³ Today, however, these technologies make it so cheap to surveil, they encourage the police to over-enforce low-level offenses, the nonstrategic prosecution of which can cause significant harm to individuals and communities and may contribute little to public safety.⁸⁴ The algorithms

⁸⁰ See, e.g., H. Brian Holland, A Third-Party Doctrine for Digital Metadata, 41 *Cardozo L. Rev.* 1549, 1550 (2020) (“Under a plain reading of the third-party doctrine . . . the substantial majority of [data generated by modern technological and social media devices] receives no Fourth Amendment protection . . .”); Jerry Ratcliffe, Video Surveillance of Public Places 33 (Problem-Oriented Guides for Police: Response Guides Series, Guide No. 4, 2011), <https://cops.usdoj.gov/ric/Publications/cops-p097-pub.pdf> [<https://perma.cc/G39N-F8ZD>] (explaining that “at least in terms of clearly public places, citizens cannot have an expectation of privacy” so “the use of CCTV would appear to be on solid ground constitutionally”); Farhang Heydari, The Private Role in Public Safety, 90 *Geo. Wash. L. Rev.* 696, 759 (2022) [hereinafter Heydari, *The Private Role in Public Safety*] (describing legal gaps around the private data market); Farhang Heydari, Understanding Police Reliance on Private Data 1 (Hoover Working Grp. on Nat’l Sec., Tech. & L., Aegis Series Paper No. 2106, 2021), https://www.hoover.org/sites/default/files/research/docs/heydari_webready.pdf [<https://perma.cc/3DPH-FXUF>] (describing increasing privatization of the criminal legal system, including at the investigation and policing stage).

⁸¹ On regulation of police wiretapping, see generally Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. On regulation of police pen registers, see generally Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848.

⁸² See Responsible Use of Policing Tech: Evaluative Framework, N.Y.U. Sch. of L. Policing Project, <https://www.policingproject.org/tech-framework> [<https://perma.cc/UUC4-5RNX>] (last visited Sept. 24, 2023) (describing potential social benefits and costs to policing technology).

⁸³ See ALPR Working Grp., *supra* note 71, at 1 (discussing London’s early use of ALPRs in its “ring of steel”).

⁸⁴ See *United States v. Jones*, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring) (“[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: ‘limited police resources and community hostility.’” (citation omitted)); see also Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 42 (Nat’l Bureau of Econ. Rsch., Working Paper 28600, 2022),

underlying the technologies also sometimes operate with stark racial and gender disparities.⁸⁵ As a result, they contribute to mistrust in heavily policed communities and beyond them. In a few cases, conflict over these technologies has led communities to ban them—denying police the use of tools that, if properly regulated, might prove beneficial to public safety.⁸⁶ More often, police use of these intrusive tools has remained democratically unregulated and unaccountable.

Compared to the federal government, states and localities have been at the forefront of reining in police use of surveillance technologies and data. New Hampshire has a law that limits ALPR data retention to three minutes.⁸⁷ Santa Cruz has banned the use of predictive policing algorithms barring city council approval.⁸⁸ San Francisco now requires affirmative legislative authorization for any new policing technology.⁸⁹ Over a dozen cities have banned use of facial recognition by police,⁹⁰ while a few states have taken a more regulatory approach. Washington, for example, imposes a variety of testing and bias-mitigation requirements, accountability reports, and a rule for criminal discovery.⁹¹

<https://www.nber.org/papers/w28600> [<https://perma.cc/9ZKN-QK58>] (finding that prosecution for marginal non-violent misdemeanor offenses leads to higher rearrest rates, while non-prosecution decreases the likelihood of further criminal involvement).

⁸⁵ See Joy Buolamwini, *Artificial Intelligence Has a Problem with Gender and Racial Bias. Here's How to Solve It*, TIME (Feb. 7, 2019, 7:00 AM), <https://time.com/5520558/artificial-intelligence-racial-gender-bias/> [<https://perma.cc/KK75-V4D4>] (describing racial and gender disparities in facial analysis and recognition technology, arguing for a “moratorium on using such technology in law enforcement” in light of “the history of racist police brutality”).

⁸⁶ See Kate Conger, Richard Fausset & Serge F. Kovaleski, *San Francisco Bans Facial Recognition Technology*, N.Y. Times (May 14, 2019), <https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html> [<https://perma.cc/TC5B-DMQR>]; Christine Clarridge, *Seattle Grounds Police Drone Program*, Seattle Times, <https://www.seattletimes.com/seattle-news/seattle-grounds-police-drone-program/> [<https://perma.cc/75CJ-35JL>] (Feb. 8, 2013, 8:52 AM).

⁸⁷ N.H. Rev. Stat. Ann. § 261:75-b (2016).

⁸⁸ Santa Cruz, Cal., Mun. Code ch. 9.85 (2023), <https://www.codepublishing.com/CA/SantaCruz/#!/SantaCruz09/SantaCruz0985.html#9.85> [<https://perma.cc/QV8B-U99M>].

⁸⁹ S.F., Cal., Admin. Code § 19B.2 (2020), https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-47320 [<https://perma.cc/MNS7-JHJ2>].

⁹⁰ Nathan Sheard & Adam Schwartz, *The Movement to Ban Government Use of Face Recognition*, Elec. Frontier Found. (May 5, 2022), <https://www.eff.org/deeplinks/2022/05/movement-ban-government-use-face-recognition> [<https://perma.cc/LZ3M-H7UF>] (listing bans).

⁹¹ Wash. Rev. Code Ann. §§ 43.386.040, 43.386.050, 43.386.070 (West 2020). Virginia also has statutory provisions centralizing procurement, requiring selection of National Institute of Standards and Technology (“NIST”)–evaluated algorithms that meet certain minimum benchmarks set by statute, and requiring publicly available policies and disclosure to defendants. See Va. Code Ann. §§ 15.2-1723.2, 23.1-815.1 (2022). The current statutes are

Again, however, these examples represent a minority approach. Most states do not regulate police use of license plate readers, let alone newer technologies like facial recognition.⁹² The unregulated landscape has led to an arms race among technology companies seeking to roll out newer and more intrusive policing technologies.⁹³ The result is that, overall, police use of facial recognition, license plate readers, and other technologies continues to mushroom.⁹⁴

3. *Burdening Racial Minorities*

As noted above, excessive police use of force and surveillance—like many other policing tactics—does not impact all communities equally.

in effect until July 1, 2026. Id.; 2021 Va. Acts 1717–18; 2022 Va. Acts ch. 737 (centralizing procurement, requiring selection of NIST-evaluated algorithm that meets certain minimum benchmarks, and requiring publicly available policies and disclosure to defendants).

⁹² See Barry Friedman, Farhang Heydari, Max Isaacs & Katie Kinsey, *Policing Police Tech: A Soft Law Solution*, 37 *Berkeley Tech. L.J.* 701, 715 (2022) [hereinafter Friedman et al., *Policing Police Tech*].

⁹³ Consider, for example, the evolution of police quadruped robots. Boston Dynamics’s Spot is a leader in this technology, but the company has maintained a ban against weaponization. Ghost Robotics, however, is seeking to compete in this market by arming its robots. James Vincent, *They’re Putting Guns on Robot Dogs Now: It Was Only a Matter of Time*, *Verge* (Oct. 14, 2021, 10:47 AM), <https://www.theverge.com/2021/10/14/22726111/robot-dogs-with-guns-sword-international-ghost-robotics> [<https://perma.cc/5D52-8YNL>].

Companies offering invasive social media analysis tools is another area of competition. See, e.g., Sam Levin, *ACLU Finds Social Media Sites Gave Data to Company Tracking Black Protesters*, *Guardian* (Oct. 11, 2016, 4:07 PM), <https://www.theguardian.com/technology/2016/oct/11/aclu-geofeedia-facebook-twitter-instagram-black-lives-matter> [<https://perma.cc/6Y9V-UKWR>]; US Start-up Geofeedia ‘Allowed Police to Track Protesters,’ *BBC News* (Oct. 12, 2016), <https://www.bbc.com/news/world-us-canada-37627086> [<https://perma.cc/G9Q6-R4UC>]; Conrad Wilson, *Oregon Orders a Stop to Surveillance of Black Lives Matter Supporters*, *NPR* (Nov. 13, 2015, 5:14 AM), <https://www.npr.org/2015/11/13/455862583/oregon-orders-a-stop-to-surveillance-of-black-lives-matter-supporters> [<https://perma.cc/BA7X-J3HN>].

⁹⁴ See Michael Keating, *Police Adopt License Plate Readers at an Accelerating Pace*, *Am. City & Cnty.* (July 25, 2022), <https://www.americacityandcounty.com/2022/07/25/police-adopt-license-plate-readers-at-an-accelerating-pace/> [<https://perma.cc/6NGC-P2QY>]; see also Clearview AI Releases 2.0 Version of Industry Leading Facial Recognition Platform for Law Enforcement, *Clearview AI* (Mar. 25, 2022), <https://www.clearview.ai/press-room/clearview-ai-releases-2.0-version-of-industry-leading-facial-recognition-platform-for-law-enforcement> [<https://perma.cc/X9Y4-NGPZ>] (“Clearview AI 2.0 is currently being rolled out to the company’s existing clients which include more than 3,100 agencies across the U.S. including the FBI, the Dept. of Homeland Security and hundreds of local agencies.”); Andrew Adams, *Neighbors App Usage Grows Among Police, Fire Departments*, *Gov’t Tech.* (June 24, 2022), <https://www.govtech.com/biz/data/neighbors-app-usage-grows-among-police-fire-departments> [<https://perma.cc/WSA5-HEWQ>] (describing growing use of the Ring Neighbors app by over 2,700 law enforcement departments).

Disparate racial impact—the disproportionate burden that policing places on Black, Hispanic, indigenous, and other marginalized communities—is perhaps the greatest problem of the criminal system.⁹⁵ A disparity is a “difference between the likelihood of a given outcome for different groups.”⁹⁶ On its own, a disparity does not necessarily mean there has been unconstitutional discrimination, which requires discriminatory intent.⁹⁷ But here again, the Constitution offers too low a floor. Although discrimination is no doubt a persistent problem in all aspects of policing and the criminal system, we focus on disparities more broadly, including those that reflect or reinforce systemic racial divisions in our society. Such disparities harm communities, undermine the legitimacy of the system, and increase public distrust.

At every stage of the criminal process, outcomes for Black Americans are worse than for whites, but these differences are particularly acute in policing.⁹⁸ Blacks are stopped more frequently—on foot and in their vehicles.⁹⁹ After being stopped, they are more often frisked, searched, and

⁹⁵ See Paul Butler, *Chokehold: Policing Black Men* 5–6 (paperback ed. 2018); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 97 (2010) (noting that Black Americans are “incarcerated at grossly disproportionate rates” in the United States); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. Rev. 650, 690 (2020) (discussing how police surveillance in segregated neighborhoods “exacerbates disadvantage by cycling people through unending rounds of arrest, misdemeanor prosecution, and various modalities of supervision”); Julissa Arce, *It’s Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, TIME (July 21, 2020, 3:35 PM), <https://time.com/5869568/latinos-police-violence/> [<https://perma.cc/FPB5-4UJA>]; Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, Prison Pol’y Initiative (Oct. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/> [<https://perma.cc/P9CN-L44R>].

⁹⁶ Racial & Identity Profiling Advisory Bd., *Annual Report 2018*, at 1, 16 (2018).

⁹⁷ See *infra* Subsection II.B.2. We speak here of constitutional requirements. Statutory protections may reach disparate impacts. This is the role of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, national origin, sex, and religion by state and local law enforcement agencies that receive financial assistance from DOJ. See 42 U.S.C. § 2000d; 34 U.S.C. § 10228.

⁹⁸ See Nat’l Acads. of Scis., Eng’g & Med., *Reducing Racial Inequality in Crime and Justice: Science, Practice, and Policy* 1 (Bruce Western, Khalil Gibran Muhammad, Yamrot Negussie & Emily Backes eds., 2023) [hereinafter *Nat’l Acads. of Scis., Eng’g & Med., Reducing Racial Inequality in Crime and Justice*], <https://nap.nationalacademies.org/catalog/26705/reducing-racial-inequality-in-crime-and-justice-science-practice-and> [<https://perma.cc/MJ2C-LUUG>] (“A large research literature has documented substantial racial and ethnic disparities at each stage of the criminal justice process.”).

⁹⁹ Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 *Nature Hum. Behav.* 736, 737 (2020), <https://www.nature.com/articles/s41562-020-0858-1.pdf> [<https://perma.cc/Q8KC-P8RY>]; Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 *U. Chi. L. Rev.* 809, 854–59 (2011).

subjected to uses of force,¹⁰⁰ though evidence of criminal activity is found at a lower rate.¹⁰¹ They are more often arrested for the same offenses.¹⁰² Black political movements frequently are targeted.¹⁰³ And at the same time, Black Americans are far more often the victims of crime—violent and nonviolent—and cases in which Blacks are the victims are solved less often.¹⁰⁴ Many of these same realities apply to Latinos, immigrant communities, and indigenous peoples.¹⁰⁵

¹⁰⁰ Weston J. Morrow, Michael D. White & Henry F. Fradella, *After the Stop: Exploring the Racial/Ethnic Disparities in Police Use of Force during Terry Stops*, 20 *Police Q.* 367, 367 (2017) (“However, hierarchical multinomial logistic regression models show that Black and Hispanic citizens were significantly more likely to experience non-weapon force than White citizens, while controlling for other relevant situational and precinct-level variables. The findings suggest that minority citizens may be exposed to a racial or ethnic ‘double jeopardy,’ whereby they are subjected to both unconstitutional stops and disparate rates of force during those stops.”); see Pierson et al., *supra* note 99, at 738–39.

¹⁰¹ Pierson et al., *supra* note 99, at 739.

¹⁰² See, e.g., Cydney Schleiden, Kristy L. Soloski, Kaitlyn Milstead & Abby Rhynehart, *Racial Disparities in Arrests: A Race Specific Model Explaining Arrest Rates Across Black and White Young Adults*, 37 *Child & Adolescent Soc. Work J.* 1, 1 (2020).

¹⁰³ See, e.g., Matthew D. Lassiter, *Policing & Soc. Just. HistoryLab, Police Violence and Black Power, 1968–1970, Detroit Under Fire: Police Violence, Crime Politics, and the Struggle for Racial Justice in the Civil Rights Era* (2021), <https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/page/1968-70> [<https://perma.cc/TB9Y-BELT>] (describing violent police response to the Civil Rights movement); Associated Press, *Feds Deliberately Targeted BLM Protestors to Disrupt the Movement, a Report Says*, NPR (Aug. 20, 2021, 9:10 AM), <https://www.npr.org/2021/08/20/1029625793/black-lives-matter-protesters-targeted> [<https://perma.cc/CS22-VNAE>] (describing federal law enforcement’s targeting of Black Lives Matter).

¹⁰⁴ See *Black Murders Accounted for All of America’s Clearance Decline*, Murder Accountability Project (Feb. 18, 2019), <https://www.murderdata.org/2019/02/black-murders-account-for-all-of.html> [<https://perma.cc/8LF4-PDUR>] (describing national decline in solving murders with Black victims); see also Chip Mitchell, *Chicago’s Dismal Murder Solve Rate Even Worse When Victims Are Black*, WBEZ Chicago (Oct. 8, 2019, 10:24 PM), <https://www.wbez.org/stories/chicagos-dismal-murder-solve-rate-even-worse-when-victims-are-african-american/100a4f2f-e683-47f2-b3c5-db9e7a07d63e> [<https://perma.cc/4DCU-C99R>] (describing Chicago’s high rate of unsolved murders with Black victims); Lauren A. Magee, J. Dennis Fortenberry, Wanzhu Tu & Sarah E. Wiehe, *Neighborhood Variation in Unsolved Homicides: A Retrospective Cohort Study in Indianapolis, Indiana, 2007–2017*, 7 *Inj. Epidemiology* 1, 1–2, 5 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7706017/pdf/40621_2020_Article_287.pdf [<https://perma.cc/5F64-ACFV>] (describing racial and economic disparities among victims of unsolved crimes).

¹⁰⁵ See, e.g., Diala Shamas & Nermeen Aratsu, *Mapping Muslims: NYPD Spying and Its Impact on American Muslims* 4 (Ramzi Kassem, Ken Kimerling & Amna Akbar eds., 2013), <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/clear/Mapping-Muslims.pdf> [<https://perma.cc/37J2-R5PL>] (last visited Sept. 24, 2023); *Hassan v. City of New York*, Ctr. for Const. Rts. (Jan. 25, 2013), <https://ccrjustice.org/home/what-we-do/our-cases/hassan-v-city-new-york> [<https://perma.cc/ZES6-83W9>] (describing

The same communities that suffer disproportionate harms of policing also suffer the brunt of crime and violence. Black, Latino, and native communities face the greatest homicide risk and have seen that risk grow since 2010.¹⁰⁶ During the pandemic, the murder rate of Black women and girls rose at a faster rate than other groups (a fifty-one percent increase), while the proportion of those killings left unsolved climbed faster than killings in other demographic groups (an eighty-nine percent increase).¹⁰⁷

States have sought to address racial disparities in policing in a variety of ways. Some have focused on improving data collection requirements, so that disparities can be better identified.¹⁰⁸ Over two dozen states now mandate some form of bias-reduction training.¹⁰⁹ Other measures seek to reduce police enforcement generally—such as by limiting low-level traffic enforcement—which should disproportionately benefit Black and brown communities that receive the brunt of the enforcement.¹¹⁰

federal lawsuit against NYPD surveillance targeting Muslims); *Tanvir v. Tanzin* (formerly *Tanvir v. Holder* and *Tanvir v. Lynch*), Ctr. for Const. Rts. (Apr. 22, 2014), <https://ccrjustice.org/tanvir-v-tanzin> [<https://perma.cc/BJB2-ZSJ5>] (describing litigation challenging the use of Muslim No-Fly Lists); Missing and Murdered Indigenous People Crisis: Violence Against Native Americans and Alaska Natives Far Exceed National Averages, U.S. Dep’t of Interior: Indian Affs., <https://www.bia.gov/service/mmu/missing-and-murdered-indigenous-people-crisis> [<https://perma.cc/4GGH-E2Q2>] (last visited Oct. 31, 2023); Pierson et al., *supra* note 99, at 739 (discussing disparities in stops and searches of Hispanic drivers).

¹⁰⁶ To Reduce Racial Inequality in the Criminal Justice System, Government Should Explore Ways to Reduce Police Stops, Detention, and Long Sentences, Says New Report, Nat’l Acad. of Scis., Eng’g & Med. (Nov. 15, 2022), <https://www.nationalacademies.org/news/2022/11/to-reduce-racial-inequality-in-the-criminal-justice-system-government-should-explore-ways-to-reduce-police-stops-detention-and-long-sentences-says-new-report> [<https://perma.cc/3L53-XG7T>].

¹⁰⁷ Zusha Elinson & Dan Frosch, Murders of Black Women Rose During the Pandemic. The Solving of Their Cases Fell., *Wall St. J.* (Dec. 31, 2022, 9:00 AM), <https://www.wsj.com/articles/black-women-homicides-clearance-rates-murders-11672431377> [<https://perma.cc/RM9A-Y2KP>].

¹⁰⁸ Recent use of force data collection statutes include H.B. 2168, 55th Leg. Sess., 1st Reg. Sess., 2021 Ariz. Sess. Laws 1759–61, and S.B. 5259, 67th Leg., Reg. Sess., 2021 Wash. Sess. Laws 2749–54. For information on stop data collection laws, see Traffic Stop Data, Nat’l Conf. of State Legislatures [hereinafter Traffic Stop Data], <https://www.ncsl.org/civil-and-criminal-justice/traffic-stop-data> [<https://perma.cc/WE9F-7YXJ>] (last updated Jan. 12, 2021).

¹⁰⁹ Nat’l Conf. of State Legislatures, Racial and Ethnic Disparities in the Justice System 4 (2022), https://documents.ncsl.org/wwwncsl/Criminal-Justice/Racial-and-Ethnic-Disparities-in-the-Justice-System_v03.pdf [<https://perma.cc/CD5X-QQC5>].

¹¹⁰ See, e.g., Success Story: Many Policing “Pretexts” Eliminated in Virginia, Just. Forward Va., <https://justiceforwardva.com/pretextual-policing> [<https://perma.cc/JY9N-MNPA>] (last visited Sept. 24, 2023) (describing a 2020 law that “changes many minor traffic and pedestrian violations from primary offenses into secondary offenses” and “prohibits stops based on the odor of marijuana”); Katie Krzaczek, 8 Common Traffic Violations No Longer Warrant a

Although these are promising steps, they hardly represent a nationwide movement. In 2022, although the number of police killings increased, the number of killings officially reported in nationwide data decreased.¹¹¹ And racial disparities in those killings persist.¹¹² Improved data collection would refine our understanding of how racial disparities arise and persist across every aspect of policing, but the majority of states still do not require the collection data on police stops and uses of force, let alone topics like surveillance or warrant enforcement.¹¹³

B. The Role of Federal Intervention

Nearly as familiar as the harms of policing is the claim that policing policy is (or should be) a matter for states and localities. This localism has deep historical roots.¹¹⁴ Arguments in favor of local control over policing mirror federalism arguments generally.¹¹⁵ In theory, local control means

Police Stop in Philly, Phila. Inquirer (Mar. 3, 2022), <https://www.inquirer.com/news/philadelphia/philadelphia-police-wont-stop-drivers-minor-offenses-20220303.html> [<https://perma.cc/QM7A-RJD7>] (describing Philadelphia’s “Driving Equality Law,” which “ban[s] police traffic stops for low-level offenses such as broken taillights and outdated registrations”).

¹¹¹ Andrew Ba Tran, Marisa Iati & Claire Healy, As Fatal Police Shootings Increase, More Go Unreported, Phila. Trib. (Dec. 7, 2022), https://www.phillytrib.com/news/across_america/as-fatal-police-shootings-increase-more-go-unreported/article_484c0732-4993-5323-b1f8-1c2e3f9a0d4f.html [<https://perma.cc/272T-UDRX>].

¹¹² Robert Farley, Hannity’s Dubious Claim About Studies Showing ‘No Systemic Racism in Policing,’ FactCheck.org (Feb. 3, 2023), <https://www.factcheck.org/2023/02/hannitys-dubious-claim-about-studies-showing-no-systemic-racism-in-policing/> [<https://perma.cc/VS4B-XJ9P>].

¹¹³ Traffic Stop Data, *supra* note 108; Use of Force Data and Transparency Database, Nat’l Conf. of State Legislatures, <https://www.ncsl.org/civil-and-criminal-justice/use-of-force-data-and-transparency-database> [<https://perma.cc/6ECV-ZX6Y>] (last updated Jan. 12, 2021); It’s Time to Start Collecting Stop Data: A Case for Comprehensive Statewide Legislation, Policing Project (Sept. 30, 2019), <https://www.policingproject.org/news-main/2019/9/27/its-time-to-start-collecting-stop-data-a-case-for-comprehensive-statewide-legislation> [<https://perma.cc/6J3P-62CW>].

¹¹⁴ Trevor George Gardner, Immigrant Sanctuary as the “Old Normal”: A Brief History of Police Federalism, 119 Colum. L. Rev. 1, 5–6 (2019) (“[T]he federal government, and state and local police departments, operat[e] with near absolute independence. . . . Prudent or not, the American public has traditionally rejected the prospect of the local beat cop serving as an agent of the federal government.”).

¹¹⁵ See Barry Friedman, Valuing Federalism, 82 Minn. L. Rev. 317, 363 (1997); see also Richard Briffault, “What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303, 1312–17 (1994) (suggesting small size and multiplicity of local governments allows them to advance values of federalism more effectively than states).

closer democratic direction, greater recognition of local diversity, and more opportunity for policy experimentation that will benefit the population in the long run.¹¹⁶ Many reformists have embraced policing localism as a way to become more responsive to local safety needs and mitigate some of the ills of mass incarceration.¹¹⁷

It is equally apparent, however, that the federal government has long been deeply involved in local policing. For the most part, it has tended to focus on promoting specific types of law enforcement, rather than improving policing. For example, the federal government has used various levers to enlist state and local police in its War on Drugs, to combat terrorism, for immigration enforcement, and other enforcement priorities.¹¹⁸ But what the federal government has not done is send a

¹¹⁶ See William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, 15 *Crime & Just.* 231, 232 (1992) (noting that “the modern movement toward community-based, problem-oriented policing,” which acknowledges diverse needs and effective solutions of each community, is facilitated by state and local control).

¹¹⁷ William J. Stuntz, *Unequal Justice*, 121 *Harv. L. Rev.* 1969, 1974 (2008) (“Make criminal justice more locally democratic, and justice will be both more moderate and more egalitarian.”); see also David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 *Geo. L.J.* 1059, 1066 (1999) (explaining that “new discretion scholars argue that discretion in policing is beneficial . . . because it allows for more closely tailored responses to local crime problems”); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 *Geo. L.J.* 1153, 1161–63 (1998) (encouraging a “new community policing” that is racially conscious); William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 *Harv. J.L. & Pub. Pol’y* 665, 671–73 (2002) (observing local police behavior is constrained by local political accountability and by budgetary limitations); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 *Yale L.J.* 2236, 2243–44 (2014) (calling for “enhancing localism—through greater accountability, participation, and local voice in both criminal lawmaking and law enforcement” (emphasis omitted)); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 *Nw. U. L. Rev.* 1693, 1696 (2017) (proposing policy changes based on “localized administration of criminal justice”).

