NDCA_States and Federalism

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*** Negative Position ***

— vs Death Penalty —

1NC—States CP v Death Penalty

The fifty states and relevant territories in the United States should abolish the death penalty

Leadership on the state-level spills up – momentum against the death penalty forces the Supreme Court to model

Stahl, Slate senior editor, and Stubbs, director of the ACLU's Capital Punishment Project, **2019**

[Jeremy Stahl, interviewing Cassy Stubbs, 3/28/19, "Is the Tide Finally Turning on the Death Penalty?," Slate Magazine, https://slate.com/news-and-politics/2019/03/momentum-to-abolish-death-penalty-growing.html, accessed 5-25-2020, MAM]

What are some of the states where you see potential for the next big moves on this issue?

Ohio is another example where there has been this legal injection litigation for some time that has been really bogged down in questions of whether or not the defendant has shown and proposed a better way—a less painful way—of killing himself. A lot of the lethal injection litigation has lost sight of the fact that there's this enormous compelling record that we are carrying out executions with a drug, midazolam, that is in fact leading to torture of prisoners in a number of states. We just saw the [Republican] governor of Ohio [Mike DeWine] say, we're not going to do this.

We have this huge [death] row in California, a row that I think is so much bigger than any other row in the country. So [Newsom's] announcement all alone would be a major development in the history of the death penalty in America. But the fact is that it's happening at the same time you have a state like Ohio moving forward with a moratorium, and you have a state like Pennsylvania that's got a large [death] row [moving ahead] with a moratorium.

You're talking a lot about state-level action. Is that because action at the federal level is such a heavy lift? For advocates of abolition, it seems to me that recent decisions from the Supreme Court may not have been so inspiring. I'm talking about that recent case before the Supreme Court, where the court let Domineque Ray be executed in Alabama despite being denied access to his imam, and the court deciding not to rule on the religious discrimination question there.

There is a lot of movement in states and by state executives and state courts, and I think that's in part **because we haven't seen enough movement from the U.S. Supreme Court yet**. But that does not mean that I am in any way giving up on federal courts, or giving up on the U.S. Supreme Court abolishing the death penalty. I do think that is coming.

The Jones case was this case out of California where the federal district court found the death penalty in California unconstitutional because of the incredibly broken nature of California's death penalty and the delays there—it's just absolutely arbitrary who might get executed in California. At the same time, there was a federal court in New Hampshire that ruled the death penalty unconstitutional a number of years ago. Those cases ultimately did not stand, but the **merits of those cases did not actually reach the Supreme Court.**

I think that when you look at the benchmarks that the Supreme Court has set forward for whether or not the death penalty today is constitutional under the Eighth Amendment, **the** evolving **standard of decency says let's look at what's happening in the states**. Let's look at the number of executions, let's look at the trends, let's look at the new death sentences. All of those are moving in the same direction. It is just an incredible downward-sloping number.

We certainly would not have predicted where we are today in terms of the low number of new death sentences, the low number of executions each year. **There is an incredible showing**, I think, **under the Eighth Amendment, and it is just a matter of time before the Supreme Court is going to take one of these cases.**

I think if you look at the Supreme Court's record, it has issued a number of opinions where we've seen that it is concerned about some of these same things that Newsom was talking about, some of these same things that the Washington state Supreme Court was talking about.

Now, we were very dismayed, and I would not ever defend the Supreme Court's allowing Ray's execution to go forward. I think that that was a coming together of some of the worst ways in which the death penalty plays out, including the fact that, because of the way that Supreme Court rules work under [deadline] of an execution, it's very difficult to get a claim heard that you would otherwise normally get heard. So they had enough votes to hear the briefing and make a reasoned decision on the merits of the religious discrimination that was going on in that case, but they didn't have enough votes to stop the execution because of the way the state rule works. Time and time again, super important legal issues don't get a real hearing because the push for finality and moving to execution just ends up outweighing decency and justice. So that was really a setback, and discouraging, but I think that we've seen from this court over the years —**even though they rule against a claim that is brought** on the eve of execution, **that doesn't tell you how they would rule on the merits of the claim**.

2NC—Solvency—Death Penalty

State abolition is key to national consensus building – forces the Supreme Court to model

Parker, J.D. candidate at Stanford Law, **2013**

[Nicholas M. Parker, 2013, "The Road to Abolition: How Widespread Legislative Repeal of the Death Penalty in the States Could Catalyze a Nationwide Ban on Capital Punishment," Legislation and Policy Brief: Vol. 5: Iss. 1, Article 3. Available at: http://digitalcommons.wcl.american.edu/lpb/vol5/iss1/3, pp. 78-79, MAM]

The previous Part begs an obvious question: given the Supreme Court's narrowing death penalty jurisprudence and the precedent set by Atkins and Roper, how many state legislatures must repeal their death penalty statutes before the Supreme Court determines that a "national consensus" has developed against capital punishment altogether? Currently, **seventeen states and the District of Columbia bar capital punishment for all crimes**.109 How many more must abrogate it before the Supreme Court is left with no choice but to determine that the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment in light of our "evolving standards of decency" and holds its use unconstitutional once and for all? Logic would suggest that once a majority of states have abolished their death penalties, a "national consensus" has developed against capital punishment. But, as the Supreme Court noted in Atkins and as Part I further illustrated, "[i]t is not so much the number of these States that is significant" when making the "national consensus" inquiry.110 Rather, there are other factors that will inform the Supreme Court's reasoning—among them "the consistency of the direction of change"111—and while **the recent spate of legislative repeal in the states is a step toward nationwide abolition**, anti-death penalty advocates believe it is only a start.112 The rest of this Article probes the questions posed above. This Part examines the legislative repeal process in New Jersey, New Mexico, Illinois, and Connecticut to illustrate how state legislatures are grappling with repeal and how lawmakers, courts, and the general public have reacted to abolition. Part III then looks ahead to evaluate which other states might soon legislatively abrogate their death penalties and to speculate about how many must do so before the Supreme Court may be required to conclude that a "national consensus" has developed against its imposition.

2NC—Solvency—Federal Follow On

The CP causes federal follow-on – established state precedent increases federal momentum

Robert M. **Bohm 19**, Ph.D., Professor Emeritus of Criminal Justice at the University of Central Florida, 4/15/19, "Routledge Handbook on Capital Punishment", Chapter 37: The Death Penalty's Demise, with Special Focus on the United States, 1st Edition, https://www.routledge.com/Routledge-Handbook-on-Capital-Punishment-1st-Edition/Bohm-Lee/p/book/97803671993711

A second legal argument and, for this author, the most likely way the Court could abolish the death penalty is for the Court to rule the death penalty unconstitutional for the same reason it has held as unconstitutional the death penalty for the rape of an adult woman (Coker v. Georgia, 1977), the rape of a child (Kennedy v. Louisiana, 2008), kidnapping (Eberheart v. Georgia, 1977), armed robbery (Hooks v. Georgia, 1977), participants in felony murders who did not kill or intend to kill (Enmund v. Florida, 1982), death row inmates who have literally gone crazy on death row (Ford v. Wainwright, 1986), the intellectually challenged (Atkins v. Virginia, 2002), and offenders who were younger than 18 years of age when their crimes were committed (Roper v. Simmons, 2005). In each of these cases, by a count of states and a consideration of momentum, that is, the number of states that had recently banned a specific death penalty application, the Court's majority concluded that the death penalty was in violation of the Constitution because it was grossly disproportionate and excessive in relation to the crime itself, the offender's role in the crime, or a specifi c characteristic of the offender based on "the evolving standards of decency that mark the progress of a maturing society." In short, the Court could declare the death penalty unconstitutional simply by following established legal precedent —by counting states and considering momentum.

While the Court traditionally has been leery about sophisticated statistical evidence, the Court has had no aversion to counting states. For the Court, the number of states that have or have not adopted a particular death penalty practice or, as will be argued here, even the death penalty itself, serves an indication of the will of the people as represented by the legislature, and is the principal way the Court determines the current "standards of decency that mark the progress of a maturing society." For example, when the Court reinstated the death penalty four years after Furman, in Gregg v. Georgia (1976), it was swayed by the 29 states that had enacted new death penalty statutes designed to remedy the problem the Court identifi ed with pre- Furman death penalty statutes: unfettered jury discretion (number of states calculated from data in Death Penalty Information Center, 2017c).

Other, less important indicators of "the evolving standards of decency" are the number of death sentences imposed by juries, which, as noted previously, has been declining consistently and dramatically; international law, which, for a majority of countries, prohibits the death penalty; public opinion polls, which show a slow, long-term decline in death penalty support and increase in death penalty opposition; offi cial positions of professional organizations and interest groups, many of which have taken positions against the death penalty; and the justices' own judgment (see, for example, Coker v. Georgia, 1977, p. 597; Enmund v. Florida, 1982, p. 801; Atkins v. Virginia, 2002, pp. 312, 316 n. 21, and 326). The justices' own judgment is brought to bear by asking "whether there is reason to disagree with the judgment reached by the citizenry and its legislators" (Coker v. Georgia, 1977, p. 597). Following are two examples of this approach.

In Atkins v. Virginia (2002), the Court decided that it was unconstitutional to execute the intellectually challenged ("mentally retarded"), in large part because, by then, 18 states had prohibited their execution. In Atkins, Justice Stevens, citing Chief Justice Warren in Trop v. Dulles and Justice Brennan in Furman, reiterated, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (pp. 311–312). He added, "We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is legislation enacted by the country's legislatures'" (p. 312). He noted, " It is not so much the number of these States that is signifi cant, but the consistency of the direction of change" (i.e., momentum) (p. 315, emphasis added). "Given the wellknown fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime," Stevens continued,

the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. (pp. 315–316)

He further stated, "The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition" (p. 316). "Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon" (p. 316), he observed. "Some States, for example New Hampshire and New Jersey," Stevens elaborated, "continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States" (p. 316). "And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded," wrote Stevens, "only fi ve have executed offenders possessing a known IQ less than 70 since we decided Penry" (p. 316) [referring to Penry v. Lynaugh, 1989, in which the Court upheld the execution of the mentally retarded]. "The practice, therefore, has become truly unusual," concluded Stevens, "and it is fair to say that a national consensus has developed against it" (p. 316).

In short, for Justice Stevens and the Court's majority in Atkins, the number of states that have prohibited a particular punishment and, more importantly, the consistency of the direction of that change (i.e., momentum) determines, at least in part, whether a punishment is cruel and unusual in violation of the Eighth Amendment. Other important considerations are whether any states legislatively reinstated the punishment following abolition, and whether states actually employ the punishment that is legislatively prescribed.

The Court's majority used the same argument it used in Atkins to determine whether the execution of juvenile offenders violated the Eighth Amendment. Writing for the majority, Justice Kennedy, citing Trop v. Dulles , framed his argument in familiar terms: "[W]e have established the propriety and affi rmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual" (pp. 560–561).

In Roper v. Simmons (2005), the Court ruled that it was unconstitutional to execute offenders who were younger than the age of 18 at the time their crimes were committed, again, in large part, because, by then, 18 death penalty states prohibited the death penalty for juveniles

(joining the 12 states that had abolished the death penalty altogether), and the 20 death penalty states that had not prohibited it infrequently imposed it (pp. 564–565). The Court did note that "the rate of change in reducing the incidence of the juvenile death penalty, or in taking specifi c steps to abolish it [i.e., momentum] [had] been slower [than in Atkins]," but they were still signifi cant (p. 565). The Court was impressed with the "consistency of direction of change" and the fact that "no State that previously prohibited capital punishment for juveniles [had] reinstated it" (p. 566). Justice Kennedy emphasized the salient point:

As in Atkins, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today society views juveniles, in the words Atkins used respecting the mentally retarded, as "categorically less culpable than the average criminal." (p. 567, citation omitted)

In sum, by using the same logic and arguments used in a series of death penalty cases, including most notably Atkins v. Virginia (2002) and Roper v. Simmons (2005), a persuasive legal argument is available for an assault on the death penalty's constitutionality; specifi cally, that the death penalty is unacceptable to contemporary society, as measured by its use. By the end of 2016, 19 states and the District of Columbia had abolished their death penalties, and at least another dozen death penalty states, the U.S. government, and the U.S. military rarely execute (Death Penalty Information Center, 2017a). One state, Nebraska, had abolished its death penalty in 2015, but reinstated it in 2016. Based on the same reasoning the Court used in its Atkins' and Simmons' decisions, the Court's threshold to abolish the death penalty for the intellectually challenged ("mentally retarded") and juveniles already has been exceeded, even with Nebraska's reinstatement. And even if the Court reasoned that 19 states were not enough to abolish the death penalty, the Court might be hard pressed to retain the death penalty if a majority of states abolished it. Currently, only seven more states are needed to reach that threshold. Nebraska's reinstatement obviously puts a damper on the momentum argument.

— vs Facial Recognition —

1NC—States CP vs Facial Recognition

The fifty states and relevant territories should restrict the use of facial recognition technology by state and local law enforcement and restrict the access of federal law enforcement agencies to databases that contain state driver's license photos and visa application photos

That solves

Ulle 2019 – Public Interest Law Intern with The Constitution Project at POGO

(Margaret Ulle AUGUST 15, 2019 - The Constitution Project works to combat the increasing partisan divide regarding our constitutional rights and liberties – "How Are States Responding to Facial Recognition Surveillance?" https://www.pogo.org/analysis/2019/08/how-are-states-responding-to-facial-recognition-surveillance/) IB

A dozen states have enacted or proposed some form of restriction to law enforcement's use of facial recognition technology in the past few years. With no federal restrictions in place, these, along with a few restrictions recently enacted by cities, are the only limits currently in effect. The Constitution Project at the Project On Government Oversight conducted an analysis of all of the facial recognition technology bills passed or up for consideration in state legislatures this year. The map below details our findings. Click the colored dots within each state for details about that state's facial recognition legislation. Use the rectangle button on the lower right-hand corner to enlarge the map, or scroll to zoom in and out. Facial recognition technology is already in wide use by local, state, and federal law enforcement officers across the country. The technology poses civil rights and civil liberties concerns, and its tendency to misidentify people also creates public safety issues. In addition to public worry about the virtually unregulated use of this surveillance, Members of Congress on both sides of the aisle have expressed concerns during recent hearings on the matter. Indeed, with nearly half of American adults' photos in law enforcement facial recognition databases, facial recognition raises a variety of concerns meriting Congress's attention. In what could be a major step forward, bipartisan legislation to limit facial recognition may be introduced as soon as this fall. State legislative proposals could also serve as examples of effective limits to guide the creation of feasible federal policy, and could demonstrate whether law enforcement's and tech companies' concerns about imposing restrictions on the use of the technology are exaggerated. Federal lawmakers should take note of states' efforts, especially in the absence of federal statutes governing the use of facial recognition. And if Congress does not act swiftly to pass federal legislation on this matter, the country may soon see a confusing, state-by-state patchwork of potentially vastly differing rules and limits on the surveillance. For example, one state could protect its residents by requiring law enforcement to obtain a warrant to run facial recognition scans, but if those residents traveled to a neighboring state without such protections, their basic activities could be freely logged and tracked with facial recognition surveillance systems. Congress should consider how states and their populations are reacting to this pervasive surveillance technology, given the interconnected nature of state and federal law enforcement operations. In fact, the federal government has already accelerated state and local law enforcement use of facial recognition in a couple of key ways. Grant funding The Department of Homeland Security funds grants for state and local governments to purchase and use facial recognition technology. For example, Department grants such as the State Homeland Security Program and the Urban Areas Security Initiative Program

fund facial recognition technology for state and local entities. Coordinated information sharing between states and the federal government occurs through "fusion centers," which are locally run and jointly owned and are funded by the Department. Florida uses the Department's information-sharing system known as the Homeland Security Information Network. In Michigan, the Detroit Police Department has used federal grant money to fund Project Green Light, a controversial surveillance program that uses facial recognition surveillance built on police cameras that blanket the city (the recent expansion of the program has sparked an intense public debate). Coordinated searching The FBI also aids state law enforcement agencies by granting them access to larger databases than they would otherwise have access to. The FBI, as part of a pilot program that began in 2011, began incrementally allowing a small number of states to submit facial recognition searches for comparison against a group of criminal images in the FBI's database. Since then, states have transitioned from pilots to full-scale use of the program. In addition to this program, researchers have found that, as of May 2019, over 20 states have partnerships with the FBI to use its Facial Analysis, Comparison, and Evaluation (FACE) Services to conduct searches, and several states are in negotiations with the FBI. These searches, unlike the pilot program discussed above, draw mostly from non-crime-related images, such as driver's license photos and visa application photos. What limits are states putting into law? As state legislatures consider limits on facial recognition, they should keep in mind how their own law enforcement's actions may be providing more surveillance power to the still-unregulated federal use of this technology, particularly as it relates to coordinated searching between agencies such as the FBI and Immigration and Customs Enforcement, and the states. Numerous states allow the FBI to search through its driver license photos, and a Washington Post investigation recently found that ICE has been using facial recognition to mine state driver's license databases. The FBI alone conducted around 4,000 searches a month on average in fiscal year 2018, with many of them coming from state driver's license databases. Some highlights among state legislatures include an Oklahoma law which generally prohibits the state from directly sharing biometric data with the federal government, and proposals in Washington state and Massachusetts to entirely ban, or place a moratorium, on government use of facial recognition. Other proposals dealt with restricting specific contexts where law enforcement can use facial recognition. This year, Massachusetts, Minnesota, and New York sought to limit the use of facial recognition in conjunction with officers' use of drones. And an Oregon law, on the books for several years already, prohibits use of the technology in combination with body cameras. Additionally, at the local level, last month Oakland, California, became the third city to enact a ban preventing any city agency, including the police department, from deploying facial recognition technology. San Francisco and Somerville, Massachusetts, banned the technology in May and June, respectively. As momentum builds at the state and local levels, it's time for Congress to address facial recognition surveillance at the federal level. Lawmakers will need to move quickly to keep pace with the spread of this dangerous surveillance technology.

2NC—Solvency—States Can Do It

The counterplan solves – several states have already banned the use of facial recognition

Samsel 2019 – Associate Content Editor for the Infrastructure Solutions Group at 1105 Media

(By Haley Samsel Oct 10, 2019 "California Becomes Third State to Ban Facial Recognition Software in Police Body Cameras" https://securitytoday.com/Articles/2019/10/10/California-to-Become-Third-State-to-Ban-Facial-Recognition-Software-in-Police-Body-Cameras.aspx?Page=1) IB

California will become the third state in the U.S. to ban facial recognition technology in police body cameras after Gov. Gavin Newsom, a Democrat, signed a measure into law on Tuesday. AB1215, which will go into effect on Jan. 1, bans biometric surveillance technology in body cameras as well as taking body camera footage and running it through facial recognition software later. However, police are not banned from using the technology on other cameras, and federal law enforcement could potentially use the software while operating in California. Originally passed in September, the California law echoes efforts across the country to prevent law enforcement from using facial recognition in their investigations. Oregon and New Hampshire already have laws in place banning police from using it in body cameras, and cities like San Francisco and Oakland have forbidden it altogether. No police agencies in California currently use facial recognition right now, according to the California Peace Officers' Association. State Rep. Phil Ting, who led the effort to ban the technology alongside other criminal justice legislation, said the law was intended to prevent California from becoming a "police state." "We wanted to introduce legislation before it became a major issue," Ting told reporters in September. "This is not just a California concern, this is a national concern, people have really … been much more sensitive to their privacy recently." In August, Ting and 25 other California lawmakers were misidentified by facial recognition software as criminals in a law enforcement database, according to a study published by the ACLU of California. Other research has found that the software is less accurate when it comes to correctly identifying women and people of color. As lawmakers consider policies that would ban facial recognition in other areas, including federal public housing, law enforcement groups and security companies are urging caution in implementing bans on the software. Late last month, a group of 39 police groups and tech organizations sent an open letter to Congress calling for regulation over outright bans. "While we agree that it is important to have effective oversight and accountability of these tools to uphold and protect civil liberties, we disagree that a ban is the best option to move forward," the letter reads. "Bans would keep this important tool out of the hands of law enforcement officers, making it harder for them to do their jobs efficiently, stay safe, and protect our communities." The California ban will last until at least 2023, when the measure expires and legislators will decide whether or not to renew it.

2NC—Solvency—Experimentation

The counterplan is key – enacting restrictions on facial recognition at the state level enables experimentation

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(Susan Crawford, 12.16.2019 "Facial Recognition Laws Are (Literally) All Over the Map" wired.com/story/facial-recognition-laws-are-literally-all-over-the-map/) IB

THE CURRENT STATE of rules for use of facial recognition technology is literally all over the map. Next month, the city council in Portland, Oregon will hold a public meeting about blocking use of the technology by private companies, as well as by the government. San Francisco, Oakland, Calfornia, and Somerville, Massachusetts, already have banned the use of facial recognition technology by city agencies; Seattle's police stopped using it last year; and Detroit has said facial recognition can be used only in connection with investigation of violent crimes and home invasions (and not in real time). State governments have their own rules too. In October, California joined New Hampshire and Oregon in prohibiting law enforcement from using facial recognition and other biometric tracking technology in body cameras. Illinois passed a law that permits individuals to sue over the collection and use of a range of biometric data, including fingerprints and retinal scans as well as facial recognition technology. Washington and Texas have laws similar to the one in Illinois, but don't allow for private suits. In other words, we're headed for a major clash. The potential benefits of facial recognition, and biometric data generally, are just too great for governments and corporations to pass up. Existing bans of public-sector use that are based on its present, inaccurate, and discriminatory implementations likely won't be sustainable long-term as the technology improves. At the same time, completely unfettered use of private biometric systems seems incompatible with American values. We're not China, or at least not yet. This situation is crying out for policy development: Government needs to act to determine where the lines of appropriate use should be drawn. **This is not likely to happen on the federal level**, though, anytime soon: **Even as pressure from activists builds, Congress has so far been unable to pass even a basic federal online privacy law**; this month's House Oversight Committee hearing on facial recognition has just been punted to next year. (A proposed bipartisan bill to constrain the use of the technology by federal law enforcement officers would address just a sliver of the issues raised by the use of biometric identifiers.) That leaves the issues to be worked out in different ways in different places, as a patchwork of local laws. Tech and telecom companies often moan about just this sort of outcome, complaining that it makes compliance difficult and drives up production costs—but in this case, it's a good thing. When federal policy is absent, ham-handed, or hopelessly captured by industry, local governments can act as testing grounds for new ideas, providing proof that the status quo can change. This is not a new idea: As Supreme Court Justice Louis Brandeis wrote in 1932, a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." That approach—of using local laws as laboratory trials—worked when it came to spreading the power grid across the country. States and localities led the way in making electricity a publicly governed utility. The same thing happened in health care: Former Massachusetts Governor Mitt Romney has said that "without Romneycare [in

Massachusetts] we wouldn't have had Obamacare." The patchwork can work for tech too. In October, the federal appeals court for the District of Columbia circuit issued a 186-page opinion allowing states to continue to impose their own "open internet" laws and executive orders in the absence of any federal regulation of high-speed internet access. As telecom commentator Harold Feld wrote, this gives the industry "significant incentive to stop fooling around and offer real concessions to get some sort of federal law on the books." In other words, the patchwork is usefully painful for companies: The agony stimulates them to come to the table. Similarly, as I described earlier this year in my book, Fiber: The Coming Tech Revolution—and Why America Might Miss It, hundreds of cities and localities across the country have taken their destinies into their own hands by calling for the construction of fiber-optic internet access networks. They're not waiting for the federal government to act to make world-class fiber a basic element of a thriving life. Instead, the cheap, ubiquitous, reasonably priced public option that cities have been pushing will—someday—shame national policymakers into action. It's clearly possible to have sensible communications policy, but it takes action at the local level to start the ball rolling. So we should be glad to have all these local takes on the ethics of biometric data use. Thank goodness that Somerville, with its public sector ban, applies a different logic than, say, Plano Texas, which has enthusiastically adopted facial recognition technology with little public oversight. Thank goodness Portland is looking at a wholesale ban on commercial facial recognition technology within its borders. All of these places can do the hard work of figuring out where use of facial recognition and other biometric data by either private companies or public bodies is unethical, inappropriate, or immoral. As more Somervilles, Planos, and Portlands decide on their different approaches to biometric identifiers, the public will continue to focus on this issue—and that will keep the pressure on both companies and government to reach a much-needed, national consensus on the use of biometric data. The hope is that someday, when all the good arguments are on the table and the pain of vendor compliance with a continued patchwork is too great to bear, the federal government will be shamed by the existence of good local laboratory test cases into adopting strong, basic rules for data use. These might include: sharply constraining real-time use (as opposed to forensic or investigative use with a warrant in the criminal justice system) of biometrics for any purpose; permitting easy opt-outs from the use of biometric data for commercial purposes; greatly limiting the retention of all biometric data; requiring continued, intrusive auditing of (and public reporting about) the use of biometric data by both companies and government; swiftly punishing misuse of this data; and prohibiting biometric use in particular contexts that are prone to discriminatory activities, such as selecting people for particular jobs, insuring them, or admitting them to educational programs. That list is just a start. We have a great deal of policy work to do. **If we end up with sensible national policies constraining the use of biometric data**—which is by no means certain—**it will largely be thanks to the role of local government in America.**

2NC—Solvency—AT Federal Action Key

State restrictions on facial recognition technology solves

Bala and Watney 2019 – Bala is the criminal justice and civil liberties associate director at the R Street Institute and a former Baltimore assistant public defender and Watney is resident fellow of technology and innovation at the R Street Institute

(Nila Bala and Caleb Watney Thursday, June 20, 2019 "What are the proper limits on police use of facial recognition?" https://www.brookings.edu/blog/techtank/2019/06/20/what-are-the-proper-limits-on-police-use-of-facial-recognition/) IB

With the collection of biometric information like that used in facial recognition technology comes the related concern on how such information is protected and stored. Just last week, news broke about a data breach of a Customs and Border Patrol contractor, which exposed thousands of photos of international travelers that had been collected for facial recognition purposes. The risk of personal data falling into the wrong hands is a very real one. To mitigate this risk, government agencies (and their contractors) should be required to meet appropriate cybersecurity hygiene standards. Restrictions on the length of time biometric information can be stored after its collection can also reduce the harm of a breach. Finally, if cities question their own ability to access the technical performance of these tools, they should consider requiring an external audit via the initial procurement contract. An important check against government misuse or accidental algorithmic bias is the ability of civil society organizations to test these systems independently, verify that the technology works accurately, and ensure that no minority populations are unfairly targeted. As cities like Oakland and Somerville, and states like Massachusetts, consider similar pieces of legislation, questions also arise as to whether these policies are best instituted at a city or state level. This isn't the first time cities have tried to lead the way on justice reforms—for example, Atlanta recently banned cash bails (though Georgia legislators tried to pre-empt that policy this legislative session). Local restrictions on police technology, however, are more complicated, since cases can sometimes touch multiple jurisdictions. Ideally, then, there would be consistency across a given state in protecting citizens' privacy rights so that state troopers and local law enforcement are held to the same standards. While San Francisco is the first city to ban the governmental use of facial recognition, it likely will not be the last. Cities and states are well within their rights to hit the pause button if they ultimately decide the technology is not ready for public deployment. But they should also pair any delay with a tangible development plan.

