ON IMMIGRATION, INFORMATION, AND THE NEW JURISPRUDENCE OF FEDERALISM

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INTRODUCTION

Under the direction of President Donald Trump, the United States Government has taken a strict stance against "sanctuary jurisdictions"—states or localities that adopt policies perceived as hospitable to undocumented immigrants, contrary to the goals of federal immigration law.[1] To accompany its rhetorical position, the Trump Administration issued an executive order to withhold all federal grants from states and localities that fail to comply with 8 U.S.C. § 1373 ("Section 1373"),[2] a federal statute that prohibits government actors from restricting the flow of immigration-related information to the Department of Homeland Security ("DHS").[3] Actions by the Administration related to this executive order have provoked a series of lawsuits in federal courts across the country, in which sanctuary jurisdictions have sought injunctive relief against the withholding of federal grants.[4]

This Paper argues that in the wake of the Supreme Court's 2018 decision, *Murphy v. NCAA*[5]—a case completely unrelated to immigration—there is now a single best answer to the constitutional question presented in the ongoing sanctuary jurisdiction cases. The answer is that the Trump Administration's withholding of federal grants is indeed unconstitutional, but this is because Section 1373, the statute on which the Executive's actions are predicated, is *itself* unconstitutional. Specifically, this Paper argues that the expansion of the anti-commandeering doctrine under *Murphy* provides a tool by which the federal appellate courts can invalidate Section 1373 as an

1. *See, e.g.*, Tal Kopan, *What are Sanctuary Cities, and Can They Be Defunded?*, CNN: POL. (Mar. 26, 2018, 3:40 PM), https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html [https://perma.cc/XUM9-RWT4].

2. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8799–803 (Jan. 25, 2017).

3. 8 U.S.C. § 1373 (2018).

4. *See, e.g.*, New York v. U.S. Dep't of Justice, 343 F. Supp. 3d 213, 243–45 (S.D.N.Y. 2018); City & Cty. of San Francisco v. Sessions, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 862–63, (N.D. Ill. 2018).

5. Murphy v. NCAA, 138 S. Ct. 1461, 1478–81 (2018).

impermissible federal regulation of state and local governments.[6] By adopting this approach, courts can surpass the comparatively surface-level questions about the Executive's power to enforce a particular federal statute, and instead address the more central issue: the existence of Section 1373.

This argument proceeds in the following stages. Part I provides a background for each of the central concepts in this analysis. These include (1) an explanation of the anti-commandeering doctrine in its pre- and post-*Murphy* forms, (2) a description of Section 1373, (3) a working definition of "sanctuary jurisdictions," and (4) a brief overview of the sanctuary jurisdiction cases decided to date. Part II argues that, in light of the Supreme Court's decision in *Murphy*, there is no question that Section 1373 is subject to anti-commandeering claims. Part III then argues that, as a matter of doctrine, Section 1373 should fail to withstand such claims because it does not qualify for any exceptions to the anti-commandeering rule. Finally, Part IV argues that, aside from Supreme Court precedent, there are a series of independent, normative reasons to strike down Section 1373. This Paper concludes that Section 1373 should be held unconstitutional in its challenge before the higher federal courts, including the Supreme Court of the United States if necessary, and that such a ruling is the most desirable method of resolving the sanctuary jurisdiction cases.

I. BACKGROUND

A. THE ANTI-COMMANDEERING DOCTRINE

It is axiomatic to the United States' constitutional system that the federal legislature is one of "enumerated powers," and that the federal government may not enact laws that regulate beyond the categories found in Article I, Section 8.[7] However, the "anti-commandeering principle" provides an additional limit on federal power that is not otherwise found in Article I.[8] This doctrine allows courts to strike down laws found to violate the values of "federalism" that the Supreme Court understands to be *implicit* in the structure of the Constitution and, in particular, in the language of the Tenth

6. *See id*. at 1478–81.

7. U.S. CONST. art. I, § 8; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405–12 (1819) (announcing that the federal government is one of "enumerated powers," although Article I, Section 8, Clause 18 allows that Congress may also enact laws that are "necessary and proper" to regulate effectively with respect to the other enumerated categories).

8. New York v. United States, 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

Amendment.[9] In this context, "federalism" refers to the notion that the people of the United States ought to be governed by two distinct sovereign bodies and that neither the federal nor state governments may interfere with each other's constitutionally permissible regulatory agenda.[10] Thus, courts may employ the anti-commandeering doctrine to render a federal law unconstitutional if the law offends federalism by imposing "command[s]" on state governments to take certain legislative or executive action, irrespective of whether the law addresses a policy area that would otherwise fall within the categories of Article I, Section 8.[11]

1. Development of the Doctrine

The anti-commandeering principle emerged from the Supreme Court's 1992 decision in *New York v. United States*.[12] In that case, the Court struck down the "take-title" provision of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985, which purported to offer state governments a "choice" between taking title to radioactive waste or "regulating [its disposal] according to the instructions of Congress."[13] The Court reasoned that either choice would "commandeer state governments into the service of regulatory purposes," and that such a law must be "inconsistent with the Constitution's division of authority between federal and state governments."[14] This case came to stand for the proposition that under the anti-commandeering doctrine, Congress may not compel state governments to enact any legislation or regulation, regardless of whether the same legislation would be constitutional if enacted by Congress itself.[15]

9. *Id.* at 156–59, 162–66 (discussing the federalist "constitutional structure" and the role of the Tenth Amendment in reiterating that any power not *specifically* granted to Congress is reserved for state governments; also considering the Framers' clear intent that the federal government *not* be granted the power to coerce state government action); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 326–330, 336–40 (5th ed. 2015) (tracing the jurisprudential roots of the anti-commandeering doctrine to the language of the Tenth Amendment).