¹¹⁸ On the federal government’s use of state and local police for drug interdiction, see, e.g., Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* 311–12 (2016) (“Reagan’s Military Cooperation with Civilian Law Enforcement Agencies Act . . . permitted defense agencies to provide local police forces access to weapons, intelligence, research, and military bases to improve drug interdiction efforts.”). On combatting terrorism, see, e.g., Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *Crime & Just.* 377, 380 (2006) (remarking that “federal counterterrorism efforts threaten to place demands on local police departments that are extraneous to and even inconsistent with their crime-fighting mission”). On immigration enforcement, see, e.g., Gardner, *supra* note 114, at 67–73 (discussing how the federal government changed its immigration enforcement system “from an elective partnership system to an automated system that managed to encompass all of subfederal law enforcement”).

coherent national message that prioritizes policing strategies that are fair, harm minimizing, accountable, and effective.¹¹⁹ For brief moments, usually following salient police killings, the federal government has galvanized attention on things like the unnecessary or excessive use of force. But coherent, sustained federal action has never followed suit.

Although we have no doubt that state and local attention remain essential,¹²⁰ below we outline four categories of actions that the federal government can take to more effectively set and promote an agenda focused on improving local policing. These categories are not exhaustive, but they demonstrate the clearest need for federal action.

1. Identifying and Enforcing Minimum Standards

A state-by-state approach to improving policing will consistently come up short in the many places where police reform is a political nonstarter. As a result, police operate under vastly different rules from one jurisdiction to the next. Local experimentation has its virtues, but setting and enforcing a uniform national floor on civil rights is quintessentially the role of federal authorities.

At present, the national floor primarily is a constitutional one. But relying on constitutional minimums is inadequate. First, the floor often is too low.¹²¹ For example, scholars and policing officials alike recognize that the Supreme Court's instruction that an officer's use of force be "reasonable" provides too little guidance and inadequately constrains police.¹²² Second, the Constitution barely touches many key issues in

¹¹⁹ See *infra* Part III ("[B]ecause presidential administrations implement federal grant and equipment programs, enforce federal law against police officers and police departments, and run federal law enforcement agencies that collaborate with local law enforcement, they cannot help but communicate to local police a national message about how policing should operate. . . . [To date, however,] they have failed to articulate a clear national commitment to policing that is fair, harm-efficient, and accountable as well as effective.").

¹²⁰ See Samuel Walker, *Police Reform Hasn't Failed, 'It's Alive and Growing,'* *Crime Rep.* (July 19, 2022), <https://thecrimereport.org/2022/07/19/police-reform-hasnt-failed-its-alive-and-growing/> [<https://perma.cc/G7AD-34J4>] (noting the continued vitality of the state and local police reform).

¹²¹ Take, for example, police interrogations. Although the constitutional guarantee against self-incrimination and due process provides some protection, the Constitution does not require that interrogation be videotaped—a widely understood best practice and safeguard against misconduct and wrongful convictions. *Principles of the L. of Policing* § 11.02 (Am. L. Inst., Combined Revised Tentative Drafts 2023).

¹²² See *infra* Subsection II.A.1; see also *Principles of the L. of Policing* §§ 7.03, 7.05, 7.06 (discussing best practices regarding use of force, including minimization, de-escalation, proportionality, and warnings); Written Directive from Gabriel Rodriguez, Chief of Police,

policing.¹²³ Take, for example, officer training. Officers require training on many aspects of their work, including training on interviewing and supporting victims of crime, interacting with diverse communities, and so forth.¹²⁴ It is hard to imagine courts constitutionalizing any of this, but that does not make sufficient training any less essential to effective, fair, and equitable policing.¹²⁵

Without national standards (beyond constitutional minimums), the country operates with a patchwork of sub-federal regulation that is not only substantively inadequate, but also creates additional problems. In other fields, national regulation is seen as necessary to avoid spillover effects—costs or consequences of an activity that impact others, without being reflected in the costs to the actor. National regulation of pollution is a prime example.¹²⁶ Although rarely spoken of in these terms, policing can also produce such spillover effects. When police engage in misconduct—excessive uses of force, for example—individuals across a city or even the state feel the effects.¹²⁷ Because trust and views of police legitimacy are central to whether people cooperate with police investigations,¹²⁸ the effects from police misconduct in one jurisdiction

Camden Cnty. Police Dep't, to All Bureaus—Sworn & Civilian, Camden Cnty. Police Dep't (Dec. 31, 2021) [hereinafter Camden Cnty. Police Dep't, Use of Force Directive], <https://camdencountypd.org/wp-content/uploads/2021/12/USE-OF-FORCE-123121.pdf> [<https://perma.cc/3NBM-2Y3R>].

¹²³ Harmon, *The Problem of Policing*, supra note 42, at 776–81 (discussing the limits of using constitutional rights in regulating the police).

¹²⁴ See, e.g., *Principles of the L. of Policing* § 13.03; id. § 7.04; id. § 7.03.

¹²⁵ Consent decrees entered into following DOJ pattern-and-practice investigations routinely address officer training. See C.R. Div., *Police Reform Work: 1994–Present*, supra note 29, at 30.

¹²⁶ See, e.g., Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 *U. Pa. L. Rev.* 2341, 2342–43 (1996) (examining environmental regulation as a solution for interstate externalities related to pollution).

¹²⁷ See, e.g., Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 *Am. Socio. Rev.* 857, 870 (2016), <http://www.asanet.org/wp-content/uploads/attach/journals/oct16asrfeature.pdf> [<https://perma.cc/3LZZ-VTUD>] (finding “publicized cases of police violence against unarmed black men have a clear and significant impact on citizen crime reporting”); Jacob Bor, Atheendar S. Venkataramani, David R. Williams & Alexander C. Tsai, *Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study*, 392 *Lancet* 302, 306 (2018), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)31130-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31130-9/fulltext) [<https://perma.cc/E2RM-K2EM>] (finding mental health impacts resulting from police killing of Black individuals across entire state).

¹²⁸ See, e.g., Carla J. Barrett & Megan Welsh, *Petty Crimes and Harassment: How Community Residents Understand Low-Level Enforcement in Three High-Crime Neighborhoods in New York City*, 41 *Qualitative Socio.* 173, 178, 193–94 (2018) (“For young

can end up impacting public safety in other places.¹²⁹ By setting and enforcing a national floor on key aspects of policing that minimize misconduct, the federal government can mitigate these externalities.¹³⁰

Of course, one cannot guarantee the national standard-setting will avoid most of the harms of policing. (And given the history of federal policing policy, that seems unlikely.) But leaving all standard-setting to the states means many will choose to do nothing. National standards can raise the floor in many places, while allowing others to continue to innovate.

2. Developing Best Practices

Closely related to setting minimum standards is the development of best practices. There are issues on which setting and enforcing minimum standards is the surest way to promote effective, fair, harm-minimizing, lawful, and accountable policing. Most often these are issues on which improved policing is unlikely to be achieved in any other way than by meeting certain definite requirements.¹³¹ On other issues, however, particularly ones in which a single standard is unlikely to capture the

people in New York City, stop, question, and frisk has been associated with an erosion of trust in and willingness to report crime to the police.”); Chris L. Gibson, Samuel Walker, Wesley G. Jennings & J. Mitchell Miller, *The Impact of Traffic Stops on Calling the Police for Help*, 21 *Crim. Just. Pol’y Rev.* 139, 147 (2010) (finding that “citizens experiencing one or more than one motor vehicle traffic stop in the past 12 months were less likely to ask for assistance/information from the police than those not experiencing a traffic stop . . . or more than one stop”); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *Fordham L. Rev.* 2257, 2355 (2002) (finding that racial profiling “arguably [has] the effect of reducing [minority] groups’ social status and increasing their sense of isolation from the broader American political community”).

¹²⁹ Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, Exec. Order No. 14,074, 87 *Fed. Reg.* 32945, 32945–46 (May 25, 2022) (“Strengthening community trust is more critical now than ever, as a community’s cooperation with the police to report crimes and assist investigations is essential for deterring violence and holding perpetrators accountable. Reinforcing the partnership between law enforcement and communities is imperative for combating crime and achieving lasting public safety.”).

¹³⁰ Disparate regulation can also create a race to the bottom, in which market forces foster intrusive policing practices in areas such as surveillance. See, e.g., Friedman et al., *Policing Police Tech*, *supra* note 92, at 705–06. The result is that private companies build suites of intrusive technologies and market them to police, who can put them into effect with little or no guardrails. A state-by-state approach will not address these market forces; only federal regulation can do that.

¹³¹ See generally *Principles of the L. of Policing* (Am. L. Inst., Combined Revised Tentative Drafts 2023) (detailing principles and best practices for policing).

range of desirable police conduct, the federal government may be better suited to develop best practices for states and localities to follow.

Consider, for example, police use of specialized criminal interdiction units. These units are frequent users of pretextual traffic stops, users of force, and often operate with stark racial disparities.¹³² But they are also seen as key assets in stemming violent crime. Individual jurisdictions lack the resources or the national perspectives to develop best practices regarding the use of these units. The research arm of DOJ—the National Institute of Justice (“NIJ”)—can foster research and evaluate social science across the nation.¹³³ It is cheaper (and less politically risky) for states and localities to copy efforts from other jurisdictions, including the federal government.¹³⁴ For that reason, DOJ recently launched an effort regarding specialized interdiction units.¹³⁵ That it took Tyre Nichols’s murder to initiate this effort is difficult to understand.

¹³² Mike Baker, *Special Memphis Police Unit Was Supposed to Stop Violence*, N.Y. Times (Jan. 27, 2023), <https://www.nytimes.com/2023/01/27/us/scorpion-unit-tyre-nichols-death.html> [<https://perma.cc/NN6G-FN5D>] (“Specialized crime-fighting teams have long been the subject of scrutiny in cities around the country because they often target people of color and utilize tactics such as pretext stops, in which officers may stop someone for a minor violation and then use the opportunity to look for more serious crimes.”); Kevin Rector & Cindy Chang, *Racial Disparities in LAPD Stops Fueled by Failed Crime-Fighting Strategy, Audit Finds*, L.A. Times (Oct. 24, 2020, 10:00 AM), <https://www.latimes.com/california/story/2020-10-24/racial-disparities-in-lapd-stops-fueled-by-failed-crime-fighting-strategy-audit-finds> [<https://perma.cc/TFM8-KKRH>] (“After The Times reported on the racial disparities in 2019, the LAPD drastically cut back on vehicle stops, eventually admitting the strategy had been ineffective and reassigning elite Metropolitan Division crime suppression officers to other duties.”).

¹³³ See generally *About the National Institute of Justice*, Nat’l Inst. of Just. (May 2, 2022), <https://nij.ojp.gov/about-nij> [<https://perma.cc/PU54-8LET>] (discussing the goals and methods of DOJ’s research arm).

¹³⁴ See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593, 610–11 (1980); see also Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 Emory L.J. 1333, 1361 (2009); Doni Gewirtzman, *Complex Experimental Federalism*, 63 Buff. L. Rev. 241, 265–66 (2015).

¹³⁵ Kerry Breen, *Department of Justice Will Review Specialized Police Units in the Wake of Tyre Nichols Beating*, CBS News (Mar. 8, 2023, 11:12 AM), <https://www.cbsnews.com/news/department-of-justice-review-memphis-police-policies-specialized-units-nationwide-in-the-wake-of-tyre-nichols-beating/> [<https://perma.cc/QA6C-223S>] (“The Department of Justice announced Wednesday that it will review specialized police units around the country after five officers from Memphis Police Department’s now-disbanded SCORPION unit were charged with second-degree murder and aggravated assault in the beating and subsequent death of Tyre Nichols. . . . The reviews will be conducted by the DOJ’s Office of Community Oriented Policing Services.”).

Still, federal investment in this area is lacking. As we discuss in more detail in Part III, there is much more the executive could do to promote best practices through federal programs, via grants, and within federal law enforcement.

3. *Collecting Data*

A third area in which the federal government should play a key role relates to data collection. As noted above, states collect data of varying quality on police stops, uses of force, and other enforcement actions—with some collecting none. Even if all states implemented their own data practices, differing standards would make cross-state comparisons impossible. The federal government can help overcome these coordination costs by setting uniform data collection standards for the nation.¹³⁶

National data standards and collection would produce myriad benefits: They would provide a fuller understanding of policing practices and trends over time that could inform national policymaking. Data standardization would allow for jurisdiction-to-jurisdiction comparison. And improving local data quality would help jurisdictions themselves that are largely in the dark as to how their own agencies and departments are doing.

The federal government has shown that it is capable of widespread, national data collection, but as is all too common, its primary focus has been on enforcement. Through the FBI's National Crime Information Center ("NCIC"), the Integrated Automated Fingerprint Identification System, and other databases, the federal government collects and shares vast amounts of information that law enforcement across the country use in their investigations.¹³⁷ To understand how deeply police rely on these

¹³⁶ Of course, as with setting national civil rights policies, federal data requirements need only be a floor. States would be free to collect more robust data to meet their particular needs. See, e.g., Racial and Identity Profiling Act (RIPA), State of Cal: Comm'n on Peace Officer Standards & Training, <https://post.ca.gov/Racial-and-Identity-Profiling-Act> [<https://perma.cc/76U2-YMDZ>] (last visited Sept. 24, 2023) (discussing stop-data reporting requirement imposed by California's Racial and Identity Profiling Act on California law enforcement agencies).

¹³⁷ See Fahey, *supra* note 39, at 1009, 1012; Crim. Just. Info. Servs. Div., U.S. Dep't of Just.: Fed. Bureau of Investigation, The Integrated Automatic Fingerprint Identification System, https://ucr.fbi.gov/fingerprints_biometrics/biometric-center-of-excellence/files/iafis_0808_one-pager825 [<https://perma.cc/NM6B-QUJF>] (last visited Nov. 5, 2023).

federal tools, consider that in 2017, NCIC alone handled about 14 million transactions a day.¹³⁸

The federal government has fallen notably and unconscionably short in insisting on the collection of data that might prove relevant to *reforming* policing. This includes data collection on police uses of force, traffic stops, warrant executions, and uses of surveillance technologies.¹³⁹ Even when Congress has mandated that DOJ collect this information, as with crime rates and deaths in custody, DOJ's performance has been abysmal.¹⁴⁰ Setting national data standards and collecting data nationally is a role that only federal authorities can fill, and one is left to wonder how the enforcement complex manages to do such a terrific job at it, while the reform apparatus gets almost nowhere.

4. Distributing Resources Nationwide

Finally, the federal government has a unique role to play in bringing resources to bear to improve policing. The role of federal resources are key in two ways:

First, the federal government's expertise and resources far surpass what states and localities could plausibly bring to bear. On certain issues, these

¹³⁸ Fed. Bureau of Investigation, *NCIC Turns 50: Centralized Database Continues to Prove Its Value in Fighting Crime* (Jan. 27, 2017), <https://www.fbi.gov/news/stories/ncic-turns-50> [<https://perma.cc/QC8S-YNC5>] (“Currently, the database is organized into a total of 21 files and contains 12 million active records entered by local, state, and federal law enforcement agencies—and it handles an average of 14 million transactions a day.”).

¹³⁹ In fact, the federal government could go beyond enforcement data—many have called for a mandatory national decertification index to address the rehiring of problematic officers. See *Principles of the L. of Policing* § 13 (Am. L. Inst., Combined Revised Tentative Drafts 2023) (discussing best practices regarding officer recruitment, hiring, promotion, supervision, and discipline). Without uniform nationwide standards in record keeping, policing agencies will never be able to fully vet future hires. Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 *Yale L.J.* 1676, 1759 (2020). A national decertification database would mitigate this problem. Even better might be a nationwide certification process.

¹⁴⁰ Mike D’Onofrio, Monica Eng, Linh Ta & Adam Tamburin, *Sweeping Reporting Failures May Compromise the FBI’s 2021 Crime Data*, *Axios* (June 14, 2022), <https://www.axios.com/2022/06/14/fbi-crime-data-2021-police-reporting-failures> [<https://perma.cc/3Q8S-LYTY>] (“Nearly 40% of law enforcement agencies nationwide, including the New York City Police Department and Los Angeles Police Department, failed to report their 2021 crime data to the FBI, according to data provided to Axios Local from a partnership with The Marshall Project.”); U.S. Gov’t Accountability Off., *Law Enforcement: DOJ Can Improve Publication of Use of Force Data and Oversight of Excessive Force Allegations* (2021) [hereinafter *U.S. Gov’t Accountability Off., Law Enforcement: DOJ Can Improve*], <https://www.gao.gov/products/gao-22-104456> [<https://perma.cc/BHN2-CS28>] (faulting DOJ and FBI for failing to take basic steps to collect use of force data).

resources make all the difference. Take the growing use of AI algorithms by police. Understanding that these algorithms can reflect and exacerbate systemic biases, evaluating algorithmic accuracy and auditing police use have become central to pushback against these new technologies.¹⁴¹ But state agencies do not have the capacity to conduct such audits of complex AI algorithms. The U.S. Department of Commerce’s National Institute of Standards and Technology, however, does have the resources. And it has been using its expertise and assets to evaluate facial recognition algorithms for years.¹⁴²

Second, the federal government can distribute its resources in ways that promote change more evenly throughout the country. It is no secret that certain jurisdictions have not only the will, but the funding to implement changes, while others do not.¹⁴³ The federal government can use its resources to fill gaps where there is the will but not the funding. But it is more than that. Federal grants can provide a great incentive to change, even where change is not particularly welcome. Federal funding for body cameras is one example. By focusing resources in particular jurisdictions, the federal government not only is able to further national priorities, but can do so in a way that smooths the distribution of resources and promotes just and equitable policing more uniformly.

* * *

State and local efforts have been and will continue to be crucial to addressing the myriad problems of policing, but there are certain types of actions that only can be motivated successfully or implemented uniformly at the federal level.

II. THE BREADTH OF CONGRESSIONAL POWER

This Part takes up what Congress should—and can—do in order to address the paradigmatic policing problems described in Part I. This Part

¹⁴¹ See, e.g., Va. Code Ann. §§ 15.2-1723.2, 23.1-815.1, 52-4.5 (2022). The current statutes are in effect until July 1, 2026, *id.*, at which point they will be replaced. 2021 Va. Acts 1717–18; 2022 Va. Acts ch. 737 (requiring police to use facial recognition algorithms that meet certain accuracy thresholds and requiring agencies to publish data on use).

¹⁴² See Face Recognition Vendor Test (FRVT), Nat’l Inst. Standards & Tech., <https://www.nist.gov/programs-projects/face-recognition-vendor-test-frvt> [<https://perma.cc/ZH6G-4V2P>] (last visited Sept. 24, 2023).

¹⁴³ State officials have a multitude of priorities and often are “hamstrung by tiny budgets, short legislative sessions, and low levels of expertise.” Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 *Colum. L. Rev.* 2187, 2190 (2022).

demonstrates that Congress has ample power to act to improve policing, including to reduce the significant harms it presently imposes. This is true even in the face of Supreme Court doctrine that is protective of local prerogatives, and perhaps in no area more so than law enforcement. The first three Sections below move through each of our three paradigmatic areas for reform. Each Section begins with a discussion of what Congress should do, followed by an explanation of why it has the power to do so even in the face of problematic constitutional doctrine. The focus of this analysis is on Congress's *regulatory* powers, under Section 5 of the Fourteenth Amendment and the Commerce Clause.¹⁴⁴ Rather than rely on its direct regulatory powers, Congress has tended instead to turn to its authority under the Spending Clause to try to “encourage,” rather than mandate, change.¹⁴⁵ We conclude this Part with a fourth Section explaining how, even under its spending power, Congress could do better than it has done so far to reform problematic policing.

In promoting congressional regulation of policing, and particularly in ways that might be reviewed by the Supreme Court, we are not without our concerns.¹⁴⁶ Congress could adopt poor regulations, either because it is difficult to get reforms right or out of an intent to favor more intrusive policing over police reform. For instance, the 1994 Crime Bill has been credited with promoting mass incarceration.¹⁴⁷ In passing such

¹⁴⁴ U.S. Const. art. I, § 8, cl. 3; id. amend. XIV, § 5.

¹⁴⁵ Id. art. I, § 8, cl. 1; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may “encourage” state actions indirectly under its spending power by conditioning federal funds on those actions).

¹⁴⁶ See Christopher Slobogin, *Virtual Searches: Regulating the Covert World of Technological Policing* 164, 166–68 (2022) (discussing the ways in which policing is exempted from administrative law requirements); Welsh S. White, *Improving Constitutional Criminal Procedure*, 93 *Mich. L. Rev.* 1667, 1681–82 (1995) (responding to Craig Bradley’s suggestion for national level policing reforms, pointing out that when it came to identification evidence, Congress went in exactly the opposite direction, ensuring such testimony never was excluded). White was referring to the Omnibus Crime Control and Safe Street Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, which famously also purported to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966). But see *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (invalidating the purported overruling of *Miranda*).

¹⁴⁷ See Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), <https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis> [<https://perma.cc/JAA6-WQZX>] (“The federal crime bill did not trigger mass incarceration, but it certainly encouraged mass incarceration to grow even further.”); Ed Chung, Betsy Pearl & Lea Hunter, *The 1994 Crime Bill Continues to Undercut Justice Reform—Here’s How to Stop It*, Ctr. for Am. Progress, <https://www.americanprogress.org/article/1994-crime-bill-continues-undercut-justice-reform-heres-stop/> [<https://perma.cc/SFG3-NXMM>] (May 29, 2019) (“Many consider the [1994] crime bill to be one of the cornerstone

legislation, Congress might even preempt state efforts. Or the Supreme Court might overturn even good legislation, out of a solicitude for federalism. Still, we think there is ample reason to proceed. The present situation with policing is sufficiently awry that one has to hope for the better. As we said quite clearly in Part I, what exactly is the alternative? If policing's ills are going to be addressed on a national basis, congressional action is likely the only answer. It would be very odd if Congress were to adopt legislation to preempt state and local lawmaking that rose above the congressional baseline—*that* would be the very antithesis of claims about federalism. And it would be unusual for the Supreme Court to buck a sitting Congress that managed to come together in the ways we suggest.¹⁴⁸

The bigger risk is that Congress neither has nor can muster the political will to do any of this. That is the point of Part III, to show what a willing Executive could do without Congress. But it seems worth pointing out what so obviously needs to be done, and to make the case that doing so is perfectly consistent with the Constitution and constitutional law.

statutes that accelerated mass incarceration.”); Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, Brennan Ctr. for Just. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice> [<https://perma.cc/SX8U-WF3J>] (“The 1994 crime bill has a complicated legacy, dominated by funding incentives blamed for driving mass incarceration.”).

¹⁴⁸ See generally Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009) (arguing that the Supreme Court tends to stay in the mainstream of public opinion); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud. Am. Pol. Dev.* 35 (1993) (arguing the Supreme Court tends to enforce the will of the governing coalition). It is true that there is at present an emboldened Court, as many have indicated. See Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. Times (July 1, 2022), <https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html> [<https://perma.cc/K84M-LU3U>] (describing the effects of the six-Justice conservative majority); Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, Atlantic (June 8, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/> [<https://perma.cc/PJ R6-WYVT>] (describing congressional failure to rein in the Court); Ryan Cooper, *The Case Against Judicial Review*, Am. Prospect (July 11, 2022), <https://prospect.org/justice/the-case-against-judicial-review/> [<https://perma.cc/P6A8-2MPT>] (detailing how the Court has “dealt several terrific blows to American freedom and self-government”). But that almost certainly is both because the Court has been aligned with Congress and need not fear retribution, and even were it otherwise, Congress is too dysfunctional to do much. See Barry Friedman, *What It Takes to Curb the Court*, 2023 *Wis. L. Rev.* 513, 529 (detailing how the dysfunction of Congress has effectively allowed the Court to act unimpeded).

*A. Regulating Police Use of Force Under the Fourteenth Amendment's Enforcement Power**1. What Ought to Be Done to Address Police Use of Force*

If the United States were a unified, and not federal, system—or if there were no judicial supremacy—there are a range of things Congress could and likely should do to address police use of force. Of course, neither of those things is true. Still, seeing the range of possibility helps understand where the Constitution may be a barrier, and where it is not.

The most minimal thing Congress ought to do—frankly, in all three areas—is create a record of precisely what the problem is, and its causes. It is difficult to address any problem appropriately if its causes and contours are not understood. As Part I made clear, we do not even have good information on how often force is used, let alone the circumstances that occasion its overuse.