2NC—Solvency—State ID Databases

Restricting federal access to state databases is key – federal agencies rely on state ID databases

Feeney 2019 – director of Cato's Project on Emerging Technologies, where he works on issues concerning the intersection of new technologies and civil liberties

(By Matthew Feeney May 13 2019 Should Police Facial Recognition Be Banned? https://www.cato.org/blog/should-police-facial-recognition-be-banned) IB

According to Grand View Research, we should expect law enforcement to spend more on facial recognition. In 2018, the size of the government "facial biometrics" market was $136.9 million and is expected to be $375 million in 2025. The scale of law enforcement's current use of facial recognition is larger than many realize. According to Georgetown's Center on Privacy and Technology half of American adults are already in a law enforcement facial recognition network, and at least 26 states allow law enforcement to conduct facial recognition searches against driver's license and other ID photo databases. The growing and widespread use of facial recognition is of particular concern given improvements in recognition technology and the private sector's interest in making surveillance technology more invasive. In 2017, the law enforcement equipment manufacturer Axon released its technology report. The report includes the following quote form Captain Daniel Zehnder, former manager of Las Vegas Police Department's body camera program: [T]he fact that I could potentially walk down the street with a camera in real time, scanning faces, doing facial recognition while it's recording, sending that data to the cloud for real-time analysis, have that data come back and somebody tell me, "That guy in the red hat, red shoes you just passed, he's wanted for burglary" That type of real-time, big data analysis application would be huge. In 2016 the Department of Homeland Security (DHS) issued a solicitation, asking private companies to build them small, portable Border Patrol drones with facial recognition capability. DHS is also keen on facial recognition at airports. Facial recognition systems vary in accuracy. Last year, news that Amazon's facial recognition tool had misidentified 28 members of Congress made headlines. Eleven of the misidentified members of Congress are African Americans, promoting more commentary about longstanding and established concerns associated with racial bias and facial recognition. Amazon responded that the test, performed by the American Civil Liberties Union, used a confidence threshold of 80 percent rather than the Amazon-recommended 95 percent. False positives are a worry, especially considering that police across the country could one day (without restrictions like those in Baltimore) be outfitted with body cameras capable of real-time facial recognition capability. Law-abiding citizens and residents being needlessly hassled wouldn't just waste time, it would harm police-community relationships. But even in a world where real-time facial recognition body camera technology is 100 percent accurate there would be serious concerns. Would protesters be likely to gather if they knew that police with facial recognition body cameras would be observing the protest? What about those attending religious gatherings, gun shows, strip clubs, or abortion clinics? Concerns about surveillance, racial bias, and speech are clearly on the minds of San Franciscan officials. These concerns look set to result in a ban on law enforcement using facial recognition in San Francisco. Such a ban may well be justified given the state of facial recognition technology and the potential for abuse. However, we should ask whether there are any policies that would allow police to use facial recognition without putting civil liberties at risk.

— vs Defund the Police —

1NC—States CP vs Defunding

The fifty states and relevant territories should prohibit localities from accepting federal aid and support of local law enforcement.

The counterplan solves – state refusal of federal grant money solves militarization and removes incentives to cooperate with federal law enforcement

Boldin 2015 – founder of the Tenth Amendment Center

(Michael Boldin April 23 2015 "Montana Bill to Help Block Federal Militarization of Police Signed into Law" https://blog.tenthamendmentcenter.com/2015/04/montana-bill-to-help-block-federal-militarization-of-police-signed-into-law/) IB

HELENA, Mont. (Apr. 23, 2015) – A bill that would heavily diminish the effect of federal programs that militarize local police was signed into law today. Introduced by Rep. Nicholas Schwaderer (R-Superior), House Bill 330 (HB330) bans state or local law enforcement from receiving significant classes of military equipment from the Pentagon's "1033 Program." It passed by a 46-1 vote in the state Senate and by a 79-20 vote in the state House. Today, Gov. Steve Bullock signed it into law. The new law will prohibit state or local law enforcement agencies from receiving drones that are armored, weaponized, or both; aircraft that are combat configured or combat coded; grenades or similar explosives and grenade launchers; silencers; and "militarized armored vehicles" from federal military surplus programs. But, as The Guardian reported last fall, handouts of such equipment from the Pentagon are far from the only way that the federal government has been militarizing local police. Department of Homeland Security (DHS) grants used to purchase such equipment amount to three times the value of the equipment given away by the Pentagon. HB330 closes this loophole by banning law enforcement agencies from purchasing such military equipment with federal grants. They could continue to purchase them, but would have to use state or local funds, and the agencies would have to give public notice within 14 days of a request for any such local purchase. "This foundation sets a massive precedent in Montana and the country as to what kind of society we want to have," Schwaderer said of his bill. "If you get to the point where you need a grenade launcher, we've got the National Guard." Last month, New Jersey Gov. Chris Christie signed a bill into law that, while not as comprehensive as the Montana bill, prohibits receipt of equipment from the 1033 program without an express authorization from the local governing body. This made his state the first to take a step towards stopping the federal militarization of police. "By making it a local decision, the New Jersey law is a great first step, but the Montana law takes things to the next level," said Mike Maharrey of the Tenth Amendment Center. "It closes loopholes and covers almost all the bases. The next step would be to expand the equipment banned, and we're hopeful that good people in Montana will work on that next session." FEDERAL SURPLUS AND GRANT MONEY Through the federal 1033 Program, local police departments procure military grade weapons, including automatic assault rifles, body armor and mine resistant armored vehicles – essentially unarmed tanks. Police departments can even get their hands on military helicopters and other aircraft. The Department of Homeland Security (DHS) runs the "Homeland Security Grant Program," which in 2013 gave more than $900 million in counterterrorism funds to state and local police. According to a 2012 Senate report, this money has been used to purchase tactical vehicles, drones, and even tanks with little obvious benefit to public safety. And, according to ProPublica, "In 1994, the Justice Department and the Pentagon funded a five-year program to adapt military security and surveillance technology for local police departments that they would otherwise not be able to afford." Local agencies almost never have the funds needed to purchase this kind of equipment, and federal money is the only way they can afford it. By banning purchases with federal funding, HB330 would effectively nullify the effect of such federal "grant" programs. COMMAND AND CONTROL Arming 'peace officers' like they're ready to occupy an enemy city is totally contrary to the society envisioned by the Founders. They've turned 'protect and serve' into 'command and control.' In the 1980s, the federal government began arming, funding and training local police forces, turning peace officers into soldiers to fight in its unconstitutional "War on Drugs." The militarization went into hyper-drive after 9/11 when a second front opened up – the "War on Terror." By stripping state and local police of this military-grade gear and requiring them to report on their acquisition and use, it makes them less likely to cooperate with the feds and removes incentives for partnerships. "Sunshine is the salve of good government," Schwaderer said. That is exactly what HB330 will start to bring to Montana.

2NC—Solvency—Local Law Enforcement

Cutting off local municipalities solves best – it alleviates top-down pressure to support federal policies and allows local governments to invest in projects specific to their constituents

Edwards 2019 – director of tax policy studies at Cato and editor of www.DownsizingGovernment.org

(By Chris Edwards May 20, 2019 "Restoring Responsible Government by Cutting Federal Aid to the States" Policy Analysis No. 868 https://www.cato.org/publications/policy-analysis/restoring-responsible-government-cutting-federal-aid-states) IB

Federal aid warps state and local spending decisions. It induces states to spend more on federally subsidized activities, and less on other activities that state residents may value more. For example, the rapid growth in state Medicaid spending—induced by generous federal matching payments—has likely squeezed out other activities in state budgets. Urban transit provides another example of how aid warps state budgets. Since the 1970s, federal aid for transit has been mainly for capital costs, not for operations and maintenance. That has induced dozens of cities to purchase systems with big up-front costs, which usually means expensive rail systems rather than cheaper bus systems, even though the latter are usually more efficient, flexible, and safer.59 The number of U.S. cities with rail transit has grown from eight in 1975 to 42 today, and the construction costs of nearly all these new systems were subsidized with federal aid.60 One consequence of the bias toward rail is that many cities are now getting stung by huge rail maintenance costs years after federal aid induced them to build the systems. U.S. transit systems have deferred maintenance costs of more than $90 billion, and systems across the nation are suffering from breakdowns, delays, and safety hazards.61 The New York City and Washington, DC, subway systems, for example, are in poor shape. Yet those cities have been prompted by federal aid to keep expanding their systems rather than ensuring the good performance of the lines they already have. A 2017 New York Times investigation of the Metropolitan Transit Authority found lavish spending on new projects—subsidized by federal aid—and at the same time a shocking neglect of subway maintenance. The result has been declining service quality, fires, derailments, and other disasters. The Times noted: The estimated cost of the Long Island Rail Road project, known as East Side Access, has ballooned to $12 billion, or nearly $3.5 billion for each new mile of track—seven times the average elsewhere in the world. The recently completed Second Avenue subway on Manhattan's Upper East Side and the 2015 extension of the No. 7 line to Hudson Yards also cost far above average, at $2.5 billion and $1.5 billion per mile, respectively. The spending has taken place even as the M.T.A. has cut back on core subway maintenance.62 Meanwhile, the Washington, DC, metro system is building a $5.8 billion subway line to Dulles airport, with $2.9 billion coming from federal grants and loans.63 That dubious expansion is going ahead even though the system has suffered from appalling maintenance and safety failures in recent years and ridership is declining. Delays plague the system, and there have been crashes and dozens of incidents of smoke in tunnels in recent years.64 It is a similar story with the Massachusetts Bay Transportation Authority, which faces $7 billion in maintenance backlogs, but continues to build new lines.65 A recent boondoggle in Albuquerque, New Mexico, illustrates how federal aid can also encourage cities to spend on ill-suited bus systems. City leaders sprang for an expensive $133 million electric bus system because federal subsidies covered more than half of the costs. But the Los Angeles Times

reports that the “project resulted in parts of what’s now Central Avenue being ripped up to host dedicated lanes for the electric buses, which are currently out of commission and have so many problems that [Mayor] Keller freely calls them ‘a bit of a lemon.’ ”66 Residents did not want the buses, local businesses hated them, and dozens of businesses along the dedicated bus route have closed. Another recent boondoggle is a 20-mile rail project in Honolulu, which has soared in cost from $5 billion to more than $9 billion. The Wall Street Journal reported on some of these problems in 2019: Honolulu pushed ahead before fully planning the project.… Officials misled the public about the train line’s shaky finances … [and] an audit by the city found HART’s [Honolulu Authority for Rapid Transportation] financial plan in disarray, with hundreds of millions of dollars unaccounted for.67 This wasteful project was likely only approved because of the lure of federal aid secured by Hawaii’s late senator Daniel Inouye. Federal aid induces state and local governments to make decisions that are divorced from the actual needs of their own citizens. A classic example was the urban renewal or “slum clearing” wave of the mid-20th century, which used billions of federal aid dollars beginning in 1949 to bulldoze poor neighborhoods in favor of grand development schemes.68 A 1963 analysis of these federally driven projects found that “wholesale clearance of slum areas and pillar-to-post relocation of the families who lived there have generated wide discontent. Members of racial and ethnic minorities who have seen the slum buildings they occupied replaced by luxury apartment houses have grown resentful of city planning that rarely seems to make adequate provision for their needs.”69 At the time, urbanist Jane Jacobs said of these projects: “This is not the rebuilding of cities. This is the sacking of cities.”70 One infamous federal-aid project in the early 1980s was the demolition of the Poletown neighborhood of Detroit. The City of Detroit condemned more than 1,300 homes over 465 acres and removed 4,200 people through eminent domain so that General Motors could build a new plant. The city demolished 143 businesses and 16 churches.71 Economist William Fischel argues that the Poletown expropriation would not have happened without hundreds of millions of dollars of federal grants and loans as well as state subsidies.72 Many residents protested, but Ralph Nader noted that citizen activists were “muzzled by the grants machine that Washington provided city governments.”73 Local politicians would be much more cautious before proceeding with grandiose and harmful projects if they had to balance the expected benefits with local tax costs. The dangling of federal and state money causes cities to make decisions that their own citizens do not want. Fischel, for example, says that grants to cities encourage the excessive use of eminent domain, and he points to the 2005 Kelo v. City of New London case in Connecticut as another example of top-down subsidies inducing a local government to expropriate private property for the sake of developers. Federal and state subsidies prompt city politicians to disenfranchise their own residents and spend on dubious projects that the cities would not pursue if they had to raise their own local funds.

2NC—Solvency—Experimentation

Decoupling local law enforcement decisions from federal aid is key – enables experimentation at the local level

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(By Chris Edwards May 20, 2019 "Restoring Responsible Government by Cutting Federal Aid to the States" Policy Analysis No. 868 https://www.cato.org/publications/policy-analysis/restoring-responsible-government-cutting-federal-aid-states) IB

Residents of each state may have different preferences for policies on education, highways, transit, and other items. They may have different views on taxes and spending. In America's federal system, state and local governments can maximize value by tailoring policies to the preferences of their residents.148 At the same time, individuals can improve their own lives by moving to jurisdictions that suit them best. Economist Gordon Tullock noted, "The fact that people can 'vote with their feet' and thus sort themselves out into different areas with different collections of public goods is one of the great advantages of federalism."149 Federal aid and related regulations undermine such beneficial state policy diversity. A good example was the 55-mile-per-hour national speed limit, which was enforced between 1974 and 1995 by federal threats of withdrawing highway aid. Such one-size-fits-all rules destroy value because they ignore state variations in geography, traditions, and resident preferences. President Reagan's 1987 executive order on federalism noted, "The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several states according to their own conditions, needs, and desires. In the search for enlightened public policy, individual states and communities are free to experiment with a variety of approaches to public issues."150 But the states cannot be free to experiment if Washington is calling the shots. Reagan was a conservative, but diversity is also a social ideal championed by liberals. It was liberal Supreme Court justice Louis Brandeis who said that with federalism each state can "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."151 Unfortunately, most policymakers on the left have been strong supporters of the federal aid system even though it undermines diversity and local choice. Brandeis put his finger on something important—it is less risky to pursue policy experiments at the state level than at the federal level. Federalism expert Adam Freedman notes, "When states are in charge, policy mistakes are localized," but "when the federal government is in charge, all mistakes are Big Mistakes."152 By contrast, he writes, with decentralization, "the failures stay local while the successes go national," as states freely copy good ideas from other states.153

2NC—Solvency—AT Federal Action Key

The counterplan solves – states can impose restrictions on local access to grants

Misra 17 - a writer and multimedia journalist who covers issues related to immigration, cities, and criminal justice

(Tanvi, August 31, 2017, "The Local Fight to Demilitarize the Police" https://www.bloomberg.com/news/articles/2017-08-31/how-cities-say-no-to-military-equipment-for-police) IB

On Monday, Attorney General Jeff Sessions announced a new executive order lifting an Obama-era ban on the transfer of certain types of military equipment, like grenade launchers and bayonets, to local police departments. "Those restrictions went too far," Sessions said in a speech to the Fraternal Order of Police. "We will not put superficial concerns above public safety." The move has elicited grave concern from civil rights groups and criminal justice experts. Not only is it unclear whether these weapons are actually effective in reducing crime and protecting officers, they argue, it's also likely to lead to rights' violations, worsening the already-frayed relations between law enforcement and communities of color. "Our communities are not the same as armed combatants in a war zone,"said Vanita Gupta, former head of Department of Justice's civil rights division who now leads the Leadership Conference on Civil and Human Rights. That means it's up to cities and local governments to step in—either say "no, thanks" to such weaponry or lay out a transparent, public process by which these acquisitions will be made by their law enforcement agency. "In the absence of leadership from this administration, state and local governments must create their own guidelines for limiting the acquisition of military equipment, and how it can be used," Gupta added in a statement. Police militarization garnered renewed scrutiny after images of a heavily militarized police response emerged in Ferguson, Missouri, in the wake of Michael Brown's shooting death: armored vehicles and heavy machine guns stood pointed at protesters. Rubber bullets, tear gas, smoke bombs, and stun grenades were fired. Journalists were arrested. The Obama administration, in its broader effort to improve police accountability, decided to place restrictions on certain types of equipment available through the "1033 program": weaponized vehicles and aircrafts, grenade launchers, high-calibre firearms, and bayonets. Other equipment, including Humvees, helicopters, and M-16 assault rifles, were allowed under certain conditions. Amid heightened scrutiny, Ferguson and other police departments had to return some of their miitary equipment. But in recent years, police chiefs have been nudging the government to review these rules. Some small U.S. counties, in particular, have been eager to get military vehicles and weapons, only to soon realize that they have no use for it other than publicity stunts to demonstrate to taxpayers that their money was well-spent. A survey conducted by the libertarian Cato Institute and YouGov found that 54 percent of Americans think the militarization of police is "going too far." But now that the federal government has lifted these restrictions, the best way to reverse the tide is at the local level, civil rights advocates say. Some jurisdictions have already passed laws banning particular kinds of military equipment for police use, or setting hurdles for their approval. They're attempts to make the acquisitions less opaque, and for local governing bodies to weigh in on the appropriateness of new police department gear. And it's not just liberal cities either. "This is an issue that transcends party lines," says Kanya Bennett of the American Civil Liberties Union (ACLU). Montana is a good example. In 2014, Bozeman City purchased a BearCat through a federal grant, much to the surprise and consternation of residents and city representatives. The incident prompted the state to pass a law with bipartisan support prohibiting the acquisition or purchase of equipment like drones, armored vehicles, silencers, and grenades. Any other military equipment requested through federal programs had to be made public. New Jersey has a similar law on the books, requiring the explicit approval of local governing bodies to approve any acquisition of military equipment. Similar legislation limiting police militarization has cropped up in other parts of the country—from liberal California to conservative Tennessee. These laws, like Montana's, have surfaced after local lawmakers realized the extent of militarization in their police departments.

— vs Implicit Bias Training —

1NC—States CP vs Police Reform

The fifty states and relevant territories should authorize state attorney generals to investigate, litigate, and resolve law enforcement misconduct and provide the necessary subpoena powers and financial resources necessary to achieve this goal.

The states are better positioned to handle police misconduct and improve police-community relations than the federal government

Maxwell & Solomon 18 (Maxwell; Connor Maxwell; Research associate for Race and Ethnicity Policy at the Center for American Progress; Solomon; Danyelle Solomon; Senior Director of Race and Ethnicity Policy at the Center; "Expanding the Authority of State Attorneys General to Combat Police Misconduct"; Center for American Progress; 12/12/18; https://www.americanprogress.org/issues/race/reports/2018/12/12/464147/expanding-authority-state-attorneys-general-combat-police-misconduct/) [DTD]

Granting pattern or practice powers to state attorneys general With **insufficient tools and resources**—and an administration that has indicated that it opposes evidence-based police reform—the DOJ is incapable of eliminating systemic misconduct nationwide. But states are well-positioned to provide oversight and accountability in the absence of federal leadership. **States possess the resources, relationships, and expertise necessary to begin leading reform efforts** around the country during the current administration, as well as when the DOJ comes under new, more motivated leadership. For these reasons, states should empower their own attorneys general to investigate, litigate, and resolve the pattern or practice of law enforcement misconduct. By granting this authority, along with robust subpoena powers and significant financial resources, states can ensure every community has access to fair, evidence-based, and effective policing. In 2000, California became the first state to statutorily authorize its attorney general to address rampant police misconduct.41 The following year, it secured a state court-enforced consent decree to reform the Riverside Police Department (RPD), which was plagued by systemic violations of civil rights and a failure to uniformly enforce the law.42 The sweeping reforms included diversity training; reporting of police stops and use of force; and increased monitoring and oversight of law enforcement officers.43 The reforms were a success and have endured long after the agreement's dissolution in 2006.44 Indeed, **complaints** against RPD officers **plummeted by almost 80 percent**—from 185 in 2002 to just 38 in 2015.45 While today's RPD is not without its problems, evidence suggests the agency and the community it serves benefited tremendously from the state's pattern or practice police reform case.46 California A.B. 248447 (a) No governmental authority, or agent of a governmental authority, or person acting on behalf of a governmental authority, shall engage in a pattern or practice of conduct by law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of California. (b) The Attorney General may bring a civil action in the name of the people to obtain appropriate equitable and declaratory relief to eliminate the pattern or practice of conduct specified in subdivision (a), whenever the Attorney General has reasonable cause to believe that a violation of subdivision (a) has occurred. For almost 20 years now, California has launched investigations into systemic law enforcement misconduct and negotiated reform agreements that improve trust and safety in local communities.48 Yet, while it was the first and may serve as a model for interested states, California is not the only state committed to ensuring fair, evidence-based, and effective policing. Just days prior to President Trump's inauguration, the DOJ released the results of a yearlong investigation into unconstitutional use of force and racially discriminatory conduct at the Chicago Police Department (CPD).49 The DOJ identified a pattern or practice that devastated police-community relations, undermined cooperation, and diminished public safety. It argued that the CPD was unlikely to succeed in addressing these systemic problems "without a consent decree with independent monitoring."50 But after Sessions took control of the DOJ, he dismissed the findings—without even reading the report51—and ordered the department to halt its

efforts to address misconduct at the CPD.52 In response to Sessions' actions, Illinois Attorney General Lisa Madigan used her pattern or practice authority under the Illinois Human Rights Act of 2004 to file a lawsuit to begin the process of negotiating a consent decree in Chicago.53 In September 2018, Madigan, Chicago Mayor Rahm Emanuel, and CPD Superintendent Eddie Johnson filed a 236-page proposed reform agreement in federal court.54 The agreement contains court oversight and an independent monitor and requires substantial reforms in training, reporting, and use of force policy. The agreement is now pending approval from a federal judge, despite former Attorney General Sessions' efforts to discredit and vilify it.55 When implemented fully, reform agreements are a reliable tool for ensuring that law enforcement agencies engage in fair, evidence-based, and constitutional policing in the communities they serve. Underutilized state authority to pursue pattern or practice cases While many states will need to pass legislation granting pattern or practice authority to their attorneys general, some existing statutes and state constitutions may already permit such cases. In these states, **attorneys general may not need to wait for legislative authorization to begin to address systemic law enforcement misconduct**. For example, Chapter 12, Section 11H of the Massachusetts General Laws states: Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.56 And the state constitution of Louisiana provides that: As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.57 Attorneys general in states such as Massachusetts and Louisiana may, in some cases, be permitted to use existing powers to begin the process of helping a law enforcement agency address rampant unconstitutional or unlawful policing. Still, state attorneys general should always consult with their legal advisers and departmental budget executives before opening an investigation. Conclusion Accountability is a core pillar of good government, as it allows the public to have faith in the institutions built to protect and serve them. When accountability is rarely delivered, faith and trust diminish. Law enforcement officers have challenging jobs, but they are not above the law and should be held accountable when appropriate. This is particularly true among communities of color, where residents have faced rampant discrimination, excessive force, and harassment at the hands of police for generations. Yet, with the support of the president of the United States, former Attorney General Sessions stripped essential resources, oversight, and accountability from police departments nationwide. The Trump administration's irresponsible approach to law enforcement is failing to improve police-community relations and public and officer safety. But law enforcement officers and the communities they serve cannot afford to wait for a new administration—they deserve better. Fortunately, states are well-positioned to ensure local law enforcement has the training, resources, oversight, and accountability necessary to reduce crime and strengthen relationships with communities. The time is now for states to usher in a new era of policing. They should empower state attorneys general to investigate, litigate, and resolve the pattern or practice of police misconduct and begin the hard work of rebuilding trust.