10. 16A AM. JUR. 2D *Constitutional Law* § 227 ("The national and state governments are each required to exercise their powers so as not to interfere with the free and full exercise of the powers of the other."); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 323 (1997); *see also New York v. United States*, 505 U.S. at 162, 166 ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

11. Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1074 (2015); *see also New York*, 505 U.S. at 162 ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

12. *See generally* New York v. United States, 505 U.S. 144 (1992) (establishing the principle that Congress may not "commandeer" the states' government or legislative processes).

13. *Id.* at 149, 175.

14. *Id.* at 175–76 (internal quotation marks omitted).

15. Jennifer L. Greenblatt, *What's Dignity Got to Do with It: Using Anti-Commandeering*

The Supreme Court's subsequent decision in *Printz v. United States* solidified the anti-commandeering principle as a constitutional limitation on federal power.[16] In that case, the Court considered the constitutionality of a provision in the Brady Act that required state law-enforcement officials to assist in the implementation of a federal handgun-control policy by performing background checks related to proposed transfers of firearms.[17] While noting that this provision did not require state governments to "make policy" by forcing states to legislate, the Court still found that the provision violated the anti-commandeering principle by requiring states to *administer* federal law.[18] The decision in *Printz* thus expanded the anti-commandeering principle by applying it to the commandeering of state *executive* power in addition to legislative power.[19]

Another characteristic of the anti-commandeering principle that emerged from these cases was that the doctrine includes no special allowances for provisions that belong to regulatory schemes with particularly important or urgent purposes, or for provisions that are helpful or even necessary for the effective execution of legislation.[20] In other words, the anti-commandeering doctrine "permits no balancing" based on fact-intensive inquiries into the interests that may be at stake with respect to specific laws.[21] Thus, if a challenged law violates the anti-commandeering rule, it will necessarily be held unconstitutional unless it falls within a defined doctrinal exception.[22]

In sum, up until the Supreme Court's decision in *Murphy*, the anti-commandeering principle connoted "short-hand for the notion that the federal government, though supreme in its own sphere of operation, may not constitutionally carry out its powers vis-a-vis compelled state service."[23] Such a violation would not be subject to any "balancing" with regard to the

Principles to Preserve State Sovereign Immunity, 45 CAL. W. L. REV. 1, 11–14 (2008).

16. *Id.* at 14; *see also* Printz v. United States, 521 U.S. 898, 926 (1997).

17. *Printz*, 521 U.S. at 903–04.

18. *Id.* at 929, 933.

19. *Id.* at 933; Greenblatt, *supra* note 15, at 14.

20. *Printz*, 521 U.S. at 931–32 ("[W]here, as here, it is the whole *object* of the law . . . to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate."); New York v. United States, 505 U.S. 144, 178 (1992); Bernard W. Bell, *Sanctuary Cities, Government Records, and the Anti-Commandeering Doctrine*, 69 RUTGERS U. L. REV. 1553, 1572 (2017).

21. Bell, *supra* note 20, at 1572.

22. Another way of conceptualizing this restraint might be to say that the Necessary and Proper Clause lends no assistance to a law standing in violation of the anti-commandeering principle, as it might for a federal law that falls narrowly outside the providence of an Article I category such as the Commerce Power.

23. Greenblatt, *supra* note 15, at 11.

societal or governmental interests that the challenged regulation might otherwise serve.[24] Importantly, this rule only applied to federal laws that would force state governments to *affirmatively* exercise their powers in concert with federal regulation. Conversely, if a federal law did not impose an affirmative duty on state governments to adopt legislation or take executive action, the anti-commandeering doctrine was not implicated.

2. Expansion of the Doctrine

In *Murphy*, the Court fundamentally expanded the application of the anti-commandeering principle.[25] In that case, the plaintiff challenged a provision in the Professional and Amateur Sports Protection Act ("PASPA") that made it "unlawful for a State . . . to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on competitive sporting events."[26] Although the PASPA provision was a clear *prohibition* on state legislative activity rather than a *command* that state legislatures take some affirmative action, it was found to be unconstitutional under the anti-commandeering rule.[27] The Court reasoned that the rule restricts the federal government's ability to dictate "what a state . . . may *and may not* do," and that any distinction between a law that affirmatively requires states to act and a law that prohibits states from acting is "empty."[28] Rather, because the basic principle underlying the anti-commandeering rule is that "Congress cannot issue direct orders to state[s]," the Court announced that the doctrine applied equally to both affirmative commands and prohibitions.[29] Additionally, the Court reiterated the "clear and emphatic" maxim that a regulation violating the anti-commandeering doctrine cannot be saved from invalidation by balancing this violation against any interests that the regulation might otherwise serve.[30]

3. Justifications for the Doctrine

While building up to its ruling and creating what would later become known as the anti-commandeering principle, the Court in *New York*

24. Bell, *supra* note 20, at 1572.

25. *See, e.g.*, Mark Brnovich, *Betting on Federalism:* Murphy v. NCAA *and the Future of Sports Gambling*, 2017–2018 CATO SUP. CT. REV. 247, 252, 259–260.