At the other pole, Congress could go ahead and define what constitutes appropriate force. Governing judicial doctrine is notoriously vague and applies a one-size-fits-all test to a variety of force tools used by law enforcement. In *Graham v. Connor*, the leading case on force, the Supreme Court held that the use of force is constitutional if an officer's actions are objectively reasonable in light of the totality of the circumstances, judged from the perspective “of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” with allowances made because police officers make those judgements in “circumstances that are tense, uncertain, and rapidly evolving.”¹⁴⁹ This vague standard provides insufficient direction to officers and inadequate guidance to courts, with the result—as we have seen—of frequent uses of excessive force that are irremediable under federal law.¹⁵⁰ Leading voices on the proper regulation of force, be they policing organizations, recent state statutory enactments, or even good police department policies, all go

¹⁴⁹ 490 U.S. 386, 396–97 (1989) (citation omitted).

¹⁵⁰ See, e.g., Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U. L. Rev. 1119, 1130–32 (2008) (“[A]s guidance regarding what constitutes reasonableness, *Graham*'s instruction is woefully inadequate . . .” (citations omitted)); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 Va. L. Rev. 211, 214–16 (2017) (describing how court-made Fourth Amendment tests like that laid down in *Graham* “reinforce a ‘split-second’ theory of policing” and prevent legal inquiries into proper police conduct); Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. Crim. L. & Criminology 481, 486–88 (1994) (describing courts' failures to define what constitutes reasonable force).

considerably further than *Graham* in giving guidance to police. They define an escalating process of using only so much force as is needed, and they define standards for using specific tools of force, be they tasers or restraints.¹⁵¹ They also ban certain force techniques altogether, such as chokeholds.¹⁵² Many commentators and policy analysts argue that the law also should consider whether an officer unreasonably placed himself in a situation in which force became necessary by, for example, failing to take advantage of opportunities to create distance, or cover, or failing to use verbal techniques to try to avoid force.¹⁵³ These often are referred to as “de-escalation” techniques; policy and law are moving in this direction.¹⁵⁴

Third, there is consensus that training is vital to the proper and limited use of force, and Congress should step in here as well. Training on use of

¹⁵¹ See Garrett & Stoughton, *supra* note 150, at 269 (describing a “‘force matrix’ that visually depicts when police may use escalating degrees of force”); see also, e.g., Camden Cnty. Police Dep’t, Use of Force Directive, *supra* note 122 (providing an exhaustive array of guidance as to when the use of force is justified); Colo. Rev. Stat. § 18-1-707 (2023) (enacting a rigid legislative regime for when the use of force is justified).

¹⁵² Farnoush Amiri, Colleen Slevin & Camille Fassett, In Year Since George Floyd’s Death, Some States Ban or Limit Police Chokeholds, *L.A. Times* (May 24, 2021, 4:00 AM), <https://www.latimes.com/world-nation/story/2021-05-24/george-floyd-killing-states-limit-ban-chokeholds> [<https://perma.cc/F7WX-JBKM>].

¹⁵³ See Curtis Gilbert, Not Trained to Not Kill: Most States Neglect Ordering Police to Learn De-Escalation Tactics to Avoid Shootings, *Am. Pub. Media Reps.* (May 5, 2017), <https://www.apmreports.org/story/2017/05/05/police-de-escalation-training> [<https://perma.cc/YNW3-9YJQ>] (describing de-escalation training, which “teaches officers to slow down, create space, and use communication techniques to defuse potentially dangerous situations”); Tom Jackman & Dan Morse, Police De-escalation Training Gaining Renewed Clout as Law Enforcement Seeks to Reduce Killings, *Wash. Post* (Oct. 27, 2020, 1:51 PM), https://www.washingtonpost.com/local/deescalation-training-police/2020/10/27/3a345830-14a8-11eb-ad6f-36c93e6e94fb_story.html [<https://perma.cc/238D-YYTW>] (describing renewed interest in de-escalation in response to cases of police brutality); Police Exec. Rsch. F., Guiding Principles on Use of Force 40 (2016) (calling for police departments to adopt de-escalation as a formal policy); see also James J. Fyfe, The Split Second Syndrome and Other Determinants of Police Violence, *in* *Violent Transactions: The Limits of Personality* 207, 219 (Anne Campbell & John J. Gibbs eds., 1986) (“[I]nstead of asking whether an officer ultimately had to shoot or fight his way out of perilous circumstances, we are better advised to ask whether it was not possible for him to have approached the situation in a way that reduced risk of bloodshed and increased the chances of a successful and nonviolent conclusion.”).

¹⁵⁴ See Farnoush Amiri, Congress Passes Bill to Fund Police De-escalation Training, *Associated Press* (Dec. 14, 2022, 9:07 PM), <https://apnews.com/article/biden-rhode-island-mental-health-police-brutality-john-cornyn-3b66eef9c2378a44faec4b18bc2959d2> [<https://perma.cc/A5PP-XR36>] (describing the House passing “bipartisan legislation . . . that would empower law enforcement agencies across the country to adopt de-escalation training when encountering individuals with mental health issues”).

force is the largest component of police training generally in the United States.¹⁵⁵ Still, such training is notably shorter than in other countries in which much less force is used.¹⁵⁶ An unconstrained Congress almost certainly would consider mandating minimum training standards and hours of training before someone can become a police officer.

Finally, Congress could improve upon the remedies available when force is overused. Remedies provide an essential part of any regulatory system; without them, there is no way to assure adherence to the regulations themselves.¹⁵⁷ Congress should adopt a federal statute that provides specifically for civil and criminal remedies for recklessly using excessive force, as federal case law defines it. And Congress should give serious consideration to modifying police officer qualified immunity, which gives far too much harbor to harmful policing.¹⁵⁸

¹⁵⁵ See Emily D. Buehler, Bureau of Just. Stats., U.S. Dep't of Just., State and Local Law Enforcement Training Academies, 2018—Statistical Tables 3 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/slleta18st.pdf> [<https://perma.cc/RBG2-PCH5>] (“In 2018, the highest average number of hours of instruction was dedicated to firearms skills (73 hours), followed by defensive tactics (61) and patrol procedures (52).”).

¹⁵⁶ See Amelia Cheatham & Lindsay Maizland, How Police Compare in Different Democracies, Council on Foreign Rels., <https://www.cfr.org/backgrounder/how-police-comp-are-different-democracies#chapter-title-0-5> [<https://perma.cc/MS78-HURW>] (Mar. 29, 2022, 2:45 PM) (“Basic U.S. training programs take twenty-one weeks on average, whereas similar European programs can last more than three years.”); Jack Date, Why Police Training in the US Falls Short Compared to the Rest of the World: Report, ABC News (Feb. 15, 2023, 6:11 AM), <https://abcnews.go.com/US/police-training-us-falls-short-compared-rest-world/story?id=96729748> [<https://perma.cc/DP5B-FWHT>] (“Police training in the U.S. is most often measured in weeks, while in many other countries it is measured in months or years.”).

¹⁵⁷ See Cristina Carmody Tilley, Tort Law Inside Out, 126 Yale L.J. 1320, 1326–27 (2017) (describing legal realist view of tort liability as a means “to achieve social policy goals” and “incentivize care”); see also Avidan Y. Cover, Reconstructing the Right Against Excessive Force, 68 Fla. L. Rev. 1773, 1776 (2016) (describing private remedies against police abuse as crucial “to the development of constitutional protections against police abuse”).

¹⁵⁸ See generally Joanna Schwartz, *Shielded*, at xvii (2023) (describing “the phalanx of shields that have been erected to protect the police” and “the groundless justifications” underlying these policies); see also Jay Schweikert, Qualified Immunity: A Legal, Practical, and Moral Failure 2 (Cato Inst. Pol’y Analysis No. 901, 2020), <https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure> [<https://perma.cc/N9S6-276R>] (qualified immunity “regularly permits egregious unconstitutional misconduct to go unaddressed”); Qualified Immunity, Equal Just. Initiative, <https://eji.org/issues/qualified-immunity/> [<https://perma.cc/HT3X-WYFJ>] (last visited Sept. 24, 2023) (“The doctrine lets police brutality go unpunished and denies victims their constitutional rights.”).

2. *The Remedial Limits of the Enforcement Power*

Although there is much Congress should or might do, the question is whether it can do so without running afoul of the Constitution's limitations on congressional power—or at least the Supreme Court's understanding of those limits. The most basic fact of our federal system is that in sharp contrast to the states, which have the full range of “police powers” available to them, Congress has only those powers enumerated in the Constitution.¹⁵⁹ Were Congress confined to the original Constitution of 1787 that might pose some difficulty, but it is not. The answer to the question of congressional power is found, properly, in the Fourteenth Amendment, and particularly Section 5 of that Amendment, both added to the Constitution following the Civil War.

To the extent that police overuse of force violates constitutional rights, Section 5 of the Fourteenth Amendment would seem to convey all the authority on Congress necessary to address the problem. In Section 5, the drafters of the Reconstruction Amendments granted Congress explicit authority to “enforce, by appropriate legislation, the provisions” of the Fourteenth Amendment, including the Due Process and Equal Protection Clauses.¹⁶⁰ Section 5 was added to the Constitution precisely to respond to the view that the original Constitution limited Congress's ability to protect civil rights in light of the extant federal system.¹⁶¹ The Supreme Court ostensibly applies the same capacious test for the enforcement power that it uses for Congress's “necessary and proper” authority: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁶² Moreover, the Justices have insisted that “[i]t is for Congress in the first instance to ‘determin[e] whether and what legislation

¹⁵⁹ See Barry Friedman, *What Is Public Safety?*, 102 B.U. L. Rev. 725, 761 (2022) (pointing out that “the police power was extended to touch on virtually any problem of the moment,” while “the federal government is . . . limited to enumerated powers”).

¹⁶⁰ U.S. Const. amend. XIV, § 5.

¹⁶¹ See Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 *Publius: J. Federalism* 69, 78 (1992) (describing support for the Fourteenth Amendment partially as a means to secure the constitutionality of the Civil Rights Act of 1866).

¹⁶² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see also *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (“[T]he *McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under § 5 of the Fourteenth Amendment.”).

is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."¹⁶³

Despite the seeming breadth of constitutional authority, Congress has been rather sparing in its use of Section 5 insofar as policing is concerned. In the aftermath of the Civil War, Congress enacted civil and criminal causes of action—42 U.S.C. § 1983 and 18 U.S.C. § 242 respectively—against those who act “under color of law” to deprive people of their civil rights.¹⁶⁴ Then, in the 1990s, Congress gave DOJ the authority to sue policing agencies that engage in the “pattern or practice” of constitutional violations and told it to collect information on excessive uses of force by the police.¹⁶⁵ But Congress has engaged in little or no substantive standard-setting around the issues of excessive force, or anything else for that matter.

Congressional timidity may rest in part on its belief that, although the Fourteenth Amendment provides Congress with enforcement authority, a line of Supreme Court cases beginning with *City of Boerne v. Flores* limits Congress’s enforcement power to legislation that is strictly remedial.¹⁶⁶ According to the Court, Congress may “enforce” the rights protected by the Fourteenth Amendment, but it may not define the extent of those rights.¹⁶⁷ Distinguishing rights definition from rights enforcement is no easy matter; it is difficult to reconcile the Court’s decisions since *City of Boerne* in articulating the line between what constitutes the enforcement of rights (which Congress may do) and defining rights (which is forbidden). The doctrine can appear so capricious that Justice Scalia concluded the Court’s test was nothing but “a standing invitation to judicial arbitrariness and policy-driven

¹⁶³ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (quoting *Katzenbach*, 384 U.S. at 651).

¹⁶⁴ See *Monroe v. Pape*, 365 U.S. 167, 183–87 (1961) (examining the text of 42 U.S.C. § 1983 and holding it provides for suits against state actors even when conduct violated state law); 18 U.S.C. § 242.

¹⁶⁵ 34 U.S.C. § 12601 (cause of action); id. § 12602 (data on excessive use of force).

¹⁶⁶ 521 U.S. at 520. See generally Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 U.C. Davis L. Rev. 673 (2001) (describing the tension between Congress and the Supreme Court over Section 5 enforcement).

¹⁶⁷ *Boerne*, 521 U.S. at 519 (“Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”); see also *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (applying the *Boerne* test); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81–83 (2000) (applying *Boerne* to the Age Discrimination in Employment Act (“ADEA”)).

decisionmaking.”¹⁶⁸ Still, as we will see, Congress has adequate power to deal with some of the most pressing policing issues. And even though the power ostensibly is strictly “remedial,” there is room for regulatory direction.

3. Congressional Power Over the Use of Force

The Supreme Court’s test for prying apart what is definition of a right and what is enforcement of that right asks if the congressional measure is “congruent and proportional” to the Supreme Court’s understanding of the underlying right.¹⁶⁹ This involves two steps. First, this involves courts defining, with some precision, what constitutional right is at stake. In particular, is it a right the Supreme Court has defined in the way Congress understands it?¹⁷⁰ Then, the question is whether a record exists to justify doing something to protect the right. Is there a pattern of violations by the states that justifies the enforcement measure, such that imposing it is “congruent and proportional” to the violations?¹⁷¹

Even given the vagueness of the *Graham* standard, Congress unquestionably could take steps to enforce the right to be free of excessive force. Take, for example, enhanced remedial measures, such as a federal statute that provides specifically for civil and criminal remedies for recklessly using excessive force, or one that curtails police officer qualified immunity. As to the first, so long as the definition of excessive force is left to what courts have countenanced in specific cases, such a law would fall well within Congress’s Section 5 authority. Congress likely also could eliminate or modify qualified immunity if it chose to, given that the Supreme Court never has treated such immunity as anything other than statutorily imposed.¹⁷² Although Congress might not be able to

¹⁶⁸ See *Lane*, 541 U.S. at 557–58 (Scalia, J., dissenting).

¹⁶⁹ See *Boerne*, 521 U.S. at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

¹⁷⁰ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (underscoring “that it is the responsibility of [the] Court” to define the right at stake and highlighting the need to identify it with “some precision”).

¹⁷¹ *Id.* at 368 (“Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional [conduct] by the States . . .”).

¹⁷² See Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 *Notre Dame L. Rev.* 1999, 2019 (2018) (“The argument for judicial superintendence of qualified immunity does not eliminate a role for Congress. . . . Recognizing judicial authority to reinterpret § 1983 so as to reform qualified immunity does not deny congressional power to do the same.”).

rule out particular force techniques altogether, it almost surely could limit the use of such techniques—such as chokeholds—to instances in which deadly force itself is constitutionally authorized.

Given *Graham*'s inadequacies, it may be more difficult—but not impossible—for Congress to go further and define substantive force standards. Falling under this category would be mandating the use of de-escalation techniques. It might even encompass mandating training on such techniques.

In Congress's favor—even for standard-setting—is that under the first step of the *City of Boerne* analysis, the Supreme Court permits Congress to step over the right-remedy line if “prophylactic” measures are necessary to protect rights.¹⁷³ In the face of persistent violations of rights, Congress can act to make sure they simply do not occur in the first place. According to the Court, “Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.”¹⁷⁴ The logic is that Congress may only be able to prevent some rights violations and protect the underlying rights by adopting measures that sweep beyond the strict definition of the right itself.¹⁷⁵

Given Supreme Court precedent, whether Congress can use this prophylactic power depends on it doing something we have already said it should unequivocally do: creating a record concerning police excessive use of force.¹⁷⁶ Whether remediating a right directly, or adopting a prophylactic protection of an existing right, the Supreme Court asks if Congress has created an adequate record from which courts can conclude that constitutional rights are being violated that require remedial attention.¹⁷⁷ Thus, what Congress must do—and what it could if it only chose to—is create an adequate record to support its legislative efforts.

¹⁷³ 521 U.S. at 532–33; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000).

¹⁷⁴ *Kimel*, 528 U.S. at 81.

¹⁷⁵ See *Boerne*, 521 U.S. at 518 (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))).

¹⁷⁶ *Kimel*, 528 U.S. at 89 (finding the ADEA provision in question outside of congressional power because “Congress never identified any pattern of age discrimination by the States”); see also *United States v. Georgia*, 546 U.S. 151, 160 (2006) (Stevens, J., concurring) (encouraging parties to “create a factual record that will inform” later decisions).

¹⁷⁷ *Kimel*, 528 U.S. at 81–82, 89.

In order to sustain prophylactic legislation, the congressional record must contain sufficient evidence to establish a pattern of rights violations.¹⁷⁸ Although Congress can prohibit more than the constitutional violations themselves, such an intervention “is appropriately exercised *only* in response to state transgressions.”¹⁷⁹ As an unanimous Court made clear in *United States v. Georgia*, although the Justices themselves have disagreed on the breadth of the prophylactic power, “no one doubts that § 5 grants Congress” enforcement power “for *actual* violations of” the Fourteenth Amendment.¹⁸⁰ Most invalidated congressional attempts at rights enforcement have been because of a failure to make the necessary record reflecting that there have been actual constitutional violations.¹⁸¹

Further, under Supreme Court precedent, Congress has greater leeway in adopting legislation under Section 5 for prophylactic purposes if prior legislative efforts have not been successful in remedying violations of an established right. In *Nevada Department of Human Resources v. Hibbs*, the Court actually upheld, in the face of the Eleventh Amendment, a private money damages remedy against states for failure to comply with the Family and Medical Leave Act.¹⁸² In doing so, the Justices noted that Congress already had passed Title VII of the Civil Rights Act and the Pregnancy Discrimination Act to address unequal treatment of the sexes in the workplace.¹⁸³ “[W]here previous legislative attempts ha[ve] failed,” the *Hibbs* Court wrote, “[s]uch problems may justify added

¹⁷⁸ See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (holding that Congress exceeded its Section 5 power because it “identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations”); *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 41 (2012) (plurality opinion) (rejecting the legislation in question because “Congress made no findings and did not cite specific or detailed evidence” justifying the measure).

¹⁷⁹ *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (emphasis added). On the other hand, Congress does not seem to have to identify and place into the record evidence of violations in each state (and perhaps local government) it regulates.

¹⁸⁰ 546 U.S. at 158.

¹⁸¹ See *Garrett*, 531 U.S. at 368 (finding that the legislative record did not support abrogation of Alabama’s Eleventh Amendment immunity); *T.W. v. N.Y. State Bd. of L. Exam’rs*, No. 16-cv-03029, 2022 WL 2819092, at *7 (E.D.N.Y. July 19, 2022) (finding that the legislative record lacked any finding by Congress relating to a history and pattern of discrimination); see also *Tennessee v. Lane*, 541 U.S. 509, 528–29 (2004) (finding that the legislative record made the appropriateness of prophylactic legislation clear).

¹⁸² 538 U.S. 721, 735 (2003).

¹⁸³ *Id.* at 737.

prophylactic measures in response.”¹⁸⁴ Similarly, in *South Carolina v. Katzenbach*, the Court outlined Congress’s decades-long, unsuccessful effort to “banish the blight of racial discrimination in voting,” which led Congress to ultimately conclude those remedies “would have to be replaced by sterner and more elaborate measures.”¹⁸⁵

By these standards, Congress surely would be on firm ground in using its Section 5 power even to set standards for what constitutes excessive force by police, because despite the existence and active use of § 1983 and pattern-and-practice causes of action, rights violations continue.¹⁸⁶ In investigations of one local department after another, DOJ’s Civil Rights Division has found the excessive use of force to be a common and persistent problem.¹⁸⁷ Undoubtedly, other evidence exists.¹⁸⁸

At bottom, the problem here—fixable should Congress muster the political will—is that Congress has failed to build the sort of record that

¹⁸⁴ *Id.*

¹⁸⁵ 383 U.S. 301, 308–09 (1966).

¹⁸⁶ One question is whether evidence of violations by local police departments—as opposed to the state governments themselves—will do. The Supreme Court has been less clear on what sort of congressional regulation is justified by local government violations, as opposed to those of the state itself, in part because most of the *Boerne* cases involved the Eleventh Amendment question of whether money damages could be awarded against the state. See Calvin Massey, Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power, 76 *Geo. Wash. L. Rev.* 1, 3–7 (2007) (arguing for a more deferential form of judicial review when Eleventh Amendment issues of state sovereign immunity are not implicated).

¹⁸⁷ See, e.g., C.R. Div., U.S. Dep’t of Just., Investigation of the Baltimore City Police Department 8 (2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/W9PT-FFN6>] (finding that the Baltimore police department “uses overly aggressive tactics that unnecessarily escalate encounters, increase tensions, and lead to unnecessary force, and fails to de-escalate encounters when it would be reasonable to do so”); C.R. Div., U.S. Dep’t of Just., Investigation of the Cleveland Division of Police 3 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [<https://perma.cc/PE3E-2X6D>]; C.R. Div., U.S. Dep’t of Just., Investigation of the Newark Police Department 23–25 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [<https://perma.cc/7NZY-4HRN>]; C.R. Div., U.S. Dep’t of Just., Investigation of the New Orleans Police Department, at vi–vii (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [<https://perma.cc/M65R-XUR9>].

¹⁸⁸ See, e.g., *Hastings v. Barnes*, 252 F. App’x 197, 203 (10th Cir. 2007) (holding that officers were not entitled to qualified immunity where their actions unreasonably escalated the situation to the point deadly force was required); *Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997) (reversing summary judgment for a city, holding that failure to properly train officers could allow the municipal agency to be held liable for excessive force when the inadequate training results in injury); C.R. Div., Police Reform Work: 1994–Present, supra note 29, at 41–48 (listing numerous DOJ findings of police misconduct over more than two decades, including use of force).

might support new Section 5 measures. As the fate of the George Floyd Justice in Policing Act suggests,¹⁸⁹ Congress may be logjammed in its ability at the moment to pass major policing legislation.¹⁹⁰ But Congress—and particularly members of Congress who feel the greatest urge to do something here—should look to the future. The Section 5 cases provide a roadmap for the work they should start to do. That work begins with building a record.

B. Using Section 5 to Address Racial Disparity in Policing

1. Tools to Address Racial Disparity

As with force, there are a litany of things Congress should do to reduce the deeply troubling racial disparities in policing.

And as with use of force, this begins with making a record of racial disparities in policing, and their causes. As we will see, this record is even more critical to satisfy Supreme Court doctrinal standards. For example, disparities in policing might result from officers' unconscious or overt biases.¹⁹¹ Social media postings by some officers suggest the racial bias can be quite overt.¹⁹² The solutions to these two causes may differ.¹⁹³

Relatedly, Congress should require data collection and reporting by policing agencies regarding the relationship between race and policing enforcement actions and outcomes. Such data would continue to provide insight into the scope of the problem. It also might highlight the problem

¹⁸⁹ George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

¹⁹⁰ See Felicia Sonmez & Mike DeBonis, No Deal on Bill to Overhaul Policing in Aftermath of Protests Over Killing of Black Americans, *Wash. Post* (Sept. 22, 2021, 7:35 PM), https://www.washingtonpost.com/powerpost/policing-george-floyd-congress-legislation/2021/09/22/36324a34-1bc9-11ec-a99a-5fea2b2da34b_story.html [<https://perma.cc/B7RM-HTPT>].

¹⁹¹ See L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 *Fordham L. Rev.* 2961, 2963 (2015) (discussing the impact that implicit racial bias has on policing); Jacob Stark, *Addressing Implicit Bias in Policing*, *Police Chief Online* (July 28, 2021), <https://www.policechiefmagazine.org/addressing-implicit-bias-in-policing/> [<https://perma.cc/K64H-2SSX>] (explaining the importance of officers understanding implicit bias).

¹⁹² See Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, *Brennan Ctr. for Just.* (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [<https://perma.cc/UK4P-35CD>].

¹⁹³ See Mychal A. Machado & Ashley M. Lugo, *A Behavioral Analysis of Two Strategies to Eliminate Racial Bias in Police Use of Force*, 15 *Behav. Analysis Prac.* 1221, 1222–27 (2022) (examining the efficacy of two separate strategies to address racial bias in policing: body cameras and implicit bias training).

for the agencies and their communities. It is harder to ignore a problem when evidence of it is readily available, and community members themselves may use that data to insist upon change. It also is easier to track progress toward solving a problem with data at hand. Data also could assist with cross-jurisdictional comparison. It is true that prior data mandates from Congress have not been successful—such as around the use of force—because the Department of Justice simply has not done its job implementing them.¹⁹⁴ But there are encouraging signs in the Biden EO that DOJ finally is stepping up.¹⁹⁵ In any event, DOJ recalcitrance is no reason for Congress to step back from doing what needs done.

But Congress ought to go further and consider restricting certain policing practices that are the drivers of racial disparity, particularly in light of evidence casting doubt on their efficacy in addressing crime. For example, Congress could regulate the use of “pretextual” traffic stops—in which police stop motorists for trivial traffic violations in order to go on fishing expeditions for evidence of other crimes. When used on a widespread basis, these stops have been shown to be highly racialized and of dubious crime-fighting value.¹⁹⁶ Jurisdictions are doing much to address them, from limiting the sorts of offenses that justify a stop, to what sort of questioning officers can engage in once there has been a stop.¹⁹⁷ Similarly, consent searches also have been employed in discriminatory ways; both anecdotes and research suggest officers are shown to stop people of color disproportionately and find contraband less

¹⁹⁴ See 34 U.S.C. § 12602 (requiring that the Attorney General “shall, through appropriate means, acquire data about the use of excessive force by law enforcement officers” and “shall publish an annual summary” of that data); U.S. Gov’t Accountability Off., *Law Enforcement: DOJ Can Improve*, *supra* note 140, at 63.