2NC—Solvency—Accountability

Investigations by the state attorneys general alleviates eliminates conflicts of interests and helps spread awareness of police misconduct – that ensures accountability

CPD 15 (Center for Popular Democracy; an American advocacy group that promotes progressive politics; "Building Momentum from the Ground Up: A Toolkit for Promoting Justice in Policing"; June 2015; https://populardemocracy.org/sites/default/files/JusticeInPolicing-webfinal_0.pdf) [DTD]

Independent Oversight Policy 11: Special or Independent Prosecutors When trying criminal defendants, district attorneys rely on testimony and evidence provided by police officers, many of whom they work with regularly. These **relationships create conflicts of interest** when prosecutors must determine whether and how to prosecute police officers accused of criminal acts. A special, or independent, prosecutor—someone external to the local jurisdiction and local governmental departments—should be assigned to investigate and determine whether criminal charges should be filed against a police officer, especially in cases where officers use force against civilians. Further, the special prosecutor should be provided with qualified investigators and resources to eliminate reliance on information provided by or investigations led by local police—another potential conflict of interest. The White House Task Force on 21st Century Policing reiterated the need for independent prosecutors in cases of police involved killings. In Practice After John Crawford, a Black man, was gunned down by white police officers in a Beavercreek, Ohio, Wal-Mart because he was holding a BB gun, organizations such as the Ohio Students Association and others rallied and pressured the county prosecutor to support the appointment of a special prosecutor. Against a backdrop of simmering national discussions about police use of force following the Eric Garner and Michael Brown shootings, the Ohio attorney general assigned a special prosecutor with experience in police-involved shootings to the case. Several states have proposed measures about appointing special prosecutors or providing independent investigation when there are officer-involved deaths, including California, Indiana, New York, Missouri, Maryland, Colorado, New Jersey, and New Mexico. New York and Indiana are the only states to propose establishing an office at the state level. Best Practices: States should establish a permanent and independent "Office of Police Investigations", authorized to investigate and prosecute all police killings of civilians, use-of-force cases, sexual assault by law enforcement officers, and any other cases of police misconduct against civilians, at its discretion. Unlike civilian oversight bodies or Inspectors General Officers, (discussed below) these offices would have the power to prosecute officers accused of misconduct in criminal court. ✓ The Office should be equipped with sufficient resources, including investigators independent of local police departments. ✓ Absent the creation of a permanent office, independent, special prosecutors should be assigned in all cases where criminal misconduct against civilians is alleged against police and in all police encounters or custody that result in the death of a civilian. ✓ In cases that involve state police departments, Attorney Generals should be required to appoint a special, independent prosecutor. Sample Legislation No model legislation for independent prosecutors exist but the following is an example of a piece of legislation that may be helpful, along with the best practices section, in crafting legislation that reflects the needs of your community. HR 5830: https://www.congress.gov/bill/113th-congress/house-bill/5830. Directs the governor of a state to: (1) appoint a special prosecutor to present evidence on the state's behalf at a hearing before a judge to determine whether probable cause exists to bring criminal charges against a law enforcement officer who uses deadly force against a person and thereby causes his or her death; and (2) use a random process to select the special prosecutor from among the prosecutors in the state, excluding the prosecutors of the locality in which the death took place. Resources h For more information about efforts to establish state-level special prosecutor policies, visit the National Conference of State Legislatures website: http://www.ncsl.org/research/ civil-and-criminal-justice/law-enforcement.aspx. h For a fact sheet on establishing a permanent special prosecutor's office, see WeTheProtestors's policy brief: https://www.scribd.com/doc/254133568/ Policy-Brief-1-Special-Prosecutor. h For more information about the Ohio Student Association's work: http://www.ohiostudentassociation.org Policy 12: Inspectors General or Oversight Commissions Subjecting law enforcement agencies to external oversight can **provide some transparency** and may help **monitor the**

practices and policies of local police. Unlike community based oversight, Inspectors General or Oversight Commissions refer to oversight of police departments by third party government agencies or officials. The establishment of an Inspectors General or Auditor's Office or Oversight Commission by no means guarantees effective oversight, but may **help the public access information** about police abuses, **ensure effective implementation of reforms**, and proactively **identify issues in the operations, policies, programs and practices of police departments**. While the powers exercised by such an office will depend on state and local law, oversight bodies are most likely to be effective if they are not controlled by law enforcement, empowered to monitor police department practices related to civil rights and civil liberties, able to exercise subpoena power, and able to issue binding policy changes. In Practice Inspectors General, auditors and oversight agencies and commissions are not a silver bullet, but they can be an important part of the landscape of oversight necessary to ensure police accountability. Oversight agencies or commissions can often investigate systemic issues of misconduct and are **well positioned** to monitor reforms and provide information to the public about how effective reforms have been. Reports and recommendations from oversight agencies or commissions can be useful advocacy tools and can help persuade local elected officials (and sometimes law enforcement leadership) to make changes to policies or procedures. A number of cities have active Inspectors General Offices, which through reports and recommendations have unearthed problematic departmental practices. For instance a report by the recently created Inspector General in New York City documented the illegal use of chokeholds by NYPD officers and the flawed NYPD disciplinary system. A report by the Los Angeles Inspectors General highlighted the lack of data around use of force by the Sheriff's department, gaining a lot of media and community attention in late 2014 and early 2015. In New Orleans, a series of reports conducted by the Inspectors General Office throughout 2014 resulted in ten federal indictments and three convictions of officers involved in misconduct. While there are a number of examples of strong Inspectors General Offices, the effectiveness of the Office depends on the priorities and allegiances of whoever is appointed. The Seattle Community Police Commission provides another model. Rather than being headed by a single person, who may be vulnerable to political pressure or just not be effective, the Community Police Commission is a fifteen member body representative of different community interests and appointed by the Mayor. Unlike most other civilian police commissions, it does not review individual misconduct cases; rather, it reviews the civilian oversight and accountability system, as well as police policies and practices of public significance. Seattle champions this approach because they believe the representative nature of the Community Police Commission ensures that the Office does not become bureaucratized and/or disconnected from community priorities or concerns. While information provided by oversight bodies has been helpful for advocates across the country, there is no clear evidence that these oversight bodies alone are effective in obtaining meaningful reforms. Best Practices: Oversight agencies, which review law enforcement policy and practices, are normally instituted at the city or county level and can help make the public aware of systemic police misconduct and abuses. ✓ Oversight agencies or commissions are most effective if they are fully independent and have the freedom and power to choose what they investigate. City or state law may limit the ability to create truly independent bodies, but it is normally possible to ensure that oversight agencies are not controlled by law enforcement. ✓ Oversight agencies or commissions should be charged with monitoring and investigating patterns and practices of police interactions with particularly vulnerable populations, including: women, LGBTQ people, youth, homeless people, and people living in public housing, immigrants, and people with disabilities, as well as specific forms of police misconduct including sexual harassment and assault and discriminatory treatment against LGBTQ people and other populations. ✓ Oversight agencies or commissions should be charged with regularly analyzing data on a range of police department practices to determine if there are disparities based on race, age, gender, gender identity, or sexual orientation in enforcement practices.4 ✓ Oversight agencies or commissions should have full access to all information needed to complete their investigations. To ensure access, they should have: subpoena power, ability to compel testimony, and access to all relevant internal documents, systems, and personnel of the police department and related departments or bodies that may have access to complaints against officers and departments. ✓ There should be legal protections from retaliation for people who provide information about potential abuses or misconduct to oversight agencies or commissions. ✓ Communities should have input in determining the priorities and topic of investigations. Oversight agencies or commissions should be mandated to report all of their findings to the public and consult communities most impacted by police brutality and incarceration in the development of their priorities. ✓ The budget of oversight agencies or commissions should be adequate and consistent. ✓ There must be various accountability mechanisms, including mandated annual reporting and/or open public hearings. ✓ Oversight

agencies or commissions should be responsible for monitoring and reporting on the status of prior recommendations. ✓ Police departments should be required to respond to and acknowledge the recommendations of oversight agencies or commissions. ✓ Oversight agencies or commissions should have public websites that include past reports, recommendations, and opportunities for community members to submit questions, complaints, or recommended investigations.

2NC—Solvency—States Key—Circumvention

State laws circumvent any meaningful reform – statutes, police unions, decertification practices, and limited disciplinary records contribute to misconduct

Stoughton et al. 20 (Stoughton; Seth W. Stoughton; Professor of law at the University of South Carolina; Noble; Jeffrey J. Noble; Former deputy chief of police at the Irvine Police Department in California; Alpert; Geoffrey P. Alpert; Criminology professor at the University of South Carolina; "How to Actually Fix America's Police"; The Atlantic; 6/3/20; https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/) [DTD]

STATE INTERVENTION State legislatures, which can often move much faster than the pace of national politics, have their own five objectives to focus on. To begin with, 36 states have statutes that govern the use of both deadly and nondeadly force, while six states have statutes only for deadly force. More than three-quarters of the 58 total state statutes (some states have more than one) were adopted prior to or during the 1970s, and most have not been recently amended. In the absence of statutes, states regulate police use of force through judicial decisions. But even where state statutes do exist, the courts that interpret them unfortunately tend to rely on the Fourth Amendment law. This is a problem for two reasons. First, the Fourth Amendment regulates police seizures, but state law is supposed to regulate use of force, and not all uses of force count as seizures. (Several courts have held, for example, that an officer shooting at someone but instead striking a bystander does not constitute a seizure.) State law is supposed to be broader than the Fourth Amendment, which means that referring to Fourth Amendment doctrines in the interpretation of state law can provide less protection than state lawmakers intended. Second, and perhaps more important, those Fourth Amendment doctrines are a mess; they provide little meaningful guidance that officers in the field can use to determine when and how much force to use, and the guidance they provide to courts reviewing use of force is often flawed. Worse, many of the state statutes and common-law doctrines are contrary to good practices. Some states allow officers to use force to make an arrest if they believe the arrest is lawful, even if it isn't and their belief is unreasonable. Others are woefully outdated, and still provide a defense to officers who use deadly force to prevent the escape of a fleeing felon. And most states authorize officers to use "reasonably necessary" force, but do not bother to define what reasonable force is or explain how officers should determine that it is necessary. Very few states admonish officers to use appropriate tactics or punish officers for egregious mistakes that contribute to avoidable use of force. States can do better. In the past several years, for example, both Washington State and California have amended their statutory regimes, giving officers the authority to use force in the situations that require it while also providing meaningful guidance to officers and courts about what those situations are. California allows officers to use deadly force against "imminent threats of death or serious bodily injury," and says that an "imminent threat" exists when "a person has the present ability, opportunity, and apparent intent" to cause such harm. Definitions like this, which draw from best practices in policing, give officers the leeway to protect themselves and others while also prohibiting them from acting on unfounded or purely speculative fears. **State legislatures can also amend** law-enforcement officers' bills of rights and the **laws that govern the collective-bargaining rights of police unions**. Most states permit or encourage collective bargaining for police unions—even states that, like Wisconsin, otherwise take a dim view of public-sector unions. Police unions do some good work; research suggests that officers at unionized agencies are, on average, higher paid and more professional than officers at nonunionized agencies. However, **unions have leveraged the collective-bargaining process to create labyrinthine procedural protections that can make it exceptionally difficult to investigate, discipline, or terminate officers**. Some of the limits on investigation—such as delaying interviewing an officer after a critical incident for several "sleep cycles"—are based on faulty reasoning and have been thoroughly debunked by credible scientific research.

Too often, discipline is precluded by unnecessary or inappropriate procedural violations; in some cities, for example, civilians can file a complaint only during a limited period after an incident, sometimes as short as 30 days. When officers are disciplined, that discipline is subject to grievance and arbitration procedures; at one agency, a study found that arbitrators "routinely cut in half" the severity of disciplinary sanctions imposed by agency management. Officers should have a right to appeal disciplinary findings, but only when they are arguing that the agency's decision was arbitrary and capricious or that the agency did not act in good faith. **By protecting bad officers, collective-bargaining agreements and state laws contribute to misconduct**. Further, state legislatures can do a better job of certifying and, when necessary, decertifying officers. Currently, most states require most officers to be certified by a standards-and-training commission. Such commissions set minimum training requirements, but state law can impose specific training that the state commission has, thus far, omitted from the academy curriculum. Washington State, for example, now requires both violence de-escalation training and mental-health training, and the commission must "consult with law enforcement agencies and community stakeholders" in developing that training. And while most states allow for decertification—which prevents someone who has engaged in misconduct from continuing to work in that state as an officer—that authority can be tightly limited. In some states, an officer can be decertified only after a criminal conviction for a felony or serious misdemeanor. Even in states that have more permissive decertification regimes, decertification is often used only sparingly. From the 1960s until 2017, only about 30,000 officers were decertified, and three states—Florida, Georgia, and North Carolina—make up about half of those. As the decertification expert Roger Goldman has said, that isn't because those states have a higher proportion of bad officers; it is because those states "have very active decertification programs." States have good reason to strengthen their commitment to policing the police: According to a recent study, **officers who are hired by another police agency after being terminated or resigning in lieu of termination from a prior agency are more likely than other officers to engage in future misconduct**. A persistent culture of secrecy regarding personnel matters has not helped. Many states have sharply limited the public's right to access officers' disciplinary files or agency use-of-force investigations. Although there is, and must be, room for certain employee information to be kept confidential, an officer's actions while dealing with members of the community and the steps that an agency takes to investigate those actions are clearly matters of public interest. The states that have passed broad sunshine laws, such as Florida, have taught us that public access can be a crucial component of police accountability without impeding proper police action. States that allow agencies to shred disciplinary records after a set period, sometimes as short as six months, are effectively making patterns of misconduct by problem employees significantly more difficult to detect. States should follow the lead of Florida and, more recently, California in passing public-records laws ensuring that disciplinary records and reports pertaining to critical incidents such as police shootings or other serious uses of force cannot be hidden.

2NC—Solvency—AT Federal Action Key

The DOJ lacks the power and resources to handle every case of police misconduct

Maxwell & Solomon 18 (Maxwell; Connor Maxwell; Research associate for Race and Ethnicity Policy at the Center for American Progress; Solomon; Danyelle Solomon; Senior Director of Race and Ethnicity Policy at the Center; "Expanding the Authority of State Attorneys General to Combat Police Misconduct; Center for American Progress; 12/12/18; https://www.americanprogress.org/issues/race/reports/2018/12/12/464147/expanding-authority-state-attorneys-general-combat-police-misconduct/) [DTD]

One study found that pattern or practice reforms minimize law enforcement misconduct and "generate desirable policy outcomes" for local communities.19 But sustaining police reforms is a challenge: The same study found that "organizational changes are not self-sustaining; implementation does not in and of itself guarantee meaningful, institutionalized change." Jurisdictions that have been subject to DOJ intervention have also been found to have reduced the risk of civil rights litigation, suggesting that consent decrees—or court-enforceable reform agreements—improve satisfaction with police agencies and reduce police misconduct.20 But while **the DOJ** has helped bring about reform in dozens of states and localities nationwide, it **has never possessed the tools or resources necessary to address every case of systemic police misconduct**. Section 14141 of the Violent Crime Control and Law Enforcement Act of 199421 (a) It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. (b) Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice. One significant limitation to Section 14141 cases is **the DOJ's lack of subpoena power** to compel the release of internal documents from law enforcement agencies.22 Therefore, if an agency refuses to cooperate with an investigation, the DOJ may be unable to obtain documents that could help in determining whether a pattern or practice case exists. Although the DOJ receives a multitude of complaints against state and local law enforcement agencies, it must exercise significant discretion in choosing cases or else **risk a potentially lengthy and expensive lawsuit if it meets resistance from local leadership**.23 Another limitation to bringing such cases is persistent underfunding. The Special Litigation Section of the DOJ's Civil Rights Division enforces civil rights laws designed to protect people in state or local institutions; individuals with disabilities who receive services in their communities; youth involved in the juvenile justice system; individuals who wish to access reproductive care clinics; and people who interact with state and local law enforcement. But in 2015, the section had just 71 positions and $12 million available for police misconduct enforcement nationwide.24 This **constituted just 0.01 percent of the $105 billion state and local governments spent** on policing in 2015.25 With such limited resources and a large mandate, the Special Litigation Section cannot afford to investigate every serious allegation of systemic policing problems. Between 1994 and 2017, the DOJ opened 69 formal pattern or practice investigations and entered into 40 police reform agreements.26 But the DOJ's Civil Rights Division admits that **it "identifies far more jurisdictions that meet the basic criteria for opening an investigation than it is able to investigate."**27 Without subpoena powers and additional resources, the DOJ is unable to adequately address systemic misconduct at state or local law enforcement agencies across the country.

— General Solvency —

Solvency—States Solve CJR

The counterplan solves best – federal reforms have little to no effect on the criminal justice system – state action is key at every level

Pfaff 2018 – professor of law at Fordham Law School. He is the author of Locked In: The Real Causes of Mass Incarceration and How to Achieve Real Reform

(John F. Pfaff January 2018 "A Smarter Approach to Federal Assistance with State-Level Criminal Justice Reform" American Enterprise Institute: Economic Perspectives https://www.aei.org/wp-content/uploads/2018/01/A-Smarter-Approach-to-Federal-Assistance-with-State-Level-Criminal-Justice-Reform.pdf) IB

Despite some of the most extreme ideological divides in modem times, both chambers of Congress have recently made genuine bipartisan efforts to reform our nation's criminal justice system, especially its reliance on incarceration. The need for such reform is clear. The United States has the highest incarceration rate in the world, detaining nearly 25 percent of the world's prisoners, and we surely lead the world when it comes to the fraction of people with any sort of criminal record or conviction.1 And a growing body of research suggests that incarceration does not provide the public-safety returns that its pro ponents claim.2 So far, most congressional efforts have focused on fixing the federal system.3 While much is wrong with the federal system, **it is ultimately a relatively minor player in criminal justice**: **State systems hold nearly 90 percent of all prisoners and far greater percentages of pretrial detainees, parolees, and probationers**. It is thus encouraging to see that one recent federal proposal, the Reverse Mass Incarceration Act (RMIA), takes direct aim at the bigger state systems. Yet there is reason to be concerned about just what the federal government can accomplish. Many of our nation's criminal justice problems are inherently hard to correct, and the federalized nature of law enforcement raises unique challenges for any congressional or presidential response to state and local problems. The goal of this policy brief is threefold. First, it will highlight several aspects of criminal justice policy that make federal solutions tricky. Second, it will examine why previous federal efforts to shape state criminal justice policies (in particular, the Violent Crime Control and Law Enforcement Act of 1994 and the Adam Walsh Child Protection and Safety Act of 2006) underperformed and why the current RMIA faces similarly dim prospects. And third, and hopefully more productively, it will suggest how the federal government can adapt it proposals to address these challenges and thus effectively help states reduce their excessive reliance on incarceration. **In the end, state and county governments will have to take the lead in righting our criminal justice system**. But the federal government can take steps to help them accomplish their goals; as we will see, in some cases that assistance could prove to be quite significant. That past efforts have been unsuccessful does not mean the federal government can do nothing. With criminal justice reform still a rare space of bipartisan agreement, more effective federal involve ment can surely yield important dividends. The Complicated Nature of Criminal Justice Reform Federal intervention in state criminal justice policy faces at least three serious challenges. First, the localized nature of criminal justice makes direct, or even indirect, federal involvement tricky. Second, the problems that drive mass incarceration are often complicated political and institutional defects that do not have easy fixes, especially given the limits the federal government already faces. And third (and this problem afflicts local, state, and federal reformers alike), significant reform requires us to tackle the third rail of criminal justice reform: treating those convicted of violence differently. Localism. Start with the problems of localism. **Almost everyone who has contact with the criminal justice system** is arrested by city police or county sheriffs, charged and convicted by county prosecutors, sentenced by county or state judges, held in county jails or state prisons or supervised by county probation officers, and released by state parole boards, all according to laws passed by state legislators, who represent often quite local districts. **At no point do we see the federal government in that list**, and that is not a mistake; well over 90 percent of those who go through the criminal justice system will have **no interaction with federal authorities at all.** This raises two serious issues. First, if the federal government is going to shape state policy, **it can only do so indirectly. The federal government**

cannot impose criminal laws on the states or **tell states what their criminal codes must look like**,4 and the Department of Justice (DOI) has almost **no oversight authority** over police, prosecutors, judges, or other state and local law enforcement officials. Unfortunately-and this is the second issue-**even indirect efforts face serious challenges**. If nothing else, most criminal justice actors are elected and respond primarily to local conditions, **limiting the impact of any federal bully pulpit**. Take prosecutors, who are almost all directly elected by county electorates. Prosecutors have played perhaps the biggest role in driving up prison populations, especially since crime started to fall in the 1990s (Pfaff 2017c, 2013, 2012), and two examples-one from New York and the other more national-show how locally focused they are.

Solvency—States Solve CJR

The counterplan uses federalism to promote CJR better and ensures enforcement at the local level

Pfaff 17 - Professor of Law at Fordham Law School in New York City (John, "Mass Incarceration Is a Local Affair," *Democracy Journal*, https://democracyjournal.org/arguments/mass-incarceration-is-a-local-affair/)//BB

In recent years, bipartisan efforts to scale back the United States's unprecedented reliance on incarceration had started to show some signs of success, with prison populations falling in nearly half the states nationwide between 2010 and 2015. Yet in 2016, Trump pulled off an upset victory in part by tapping into Americans' continued fear of violence, relying aggressively on "tough on crime" rhetoric. Despite all the chaos currently embroiling his Administration, many are understandably nervous that his presidency could still derail these relatively nascent reform efforts. Thankfully, I think (and hope) these fears are likely misplaced, and contrary to many commentators I do not expect that the Trump Administration will have much impact on reform. Many of you will already know the story behind the recent prison reform efforts. In the 1970s, the U.S. incarceration rate was comparable to that of other western countries, at about 100 per 100,000 (for comparison, the rate in England and Wales in 1970 was approximately 80 per 100,000). Over the next 35 years, however, it steadily and relentlessly rose, essentially quintupling by the 2000s. We now have the world's highest incarceration rate—and, to quote a hoary statistic, we are home to 5 percent of the world's population but roughly 25 percent of its prisoners. The countries that come close to us are mostly autocratic or semi-autocratic regimes including Russia, Cuba, and Turkmenistan. After several decades of low and falling crime rates, however, the budget-eviscerating 2008 financial crisis appears to have produced a genuinely bipartisan effort to scale back incarceration (and its costs). And in 2010, total prison populations dropped for the first time since 1972; by 2015, state and federal prison populations had fallen by a bit more than 5 percent. This was not a dramatic drop, but after so many years of unceasing growth, it was an accomplishment to celebrate, and one that indicated reforms like expanding parole and cutting sanctions for certain crimes were starting to succeed. Reform's biggest vulnerability, however, is that Americans remain fearful of crime, even as crime rates have dropped to near-historic lows. And from its start, Donald Trump's campaign aimed to stoke those fears. He launched his campaign with a speech vilifying immigrants as violent criminals, and his inauguration address replaced Reagan's "morning in America" with "American carnage." He soon after nominated Jeff Sessions, a staunch opponent of criminal justice reform, as his attorney general. Sessions, in turn, has persistently advocated for 1980s-style "tough on crime" policies, such as insisting federal prosecutors impose the toughest prison sentences they can. Yet I still remain cautiously hopeful. The Administration's rhetoric certainly doesn't help matters, but in the end, the federal government **has very little control** over criminal justice. About 90 percent of all prisoners—and a far greater percentage of those in jails, on probation, or who are arrested every year—are handled by states and counties, not by the federal government. And the federal government **cannot directly tell states what to do** when it comes to dealing with these individuals. For example, they cannot make local governments change their laws, enforce existing laws more aggressively, or determine who is released on parole or who is sent back to prison. The federal government has only two indirect tools at it disposal: incentive grants and the bully pulpit. And **neither is as powerful as many people think**. Take grants. State and local governments spend about $200 billion per year on criminal justice (about $100 billion on

policing, $50 billion on prisons, $30 billion on jails, and $20 billion on courts and other expenses). Federal criminal justice grants come to about 2-3 percent of that total. So these grants are not irrelevant, but the amounts are likely not large enough of a carrot to change behavior all that much. In fact, states have a history of paying seemingly little attention to fiscal offers and threats from the federal government. When the federal government offered states up to $10 billion to toughen their sentencing laws as part of the 1994 Violent Crime Control Act, most states ignored the program; the federal government eventually paid out less than $3 billion of the $10 billion on offer. Conversely, when the federal government threatened in 2006 to strip states of some grants if they did not adopt specific sex offender registry requirements, almost two-thirds of states chose to lose funding rather than comply—most because the costs of compliance were too high, but at least one (Nebraska) out of opposition to the policy itself. As for the bully pulpit, it's surely the case that harsh, tough-on-crime rhetoric will make reformers' jobs somewhat tougher, but the overall impact is likely to be **slight**. Prison growth is driven, first and foremost, by local county prosecutors, and these prosecutors are **focused almost entirely on local issues** and interests and politics. A striking example: In 1973, New York State adopted the remarkably harsh "Rockefeller Drug Laws," named after then-Governor Nelson Rockefeller, who pushed for these laws partly in response to rising drug-related violence, but also to further his presidential aspirations. Remarkably, though, by 1984 the number of people in prison in New York on drug charges had barely changed. Local prosecutors essentially ignored the law—and, by extension, Rockefeller's bully pulpit. That all changed in 1984, when the number of people in prison for drugs rose sharply, and continued to rise until the mid-1990s. This still had little to nothing to do with state issues and, again, everything to do with local crime. In 1984, crack, and the violence associated with its markets, tore across New York, and local prosecutors cracked down in response. New York has since reformed the Rockefeller Laws twice, in 2004 (weakly) and in 2009 (more significantly). Yet the number of people in state prison for drugs started to decline years before the reforms were passed—in 1995—the two reforms did not appear to affect that decline at all. Again, local prosecutors changed their behavior in response to improving local conditions, consistently paying little attention to what was happening in Albany. If New York prosecutors have been willing to ignore Albany, why would they pay attention to what is being said by even more remote politicians in Washington, D.C.? More than likely, they won't; what prosecutors care about is their county electorates. And, at least in more populous counties, local politics still seem to favor reform. The 2016 election provides several interesting examples of this. In red and blue states alike, voters frequently approved smart-on-crime initiatives (including two focused on decriminalizing drugs in strongly pro-Trump Oklahoma) and elected reform-minded prosecutors in places ranging from Corpus Christi and Dallas in Texas, to Jacksonville, Florida, to Chicago, Illinois. In some ways, the localism of prison growth acts a **bulwark against the Trump Administration**, since no single federal law or executive order can tell police and prosecutors and governors what to do. **Federalism**, here, **is a shield**.

Solvency—States Solve Policing

State legislative reforms can assure police accountability.

Stoughton et al. 20 - Professor of law at the University of South Carolina.