26. Murphy v. NCAA, 138 S. Ct. 1461, 1470 (2018) (alterations in original) (internal quotation marks omitted) (quoting 28 U.S.C. § 3702(1)).

27. *Id.* at 1478.

28. *Id.* (emphasis added).

29. *Id.* at 1467.

30. *Id.* at 1476 (citing New York v. United States, 505 U.S. 144, 178 (1992)).

explained that "the question [of] whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers."[31] This debate began with the idea that the previous form of federal government under the Articles of Confederation was largely considered ineffective due to its inability to directly regulate citizens.[32] In practice, the federal government had relied on the consent of state governments to enforce any policies whatsoever.[33] As such, the Framers intended that the new form of federal government "carry its agency [directly] to . . . the citizens," and that it "stand in need of no intermediate legislations."[34] However, much of the ensuing debate over the appropriate *degree* of power for the new federal government was informed by the Framers' countervailing anxiety about whether this power would be used to coerce the states.[35] Thus, despite the desire to grant substantial legislative authority to Congress, it was also crucial to maintain the notion that—as Alexander Hamilton phrased it—the *people* are "the only proper objects of government."[36]

The *New York* opinion explains that the Constitutional Convention attendees primarily debated between two proposals for the new structure of government: the Virginia Plan and the New Jersey Plan.[37] The Virginia Plan, on one hand, would allow the federal legislature to directly impose regulations on the United States' citizens without requiring a role for state governments in the enactment or execution of those laws.[38] The New Jersey Plan, on the other hand, would require Congress to seek the approval of state governments before imposing any regulations on their citizens.[39] After the Convention adopted the Virginia Plan over the New Jersey Plan,[40] historical

31. New York v. United States, 505 U.S. 144, 163 (1992).

32. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1447–48 (1987) ("Although the Congress enjoyed some important powers on paper, it had no means of carrying them out or of compelling compliance. It could not directly tax or legislate upon individuals; it had no explicit 'legislative' or 'governmental' power to make binding 'law' enforceable . . . . ").

33. *See id.*

34. THE FEDERALIST NO. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

35. 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 255–56 (Max Farrand ed., 1911), http://lf-oll.s3.amazonaws.com/titles/1057/0544-01_Bk.pdf [https://perma.cc/47E3-EQDV] ("There are but two modes, by which the end of a Genl. Govt. can be attained: the 1st is by coercion . . . . We must resort therefore to a national *Legislation over individuals* . . . ."); 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 9 (Max Farrand ed., 1911), http://lf-oll.s3.amazonaws.com/titles/1786/0544-02_Bk.pdf [https://perma.cc/NY5A-3G9A] ("The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.").

36. THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37. New York v. United States, 505 U.S. 144, 164 (1992).

38. 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, *supra* note 35, at 21.

39. *Id.* at 243–44.

40. *Id.* at 313.

records make it evident that the Framers understood and intended for this choice to stand, at least partially, for the principle that the federal government ought to be sovereign over the people but *not over the states*.[41] Accordingly, the federal structure as adopted by the Framers would allow both levels of government to regulate their citizens, but would not allow one level of government to coerce another into sovereign activity. The latter situation describes precisely the sort of governmental coercion that the anti-commandeering doctrine prohibits. Therefore, to the extent that one values "originalism" as an independent normative basis to support constitutional argumentation, history itself suggests that the anti-commandeering principle is justified.

In addition to history, however, there are a series of political and economic arguments for why we ought to have an anti-commandeering rule. According to contemporary Supreme Court jurisprudence, the dominant justifications for the anti-commandeering doctrine are threefold.[42]

First, "the rule serves as 'one of the Constitution's structural protections of liberty.'"[43] This justification arises out of liberal-democratic political theory, because it attempts to realize a form of government that will best maintain the rights and liberties afforded to citizens under the Constitution.[44] Rather than merely protecting the independence of state governments for the sake of those governments, this justification points out that a fundamental goal of the federal system is to protect against tyranny over individuals through a diffusion of power among distinct sovereigns.[45] Such arguments for federalism are therefore substantially similar to those supporting the

41. *E.g.*, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 256 (Jonathan Elliott ed., 2d ed. 1827), http://lf-oll.s3.amazonaws.com/titles/1908/1314.04_Bk.pdf [https://perma.cc/978T-24BC] (illustrating that delegates to the Constitutional Convention reported to their respective state legislatures that "the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present").

42. Murphy v. NCAA, 138 S. Ct. 1461, 1477 (2018). Although the Court noted that it did not attempt "a complete survey" of the justifications for the anti-commandeering principle, this analysis presumes those factors that the Court discussed in the *Murphy* opinion can be considered most prevalent. *Id.*

43. *Id.* (quoting Printz v. United States, 521 U.S. 898, 921 (1997)).

44. For example, Alexander Hamilton argued that the federal system allowed each level of government "to check the usurpations" of the other. THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

45. *Murphy*, 138 S. Ct. at 1477 (quoting New York v. United States, 505 U.S. 144, 181 (1992)); *see also* THE FEDERALIST NO. 28, *supra* note 44, at 180–81 ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments [and vice versa]. The people, . . . if their rights are invaded by either, . . . can make use of the other as the instrument of redress.").

separation of powers between the legislative, executive, and judicial branches at the federal level—each contributes to a system of checks and balances between the different governmental organs.[46] Because the distinctness of sovereign entities would be undermined if federal and state governments were able to control one another, the anti-commandeering doctrine operates as a means of upholding a strong federal system, and thus offers a safeguard for individual liberties.