¹⁹⁵ Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32949 (May 25, 2022) (creating a “National Law Enforcement Accountability Database”).

¹⁹⁶ Heydari, *The Invisible Driver of Policing*, *supra* note 19, at 39–40, 46; Heydari, *Rethinking Federal Inducement of Pretext Stops*, *supra* note 26 (manuscript at 12).

¹⁹⁷ See Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 *Stan. L. Rev.* 637, 644–45, 702–05 (2021) (analyzing racial disparities in pretextual stops and evaluating proposals for reform); David D. Kirkpatrick, Steve Eder & Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, *N.Y. Times* (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/us/police-traffic-stops.html> [https://perma.cc/VV3G-PXGR] (detailing reform efforts in jurisdictions across the country). The American Law Institute has also issued principles to inform best policing practices. See *Principles of the L. of Policing* § 2.04 (Am. L. Inst., Combined Revised Tentative Drafts 2023) (limiting the use of pretextual traffic stops); *id.* § 4.06 (proposing restrictions on consent searches).

often.¹⁹⁸ Jurisdictions also have taken action to limit such searches, such as requiring reasonable suspicion before consent is requested.¹⁹⁹

2. Doctrinal Limitations on Congressional Power Over Racial Disparity

If Congress can regulate the use of force, one would think there is little question about Congress's power to act to reduce racial disparities. After all, race was the primary motivator for the Fourteenth Amendment.²⁰⁰ Justice Scalia, who generally considered prophylactic legislation out of bounds under Section 5, nonetheless believed such statutes permissible to address racial discrimination.²⁰¹

Even more than with excessive force, however, the Court's doctrine defining the constitutional right may complicate and indeed prevent legislation to curtail discriminatory outcomes in policing. The Supreme Court has interpreted the constitutional right to equal protection narrowly. In its 1976 decision in *Washington v. Davis*, the Supreme Court held that a statute's racially disparate impact would not by itself trigger the sort of strict judicial scrutiny necessary to address racial discrimination.²⁰² Rather, as the Court later elaborated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."²⁰³ Stated simply, the racial disparities that run

¹⁹⁸ See Eamon Kelly, *Race, Cars, and Consent: Reevaluating No-Suspicion Consent Searches*, 2 DePaul J. for Soc. Just. 253, 253–54 (2009); Nat'l Acads. of Scis., Eng'g & Med., *Proactive Policing: Effects on Crime and Communities* 294 (David Weisburd & Malay K. Majmundar eds., 2018) [hereinafter *Nat'l Acads. of Scis., Eng'g & Med., Proactive Policing*] (detailing study of "driver searches conducted by the Maryland State Police" between 1995 and 2006 and reporting "Black hit rates 10 percentage points lower than White hit rates"); Nat'l Acads. of Scis., Eng'g & Med., *Reducing Racial Inequality in Crime and Justice*, supra note 98, at 71–72 (reporting findings by a California board that "hit rates for all stops . . . are slightly lower . . . for racial and ethnic minorities relative to White hit rates"); see also Alexander Weiss Consulting, LLC, Ill. Dep't of Transp., *Illinois Traffic and Pedestrian Stop Study: 2017 Annual Report* 10 (2017), <https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/traffic-stop-studies/2017-itss-executive-summary.pdf> [<https://perma.cc/4NDY-9ZWA>] (noting that once stopped, "African American and Hispanic drivers are more likely to be the subject" of vehicle consent searches than others).

¹⁹⁹ See Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. Ill. L. Rev. 1759, 1771–76 (detailing reform efforts).

²⁰⁰ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71–72 (1872).

²⁰¹ *Tennessee v. Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) ("Broad interpretation [is] particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed . . .").

²⁰² 426 U.S. 229, 242 (1976).

²⁰³ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

rampant in policing are not necessarily enough to allow Congress to act, because only intentional discrimination violates the Constitution.

Proving intentional racial discrimination has its challenges in the policing context. If Officer Unfriendly stops a person precisely because he is Black, that obviously violates the Constitution. But Unfriendly will know better than to admit such, and little other evidence of his intent is likely to exist. Even if he and all the other members of Midtown's police force stop Black people in numbers grossly disproportionate to the racial demographics of the jurisdiction, no relief will be forthcoming unless plaintiffs can show that disparity resulted from some governmental decision to act specifically along racial lines.²⁰⁴ Even though a mere particle of intent evidence can cause the Justices to abandon their usual deference toward governmental decision-making, finding that particle is tough.²⁰⁵ Officer intent is hard to prove, and departmental intent is hard to decipher.

Although the Supreme Court recognizes that persistent disparities may indicate ongoing intentional discrimination, its doctrine makes this unreasonably difficult to establish in policing. According to *Arlington Heights*, “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when [that action] appears neutral on its face.”²⁰⁶ The problem is that what counts as “unexplainable on grounds other than race” can be challenging to prove in the policing context. If the government action is supposed to be random, such as selecting candidates for a grand jury, then one would expect an outcome that mirrored the broader population.²⁰⁷ But when it comes to policing, the government typically argues that enforcement

²⁰⁴ Compare *Brown v. City of Oneonta*, 221 F.3d 329, 337–39 (2d Cir. 2000) (dismissing an equal protection claim even though police conduct had a disparate impact on Black people because there was no proof of discriminatory purpose), and *United States v. Johnson*, 122 F. Supp. 3d 272, 351–52, 357 (M.D.N.C. 2015) (finding that while there was statistical evidence of disparate impact, there was no evidence of a discriminatory purpose), with *Floyd v. City of New York*, 959 F. Supp. 2d 540, 665–67 (S.D.N.Y. 2013) (finding a constitutional violation because there was “direct evidence of discriminatory intent” in addition to statistical evidence of a disparate impact).

²⁰⁵ *Arlington Heights*, 429 U.S. at 265–66 (observing that plaintiffs need not “prove that the challenged action rested solely on racially discriminatory purposes” and that “[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified” (emphasis added)).

²⁰⁶ *Id.* at 266.

²⁰⁷ See *Castenada v. Partida*, 430 U.S. 482, 494–99 (1977) (overturning conviction due to wide disparity between portion of Hispanic grand jurors and jurisdiction's population).

efforts necessarily follow crime, that crime occurs in communities that are predominantly communities of color, and so that is where police will patrol and act.²⁰⁸ According to this logic, more enforcement will occur of Black people than others, not “because of” race, but—in the Supreme Court’s formulation—“in spite of” it.²⁰⁹

Matters are complicated further because aggregated policing outcomes tend to be the result of countless individual discretionary actions by officers operating under rather fuzzy legal standards, such as “reasonable suspicion.”²¹⁰ The U.S. District Court for the Southern District of New York’s decision in *Floyd v. City of New York*, which held racial bias infected New York City’s stop-and-frisk program, rested in part on the fact that members of the NYPD had been recorded surreptitiously and explicitly expressing racial animus.²¹¹ As one might guess, that sort of evidence can, at times, be difficult to come by.

3. Congressional Power to Address Racial Disparities

Still, once again, Congress has the ability to overcome these legal barriers if it simply puts in the effort, largely by doing the work to create the necessary record. Although establishing discriminatory intent can be challenging, intent evidence often exists. First, investigations and lawsuits, both by DOJ and private parties, have succeeded in establishing intentional discrimination by police departments.²¹² New York’s *Floyd*

²⁰⁸ See, e.g., *Floyd*, 959 F. Supp. 2d at 591 (describing the city’s argument that “the apparently disproportionate stopping of [B]lacks and Hispanics can be explained on race-neutral grounds by police deployment to high crime areas, and by racial differences in crime rates”); *Commonwealth v. Long*, 152 N.E.3d 725, 747 (Mass. 2020) (describing the state’s argument that statistical evidence of disparate impact was unreliable because “Black individuals commit more crimes”); see also Huq, *supra* note 44, at 2456 (describing defenses of discriminatory policing practices are “often expressly predicated on a putative relationship between race to criminality”).

²⁰⁹ See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that government action must be “because of” some protected characteristic, not “in spite of” it).

²¹⁰ See *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”); *United States v. Cortez*, 449 U.S. 411, 417 (1981) (summarizing the Court’s prior jurisprudence as a “totality of the circumstances” test).

²¹¹ 959 F. Supp. 2d at 602–06, 663 & n.767 (detailing testimony from NYPD officers about the department’s policy of “targeting ‘the right people,’” which the chief admitted included “young [B]lack and Hispanic youths 14 to 20”).

²¹² See, e.g., Carrie Johnson & Eyder Peralta, Justice Department Issues Scathing Report on Baltimore Police Department, NPR (Aug. 9, 2016, 5:12 PM), <https://www.npr.org/sections/>

case is one such example, but in jurisdictions from Chicago to New Jersey, litigation has made the case that police are engaging in widespread intentional racial profiling in traffic stops, and academic research supports this conclusion.²¹³ What is needed from Congress under governing Supreme Court precedent is a record that shows stark disparity as well as racial animus.²¹⁴ Social media alone has been shown to be full of evidence of such animus, i.e., material in which individual officers are revealed expressing themselves in racist ways, although it may be necessary to connect such animus to specific conduct.²¹⁵ Even less recent evidence of intentional discrimination helps: according to *Arlington Heights*, a pattern of historical discrimination can contribute to finding intentional discrimination in a given case.²¹⁶ Ironically, the discretionary nature of policing also might help rather than hinder making the case. The Supreme Court arguably has afforded greater leeway to congressional regulation precisely when the unconstitutional acts are those of individuals imbued with great discretion.²¹⁷

Given a proper record of racial discrimination in policing, Congress unequivocally could, and should, require data collection. This data should

thetwo-way/2016/08/09/489372162/justice-department-to-issue-critical-report-on-baltimore-police-department [https://perma.cc/FSF7-YT9B] (reporting that a DOJ investigation found evidence of intentional discrimination).

²¹³ See, e.g., *Gray v. City of Chicago*, 159 F. Supp. 2d 1086, 1089 (N.D. Ill. 2001) (finding allegations that city had pattern of racial profiling during traffic stops were sufficient to state a constitutional claim); *Giron v. City of Alexander*, 693 F. Supp. 2d 904, 943 (E.D. Ark. 2010) (concluding racial profiling was an ongoing practice at police department and imposing municipal liability on city); *Arnold v. Ariz. Dep't of Pub. Safety*, No. 01-cv-01463, 2006 WL 2168637, at *5–12 (D. Ariz. July 31, 2006) (approving settlement agreement in civil rights action alleging that officers were engaged in racial profiling during traffic stops). See generally Frank R. Baumgartner, Derek A. Epp & Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (2018) (analyzing racial discrimination in traffic stops in North Carolina).

²¹⁴ See *Veasey v. Abbott*, 830 F.3d 216, 234, 264–65 (5th Cir. 2016) (describing the discriminatory purpose and discriminatory effects test in terms of “racial animus,” and “stark, racial disparity”).

²¹⁵ See, e.g., Richard Winton, *9 Oakland Police Officers Disciplined Over Racist, Sexist Social Media Posts*, L.A. Times (Sept. 20, 2021, 11:21 AM), <https://www.latimes.com/california/story/2021-09-20/9-oakland-police-officers-disciplined-over-social-media-posts> [https://perma.cc/TV7D-EXUL]; Kayla Epstein, *Racist Posts from Police Officers' Social Media Accounts Trigger a Wave of Investigations*, Wash. Post (June 4, 2019, 6:13 PM), <https://www.washingtonpost.com/nation/2019/06/04/racist-posts-police-officers-social-media-accounts-trigger-wave-investigations/> [https://perma.cc/NK75-TA7K].

²¹⁶ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

²¹⁷ *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 732 (2003) (quoting H.R. Rep. No. 103–8, pt. 2, at 10–11 (1993)).

be more fine grained than the fact of disparity alone. Are some officers more likely to engage in disparate treatment than others? Is disparity more common in some sorts of enforcement actions than others?

What remains is the question of what actions beyond data collection Congress could take to eliminate racial disparity and still stay on the right side of the *Boerne* definition/enforcement line. Congress might not be able to prevent discriminatory street stops by raising the standard of suspicion from reasonable suspicion to probable cause, given that in *Terry v. Ohio*, the Supreme Court countenanced use of the lower standard.²¹⁸ Doing so might be seen as a direct assault on the Supreme Court's definition of the underlying right. But with a strong record of racial discrimination in policing, Congress likely could use its power of prophylaxis to restrict practices like pretextual and consent stops, which, when used on a widespread basis, have been shown to exacerbate racial disparities without effectively fighting crime. And Congress might well be able to require that officers conducting street stops be able to articulate what offense they believe is being committed.²¹⁹

C. The Commerce Clause: Unnecessarily Dormant

Despite its utility for use of force and race, Section 5 offers little help if Congress wants to regulate our last paradigmatic example, police surveillance. Section 5 requires showing a pattern of constitutional violations by state and local government. As Part I pointed out, however, under existing Supreme Court doctrine, invasive state surveillance often is not deemed unconstitutional either because people have “knowingly expose[d]” their conduct to the authorities, or because police collection

²¹⁸ 392 U.S. 1, 27 (1968).

²¹⁹ Barry Friedman, *Unwarranted: Policing Without Permission* 157–59 (2017) [hereinafter Friedman, *Unwarranted*] (making this suggestion and rehearsing other proposed reforms). The Supreme Court's decision in *Illinois v. Wardlow* may seem to dispense with this requirement. See 528 U.S. 119, 124–25 (2000) (finding reasonable suspicion to justify a *Terry* stop due to suspect's “nervous, evasive behavior” in a “high crime area”). But more recently, the Court has indicated some sympathy for reinforcing a requirement along these lines. See *Navarette v. California*, 572 U.S. 393, 401 (2014) (“Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that ‘criminal activity may be afoot.’” (quoting *Terry*, 392 U.S. at 30)); *Kansas v. Glover*, 140 S. Ct. 1183, 1191 n.1 (2020) (“[W]e reiterate that the Fourth Amendment requires . . . an individualized suspicion that a particular citizen was engaged in a particular crime.”).

from third parties is immune under the Supreme Court’s “third party doctrine.”²²⁰

Nevertheless, Congress has another power that works well for this purpose: the power “[t]o regulate Commerce . . . among the several States”²²¹ Because surveillance tools today are traded in an interstate market and run over the internet, Congress has ample power under the Commerce Clause to regulate, and even to ban, them. There is little doubt this power exists: Congress already has relied on the commerce power to pass sweeping statutes like the Electronic Communications Privacy Act (“ECPA”), which regulates when law enforcement may employ pen registers or acquire information from internet providers.²²² While some (unclear) limits may exist on regulating state and local governments directly under the Commerce Clause, Congress’s undisputed power over the makers and sellers of surveillance tools gives it the power it needs to reduce inappropriate and unregulated uses of surveillance technologies.

1. The Ways in Which Surveillance Technologies Require Regulation

In order to see the ways in which Congress should regulate surveillance technologies, consider two particular technologies that are used frequently and often controversially: automated license plate readers (“ALPRs”) and facial recognition technology (“FRT”). As explained above, ALPRs are cameras that capture (“read”) the license plates of passing vehicles. Time-stamped and geo-located reads are compared to a “hot list” of vehicles the police are after and often stored to create a historical record of a vehicle’s movement.²²³ Facial recognition can be used to identify an unknown person in a photograph, typically someone who is suspected of having committed an offense. This often is referred to as “face identification.”²²⁴ It also can be used for “face verification” to

²²⁰ *Katz v. United States*, 389 U.S. 347, 351 (1967); *United States v. Miller*, 425 U.S. 435, 443 (1976). See generally Friedman, *Unwarranted*, supra note 219, at 211–58 (providing an overview of how modern surveillance technology often eludes Fourth Amendment protections). But see *Carpenter v. United States*, 138 S. Ct. 2206, 2224 (2018) (requiring a warrant when police gather more than six days of cell-site location information, despite third-party doctrine).

²²¹ U.S. Const. art. 1, § 8, cl. 3.

²²² See Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at scattered sections of 18 U.S.C.).

²²³ See supra Subsection I.A.2.

²²⁴ Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 Minn. L. Rev. 1105, 1119–22 (2021).

ensure that the person in a given location, such as a border checkpoint, is the same person on an identity document.²²⁵ Finally, facial recognition also could be used, across a range of cameras, to track a person's movements—"face tracking."²²⁶

Three different aspects of surveillance technologies like ALPRs and FRT cry out for regulation.

First, Congress should regulate the *quality* of the tools law enforcement uses—for example, to ensure they are accurate and free of bias, racial or otherwise. It is now common knowledge that many face recognition algorithms do a less good job of recognizing darker faces, or women's faces.²²⁷ Similarly, ALPRs misread license plates. The result can be missing a vehicle with an open warrant, or worse yet, alerting police to a match to a hot list when in fact the person has done nothing wrong.²²⁸

Second, Congress should regulate the *capabilities* of technologies that law enforcement uses. For example, to protect privacy, Congress might want to limit data retention when it comes to information the technologies keep about members of the public. At the same time, in order to promote accountability, Congress might want to require retention of data regarding how the device has been used.

Finally, Congress should regulate *the circumstances under which the technology is used* by law enforcement agencies. When ALPRs and FRT are deployed for low-level offenses, they may deprive people of privacy and lead to extensive enforcement for little public safety gain, often with disproportionate impact on communities of color.²²⁹ Congress might well want to restrict some harm-inefficient uses of these technologies.

²²⁵ Id. at 1113.

²²⁶ Id. at 1122–24.

²²⁷ Joy Buolamwini & Timnit Gebru, Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, 81 Procs. Mach. Learning Rsch. 1, 8–10 (2018); Patrick Grother, Mei Ngan & Kayee Hanaoka, U.S. Dept. of Com., Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects 2–3 (2019).

²²⁸ See, e.g., William Peacock, License-Plate Reader's Mistake Leads to Excessive Force Claims, FindLaw (Mar. 21, 2019), www.findlaw.com/legalblogs/ninth-circuit/license-plate-readers-mistake-leads-to-excessive-force-claims/ [<https://perma.cc/MP7P-D6ES>].

²²⁹ See AI & Policing Tech. Ethics Bd., Axon Enter., Inc., Second Report of the Axon AI & Policing Technology Ethics Board: Automated License Plate Readers 6 (2019), https://www.policingproject.org/s/Axon_Ethics_Report_2_v2.pdf [<https://perma.cc/C6X9-YH3T>] (explaining risk that ALPRs exacerbate enforcement of low-level offenses and disproportionately harm communities of color); Clare Garvie, Alvaro M. Bedoya & Jonathan Frankle, Geo. L. Ctr. on Priv. & Tech., The Perpetual Line-Up: Unregulated Police Face Recognition in America 31–40, 53–57 (2016), <https://www.perpetuallineup.org/report> [<https://perma.cc/6EEZ-8LQN>] (finding that law enforcement uses face recognition without

Before turning to the question of whether Congress has the power to regulate surveillance technologies (the answer is yes), we pause to note that the largest obstacle to well-needed legislation may be political. As Part I makes clear, the federal government itself deploys these surveillance technologies widely, and federal law enforcement and intelligence agencies often are the largest obstacles to congressional reform when it comes to regulating surveillance.²³⁰ Part III deals at length with the conflict within the federal government itself and how that hobbles policing reform. On the other hand, some of the Justices on the Supreme Court have literally been asking it to enact legislation governing some of the new policing technologies.²³¹

2. Congressional Power to Regulate the Product Itself

Congress's ability to regulate the quality and capability of surveillance technologies is likely unlimited. Congress's power over interstate commerce is "plenary," which is to say that short of violating another constitutional provision, Congress can do what it wants.²³² Since the New Deal, there is no serious debate about Congress's power over the local

requiring reasonable suspicion to run a search, as well as racial bias in searches); Barton Gellman & Sam Adler-Bell, Century Found., *The Disparate Impact of Surveillance* 2, 6–11 (2017), <https://production-tcf.imgix.net/app/uploads/2017/12/03151009/the-disparate-impact-of-surveillance.pdf> [<https://perma.cc/2ZXP-8JWY>] (analyzing disproportionate impact of mass surveillance on communities identified by poverty, race, religion, and immigration status); Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 Md. L. Rev. 487, 498–502 (2021) (describing the tendency of algorithmic tools used in policing to be racially biased); Alvaro M. Bedoya, *Privacy as Civil Right*, 50 N.M. L. Rev. 301, 306 (2020) (explaining surveillance often is used as "a tool to stop marginalized people from achieving power").

²³⁰ See Friedman, *Unwarranted*, *supra* note 219, at 247–52 (detailing role law enforcement played in defeating reforms to the Electronic Communications Privacy Act). See generally Danielle Keats Citron & Barry Friedman, *Controlling Public-Private Surveillance* (Sept. 17, 2023) (unpublished manuscript) (on file with authors) (detailing intelligence community's role in derailing needed reforms to Section 702 of the Foreign Intelligence Surveillance Act).

²³¹ See *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring in the judgment) (suggesting the necessity for a legislative solution to surveillance practice); see also *Carpenter v. United States*, 138 S. Ct. 2206, 2261 (2018) (Alito, J., dissenting) (noting the risk that the Court stepping in could have in dissuading Congress to act on the issue of Fourth Amendment protection of cell-site location information).

²³² *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824); *United States v. Darby*, 312 U.S. 100, 115 (1941) ("Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.").

production and marketing of goods bound for interstate commerce.²³³ If what is being regulated is interstate commerce, Congress has free rein.

In terms of what qualifies as “commerce among the several States,” the Supreme Court has divided the world into three doctrinal categories.²³⁴ One is regulation of the “instrumentalities” of commerce itself—things like shipping companies and railroads.²³⁵ This includes more recent instrumentalities like the internet.²³⁶ The second category is that Congress can control the “channels” of commerce, which is to say that Congress can define what may move through those channels in commerce and what may not.²³⁷ This is the power that allows Congress to define permissible articles of commerce—what are safe products or prescription drugs—and also to ban some products entirely, such as adulterated products or drugs like marijuana.²³⁸ Finally, Congress has the power to regulate anything, including entirely *intrastate* activities, that have a “substantial effect” on interstate commerce.²³⁹

Congress’s combined power over the “channels” and “instrumentalities” of interstate commerce allows Congress to regulate any of the three aspects of surveillance technologies.²⁴⁰ Control over the channels of commerce permits Congress to spell out the capabilities and quality of surveillance devices that it allows marketed and transported. Thus, Congress could insist that before an FRT product is shipped in interstate commerce, it must meet testing and performance standards that

²³³ See, e.g., *Darby*, 312 U.S. at 115 (holding Congress could bar from interstate transit goods made by employees who were not paid in accordance with minimum wage and maximum hours requirements of the Fair Labor Standards Act).

²³⁴ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

²³⁵ *Id.* at 558.

²³⁶ See, e.g., *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (“Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce”); *United States v. MacEwan*, 445 F.3d 237, 246 (3d Cir. 2006) (describing the internet as “properly regulated by Congress as a channel and instrumentality of interstate commerce”).

²³⁷ *Lopez*, 514 U.S. at 558.

²³⁸ See *Darby*, 312 U.S. at 114 (“Congress . . . is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.”); see also Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 Mich. L. Rev. 554, 560 (1995) (summarizing Commerce Clause jurisprudence and noting that “Congress may prohibit the movement across state lines of anything it pleases”).

²³⁹ *Lopez*, 514 U.S. at 557 (quoting *Darby*, 312 U.S. at 119–20).

²⁴⁰ See *id.* at 558.

would mitigate concerns about racial bias in FRT algorithms.²⁴¹ Control over the instrumentalities of commerce matters as well because many surveillance technologies, such as ALPRs, run over the internet.²⁴² Unless a policing agency used a surveillance tool built wholly within a state, from parts entirely constructed in that state, and ran it completely in-state, it will be subject to regulation. This is highly unlikely.

3. Congress's Less Clear Power to Regulate State and Local Governments Directly

Regulating surveillance products likely will have an important impact on local law enforcement's use of such technologies as well. To be blunt: police cannot use what is unavailable on the market. This is indirect influence.

The more difficult question is whether, because police departments are creatures of state government, *direct* regulation of their use of surveillance technology is permissible. There are federalism concerns expressed in the Court's doctrine about such direct regulation, though it is difficult to say precisely how much these concerns matter. To quote the Justices, "The Court's jurisprudence in this area has traveled an unsteady path."²⁴³

Some Justices have been sensitive about allowing Congress to tell state and local governments what to do in areas of traditional state and local responsibility, of which policing is one.²⁴⁴ In *National League of Cities v. Usery*, for instance, the Justices held that Congress could not regulate

²⁴¹ Cf. *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911) (upholding the regulation of adulterated food products as part of the Pure Food and Drug Act); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974) (upholding emissions standards for motor vehicles as valid under the Commerce Clause); *Geir v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (holding that the National Traffic and Motor Vehicle Safety Act preempted a state tort claim).