(Seth Stoughton, Jeffrey J. Noble, Former deputy chief of police at the Irvine Police Department in California, Geoffrey P. Alpert, Criminology professor at the University of South Carolina, 6-3-2020; "How to Actually Fix America's Police," *Atlantic*, https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/)

STATE INTERVENTION **State legislatures**, which can often move **much faster** than the pace of national politics, have their **own** five **objectives** to **focus on.** To begin with, 36 states have statutes that govern the use of both deadly and nondeadly force, while six states have statutes only for deadly force. More than three-quarters of the **58 total state statutes** (some states have more than one) were adopted prior to or during the 1970s, and most **have not been recently amended**. In the absence of statutes, states regulate police use of force through judicial decisions. But even where state statutes do exist, the courts that interpret them unfortunately tend to rely on the **Fourth Amendment law**. This is a **problem** for two reasons. First, the Fourth Amendment regulates police seizures, but state law is supposed to regulate use of force, and not all uses of force count as seizures. (Several courts have held, for example, that an officer shooting at someone but instead striking a bystander does not constitute a seizure.) State law is supposed to be broader than the Fourth Amendment, which means that referring to Fourth Amendment doctrines in the interpretation of state law can provide less protection than state lawmakers intended. Second, and perhaps more important, those Fourth Amendment doctrines are a mess; they provide little meaningful guidance that officers in the field can use to determine when and how much force to use, and the guidance they provide to courts reviewing use of force is often flawed. Worse, many of the state statutes and common-law doctrines are **contrary to good practices**. Some states allow officers to use force to make an arrest if they believe the arrest is lawful, even if it isn't and their belief is unreasonable. Others are woefully outdated, and still provide a defense to officers who use deadly force to prevent the escape of a fleeing felon. And most states authorize officers to use "reasonably necessary" force, but do not bother to define what reasonable force is or explain how officers should determine that it is necessary. Very few states admonish officers to use appropriate tactics or punish officers for egregious mistakes that contribute to avoidable use of force. **States can do better**. In the past several years, for example, both Washington State and California have **amended their statutory regimes**, giving officers the authority to use force in the situations that require it while also providing **meaningful guidance** to officers and courts about what those situations are. California allows officers to use deadly force against "imminent threats of death or serious bodily injury," and says that an "imminent threat" exists when "a person has the present ability, opportunity, and apparent intent" to cause such harm. **Definitions** like this, which draw from best practices in policing, give officers the leeway to protect themselves and others while also **prohibit**ing them from acting on **unfounded** or **purely speculative fears. State legislatures** can also **amend** law-enforcement officers' bills of rights and the laws that govern the **collective-bargaining rights of police unions**. Most states permit or encourage **collective bargaining** for police unions—even states that, like Wisconsin, otherwise take a dim view of public-sector unions. Police unions do some good work; research suggests that officers at unionized agencies are, on average, higher paid and more professional than officers at nonunionized agencies. However, unions have leveraged the collective-bargaining process to create **labyrinthine procedural protections** that can make it exceptionally difficult to **investigate, discipline, or terminate officers**. Some of the **limits** on investigation—such as delaying interviewing an officer after a critical incident for several "sleep cycles"—are based on **faulty reasoning** and have been thoroughly debunked by credible scientific research. Too often, discipline is precluded by **unnecessary** or **inappropriate** procedural violations; in some cities, for example, civilians can file a complaint only during a limited period after an incident, sometimes as short as 30 days. When officers are disciplined, that discipline is subject to grievance and arbitration procedures; at one agency, a study found that arbitrators "routinely cut in half" the severity of disciplinary sanctions imposed by agency management. Officers should have a right to appeal disciplinary findings, but only when they are arguing that the agency's decision was arbitrary and capricious or that the agency did not act in good faith. By **protecting** bad officers, collective-bargaining agreements and state laws **contribute to misconduct**. Further, state legislatures can do a better job of **certifying** and, when necessary, **decertifying** officers. Currently, most states require most officers to

be certified by a standards-and-training commission. Such commissions set minimum training requirements, but state law can impose **specific training** that the state commission has, thus far, **omitted** from the academy curriculum. **Washington State**, for example, now requires both **violence de-escalation training** and **mental-health training**, and the commission must "consult with law enforcement agencies and community stakeholders" in developing that training. And while most states allow for decertification—which prevents someone who has engaged in misconduct from continuing to work in that state as an officer—that authority can be tightly limited. In some states, an officer can be decertified only after a criminal conviction for a felony or serious misdemeanor. Even in states that have more permissive decertification regimes, decertification is often used only sparingly. From the 1960s until 2017, only about 30,000 officers were decertified, and three states —Florida, Georgia, and North Carolina—make up about half of those. As the decertification expert Roger Goldman has said, that isn't because those states have a higher proportion of bad officers; it is because those states "have very active decertification programs." States have good reason to **strengthen their commitment** to **policing the police**: According to a recent study, officers who are hired by another police agency after being terminated or resigning in lieu of termination from a prior agency are more likely than other officers to engage in future misconduct. A persistent culture of secrecy regarding personnel matters has not helped. Many states have **sharply limited** the public's right to access officers' **disciplinary files** or agency use**-of-force investigations**. Although there is, and must be, room for certain employee information to be kept confidential, an officer's actions while dealing with members of the community and the steps that an agency takes to investigate those actions are **clearly matters of public interest**. The states that have passed **broad sunshine laws**, such as Florida, have taught us that public access can be a **crucial component of police accountability** without impeding proper police action. States that allow agencies to shred disciplinary records after a set period, sometimes as short as six months, are effectively making patterns of misconduct by problem employees significantly more difficult to detect. States should follow the lead of Florida and, more recently, California in passing public-records laws ensuring that disciplinary records and reports pertaining to critical incidents such as police shootings or other serious uses of force cannot be hidden. Finally, states can **rethink** their approach to **criminalization**. "Overcriminalization" has been broadly discussed; there are so many laws that violations are ubiquitous. If everyone is a criminal, officers have almost **unfettered discretion** to **pick and choose** which laws to **enforce** and whom to **stop**, **frisk**, **search**, or **arrest**. And, as the saying goes, when all you have is a hammer, every problem looks like a nail. For too long, the **hammer** of criminal law has been used against a **wide array of social ills**. The result is police **over-involvement** in matters that would be far better left to **other government institution**s and **social-service providers,** including school discipline, poverty, homelessness, and substance abuse. The opioid crisis remains a stark reminder that the United States cannot **arrest its way out of addiction**. The troubling discrepancies between how police have been cast as soldiers in the War on Drugs—a war that, despite almost identical drug-use rates between white and black Americans, is fought mostly in poor and minority communities—and how police have been seen as an adjunct to the public-health authorities addressing opioid abuse in suburban middle- or upper-class neighborhoods should be a stark warning for state legislators to rethink the scope of criminal law.

Solvency—States Solve Policing

States solve best – they are a perfect middle ground between over-federalization and reliance on local reforms

Gass 2017 – staff writer

(Henry Gass April 20, 2017 "Across US, states answering cries for police reforms" https://www.csmonitor.com/USA/Justice/2017/0420/Across-US-states-answering-cries-for-police-reforms) IB

The week that Freddie Gray died in a Baltimore hospital in April 2015, while the city burned and protesters across the country demanded police reforms, legislators in Colorado were gathered to deliver just that. The Colorado lawmakers were grappling with 10 bills aimed at instituting reforms of law enforcement policies and procedures, ranging from restrictions on the use of chokeholds to the collection of data on officer-involved shootings. Half of Colorado's "Rebuilding Trust Package" – as Democratic lawmakers there dubbed it – failed that week, but Gov. John Hickenlooper went on to sign five of those bills that year, followed by two more (refashioned from failed 2015 bills) in 2016. And Colorado is only one example of states taking a serious look at judicial reform in the wake of the national debate around policing and police violence – particularly in communities of color. Nevertheless, these legislative efforts have largely been overshadowed by the protests that have precipitated them. In 2015 and 2016, 34 states and the District of Columbia enacted at least 79 bills, resolutions, or executive orders that changed policing policies and practices, according to a report released by the Vera Institute of Justice. That's almost four times as many as the 20 passed between 2012 and 2014, a Vera spokesman says. In recent years, it has been left to individual departments to enact reforms if they deem them necessary, or – when especially troubled departments are either unwilling or unable to change – to the US Department of Justice, typically via a court-ordered "consent decree" that requires departments to implement certain reforms. **The emerging role of states in policing reform is critical,** says Jim Bueermann, the president of the Police Foundation and the former chief of police in Redlands, Calif., since they can strike the perfect balance between being close enough to the streets to understand specific local policing issues and solutions, while having the broad authority to pass laws that affect every policing agency in their state**. "States are the sweet spot between the federal government passing laws and the 17,000 communities [with law enforcement agencies] passing laws**," says Mr. Bueermann. Creating consensus **If enough states legislate reforms**, he says, **it could contribute to a national consensus on what constitutes good policing policies**. "If you get 50 states to develop a national coherence around what constitutes good policing," he adds, "we would take a quantum leap forward in helping people understand the values of policing, the challenges police face every day, and police departments would better understand how they have to reform their own operations."

Solvency—States Solve Sentencing

The counterplan solves and creates the momentum for federal follow-on
Prison Fellowship 2017

("THE IMPORTANCE OF STATE JUSTICE REFORM" Prison Fellowship https://www.prisonfellowship.org/2016/07/importance-state-justice-reform/ Published 2016-07-12 modified 2017-09-26) IB

Efforts to bring about criminal justice reforms on the federal level have hit upon a bit of a rough patch in recent weeks. With the focus in Washington shifting toward the general elections in November, some members of Congress have determined that maintaining a "tough on crime" approach to criminal justice is beneficial to their reelection efforts, while others have opted to back-burner the issue until their campaigns have concluded. As a result, legislation such as the Sentencing Reform and Corrections Act, which has received an unusually high level of bipartisan support, faces an uphill battle to passage before the Congressional session concludes. But does this mean that criminal justice reform is a lost cause for 2016? Actually, no. Far from it. In an article in the Washington Post, Keith Humphreys makes a point largely lost in the discussion surrounding justice reforms—that over 87 percent of those currently serving sentences in American prisons are doing so in state facilities, not national. Because of this, **any meaningful reduction in incarceration rates will necessarily involve reforms on the state level.** And while progress may appear to have stalled on the federal level, state reform measures are continuing to advance through their respective legislatures. Earlier this week, the governor of Alaska signed into law a bill reforming that state's criminal justice system. Reform efforts are also underway in many states across the nation, including Georgia, Michigan, Maryland, Utah, and California. **States** often **serve as incubators for reform**, testing out policies and practices on a smaller scale, **and providing federal reform efforts with the necessary documentation and evidence to move forward.**

Counterplan solves best – federal action risks establishment of intra-state competition models that produce harsher sentencing guidelines in states that opt out
National Conference of State Legislatures 2020

(Policies for the Jurisdiction of the Law, Criminal Justice and Public Safety Committee https://www.ncsl.org/ncsl-in-dc/task-forces/policies-law-and-criminal-justice.aspx) IB

Sentencing, Corrections and Recidivism Reduction

Federal jurisdiction for crimes also covered under state law can create competition to escalate punishments and build more prisons. **This** competition **is shortsighted, expensive and unnecessary**. The national government should refrain from making federal crimes of state offenses or from enhancing sentences for crimes that are more properly the domain of states. NCSL supports federal leadership and funding for state criminal offender reentry initiatives and criminal justice reinvestment approaches. These initiatives assist states in addressing recidivism and reentry of offenders back into communities in meaningful, cost-effective ways. State and local governments should be afforded maximum flexibility in using federal funds within criminal justice systems, including but not limited to offender needs for drug treatment and mental

health services. NCSL opposes any legislation that would restrict state flexibility in sentencing and corrections policy. NCSL urges the federal government to address federal expungement requirements which can impede reentry and job security.

Solvency—Experimentation

The counterplan solves best – state action provides space for experimentation and innovation

National Conference of State Legislatures 2020

(Policies for the Jurisdiction of the Law, Criminal Justice and Public Safety Committee https://www.ncsl.org/ncsl-in-dc/task-forces/policies-law-and-criminal-justice.aspx) IB

Congress must allow states flexibility to shape public policy. Creative solutions to public problems can be achieved more readily when state laws are accorded due respect. **Every pre-emptive law diminishes other expressions of self-government**; therefore, state legislators believe that state laws should never be pre-empted without substantial justification, compelling need, and broad consensus. Our federalism anticipates diversity; our unity does not anticipate uniformity. While proponents of pre-emption may claim expected benefits, these must be balanced against the potential loss of accountability, innovation and responsiveness. Pre-emption may be warranted in specific instances when it is clearly based upon provisions of the U.S. Constitution authorizing such pre-emption and only when it is clearly shown (1) that the exercise of authority in a particular area by individual states has resulted in widespread and serious conflicts imposing a severe burden on national economic activity or other national goals; (2) that solving the problem is not merely desirable, but necessary to achieve a compelling national objective; and (3) that pre-emption of state laws is the only reasonable means of correcting the problem. The authority of Congress under the Supremacy Clause to pre-empt state legislation is exercised by the federal government assuming responsibility for regulating under federal law. In addition, the Supremacy Clause allows the federal government to offer states the option of regulating pursuant to federal standards. The power of Congress to thus pre-empt state authority must not be expanded to permit the federal government to commandeer states to administer federal programs. Congress shall provide reasonable notice to state legislative leaders and governors of any congressional intent to pre-empt and shall provide them with opportunity for formal and informal comment prior to enactment. To ensure that the national legislature knows the effects of its decisions on other levels of government, members of Congress shall investigate which of their state's laws would be pre-empted by federal legislation before they vote on the pre-emptive legislation. Congress shall develop processes to understand better the impact of proposed bills on federalism. Congress shall refer bills that affect state powers and administration to intergovernmental subcommittees. **States should not be undercut through the regulatory process**. It is not acceptable for unelected federal agency officials to exercise legislative authority in the guise of regulation and to pre-empt the decisions of the elected legislatures of the sovereign states. Any agency intending to pre-empt state laws and rules must have the express authority or clear evidence from Congress of the intent to pre-empt. The Executive Order on Federalism (E.O. 13132) provides guidance for agency examination of intergovernmental impact and should be codified and enforced. Circumvention of rule-making procedures through interim final rule-making and the like, should be prohibited. An appropriate congressional committee shall review agency regulations to identify unjustified intrusions into state sovereignty.

Solvency—Federal Follow On

States solve best and lead to federal follow-on

Lesser 2018 – second term senator in Massachusetts State Senate, where he serves as Co-Chair of the Joint Committee on Economic Development & Emerging Technologies

(Eric P Lesser January 11 2018 "Criminal Justice Reform Starts and Ends with the States" Harvard Law Review Blog https://blog.harvardlawreview.org/criminal-justice-reform-starts-and-ends-with-the-states/) IB

Criminal justice reform has the attention of the country, **but it is at the state and local level where reform will be implemented**. Much of the conversation about criminal justice reform has revolved around high-profile incidents in major U.S. cities like Cleveland and New York City —and on what the federal Department of Justice can do in response. **But state and local officials are responsible for 90 percent of the prison population.** Most observers agree that our federal and state prisons have a mass incarceration problem: too many people are locked up for minor offenses and too large a proportion of those behind bars are people of color, both of which point to inherent biases in our criminal justice system. Many local factors influence who goes to prison and why, from the number of public defenders available to serve the accused to the number of clinic beds available for drug addicts who need treatment instead of jail time. These are some of the reasons why I continue to advocate for increased funding for local legal aid and measures to combat our opioid epidemic as a State Senator. States are the traditional "laboratories of democracy," the places where new ideas and approaches can be experimented with despite political paralysis in Washington**. State governments have considerable latitude to direct their own policymaking and**, if successful, **provide models for national policies.** Reforming Criminal Justice In October, the Massachusetts State Senate passed a comprehensive criminal justice reform bill which tackled a host of issues, including excessive bail, mandatory minimums, and solitary confinement sentencing. The Massachusetts House passed its own version in November, and the two bodies are now negotiating a final version to present to Governor Charlie Baker. Because low-income offenders are often jailed due to their inability to pay criminal fines, the Senate bill lowered the fee brackets on a number of offenses. The Senate bill also reduced or removed a number of mandatory minimum sentences on drug offenses, allowing judges greater discretion in assigning jail time or other deterrents such as community service hours. Additionally, the Senate bill limited the use of solitary confinement in recognition of the fact that it can be harmful to inmates' mental health and can exacerbate already existing mental disorders. Indeed, any attempt at criminal justice reform must reckon with the realities and inadequacies of our mental health care system —another realm that is largely under local control. There is a constellation of state agencies and organizations that are outside the justice system but can have substantial impacts on it —and on how effective reform can be. These include state departments of health, education, and child services, as well as community organizations like Boys and Girls Clubs and homeless shelters. All of these provide services that keep people, especially young people, from turning to criminal activities. They can also help formerly incarcerated people transition back into civilian life. Focusing on the Right Things One of the more significant pieces of the criminal justice reform package passed by the Massachusetts Senate was the emphasis on treating drug addictions instead of criminalizing them. Sixty-eight percent of individuals in local jails have a substance abuse disorder. In response, the bill expands drug diversion programming, requires the examination of prisoners for drug dependency and whether medication-assisted treatment is appropriate, and establishes a pilot program within select state prisons to evaluate inmates' access to appropriate treatment for opioid addictions. Sending these people to prisons instead of treatment centers creates a vicious cycle of unmonitored drug use, inevitable hospital visits, and short-term jail sentences that do nothing to cure addictions or curb criminal behavior —a revolving prison door. Working with (and Against) the Federal Government Of course, state and local governments are also the primary entities that can implement federal regulations and recommendations regarding most law enforcement, since the federal government does not control local police forces. In December 2014, President Obama created the Task Force on 21st Century Policing to identify and share policy recommendations with state and local leaders. The goal was to improve police-community relations and make crime prevention efforts as effective —and fair —as possible. The Task Force's recommendations included strategies to achieve more diversity in police forces, expand civilian oversight of law enforcement and prohibit racial profiling in policing, all of which Massachusetts can and should do more to act on. I'm proud that, in the Massachusetts Senate, we included in our criminal justice reform legislation a requirement that law enforcement train officers in bias-free policing and de-escalation techniques, one major recommendation of the Task Force. The federal government can give states an incentive to follow its policy recommendations through the use of federal grants, and the Justice Department under President Obama backed up the Task Force's recommendations with $100 million in grants to state and local police departments. On

the other hand, the states are also a bulwark against federal encroachment and overreach. While the states are responsible for implementing federal policies, **they can also limit federal influence where they see state law taking precedence.** In our federal system of government, the residual power not included in the Constitution rests with the states, not with the Federal government. **In the absence of a specific federal question, state law prevails**. This tremendous power can be used on behalf of defendants, as we have seen with California's "sanctuary state" law shielding immigrants by limiting how state and local law enforcement cooperate with federal Immigration and Customs Enforcement. Or it can be used to increase the state's own authority, as with Florida's alleged subversion of medical marijuana dispensaries approved by voters in 2016. Our Framers designed a system that would put the states themselves, and the three branches of the federal government, in competition with one another. Through that competition between the Judiciary and the Presidency, the Congress and the state legislatures, the governors and the judges, the Framers believed that two things would happen. First, freedom would be protected because no single authority would become absolute. Second, just like competition in the free market economy, competition between states, and between the three branches, would allow the best ideas to bubble to the surface while continuously being refined and improved. When it comes to criminal justice reform, those ideas are being developed and implemented at the state level, **whether or not they receive support from the Congress or the Executive Branch.** This system does not work perfectly, and the institutions that make it possible are under strain. But even in this challenging political environment, we've seen the Founders' vision play out in virtually every sector of American life. And here in Massachusetts, we are taking the necessary steps to bring balance to our criminal justice system and bring the focus back to prevention and restoration.

Solvency—Nullification

State reform is a check against federal overreach – the CP is a form of sub-federal resistance

Gardner, Assistant Professor of Law - University of Washington, 19

[Trevor George Gardner, Spring 2019, "Right at Home: Modelling Sub-Federal Resistance as Criminal Justice Reform", Florida State University Law Review, 46, 527, pp. 4-6, MAM]

Momentarily setting aside the merits of their respective assessments, it is important to first note that both Stuntz and Schulhofer frame the relative influence of local and federal government on the penal system in dichotomous terms. Indeed, if either of these leading voices is right in his diagnosis of the source of penal dysfunction, the basic blueprint for criminal justice reform within the federalist system would be a simple matter--either a bottom-up or top-down legal and administrative campaign. However, both perspectives overlook the policy and administrative diversity at each level of government. Crime policy and corresponding enforcement at the local level, for instance, are not wholly good or bad. This should be taken as a modest claim given that there are tens of thousands of local government units. 16The story of criminal federalism is further complicated by the multiple and varied roles the federal government plays in the modern criminal justice system. Contrary to representations in the criminal law literature, the federal government has served as a catalyst for many of the first-order problems in criminal justice--**problems such as prison proliferation, overcriminalization, and over-reliance on police departments.** 17Put simply, the federal government is in many ways responsible for contemporary criminal justice dysfunction.

8Over the past forty [*532] years, it has expanded the scope of criminal liability, increased the scope of criminal surveillance, and facilitated the militarization of police departments. 19

Consider specific examples. In 2014, the U.S. Department of Justice directed the distribution of military equipment to the Ferguson, Missouri, police department while at the same time insisting that public officials in Ferguson adopt "community-oriented" policing programs in the wake of the police shooting of Ferguson resident Michael Brown. 20In the field of immigration, the federal government has spent nearly all of the past two decades pursuing the incorporation of every state and local police department into the federal immigration enforcement [*533] system. Over the same period, **it has clung to the role of chief architect of the War on Drugs** despite considerable evidence of the initiative's futility. 21

If the federal government is not the savior, but instead a frequent bad actor in the emerging narrative of criminal justice reform, reform advocates face a difficult question: who or what will reform the federal government? To credibly answer this question, criminal justice reformers must discard conventional assumptions regarding the relationship between criminal federalism and social justice. Rather than reducing state and local governments to sites of penal oppression, reformers should appreciate these sites for their capacity to **function as a check against unbridled federal ambition** in the field of criminal justice. 22 This point falls in tension with certain political dogmas. Given that the most heralded political achievements in support of the socially and economically marginalized (e.g., the War on Poverty, the Civil Rights Acts, and, most recently, the Affordable Care Act) were based on federal statutes and managed by federal agencies, the notion that state and local government activism can help to deliver a more

equitable and more effective system of criminal justice will strike many as misguided. But these **federal achievements obscure the role** that state and local governments now play in **breaking the national fever** for punishment. Accordingly, this Article captures the legal and administrative tools at the disposal of sub-federal governments as part of a larger toolkit provided within the framework of criminal federalism. 23It endorses sub-federal government resistance within this framework as critical to challenging conventional penal practices and the cultural norms that sustain them.

Solvency—Nullification

States are reframing and recoding criminal justice reform – the process of going against federal policy facilitates structural change

Gardner, Assistant Professor of Law - University of Washington, 19

(Trevor George Gardner, Spring 2019, "Right at Home: Modelling Sub-Federal Resistance as Criminal Justice Reform", Florida State University Law Review, 46, 527, pp. 20-21, MAM)

*554] How, then, are we to understand mimicry as a socio-legal process? How can we be sure that the subfederal governments promoting and passing legislation intended to hamstring Patriot Act enforcement actually shaped the perspective of external public actors and political constituencies? The normative impact of a single state or local government's decision to abstain from a federal enforcement initiative can be difficult to discern; however, social theorists offer a basic framework for analyzing the relationship between culture and institutions that can be used to extend the proposed process model.

In theorizing the role of culture in social movements, cultural sociologists find that social institutions lead the processes of "**cultural recoding**" that facilitate structural change. 102For a social movement to take flight, advocates must succeed in "winning the battle for symbolic encoding" 103by propagating new cultural frames through influential institutions.

In the field of criminal administration, **sub-federal governments** have taken on this work of recoding and reframing in **waging an ideological battle with the federal government** over the precise meaning of public security. Both sides seek to establish who or what poses a risk to the public, as well as what configuration of laws, enforcement mechanisms, and enforcement priorities is needed to keep communities safe. Immigrant sanctuary jurisdictions often proclaim to have established strong public security through the trust police receive from the local immigrant community--a trust largely based on the community's understanding that its police will not participate in ICE raids and federal immigrant-removal proceedings. 104Organizations like the ACLU do similar work in shaping the public's understanding of the meaning of and the means to public safety when promoting concepts like "dual security." The concept of "dual security" is meant to rival the concept [*555] of "national security" as an organizing principle in public security administration. To this end, the ACLU aggressively promotes the idea that sub-federal governments can and sometimes should pursue a public security agenda that conflicts with their federal counterpart. 105As a general matter, the **bigger the gap** between the federal security initiative in practice and the federal theory of public security driving the initiative, the more likely it is that other **sub-federal governments will** take note of the conflict between the federal government and the obstinate sub-federal government and **consider the relative efficacy of the contrasting models of security**. Effective public security models predicated on enforcement abstinence will inspire other governments to follow suit. **As the dominoes fall, momentum builds toward a subfederal decriminalization movement.**

— AT Perm —

AT Perm—Collapses Innovation

Overlapping laws deter innovation and enforcement at the state level even if the laws carry parallel language

National Conference on State Legislators 2010

(August 2010 "2008 - 2009 Policies for the Jurisdiction of the: Law and Criminal Justice Committee" National Conference on State Legislators https://www.ncsl.org/ncsl-in-dc/standing-committees/law-criminal-justice-and-public-safety/2008-2009-polices-law-and-criminal-justice-comm.aspx) IB

States and local governments have the predominant burden of ensuring public safety through the criminal justice system, and the juvenile justice systems. The national government should refrain from making federal crimes of state offenses or from enhancing sentences for crimes that are more properly the domain of states. Federal jurisdiction must be justified by significant improvements in interstate law enforcement or protection of federal constitutional rights. A mere showing that the Constitution may allow federal jurisdiction is not sufficient basis for expansion. **Nationalizing broad areas of crime policy has the same effect as preemption** by deterring innovation, diminishing community responsibility, and reducing accountability. Congress should rely on the Assimilation of Crimes Act, rather than creating a federal criminal code that parallels state laws. The federal government should work with states to examine ways that conflicts in jurisdiction can be avoided.