Second, the anti-commandeering doctrine "promotes political accountability" for each sovereign in the federal system.[47] Thus, "[w]hen Congress itself regulates, the responsibility for the benefits and burdens of the regulation [should be] apparent" to those who are governed by it, such that "[v]oters who like or dislike the effects of the regulation know who to credit or blame."[48] This justification is an appeal to democratic efficiency because it asserts that the anti-commandeering doctrine is a means of ensuring that, when voters approve or disapprove of some regulation, they may cast their votes accordingly with the goal of affecting change or preserving the status quo.[49] Without the anti-commandeering rule, governments would be able to control each other's uses of sovereign power, creating a sense of confusion among voters as to *which* government is responsible for *which* regulations, and thus more uncertainty about how votes ought to be cast in order to achieve the desired electoral outcome.[50] On this view, the anti-commandeering principle fosters a more responsive and practical process for representative democracy.

Third, the anti-commandeering doctrine "prevents Congress from shifting the costs of regulation to the [s]tates."[51] This justification seems to rely on an economic argument that legislatures ought to engage in cost-benefit analyses with the aim of enacting only rules that generate a net social benefit. That is, for any given law to be justified, the benefits of enacting and executing the law must exceed the costs of doing so, or else the legislature is guilty of irrationality. However, if Congress is able to force state

46. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

47. *Murphy*, 138 S. Ct. at 1477.

48. *Id.*

49. *See, e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1360 (2001) ("If our system of political checks is to rest on a foundation of popular loyalty, . . . [i]t must be clear when the national government has acted, as opposed to the states, so that the people can provide feedback to the political process that resulted in the action.").

50. *Murphy*, 138 S. Ct. at 1477 (citing New York v. United States, 505 U.S. at 168–69).

51. *Id.*

governments to create or execute rules, then Congress is able to ignore significant costs of its rulemaking by externalizing those costs onto other sovereign entities. Given that the anti-commandeering rule prohibits such cost-and-benefit shifting between the federal and state governments, it thereby assures that each sovereign must consider the full cost of its rules while attempting to legislate rationally.

B. SECTION 1373

Section 1373 is a federal statute addressing "[c]ommunication between government agencies and the Immigration and Naturalization Service."[52] Subsection (a) states:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may *not prohibit*, or *in any way restrict*, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, or any individual.[53]

Subsection (b) further states:

> [N]o person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service . . . (2) Maintaining such information . . . [or] (3) Exchanging such information with any other Federal, State, or local government entity.[54]

In essence, Section 1373 prohibits any government actor in the United States from implementing a policy restricting the ability of other government actors to share immigration-related information with the Department of Homeland Security ("DHS").[55] This statute does not impose any affirmative obligations on government actors to collect immigration-related information in support of the DHS or its goals.[56] It is instead a guarantee that the DHS will have

52. 8 U.S.C. § 1373 (2018).

53. *Id.* § 1373(a) (emphasis added).

54. *Id.* § 1373(b).

55. The INS has been abolished since the enactment of Section 1373, with its functions and authority transferred to the DHS under 6 U.S.C. § 251 (2018) and 6 U.S.C. § 542 (2018). Therefore, for purposes of the present analysis, any reference to the INS can be understood as a reference to today's DHS. Within the DHS, the Immigration and Customs Enforcement agency ("ICE") is responsible for the enforcement of federal immigration and customs policy. *Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/about [https://perma.cc/FV37-CSUF]. .

56. IMMIGRANT LEGAL RESOURCE CTR., FAQ ON 8 USC § 1373 AND FEDERAL FUNDING THREATS

access to any immigration-related information that those actors collect on their own authority.

Congress passed this statute in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act, which added to the existing "comprehensive federal statutory scheme for regulation of immigration and naturalization."[57] A report from the Senate Judiciary Committee before the creation of Section 1373 explained that the "acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act."[58] It is therefore evident that the primary aim and application of this law is to ensure that the DHS enjoys unrestricted access to all immigration-related information collected by any governmental body in the country, for the purpose of optimizing the DHS's ability to enforce federal immigration policy.

C. "SANCTUARY JURISDICTIONS"

"Sanctuary" is a broad conceptual category encompassing state and local jurisdictions that implement policies designed to limit cooperation with, or to obstruct, the efforts of the federal Immigration and Customs Enforcement ("ICE") agency.[59] Although the term "sanctuary" is largely used in contemporary political discourse to refer to states, municipalities, and other localities that have refused to support the enforcement of federal immigration policy under the Trump Administration, there seems to be no single, more specific definition for it.[60] In an effort to adopt a precise definition of "sanctuary" jurisdictions for the purpose of legal analysis, some scholars identify particularized categories of "sanctuary" policy that a state

TO "SANCTUARY CITIES" 1–2 (2017), https://www.ilrc.org/sites/default/files/resources/8_usc_1373_and_federal_funding_threats_to_sanctuary_cities.pdf [https://perma.cc/3LSM-DLUK].

57. De Canas v. Bica, 424 U.S. 351, 353 (1976), *superseded by statute*, Immigration and Nationality Act, 8 U.S.C. § 1324(a) (effective Nov. 10, 2005).