²⁴² ALPRs are connected to the internet, Zack Whittaker, *Police License Plate Readers Are Still Exposed on the Internet*, TechCrunch (Jan. 22, 2019, 6:26 PM), <https://techcrunch.com/2019/01/22/police-alpr-license-plate-readers-accessible-internet/> [<https://perma.cc/HX94-E9KV>], and the databases used for facial recognition and ALPR matches depend on the internet, see Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 *Fordham Urb. L.J.* 803, 806 (2010) [hereinafter *Murphy, Databases*] (describing how the internet facilitated modern police databases). Clearview AI, a particularly prominent facial recognition tool, runs on the internet. See *Company Overview, Clearview AI*, <https://www.clearview.ai/overview> [<https://perma.cc/HR8R-L2YP>] (last visited Nov. 1, 2023) (describing service as a "web-based intelligence platform" that harvested its data from public websites).

²⁴³ *New York v. United States*, 505 U.S. 144, 160 (1992).

²⁴⁴ See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 14–15 (1895) (discussing manufacturing-commerce dichotomy).

something with a substantial effect on interstate commerce in a way that interfered with state and local governments' ability to provide governmental functions in areas of "traditional" state authority.²⁴⁵ Ten years later, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court recanted, holding that any such protection of state and local autonomy was the job of the political process, not the courts, in part because the Justices found it hard to determine which state functions are traditional.²⁴⁶ Although *Garcia* seemed to put to rest the notion that the courts would protect traditional areas of state and local responsibility from congressional regulation, Justice Kennedy's concurrence in *United States v. Lopez*, joined by Justice O'Connor, once again raised the idea that there are core areas of state and local responsibility in which the federal government should not interfere.²⁴⁷

The Justices' ongoing sensitivity about Congress regulating governments performing traditional functions cashes out doctrinally today in the rule that the federal government may not "commandeer" the regulatory authority of state and local officials. The Supreme Court has held generally that although Congress can "encourage" state participation in national regulatory efforts, it cannot "compel" them.²⁴⁸ This line is patrolled by the "anti-commandeering" doctrine of *New York v. United States* and *Printz v. United States*.²⁴⁹ In *New York*, the Justices held that Congress cannot compel state legislators to "enact and enforce a federal regulatory program."²⁵⁰ *Printz* applied the logic of *New York* to the administrative officials of states and "their political subdivisions,"

²⁴⁵ 426 U.S. 833, 852 (1976).

²⁴⁶ 469 U.S. 528, 546–47 (1985); *id.* at 552 ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."). See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954) (arguing judicial intervention is unnecessary in preserving federalism); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215 (2000) (defending Wechsler's theory and highlighting contemporary political safeguards of federalism).

²⁴⁷ 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

²⁴⁸ See Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 *Vand. L. Rev.* 1629, 1630–60 (2006) (providing a general overview of the Court's anti-commandeering jurisprudence); Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 *B.U. L. Rev.* 1, 6–10 (2015) (same).

²⁴⁹ *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

²⁵⁰ *New York*, 505 U.S. at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

holding that they cannot be forced to “administer or enforce a federal regulatory program.”²⁵¹ *Printz* may be of particular note here: it involved a requirement that local law enforcement run background checks on gun purchasers.²⁵² In light of *Printz*, the current Supreme Court might deem telling policing agencies they cannot use FRT or ALPRs to be “commandeering.”

A broader concern is that under the anti-commandeering doctrine, the Court might be concerned about upholding any statute that banned the use of certain surveillance technologies or limited how they might be used. A federal statute banning the use of FRT to address certain offenses would, at the least, make law enforcement more expensive—it was time-consuming to thumb through mug-shot books to find a culprit from a photograph.²⁵³ And it might limit enforcement altogether if facial recognition were the only way to identify responsible parties.²⁵⁴

Even if such regulation were deemed “commandeering,” however, there are workarounds Congress could employ. For example, the Court has held that it is not commandeering if congressional regulation is “generally applicable,” i.e., if it affects private and governmental entities alike.²⁵⁵ In *Reno v. Condon*, for instance, the Supreme Court upheld congressional regulation of states selling driver information, on the ground that private resellers of license plate data were bound by similar strictures.²⁵⁶ The Federal Aviation Administration (“FAA”) seems to have adopted just this tactic with drones. After Congress told the FAA to do something about law enforcement users, it adopted generally applicable regulations that treated private users the same way.²⁵⁷

²⁵¹ *Printz*, 521 U.S. at 935.

²⁵² *Id.* at 904, 933.

²⁵³ See Shirin Ghaffary, How to Avoid a Dystopian Future of Facial Recognition in Law Enforcement, *Vox* (Dec. 10, 2019, 8:00 AM), <https://www.vox.com/recode/2019/12/10/20996085/ai-facial-recognition-police-law-enforcement-regulation> [<https://perma.cc/9RWG-D29E>] (describing how one county police department said that before facial recognition, finding matches “used to take days, weeks, or longer”).

²⁵⁴ See Julie Bosman & Serge F. Kovaleski, Facial Recognition: Dawn of Dystopia, or Just the New Fingerprint?, *N.Y. Times* (May 18, 2019), <https://www.nytimes.com/2019/05/18/us/facial-recognition-police.html> [<https://perma.cc/L3DL-TT9V>] (detailing how facial recognition has made policing more efficient and helped to solve cold cases).

²⁵⁵ See *Reno v. Condon*, 528 U.S. 141, 151 (2000) (upholding the Driver’s Privacy Protection Act in part because it was “generally applicable”).

²⁵⁶ *Id.* at 143, 151.

²⁵⁷ U.S. Department of Transportation Issues Two Much-Anticipated Drone Rules to Advance Safety and Innovation in the United States, *Fed. Aviation Admin.* (Dec. 28, 2020), <https://www.faa.gov/newsroom/us-department-transportation-issues-two-much-anticipated->

Private actors use both FRT and ALPRs.²⁵⁸ Homeowners associations and gated communities use ALPRs to keep tabs on who comes and goes.²⁵⁹ And FRT is used by many retail establishments.²⁶⁰ If Congress were to declare that no entity could use a facial recognition system that operated differently on darker or lighter faces, or on male or female faces, that would be a “generally applicable” law. It might similarly work to say that private merchants and local police alike cannot use facial recognition systems for anti-shoplifting purposes.

This idea, that Congress may pass generally applicable laws without running afoul of the anti-commandeering rule, likely supports why existing congressional statutes that regulate surveillance are constitutional. ECPA governs wiretaps, pen registers, and access to files and records kept by service providers.²⁶¹ And as Erin Murphy explains, a raft of other federal privacy laws restrict access to information from books we borrow, to credit histories, to drivers’ records retained by state departments of motor vehicles.²⁶² In most if not all of these existing statutes regulating privacy from intrusive inquiry, Congress regulates all conceivable users, then creates exemptions or special rules for law enforcement access.²⁶³ In that structure, law enforcement not only is being treated the same as all entities that might seek to acquire private

drone-rules-advance-safety-and?newsId=25541 [https://perma.cc/FPM6-TMCT] (describing new drone regulations which apply to “all operators of drones that require FAA registration”).

²⁵⁸ See generally Heydari, *The Private Role in Public Safety*, supra note 80 (arguing that private actors play key roles across all aspects of public safety, from furnishing equipment, funds, and privately generated surveillance data that aid law enforcement, to forming community-based organizations that conversely emphasize alternatives to traditional policing).

²⁵⁹ Josh Kaplan, *License Plate Readers Are Creeping into Neighborhoods Across the Country*, *Slate* (July 10, 2019, 7:30 AM), <https://slate.com/technology/2019/07/automatic-license-plate-readers-hoa-police-openalpr.html> [https://perma.cc/LBJ6-F4BZ].

²⁶⁰ Kashmir Hill, *Which Stores Are Scanning Your Face? No One Knows.*, *N.Y. Times*, <https://www.nytimes.com/2023/03/10/technology/facial-recognition-stores.html> [https://perma.cc/U735-AZK2] (June 5, 2023).

²⁶¹ See generally Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 *Geo. Wash. L. Rev.* 1557 (2004) (detailing the body of surveillance law created by ECPA, especially statutes governing the use of wiretaps, pen registers, and retrospective surveillance). See also *Electronic Communications Privacy Act of 1986*, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at scattered sections of 18 U.S.C.).

²⁶² See Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 *Mich. L. Rev.* 485, 487 & n.2, 501–02, 546 (2013).

²⁶³ *Id.* at 504–06.

information; it is being treated better. In that situation, anti-commandeering claims are unlikely to prevail.²⁶⁴ Still, it is not clear how far the generally applicable law rule goes, especially if there are no private analogues to law enforcement uses of surveillance.

Most likely, given Congress's substantial control over the capabilities and quality of policing technologies—and the resulting limits on their use—the widespread harmful use of surveillance technologies can be curtailed no matter what. There may well be some federalism-based limitations on the direct instructions Congress could give state and local law enforcement, like requiring recordkeeping or that they refrain altogether from certain uses. But the limitations may themselves have work-arounds. In short, Congress has ample power to bring a great deal of sanity to the present unrestrained use of policing technologies.

And no matter what, Congress has one final trick up its sleeve regarding regulating law enforcement uses of technology, even if the anti-commandeering doctrine proves problematic: the control over federal databases. Many of the surveillance technologies used by state and local law enforcement depend on databases for their utility. The use of facial recognition to identify faces requires a target or enrollment database.²⁶⁵ ALPR hot-lists the same.²⁶⁶ There are state and local databases and hot lists, but some of the most crucial databases are federal ones.²⁶⁷ No matter what else is the case, Congress surely can limit access to those federally run databases to those who play by federal rules.

²⁶⁴ Ira S. Rubinstein, *Privacy Localism*, 93 *Wash. L. Rev.* 1961, 2023–24 (2018) (“[T]here is scant evidence of legislatures, courts, or scholars treating government restrictions on the collection, use, and disclosure of personal data as a power reserved to the states for their exclusive control or viewing federal lawmaking in this area as necessarily intruding upon state sovereignty.”).

²⁶⁵ Ferguson, *supra* note 224, at 1112.

²⁶⁶ Crump et al., *supra* note 67, at 5.

²⁶⁷ Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 *Stan. L. Rev.* 1393, 1403 (2001) (“Today, federal agencies and departments maintain almost 2,000 databases, including records pertaining to immigration, bankruptcy, Social Security, military personnel, as well as countless other matters.”); Murphy, *Databases*, *supra* note 242, at 809 (“There are gang databases, terrorist watch lists, violent criminal databases, forensic reference databases, corrections databases, and a wide variety of public and private databases ranging from security industry to identity theft to gaming industry databases.”).

*D. The Spending Power: Encouraging State Regulation**1. The Tools Congress Possesses and Uses*

To this point, we have been discussing the federal government's direct regulation of policing, but Congress also has nonregulatory tools that it can use to "encourage" states and local governments to pursue federal aims.²⁶⁸ The Constitution gives Congress the power to raise taxes and spend them on the "general Welfare of the United States."²⁶⁹ The spending power gives Congress two basic ways to induce others to change their behavior: First, Congress can simply spend money on reforms it wants to promote. Second, it can attach reform conditions to money it gives out for other purposes, requiring recipients to satisfy congressional requirements in order to get the money. Congress regularly uses both of these tools to influence policing, although—as we will see—it often does so ineffectively.

The first strategy—simply spending money—has a direct effect on local policing. More departments have body-worn cameras and use of force training because Congress has paid the bill.²⁷⁰ This is why President Biden's 2023 budget requested \$15 billion over ten years for a new discretionary grant program to develop alternative response approaches, "so [police] do not have to respond to non-violent situations that may not merit police intervention."²⁷¹ It also seeks funds to promote strategies to reduce racial disparities.²⁷²

Given the size of the congressional purse, Congress could accomplish a great deal simply by spending, but this strategy has a serious limitation: gift giving only works if the recipients want what is being handed out. Congress can, for example, spend all it wants to develop programs to reduce racial disparities. If the states and police departments that most

²⁶⁸ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages.").

²⁶⁹ U.S. Const. art. I, § 8, cl. 1.

²⁷⁰ See, e.g., H.R. 2471, 117th Cong. (2022) (enacted) (funding for body-worn cameras); S. 4003, 117th Cong. (2022) (enacted) (funding for training on alternative to use of force and de-escalation); H.R. 1280, 117th Cong. (2022) (requiring law enforcement officers to complete training on racial profiling and implicit bias).

²⁷¹ Fact Sheet: President Biden's Safer America Plan, White House (Aug. 1, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/01/fact-sheet-president-bidens-safer-america-plan-2/> [<https://perma.cc/E6TH-SMK9>].

²⁷² *Id.*

need such programs do not want to learn from them, the program may do little good.²⁷³

That is where Congress's power to spend conditionally comes in. "Congress may attach conditions on the receipt of federal funds, and [it] has repeatedly employed the power 'to further broad policy objectives'"²⁷⁴ In theory, when Congress sets conditions, state or local governments only receive and retain federal funding to the extent they agree to, and do in fact, adhere to conditions Congress (or the executive branch, utilizing delegated power from Congress) placed on those grants.

In some sense, all federal grant programs are conditional. Congress gives federal agencies authority to use the funding only toward particular ends, and it obviously requires the funds be spent for that specific purpose. That is a condition. It often also goes a bit further and requires recordkeeping or that recipients provide matching funds.²⁷⁵

But the power to add conditions to federal grant programs is more expansive than simply limiting the purposes for which the funds may be used or demanding related local commitments. Congress can set conditions on recipients that sweep beyond what it is funding. For example, Title VI and the Safe Streets Act prohibit discrimination in all programs receiving federal funds.²⁷⁶ Conditioning grants in these ways "greatly increases federal power," for it effectively increases the federal

²⁷³ See Roger Michalski & Stephen Rushin, *Federal (De)funding of Local Police*, 110 *Geo. L.J. Online* 54, 55 (2021) ("[E]fforts to use the lever of federal funding to alter the behavior of local police departments will at most have a limited effect, particularly if the reforms that federal lawmakers demand are expensive or unpopular locally.").

²⁷⁴ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (plurality opinion)); see Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 *Stan. L. Rev.* 1103, 1114–16 (1987) (distinguishing between Congress's use of both classifying and coercive conditions tied to federal funding); 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, 461–62 (2003) (discussing the shift in view of the Supreme Court about the scope of Congress's conditional spending power from 1936 to today); Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 *Geo. L.J.* 861, 868–69 (2013).

²⁷⁵ See, e.g., U.S. Dep't of Just., *DOJ Grants Financial Guide 126* (2017), https://www.justice.gov/d9/pages/attachments/2019/12/19/doj_financialguide_feb_2019.pdf [<https://perma.cc/QJG6-79B7>] (noting grantees are required to retain records pertinent to the award for a period of three years from the date of submission of the final expenditure report).

²⁷⁶ See 42 U.S.C. § 2000d (Title VI discrimination prohibition); 34 U.S.C. § 10228(c)(1) (Safe Streets Act discrimination prohibition).

government's regulatory reach.²⁷⁷ More pointedly, Congress already imposes specific reforms through grant conditions. For example, it requires that departments adopt a policy encouraging officers to arrest rather than cite or summons those accused of domestic violence, even when those charges are misdemeanors.²⁷⁸

2. *The Limitations on the Use of Spending Conditions*

The Supreme Court set out the basic rules for conditional spending grants in *South Dakota v. Dole*, which involved a decision by Congress to condition up to five percent of federal highway funds to states on raising their drinking age to twenty-one.²⁷⁹ The Court upheld the legislation.²⁸⁰ In addressing the challenge, the Justices set out four “limitations” for a valid spending condition, then added a caveat that has grown to overshadow all the rest.

The limitations set out in *Dole* easily are met by any federal grant for policing. First, the spending grant itself has to be for the “general welfare.”²⁸¹ Anything to improve public safety and policing almost certainly will meet this test. Second, the condition has to be “unambiguous[]” such that the state and local governments understand to what they are committing.²⁸² This is because the Supreme Court sees conditions on spending grants as “much in the nature of a contract”—and so consent to entering into those terms requires knowing what they are.²⁸³ This too seems straightforward enough; problems arise for the most part only when Congress tries to add conditions retroactively to monies it already has bestowed.²⁸⁴ Third, conditions “may not be used to induce the States to engage in activities that would themselves be unconstitutional.”²⁸⁵ It is hard to imagine that imposing conditions on

²⁷⁷ Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 675 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

²⁷⁸ 34 U.S.C. § 10461(c).

²⁷⁹ *Dole*, 483 U.S. at 205–08, 211.

²⁸⁰ *Id.* at 212.

²⁸¹ *Id.* at 207 (citation omitted).

²⁸² *Id.*

²⁸³ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

²⁸⁴ See Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 584 (2012) (plurality opinion) (“[T]hough Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or ‘retroactive’ conditions.” (quoting *Pennhurst*, 451 U.S. at 25)).

²⁸⁵ *Dole*, 483 U.S. at 210–11.

grants to achieve policing reform, such as requiring officer training in using the technologies, would violate the Constitution. To the contrary, they would foster respect for constitutional rights. Finally, the spending condition must be reasonably related or “germane[]” to the spending grant.²⁸⁶ In *Dole*, by an 8-1 vote, the Court took a loosey-goosey approach that basically asked only if there was some fathomable relationship between why Congress gave the money and what conditions it imposed.²⁸⁷ So this too should be no problem.

Problems arise only because the *Dole* Court also attached a caveat to its green light on conditional spending grants: Congress can “induce[]” state acceptance of spending conditions, but it may not “coerc[e]” them.²⁸⁸ The idea is that dangling some money in order to achieve Congress’s regulatory ends is fine, but at some point, it becomes too much, moving from an incentive to states to an offer they cannot refuse. Prior to the decision in *National Federation of Independent Businesses v. Sebelius* (*NFIB*), this seemed little obstacle.²⁸⁹ The *Dole* Court held that conditioning five percent of federal highway funds in order to get states to raise their drinking age was just fine.²⁹⁰ But then, the *NFIB* case struck down the Medicare provision in the Affordable Care Act (“ACA”) on the ground that it coerced state participation rather than inducing it.²⁹¹

Although the Court found the ACA provision coercive by a 7-2 vote, this holding was set out in two very divergent opinions.²⁹² Justice Scalia and three others, in a joint dissent, held the Medicare provision unconstitutionally coercive because the amount of money at stake was a large percentage of any state’s budget.²⁹³ He reasoned that if Congress had the power to raise huge amounts of money through taxes only to give

²⁸⁶ Id. at 207–08 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

²⁸⁷ Id. at 208–09.

²⁸⁸ See id. at 211 (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

²⁸⁹ 567 U.S. 519 (2012).

²⁹⁰ *Dole*, 483 U.S. at 211–12.

²⁹¹ *NFIB*, 567 U.S. at 585 (plurality opinion).

²⁹² See id. at 529–46, 563–74 (majority opinion) (Roberts, C.J., joined by Ginsburg, Breyer, Sotomayor & Kagan, JJ.); id. at 546–63, 574–75 (opinion of Roberts, C.J.); id. at 575–89 (plurality opinion) (Roberts, C.J., joined by Breyer & Kagan, JJ.); id. at 646–707 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); see also Ellen K. Howard, *Constitutional Law—Breaking Down the Supreme Court’s Spending Clause Ruling in NFIB v. Sebelius: A Huge Blow to the Federal Government or a Mere Bump in the Road?*, 35 U. Ark. Little Rock L. Rev. 609, 612 (2013) (“*NFIB v. Sebelius* contains two different tests for establishing unconstitutional coercion.”).

²⁹³ *NFIB*, 567 U.S. at 683 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

it back in grants, then Congress could make the states dance to whatever federal tune Congress played.²⁹⁴ Chief Justice Roberts’s narrower opinion more likely spells out the governing law for the future.²⁹⁵ Roberts divided conditions into two categories: (1) conditions that simply specified how granted federal dollars were to be spent largely were fine;²⁹⁶ and (2) regulatory conditions that asked the states to do something to get the federal money beyond spending it how Congress wished.²⁹⁷ For this latter category alone, Chief Justice Roberts asked if the grant was coercive.²⁹⁸ For Chief Justice Roberts, the Medicaid program failed as coercive largely because it changed the terms of the existing program so substantially that it basically was a new program whose terms had not been set out unambiguously at the outset.²⁹⁹ In effect, then, he merged *Dole*’s requirement of “unambiguous” conditions into the coercion test.³⁰⁰

Although these opinions do not make it clear how the coercion test will apply in the future, both suggest that criminal justice funding would have to be far greater than it is now to come close to the line.³⁰¹ In *Dole*, which the *NFIB* Justices had no problem affirming, the total amount of federal money at risk, if every state declined the conditions, amounted to \$614.7

²⁹⁴ *Id.* at 680–81.

²⁹⁵ Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outtersson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. Rev. 1, 36 (2013) (writing that Chief Justice Roberts’s opinion is controlling “because it is the narrowest point of law”); Howard, *supra* note 292, at 633 (“Out of the two possible controlling opinions, the lower courts will likely follow the plurality’s opinion.”).

²⁹⁶ See *NFIB*, 567 U.S. at 580 (plurality opinion).

²⁹⁷ *Id.* Chief Justice Roberts’s distinction echoes one made by Justice O’Connor, dissenting in *Dole*. There, she set out an alternative version of the “reasonable relation[]” test that actually addressed the fundamental federalism concern with conditions on spending grants: that they can be sneaky means of Congress regulating in areas in which it has no regulatory authority. See *South Dakota v. Dole*, 483 U.S. 203, 214–16 (1987) (O’Connor, J., dissenting).

²⁹⁸ *NFIB*, 567 U.S. at 580–82 (plurality opinion) (“In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”).

²⁹⁹ *Id.* at 582–84.

³⁰⁰ Huberfeld et al., *supra* note 295, at 52 (“[I]t now appears that clear notice and coercion are also linked because the Court’s coercion reasoning was based, in part, on what it deemed inadequate notice to the states of the new conditions on federal Medicaid dollars.”).

³⁰¹ *NFIB*, 567 U.S. at 644 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation.”); Huberfeld et al., *supra* note 295, at 46 (“The courthouse doors have now been thrown open to challengers seeking to explore the contours of the coercion doctrine.”).

million in federal highway funds.³⁰² In contrast, the federal government dispersed \$233 billion in 2010 to states under the Medicaid program.³⁰³ The current major sources of federal funding to police departments are far smaller. The Edward Byrne Memorial Justice Assistance Grant (“JAG”) program is intended to be the leading source of federal criminal justice funding.³⁰⁴ It totals about \$250 million annually, although much of that does not go to law enforcement.³⁰⁵ The Community Oriented Policing Services (“COPS”) grant program, perhaps the largest single direct grant source for policing, has varied dramatically over the years, but in recent years averages no more than a few hundred million dollars a year.³⁰⁶ This is certainly in the range of what was at risk in *Dole*.³⁰⁷

3. The Ineffective Use of the Spending Power

Despite the fact that constitutional law appears to impose no real constraints on spending to improve policing, Congress has underutilized this tool as a means of effecting policing reform.

First, although Congress spends more than a billion dollars a year for local policing, it is mostly not devoted to reform. Instead, programs give out federal money for policing efforts: more drug crime investigation,³⁰⁸

³⁰² *NFIB*, 567 U.S. at 684 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

³⁰³ *Id.* at 682.

³⁰⁴ Bureau of Just. Assistance, U.S. Dep’t of Just., Justice Assistance Grant Program Activity Report, Fiscal Year 2020, at 1 (2021), <http://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/JAG-Activity-Report-FY-2020.pdf> [<https://perma.cc/7ZNR-492Y>].

³⁰⁵ *Id.* at 1–2.

³⁰⁶ Nathan James, Cong. Rsch. Serv., IF 10922, Community Oriented Policing Services (COPS) Program 1–2 (2023), <https://crsreports.congress.gov/product/pdf/IF/IF10922> [<https://perma.cc/Y2MY-6SW5>].

³⁰⁷ Thus, for example, even after *NFIB*, DOJ continues to apply the Sex Offender Registration and Notification Act (“SORNA”), which mandates a ten percent reduction in Byrne JAG awards for states that have failed to substantially implement the law, and the Prison Rape Elimination Act, which subjects states to a five percent reduction in certain grant funds, including Byrne JAG awards, for failing to certify full compliance with the law’s national standards. See 34 U.S.C. § 20927 (SORNA); *id.* § 30307(e)(2) (specifying five percent loss unless the state indicates that no less than of five percent of such funds will be used solely for working towards full compliance).

³⁰⁸ See COPS Anti-Methamphetamine Program (CAMP), U.S. Dep’t of Just.: Off. of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/camp> [<https://perma.cc/NZY8-PQ69>] (last visited Nov. 1, 2023) (detailing “program designed to advance public safety by providing funds . . . to state law enforcement agencies . . . for the purpose of locating or investigating illicit activities such as precursor diversion, laboratories, or methamphetamine traffickers”).

or more terrorism prevention,³⁰⁹ or just more policing.³¹⁰ Very little goes to increasing accountability and fairness or reducing intrusiveness and harm. COPS grants fund more officers but not necessarily better ones, leading some to argue that Congress did more harm than good in giving out the money.³¹¹ Sometimes, the fact that spending is promoting policing practices rather than reforming them can be invisible. The COPS program was created to promote community policing.³¹² Among the twenty-three purposes for which grants may be made under the current statute, a few can be seen as promoting reform.³¹³ But many more, such as fighting methamphetamine, providing active shooter training, and hiring anti-terror officers, cannot.³¹⁴ Even the “community policing” part of community policing grants has been perverted, including by using the funds for SWAT teams.³¹⁵

³⁰⁹ See Homeland Security Grant Program, Fed. Emergency Mgmt. Agency, <https://www.fema.gov/grants/preparedness/homeland-security> [https://perma.cc/D9NQ-V7KX] (last updated Sept. 5, 2023) (explaining “a suite of risk-based grants to assist . . . efforts in preventing . . . acts of terrorism and other threats”).