AT Perm—Crowds Out State Action

Federal policies crowd out the states—reduces demand for state action

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(Jonathan H "WHEN IS TWO A CROWD? THE IMPACT OF FEDERAL ACTION ON STATE ENVIRONMENTAL REGULATION", 31 Harv. Envtl. L. Rev. 67)

A second potential negative indirect effect of federal regulation on state regulatory choices **is crowding out**. This occurs because federal regulation **may serve as a substitute for state-level regulation, thereby reducing the benefits of adopting or maintaining state-level protections**. Insofar as voters in a given state demand a certain level of environmental protection, there is no reason to expect states to duplicate federal efforts when a federal program satisfies that demand, particularly if a state has not already created such a program. If the federal floor is greater than or equal to the level of environmental protection demanded by a state's residents, **that state has no reason to adopt environmental regulations of its own** once the federal government has acted. To the extent that this effect occurs, it is separate from--perhaps even in addition to--the signaling effect described above. The claim here is not simply that states regulate less than they would absent federal regulation--although this claim is almost certainly true. Rather, the claim is that some states that would adopt regulations more protective than the federal floor, absent the imposition of federal regulation, have not done so due to federal regulation and may not do so in the future. If this hypothesis is correct, the net effect of federal environmental regulation in at least some states **could be less** environmental protection than would have been adopted had the federal government not intervened. To see how this could occur, recall that the demand for environmental regulation in any given jurisdiction tends to increase over time as wealth, [*99] technical capability, scientific knowledge, and environmental impacts increase. n131 In any given state (as in the nation as a whole), there is an initial period ("Period A") during which the demand for a given type of environmental protection is relatively low. The costs of adopting environmental regulations in this period are greater than the benefits of adopting any such protections. These costs include the costs of developing, drafting, and passing legislation; the costs of creating a new policy program, drafting and implementing regulations, defending the regulations from any potential legal or administrative challenges, creating a means to monitor and enforce regulatory compliance; and so on. In addition, there are opportunity costs of devoting state resources and political capital to the cause of environmental protection as opposed to some other policy goal. As discussed earlier, the demand for environmental protection has tended to increase over time along with increases in living standards. n132 At the same time, increases in technical knowledge and administrative efficiency may lower the costs of a given regulatory program. Eventually, a state will enter a second period ("Period B") in which the benefits of a given environmental regulatory program are greater than the costs of initiating, implementing, and operating such a program. Absent any federal interference, the hypothetical state will not adopt environmental regulations in Period A, but will adopt such regulations in Period B. See Figure 3. This is the environmental transition discussed in Part I. In Period A, the demand for environmental protection is insufficient to justify the costs of implementing environmental protection measures. By Period B, however, the demand for environmental protection has risen due to increases in wealth and knowledge, among other factors. At the same time, increases in technical capacity and scientific understanding have reduced the cost of adopting environmental protections. As a result, in Period B a state will adopt Q[B] amount of environmental protection. n133 [*100] The timing of Period A and Period B will vary from state to state. This is clearly the case as different states have enacted different environmental regulatory measures at different times--some before the adoption of federal environmental regulation, some after, and some not at all. Looking at the history of various environmental concerns, such as air quality, water quality, or wetlands, it is clear that many states moved from Period A to Period B for these environmental concerns at various times prior to the onset of federal regulations in the 1970s. In many other states, however, a federal regulatory floor was adopted before the onset of Period B. [*101] For states that went through their environmental transition and entered Period B prior to the enactment of federal environmental protection, whether the adoption of a federal regulatory floor increased the aggregate level of environmental protection in that state depended upon whether preexisting state policies offered greater or lesser levels of protection than the relevant federal policies. For states in which the onset of Period B begins after the adoption of federal regulations, the enactment of a federal regulatory floor will, at the time of enactment, increase the aggregate level of environmental protection in that state. However, this may not be the case over time. In states that desire a greater level of protection than that provided by the relevant federal regulations, it is not clear that the existence of the federal regulatory floor will result in an equal or greater level of protection than would be adopted were it not for the federal regulations. This is because federal regulation

will, **to some extent, act as a substitute for state regulation**. As a result, the adoption of federal regulation has the potential to reduce the demand for state regulation and, in some instances, even result in less aggregate regulation in a given state than would have been adopted absent federal intervention. In short, federal regulation can crowd out state regulation. **The potential for such a crowding-out effect is illustrated** in Figure 4. The existence of federal regulation will reduce the demand for state regulation by an amount equal to the extent to which federal regulation is a substitute for state regulation of the same environmental concern (Q[FReg]). This substitution effect will reduce the net benefit of adopting state-level environmental regulations from OCQ[B] to OC'Q'[B]. By reducing the net benefits of state-level environmental regulation in this manner, federal regulation has the potential to crowd out state-level environmental protections, even if the quantity of environmental protection demanded in the state is greater than that provided by the federal government. In such cases, the aggregate level of environmental protection will be lower with federal regulation than it would be without it. [*102]

— Theory —

50 State Fiat Good

Uniform 50 State fiat is good--

1. Its predictable – The states CP is an important test of the desirability and necessity of federal action

2. Key to negative ground – states act as a limit on the topic-small affs with no real fed key warrant won't be run by the aff- that creates a functional limit on the topic and focuses the debate on the best affs- we can debate the core of emissions policy

3. No abuse – the CP fiats all 50 states as one unitary actor – comparison of one actor versus another as opposed to one actor versus multiple actors – and this is equally true because use of the USFG also fiats multiple actors across multiple branches of the government

4. Uniformity is predictable on this topic

Barkow 2011 – Professor of Law and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law

(Rachel E. Barkow "Federalism And Criminal Law: What The Feds Can Learn From The States" vol. 109 no. 4 Michigan Law Review pp. 519-580 2011) IB

Criminal law enforcement in the United States is multijurisdictional. Local, state, and federal prosecutors all possess the power to bring criminal charges. An enduring question of criminal law is how authority should be allocated among these levels of government. In trying to gain traction on the question of when crime should be handled at the federal level and when it should be left to local authorities, courts and scholars have taken a range of approaches. Oddly, one place that commentators have not looked for guidance on how to handle the issue of law enforcement allocation is within the states themselves. States have the option of vesting authority in a state-level actor-typically, the attorney general-or in local district or county attorneys. This choice, like the choice between federal and state authority, also requires a balancing of the advantages of centralization against the loss of local values. How states choose to strike that balance is therefore informative for the question of local versus federal authority in that states are weighing the same issues. This Article accordingly looks to the states for guidance on when criminal enforcement responsibility should rest with local authorities and when it should reside with a more centralized actor (be it one at the state or federal level). A comprehensive empirical survey of criminal law enforcement responsibility in the states including a review of state codes and caselaw and interviews with state prosecutors-reveals remarkable similarity among the states about the degree of local control that is desirable**. The states are virtually unanimous** in their deference to local prosecutors, the relatively small number of categories they identify for centralized authority in a state-level actor and their support of local prosecution efforts with resources instead of direct intervention or case appropriation. **The state experience** thus **provides an alternative model of central-local cooperation to the one used at the federal level.** The Article explains that a main source of the difference in approach is sentencing policy. In the states, questions of procedure and sentencing are irrelevant to the allocation of power because they are the same at both levels of government**. States** thus **serve as laboratories where sentencing differences and variation in procedural rules are taken out of the equation** and the focus is on institutional competence. In contrast, the federal government typically decides whether to vest authority in federal prosecutors based on whether or not it agrees with local sentencing judgments. Because sentencing proves to be so central to federal prosecutions of local crime, the Article concludes by urging those interested in federalism to pay greater attention to the role of sentencing as a driver of the federal government's decision to get involved with questions of local crime.

Theory—AT States CP Not Real World

State action is predictable in the literature – its at the core of debates about criminal justice

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(Rachel E. Barkow "Federalism And Criminal Law: What The Feds Can Learn From The States" vol. 109 no. 4 Michigan Law Review pp. 519-580 2011) IB

The expansion of federal criminal law and the Rehnquist Court's attempts to police it have spawned an avalanche of scholarship. Much of the commentary on federalism is general in nature, without any particular emphasis on criminal enforcement in particular. Although the costs and benefits of federal versus local control are, of course, relevant to the more specific question of whether responsibility for criminal law should be federalized, the most relevant and informative scholarship for those interested in identifying the proper scope of federal involvement in criminal law enforcement tends to tackle that question head-on. To the extent arguments from the larger literature are relevant, the specific pieces on criminal law typically incorporate them and discuss their particular relevance or irrelevance to crime. And **there has been no shortage** of commentators interested in the specific question of when the federal government should play a role in criminal law enforcement and when it should leave matters to local control. One school of analysis approaches these questions as the Supreme Court has and is largely interested in what the Constitution has to say about the relationship among the different institutions. These scholars take what is essentially a doctrinal approach to the federalism question, analyzing it much the same way a court would. This line of scholarship therefore looks at constitutional text, history, and theory to address the question of which criminal powers are within federal authority and which fall outside it. Another group of scholars focuses not on the constitutional question of where power can or must reside, but on the normative question of where power should reside. A subset of this group tends to focus on arguments grounded in "the political economy of the different governmental institutions" that make up the criminal justice system. These scholars, for example, analyze the incentives of officials at the different levels of government given voter and interest-group demands." They also consider whether a "race to the top" or a "race to the bottom" might suggest the wisdom of greater or lesser federal involvement in criminal enforcement.60 Efforts in this vein also include scholarship that addresses the political and institutional failings of federal law enforcement that may put it at a disadvantage 61 compared to local actors. Still another major approach to the normative question of federalism in criminal law focuses on procedural differences between federal and state systems to decide where best to allocate power.62 Some advocates of federal law enforcement point to what they see as procedural advantages in federal court. These include fewer restrictions on the government's use of informants,56 easier access to wiretaps and warrants,4 less generous discovery rights for defendants, 6 and broader grand jury powers." The federal jury pool may also differ from the relevant state jury pool,67 so it is possible that prosecutors might see an advantage in drawing from the federal pool over a more localized state jury pool. The federal government's superior witness protection program has also been cited as a plus." Opponents of increased federal involvement in matters traditionally left to local prosecutors often look to judicial resources, typically observing that the size and structure of the federal judiciary is not suited for taking on a larger share of criminal matters . Given the richness of the debate and the sheer quantity of articles addressing the question, it is perhaps hard to believe that anything more can be added to the vast literature on federalism and crime. But there is an important omission from the current analysis. To the extent scholars are seeking to answer the normative question of when power over criminal enforcement should be centralized or left with local authorities, they have overlooked a valuable source of information. As the next Section explains, the states have been wrestling with that same basic question since their inception, and their experience offers insights into the larger federalism debate.

*** Affirmative Answers ***

— Federal Action is Key —

2AC—Fed Key—Prosecutorial Discretion

The counterplan cant solve – federal prosecutors would see state prosecutions as too lenient and intervene by making the cases federal

Barkow 2011 – Professor of Law and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law

(Rachel E. Barkow "Federalism And Criminal Law: What The Feds Can Learn From The States" vol. 109 no. 4 Michigan Law Review pp. 519-580 2011) IB

Sentencing policy differences are often at the root of the differing approaches of the states and the federal government in addressing the central-local balance. As noted above, local and state prosecutors apply the same state laws, so there is no set sentencing differential when one or the other brings the case. In contrast, federal law typically establishes higher sentences than state law for the same conduct,2 92 so one of the chief motivators for federal involvement is a different view of what sentence is appropriate. Congress is often quite explicit about this. For example, when it passed the Violence Against Women Act that provided a civil remedy for gender-motivated crimes of violence that were already covered by state law, it explained that a reason for the intervention was "unacceptably lenient punishments" for those convicted in state courts.293 It is not just Congress that is making decisions with a focus on sentencing. That same factor is also the most persuasive explanation for why federal prosecutors are more likely to use their discretionary power than statewide prosecutors are in those states where state prosecutors can intervene at their discretion. When federal prosecutors choose to exercise their discretion to 294 bring a prosecution instead of leaving the matter to localities, they are making a decision to charge a defendant under a federal law that typically imposes a more severe sentence, 295 through either a mandatory minimum or the application of guidelines that have high rates of compliance among federal judges.296 For example, former Attorney General Alberto Gonzales touted the use of the federal RICO law to target gangs because it "is an innovative approach to fighting criminals with tough penalties that may be unavailable in the state system."97 Similarly, when former Attorney General William Barr announced support for Project Triggerlock, a program that uses federal firearms laws to prosecute "the most dangerous violent criminals in each community," he noted that "[v]iolent criminals typically prosecuted in State court will be prosecuted Federally to take advantage of stiff mandatory sentences without the possibility of parole." 298 Indeed, the motto for Project Triggerlock was "[a] gun plus a crime equals hard Federal time."m9 The U.S. attorney's office in Richmond adopted a similar program, Project Exile, because it made use of stiffer federal sentences and the federal prison system, which was likely to mean the offender served his or her time far from home.3 0 Thus, in the 1990s, **the federal government made an "institutionalized commitment ... to take cases that would have otherwise been pursued locally" precisely because federal sentences were more severe. The United States Attorneys' Manual makes this explicit.** In advising federal prosecutors whether or not to decline to prosecute because a matter could be brought in another jurisdiction, the manual tells federal prosecutors to consider "[t]he other jurisdiction[']s ability and willingness to prosecute effectively" and "[t]he probable sentence or other consequences if the person is convicted in the other jurisdiction.,32 The manual reflects the Department's view that the two are inextricably linked by explaining that "[t]he ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. 303 Thus, the Department's own express policies reflect that increased federal involvement in local matters is often based on the fact that federal prosecutors disagree with state judgments about the appropriate sentence for criminal conduct and what makes an "effective" prosecution.so To the extent federal procedural advantages are cited as justifying federal involvement in local crime, those procedural advantages are often dependent upon the ability of federal prosecutors to credibly threaten defendants with longer sentences to gain cooperation. For example, when John Jeffries and Judge John Gleeson argue that federal prosecutors do a better job bringing organized crime cases than state and local prosecutors, they argue it is because of various aspects of federal law. Although their list of federal procedural advantages includes the ability to use uncorroborated accomplice testimony and hearsay evidence before the federal grand jury, the real driving force aiding

federal prosecutors is federal sentencing law. Jeffries and Gleeson themselves admit as much, noting that "much of the credit for [federal prosecutors and investigators'] success [against organized crime] goes to the effect of the Sentencing Guidelines." 30 ' After all, it is the operation of the guidelines that gets accomplices to testify in the first place, whether before a grand jury or at trial. **Without that threat, the other differences would not matter** nearly as much, if **at all**. Sentencing therefore drives much of the federal push for involvement, whether by legislators or prosecutors.

1AR—Fed Key—Prosecutorial Discretion

Even if its legal at the state level, local law enforcement will threaten federal charges to coerce plea agreements – nullifies the benefits of the aff

Divine 2020 - Yale Law School, J.D.

(Joshua M Divine 2020 "Statutory Federalism And Criminal Law" Virginia Law Review, Vol 106, pp 127-196) IB

The gatekeeping role local officials play also gives both police and prosecutors much more leverage over defendants. This power enables them to use threats of federal prosecution as leverage in plea negotiations. Although local prosecutors do not have as much gatekeeping influence as police because they are second in line as gatekeepers, they too possess power to convey cases to federal prosecutors. One study found that prosecutors who threaten defendants with possible federal prosecution extract plea agreements where defendants face sentences "higher than the standard state plea for similar crimes."264 The gatekeeping function also enables police in some locations to make arrests **even when they lack probable cause** to believe a defendant committed a crime under state law. Although courts are split on the issue, some courts allow state officials to arrest individuals for violating federal law **even when the underlying conduct is legal under state law**.265 This gatekeeping role thus gives local law enforcement greater arrest powers than they otherwise would have.

1AR—Fed Key—AT: Oversight Checks Discretion

No checks on prosecutorial discretion – no oversight for how they determine whether to prosecute at the federal level

Divine 2020 - Yale Law School, J.D.

(Joshua M Divine 2020 "Statutory Federalism And Criminal Law" Virginia Law Review, Vol 106, pp 127-196) IB

This enhancement of enforcement power creates problems not only because it increases the opportunities for misuse of enforcement discretion, but also because it increases those opportunities where oversight already is thin. **The judiciary is nearly powerless to review enforcement discretion**. Courts have repeatedly declared, for example, that the decision to prosecute a defendant in federal court instead of state court is not actionable.275 **That is true even when prosecutors admit that they shifted the defendant to federal court to obtain a higher sentence**.276 Plaintiffs can successfully challenge enforcement discretion only by proving that officials acted because of the defendant's race or other similarly protected characteristics.277 As one court put it, local police and prosecutors have substantial discretion, yet "there exists no means [for the judiciary] to ensure that this substantial discretion is constitutionally exercised."278 What remains is political accountability, but that too does not suffice. Even where law enforcement authorities (such as sheriffs) or prosecutors are elected, they are unlikely to bear political accountability for how they exercise their gatekeeping role because that role is of "low-visibility."279 Indeed, the methods by which officials sort cases between federal and state prosecutors is "well hidden to most criminal practitioners,"280 who are much more likely to have better information about these issues. To the extent a need already existed for greater oversight of enforcement discretion, that need has only increased because the gatekeeping role has greatly expanded the power of local officials, enabling them to evade constraints imposed by state law and giving them greater leverage over defendants. This enhanced power makes external oversight even more necessary. Yet, if anything, the gatekeeping role of local officials has reduced external oversight. Congress exercises some oversight of federal enforcers through appropriations, oversight hearings, and managing the structure of federal bureaucracies.281 **But Congress's power to exercise oversight of local enforcers is far less**. Congress might be able to strip away grants from local agencies, but it cannot do much else. The gatekeeping relationship thus lets federal officials receive information or resources through a source not managed or overseen much by Congress.

The power local prosecutors hold as gatekeepers also has diminished what Blackstone called the "grand bulwark" of accountability: the jury.282 The jury, by design, is the "check or control" against "dangerous and destructive" use of the prosecutorial power.283 Indeed, the Rehnquist Court's revitalization of the jury role has substantially affected plea bargaining by shifting some power back to juries who, under modern sentencing doctrine, must find all facts necessary to make a defendant eligible for enhanced sentences.284 This accountability check is traditionally considered strongest when the jury pool draws from the accused's peers.285 Local juries might convict less often when they live in communities that have experienced overincarceration or police abuse.286 But shifting cases to federal courts allows local prosecutors to diminish this check because federal courts draw from larger, less representative jury pools. For example, in the late 1990s, the jury pool for Richmond, Virginia, was 75% black, but the jury pool for the division

of the Eastern District of Virginia that contained Richmond was just 10% black.287 When a jury is not representative of the community, it no longer reflects "the values and insights of the communities in which such policing is taking place."288 This problem is inherent in federal criminal law to the extent federal juries come from a broader jury pool, but the problem is made worse because the gatekeeping function enables local officials to venue shop. Local officials can shunt cases to federal courts if they expect they will draw a more favorable jury. The gatekeeping function thus decreases the already limited accountability of local police and local prosecutors, even as it enhances the power of both.

2AC—Fed Key—Local Enforcement

Local law enforcement will circumvent – they will just push cases to the federal level to avoid the counterplan

Divine 2020 - Yale Law School, J.D.

(Joshua M Divine 2020 "Statutory Federalism And Criminal Law" Virginia Law Review, Vol 106, pp 127-196) IB

The gatekeeping role local officials play **enables them to circumvent constraints imposed by state law**. Nowhere is this clearer than with sentencing law. The stark differences between state and federal incarceration periods, plus the gatekeeping role local officials play, give local officials tremendous power to create significant sentencing disparities among similarly situated offenders. (Again, some officials may not use this power, but they nonetheless possess it.) Because of Congress's decision to drastically expand the scope of federal criminal law jurisdiction, **nearly all conduct that would violate state criminal law also can be prosecuted federally**.234 Yet almost **across the board, Congress has authorized**—and even mandated—**far harsher sentences** than have state legislatures. Some federal sentences are ten or twenty times as harsh as state sentences.235 In one case, the U.S. Sentencing Guidelines required a sentence of 188 to 235 months for distributing controlled substances while state sentencing guidelines prescribed a sentence of just 18 to 20 months.236 In another, a drug offender faced a four-year sentence in state court but life without parole in federal court.237 Not only are sentences higher, but federal offenders typically serve larger proportions of their sentences. Federal offenders who display "exemplary compliance" with disciplinary directives can receive credit for 419 days for every 365 served.238 So a federal offender with a good disciplinary record can obtain release after serving about 87% of his sentence. But sentence proportions are very different in the states. In Missouri, certain felony offenders need only serve 15% of their sentences before becoming eligible for parole.239 Even for repeat offenders, Missouri sometimes requires only that offenders serve 40% of their sentences.240 Because incarceration periods are much longer under federal law, the choice whether to prosecute a defendant in state court or federal court —for the same conduct—is more consequential to the defendant than any other decision. As one scholar has noted, the disparity in how much time persons spend incarcerated if convicted federally instead of under state law creates "a kind of cruel lottery."241 Exploiting this disparity, **officials routinely shift defendants to federal court simply to obtain higher sentences**,242 **and they openly admit doing so**.243 When he was Attorney General, Jeff Sessions asked local officials to "steer more gun-crime cases to federal court, where offenders face an average of six years in prison, compared with the lighter punishments that can result from state convictions."244 **Shifting defendants for these reasons is official Department of Justice policy.** Since at least 1988, the DOJ manual has directed officials to weigh "[t]he probable sentence or other consequences if the person is convicted in the other jurisdiction."245 The manual states that sentencing disparity is one of the most important factors for prosecutors to consider. It stresses that "[t]he ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted."246 As one scholar put it, this "language appears virtually to instruct federal prosecutors to go after particular defendants on the basis that a harsher sentence can be obtained under federal law."247 Local officials have the power to create sentencing disparity between similarly situated offenders by choosing to convey information about some defendants to federal officials. Federal officials have a much higher rate of convictions and guilty pleas248 in part because they can choose to "charge only rock-solid cases."249 Local officials cannot force federal officials to take cases, but they can increase the likelihood that federal officials will take a case by making an arrest, pouring more investigation resources into a case, and conveying all that information to federal officials. **This ability greatly enhances the enforcement discretion of local officials**—discretion that receives little oversight under current procedures. Consider the case of Mark Palmer and Jack Roberts, two joint partners of a marijuana-growing venture. Despite their equal involvement in the unlawful scheme, their sentences could not have been more different. Local officials chose to charge Roberts locally under state law. He received a fine of just $1,000, reduced to $176 because of financial insecurity.250 Palmer was far less fortunate. In a move the Ninth Circuit declared "troubling" but legal, local officials sent his case file to federal officials. Palmer received a mandatory minimum sentence of ten years.251 Local officials were the gatekeepers for Palmer's conviction. The DEA learned about Palmer only because local enforcement officials informed the agency of their investigation into Palmer.252 Their decision to shift information about Palmer's case created stark disparity between Palmer's and Roberts's sentences. **The ability of local officials to circumvent constraints imposed by state law extends much further than evading state**

sentencing constraints. Defendants in state court often possess greater procedural and substantive rights than defendants in federal courts because most (although not all) procedural protections under federal law are constitutional and apply both to states and the federal government. So to the extent states have different procedural requirements, those provisions tend to give defendants greater protection. For example, the Fourth Amendment does not recognize a right against the government searching trash left at the curb,253 but materially identical provisions in some state constitutions do.254 The gatekeeping role local officials play allows them to evade these protections. A New Jersey investigator, for example, can search a person's trash in violation of the New Jersey Constitution without having to worry that a judge will suppress the evidence so long as prosecution occurs in federal court.255 Likewise, under federal law, obtaining bail or pretrial discovery is harder,256 asset forfeiture is harsher,257 and statutes of limitations are longer,258 so local officials can evade defendant-friendly state policies **in all these areas** by shunting cases to federal prosecutors. In the light of the greater protections generally afforded under state law, it should not be surprising that the rate of conviction is far higher in federal courts.259 **Evading state constraints is easier than ever before**. The status of local police as gatekeepers of federal information gives them new bargaining power over prosecutors. Police "used to be wholly dependant [sic]" on local prosecutors.260 But **federal dependence on local police has given those police "bargaining leverage over local prosecutors."**261 As one police captain reported, "it's like buying a car: we're going to the place [federal or state] we feel we can get the best deal."262 Police in New York City have used their informational monopoly to skirt local prosecutors in favor of federal prosecutors because they disagreed with the decision by local prosecutors to put first-time firearm offenders through diversion programs instead of into prison.263

1AR—Fed Key—Local Enforcement—Circumvention

Local law enforcement will circumvent the counterplan

Divine 2020 - Yale Law School, J.D.

(Joshua M Divine 2020 "Statutory Federalism And Criminal Law" Virginia Law Review, Vol 106, pp 127-196) IB

Second, dynamic incorporation can strengthen separation of powers by providing state legislatures with greater opportunities to exercise oversight for enforcement discretion. Few realize that local police heavily influence federal prosecutions and thus **can evade state law**. Local police often are the information gatekeepers both for local and federal prosecutors. So local police often can avoid more defendant-friendly state sentencing laws, substantive laws, or procedures simply by shifting defendants to federal court. This forum shopping might be beneficial in some contexts. But the problem is that it is exercised with little or no external accountability.

1AR—Fed Key—Local Enforcement

Compliance by local officers is key – they can push the cases federal or divulge information to federal enforcement to circumvent the counterplan

Divine 2020 - Yale Law School, J.D.

(Joshua M Divine 2020 "Statutory Federalism And Criminal Law" Virginia Law Review, Vol 106, pp 127-196) IB

The reliance the federal government places on local officials to obtain information enhances the power both of federal and local enforcement officials. For federal officials, the enhancement is obvious: their relationship with local officials gives them information they could not otherwise acquire given their limited resources. This reliance also enhances the power of local officials because their gatekeeping role enables them to exercise substantial influence over when, where, and if federal criminal law will apply. As sanctuary cities can do in the immigration context, local officials can impede federal enforcement by declining to share information. They also can enable federal enforcement by sharing information. And they can funnel federal enforcement by strategically choosing to convey certain information or pursue certain paths of investigation. Local officials may choose not to exercise this power, and lots of ink could be spent discussing whether officials should or should not exercise this power, but evaluating the state of criminal law requires understanding precisely the power local officials have**. This power gives local officials the ability to evade state law and obtain enhanced leverage over defendants**.

Fed Key—AT Follow On

No follow-on, even if pressured

Mikos 15 - Professor of Law and Director of the Program in Law and Government, Vanderbilt University Law School (Robert, "ARTICLE: INDEMNIFICATION AS AN ALTERNATIVE TO NULLIFICATION," *76 Mont. L. Rev. 57*)//BB

The federalization of criminal law arguably poses a threat to the states' traditional police powers. 1 Congress has created thousands of distinct federal crimes, 2 and the "amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades." 3 Though not all of these federal criminal statutes necessarily upset the careful regulatory choices the states have made, many of them likely do. For example, Congress has criminalized activities the states now permit; it has denied federal criminal defendants many of the special procedural rights they would enjoy if prosecuted in state criminal justice systems; and it has imposed punishments on convicted offenders that [*58] vary both in degree and kind from the punishments imposed by state law for comparable offenses. 4 In many instances, Congress's decision to supplant the policy choices made by the states seems unjustified by any legitimate federal interest. 5 The conventional wisdom suggests there is very little the states themselves can do to stop the federalization of criminal law and the resultant diminution of state prerogatives. The states, of course, have no authority to nullify federal law, nor can they interfere with the enforcement of federal law. At most, the states can petition the federal courts, Congress, and the President to respect state authority, but it **seems unlikely they will find a receptive audience in any of the three branches of the national government**. The federal courts have done little to stem the tide of federalization; Congress lacks the incentive to abstain from criminal legislation and has repeatedly passed over proposals to comprehensively reform federal criminal law; and while the President has discouraged enforcement of certain federal criminal statutes, the President's willingness and ability to do so are limited in important respects. 6

Fed Key—AT Nullification

States cannot impede the enforcement of federal law

Levy 2013 – chairman of the board at the Cato Institute

(Robert Levy, CATO Institute "Yes, States Can Nullify Some Federal Laws, Not All" March 18 2013 https://www.cato.org/publications/commentary/yes-states-can-nullify-some-federal-laws-not-all) IB

Rumblings from ardent states' rights advocates grow louder in the wake of perceived federal overreach in such areas as health care, immigration reform, marijuana regulation and gun control. Indeed, on March 13 the Oklahoma House voted overwhelmingly to invalidate President Barack Obama's signature legislation, the Affordable Care Act. That process is known as nullification. But is it constitutional? In a nutshell: (1) State officials need not enforce federal laws that the state has determined to be unconstitutional; nor may Congress mandate that states enact specific laws. **But** (2), **states may not block federal authorities who attempt to enforce a federal law unless a court has held that the law is unconstitutional. And** (3), **individuals are not exempt from prosecution by the federal government just because the state where they reside has legalized an activity or pronounced that a federal law is unconstitutional**; if convicted, individuals can attempt to vindicate their constitutional rights in court. Let's examine each of those questions: First, are states required to enforce federal laws and enact regulatory programs that Congress mandates? The answer on both counts is "No." In the 1997 case, Printz v. United States, the Supreme Court ruled that the federal government could not command state law enforcement authorities to conduct background checks on prospective handgun purchasers. In the 1992 case, New York v. United States, the Court ruled that Congress couldn't require states to enact specified waste disposal regulations.