58. S. REP. NO. 104-249, at 19–20 (1996); *see also* City of New York v. United States, 179 F.3d 29, 32–33 (2d Cir. 1999).

59. Peter Galuszka, *What are Sanctuary Cities, Anyway?*, WASH. POST (Nov. 6, 2017, 9:26 AM), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/11/06/what-are-sanctuary-cities-anyway/?noredirect=on&utm_term=.e868d378dfb8 [https://perma.cc/9NQY-USFR]; Alan Gomez, *A Multi-Million Dollar Question: What's a 'Sanctuary City?'*, USA TODAY (April 26, 2017, 6:14 PM), https://www.usatoday.com/story/news/world/2017/04/26/multi-million-dollar-question-whats-sanctuary-city/100947440 [https://perma.cc/5TNY-SAY6]; Kopan, *supra* note 1.

60. Gomez, *supra* note 59; Jasmine C. Lee et al., *What are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html [https://perma.cc/Q3VG-TVXL] ("In cities, sanctuary policies often mean local officials do not ask about a person's immigration status, but there is no universal definition for a sanctuary city.").

or locality might enact with respect to undocumented immigrants.[61] According to Bernard Bell, three useful categories include "(1) policies that limit inquiries into immigration status; (2) policies that limit immigration-related arrests and detentions; and (3) policies that limit the information sharing with federal officials."[62]

Because Section 1373 addresses immigration-related information sharing between the federal, state, and local governments within the United States, this analysis defines "sanctuary jurisdictions" as those that employ policies falling into Bell's third category: restrictions on the sharing of information with federal officials. Jurisdictions that employ such policies justify them on the basis that local authorities will often "pledge confidentiality of information regarding immigration status to . . . encourage undocumented aliens to provide information regarding criminal elements in their communities and seek the protection of [local] authorities against people or businesses that use their undocumented status to exploit them economically or otherwise."[63] New York City is an example of such a jurisdiction, as inaugurated by former Mayor Michael Bloomberg's Executive Order 41, which restricts the disclosure of immigration-related information provided by persons with whom City officials interact.[64]

D. THE SANCTUARY JURISDICTION LITIGATION: WHAT IS AT STAKE?

On January 25, 2017, President Donald Trump issued Executive Order 13768, Section 9 of which directed the Attorney General of the United States to withhold all federal grants from sanctuary jurisdictions.[65] It defined such jurisdictions as states or localities that fail to comply with Section 1373.[66] The order precipitated the Department of Justice's ("DOJ") announcement that compliance with Section 1373 would be an additional necessary condition for states and localities to continue receiving the Byrne Justice Assistance Grant, which in turn provoked a series of lawsuits across the country to enjoin the Administration from withholding these grants from non-complying jurisdictions.[67] To date, the plaintiffs have successfully

61. Bell, *supra* note 20, at 1556.

62. *Id.* (citing Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1455 (2006)).

63. *Id.* at 1556–57.

64. *Id.* at 1559.

65. Exec. Order No. 13768, 82 Fed. Reg. 18, 8799-803 (Jan. 25, 2017).

66. *Id.*

67. *See generally, e.g.*, City of Providence v. Barr, 385 F. Supp. 3d 160 (D.R.I. 2019); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289 (E.D. Pa. 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855 (N.D. Ill. 2018); City & Cty. of San Francisco v. Sessions, 349 F. Supp. 3d 924 (N.D. Cal. 2018);

obtained permanent injunctions against the DOJ from every district court that has heard their cases.[68] The Trump Administration has subsequently appealed these orders to the First, Second, Third, Seventh, and Ninth Circuit Courts, respectively.[69] At the time of this Paper's writing, only the Third Circuit has issued its opinion, which upheld most aspects of the district courts' injunctions.[70]

The plaintiffs in these sanctuary-jurisdiction cases have advanced three primary claims. The first is a "separation of powers" theory, which argues that the DOJ's imposition of additional grant conditions constitutes an impermissible exercise of legislative power by the executive branch.[71] The second claim argues that the DOJ's additional grant conditions amount to a violation of the Spending Clause, because they are ambiguous and unrelated to the grant's purpose.[72] The third claim asserts that Section 1373 is itself unconstitutional because it violates the anti-commandeering rule by imposing a prohibition on state and local sovereign activity.[73] Although the district courts involved with the sanctuary jurisdiction litigation seem to have primarily relied upon the separation of powers theory in ordering their injunctions, most of their decisions also suggest that any of the plaintiffs' claims might be sufficient to support an injunction against the Trump Administration.[74]

While injunctions against the DOJ are certainly a success for the plaintiffs, the particular claim upon which they obtain those injunctions holds practical importance for the future status of sanctuary jurisdictions. The separation of powers and Spending Clause theories target the scope of the executive branch's power to impose conditions on the Byrne Justice Assistance Grant, while the anti-commandeering theory focuses on the

New York v. U.S. Dep't of Justice, 343 F. Supp. 3d 213 (S.D.N.Y. 2018).

68. *E.g.*, *City of Providence*, 385 F. Supp. 3d at 165; *City of Chicago*, 321 F. Supp. 3d at 881–882; *City of Philadelphia*, 309 F. Supp. 3d at 331; *City & Cty. of San Francisco*, 349 F. Supp. 3d at 973–74; *New York v. U.S. Dep't of Justice*, 343 F. Supp. 3d at 221, 245–46.