³¹⁰ See COPS Hiring Program (CHP), U.S. Dep’t of Just.: Off. of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/chp> [https://perma.cc/WQ3E-2EW5] (last visited Nov. 1, 2023) (detailing grants to “to increase [law enforcement agencies’] community policing capacity and crime prevention efforts”).

³¹¹ Chung et al., *supra* note 147 (“Many consider the crime bill to be one of the cornerstone statutes that accelerated mass incarceration.”); Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, Brennan Ctr. for Just. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs> [https://perma.cc/NSB9-GZKU] (“[The crime] bill featured the largest expansion of the federal death penalty in modern times, the gutting of habeas corpus, the evisceration of the exclusionary rule, the trying of 13-year-olds as adults, and 100,000 new cops on the streets, which led to an explosion in racial profiling.”).

³¹² See About the COPS Office, U.S. Dep’t of Just.: Off. of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/aboutcops> [https://perma.cc/2HVH-7KWF] (last visited Nov. 1, 2023); Program Documents, Off. of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/programdocuments> [https://perma.cc/3D3B-TZVY] (last visited Nov. 1, 2023) (cataloguing the standardized program documents for the COPS program for FY 2012–22).

³¹³ See, e.g., 34 U.S.C. § 10381(b)(1) (rehiring officers laid off due to budget cuts in “community-oriented policing”); *id.* § 10381(b)(6) (enhancing “conflict resolution” skills); *id.* § 10381(b)(7) (increasing participation in “early intervention teams”); *id.* § 10381(b)(13) (promoting community policing as an “organization-wide philosophy”); *id.* § 10381(b)(18) (training to recognize and interact with those with mental illness); *id.* § 10381(b)(19) (better addressing “mental health, behavioral, and substance abuse problems of individuals”).

³¹⁴ See *id.* § 10381(b)(4) (conducting “intelligence, anti-terror, or homeland security duties”); *id.* § 10381(b)(17) (performing “active shooter training programs”); *id.* § 10381(k) (fighting methamphetamine).

³¹⁵ Karena Rahall, *The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex*, 36 *Cardozo L. Rev.* 1785, 1799–800 (2015).

Congress similarly has failed to specify reform conditions required in exchange for money. Congress rarely imposes eligibility criteria designed to change departmental practices in grant programs statutes. The COPS grant includes none.³¹⁶

It is not as if Congress does not know how to impose conditions on policing grant programs. States get docked in grant funding if they do not strengthen their sex offender registry enforcement.³¹⁷ But, as this example suggests, even if grant conditions serve public policies, they often make local policing more intrusive rather than less violent or unfair. Congress has not mandated that agencies receiving federal funding submit use of force or traffic stop data. Grant conditions do not require de-escalation training or transparency and governmental approval for new surveillance equipment.

Perhaps making more serious use of grant conditions would not radically alter policing. Federal funding plays a relatively small part in local law enforcement.³¹⁸ Most police departments do not receive any federal funds.³¹⁹ Among those agencies, some might forgo federal grants rather than meet unpopular or costly conditions. Faced with a penalty if they fail to implement the Sex Offender Registration and Notification Act (“SORNA”) substantially, for example, some states simply gave up the JAG grants altogether.³²⁰ But well-crafted conditions, especially on new public safety money, could help.

Even if Congress imposes more reform conditions on federal funding to local law enforcement, however, policing still might not get any better if no one enforces those conditions. Congress long ago passed Title VI, forbidding discrimination in federally funded programs. But, as Part III discusses further, federal agencies have failed miserably in enforcing the statute against police departments, something the Biden Administration

³¹⁶ See 34 U.S.C. § 10381 (listing statutory grant criteria).

³¹⁷ See *id.* § 10461(c)(1) (specifying that grant recipients must by law or official policy encourage domestic violence arrests); *id.* § 20927(a) (docking funding in jurisdictions that fail to implement sex offender registry software).

³¹⁸ Nationwide, federal funding accounts for between three and nine percent of policing agencies’ budgets. Michalski & Rushin, *supra* note 273, at 59. The federal government spends about \$10 to \$30 per capita on local policing, compared to the roughly \$350 per capita spent by municipal governments. *Id.*

³¹⁹ *Id.* at 54–55.

³²⁰ In 2021, ten SORNA-noncompliant states lost \$2,147,863. See Alexia D. Cooper, Bureau of Just. Stats., U.S. Dep’t of Just., Technical Report: Justice Assistance Grant (JAG) Program, 2021, at 7 (2022), <https://bjs.ojp.gov/content/pub/pdf/jagp21.pdf> [<https://perma.cc/N9MN-V39W>].

has more or less acknowledged and taken initial steps to fix.³²¹ Yet, Congress has let Title VI enforcement slide. Similarly, DOJ never has levied the Death in Custody Reporting Act (“DCRA”) funding penalty for failing to submit data to the federal government, though states have been required to submit this data since 2013.³²² Although the Department’s own Inspector General has made clear the agency’s failure, Congress has not called the department to account.³²³

At bottom, the problem seems to be that Congress lacks much will to change policing. Congress has the power; it just will not use it. This Part has argued it should, and provided a roadmap for what needs done. But in the absence of congressional will, the only other federal option is the executive branch, to which we turn next.

III. THE ROLE OF THE FEDERAL EXECUTIVE

As Part II suggests, congressional legislation could transform local policing. But Congress has often failed to pursue policing reform effectively and sometimes has made things worse in local policing. This Part explores the other federal options: whether Congress acts or not, the president also has the power to influence local policing.

Presidents derive authority to address policing from several constitutional provisions. The Executive Vesting Clause vests executive power in the president; the Take Care Clause instructs the president to “take Care that the Laws be faithfully executed;” the Pardon Power gives the president almost unlimited authority to pardon those who violate federal criminal law; and the Appointments Clause gives the president considerable power to appoint and remove officials.³²⁴

³²¹ Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32961 (May 25, 2022); see *infra* notes 410–19 (discussing nonenforcement of Title VI and steps Biden Administration has taken to address this).

³²² Nat’l Crim. Just. Ass’n, A Primer for Death in Custody Reporting Act (DCRA) and Related Program Data Requirements 1 (2022), https://www.ncja.org/_files/ugd/cda224_cb8b3c3a3ada4aaba9e130aeea3bc521.pdf [<https://perma.cc/J556-UP6H>].

³²³ Off. of the Inspector Gen., U.S. Dep’t of Just., Review of the Department of Justice’s Implementation of the *Death in Custody Reporting Act of 2013*, at 19–20 (2018), <https://oig.justice.gov/reports/2018/e1901.pdf> [<https://perma.cc/G47U-URNU>].

³²⁴ U.S. Const. art. II, § 1, cl. 1 (Executive Vesting Clause); *id.* § 3 (Take Care Clause); *id.* § 2, cl. 1 (stating that the President “shall have Power to grant Reprieves and Pardons”); *id.* § 2, cl. 2 (Appointments Clause).

The President cannot use these powers to write laws or fund programs; rather, the president operates—often indirectly and interstitially—to guide federal agencies in executing and enforcing the law. In practice, despite limitations, these powers offer the president several mechanisms for shaping policing: although presidents cannot enact lasting legislation, they can set out policy in executive orders that have the force of law.³²⁵ Although Congress funds federal programs, agencies administer those programs and set conditions on and priorities for how funds may be used. Although Congress authors civil rights laws, presidents appoint those who enforce them and guide the strength of the nation’s commitment to constitutional rights. And although Congress creates and funds federal law enforcement agencies, executive branch officials dictate the policies and practices of those agencies, including how they interact with local law enforcement.

Together, these mechanisms give the president considerable power to establish national policing policy. Indeed, because presidential administrations implement federal grant and equipment programs, enforce federal law against police officers and police departments, and run federal law enforcement agencies that collaborate with local law enforcement, they cannot help but communicate to local police a national message about how policing should operate. There are, however, four problems with how administrations have acted: First, they have failed to articulate a clear national commitment to policing that is fair, harm efficient, and accountable as well as effective. Second, they have pushed local policing in incoherent, often contradictory, directions—on the one hand seeking reform to make it less harmful and more responsive to communities and, on the other, subsidizing intrusive policing strategies and undermining local accountability. Third, administrations more often push local policing in the latter direction, towards intrusiveness without adequate benefit or accountability. And fourth, when the executive branch has articulated standards for how to make local policing fairer, less harmful, and more accountable, it has failed to hold federal law enforcement agencies to them, and those agencies in turn influence local policing. President Biden has done better than his predecessors, but there

³²⁵ Staff of H. Comm. on Gov’t Operations, 85th Cong., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers 1* (Comm. Print 1957) (“Executive orders . . . are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.”).

remains a vast chasm between where the executive branch should be on policing and where it currently is.

A. Setting National Policy

One of the greatest obstacles to police reform at the local level is that the federal government does not speak with a unified voice. There is friction between the parts of the federal government dedicated to protecting constitutional rights and promoting police reform and those parts that are law enforcement agencies themselves or exist to promote policing and enforcement, even within agencies and certainly across them.

Making the range of federal interventions into local policing a positive force demands vision and coordination. Presidents exercise this kind of leadership in other areas: President Biden's White House has offices on economics, environmental quality, gender policy, national security, climate policy, intellectual property enforcement, drug control, science and technology, cybersecurity, space, and trade.³²⁶ But no president has developed a coordinated, national effort to promote sound policing.³²⁷

Even if presidents do not establish a policing or public safety czar, they could do far better in articulating a national, cross-agency agenda for how federal agencies approach their impact on local law enforcement. The most natural way to do this is by executive order. Yet, presidents rarely have made meaningful policing policy by executive command.

This is not to say presidents have done nothing positive on policing with executive orders. Facing protests over police violence against Black men in 2015, President Obama, for example, ordered review and coordination among federal programs offering military equipment to

³²⁶ Executive Office of the President, White House, <https://www.whitehouse.gov/administration/executive-office-of-the-president/> [<https://perma.cc/V8PR-ECC7>] (last visited Nov. 1, 2023).

³²⁷ See generally Barry Friedman, N.Y.U. Sch. of L. Policing Project & Rachel Harmon, Ctr. for Crim. Just. at the Univ. of Va. Sch. of L., *Policing Priorities for the New Administration* (2020), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/600757727bc025296a0f1fd0/1611093875845/Policing%2BPriorities%2Bfor%2Bthe%2BNew%2BAdministration.pdf> [<https://perma.cc/K2NT-KE2L>] (noting that the federal government's approach to policing lacks coherence and recommending national strategies). See also Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 *Wm. & Mary L. Rev.* 387, 394 (2017) (arguing that criminal justice reform efforts are "best served by creating a commission within the Executive Office of the President to advise him or her on criminal justice policy matters").

police departments. And he created the President's Task Force on 21st Century Policing, which in turn made influential recommendations to local agencies.³²⁸ When President Trump faced the largest protests in U.S. history after officers killed George Floyd in Minneapolis, he issued an order directing the Attorney General to create a national use of force database.³²⁹ President Trump's order also conditioned grants to local police departments on seeking accreditation, which the order stated must require banning chokeholds and other steps to "ensure transparent, safe, and accountable delivery of law enforcement services."³³⁰

Both Presidents could have gone further. President Trump's order, for example, could have said more about the content of accreditation or mandated incentives for local departments to participate in the federal database. And it said almost nothing about fairness or intrusiveness of policing beyond the use of force.³³¹ Moreover, much of the order was never implemented. Still, President Trump's order suggested what is possible. It used an uncontroversial set of tools to promote reform: directing federal agencies to gather and share information, to recommend legislation, to develop and promote training and best practices, to promote standards through external organizations, and to leverage federal funding in service of reform.³³² And it did so for the purpose of encouraging local law enforcement to be less violent and more responsive and accountable.

In May 2022, after soliciting input from stakeholders, President Biden issued a more comprehensive response to what many saw as an ongoing crisis in policing.³³³ Much of the EO is focused on reforming federal, rather than local, law enforcement, which is not surprising, since that is

³²⁸ See generally President's Task Force on 21st Century Policing, U.S. Dep't of Just., Final Report of the President's Task Force on 21st Century Policing (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/7CP9-2UGB>] (recommending proposals to rebuild trust between local communities and their police departments).

³²⁹ See Safe Policing for Safe Communities, Exec. Order No. 13,929, 85 Fed. Reg. 37325 (June 16, 2020), *revoked by* Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32962 (May 25, 2022) (directing the Attorney General to create a use of force database). George Floyd was killed on May 25, less than a month earlier. How George Floyd Died, and What Happened Next, N.Y. Times (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/NHE8-LFY4>].

³³⁰ See 85 Fed. Reg. 37325–26.

³³¹ See *id.* at 37325–28.

³³² *Id.*

³³³ See generally Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, Exec. Order No. 14,074, 87 Fed. Reg. 32945 (May 25, 2022) (describing more detailed police reform plan).

where presidents have the most power to act. In this respect, the order is a significant achievement. In addition, the order directs federal agencies to promote local police reform in hiring, officer wellness, encounters with people in crisis, community relations, surveillance technology, accountability, and limiting unnecessary arrests and interactions with the police.³³⁴ It renews restrictions on the transfer and purchase of some kinds of military equipment for local agencies and expands data collection on policing.³³⁵ And, as discussed below, it instructs several federal agencies to award discretionary grants in a manner consistent with the policies promoted by the order.

Although the Biden EO takes important steps to make local policing less harmful, more accountable, and fairer, it still falls short as national policing policy. The order is anything but comprehensive. Although Biden's EO covers a critical range of policing issues, including the use of force, data collection, and reducing racial disparities, it leaves many others—transparency, First Amendment protection, most surveillance technology, and undercover policing, for example—untouched.

The Biden EO also commands some federal agencies, but not others, to promote the goals of the order in programs directed at local law enforcement. Consider the inconsistency in calling for “ending discriminatory pretextual stops,” but then failing to include the Department of Transportation among agencies that should bring programs into line.³³⁶ And the order excludes major non-grant programs, especially the Equitable Sharing Program, discussed below. As much progress as it represents, the Biden order does not constitute a national policing policy, even if it is the closest any administration has come.

B. Implementing Federal Programs

Even without a national policy, administrations have many avenues to promote fair, harm-efficient, and accountable policing. As discussed in

³³⁴ See *id.* at 32948–50 (§§ 3–5); *id.* at 32955–58 (§§ 13–15).

³³⁵ See *id.* at 32953–54 (§ 12) (“Limiting the Transfer or Purchase of Certain Military Equipment by Law Enforcement”); see also *id.* at 32960–61 (§ 18) (detailing new data collection scheme).

³³⁶ Compare *id.* at 32946 (§ 1) (describing “proactive measures” to prevent profiling like “ending discriminatory pretextual stops”), with *id.* at 32961–62 (§ 20) (listing “Attorney General, the Secretary of HHS, and the Secretary of Homeland Security” as department heads that can help reform local agencies, but not the Secretary of Transportation). See generally Heydari, *The Invisible Driver of Policing*, *supra* note 19 (exploring the National Highway and Traffic Safety Agency’s support of pretextual traffic stops).

Part II, Congress creates and funds programs that funnel resources to local police departments. But Congress does not administer such programs directly. Instead, it delegates that authority to federal agencies.³³⁷ Those agencies have significant discretion in administering such programs, and with that discretion, agencies create incentives for local police departments to choose some initiatives and forms of policing over others. Federal agencies can—and do—use this discretion to shape local policing. And the impact is not just on grant recipients. Any police department that peruses the federal websites looking for grants learns what expert federal agencies think good policing looks like. But federal agencies have used this influence inconsistently and often towards problematic ends, rather than as a means of promoting national policing.

One reason for inconsistent program implementation: presidents differ in their views about policing. As discussed in Part II, Congress created the COPS Office to advance community policing across the United States. The Office has awarded more than \$14 billion to police departments, much of it through its flagship grant program, the COPS Hiring Program.³³⁸ But the statute leaves the question of what constitutes community policing worthy of federal funding to DOJ, and that answer changes across administrations. In 2021 and 2022, the Biden DOJ gave out most of the grants to agencies promising to build legitimacy and trust in police departments.³³⁹ Two years earlier, the same agency implementing the same program under the same statute during the Trump administration favored agencies focused on violent crime, school-based

³³⁷ See, e.g., Violent Crime Control & Law Enforcement Act of 1994, 34 U.S.C. § 10381 (instructing the Attorney General to carry out public safety and community policing grant program); 6 U.S.C. § 603 (authorizing the Secretary of Homeland Security to award grants).

³³⁸ 34 U.S.C. § 10381 (authorizing Attorney General to carry out grant program in support of community policing); Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Justice Department Announces \$139 Million for Law Enforcement Hiring to Advance Community Policing (Oct. 13, 2022), <http://www.justice.gov/opa/pr/justice-department-announces-139-million-law-enforcement-hiring-advance-community-policing-0> [<https://perma.cc/G92V-7H9Q>] (“Since its creation in 1994, COPS has invested more than \$14 billion to advance community policing”).

³³⁹ Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., Fact Sheet: 2022 COPS Hiring Program 1 (2022), https://cops.usdoj.gov/pdf/2022AwardDocs/chp/Post_Award_Fact_Sheet.pdf [<https://perma.cc/MR4F-NZ55>] (noting “[e]ighty-six of the awardees will use the funding to focus on building legitimacy and trust” while eighty-four awardees will focus on other three grant areas); Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., Fact Sheet: 2021 COPS Hiring Program 1 (2022), https://cops.usdoj.gov/pdf/2021AwardDocs/chp/Post_Award_Fact_Sheet.pdf [<https://perma.cc/LDQ7-CFTN>] (noting “[a]pproximately half the awardees will use the funding to focus on building legitimacy and trust”).

policing, and homeland and border security.³⁴⁰ Those differences represent genuine policy disagreements about what makes local policing better. There might be less variation, or at least it would be more transparent, if the COPS Office established public guidelines for what it considers community policing for all of its programming. But, to some degree, policing priorities inevitably reflect political realities that will persist unless Congress itself provides more precise directions in legislation.

Still, inconsistent and problematic program implementation goes beyond an easy partisan explanation. Even administrations that differ on how and how much to enforce the law generally agree with our basic premise that good local policing should be fair, harm efficient, and accountable as well as effective. President Trump's executive order on policing articulates this as clearly as does President Biden's.³⁴¹ And yet, even as they articulate those values, administrations have failed to ensure that federal programs adhere to them; they have simultaneously implemented federal programs in ways that encourage intrusive local policing practices and unaccountable policing.

1. The President's Implementation Power

To see the problem, consider the president's power to set conditions on grant recipients that go beyond those established by Congress. That power allows federal agencies to reach into departments to reform them in specific ways connected to the program. For example, DOJ gives money for body-worn cameras only to agencies with policies in place about using

³⁴⁰ Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., Fact Sheet: 2020 COPS Hiring Program 1 (2020), https://cops.usdoj.gov/pdf/2020AwardDocs/chp/Post_Award_Fact_Sheet.pdf [<https://perma.cc/EL37-V6KV>]; see also Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., Fact Sheet: 2017 COPS Hiring Program (2017), https://cops.usdoj.gov/pdf/2017AwardDocs/chp/Post_Award_Fact_Sheet.pdf [<https://perma.cc/H3TB-V665>] (announcing illegal immigration, violent crime, and homeland security as problem focus areas, giving priority consideration to those willing to cooperate with federal immigration authorities); *City of Los Angeles v. Barr*, 929 F.3d 1163, 1179 (9th Cir. 2019) (permitting consideration of applicant-agency's commitment to priority areas like immigration).

³⁴¹ Safe Policing for Safe Communities, Exec. Order No. 13,929, 85 Fed. Reg. 37325, 37325 (June 16, 2020) (revoked in 2022) ("State and local law enforcement must constantly assess and improve their practices and policies to ensure transparent, safe, and accountable delivery of law enforcement services to their communities."); Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32945 ("Public safety therefore depends on public trust, and public trust in turn requires that our criminal justice system as a whole embodies fair and equal treatment, transparency, and accountability.").

them.³⁴² And it allows agencies to develop requirements that apply across many programs.

Federal agencies have the most discretion when Congress creates a competitive grant program, leaving it to the federal agency to choose among applicants. Even when Congress fixes more precisely how grants are distributed, however—seemingly leaving little room for agency discretion—federal agencies set some restrictions that shape the use of the funding.³⁴³ Overly stringent conditions might discourage policing agencies from becoming grant applicants, so federal agencies face a balancing act between pursuing the purposes of the grant program widely and leveraging the program to encourage best practices. The important point is federal agencies have the power to decide that balance.

Of course, federal agencies do not have unlimited power to shape federal programs; they have only the authority that can be, and is, conveyed by the congressional statutes that create the grant programs. As a consequence, there are three main legal constraints on federal agency authority. First, agencies cannot impose any condition that Congress itself could not impose under its spending power. Just like statutory conditions, agency conditions on funding must be related to the purposes of the program, provide clear notice about what is required of fund recipients, and not coerce participation.³⁴⁴ Second, agency-imposed conditions must be consistent with the federal statutes they implement, though courts treat agency ideas about what is consistent with the statutes deferentially.³⁴⁵ Third, agency-imposed conditions must satisfy the Constitution, which

³⁴² Bureau of Just. Assistance, Off. of Just. Programs, U.S. Dep't of Just., BJA FY 2022 Edward Memorial Justice Assistance Grant Program—Local Solicitation 11 (June 22, 2022, 2:00 PM), <https://bja.ojp.gov/funding/o-bja-2022-171368.pdf> [<https://perma.cc/J3PY-8UF7>] (requiring that any department seeking to purchase body-worn cameras (“BWCs”) with a JAG grant must provide certifications “that each direct recipient receiving the equipment or implementing the program has policies and procedures in place related to BWC equipment usage, data storage and access, privacy considerations, and training”).

³⁴³ See, e.g., Exec. Order No. 14,074, 87 Fed. Reg. at 32961–62; accord Bureau of Just. Assistance, U.S. Dep't of Just., Edward Byrne Memorial Justice Assistance Grant (JAG) Program: Prohibited and Controlled Expenditure Guidance for Awards Made During or After (Federal) Fiscal Year 2023, at 2–4 (2023), <https://bja.ojp.gov/doc/jag-controlled-purchase-list.pdf> [<https://perma.cc/MQ5B-WJWJ>] (imposing restrictions on JAG formula grant program).

³⁴⁴ See, e.g., *New York v. U.S. Dep't of Just.*, 951 F.3d 84, 91–92 (2d Cir. 2020) (considering challenge to adequacy of notice and coerciveness of agency-imposed grant condition on Byrne JAG grants); *City & County of San Francisco v. Barr*, 965 F.3d 753, 765–66 (9th Cir. 2020).

³⁴⁵ 5 U.S.C. § 706(2)(C); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (articulating the principle of deference to agency interpretations).

constrains executive authority vis-à-vis Congress through the separation of powers.³⁴⁶

Although presidents rarely test the limits of their authority to impose conditions on federal grants, localities challenged the Trump Administration's attempt to use police funding to promote federal immigration enforcement on all three of these grounds. In the end, several federal courts of appeals held DOJ's immigration conditions inconsistent with either the JAG or the COPS statute.³⁴⁷ Yet, except for the U.S. Court of Appeals for the Seventh Circuit, which implied that the Trump Administration violated the separation of powers, courts quickly batted away the constitutional claims against DOJ's efforts.³⁴⁸ The lesson is that unless an administration tries something a lot more dramatic, statutes rather than constitutional doctrine will limit the executive branch's ability to further national policing policy through federal grant programs. Yet the statutes tend to be permissive, often defining broad or multiple purposes for grant programs.³⁴⁹ This leaves federal agencies significant room to maneuver.

³⁴⁶ See, e.g., *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1233–35 (9th Cir. 2018) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)) (finding an executive order to withhold funds from localities with “sanctuary city” regimes exceeds executive authority where Congress did not authorize such withdrawal); see also *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

³⁴⁷ See, e.g., *City of Providence v. Barr*, 954 F.3d 23, 45 (1st Cir. 2020); *City of Chicago v. Barr*, 961 F.3d 882, 931 (7th Cir. 2020); *City & County of San Francisco*, 965 F.3d at 766. But see *City of Los Angeles v. Barr*, 929 F.3d 1163, 1183 (9th Cir. 2019) (upholding DOJ's policy to give “bonus points” to grant applicants who focused on illegal immigration and cooperated with federal immigration authorities). The Supreme Court never had reason to resolve the circuit split because the Biden Administration eliminated the challenged conditions. See *New York v. U.S. Dep't of Just.*, 141 S. Ct. 1291 (2021) (denying certiorari); *City of New York v. U.S. Dep't of Just.*, 141 S. Ct. 1291 (2021) (same).