Even the most historical examples of nullification are temporary – they will get overturned by the courts

Graham 2015 – staff writer at the Atlantic

(David A Graham "Can States Ignore the Supreme Court on Gay Marriage?" https://www.theatlantic.com/politics/archive/2015/07/nullification-again/397373/) IB

The Supreme Court's decision last week did make gay marriage legal around the nation. Unfortunately for social conservatives, it did not, however, make nullification legal around the nation. Nullification is the historical idea that states can ignore federal laws, or pass laws that supersede them. This concept has a long but not especially honorable pedigree in U.S. history. Its origins date back to antebellum America, where Southern states tried to nullify tariffs and Northern states tried to nullify fugitive-slave laws. In the 1950s, after Brown v. Board of Education, some Southern states tried to pass laws to avoid integrating schools. It didn't work, because nullification is not constitutional. Yet futile hope springs eternal. Since the ruling [making gay marriage constitutional], a handful of officials have suggested that states need not issue licenses for same-sex marriages. The two most notable voices are two Republican candidates for president, Mike Huckabee and Ted Cruz. Here's Cruz, speaking to NPR: They cannot ignore a direct judicial order. The parties to a case cannot ignore a direct judicial order. But it does not mean that those who are not parties to case are bound by a judicial order .... The entire premise of the decision on marriage was that in 1868, when the people of the United

States ratified the 14th Amendment, that we were somehow silently and unawares striking down every marriage law across the country. That's a preposterous notion. That is not law. That is not even dressed up as law. This is a little slippery to interpret—Cruz's words are opaque, so that it's unclear whether he's actually arguing that officials should refuse to issue marriage licenses, or simply making an intellectual argument that they could. (Or perhaps it's a dogwhistle!) Is he right? "It's ridiculous," said David Vladeck, a professor of law at Georgetown. "The Supreme Court says the Fourteenth Amendment requires states to issue licenses …. That is the law of the land. We have something in the Constitution called the Supremacy Clause," which states that the Constitution is the ultimate authority in the U.S. One argument here is that the ruling only applies to the Sixth Circuit, as that's where the case the justices decided originated. That might hold true if it was a statutory, rather than constitutional ruling, Vladeck said—but it wasn't. "Ted Cruz ought to know that. I knew Ted Cruz before he became the new Ted Cruz, and he was an able lawyer," Vladeck said. "My guess is this is just political posturing of the worst kind." Now, a state—say, Texas, where Attorney General Ken Paxton has told clerks they can refuse to issue same-sex marriage licenses—could try its luck: "You don't have to obey a red light," Vladeck cracked. But it's pretty easy to guess what would happen: A plaintiff would bring a civil-rights suit; courts would rule in their favor; and the state would probably have to pay for the plaintiffs' attorneys fees, under a federal law. Mike Huckabee takes a slightly different approach: "I'm not sure that every governor and every attorney general should just say, well, it's the law of the land because there's no enabling legislation." The former Arkansas governor has been trying this line for some time, but it hasn't gotten any more correct since I wrote about it in January. Huckabee is claiming that there needs to be an affirmative law authorizing gay marriage, but that's wrong. The justices ruled only that provisions banning same-sex marriage are illegal, not that all marriage laws have to be rewritten. By analogy, the Supreme Court's decision overturning bans on mixed-race unions in Loving v. Virginia didn't eliminate all marriage laws. Really, **the only way a state or jurisdiction could legally circumvent the Court's ruling would be to stop issuing marriage licenses altogether**. "But that would be self-defeating, particularly among people who view marriage as the foundation of American society," Vladeck noted. There's some precedent for that**,** though it's not pretty. After Brown, some whites pulled their children out of public schools and opened all-white "segregation academies"—effectively reconstituting the public schools as private ones and avoiding integration orders. Virginia tried to close public schools that integrated. When that was ruled unconstitutional, Prince Edward County simply closed down its entire public-school system. Elsewhere in the South, the resistance was less elaborate—governors like Orval Faubus and George Wallace simply tried to block integration, sometimes by literally standing in the doorway. **They were overruled by the federal government**. Unlike in the 1950s and 1960s, it seems unlikely that the government will send in troops to enforce the Court's ruling on marriage. That's because they won't have to, which is a positive sign for the rule of law in the United States. But there may be a period of litigation as marriage-equality opponents exhaust every possible path (and possibly their states' coffers) fighting against the ruling. To see how real the shift is, look to the example of Roy Moore, the chief judge of the Alabama Supreme Court. Moore became famous in an earlier term as chief judge, when he refused to remove a Ten Commandments monument and was removed from the bench. He later returned, and in February instructed Alabama probate clerks not to issue same-sex marriage licenses, despite a federal court striking down Alabama's gay-marriage ban—a bid for state judiciaries to trump the federal one. This week, Moore issued a confusing order, but then clarified to say that he was not instructing probate clerks to disobey the Supreme Court.

— Perm —

2AC—Perm—Coordination Key

Coordination is key – reforms only at the state level are inadequate

Grawert 2020 - senior counsel and John L. Neu Justice Counsel in the Brennan Center's Justice Program.

(Ames Grawert PUBLISHED: January 2, 2020 "How to Fix the Federal Criminal Justice System (in Part)" Brennan Center for Justice https://www.brennancenter.org/our-work/research-reports/how-fix-federal-criminal-justice-system-part)

People often talk about reforming "the criminal justice system." But there is no single such system in the United States. When counting state and local jurisdictions, there are really thousands of "systems," all with their own distinct challenges. Improving them takes work on the local, state, and federal levels. Given that federal prisons hold just over 12 percent of the national prison population, federal justice reform might seem like it should be a low priority. But it still holds more than any single state, **making federal reform a vitally important step on the path to ending mass incarceration**. And mandatory minimum sentences, which are often applied to drug cases, can create uniquely unjust outcomes. To understand how to fix these problems, it's important to know what makes the federal justice system different in the first place. Different cases, different priorities The most common crimes, such as assault and theft, are generally prosecuted by cities, counties, and states. Federal law enforcement handles a narrower set of issues, like crimes that cross state lines or involve federal law. (For how to address the issues facing state criminal justice systems, see this companion expert brief.) It's no surprise, then, that the federal prison population looks different than the states'. Nearly half of all people in federal prison are incarcerated for drug offenses, compared to just 15 percent in state prisons —the product of a Supreme Court case allowing Congress to exercise broad regulatory authority over drugs, and a series of laws where Congress did just that. People convicted of weapons offenses —19 percent of people in federal prison —make up another large part of the federal prison population, as do those held on immigration offenses, comprising 6 percent. Comparatively, more than half of those in state prison are incarcerated for crimes classified as violent, like assault and robbery. The unique role of federal sentencing Perhaps surprisingly, stays in federal prison are generally shorter than those in state prisons: an average of about 4 years in federal prison compared to about six-and-a-half years in state facilities. But some federal offenses carry significant, often inflexible penalties. This is due to the prevalence of "mandatory minimums" in the federal system —laws requiring that upon conviction of a certain offense, the defendant must be sentenced to a minimum term of imprisonment. Mandatory minimum penalties figure especially prominently in drug cases. According to the U.S. Sentencing Commission, an agency with an important but advisory say in how federal crimes are sentenced, around half of all drug offenders in FY 2018 were subject to a mandatory minimum at sentencing. More generally, around a quarter of all federal cases triggered a mandatory minimum that year. These penalties tend to fall hardest on people of color: focusing again on FY 2018, roughly 70 percent of offenders convicted of a crime carrying a mandatory minimum were Black or Latino. To be sure, these mandatory punishments aren't unique to the federal system. New York imposes minimum penalties for many felonies, for example. But given the federal government's outsized role in drug enforcement, federal mandatory minimums have become synonymous with the drug war. Mandatory minimums empower federal prosecution Mandatory minimum penalties also give prosecutors significant power over the sentence a defendant ultimately receives. If a prosecutor charges a defendant with a crime carrying a mandatory minimum, the judge's hands are tied: the court will not be able to impose a sentence below the one required by statute, preventing any judicial consideration of mercy. Knowing this, federal prosecutors can (and do, as NYU Law professor and sentencing expert Rachel Barkow writes) at times leverage the threat of a mandatory minimum to induce plea bargains and cooperation. While it's not unique to the federal system, this is an important dynamic in federal drug enforcement, and helps explain some recent debates around federal criminal justice policy. In May 2017, for example, then-Attorney General Jeff Sessions rescinded Obama-era guidance that instructed federal prosecutors to consider charging some drug offenses in a way that wouldn't trigger a mandatory minimum. Sessions argued that reversing the rule would restore "tools" that prosecutors need to "dismantle drug trafficking enterprises," an oblique reference to using the threat of mandatory minimums to induce cooperation. On the other hand, this change took one path to prosecutorial mercy off the table, meaning people would likely face longer prison sentences. Again, many state prosecutors enjoy comparable discretion. But the length and prevalence of federal mandatory minimums makes the problem

especially stark in the federal system. And, the federal Bureau of Prisons remains the nation's largest incarcerator, magnifying the impact of unfair federal penalties. Different bail and pretrial detention practices In some areas the federal system is ahead of the states. Most jurisdictions use cash bail, where people accused of a crime remain in jail until trial unless they pay a certain amount of money (or have a bail bondsman pay that amount, for a hefty fee). Functionally, this system ties someone's freedom to their ability to pay for it. Originally, that was how the federal system worked too. "All too often we imprison men for weeks, months, and even years," President Lyndon Johnson said, "solely because they cannot afford bail." The Bail Reform Act of 1966 changed that, sweeping the old system aside and making pretrial release the default for most federal crimes. Some Reagan-era changes narrowed that rule. But today, money bail is rarely used in federal courts. If the government can prove someone is dangerous or poses a flight risk, they can be detained pending trial. Otherwise, conditions are set to ensure they return to court. Pretrial supervision may also be ordered, in which case a pretrial service officer may check in on someone accused of a crime, ensure compliance with any release conditions, and remind them of their required court appearances. Federal pretrial release isn't perfect, but it's well ahead of where many of the states are today. It also offers ongoing proof that cash bail isn't necessary to preserve public safety —something state reform advocates can point to in their own work. What reform must accomplish Between the huge number of people locked up in the federal justice system and the unfair sentences some are serving in it, **reforming the federal justice system is an imperative that we simply cannot ignore**. But any proposals must be tailored to the unique role of the federal government in the national criminal justice infrastructure. Last year saw a major reform bill enacted: the First Step Act, which cut some federal drug sentences and sought to improve conditions in federal prison. But the law is what it claims to be: just a first step in a much longer process. Other changes —like modernizing the federal clemency process and diverting people who commit lower-level crimes to alternatives to incarceration —will also be necessary to improve the federal justice system and the lives of the people caught up in it.

— Theory —

States CP Bad – 2AC

States CP is a voting issue –

1: Steals 1AC

a) we can't garner offense because they just replace USFG with states

b) shift debate one speech later which destroys in-depth clash and leads to poor argument development

2: Artificially Contrived-No comparative literature exists for ALL 50 states acting at the exact same time means its unpredictable and not real world. We should strive to maintain debate as real world as possible in order to make debate most valuable.

3: Multiactor fiat bad- no one agent has control over multiple entities and it allows them to shift out of our offense because they can use another actor to take out our turns

4: Counterinterpretation- the neg gets any counterplan with one actor solves their neg flex/education offense

Federalism DA (Neg Position and Aff Answers)

*** Negative Position ***

1NC

1NC—Federalism Net Benefit

Federal decisions on criminal justice would break the presumption against preemption over state police powers – that's key to coronavirus quarantines

Blake and Arianina **20** [David Blake is a partner and chairs the state attorneys general practice at Squire Patton Boggs LLP. Kristina Arianina is a senior associate at the firm. Potential Federal Vs. State Conflicts Due To COVID-19. April 9, 2020. https://www.law360.com/articles/1262048/potential-federal-vs-state-conflicts-due-to-covid-19]

States also have the ability to use their **police powers** to enforce any declarations during emergencies. For example, state **police powers** allow them to put in place isolation and **quarantine laws** to prevent or stop the spread of disease, even over the objections of those affected and despite the inherent loss of liberty by those impacted. Such orders must be temporary and well justified but they are very powerful when used. In accordance with these powers, states' shelter-in-place orders have forced the closure of an untold number of nonessential businesses and restricted the freedom of movement of their citizens except for essential needs such as limited visits to grocery stores or the doctor's office. Over 40 states had some variation of a shelter-in-place order, covering 97% of Americans. It is now a crime to leave your home unless the government has decreed it is OK. The federal government also has surprisingly powerful tools at its disposal during extraordinary health-related emergencies. For example, the basis for the federal government's authority to prescribe a quarantine and other health measures is based on the commerce clause, which gives Congress exclusive authority to regulate interstate and foreign commerce. The Public Health Service Act gives the U.S. Department of Health and Human Services the authority to impose quarantines to prevent the spread of communicable diseases "from foreign countries into the United States and within the United States and its territories/possessions." The authority for carrying out these measures has been delegated to the U.S. Centers for Disease Control and Prevention. Through the CDC, the federal government has the authority to "take measures to prevent the entry and spread of communicable diseases from foreign countries into the United States and between states." However, the HHS and CDC rarely use the quarantine powers and have traditionally deferred to state and local health authorities. So has, so far, the president. The **Federal Government** Is **Not King** On March 16, President Trump published "Coronavirus Guidelines for America—15 days to slow the spread," recommending that Americans "[l]isten to and follow the directions of your state and local authorities." On March 26, when many states had shelter-in-place orders extending into May and June, President Trump sent a letter to governors informing them that his administration was working on the new guidelines that would reopen parts of the stalled U.S. economy as soon as possible. Current federal social distancing guidelines expire April 30. So what would happen if President **Trump** were to relax the federal guidelines yet governors determine stay-at-home orders remain indispensable to manage the health crisis in their states? The preemption doctrine is **legally complex** and normally the supremacy clause of the U.S. Constitution would suggest federal law is "the supreme law of the land." But the application of the following principles to the potential conflict between states and the federal government in the context of COVID-19 pandemic — where the states have adopted stricter measures than the federal government to preserve health and safety — **most likely** would result in **state policies** trumping Trump's efforts to open the country for business before governors agree. First, when a federal statute contains an express preemption clause, as long as the statute is constitutional, it forecloses a potential state argument against preemption.[1] In other words, if a federal statute says it preempts state laws on the same subject, it mostly likely does. The PHS Act, however, does not contain an express preemption clause. In fact, it could be read as prohibiting the abrogation of a state or local quarantine as it states: "Nothing in this section … may be construed as superseding any provision under State law … except to the extent that such a provision conflicts with an exercise of Federal authority under this section." The federal PHS power here would only work to create more restrictive policies, not eviscerate state orders in the name of the economy. The federal wrench, at least in this situation, only ratchets in the wrong direction of where the president seems to want to go. Second, **courts** are likely to **find against** the **federal preemption** of **state** exercise of **police powers** by federal law in the **areas traditionally reserved** for the **states**, such as public health, **safety** and welfare. In these cases, the **presumption against preemption** may apply.[2] **Quarantines** historically fall within the **states' police power**. The U.S. **Supreme Court** recognized this as early as in 1824[3] and again in 1902: "from an early day the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants … is beyond question."[4]

Coronavirus could kill millions

Chappell 20 (Bill, Reporter and Producer for NPR "'We Are At War,' WHO Head Says, Warning Millions Could Die From COVID-19." NPR, 3/26/20, https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822123471/we-are-at-war-who-head-says-warning-millions-could-die-from-covid-19, Accessed 7/5/20, GDI – JMoore)

"We are at war with a virus that threatens to tear us apart," World Health Organization Director-General Tedros Adhanom Ghebreyesus told world leaders Thursday, in a special virtual summit on the COVID-19 pandemic. The deadly coronavirus, Tedros said, "is the defining health crisis of our time." As the WHO head spoke, the number of coronavirus cases worldwide was reaching the 500,000 mark. More than 20,000 people have died, and both Italy and the U.S. are poised to surpass China atop the list of countries with the most coronavirus cases. In the U.S., thousands of National Guard members are bolstering vital support systems, such as helping to distribute supplies at food banks. An increasing share of the world's population is under orders to stay at home; many schools and businesses are being told to shut down. Two weeks after deeming the viral respiratory disease a global pandemic, Tedros told those attending the G20 Extraordinary Leaders' Summit on COVID-19, "The pandemic is accelerating at an exponential rate." He noted that while it took weeks for the first 100,000 cases to accrue, the most recent 100,000 cases were reported over the course of just two days. Millions of people could die if governments don't take aggressive action against the coronavirus, Tedros said. The summit's participants included the world's most powerful leaders, from President Trump to China's President Xi Jinping.

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L—CJR—AT: Criminal Justice = Federal Jurisdiction

States possess primary authority for defining and enforcing criminal law

Barkow 5 [Rachel E. Barkow, Associate Professor, NYU School of Law. FEDERALISM: OUR FEDERAL SYSTEM OF SENTENCING. Stanford Law Review, 2005. www.stanfordlawreview.org/wp-content/uploads/sites/3/2010/04/Barkow_0.pdf]

When it comes to **criminal law** enforcement, as the **Supreme Court** has recognized, "**[s]tates** historically have been **sovereign**."8 This Part discusses the reasons for the states' primary responsibility for crime control. Part I.A begins with the Constitution and its federalism requirements. Part I.B then discusses the functional arguments for keeping most matters of crime control with the states.

A. The Constitution and Federalism

The Framers vested the **federal government** with **few** explicit **criminal enforcement powers**.9 Congress therefore promulgates most federal crimes under its **Commerce Clause** powers.10 In 1995, the Supreme Court made clear in United States v. **Lopez**11 that this authority is **limited** and does **not allow** Congress to take an **expansive view** of federal **criminal** law **enforcement**. The Supreme Court held in Lopez that Congress had exceeded its powers in enacting the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm within 1000 feet of a school. Although the decision was a marked shift from the lax enforcement of the Commerce Clause that prevailed in the almost six decades of Supreme Court jurisprudence prior to Lopez, the decision was grounded in "first principles" of constitutional law: that the "the powers delegated ... to the federal government are few and defined" whereas those vested in the states "are numerous and indefinite."

Whatever the scope of the **Commerce Clause** in **other** substantive **areas**, it is **particularly important** to adhere to a strict dichotomy between federal and state authority when it comes to **criminal law** enforcement. Indeed, this was a critical part of the Court's decision in Lopez. The Court emphasized that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it affects a 'change in the sensitive relation between federal and state criminal jurisdiction.'"13 As the Court made clear, "[u]nder our **federal system**, the '**States** possess **primary authority** for **defining** and **enforcing** the **criminal law**.'"14

L—Policing

National policing regulations undermine federalism and worsen policing quality – the squo is headed in the right direction

Mayer 12 [Matt A. Mayer is a Visiting Fellow at The Heritage Foundation and author of Homeland Security and Federalism: Protecting America from Outside the Beltway. Federalism Allows Law Enforcement to Determine Counterterrorism Policies That Work Best. March 26, 2012. https://www.heritage.org/terrorism/report/federalism-allows-law-enforcement-determine-counterterrorism-policies-work-best]

The **10th Amendment** of the U.S. Constitution simply states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Those 28 words confirm that states possess the ability to tailor policies that best address the issues they confront. Because of the various demographic differences among the states, a **one-size-fits-all policy** may **not work** or may not work most effectively and efficiently in a particular state.

When the **federal government** **nationalizes** an **inherently state** or local **issue**, it **ensures** that whatever policy it produces will **fail** to solve the problems. We know from the welfare reforms in the 1990s that a policy solution in one state may not work well in another state, which demonstrated the importance of states maintaining the flexibility and authority to tackle issues as they see fit. A robust policy competition among the states will enable America to find out what works and what does not. Domestic counterterrorism policy is no different.

Each Community Presents **Unique Challenges** Requiring **Unique Solutions**

America, thankfully, does not have a **national police force**. The Federal Bureau of Investigation (FBI) has authority over federal crimes, including terrorism, and exercises its authority by investigating and arresting suspected terrorists. With only 15,000 agents for the entire United States, the FBI lacks the resources to protect every American city. Because of this inherent limitation, outside of constitutional and legislative protections, America's law enforcement community is **not covered** by a **one-size-fits-all policy** on how best to protect U.S. cities.

State and local law enforcement entities are **not displaced** by **federal authorities** (except in some very narrow areas of national control) and instead retain their **inherent** sovereign **authority** to design counterterrorism programs that are tailored to the needs of each community. These needs are typically defined by **demographics**, **risk assessments**, **community norms**, and other factors **unique** to **each jurisdiction**. The ideal outcome for Americans is one where there is strong cooperation and true partnering between the FBI and other federal law enforcement agencies and state and local law enforcement entities. We are **getting closer** to that **ideal** with **each passing year**.

The NYPD Example

Recently, the New York Police Department (NYPD) received potentially unfair negative media coverage about its counterterrorism policies, specifically its Muslim surveillance program. The focus of criticism involves the NYPD's surveillance of Muslim college students, restaurants, and mosques throughout the northeast United States. The NYPD insists that its policies and practices adhere to the 1985 Handschu v. Special Services Division guidelines, as modified via judicial approval in 2002 after the September 11, 2001, terrorist attacks. Recent events in France may bolster the NYPD's case on the importance of conducting surveillance of individuals based on leads.

In Handschu, the court held that the NYPD's surveillance of political activity had violated the First Amendment's free speech clause. The decision resulted in a set of guidelines that regulated the NYPD's programs covering political activity. To engage in surveillance, the 1985 guidelines required a warrant based on suspicion of criminal activity and prohibited certain activities absent unlawful conduct. In 2002, a federal judge modified the Handschu guidelines to reflect the new realities arising from the terrorist threat.

In response to the criticism, New York City Mayor Michael Bloomberg stated: "They are permitted to travel beyond the borders of NYC to investigate cases. They can look at websites [and] they can watch television to detect unlawful activities or where there might be unlawful activities to get leads. We don't target individuals based on race or religion. We follow leads and we are consistent, I

think, with the guidelines resulting from the Handschu federal court decision." In a speech at Fordham Law School, NYPD Commissioner Ray Kelly indicated that the NYPD surveillance program has helped stop more than a dozen terrorist plots against New York City, despite the fact that "no other police department in the country is bound by these rules, which restrict police powers granted under the Constitution."

Time will tell if the NYPD adhered to the Handschu guidelines. The point here is that a dual sovereignty has provided the NYPD and its leaders with the flexibility and authority to develop policies specific to the enormous challenges faced in New York City, which is America's most at-risk city with the highest population density and countless vulnerabilities. No other American city must confront the terrorist threats that New York City faces.

On the Other Coast

Across the country in Los Angeles, the policies implemented by the NYPD may not work. Los Angeles faces a different set of challenges, so the Los Angeles Police Department (LAPD) may choose to utilize different methods for securing its city.

For example, under the leadership of Deputy Chief Michael Downing, the commanding officer of the Counterterrorism and Special Operations Bureau, the LAPD launched a Liaison Section to serve as the face of the LAPD to the various Muslim communities. Because of the community norms in Los Angeles and the importance the LAPD has placed on developing strong relationships with its Muslim communities, the Liaison Section is specifically walled off from the intelligence and investigation elements at the LAPD.

Officers in the Liaison Section routinely spend time among the Muslim population, including at restaurants, mosques, and even private celebratory events. The relationships developed through this outreach program are genuine and stronger because of the compartmentalization policy. When an event occurs that causes conflict, LAPD Liaison Section officers can serve as honest brokers to reduce or eliminate any tensions.

If an LAPD investigation results in counterterrorism actions within a particular part of the Muslim community, the Liaison Section officers can seriously state they did not have any knowledge of the investigation and did not provide any information to the investigators. Again, this critical fact leads to a far more positive and productive environment in Los Angeles.

These two examples present two different approaches to the same issue. **Without** a **federalist approach**, the **nationalization** of domestic counterterrorism policies by the **FBI** would result—as does every other nationalized program—in a **one-size-fits-all policy** that would be less effective and, therefore, a less secure America.

Forbearance Is Okay

With all of the media and **civil liberties** attention being given to the **NYPD** and its surveillance policy, pressure will build on **Congress** to do something—hold a hearing or **pass a law**. **State** or local oversight **entities**, including the courts, will review what has actually occurred in New York City and either **affirm** the work done **or require changes** to the policy. **Either way**, Congress should exercise **forbearance** and respect the **constitutional right** of those **state** or local **entities** to do their jobs.

Federalism Is Alive and Well

Despite the belief that **state** and local involvement in **law enforcement** is no longer relevant or useful, it is being used **responsibly** across America by state and local entities. These entities must have the **flexibility** and **authority** to design policies based on each entity's particular demographics and needs. These unique approaches will help counterterrorism officials identify best practices and implement better programs. More critically, federalism will keep us safer.

L—Policing

Federal policing reforms undermine federalism

Cole 16 [Jared P. Cole, Legislative Attorney, Congressional Research Service. Federal Power over Local Law Enforcement Reform: Legal Issues. July 7, 2016. https://fas.org/sgp/crs/misc/R44104.pdf]

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

L—Death Penalty

Federal Death Penalty preserves federalism – provides states political cover and allows to be laboratories of criminal justice policy – turns case

Campbell 11 (Michele Martinez Campbell, Associate Professor of Law, Vermont Law School, "FEDERALISM AND CAPITAL PUNISHMENT: NEW ENGLAND STORIES." Vermont Law Review, Vol. 36, Fall 2011, https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/12-Martinez-Campbell-Book-1-Vol.-36.pdf, Accessed 6/9/20, JMoore)

The federal death penalty can play a salutary role in preserving state abolitionism in the face of political pressure and should be viewed as a **help** rather than a hindrance to **robust federalism.** The Petit and Jacques case studies, read together, suggest that state diversity in sentencing policy is more resilient where federal capital charges are available to address those rare murder cases that generate political backlash. **Federal capital punishment**, rather than squelching states' freedom of choice in capital sentencing, can **preserve the ability of the states to function as "laboratories"** 296 **of criminal justice policy.** Polls demonstrate that sentiment in favor of abolishing capital punishment is lukewarm at best. 297 Even in states with no death penalty, abolitionism hangs by a thread and a highprofile, particularly shocking murder can pose a serious threat to a state abolitionist sentencing regime. The availability of the federal death penalty in those cases can blunt public outrage sufficiently to **protect state abolitionism.**

The federal Death Penalty doesn't undermine state sovereignty – policy requires state consultation and the impact on states is minimal

Campbell 11 (Michele Martinez Campbell, Associate Professor of Law, Vermont Law School, "FEDERALISM AND CAPITAL PUNISHMENT: NEW ENGLAND STORIES." Vermont Law Review, Vol. 36, Fall 2011, https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/12-Martinez-Campbell-Book-1-Vol.-36.pdf, Accessed 6/9/20, JMoore)

As described above, since 2001, the DPP has permitted federal prosecutors to consider the lack of a state death penalty in determining whether to prosecute on capital charges in instances where there is concurrent jurisdiction. Scholarly opinion has been uniform in viewing this policy as an attack on state sovereignty—an attempt to prevent states from pursuing their own sentencing policies. But a pragmatic examination of the facts, stripped of any ideological spin, demonstrates that this is simply not true. First, federal policy commands consultation with, rather than defiance of, state authorities. Indeed, though information on negotiations between federal and state prosecutors in these cases is difficult to come by, there are documented instances in which federal authorities have stepped in only at the request of state authorities. 298 Second, the miniscule number of federal capital prosecutions brought in abolitionist states proves the falsity of the idea that the Department of Justice pursues cases in order to undermine state sentencing choices. As one commentator has noted, "If . . . the Department of Justice were using the federal death penalty to impose a death penalty on states that chose not to have a state death penalty, the incidence of capital federal prosecutions in the fifteen states that do not have a state death penalty would be far higher . . . ." 299 In short, a pragmatic look at the numbers suggests that federal prosecutors make charging decisions based on the facts of individual cases rather than in an attempt to undermine state abolitionism.