69. Notice of Appeal at 10–11, City of Providence v. Barr, No. 19-1802 (1st Cir. Aug. 19, 2019); Notice of Civil Appeal at 1, City of New York v. Whitaker, No. 19-275 (2d Cir. Jan. 28, 2019); Notice of Appeal at 1–2, City of Philadelphia v. Att'y Gen. of U.S., No. 18-2648 (3d Cir. July 26, 2018); Notice of Appeal at 1–2, City of Chicago v. Whitaker, No. 18-2885 (7th Cir. Aug. 28, 2018); Time Schedule Order at 1–3, City & Cty. of San Francisco v. Whitaker, No. 18-17308 (9th Cir. Dec. 4, 2018).

70. City of Philadelphia v. Att'y Gen. of U.S., 916 F.3d 276, 293 (3d Cir. 2019).

71. *See, e.g.*, *City of Chicago*, 321 F. Supp. 3d at 863, 873.

72. *See, e.g.*, *id.* at 863.

73. *See, e.g.*, *id.*

74. *See, e.g.*, *City & Cty. of San Francisco*, 349 F. Supp. 3d at 943–47 (holding that the Trump Administration's action was unconstitutional based on the plaintiffs' "separation of powers" theory, noting that the other district courts reached the same decision, and analyzing this theory prior to addressing the potential anti-commandeering issues).

constitutionality of a federal statute on which those conditions depend.

Thus, if the cases were resolved on a separation of powers theory, this would amount to a decision that the DOJ's grant conditions are illegal because Congress has not authorized the executive branch to take such action. This resolution would not entail that such action exceeds the federal *legislature's* power, and would therefore leave open the possibility that Congress may simply authorize the DOJ to impose the same or similar grant conditions on sanctuary jurisdictions in the future.

Alternatively, if the cases were resolved under the Spending Clause claim, this would amount to a decision that the grant conditions, as stated by the DOJ, are ambiguous and insufficiently related to the purpose of the Byrne Justice Assistance Grant itself.[75] This resolution would nevertheless concede that it is within the DOJ's existing power to impose *some* kinds of conditions on the grant. Therefore, it may leave an opening for the DOJ to reframe its conditions such that they bear a closer connection to the grant's purpose and are less ambiguous, but have equally damaging consequences for non-complying jurisdictions. Both of these resolutions would ignore the question of whether Section 1373—an existing federal statute that maintains force against state and local governments irrespective of the Trump Administration's activity—is itself unconstitutional.

On the other hand, if the sanctuary jurisdiction cases were resolved on the basis that Section 1373 is unconstitutional, this would foreclose any further action that the Trump Administration or even Congress might take against state or local governments that adopt policies restricting the flow of immigration-related information to the DHS. This is because, if Section 1373 is struck down, it is immaterial whether and how the DOJ imposes additional conditions on federal grants; as long as one of those conditions is to comply with Section 1373, the federal government's action against sanctuary jurisdictions will be barred. For this reason, this Paper asserts that while the federal appellate courts seemed previously unwilling to resolve these cases using the anti-commandeering doctrine,[76] the Supreme Court's *Murphy*

75. The Byrne Justice Assistance Grant is described as "the primary provider of federal criminal justice funding to states and units of local government." U.S. DEP'T OF JUSTICE ET AL., OMB NO. 1121-0329, EDWARD BYRNE MEMORIAL JUSTICE (JAG) PROGRAM: FY 2018 LOCAL SOLICITATION 5 (2018). Permissible uses of grant funding include spending on "additional personnel, equipment, supplies, contractual support, training, technical assistance, and information systems for criminal justice . . . ." *Id.*

76. City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018); *see also* City of Chicago v. Sessions, 888 F.3d 272, 295–96 (7th Cir. 2018). These decisions affirmed the respective district courts' grants of *preliminary* injunctions against the Trump Administration. The circuit courts have not yet rendered any decisions on the *permanent* injunctions subsequently issued by the district courts.

decision has afforded them a broader license to do so. This assertion takes on a particular urgency given that the Third Circuit, which has already issued its opinion, neglected to consider the constitutionality of Section 1373 at all. In the following Parts, this Paper argues that Section 1373 is subject to anti-commandeering challenges, and that the First, Second, Seventh, and Ninth Circuit Courts—and if necessary, the Supreme Court of the United States—should invalidate the statute for doctrinal and normative reasons.[77]

II. THE ANTI-COMMANDEERING DOCTRINE APPLIES TO SECTION 1373

To evaluate the constitutionality of Section 1373, this analysis must address two related questions. The first is the threshold question of whether Section 1373 is subject to anti-commandeering challenges. To answer this question, one is required to consider the *form* of Section 1373 in order to determine whether it is the sort of law that falls within the anti-commandeering rule's application. The second question is whether the statute should withstand such a challenge. To answer this question, one must consider the *content* of Section 1373 using relevant doctrinal and normative factors in order to determine the appropriate legal outcome. The remainder of this Part addresses the first question, and argues that Section 1373 is indeed subject to anti-commandeering challenges in the wake of Supreme Court precedent from *Murphy*. Parts III and IV then address whether Section 1373 ought to survive such challenges.

The strongest argument *against* applying the anti-commandeering doctrine to Section 1373 emerges from the Second Circuit's 1999 decision

77. This Paper presumes that the Trump Administration will petition for review of the Third Circuit's decision affirming the permanent injunction, and that the Supreme Court is likely to grant certiorari. The probability that the Supreme Court will grant certiorari seems increasingly likely if any combination of the First, Second, Seventh, or Ninth Circuits issue opinions that create some conflict either in result or in reasoning.