³⁴⁸ *City of Chicago*, 961 F.3d at 897–98; cf. *City of Providence*, 954 F.3d at 31, 45 (denying claim but not reaching constitutional question); *City of Philadelphia v. Att'y Gen. of the U.S.*, 916 F.3d 276, 284, 291 (3d Cir. 2019) (same). But see *New York v. U.S. Dep't of Just.*, 951 F.3d at 123–24 (holding that the conditions were consistent with both statutory authority and constitutional separation of powers).

³⁴⁹ See, e.g., 34 U.S.C. § 10461(b) (specifying multiple purposes for grants); 6 U.S.C. § 604(a) (specifying broad purpose “to assist high-risk urban areas in preventing, preparing for, protecting against, and responding to acts of terrorism”).

2. The Failure to Promote Policing Policy Through Program Implementation

What have presidents done with the power to promote national values through federal programs? Not enough. Administrations sometimes have pushed reform in the tiny grant and technical assistance programs that most demand it, grants like community policing microgrants and de-escalation grants.³⁵⁰ And the Obama and Biden Administrations used the COPS Office collaborative reform program to help agencies reduce force, increase fairness, and build trust.³⁵¹ But administrations have failed to ensure a commitment to similar values in administering other, much larger policing programs. Reform ideas pop up in individual program conditions and priorities. But efforts to encourage reform across agencies and programs through grant administration have been both limited and piecemeal.

Over more than sixty years, federal agencies have given out substantial money, equipment, and power to local law enforcement without any cross-program effort to ensure that local agencies meet basic standards for making policing not only effective, but also fair, harm efficient, and accountable to communities.³⁵² For instance, while federal programs fund or provide surveillance equipment and weaponry, federal agencies do not, as a condition for receiving federal money and wares, require police departments to publish their surveillance and use of force policies or statistics about how often they engage in these activities.³⁵³ Yet

³⁵⁰ See Community Policing Development (CPD) Microgrants Program, U.S. Dep't of Just.: Off. of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/cpdmicrogrants> [<https://perma.cc/D6SN-2A3L>] (last visited Nov. 1, 2023); Community Policing Development: De-escalation Training Solicitation, U.S. Dep't of Just.: Off. of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/de-escalation> [<https://perma.cc/XMD6-Q8TT>] (last visited Nov. 1, 2023).

³⁵¹ Collaborative Reform Initiative, U.S. Dep't of Just.: Off. of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/collaborativereform> [<https://perma.cc/Y76Z-BF2V>] (last visited Nov. 1, 2023) (listing topics for each critical response).

³⁵² See Harmon, *Federal Programs*, *supra* note 39, at 872–74.

³⁵³ See Juhohn Lee, *How Police Militarization Became an Over \$5 Billion Business Coveted by the Defense Industry*, CNBC (July 10, 2020, 4:46 PM), <https://www.cnbc.com/2020/07/09/why-police-pay-nothing-for-military-equipment.html> [<https://perma.cc/DTY3-LREK>] (noting departments' receipt of military surveillance equipment and weapons through the 1033 program); 1033 Program FAQs, Def. Logistics Agency [hereinafter Def. Logistics Agency, 1033 Program FAQs], <https://www.dla.mil/Disposition-Services/Offers/Law-Enforcement/Program-FAQs/> [<https://perma.cc/SPA9-5BJV>] (last visited Nov. 1, 2023) (describing lack of a requirement to post policies or statistics on usage).

promoting reform within federal programs is well within the discretion permitted by the grant statutes.

President Biden has made much more of an effort than others. In Section 19 of President Biden's Executive Order, Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, the President directs DOJ to publish standards for accrediting local police departments and to consider whether some discretionary grants should require that accreditation.³⁵⁴ Those standards might be the beginning of national standards for local agencies, ones that federal programs can promote. In addition, Section 20 of the order asks the Departments of Justice, Health and Human Services ("HHS"), and Homeland Security to examine their discretionary federal grants to local police departments and tailor them to the order's policies as well as to use training and technical assistance to support local law enforcement in adopting those policies.³⁵⁵ These discretionary grant programs constitute a significant portion of the discretionary federal money that goes to local agencies, and, for the first time, those programs will incentivize satisfying national best practices in some areas.

But these efforts are not enough to align federal programs with national values. First, as noted above, the Biden order addresses an important, but ultimately limited, swath of policing's key issues. Second, although Section 20 makes some effort to bring federal grant-making into line with the policies articulated in the order, this section fails to include some of the largest sources of federal support for local policing. The order does not apply to discretionary grant programs administered by agencies other than DOJ, HHS, and the Department of Homeland Security. Thus, for instance, the Department of Agriculture, which offers grants for local law enforcement through the Community Facilities Direct Loan and Grant Program, need not administer that program in a manner consistent with any national policing policy goals.³⁵⁶ Nor does it apply to programs such as the Equitable Sharing Program that provides non-grant funding, or

³⁵⁴ Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32961 (May 25, 2022).

³⁵⁵ *Id.* at 32961–62.

³⁵⁶ Community Facilities Direct Loan and Grant Program, U.S. Dep't of Agric.: Rural Dev., <https://www.rd.usda.gov/programs-services/community-facilities/community-facilities-direct-loan-grant-program> [<https://perma.cc/QXZ5-9BEE>] (last visited Nov. 1, 2023).

programs such as the Department of Defense's 1033 program that provide equipment rather than funding.³⁵⁷

Finally, the order does not require the vast amount of training and technical assistance federal agencies offer local police departments to promote its policies. The FBI-run National Academy and the Department of Homeland Security's Federal Law Enforcement Training Centers provide significant multi-week training for police officers and command staff.³⁵⁸ In DOJ alone, local police departments and officers also get advice from the COPS Office, the Office of Justice Programs (including the Bureau of Justice Assistance), the Office for Victims of Crime, the Office on Violence Against Women, and the Criminal and Civil Rights Divisions.³⁵⁹ Beyond the Justice Department, local departments can get advice and training from HHS,³⁶⁰ the Department of Defense ("DOD"),³⁶¹ the Department of Transportation,³⁶² the Department of Commerce,³⁶³ the Department of Agriculture,³⁶⁴ and other components of the Department

³⁵⁷ See *infra* notes 377–79.

³⁵⁸ Law Enforcement Training Programs and Resources, Fed. Bureau of Investigation, <https://le.fbi.gov/training#National-Academy> [<https://perma.cc/27WB-DFFR>] (last visited Nov. 1, 2023) (indicating that the FBI National Academy is a ten-week program); Training Catalog, Fed. L. Enf't Training Ctrs., <https://www.fletc.gov/training-catalog> [<https://perma.cc/S2LM-AR29>] (last visited Nov. 1, 2023) (listing various law enforcement training programs and providing program links detailing duration).

³⁵⁹ See, e.g., Training and Technical Assistance, U.S. Dep't of Just.: Off. of Cmty. Oriented Policing Servs., <https://cops.usdoj.gov/training-technical-assistance> [<https://perma.cc/AX53-229D>] (last visited Nov. 1, 2023); Training & Technical Assistance, U.S. Dep't of Just.: Bureau of Just. Assistance, <https://bja.ojp.gov/training-technical-assistance> [<https://perma.cc/KYN6-6CGF>] (last modified Aug. 30, 2021); Policing Guidance, U.S. Dep't of Just.: Off. on Violence Against Women, <https://www.justice.gov/ovw/policing-guidance> [<https://perma.cc/PR9Q-M7V4>] (last updated Dec. 19, 2022).

³⁶⁰ Off. of the Surgeon Gen., Opioid Overdose Prevention, U.S. Dep't of Health & Hum. Servs., <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/opioid-overdose-prevention-resources/index.html> [<https://perma.cc/MG3S-NHBA>] (last reviewed Apr. 8, 2022).

³⁶¹ See, e.g., 10 U.S.C. § 284(b)(5) (providing for counter-drug-crime training and expenses); *id.* § 273 (authorizing DOD equipment training and advising for civilian law enforcement).

³⁶² See, e.g., Heydari, *The Invisible Driver of Policing*, *supra* note 19 (manuscript at 4–5); Fed. Motor Carrier Safety Admin. Nat'l Training Ctr., U.S. Dep't of Transp., Drug Interdiction Assistance Program Training Information Packet, <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/DIAP.pdf> [<https://perma.cc/29GV-ZLFL>] (last visited Nov. 1, 2023).

³⁶³ See, e.g., Public Safety, U.S. Dep't of Com.: Nat'l Telecomms. & Info. Admin., <https://www.ntia.doc.gov/category/public-safety> [<https://perma.cc/9V5Y-FQB5>] (last visited Nov. 1, 2023).

³⁶⁴ See, e.g., Community Facilities Technical Assistance and Training Grant, U.S. Dep't of Agric.: Rural Dev., <https://www.rd.usda.gov/programs-services/community-facilities/comm>

of Homeland Security.³⁶⁵ In each case, technical assistance offers departments and officers expertise they cannot easily afford, without interfering with local control over policing.

Training to make policing fairer and less harmful has gotten a big boost during the Biden Administration. President Biden's EO on policing mandated that local participants in federal task forces receive implicit bias training,³⁶⁶ asked DOJ to produce best practices for local police on conducting law enforcement-community dialogue,³⁶⁷ and required that an interagency recommend guidelines for local police departments on using facial recognition and other technologies consistent with privacy, civil rights, and fairness.³⁶⁸ But those efforts are piecemeal.

By its nature, like discretionary grant-making, all training and advice has content. Federal agencies that offer it cannot help but speak to what local policing should look like, yet they do so in a hodgepodge manner at best. Some programs promote beneficial practices like increasing community trust or addressing people in crisis.³⁶⁹ But others promote pretextual policing and drug interdiction without minimizing the harms of these controversial practices.³⁷⁰ Rather than this hodgepodge, all federal agencies should ensure that no federal money, equipment, power, or advice provided to police departments and officers is inconsistent with a uniform set of basic standards for policing.

unity-facilities-technical-assistance-and-training-grant [https://perma.cc/625S-BC5B] (last visited Nov. 1, 2023).

³⁶⁵ See, e.g., State, Local & Tribal Law Enforcement Training, Fed. L. Enf't Training Ctrs., <https://www.fletc.gov/state-local-tribal-law-enforcement-training> [https://perma.cc/SU3A-DNUS] (last visited Nov. 1, 2023).

³⁶⁶ Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32952 (May 25, 2022).

³⁶⁷ Id. at 32953 (§ 11(c)).

³⁶⁸ Id. at 32955–56 (§ 13(e)).

³⁶⁹ Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., Building Trust Between the Police and the Citizens They Serve: An Internal Affairs Promising Practices Guide for Local Law Enforcement 7–16 (2009), <https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p170-pub.pdf> [https://perma.cc/QJH5-WYGD]; Crisis Response and Intervention Training (CRIT), U.S. Dep't of Just.: Bureau of Just. Assistance, <https://bja.ojp.gov/events/crisis-response-and-intervention-training-crit> [https://perma.cc/7N2J-R5R6] (last visited Nov. 1, 2023).

³⁷⁰ See, e.g., Heydari, Rethinking Federal Inducement of Pretext Stops, *supra* note 26 (manuscript at 25–30).

3. Implementing Federal Programs in Ways That Make Policing Worse

Even if administrations do not use federal programs to encourage reform by, for example, setting grant conditions that require departments to ban shooting at a motor vehicle, posting their racial profiling policy online, or requiring a public hearing before obtaining surveillance technology, they still might implement federal programs so as to refrain from promoting or subsidizing especially unfair or harmful policing. But they have not. Instead, departments obtain equipment, money, information, and advice from the federal government in ways that encourage rather than limit policing's problems.

For instance, DOD provides training, support, and equipment to local police departments, most famously through its 1033 Program.³⁷¹ By statute, the 1033 Program allows DOD to transfer its surplus equipment that DOD determines is "suitable" for law enforcement activities.³⁷² This program does not just permit discretion in the interstices; it specifically requires that presidential appointees decide what military equipment local agencies should have because it is suitable for them.³⁷³

After years in which DOD gave away billions of dollars of equipment with almost no scrutiny, the Obama Administration imposed some restrictions on the 1033 Program similar to ones it imposed on JAG grants.³⁷⁴ The Trump Administration stripped some of those limits, but the Biden Administration has reimposed them³⁷⁵: now, again, police

³⁷¹ See 10 U.S.C. §§ 271–275; Rachel Harmon, *The Law of the Police* 544 (2021) [hereinafter Harmon, *The Law of the Police*] (discussing the origin and development of the 1033 Program).

³⁷² 10 U.S.C. § 2576a(a)(1)(A).

³⁷³ *Id.*

³⁷⁴ Law Enforcement Support Office (LESO), Def. Logistics Agency, <https://www.dla.mil/Disposition-Services/Offers/Law-Enforcement/> [https://perma.cc/YL3N-YDLF] (last visited Nov. 1, 2023) (identifying \$7.6 billion in total equipment transfers since program inception); Federal Support for Local Law Enforcement Equipment Acquisition, Exec. Order No. 13,688, 80 Fed. Reg. 3451, 3451 (Jan. 16, 2015), *superseded by* Restoring State, Tribal, and Local Law Enforcement's Access to Life-Saving Equipment and Resources, Exec. Order No. 13,809, 82 Fed. Reg. 41499 (Aug. 31, 2017) (establishing the Law Enforcement Equipment Working Group to strengthen agency standards regulating 1033 Program use); Law Enf't Equip. Working Grp., *Recommendations Pursuant to Executive Order 13688*, at 4–5 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/le_equipment_wg_final_report_final.pdf [https://perma.cc/J5GT-AX3Z] (recommending restrictions on equipment transfers, with an implementation date of October 1, 2015, upon President's approval).

³⁷⁵ Restoring State, Tribal, and Local Law Enforcement's Access to Life-Saving Equipment and Resources, Exec. Order No. 13,809, 82 Fed. Reg. 41499, 41499 (Aug. 28, 2017) (revoking

departments cannot get grenade launchers, and they must make a case for tactical vehicles.³⁷⁶

At best, the limits imposed on the 1033 Program represent a thin idea of what is “suitable” for law enforcement activities; the executive branch nonetheless hands out much else that is problematic for local policing agencies to possess. Even ordinary surveillance equipment and guns and ammunition can do more harm than good in policing.³⁷⁷ Why should the Secretary of Defense (of all people) be left to conclude that extra weaponry or surveillance equipment is suitable for all agencies, for any law enforcement purpose they deem fit?

The federal government also gives out billions of dollars through what is known as the Equitable Sharing Program.³⁷⁸ Under federal asset forfeiture law, property associated with criminal activity can be seized and forfeited to the government.³⁷⁹ Once that happens, the law permits the Attorney General to share the property or the proceeds from selling the property with local law enforcement agencies that conducted or helped conduct the seizure.³⁸⁰ The Attorney General’s discretion to give out forfeiture proceeds is total, so long as any money given out will promote local/federal cooperation and the value given “bears a reasonable relationship” to the agency’s participation in the seizure.³⁸¹

There are at least five obvious ways the Attorney General should use discretion under the Equitable Sharing Program to stop making policing worse. First, considering the risk that seized proceeds distort policing

Exec. Order No. 13,688 and all recommendations issued pursuant to such order); Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Safety, Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32962 (May 25, 2022) (revoking Exec. Order No. 13,809).

³⁷⁶ Def. Logistics Agency, 1033 Program FAQs, *supra* note 353.

³⁷⁷ Harmon, *Federal Programs*, *supra* note 39, at 921–25.

³⁷⁸ DOJ provided local law enforcement agencies with over \$230 million in Equitable Sharing payments in fiscal year 2022. Asset Forfeiture Mgmt. Staff, U.S. Dep’t of Just., *Equitable Sharing Payment of Cash and Sales Proceeds by Recipient Agency* (2022), <https://www.justice.gov/afms/page/file/1566041/download> [<https://perma.cc/7ZMR-FFD4>]. From 2000 to 2019, DOJ and the Treasury together distributed over \$8.8 billion in Equitable Sharing payments. Lisa Knepper, Jennifer McDonald, Kathy Sanchez & Elyse Smith Pohl, *Inst. for Just., Policing for Profit: The Abuse of Civil Asset Forfeiture* 47 (3d ed. 2020), <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf> [<https://perma.cc/ZWD3-9NYN>].

³⁷⁹ See, e.g., 21 U.S.C. § 881(a) (describing seizable property); *id.* § 881(e)(1) (describing procedures governing the disposition of forfeited property).

³⁸⁰ *Id.* § 881(e)(1)(A)–(B).

³⁸¹ *Id.* § 881(e)(3).

priorities, the Attorney General should stop departments from using the money to get around restrictions on asset forfeiture embedded in state laws.³⁸² If states do not permit proceeds from state seizures to go directly to a police department, police departments should not be able to shop the seizure around hoping to get federal dollars. Otherwise, a federal program is undermining state attempts to ensure that local police use asset forfeiture to serve public ends.

Second, the Attorney General should restrict sharing to circumstances in which asset forfeiture is worth the harms it imposes. Some will say that means never, because there is no evidence that asset forfeiture discourages drug crimes or helps police solve violent crimes.³⁸³ But even those who would not go so far still may think it reasonable for the federal government to refuse to pay local police departments for forfeitures unless someone is convicted of a serious crime and the forfeiture is not disproportionate to the criminal activity.³⁸⁴

Third, the Attorney General should restrict the use of proceeds so that agencies do not use the money to fund activities that may be especially likely to be harmful, and therefore should be the product of local governmental decision-making and funding, rather than federal largesse. That could include banning the use of funds to buy weaponry or surveillance equipment or to serve as buy-bust money for undercover policing.

³⁸² Even in states with protective state-level forfeiture laws, the Equitable Sharing Program creates a loophole enabling law enforcement to seize property under federal law, containing fewer safeguards, and to redistribute the lion's share of proceeds back to state and local law enforcement. Knepper et al., *supra* note 378, at 46. No state has fully prohibited this practice, but nine states and the District of Columbia have passed laws to shrink the permitted size and/or scope of such transfers. *Id.* at 49.

³⁸³ See, e.g., Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the H. Comm. on the Judiciary, 105th Cong. 193–97 (1997) (statement of Nadine Strossen, President, ACLU); see also Brian D. Kelly, Inst. for Just., *Does Forfeiture Work? Evidence from the States* 5 (2021), <https://ij.org/wp-content/uploads/2021/02/does-forfeiture-work-web.pdf> [<https://perma.cc/Q9DC-LJLM>] (finding no positive correlations between civil asset forfeiture and subsequent rates of drug crime or police case clearance rates).

³⁸⁴ Sixteen states have instituted such conviction requirements for the forfeiture of most or all types of property. Civil Forfeiture Reforms on the State Level, Inst. for Just., <https://ij.org/legislative-advocacy/civil-forfeiture-legislative-highlights/> [<https://perma.cc/S366-Q5WG>] (last visited Nov. 1, 2023). Such requirements are not ironclad, however. They often contain lower standards of proof for linking seized property with the conviction, and they may have few protections, if any, for innocent third-party property owners. Knepper et al., *supra* note 378, at 40–41.

Fourth, the Attorney General should demand basic political accountability. Even if local communities refuse to fund something—like surveillance equipment—equitable sharing means that the department can get around that constraint. DOJ should require that, before agencies receive shared funds, local governments sign off on uses of the funds, just as they now must approve military equipment under the 1033 Program.³⁸⁵

Finally, the Attorney General could leverage the fact that the federal government funnels hundreds of millions of dollars into police departments to secure reforms that make those departments better. President Trump attempted to curtail federal grant funding for police departments that allowed the use of chokeholds in situations other than those calling for deadly force.³⁸⁶ If such a policy is sensible, why should equitably shared funds go to the same departments? Or those which fail to meet other basic standards for policing?

These are obvious reforms that could engender bipartisan support given that both conservatives and liberals have expressed concern about the program.³⁸⁷ Yet, so far, no administration has used its discretion to shape the Equitable Sharing Program in any of these ways. Quite the contrary. The program guidelines, for example, encourage using the hundreds of millions of dollars the program gives out each year to pay informants and to buy electronic surveillance equipment.³⁸⁸ And not only do the guidelines fail to require local approval on spending the funds, but equitably shared funds also can be used to pay matching requirements for other federal grants, undermining accountability measures built into those other programs.³⁸⁹

³⁸⁵ 10 U.S.C. § 2576a(b)(5) (permitting the transfer of equipment only if “the recipient, on an annual basis, and with the authorization of the relevant local governing body or authority, certifies that it has adopted publicly available protocols for the appropriate use of controlled property, the supervision of such use, and the evaluation of the effectiveness of such use”).

³⁸⁶ Safe Policing for Safe Communities, Exec. Order No. 13,929, 85 Fed. Reg. 37325 (Jun. 16, 2020) (superseded in 2022).

³⁸⁷ Knepper et al., *supra* note 378, at 56; Letter from Inst. for Just. et al. to Bob Goodlatte, Chairman, House Comm. on the Judiciary & Chuck Grassley, Chairman, Senate Comm. on the Judiciary (July 20, 2017), https://www.aclu.org/wp-content/uploads/document/Forfeiture_Coalition_Letter_-_July_20_2017.pdf [<https://perma.cc/E5PV-KC8S>].

³⁸⁸ U.S. Dep’t of Just. & U.S. Dep’t of Treasury, Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies 14–15 (2018) [hereinafter Dep’t of Just. & Dep’t of Treasury, Equitable Sharing]; see also Harmon, Federal Programs, *supra* note 39, at 929–36 (detailing the uses of the billions of dollars given through the Equitable Sharing Program).

³⁸⁹ Dep’t of Just. & Dep’t of Treasury, Equitable Sharing, *supra* note 388, at 14–16.

C. Enforcing Civil Rights

Some might object to the idea of a national policing policy on the ground that the executive branch does not know much about how to make local policing effective, fair, harm minimizing, and accountable. But that objection is unfounded. DOJ has spent more than a quarter-century building that expertise, and it regularly uses it to reform local police departments. Indeed, when people call on DOJ to intervene in local law enforcement, they are not usually thinking about grant conditions or technical assistance. Instead, they are demanding that the Civil Rights Division prosecute an officer or sue a police department, the most visible ways in which the federal government influences local policing.³⁹⁰ This enforcement offers DOJ a high-profile mechanism for promoting national policing policy. As with training, grant programs, and equipment programs, the executive branch has no choice but to make policy through agency enforcement decisions.³⁹¹

Still, both resource and legal constraints inevitably limit the number of officers and policing agencies DOJ can charge or sue directly. This has two implications. First, it makes it more important that the president promotes police reform in other ways, such as through grant-making, informed by DOJ's experience with civil rights enforcement.³⁹² And second, it means that DOJ should do what it can to expand the influence of the cases it brings, including by engaging in strategic enforcement. Presidential policy setting by enforcement can be a complicated enterprise, one that the executive branch should engage in cautiously, and—as experience has taught—political influence over enforcement decisions can undermine justice and faith in the federal government.³⁹³

³⁹⁰ Law Enforcement Misconduct, U.S. Dep't of Just.: C.R. Div., <https://www.justice.gov/crt/law-enforcement-misconduct> [<https://perma.cc/A8JB-NNFV>] (last updated June 7, 2023) (defining misconduct and outlining investigations and procedures); Conduct of Law Enforcement Agencies, U.S. Dep't of Just.: C.R. Div. [hereinafter C.R. Div., Conduct of Law Enforcement Agencies], <https://www.justice.gov/crt/conduct-law-enforcement-agencies> [<https://perma.cc/E9YA-7SB4>] (last updated July 22, 2016) (describing enforcement procedures).

³⁹¹ See Jack Goldsmith & John F. Manning, The President's Completion Power, 115 *Yale L.J.* 2280, 2293–95 (2006).

³⁹² C.R. Div., Police Reform Work: 1994–Present, *supra* note 29, at 37, 50.

³⁹³ See Peter Baker, Trump Claims He's a Victim of Tactics He Once Deployed, *N.Y. Times* (Aug. 10, 2022), <https://www.nytimes.com/2022/08/10/us/politics/trump-fbi-justice-department.html> [<https://perma.cc/ZFC2-JYNP>] (describing President Trump's efforts to politicize law enforcement and their influence on public perception of federal law enforcement agencies when the same agencies investigated him).

Nevertheless, the executive branch will and should enforce the law. Doing so strategically to promote national policy, rather than haphazardly, would enhance the value of enforcement.

Start with criminal prosecutions of police officers. As with criminal prosecutions generally, convicting a police officer condemns their actions and subjects them to significant, lasting harm. This is precisely why many demand criminal prosecutions—to punish officers and show respect for what victims have suffered when an officer has violated rights. In exceptional circumstances, federal prosecutions also send a national message that reverberates in agencies. In prosecuting the officers who watched George Floyd die, for example, DOJ highlighted two violations of constitutional rights often ignored by departments: failure to intervene to stop a constitutional violation and deliberate indifference to serious medical needs.³⁹⁴ Doing so was a strong reminder to departments to train officers to intervene to stop excessive force and address the injuries associated with all force.