But rather than focusing on what the Department of Justice intends to accomplish when it brings federal capital charges for crimes committed in abolitionist states, we must assess what it actually accomplishes. The Connecticut and Vermont case studies, read together, suggest that by bringing capital charges in a rare, extreme case, federal prosecutors preserve

the ability of states to decide not to allow the death penalty in a much greater number of other cases. While this assertion cannot be proved with certainty, common sense strongly suggests that it is the case. Thus, the rare federal capital prosecution that answers public calls for justice in the face of a particularly heinous crime should be viewed as preserving state abolitionism rather than destroying it.

--- Internal Links ---

Internal Link—Spillover—General

Federal mandates spillover to crush federalism—The plan enables boarder bullying in other areas.

Somin 5/1/2020

Ilya Somin is Professor of Law at George Mason University. His research focuses on constitutional law, property law, and the study of popular political participation and its implications for constitutional democracy. “Seventh Circuit Rules Against Trump Administration in Major Sanctuary City Decision”, https://reason.com/2020/05/01/seventh-circuit-rules-against-trump-administration-in-major-sanctuary-city-decision/

The decision, written by Judge Ilana Rovner, also emphasizes the broader stakes for constitutional federalism. If the executive can get away with using vaguely worded statutes (in this case, a requirement that grant recipients obey "applicable federal law") to impose its own new conditions on state and local governments, it **would enable the president to bully them on a wide range of issues**:

Interpreting that language as potentially incorporating any federal law would vest the Attorney General with the power to deprive state or local governments of a wide variety of grants, based on those entities' failure to comply with whatever federal law the Attorney General deems critical. Yet there is nothing in those statutes that even hints that Congress intended to make those grants dependent on the Attorney General's whim as to which laws to apply, cabined only by the requirement that the laws apply generally to states or localities.

Yes spillover—grant conditions can coerce states its ***UNIQUELY*** dangerous to fizm

Somin 19

3/7/19, Ilya Somin is a law professor at George Mason University, an adjunct scholar at the Cato Institute,, “Making Federalism Great Again”, https://texaslawreview.org/making-federalism-great-again/

Even congressionally authorized grant conditions can undermine diversity in policy and reduce opportunities for foot voting. But giving the power to set grant conditions to the president **greatly exacerbates the danger**. It is much easier for the Executive to enact coercive grant conditions at odds with the preferences of numerous state and local governments than for Congress to do so. The latter generally has far greater partisan and ideological diversity than the former, and the prevalence of divided government also makes it harder for it to adopt dangerous new grant conditions.

In this way, the potential threat to federalism is heightened by the threat to **s**eparation **o**f **p**owers. By intruding on Congress’s power of the purse, the Administration also makes it easier for the federal government to coerce states and localities.

Internal Link—Spillover—CJR

Criminal law is the greatest issue of federalism – each time congress oversteps, it expands power of the federal government over states

Walsh 11 [Brian W. Walsh, Former Senior Legal Research Fellow, Heritage. Doing Violence to the Law: The Over-Federalization of Crime. June 9, 2011. https://www.heritage.org/crime-and-justice/commentary/doing-violence-the-law-the-over-federalization-crime]

The power to punish **criminally**—including the deprivation of one's personal liberty and even one's life—is the **greatest power** that government regularly exercises with respect to its own citizens. As Professor Herbert Wechsler famously characterized it, **criminal law** "governs the **strongest force** that we permit official agencies to bring to bear on individuals." Perhaps **the central question** that the Framers of the Constitution and the Bill of Rights debated, and to which they gave painstaking consideration, was how best to protect individuals from the **unfettered power** of government. They were well acquainted with abuses of the criminal law and **criminal process** and so endeavored to place in our founding documents significant safeguards against unjust criminal prosecution, conviction, and punishment.

In fact, they understood so well the nature of criminal law and the natural tendency of government to abuse it, that two centuries later, the most important procedural protections against unjust criminal punishment are derived directly or indirectly from the Constitution itself, specifically the Fourth, Fifth, Sixth, and Eighth Amendments.

But despite these protections, the wholesale **expansion** of **federal criminal law**—both as to the number of offenses and the subject matter they cover—is a **major threat** to Americans' **civil liberties**. **Each time** Congress crafts a **criminal law** covering a **new subject matter**, it **effectively expands** the **power** of the **federal government**. And the types of crimes that Congress now often creates—lacking a true actus reus or a meaningful mens rea requirement—can effectively circumvent the Bill of Rights' procedural protections.

Of similar concern, criminal offenses that exceed the limits of Congress's limited, enumerated power are **breaches** of one of the **primary structural limitations** that constitutional **federalism** imposes on the federal government. After countenancing for decades Congress's almost unlimited criminalization of conduct that is inherently local in nature (as long as, that is, the Constitution's Commerce Clause was invoked to justify the assertion of congressional authority) the Supreme Court rediscovered constitutional limits in United States v. Lopez and United States v. Morrison. In both of these cases, the Court explained that such limits on federal commerce power are consistent with and flow from the fact that Congress is a body of limited, enumerated powers.

The federal offense of carjacking is a quintessential example of Congress's overreaching assertions of federal criminal jurisdiction. The federal carjacking offense is currently defined as taking a motor vehicle "from the person or presence of another by force and violence or by intimidation." The federal jurisdictional "hook" for this carjacking offense is that the vehicle must have been "transported, shipped, or received in interstate or foreign commerce," but how many vehicles have not? Actual commissions of carjackings take place almost uniformly within a single locale of a single state, yet federal criminal law now purports to authorize federal prosecutors to be the ones to charge and prosecute local carjackings. Such **breaches** of constitutional **federalism** are **not mere breaches** of technical and **theoretical niceties**, for the power to **criminalize** is the power to **coerce and control**. The purpose of constitutional federalism is akin to the purpose of **limited government itself**: to guard against accumulation of power by a single sovereign—i.e., the federal government—as a "double security . . . on the rights of the people." Thus, if there were no limits on Congress's power to criminalize, there would be **no limits** on the power of the **federal government** to **coerce** and control **Americans**.

Internal Link—Spillover—Police Powers Spillover

Criminal justice authority is the quintessential question of federalism

Barkow 11 [Rachel E. Barkow, Professor of Law and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law. FEDERALISM AND CRIMINAL LAW: WHAT THE FEDS CAN LEARN FROM THE STATES. Michigan Law Review, Volume 109, Issue 4. 2011. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1165&context=mlr]

Criminal law enforcement in the **U**nited **S**tates is multi-jurisdictional. Local, state, and federal prosecutors all possess the power to bring criminal charges. An **enduring question** of criminal law is **how authority should be allocated** among these **levels of government**. The **Supreme Court** has wrestled repeatedly with the issue of how the Constitution allocates criminal power between the **federal** government and the **states**.' The **first** significant **shot fired** in the Rehnquist Court's **federalism revolution** was United States v. Lopez,2 in which the Court held that Congress overreached in passing the Gun-Free School Zones Act because the possession of a gun near a school zone was a matter for localities, not the federal government. Indeed, **jurisdiction over crime**—and the power to strip an individual of liberty—is the **quintessential question** of **federalism** and state power.

--- Impacts ---

2NC—Federalism Key to Stop COVID

only a clearly defined role for state, local, and federal governments can the U.S. address the pandemic

Allen et al 4/28 Danielle Allen, Department of Government and Edmond J. Safra Center for Ethics, Harvard University, Anne-Marie Slaughter, New America, Washington, D.C., Josh Simons, Department of Government, Harvard University, Carmel Shachar, Harvard Law School and Petrie-Flom Center for Law and Bioethics, April 28 2020 "Federalism Is an Asset: How to Activate It to Build a National Pandemic Testing Program" Edmond J. Safra Center for Ethics, Harvard University, https://ethics.harvard.edu/files/center-for-ethics/files/federalismisanasset.pdf

"If you've seen one state public health system, you've seen one state public health system." – Public Health Official in Illinois As of April 7, 95% of Americans, or some 306 million people, were under stay-at-home orders or advisories (Secon and Woodward 2020). While some states have begun to reopen, it continues to be the case that **there is no clear timetable for the progress and conclusion of this collective isolation, and no nationally shared strategy for addressing the pandemic.** The White House routinely redirects responsibility to states and governors—cities cry out for more tests; states ask the federal government for help; the federal government tells states it's their job (see Eilperin et al. 2020); states respond back that they don't have the authority to generate the needed changes in the testing supply chain. In the absence of coordination, states have begun to compete (Whalen et al. 2020) with each other for ventilators, testing supplies (both PCR and serological), and personal protective equipment, driving prices up in a time when we instead need to drive prices down as part of scaling. The broad public perception is that our federal system is failing as responsibility and authority seem not to align, leading to a societal inability to mobilize for an effective response to COVID-19. In fact**, our federal structure—simultaneously centralized and decentralized—is an asset**. But we need to understand that structure in order to mobilize it. Each tier of our system—federal, state and territorial, regional (via interstate compacts), tribal, county, metropolitan, and municipal—has a role to play. The conditions for the success of each tier depend on leaders in the other tiers fulfilling their own responsibilities. Our complex, interdependent system is highly resilient, provided that all tiers fulfill their assigned roles and that we design organizational structures for coordination and cooperation across the tiers. The policy landscape is converging around the view that in order to control COVID-19 while also reopening the economy and keeping it open, we will need to massively scale up our ability to test for presence of the virus, including in contexts of community spread, and trace the contacts of those who are COVID-positive. While policy analysts continue to debate the exact magnitude of testing we need (5 million tests a day vs. 5 million a week), it is highly likely that the country will need to administer millions of COVID-19 PCR diagnostic tests each day.5 That prospect has seemed daunting to some, yet it does not need to be. **If we attend to the distinct role in pandemic response to be played by each tier of our federalized system, we can activate that system as an asset that can simultaneously achieve scale and flexibility—and build resilience for future pandemics and disasters.**

Federalism can effectively address the pandemic – empirically effective for progressive policies, local differences mean public health is best addressed locally

Hecht 4/27 Sean B. Hecht is the Co-Executive Director of the Emmett Institute on Climate Change and the Environment, Evan Frankel Professor of Policy and Practice, and Co-Director of the Frank G. Wells Environmental Law Clinic at UCLA School of Law, April 27 2020, "In Support of

Public Health Federalism" Legal Planet, https://legal-planet.org/2020/04/27/in-support-of-public-health-federalism/

But federalism—the division of authority between state and local governments, on one hand, and the federal government on the other—doesn't have to tilt in one (rightward) political direction**. Some issues are indeed best handled at the local or state level, either for reasons that transcend left-right politics, or because that actually facilitates progressive solutions**. Ceding "federalism" to the right wing ignores the ways in which it's often completely appropriate to address major challenges in ways that differ locally. And where federalism provides a floor, rather than a ceiling, to public health protection (meaning that states have to do at least as much to protect health as federal standards dictate), it is often most effective—and also most congruent with progressive values. This isn't a comment on the constitutional dimensions of federalism. I agree with my colleague Jonathan Zasloff that Congress likely could constitutionally pass, under its power to regulate interstate commerce, a law "ordering a nationwide shelter-in-place order to last 90 days" under appropriate circumstances. I also agree with Jonathan, to a point, when he says Combatting [GOP governors'] localized obtuseness is precisely why the Framers gave Congress regulatory authority. In our justified desire to resist arbitrary authoritarianism from the White House, we must remember that national crises require national solutions. But I have to disagree with Jonathan's argument that Trump's (short-lived) claim that he had the authority to "reopen" businesses and institutions "did not violate federalism in the least." And more importantly, I must disagree with his assertion that "Federalism Is For Suckers." Federalism can be employed to ensure there are national solutions to national crises, while still leaving important authority to local governments—**including the authority to do more than the federal government** (like, for example, the federal government we have right now) would. State and local governments possess, presumptively, broad "police power" authority to protect public health. Despite the modern connotations of the word "police," this power forms the basis for virtually all claims of state and local authority to regulate conduct, from prevention of public nuisance to regulation of noxious land uses to just about everything local and state governments do to protect residents' quality of life. States in most US jurisdictions have delegated much of this authority to local governments, including cities and counties. And it especially encompasses broad powers over public health, traditionally a primarily local function. The leading case in this area, from 1904, is Jacobson v. Massachusetts, in which the U.S. Supreme Court found that Massachusetts's mandatory smallpox vaccination program was a lawful exercise of that authority. The police power is extraordinarily strong, even intruding into areas that might otherwise be considered violations of civil liberties. As Justice Harlan said in Jacobson: [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' The opinion is noteworthy for its broad upholding of state and local government authority to regulate for the common good, (The opinion also opened the door to deference even to odious state policies. Unfortunately, abuses of the Jacobson principle, including the infamous, and now discredited, opinion of Justice Holmes in Buck v. Bell upholding forced sterilization of patients judged to be "feeble minded," were common in the early 20th century. And police power to this day can be applied in ways that disproportionately impact groups lacking political representation.) But back to federalism: Importantly, federal courts have recognized that where otherwise lawful, state and local exercises of local public health police power constitute the law of the land, unless and until Congress specifically legislates to the contrary. This principle has been recognized by the U.S. Supreme Court since at least 1886, when the Court in Morgan's Steamship Co. v. Louisiana Board of Health said: [Q]uarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of congress. The matter is one in which the rules that should govern it may, in many respects, be different in different localities, and for that reason be better understood and more wisely established by the local authorities. It's

clear that state and local governments have broad authority to address COVID-19 or other public health threats in the absence of Congressional action, and similarly that a court, or a President, lacks the ability to override that state and local authority**. So federalism certainly matters, in that important sense**. And this is sensible**: public health—encompassing everything from sanitation to local mosquito control to most transmissible diseases—is best addressed, for the most part, at a local level.** But Jonathan is correct that Congress could, if it wanted to, use its Commerce Clause authority to provide a national solution to virtually any aspect of this national crisis. In fact, there are already existing federal authorities that explicitly coexist alongside state authority, including the power to take actions to protect public health where local authorities aren't doing their job. Pointedly, those authorities—including the Public Health Act and its implementing regulations—are a one-way ratchet: they allow the federal government to override some state actions that aren't protective enough, but not to do what Trump suggests and order actions less protective of public health than what states do. For example, the PHA regulations empower the Director of the Centers for Disease Control and Prevention (CDC) to act in specified ways where "measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession." But notably, Congress has said that the law authorizing those regulations may not "be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section…." Not only does Congress certainly possess the authority to address a national crisis that spans all 50 states and far beyond, it has actually done so in the PHA—at least to the extent that it has authorized certain measures (including quarantine, "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [CDC's] judgment may be necessary" to protect public health). But those authorities are subject to the non-preemption clause above, and also do not authorize the President to order anything to reopen, or any action that harms public health. Congress has employed and recognized federalism here in a particular way: the federal government may act in specified ways where a local or state response has been insufficient. Otherwise, state and local law controls. So, according to Congress, federalism does matter here. As shown above, the Public Health Act doesn't give the President the authority to override health-protective state policies with less-protective federal policies. So I have to conclude Public Health Act authority simply may not be used to override state and local authority to do what Trump has suggested: force the reopening of closed businesses and institutions and relax social distancing. On the other hand, the federal government may also use Public Health Act authority to take "other measures, as in [CDC's] judgment may be necessary"; this might allow the federal government to require more such measures than states and localities already exercise. (It is unclear, though, how or to what extent those measures could be reconciled with the non-preemption clause in the law, if a state were to affirmatively legislate the reopening of its businesses or institutions. It seems unlikely Congress considered this situation when it drafted the Public Health Act.) Local authorities have police powers for a reason. They are typically responsive to political pressure, and have local resources to deploy in response to local needs. They also enable states and counties in California to exercise public health authority, a power that would be disastrous in an administration like the current one if left to the federal government, in the flip-side scenario to Jonathan's (federalization of less-protective policy through laws passed by Congress). Here, federalism can be used effectively and constitutionally to provide assurances of some federal backstop on the level of public health protection, and not just to erode or limit protections. Our federal environmental laws recognize this same principle, for example in enshrining the waiver of preemption for California to regulate mobile sources of air pollution and in federal non-preemption of stricter state regulation (including common law claims) of air and water pollution from factories. While a surprising number of states have even enacted legislation preventing themselves from regulating pollution more strictly than the federal government, this fact together with the actions of states like California just shows the value of a system where a federal backstop exists alongside local authorities. Federalism isn't for suckers. **We shouldn't be skeptical of federalism as a principle, but rather we should employ it in service of governance goals that help our country**. In fact, we already do.

2NC—Federal Response to COVID → Overburdened Healthcare

Increased federal control leads causes massive spikes and overloads the health system

Hodge 20 [James G. Hodge, Jr., Peter Kiewit Foundation Professor of Law and Director of the Center for Public Health Law and Policy at the Sandra Day O'Connor College of Law, Arizona State University. "Federal vs. State Powers in Rush to Reopen Amid Coronavirus Pandemic," Just Security, 4-27-2020, https://www.justsecurity.org/69880/federal-vs-state-powers-in-rush-to-reopen-amid-coronavirus-pandemic/]

The cumulative public health consequences of these "**back to business**" strategies are largely unknown. Many public health **experts and health care workers fear the worst** – namely a **rapid rise** in COVID-19 cases lending to a **second wave** over the summer and into the early fall. **Strains on health care systems may be insurmountable given there is no cure**, treatments are resource intensive (and often futile), access to tests and personal protective equipment (PPE) is highly inadequate, and safe and effective vaccines are still months away.

The Federalism Quandary

Even less defined are the legal ramifications behind the political grandstanding about reopening or maintaining stay home and other mitigation orders. National and state responses to COVID-19 are severely testing constitutional structural principles of federalism at the heart of public health responses.

Following multiple federal missteps early in the pandemic around testing, coordination, and messaging, substantial constitutional challenges have surfaced. On April 13, the president claimed all-**inclusive federal power to require state action**, **specifically to open up the economy** and override New York and other states' mitigation efforts. Two days later he pushed responsibilities back to the states to **follow forthcoming White House reopening guidelines**. When some states balked, Attorney General William Barr **threatened to sue states and localities** whose infection control measures counter federal objectives. After Georgia laid out aggressive reopening measures, Trump criticized a political ally, Kemp, for proceeding too quickly (after initially supporting the governor).

Americans are left wondering, "which level of government is actually in charge here?" In the face of a pandemic like COVID-19, the answer under principles of federalism is increasingly clear: neither. Constitutional federalism is designed to assure political accountability at each level of government not so much through clear demarcations of power, but rather through incentives to engage in collaborative responses.

Impact—COVID

You should prioritize the risk of pandemics over other impacts

Bergmann 2020 – senior fellow at the Center for American Progress. From 2011 to 2017, he served in the U.S. Department of State in a number of different positions, including as a member of the secretary of state's policy planning staff, where he focused on political-military affairs and nonproliferation; special assistant to the undersecretary for arms control and international security;; and senior adviser to the assistant secretary of state for political-military affairs. Bergmann received his master's degree from the London School of Economics in comparative politics and his bachelor's degree from Bates College.

Max Bergmann is a "The US Should Be Leading the Global Response to the Coronavirus Crisis" – Center for American Progress -March 26, 2020 - #E&F - https://www.americanprogress.org/issues/security/news/2020/03/26/482274/us-leading-global-response-coronavirus-crisis/

For decades, the intelligence community, political scientists, futurists, philanthropists, and security analysts across the field have warned that **a pandemic was one of the top threats to global security**. However, America and the world have been too narrowly focused on traditional security threats, and the consequences of that constricted view are playing out now.

During the Cold War, there were massive efforts to plan for the **low-probability**, high-impact threat of nuclear war—everything from scenarios for continuity of government to strategic responses. Today, the world faces a number of possible **high-impact threats**, **from global pandemics** to climate change to food security. **These can be addressed** and mitigated to prevent them from spiraling into unmanageable crises, but that will require a robust global effort. The current crisis should serve as **a wake-up call** for the world to get a better handle on these issues. With the right leadership, **the U**nited **S**tates **can play an indispensable role** in developing the international infrastructure for addressing these emerging challenges, and it should.

Failure to act now could see a spike in preventable deaths

Bendix 20 (Aria, Senior Reporter at Business Insider, covering urban and environmental science. "The US's second peak may be less deadly than the first — but coronavirus fatalities in the next 3 months could still rival US combat deaths during World War I." Business Insider, 7/5/20, https://www.businessinsider.com/us-coronavirus-deaths-could-rise-soon-2020-7, Accessed 7/6/20, GDI – JMoore)

Indeed, projections from the University of Washington's Institute for Health Metrics and Evaluation (IHME) suggest that this new peak is not expected to be as deadly as the one in April.

That's primarily because increased testing means more mild cases are being confirmed, and young people represent a larger share of coronavirus cases than they did at the start of the outbreak. (We know now that COVID-19 is far less fatal in younger people.) In Florida, the median age of coronavirus cases has dropped to 35, compared 65 in March. Cases among people under 40 are also rising in Arizona, California, Minnesota, Ohio, South Carolina, and Texas.

But even if higher case counts don't bring a proportional surge in deaths, there is still reason for alarm. The IHME model projects that the US will see nearly 50,000 new coronavirus deaths from July to October 1. That's close to the number of US combat deaths recorded during World War I.

Put another way, the model expects the US to see 500 or more people die of COVID-19 every day for the next three months, on average. The projection accounts for seasonality, the amount of testing being done, and how often people are interacting with others outside their household.

Currently, more than 128,000 people have been killed by COVID-19 in the US, so the additional projected deaths represent a nearly 40% increase. These deaths are expected to arrive as other countries' daily cases and deaths continue to drop precipitously.

And if that wasn't concerning enough, there's still a strong possibility that coronavirus deaths will rise in the near future.

2NC/1NR—Economy Impact Module

That's key to long term growth – quarantines now allow quick bounce back to a strong economy

Rampell 20 [Catherine Rampell, WaPo columnist and economist. Saving lives in the pandemic will also save the economy in the long run. March 30, 2020. https://www.washingtonpost.com/opinions/saving-lives-in-the-pandemic-will-also-save-the-economy-in-the-long-run/2020/03/30/dffc211c-72c3-11ea-a9bd-9f8b593300d0_story.html]

But if you listen to economists, you'll learn that this is a false choice. **Prematurely reopening** businesses, schools and public gatherings — as Trump has agitated to do — would be **worse** for **long-run** economic **growth** than requiring them to remain closed until the virus is contained.

Last week, Trump and his National Economic Council director, Larry Kudlow, complained that the "cure" to this pandemic — that is, our collective economic coma — might "be worse than the disease." Right-wing news organizations echoed this complaint, sometimes appallingly implying that Grandpa should be sacrificed to juice GDP.

After widespread pushback from public health experts, Trump gave in, and on Sunday extended social distancing guidance through the end of April. Still, he appeared to want credit for making the supposedly bold choice to set aside U.S. economic interests (and by implication, his political interests) to save lives.

In fact, there's near-**unanimity** among **economists** that the **best way** to **limit economic damage** would be to **listen** to the **public health experts**' advice about how to limit infections — including by **continued dramatic** social **distancing** measures.

If the virus is **not contained**, customers will be **afraid to shop**, **travel** and dine out, even **without** mandatory **lockdowns**. Or, as Harvard economics professor Lawrence H. Summers wrote in The Post recently: "It is an elementary confusion to believe that lost growth and lost jobs are primarily a consequence of social distancing measures rather than the pandemic itself."

In other words, the **demand**-side **shock** would **continue**, even without forced business closures. So, too, would the supply-side shock. After all, Americans won't be able to work if they're sick. They definitely won't be able to work if they're dead.

In a recent University of Chicago IGM Economic Experts Panel survey, 80 percent agreed that "**Abandoning** severe **lockdowns** at a time when the likelihood of a resurgence in infections remains high will lead to **greater** total **economic damage** than sustaining the lockdowns to eliminate the resurgence risk." **Not a single economist** surveyed **disagreed** with the statement; remaining respondents instead said they were "uncertain."

A bipartisan group of high-profile economists and former economic policymakers likewise signed onto a recent letter reading in part: "**Saving lives** and saving the economy are not in conflict right now; we will **hasten the return** to **robust economic activity** by taking steps to stem the spread of the virus and save lives."

Theoretical work by Martin Eichenbaum and Sergio Rebelo (of Northwestern University) and Mathias Trabandt (of Freie Universitat Berlin) finds that, in the short term, there does appear to be a trade-off between economic activity and health outcomes. That is, the containment measures required to limit the spread of the coronavirus would result in a sharp initial recession. But over the long run, an optimal containment strategy would reduce economic costs, largely because it preserves the lives of workers needed to keep the economy running.

Their new working paper finds that "cities that intervened earlier and more aggressively" through school closures, bans on public gathering, isolation and quarantine did better economically post-pandemic than cities with a more laissez-faire approach.

Economists, by the way, have also found ways to quantify the value of saved lives above and beyond whatever might be measured by wages or productivity.

A new paper from Michael Greenstone and Vishan Nigam, both of the University of Chicago, estimates that moderate social distancing would save **1.7 million** (!) **lives** in the next six months, an astronomical number largely due to not overwhelming hospital systems. This translates to about **$8 trillion** in **economic benefits** — equivalent to **more than a third of GDP**, and more than the size of the entire annual federal budget — when monetized through a standard measure used by the U.S. government called the value of a statistical life.