Alternatively, the Supreme Court may consider the constitutionality of Section 1373 as a collateral issue in separate litigation between the federal government and the State of California. After considering the Trump Administration's preemption-based challenge to a series of California statutes limiting the ability of state and local officials to share immigration-related information with federal authorities, the Ninth Circuit determined that these statutes were constitutional given that they did not directly conflict with the federal regime of immigration regulation. *See generally* United States v. California, 921 F.3d 865 (9th Cir. 2019). On October 22, 2019, the Trump Administration filed a petition for certiorari to review the Ninth Circuit's decision, which adopted a narrow interpretation of Section 1373 and briefly discussed its relationship to the Tenth Amendment without reaching a specific holding on its constitutionality. *See generally* Petition for Writ of Certiorari, United States v. California, No. 19-532 (Oct. 22, 2019). At the time of this Paper's writing, the Supreme Court has yet to issue its decision on whether to grant the federal government's petition. In any event, the arguments presented in this Paper apply equally to any constitutional challenge to Section 1373 under the anti-commandeering doctrine.

in *City of New York v. United States*,[78] in which Section 1373 was explicitly upheld in the face of a direct anti-commandeering challenge.[79] That case arose after the City of New York prohibited its employees from "voluntarily providing federal immigration authorities with information concerning the immigration status of any alien"; this was a policy that plainly violated Section 1373.[80] As the plaintiff, the City of New York claimed that the federal statute was unconstitutional because it effectively forbade "states and localities from enacting laws that . . . restrict[ed] state and local officials from cooperating in the federal regulation of aliens."[81] The Second Circuit dismissed this claim on the basis that the anti-commandeering doctrine simply did not apply, reasoning that precedent from *New York* and *Printz* reserved anti-commandeering scrutiny for federal statutes that "affirmatively conscript[]" state or local governments into action.[82] Thus, unlike the statutes in *New York* and *Printz*, which created affirmative obligations for states to take legislative or executive action in accordance with the federal government's commands, Section 1373 compelled no analogous action, and therefore survived the City of New York's challenge.[83]

Although the Second Circuit's decision in *City of New York* provides remarkably direct answers to the questions presented in this analysis, it seems inescapable that the case's holding no longer constitutes good law. This is because *Murphy* represents a clear expansion of the anti-commandeering rule's application—courts may now use the doctrine to scrutinize any federal law that implicates state or local government action without regard to the prior distinction between affirmative duties and mere prohibitions.[84] Therefore, because this very distinction formed the basis for the Second Circuit's refusal to apply the anti-commandeering doctrine in *City of New York*, the decision no longer suggests that Section 1373 would escape the scrutiny of anti-commandeering claims.

Once the decision in *City of New York* is obviated, there is little else to suggest that the anti-commandeering rule would not apply to Section 1373. On the contrary, there are several arguments to support the anti-commandeering rule's application to this statute. First, the statute's plain text

78. This Second Circuit decision from 1999 is completely separate from the Supreme Court's earlier, 1992 decision in *New York*, although both cases are relevant to this analysis. The latter's full case name is used throughout this Part in order to avoid confusion.

79. City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999).

80. *Id.* at 31.

81. *Id.* at 34.

82. *Id.* at 34–35.

83. *Id.*

84. Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018).

states, "a Federal, State, or local government entity *may not* prohibit, or in any way restrict."[85] Under any common-sense understanding of the phrase, "may not," this law constitutes a direct prohibition on governmental activity.[86]

Moreover, in case there is any lingering dispute about the proper interpretation of Section 1373, additional evidence can be found in Congressional intent as illuminated by the statute's legislative history. The Report of the Senate Judiciary Committee on the Senate bill that eventually became Section 1373 states, "[t]he committee bill is intended, first, to increase control over immigration to the United States" and also adds that "[n]o matter how successful Congress might be in crafting a set of immigration laws that would . . . lead to the most long-term benefits to the American people, such benefits will not actually occur if those laws cannot be enforced."[87] With respect to the specific section of the bill that eventually became Section 1373, the Report explains that the provision is justified because "[e]ffective immigration law enforcement requires a cooperative effort between all levels of government."[88] Moreover, the Conference Report accompanying the bill provision that eventually became 8 U.S.C. § 1644, the statute upon which Section 1373 expands, explains that "[t]his provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS."[89] Therefore, the legislative history makes clear that Section 1373 is intended to provide a prohibition primarily on state and local governments with respect to their ability to restrict access to information by the DHS. Most importantly, the purpose of this prohibition is to ensure "effective" enforcement of a federal regulatory program through enhanced federal "control" over all immigration matters.[90] This is precisely the form of federal law that the anti-commandeering doctrine is designed to police, because the statute nakedly regulates state and local governments in an effort to bolster the administration of federal policy.

85. 8 U.S.C. § 1373 (2018) (emphasis added).

86. The modal verb "may" in both legal or ordinary parlance expresses possibility or permission, so it follows that "may not" must express the foreclosure of such possibility or permission. *See May*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "may" as a verb that means either "[t]o be permitted to" or "[t]o be a possibility"); *May*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "may" as a modal verb "[e]xpressing possibility").

87. S. REP. NO. 104-249, at 2–3 (1996).

88. *Id.* at 19.