The Justice Department need not necessarily wait for an extraordinary case to achieve that impact. What might be accomplished by one high-profile prosecution also might be accomplished by several, less notable ones. If DOJ prosecuted several officers who used chokeholds unconstitutionally, one might similarly expect more assiduous training by departments. Perhaps DOJ could reinforce its message by combining its criminal press releases with training and grant opportunities for departments and communities that want to avoid such events. Integrating criminal prosecution with broader policy promotion might make it more effective at promoting change, as well as justice.

Even at their best, however, prosecutions provide a limited tool for influencing departments. If DOJ wanted to change widespread pretextual traffic stops that produce disparities, for example, no amount of prosecution will get the job done. That brings us to investigations and litigation by the Civil Rights Division against police departments engaged in a pattern or practice of civil rights violations. After the beating of Rodney King, Congress passed 34 U.S.C. § 12601, authorizing DOJ to sue departments that engage in a pattern or practice of civil rights violations seeking court-ordered reform to prevent future violations.³⁹⁵ Using this authority, DOJ has investigated dozens of departments.³⁹⁶

³⁹⁴ *United States v. Thao*, 76 F.4th 773, 778 (8th Cir. 2023).

³⁹⁵ 34 U.S.C. § 12601 (originally codified as 42 U.S.C. § 14141).

³⁹⁶ C.R. Div., *Conduct of Law Enforcement Agencies*, *supra* note 390.

These agencies overwhelmingly have settled with the Department, entering consent decrees that mandate detailed changes to policies, training, supervision, disciplinary mechanisms, and community engagement.³⁹⁷

Pattern-or-practice investigations have impacted local policing largely by driving reform in individual departments, including some of the nation's largest.³⁹⁸ But these cases also are resource intensive: investigating, negotiating, and enforcing reform against just one police department can take several years and several lawyers from DOJ.³⁹⁹ There likely are a far greater number of offending departments than there ever will be the means to investigate. For DOJ to have a broader impact, it must combine strategic enforcement with technical assistance by other DOJ offices to promote reform in departments that it does not investigate.⁴⁰⁰

Pattern-or-practice litigation lends itself to sending a national message. Anyone who reads DOJ's recent findings reports can see its methods and standards for assessing police practices.⁴⁰¹ And both the investigative findings and consent decree reforms provide DOJ's views about what causes and cures constitutional violations in policing. Every decree, for example, has emphasized changes to policies, training, supervision, disciplinary mechanisms, systems for monitoring officer conduct, and community engagement.⁴⁰² Largely through DOJ's efforts, this model of departmental accountability has become conventional wisdom among reformers inside and outside departments.⁴⁰³

But DOJ could do much more to clarify and strengthen this signal, which has long been fuzzy. Although DOJ has mandated a largely consistent set of reforms in its settlements, it has described that agenda in

³⁹⁷ C.R. Div., *Police Reform Work: 1994–Present*, supra note 29, at 20–34.

³⁹⁸ Samuel Walker, *The Justice Department's Pattern-or-Practice Police Reform Program, 1994–2017: Goals, Achievements, and Issues*, 5 *Ann. Rev. Criminology* 21, 34–36 (2022); see also Harmon, *Promoting Civil Rights*, supra note 30, at 16–24 (contrasting effecting reform in individual departments through investigations with inducing proactive reform in departments that have not been investigated).

³⁹⁹ See Harmon, *The Law of the Police*, supra note 371, at 760.

⁴⁰⁰ See Harmon, *Promoting Civil Rights*, supra note 30, at 65.

⁴⁰¹ See C.R. Div., *Police Reform Work: 1994–Present*, supra note 29, at 9–16.

⁴⁰² *Id.* at 25; see, e.g., *United States v. City of Ferguson*, No. 16-cv-00180 (E.D. Mo. Apr. 19, 2016) (consent decree); *United States v. Balt. Police Dep't*, 249 F. Supp. 3d 816 (D. Md. 2017) (consent decree).

⁴⁰³ Samuel E. Walker & Carol A. Archbold, *The New World of Police Accountability* 7–8 (3d ed. 2019).

only two contexts: in thousands of pages of consent decrees tailored to individual departments, and in a couple of short reports that describe the reforms generally.⁴⁰⁴ What about providing data and descriptive narratives that departments can use? Complacent law enforcement agencies might not peruse the Civil Rights Division's website, but department command staff committed to improvement, and community groups wanting change in their local departments, might.⁴⁰⁵ They should be able to find out far more easily what data departments should collect, what practices to watch, and what reforms might work.

DOJ could also consider a safe-harbor program for departments that want to avoid being targets of a pattern-or-practice investigation.⁴⁰⁶ Such a program would require identifying a set of reform measures related to, but less onerous than, those in existing consent decrees, which any department then might adopt to reduce (for example) excessive force or racially disparate policing. Departments would have to adopt the reforms voluntarily, collect and provide data on implementation, and allow the Civil Rights Division to review and monitor progress.⁴⁰⁷ In other words, the Division could leverage its enforcement discretion to incentivize widespread reform—reform that would require less intrusion by the federal government into local affairs and be less expensive for DOJ to achieve.⁴⁰⁸ But perhaps a safe harbor is difficult and risky to implement. The broader point is this: DOJ has learned a lot about police reform through its civil rights enforcement. It should do better at teaching law enforcement agencies those lessons and giving them an incentive to apply them.⁴⁰⁹

There also are civil rights laws that have been enforced far less well by administrations than criminal civil rights laws and the pattern-or-practice laws, even by administrations committed to civil rights. For an illustration, consider how poorly federal agencies have enforced Title VI of the Civil Rights Act of 1964.⁴¹⁰ Title VI is effectively a congressionally imposed, cross-cutting grant condition that seeks to promote a clear,

⁴⁰⁴ See, e.g., C.R. Div., *Police Reform Work: 1994–Present*, supra note 29, at 20–34.

⁴⁰⁵ Thanks to Christy Lopez, a key architect of the pattern-or-practice program, for this point.

⁴⁰⁶ Harmon, *Promoting Civil Rights*, supra note 30, at 36–37.

⁴⁰⁷ See *id.* at 40; Harmon, *The Law of the Police*, supra note 371, at 761–62.

⁴⁰⁸ Harmon, *Promoting Civil Rights*, supra note 30, at 40–41.

⁴⁰⁹ See *id.* at 44.

⁴¹⁰ For the statutory language of Title VI, see 42 U.S.C. § 2000d.

national antidiscrimination policy for local police departments.⁴¹¹ It prohibits local departments receiving federal funding from discriminating in using those funds, even if that discrimination is unintentional.⁴¹² Although the statute demands fair policing and offers the executive branch a powerful tool for promoting it, no agency or administration has fulfilled its promise.

A minimally effective Title VI enforcement program would take in complaints easily, investigate them thoroughly, work with departments with disparities to mitigate them, and impose consequences for departments that violate the law, including if necessary, denying funding to agencies. A more robust program would require all grant recipients to collect and report data, which would be monitored proactively by federal agencies, and it would have a well-developed technical assistance program to help departments comply with the reporting requirements and the law. DOJ—which carries out its own program, litigates all Title VI cases, and supervises guidance and enforcement efforts by other agencies—has implemented neither.⁴¹³

In DOJ’s Title VI program, for example, the complaint system is unknown and inaccessible; the data collection standards are weak and confusing; its investigations are minimal; its work with departments is invisible; and its enforcement, when reforms do not mitigate disparities, is nonexistent, even in sympathetic administrations.⁴¹⁴ Although the Civil

⁴¹¹ Id. § 2000d-1. The Omnibus Crime Control and Safe Streets Act (“Safe Streets Act”), which was modeled after Title VI, prohibits discrimination on the basis of race, color, national origin, religion, and sex. 34 U.S.C. § 10228(e)(1). Here, we focus on Title VI, but similar arguments apply.

⁴¹² See 28 C.F.R. § 42.104(b)(ii) (prohibiting departments receiving federal funding from providing treatment “which is different . . . from that provided to others under the program”).

⁴¹³ See generally Leadership and Coordination of Nondiscrimination Laws, Exec. Order No. 12,250, 45 Fed. Reg. 72995 (Nov. 2, 1980) (detailing Title VI enforcement powers in DOJ). Cf. Memorandum from Vanita Gupta, Assoc. Att’y Gen., U.S. Dep’t of Just., to Kristen Clarke, Assistant Att’y Gen., C.R. Div., Maureen Henneberg, Acting Assistant Att’y Gen., Off. of Just. Programs, Rob Chapman, Acting Director, Off. of Cmty. Oriented Policing Servs. & Allison Randall, Acting Director, Off. on Violence Against Women (June 22, 2022) [hereinafter Memorandum from Vanita Gupta to Kristen Clarke et al.], https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/ocr_titlevi.pdf [https://perma.cc/CGF2-WE BW] (discussing the importance of promoting data collection to improve implementation of Title VI).

⁴¹⁴ See LDF Calls on AG to Freeze DOJ Funding to Law Enforcement Departments with Discriminatory Practices, Legal Def. Fund (Apr. 20, 2021), <https://www.naacpldf.org/case-issue/stop-doj-funding-to-law-enforcement-agencies-that-violate-title-vi/> [https://perma.cc/ZW6F-Q5MM] (referencing numerous police departments with discriminatory practices that continue to receive federal funding).

Rights Division occasionally brings suit under Title VI, these claims are typically an add-on to a pattern-or-practice investigation.⁴¹⁵

Enforcing Title VI is complicated and labor intensive. Data collection on programs that receive federal funding, for example, can be onerous for local agencies—especially small ones.⁴¹⁶ If agencies give up grants rather than comply with data requirements, the purpose of the grant programs may go unserved *and* the federal government may lose the opportunity to guide departments towards fairer practices. Moreover, even with good data, assessing disparities remains difficult for DOJ, just as it is for the law enforcement agencies themselves.⁴¹⁷ And avoiding disparities is one of policing's greatest challenges. Given all that, an effective Title VI program might not be within easy reach. But decades of executive neglect have not helped.

The Biden Administration has noticed the problem. After a thorough review of existing DOJ Title VI compliance and enforcement efforts,⁴¹⁸ Associate Attorney General Vanita Gupta ordered improvements to DOJ's complaint, data collection, and compliance review practices.⁴¹⁹ Such efforts are in their infancy, but perhaps they signal improved use of this longstanding law to promote fairness in policing.

D. Supervising Federal Law Enforcement

The final way that federal agencies influence local policing policy is, paradoxically, through the conduct of federal law enforcement agencies. There are more than 50 federal law enforcement agencies (excluding the Offices of Inspectors General), with nearly 137,000 officers.⁴²⁰ These

⁴¹⁵ *Id.* (discussing failures of DOJ Title VI enforcement); see also 28 C.F.R. §§ 0.50, 0.51 (giving DOJ the power to litigate and enforce Title VI claims, including those arising from funding by other agencies); Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Justice Department Announces Investigation of the City of Phoenix and the Phoenix Police Department (Aug. 5, 2021), <https://www.justice.gov/opa/pr/justice-department-announces-investigation-city-phoenix-and-phoenix-police-department> [<https://perma.cc/U6RL-VBMC>] (showing Title VI claims included as part of pattern or practice investigation).

⁴¹⁶ See Memorandum from Vanita Gupta to Kristen Clarke et al., *supra* note 413, at 4 (“[A]dditional data collection requirements could prove to be cost-prohibitive.”).

⁴¹⁷ Nat'l Acads. of Scis., Eng'g & Med., *Proactive Policing*, *supra* note 198, at 12.

⁴¹⁸ See Memorandum from Vanita Gupta to Kristen Clarke et al., *supra* note 413, at 3–5 (discussing DOJ review of its Title VI procedures).

⁴¹⁹ *Id.* at 5–13 (mandating improvements to DOJ's Title VI procedures).

⁴²⁰ See Connor Brooks, Bureau of Just. Stats., U.S. Dep't of Just., *Federal Law Enforcement Officers, 2020—Statistical Tables 1, 4* (2022) [hereinafter Brooks, *Federal Law Enforcement*].

agencies work closely with local law enforcement agencies.⁴²¹ Although they could model law enforcement that is fair, harm efficient, and accountable, as well as effective, and promote reform in their extensive cooperative endeavors with local agencies, they have done little of either. Too often, indeed, to the contrary.

First, federal law enforcement agencies fail to live up to best practices, even those identified by other federal agencies whose focus is reform. The COPS Office, for example, recommends that law enforcement agencies check job applicants' social media accounts for evidence of overt bias, an important means of ensuring agencies are hiring officers who communities can trust.⁴²² But only one in six large federal law enforcement agencies conduct such a check.⁴²³ For decades, federal agencies dragged their feet on body-worn cameras and videotaping interrogations, even as local policing used these mechanisms for ensuring lawful policing.⁴²⁴ The Civil Rights Division insists that agencies make policies, use of force data, misconduct complaints, and stop, search, and arrest data available to the public, but no federal law enforcement agency achieves this level of transparency.⁴²⁵ These agencies do not have the detailed policies, the complaint and disciplinary mechanisms, or the

Officers, 2020—Statistical Tables], <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fleo20st.pdf> [<https://perma.cc/L927-LNDB>].

⁴²¹ See, e.g., Law Enforcement, Dep't of Homeland Sec., <https://www.dhs.gov/topics/law-enforcement> [<https://perma.cc/WX53-54YZ>] (last visited Nov. 1, 2023).

⁴²² See Off. of Cmty. Oriented Policing Servs., U.S. Dep't of Just., *Hiring for the 21st Century Law Enforcement Officer: Challenges, Opportunities, and Strategies for Success 26* (2017), <https://cops.usdoj.gov/ric/Publications/cops-w0831-pub.pdf> [<https://perma.cc/9GZZ-F63V>].

⁴²³ Brooks, *Federal Law Enforcement Officers, 2020—Statistical Tables*, supra note 420, at 13 tbl.7.

⁴²⁴ See Andy Mannix, *Star Trib.*, *Some Federal Agents Lack Body Cameras Despite WH Order*, Gov't Tech. (May 30, 2023), <https://www.govtech.com/public-safety/some-federal-agents-lack-body-cameras-despite-wh-order> [<https://perma.cc/WR27-LPZX>]; Matt Zapotosky, *Justice Dept. Will Require its Law Enforcement Officers to Use Body Cameras in Certain Circumstances*, Wash. Post (June 7, 2021, 10:22 PM), https://www.washingtonpost.com/national-security/body-cameras-justice-department/2021/06/07/127f86c2-c7f7-11eb-a11b-6c6191ccd599_story.html [<https://perma.cc/95DL-8T7H>].

⁴²⁵ See, e.g., Press Release, U.S. Att'ys Off., Dist. of N.J., *Justice Department Reaches Agreement with City of Newark, New Jersey, to Reform Police Department's Unconstitutional Practices* (Mar. 30, 2016), <https://www.justice.gov/usao-nj/pr/justice-department-reaches-agreement-city-newark-new-jersey-reform-police-department-s> [<https://perma.cc/3G6G-VXQD>] (listing accountability and transparency measures Newark agreed to adopt in a settlement with the Civil Rights Division); Zapotosky, supra note 424 (indicating that federal law enforcement agencies often resist transparency imposed on local law enforcement, but that in 2021, DOJ agreed to use body-worn cameras for some operations).

community input and oversight that the Civil Rights Division expects, though federal law enforcement agency heads, including in DOJ, have substantial control over these practices.

To be clear, there are several ways in which federal law enforcement is different from local policing. Most federal officers do not engage in patrols, for example; they make fewer arrests, and they deal with international borders.⁴²⁶ But it is hard to argue that these differences justify the current state of affairs. For federal agencies to fail to satisfy basic best practices in policing is, to be blunt, an embarrassment.

Consider the track record of federal law enforcement agencies with respect to surveillance technologies and data collection. Numerous federal agencies conduct social media surveillance, but many have not made public any information regarding the rules or procedures they follow, and the few agencies that have done so employ overly permissive standards.⁴²⁷ Federal agencies' use of facial recognition is similarly haphazard, with limited privacy protections in place and often a lack of awareness of what sorts of facial recognition searches are being run by employees.⁴²⁸

The Biden Administration has taken steps, but they are far too limited. The President's executive order, for instance, requires that all federal law enforcement agencies embrace more inclusive hiring practices, restrict no-knock warrants, and contribute data to a federal law enforcement accountability database.⁴²⁹ More significantly, following the Biden EO, DOJ restricted chokeholds and updated its use of force policy for the first

⁴²⁶ Compare Connor Brooks, Bureau of Just. Stats., Dep't of Just., *Federal Law Enforcement Officers, 2016—Statistical Tables 1*, 6 tbl.4 (2019), <https://bjs.ojp.gov/content/pub/pdf/fleo16st.pdf> [<https://perma.cc/U9LS-ATHW>] (indicating that fewer than ten percent of federal law enforcement officers primarily engage in patrol), with Goodison, *Local Police Departments Personnel*, supra note 2, at 10 tbl.11 (indicating that more than sixty percent of local law enforcement officers primarily engage in patrol).

⁴²⁷ See Rachel Levinson-Waldman, Harsha Panduranga & Faiza Patel, *Social Media Surveillance by the U.S. Government*, Brennan Ctr. for Just. (Jan. 7, 2022), <https://www.brennancenter.org/our-work/research-reports/social-media-surveillance-us-government> [<https://perma.cc/9PT5-K24Z>].

⁴²⁸ See U.S. Gov't Accountability Off., *GAO-22-106100, Facial Recognition Technology: Federal Agencies' Use and Related Privacy Protections* (2022), <https://www.gao.gov/products/gao-22-106100> [<https://perma.cc/LB9H-ZUJA>].

⁴²⁹ *Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*, Exec. Order No. 14,074, 87 Fed. Reg. 32945, 32948–52 (§§ 3, 5), 32953 (§ 10) (May 25, 2022).

time in nearly two decades.⁴³⁰ The new policy makes clear that deadly force may not be used solely to prevent the escape of a fleeing felon, it emphasizes officers' duties to intervene to stop excessive force and provide medical treatment, and it encourages de-escalation, among other steps, to prevent unnecessary and illegal force.⁴³¹ The Executive Order also requires all other federal law enforcement agencies develop use of force policies at least as protective of the public as the one developed by DOJ.⁴³²

But even in the area of use of force, federal agency policies are less specific and more permissive than what many local agencies use. And where is the requirement that federal law enforcement agencies maintain the kinds of easy-to-access complaint mechanisms and robust investigation and disciplinary mechanisms that the federal government regularly demands of local law enforcement?⁴³³ Or policies for protecting First Amendment activities? Compare DOJ's brand new use of force policy to the one adopted in Baltimore under its consent decree with DOJ, and you will see that even as the Civil Rights Division, state laws, and communities demand more (and more) from local police departments, and even as the Biden Administration has tried to push federal agencies forward, they are falling further behind local agencies, rather than leading them.⁴³⁴

⁴³⁰ Memorandum from Merrick Garland, Att'y Gen., U.S. Dep't of Just., to Christopher Wray, Dir., Fed. Bureau of Investigation, Anne Milgram, Admin'r, Drug Enf't Admin., Gary M. Restaino, Acting Dir., Bureau of Alcohol, Tobacco, Firearms & Explosives, Ronald L. Davis, Dir., U.S. Marshals Serv., Michael D. Carvajal, Dir., Bureau of Prisons & Krista A. Boyd, Inspector Gen., Office of the Inspector Gen. (May 20, 2022), https://www.justice.gov/d9/pages/attachments/2022/05/23/departments_updated_use-of-force_policy.pdf [<https://perma.cc/VT85-PHXN>].

⁴³¹ See U.S. Dep't of Just., Justice Manual § 1-16.000 (2022) [hereinafter DOJ Policy on Use of Force], <https://www.justice.gov/jm/1-16000-department-justice-policy-use-force> [<https://perma.cc/4TQF-GQ34>].

⁴³² Exec. Order No. 14,074, 87 Fed. Reg. at 32952 (§ 8).

⁴³³ See, e.g., Settlement Agreement at 20–31, *United States v. Springfield Police Dep't*, No. 22-cv-30043 (D. Mass. Apr. 29, 2022) (consent decree), ECF No. 2-1.

⁴³⁴ Compare DOJ Policy on Use of Force, *supra* note 431 (use of force policy of fewer than 950 words), with Balt. Police Dep't, Policy 1115: Use of Force (2019), <https://www.baltimorepolice.org/transparency/bpd-policies/1115-use-force> [<https://perma.cc/YV27-LNW9>] (use of force policy of more than 4000 words). See, e.g., Simone Weichselbaum, Sachi McClendon & Uriel J. Garcia, U.S. Marshals Act Like Local Police with More Violence and Less Accountability, Marshall Project (Feb. 11, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/02/11/u-s-marshals-act-like-local-police-with-more-violence-and-less-accountability> [<https://perma.cc/9LZC-6RGD>] (finding U.S. Marshals have killed an average of twenty-two suspects and bystanders a year); Press Release, Off. of

Second, federal agencies ought to use their relationships with local law enforcement to promote reform. Federal law enforcement agencies run hundreds of task forces with local law enforcement agencies—drug task forces, fugitive task forces, violent crime task forces, and more.⁴³⁵ These cooperative efforts offer local agencies resources, information, and power. But they also offer federal agencies a range of opportunities to promote reform that too seldom are taken. Federal agencies, for example, could screen out officers with histories of misconduct; they could condition participation on receiving training to minimize use of force; and they could adopt clear, accessible policies guiding task force practices and accountability. Instead, many federal task forces are known for their aggressive policing and lack of accountability.⁴³⁶

Not only have federal task forces not promoted reform; too often they have resisted it. For years, for example, federal agencies not only refused to permit, much less require, federal officers to wear body-worn cameras, they also prohibited local agencies from publicly releasing video of officer-involved shootings when that video was captured on cameras worn by local officers participating in federal task forces.⁴³⁷ Only a revolt by local departments, which pulled officers from task forces over the federal body-worn camera policy, led DOJ to back down.⁴³⁸

Pub. Affs., U.S. Dep't of Just., Justice Department Reaches Agreement with City of Springfield to Reform Police Department's Unconstitutional Practices (Apr. 13, 2022), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-springfield-reform-police-department-s> [<https://perma.cc/5MYQ-C3A2>] (finding that the Narcotics Bureau of the Springfield Police Department engaged in a pattern or practice of excessive force).

⁴³⁵ Radley Balko, *State-Federal Task Forces Are Out of Control*, Wash. Post (Feb. 14, 2020, 5:23 PM), <https://www.washingtonpost.com/opinions/2020/02/14/state-federal-task-forces-are-out-of-control/> [<https://perma.cc/VM2B-VXK4>] (reporting in detail on several of the hundred task forces ranging from the Crimes Against Children Task Force to an FBI Opioid Task Force).

⁴³⁶ Simone Weichselbaum, *Why Some Police Departments Are Leaving Federal Task Forces*, Marshall Project (Oct. 31, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/31/why-some-police-departments-are-leaving-federal-task-forces> [<https://perma.cc/D7XJ-4GE7>] (finding some police departments are choosing to leave federal task forces due to concerns about the federal government's lack of accountability). The Biden order does require implicit bias training for local officers participating in a federal task force. See Exec. Order No. 14,074, 87 Fed. Reg. at 32952–53 (§ 9).

⁴³⁷ Simone Weichselbaum, *Facing Revolt From Police Chiefs, U.S. Marshals Agree to Change Body Camera Rules*, NBC News (Aug. 19, 2021, 6:00 AM), <https://www.nbcnews.com/politics/justice-department/facing-revolt-police-chiefs-u-s-marshals-agree-change-body-camera-rules> [<https://perma.cc/9LBB-HVAX>].

⁴³⁸ *Id.*; see also Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Department of Justice Announces the Use of Body-Worn Cameras on Federal Task Forces (Oct. 29, 2020),

Federal agencies enforce civil rights laws against local police officers and departments; they give local law enforcement agencies billions of dollars each year in federal grants, equipment, and equitable-sharing proceeds, and they work alongside and give power to local police. Until all those oars row hard in the same direction, and the right direction, enduring federal intervention in local policing will do less good than it should.

Presidents do not control agency action directly, and federal agencies may only slowly or incompletely implement the president's or Congress's agenda. But presidents can fashion a better federal executive approach that communicates clear national priorities and values to federal actors and local police departments alike. All things being equal, it is the best chance we have at national police reform.

CONCLUSION

We end where we began. There are some 18,000 policing agencies in the United States. Many lack the capacity to discover and implement best practices; others lack the will. State (and local) governments have taken some steps in demanding reform. But if we are going to have anything approaching consistency in achieving effective, accountable, and equitable policing that minimizes harm, leadership is going to have to come from the federal government. Yet even the most ambitious efforts, such as the Biden Executive Order on Policing, fall far short. And, as we hope to have made clear, this is a job not just for the executive branch but for Congress as well. It is high time that the federal government—all branches of it—stepped up to recognize the problems of policing and acted to remedy them.

<https://www.justice.gov/opa/pr/department-justice-announces-use-body-worn-cameras-federal-task-forces> [<https://perma.cc/VXU8-VR9H>] (announcing DOJ's change in policy to allow "state, local, territorial, and tribal task force officers to use body-worn cameras on federal task forces").