US growth solves global recovery and extinction – alternative is power vacuum conflicts

Haass 13 [Richard N. Haass, President of the Council on Foreign Relations; previously served as Director of Policy Planning for the US State Department. "The World Without America." Project Syndicate. https://www.project-syndicate.org/commentary/repairing-the-roots-of-american-power-by-richard-n--haass]

But, like most temptations, the urge to gloat at America's imperfections and struggles ought to be resisted. People around the globe should be careful what they wish for. America's failure to deal with its internal challenges would **come at a steep price**. Indeed, the rest of the world's stake in American success is nearly **as large as that of the US itself**. Part of the reason is economic. The US economy still accounts for about one-quarter of global output. If US growth accelerates, America's **capacity to consume** other countries' goods and services will increase, thereby **boosting growth around the world**. At a time when Europe is drifting and Asia is slowing, only the US (or, more broadly, North America) has the potential to drive **global economic recovery**. The US remains a **unique source of innovation**. Most of the world's citizens communicate with mobile devices based on technology developed in Silicon Valley; likewise, the Internet was made in America. More recently, new technologies developed in the US greatly increase the ability to extract **oil and natural gas** from underground formations. This technology is now making its way around the globe, allowing other societies to increase their **energy production and decrease both their reliance on costly imports and their carbon emissions**. The US is also an invaluable source of ideas. Its world-class universities educate a significant percentage of future world leaders. More fundamentally, the US has long been a leading example of what market economies and democratic politics can accomplish. People and governments around the world are far more likely to become more open if the American model is perceived to be succeeding. Finally, the world faces **many serious challenges**, ranging from the need to halt the **spread of weapons of mass destruction, fight climate change**, and **maintain a functioning world economic order** that promotes trade and investment to regulating practices in **cyberspace, improving global health**, and **preventing armed conflicts**. These problems will not simply go away or sort themselves out. While Adam Smith's "invisible hand" may ensure the success of free markets, it is powerless in the world of geopolitics. Order **requires** the visible hand of **leadership** to **formulate** and **realize** global **responses to global challenges**. Don't get me wrong: None of this is meant to suggest that the US can deal effectively with the world's problems on its own. Unilateralism rarely works. It is not just that the US lacks the means; the very nature of contemporary global problems suggests that only collective responses stand a good chance of succeeding. But **multilateralism** is much easier to advocate than to design and implement. Right now **there is only one candidate for this role: the US**. No other country has the **necessary** combination of **capability** and **outlook**. This brings me back to the argument that **the US must put its house in order** – economically, physically, socially, and politically – if it is to have the resources needed to **promote order** in the world. Everyone should hope that it does: The alternative to a world led by the US is not a world led by China, Europe, Russia, Japan, India, or any other country, but rather **a world that is not led at all**. Such a world would almost certainly be **characterized by chronic crisis and conflict**. That would be bad not just for Americans, but for the vast majority of the planet's inhabitants.

Economic Decline → War

Economic decline causes nuclear war – loose nukes, counterbalancing, and regional instability

Mann 14 – Eric Mann is a special agent with a United States federal agency, with significant domestic and international counterintelligence and counter-terrorism experience. Worked as a special assistant for a U.S. Senator and served as a presidential appointee for the U.S. Congress. He is currently responsible for an internal security and vulnerability assessment program. Bachelors @ University of South Carolina, Graduate degree in Homeland Security @ Georgetown. "AUSTERITY, ECONOMIC DECLINE, AND FINANCIAL WEAPONS OF WAR: A NEW PARADIGM FOR GLOBAL SECURITY," May 2014, https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/37262/MANN-THESIS-2014.pdf

The conclusions reached in this thesis demonstrate how economic considerations within states can figure **prominently into the calculus for future conflicts**. The findings also suggest that security issues with economic or financial underpinnings will transcend classical determinants of war and conflict, and change the manner by which rival states engage in hostile acts toward one another. The research shows that security concerns emanating from economic uncertainty and the inherent vulnerabilities within global financial markets will present new challenges for national security, and provide developing states new asymmetric options for balancing against stronger states.¶ The security areas, identified in the proceeding chapters, are likely to mature into **global security threats** in the immediate future. As the case study on South Korea suggest, the overlapping security issues associated with economic decline and reduced military spending by the United States will **affect allied confidence in America's security guarantees**. The study shows that this outcome could cause **regional instability** or realignments of strategic partnerships in the Asia-pacific region with ramifications for U.S. national security. Rival states and non-state groups may also become **emboldened to challenge America's status** in the unipolar international system.¶ The potential risks associated with **stolen or loose WMD**, resulting from poor security, can also pose a threat to U.S. national security. The case study on Pakistan, Syria and North Korea show how financial constraints affect weapons security making weapons vulnerable to theft, and how financial factors can influence WMD proliferation by contributing to the motivating factors behind a trusted insider's decision to sell weapons technology. The inherent vulnerabilities within the global financial markets will provide terrorists' organizations and other non-state groups, who object to the current international system or distribution of power, with opportunities to disrupt global finance and perhaps weaken America's status.

*** Affirmative Answers ***

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2AC—AT Link—Federal Jurisdiction

There's no debate that the aff area is exclusively federal authority – that doesn't implicate federalism

Barkow 11 [Rachel E. Barkow, Professor of Law and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law. FEDERALISM AND CRIMINAL LAW: WHAT THE FEDS CAN LEARN FROM THE STATES. Michigan Law Review, Volume 109, Issue 4. 2011. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1165&context=mlr]

311. There is also **no serious debate** or **disagreement** with the **federal** government addressing crime that "intrudes upon **federal functions**, harming **entities** or personnel acting in a **federal capacity**, or when it addresses offenses committed on **sites** where the **federal** government has **territorial responsibility**, or when it addresses matters of **international crime**." Task Force, supra note 10, at 47.

2AC—AT Link—Constitutional Rights

Protecting constitutional rights in criminal justice is federal jurisdiction

FCNL 20 [The Friends Committee on National Legislation is a lobbying organization in the public interest founded in 1943 by members of the Religious Society of Friends. FCNL works for social and economic justice, peace, stewardship of the environment, and good government in the United States. State and Federal Responsibilities for Criminal Justice. Last updated 2020. https://www.fcnl.org/updates/state-and-federal-responsibilities-for-criminal-justice-117]

The federal government is also **responsible** for ensuring that **constitutional**ly-guaranteed **rights** of all persons (convicts, defendants, and people on the street, alike) are **not trammeled** by the criminal justice system. For example,

- The **Fourth** Amendment protects against **unreasonable search and seizure**.
- The **Fifth** Amendment protects persons against **double jeopardy** and self-incrimination, and provides for **due process**.
- The **Sixth** Amendment guarantees defendants a **speedy and public trial**, the opportunity to **confront witnesses** for the prosecution and to obtain witnesses for the defense, and to have **counsel**.
- The **Eighth** Amendment protects against **cruel and unusual punishments**.
- The **Fourteenth** Amendment assures **equal protection** of the laws for all in the U.S.

2AC—Death Penalty

Federal capital punishment in non-death states undermines federalism – Supreme Court Interventions stops the feds over-expansion

Mannheimer 17 (Michael J. Zydney Mannheimer, Professor of Law and Associate Dean for Faculty Development of the Salmon P. Chase College of Law at Northern Kentucky University, "The Coming Federalism Battle in the War over the Death Penalty." Arkansas Law Review, Vol. 70, No. 2, https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=1015&context=alr, Accessed 6/8/20, JMoore)

In both the short term and the long term, we can expect more federal capital prosecutions in non-death penalty states. We can also expect more federalism based arguments by federal capital defendants against this application of the death penalty. We have already begun to see these arguments in federal district courts and at some point, federal appeals courts and perhaps the Supreme Court will have to weigh in.

As discussed above, in the long-term, the federal death penalty will likely grow as capital punishment recedes in the states. Short-term prospects for application of the federal death penalty in non-death states appear similar. Recall that Attorneys General in the George W. Bush administration sought the death penalty in non-death states nearly four times as often as those in the Obama administration: thirty-nine versus ten. The very fact that the Justice Department is in Republican hands for at least the next four years indicates that the numbers may again spike very soon.

Moreover, President Trump famously took out full page advertisements in the four major New York newspapers in 1989 calling for New York to bring back the death penalty after five teenagers were accused (and later convicted) of raping and nearly killing a woman in Central Park.171 In October 2016, despite virtually conclusive evidence that the five had been wrongly convicted,172 Trump continued to assert that they were guilty.173 Attorney General Jeff Sessions has pointed to Trump's position in that case as evidence that he "believes in law and order."174 These sentiments perhaps signal that the use of the federal death penalty will increase across the board in the next four years.

Federal capital defendants, however, have begun to raise arguments that the Constitution forbids the imposition of the federal death penalty in non-death penalty states. Sometimes, the argument relies solely or primarily on the notion that such use of federal capital punishment constitutes "cruel and unusual punishment" in violation of the Eighth Amendment.175 Sometimes, the defendant makes a more generalized argument based on the Tenth Amendment or general federalism principles.176 District courts that have addressed these arguments have thus far uniformly rejected them.177

One can certainly understand the hesitancy that district courts have shown in embracing the argument that federalism principles embedded in the Constitution prohibit the federal government from imposing the death penalty in some states but not others. It is, to be sure, a novel argument. But the argument is novel precisely because the practice of seeking the federal death penalty in non-death penalty states is itself novel—at least by reference to the long sweep of American history. One can only hope that, if and when the issue reaches the Supreme Court, the Justices will display the same sort of skepticism over the constitutionality of the practice that they have done in scrutinizing other unprecedented federal schemes.178

For those who would like to see a judicially enforced robust federalism in this area, there is some glimmer of hope. In his lone dissent in Taylor v. United States, Justice Thomas not only lamented the vast expansion of the reach of the Commerce Clause,179 but he also went on to specifically criticize the reflexive application of that jurisprudence beyond the economic and regulatory realm, where it was created, to the criminal sphere. He wrote: "[T]he substantial-effects test gained momentum not in the criminal context, but instead in the context in which courts most defer to the Government: the regulatory arena. Without adequate reflection, the Court later extended this approach to the criminal context."180 Thus, it appears that at least one sitting Justice may be

willing to re-think an expansive view of federal power in the area most traditionally reserved for the states: the definition and punishment of criminal offenses. Given the specific constitutional injunction against "cruel and unusual punishments," a principled line could be drawn at the imposition of a type of punishment foreign to the people of a state.

--- Internal Link ---

2AC—AT Spillover

No spillover or nonunique

Constantine 16 [Molly; 4/21/16; B.A. in Political Science and Government from Boston University, administrative coordinator; Thesis, "The Capitol in the Classroom: Implementing the Common Core in an Era of Coercive Federalism," open.bu.edu/bitstream/handle/2144/16144/Constantine.HonorsThesis.pdf]

The challenges with implementing the federal programs have raised great concerns. Bowling and Pickerill discuss the challenges faced by states as the system of federalism our nation employs becomes less distinct.5 They note that as of 2012, the state of our federalism can no longer be designated as **one specific type**. This can be attributed by, "challenges at the federal level-the **party polarization**, the **budget** deficit, the level of tax increases and **spending cuts** required, and the inability of lawmakers to compromise," which have then trickled down to subnational governments in the process.6 This fragmented federalism is especially prominent in education policy, as Bowling and Pickerill explain. The **overlapping existence** of **N**o **C**hild **L**eft **B**ehind, the No Child Left Behind **waivers**, Race to the Top, and the end of the American Recovery and **Reinvestment** Act of 2009 has led to great confusion. The lack of clarity in policy causes difficulty in determining the authority of the federal government and the states. One result of this **fragmented federalism** is the creation of **state-specific policy**. The inability of the federal government to offer more specific policy causes states to create policy catering to their needs. Recent education policies fall in line with the current period of **coercive federalism**, as federal policies seek to address the disparity in academic achievement amongst students of different socioeconomic backgrounds, formally known as the achievement gap. Traditionally, education has been the responsibility of state governments. However, reforms to the education system over the past two decades have placed **greater authority in** the hands in **the federal government**, largely evident through federal incentives programs and policies aimed to instate nation-wide academic standards.

No spillover

Robinson 15 [Kimberly; 2015; J.D. from Harvard University, B.A. from the University of Virginia, Professor of Law at the University of Richmond School of Law; Washington University Law Review, "Disrupting Education Federalism," Rev. 959]

In offering a theory for how education federalism should be restructured to strengthen the federal role over education, and thus reduce reliance on states to ensure equal access to an excellent education, I build upon Yale Law Professor Heather Gerken's argument that **federalism** theory should **eschew** advancing **a single theory** for all occasions because "[b]oth in theory and practice .. . **there are many federalisms**, not one."39 She astutely contends that scholars developing and critiquing federalism theory should consider the appropriate balance of institutional arrangements for a specific context. 40 Therefore, my theory for how education federalism should be restructured **does not** attempt to **propose** a **federalism** theory for **other policymaking arenas** such as **environmental law** or **healthcare** policy. Instead, it solely proposes a shift in the balance of federal, state, and local authority in order to strengthen the federal role in ensuring equal access to an excellent education while preserving the aspects of state and local autonomy over education that do not undermine equal access to an excellent education.

1AR—AT Spillover

One Federal violation won't spillover – many safeguards check.

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Jenna Bednar, April 17 2020, "Of course Trump's authority isn't 'total.' Here are 3 myths about how federalism works," Washington Post, - 4/17 - https://www.washingtonpost.com/politics/2020/04/17/course-trumps-authority-isnt-total-here-are-3-myths-about-how-federalism-works/

Instead of coordinating a national pandemic response, the federal government has compounded the collective action problem, as shown by Jared Kushner's striking assertion that the national stockpile is "ours" and not a resource for the states. **The founders pointedly included safeguards to prevent national government overreach** or shirking; those include **the judiciary, separation of powers, state representation in federal decisions, intergovernmental councils, the people themselves and states' ability to push back**. Another safeguard emerged later: **the party system**. In a robust federal system, these reinforce one another, a kind of fail-safe system intentionally full of redundancies. The founders worked to design an institutional immune system so that no single person or faction could disrupt the government. They hoped that federalism might sustain democracy. What might threaten this robustness would be what the Federalist Papers called a "lack of diverse interests": If the judiciary, the branches of federal government and the internal workings of political parties were all aligned in their thinking or had a culture of obedience, and if the public were apathetic or ill-informed, then the safeguards may simultaneously fail. Where Trump has faced limits to his attempts to expand powers, he has attempted to skirt them: purging internal oversight by firing inspectors general and on Wednesday, making the extraordinary threat to adjourn Congress so he can make recess appointments. Will the pandemic serve as a catalyst, making it even easier for the president to accumulate power, or awaken the slumbering safeguards? **The governors' decisive responses to the pandemic may suggest that the safeguards can again constrain the federal government.**

--- Impact ---

2AC—No Impact—Over-Federalization

The impacts of over-federalization are a myth – states have found ways to work within federal frameworks to avoid any major complications

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[Susan R., Ingrid, last reviewed 5/17/13, *Emory Law Journal, Volume 62, Forthcoming Sept. 2012, U of Texas Law, Public Law Research Paper No. 223*, "Debunking Claims of Over-Federalization of Criminal Law", page 77-78, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050081, accessed 5/25/2020, GNL]

The widely-reported "problem" of over-federalization of crime is largely a myth. Through the empirical data presented in Part I, including federal caseload data from 1940 to 2010, current federal prison-population data, comparisons of federal and state court felony convictions, and an analysis of frequently used federal statutes, we have provided ample support for our claim that, **despite the large number of federal criminal proscriptions now in existence, the sheer number of criminal statutes in effect at a given time has no demonstrable impact on the balance of power between state and federal law enforcement systems.** In fact, **state and federal law enforcement entities continue to share the workload much as they always have**, with states dominant in areas of traditional local concern, such as violent and property crime, and the federal government tackling problems of national and international significance. The reality on the ground, then, is vastly different from the conclusory argument advanced by some, that is, that Congress' promiscuous habit of enacting too many criminal proscriptions has resulted in a significant disruption of traditional federal-state relations. As the data reveals, no such seismic shift has occurred.

While some critics have expressed dissatisfaction with the prevalence of federal prosecutions in areas of concurrent federal/state jurisdiction, particularly in the controlled substance area, such dissatisfaction is likewise not a function of a recent over-federalization phenomenon. Controlled substance cases on the federal level are prosecuted pursuant to essentially a single statute enacted in 1970. 299 Importantly, these areas of concurrent or overlapping jurisdiction have not been particularly problematic for state systems, which continue to prosecute the vast majority (more than 95%) of criminal conduct occurring within their borders. Because federal criminal proscriptions do not preempt state law, and because the federal system is very small relative to the states' systems, criminal law enforcement in this country remains the province of state and local criminal justice systems. Individuals who engage in misconduct that violates both state and federal laws have no cause to complain upon prosecution, especially because federal prosecutors will not charge them successively if the state chooses to prosecute first, and various checks and balances ensure that federal prosecutors use good judgment in selecting which defendants are appropriate for federal charges.

Finally, overbroad or vague federal criminal proscriptions, while admittedly troubling, are not a product of over-federalization itself. Vague federal statutes, particularly in the area of fraud, derive from the common law and have been in existence for decades (for example, the frequently charged mail fraud statute, the enactment of which dates back to 1876.) While vague statutes have created temporary but serious problems in the federal system, the Supreme Court has managed to interpret such federal proscriptions in a manner that balances the amount of

breadth needed to capture new forms of criminal conduct against the level of narrowing necessary for fairness. The Court has taken a similarly active role in curbing what might otherwise constitute strict liability offenses by imposing extra-textual mens rea requirements, particularly in the area of regulatory offenses. The Court's active involvement in these areas has and continues to serve as a powerful antidote to the perceived ills of Congressional overreaching, poor statutory drafting, and regulatory criminalization.

2AC—AT Federalism Solves Coronavirus

Federalism worsens coronavirus response

Feldman 20 [Noah Feldman is a Bloomberg Opinion columnist and host of the podcast "Deep Background." He is a professor of law at Harvard University and was a clerk to U.S. Supreme Court Justice David Souter. His books include "The Three Lives of James Madison: Genius, Partisan, President." U.S. Federalism Isn't Great at Handling Pandemics. March 19, 2020. https://www.bloomberg.com/opinion/articles/2020-03-19/coronavirus-pandemic-shows-challenges-of-u-s-federalism]

One of the **weirdest things** in this weird historical moment is the **hodgepodge** nature of the coronavirus responses from **different state**, county, and local **governments** throughout the **U**nited **S**tates. In essentially every other country on earth, central government authorities are directing and running the response to Covid-19.

If Italy shuts down, it's the Italian government that decides to do it. If Germany chooses to end hotel stays, it's Chancellor Angela Merkel who makes the call. But in the U.S., separate Bay Area counties can go one way, the mayor of New York another, and the governor of Massachusetts yet a third. There's little if any **national coordination**.

It **hardly** seems like an optimal arrangement during a **global pandemic**.

The explanation for this bizarre diversity of uncoordinated responses can't be laid solely at the feet of President Donald Trump, despite his alarming lack of leadership. The **deeper explanation** is the distinctive, peculiar system of U.S. **federalism**. We have a national **C**enters for **D**isease **C**ontrol and Prevention and a **F**ederal **E**mergency **M**anagement **A**gency. But they **don't exercise** direct **supervisory authority** over state, county or local boards of health — just as Trump has no supervisory authority over state, county or local executives.

Most of the time, the pervasively federal nature of how government power is deployed in the U.S. goes unnoticed, simply because it seems so normal to Americans. We take it for granted that schools, say, don't fall into a national bureaucracy and aren't under a single national set of standards. We accept that police forces are uncoordinated and that they don't work for the Federal Bureau of Investigation.

When we do notice federalism, we tend to **accept its inefficiencies** because of the desirable democratic benefit we think it provides: We get better self-government, we think, when decisions are made nearer to home, not far off in Washington, D.C.

The **unique conditions** of a **pandemic** call that tradeoff of **inefficiency-for-democracy** into **question**. The virus isn't local. It's global. It **doesn't respect state** of national **borders**, no matter that many national governments are trying to close their borders to keep it out.

When it comes to strategies for containment, **non-coordination** seems not **charmingly democratic** but **worrisome**. **If some states** or cities are **too slow** to control the virus, that will **affect all the others** – because the virus will gain steam and eventually spread even to the places that have imposed controls.

Weak pandemic control is the ultimate example of what economists call a negative externality, a spillover effect that harms others, not just those who are acting (or failing to act) themselves.

In a perfect world, the ideal answer to these federalism-based coordination problems would be for the **federal government** to **preempt state actors** and agencies and **command and control** a **national response**. Federal law allows for roughly that approach. Technically, states would have to agree to put their officials under federal direction; states can't be "commandeered" without their consent. But presumably in a time of emergency, most states would fall into line.

That isn't happening. The **federal response** so far has been **haphazard** and **inadequate**. We would be **much better off** with **strong leadership**, informed by public health science and policy, but we don't have that right now.

1AR—AT Federalism Solves Coronavirus

Absolute state control is bad for federalism – prevents effective coronavirus response

Cooper 20 [Ryan Cooper is a national correspondent at TheWeek.com. His work has appeared in the Washington Monthly, The New Republic, and the Washington Post. America's fake federalism. April 19, 2020. https://theweek.com/articles/909388/americas-fake-federalism]

But in fact, the **U.S. version** of **federalism** is largely **disintegrating or fake**. On the one hand, President Trump's abject failure to coordinate a national response to the novel coronavirus pandemic has forced states to **jury-rig** new **federal structures** themselves. On the other, the rump federal government is not actually constructed according to federalist principles — it is a **minoritarian system** which grants **certain states** enormous leverage over **national policy**.

To begin, the Trump administration has refused to set up a rational system to allocate medical supplies like protective gear and ventilators across the country. The Defense Production Act allows the president to nationalize factories during an emergency, or instruct them to produce important materials, which any sane person would have done months ago. Trump still refuses to do this on a systematic basis, so states have been desperately bidding against each other and the federal government and foreign governments for supplies. Indeed, Trump's FEMA has routinely been seizing shipments of protective equipment en route to hospitals or state governments, for unclear reasons or purposes. Meanwhile, even after he stopped relentlessly downplaying the threat of the virus, Trump has continually undermined Democratic governors by blaming them for equipment shortages and testing delays.

Now Trump and the right-wing agitprop machine are beginning to **demand** that the **economy** be **reopened** long before the virus is under control. He recently falsely claimed that he has **"total" power** to decide when states should reopen, and while he characteristically backed off that statement later, on Friday he recklessly **encouraged** the tiny groups of **right-wing nuts** who have been protesting state-level restrictions (after watching Fox News, of course).

All this is why three groups of states have created **ad-hoc coalitions** to manage their fight against the epidemic. At time of writing, California, Oregon, and Washington have created a Western States Pact; Minnesota, Wisconsin, Michigan, Illinois, Ohio, and Kentucky have created another pact in the Midwest; and New York, New Jersey, Connecticut, Massachusetts, Pennsylvania, Rhode Island, and Delaware have created a third in the Northeast. More states are likely to join, or create their own pacts.

The basic point is to rationally deploy medical supplies and hospital capacity, coordinate relief efforts to the hardest-hit communities, and carefully manage the easing of lockdown measures across states to prevent new infection surges from crossing state borders. In other words, they are doing what Trump should have done this entire time — except **incompletely**, and **without** nearly the **resources** available to the **federal government**.

A **federal system** has **some advantages**, but the lesson is that **individual regions** simply **cannot go it alone** when faced with a **nationwide emergency**. There must be an **overarching authority** to **manage** the **overall response** — because if there isn't, states will be forced to create one on the fly. What we're seeing today is precisely why the Articles of Confederation was abandoned as an **unworkable mess**.

2AC—AT Economy Impact

The economy doesn't cause wars

Liao 19 [Jianan Liao, Shenzhen Nanshan Foreign Language School, China. Business Cycle and War: A Literature Review and Evaluation. Advances in Economics, Business and Management Research, volume 68. Copyright 2019]

First, **war can occur** at **any stage** of **expansion**, **crisis**, **recession**, **recovery**, so it is **unrealistic to assume** that **wars occur** at **any particular stage** of the business cycle. On the one hand, **although** the domestic economic problems in the crisis/recession/depression period break out and become prominent in a **short time**, in fact, **such challenge exists** at **all stages** of the business **cycle**. When countries cannot manage to solve these problems through conventional approaches, including fiscal and monetary policies, they may resort to military expansion to achieve their goals, a theory known as Lateral Pressure. [13] Under such circumstances, even countries in the period of economic expansion are facing downward pressure on the economy and may try to solve the problem through expansion. On the other hand, although the resources required for foreign wars are huge for countries in economic depression, the **decision to wage wars depends** largely on the **consideration** of the **gain and loss of wars**. Even during depression, governments can raise funding for war by issuing bonds. Argentina, for example, was mired in economic stagflation before the war on the Malvinas islands (also known as the Falkland islands in the UK). In fact, many governments would dramatically increase their expenditure to stimulate the economy during the recession, and economically war is the same as these policies, so the claim that a depressed economy cannot support a war is unfounded. In addition, during the crisis period of the business cycle, which is the early stage of the economic downturn, despite the economic crisis and potential depression, the country still retains the ability to start wars based on its economic and military power. Based on the above understanding, war has the conditions and reasons for its outbreak in all stages of the business cycle.

Second, the economic origin for the outbreak of war is **downward pressure** on the economy rather than optimism or competition for monopoly capital, which **may exist during** economic recession or economic **prosperity**. This is due to a fact that **during** economic **prosperity**, people are also **worried** about a **potential** economic **recession**. Blainey pointed out that wars often occur in the economic upturn, which is caused by the optimism in people's mind [14], that is, the confidence to prevail. This interpretation linking optimism and war ignores the strength contrast between the warring parties. Not all wars are equally comprehensive, and there have always been wars of unequal strength. In such a war, one of the parties tends to have an absolute advantage, so the expectation of the outcome of the war is not directly related to the economic situation of the country. Optimism is not a major factor leading to war, but may somewhat serve as stimulation. In addition, Lenin attributed the war to competition between monopoly capital. This theory may seem plausible, but its scope of application is obviously too narrow. Lenin's theory of imperialism is only applicable to developed capitalist countries in the late stage of the development capitalism, but in reality, many wars take place among developing countries whose economies are still at their beginning stages. Therefore, the theory centered on competition among monopoly capital cannot explain most foreign wars. Moreover, even wars that occur during periods of economic expansion are likely to result from the potential expectation of economic recession, the "limits of growth" [15] faced during prosperity — a potential deficiency of market demand. So the downward pressure on the economy is the cause of war.

1AR—AT Economy Impact

War can't be attributed to recessions

Liao 19 [Jianan Liao, Shenzhen Nanshan Foreign Language School, China. Business Cycle and War: A Literature Review and Evaluation. Advances in Economics, Business and Management Research, volume 68. Copyright 2019]

Academic researches on the relationship between business cycle and war are particularly rich, all of which can be divided into two major categories. One is the relationship between economic **rise** and **war**, and the other is the relationship between economic **recession** and war. Through the simple description and comparison of the two types of standpoints, the author divides economic upturn into recovery phase and expansion phase, and economic recession into recession phase and crisis phase, **all of which** have motivations as well as conditions enabling wars to break out. Therefore, the **outbreak of war** shall **never** be **simply attributed** to **either economic rise or recession**.