89. H.R. CONF. REP. NO. 104-725, at 383 (1996).

90. S. REP. NO. 104-249, at 2–3, 19 (1996).

Finally, as a matter of empirical observation, federal district courts directly addressing the issue have ubiquitously held that anti-commandeering challenges may now be levied against Section 1373.[91] Although these district-level judgments lack the force of *stare decisis*, it is instructive that courts across a wide range of jurisdictions agree that Section 1373 is the sort of law that may be subjected to anti-commandeering challenges in the wake of *Murphy*. For example, in *City of Chicago v. Sessions*, the district court specifically revisited the City's anti-commandeering claim in light of the Supreme Court's *Murphy* decision.[92] Although the district court had previously dismissed the plaintiff's anti-commandeering claim on the ground that Section 1373 imposed no "affirmative demand" on state or local governments, the court subsequently acknowledged that *Murphy* necessitates that "the anticommandeering doctrine applies" to Section 1373.[93] Similarly, in *City of Philadelphia v. Sessions*, the district court reasoned that the anti-commandeering rule must apply because Section 1373 is formally "the same" as the statute struck down in *Murphy*.[94] Additionally, the district court in *City & County of San Francisco v. Sessions* reached the same conclusion for the same reason.[95] Perhaps most persuasively, the district court in *New York v. U.S. Department of Justice* also followed this trend while explicitly declining to apply the Second Circuit's precedent from *City of New York*.[96] Thus there is strong empirical evidence, in addition to legal reasoning, suggesting that the first question in this analysis can be confidently answered in the affirmative: *Murphy* entails that Section 1373 is subject to anti-commandeering claims.[97]

91. *See generally, e.g.*, City of Chicago v. Sessions, 321 F. Supp. 3d 855, 866–69 (N.D. Ill. 2018); City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 329 (E.D. Pa. 2018); New York v. U.S. Dep't of Justice, 343 F. Supp. 3d 213, 231–35 (S.D.N.Y. 2018); City & Cty. of San Francisco v. Sessions, 349 F. Supp. 3d 924, 950 (N.D. Cal. 2018). The constitutionality of Section 1373 was also briefly considered in United States v. California, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018), *aff'd in part, rev'd in part*, 921 F.3d 865 (9th Cir. 2019), in which the court noted that the statute is "highly suspect" because it appears to "dictate what states may and may not do, in contravention of the Tenth Amendment." However, that court did not directly subject Section 1373 to an anti-commandeering analysis, nor did it make an ultimate ruling on the statute's constitutionality, because such decisions were not required to resolve the preemption-based disputes in that case. *See generally id.* Moreover, although City of Providence v. Barr, 385 F. Supp. 3d 160 (D.R.I. 2019), also dealt with a challenge to Executive Order 13768, that court did not address Section 1373 in any part of its opinion.

92. *City of Chicago*, 321 F. Supp. 3d at 866–67.

93. *Id.* at 866–69.

94. *City of Philadelphia*, 309 F. Supp. 3d at 329.

95. *City & Cty. of San Francisco*, 349 F. Supp. 3d at 949–50, 953.

96. New York v. U.S. Dep't of Justice, 343 F. Supp. 3d 213, 233–34 (S.D.N.Y. 2018). ("It is clear that *City of New York* cannot survive the Supreme Court's decision in *Murphy*.").

97. The Trump Administration appealed all of these district court decisions, and most remain pending in the Second, Seventh, and Ninth Circuits, respectively. Notice of Civil Appeal at 1, City of

III. SECTION 1373 IS UNCONSTITUTIONAL: A DOCTRINAL PERSPECTIVE

This analysis now turns to the question of whether the statute should withstand its anti-commandeering challenges. The outcome of the analysis is predicated on whether Section 1373 is different, in some constitutionally significant way, from the statutes found to be unconstitutional in *New York*, *Printz*, and *Murphy*. This Part addresses this question from a *doctrinal* perspective: it identifies the conditions under which courts have previously upheld or struck down challenged laws, and the extent to which Section 1373 meets those conditions. It also considers some extraneous constitutional doctrines that were not implicated in the Supreme Court's prior anti-commandeering cases, but may nonetheless apply in the case of Section 1373.

To reiterate the anti-commandeering rule in its apparent, post-*Murphy* form, the federal government may not impose duties *or* prohibitions on state or local governments. This rule remains firm irrespective of the particular societal or governmental interests that a challenged law might otherwise promote. This entails that the federal imposition of duties or prohibitions on the states is a sufficient condition both to *subject* a law to an anti-commandeering claim—as discussed above—and also for the law to *fail* against such a claim, absent any specific doctrinal exceptions.

Therefore, this portion of the analysis begins with the presumption that if Section 1373 is subjected to anti-commandeering scrutiny, it will fail the test because it takes the form of a blatant federal prohibition on certain state and local policymaking, and was created for the purpose of forcing those governments to support the administration of federal immigration regulation. At a certain level of abstraction, it seems clear that this prohibition closely resembles the federal statutes held to be unconstitutional in *New York*, *Printz*, and especially *Murphy*.[98] First, Section 1373 precludes state and local governments from imposing certain restrictions on how their paid employees may spend work time.[99] Indeed, the statute restructures power dynamics

New York v. Whitaker, No. 19-275 (2d Cir. Jan. 28, 2019); Notice of Appeal at 1–2, City of Chicago v. Whitaker, No. 18-2885 (7th Cir. Aug. 28, 2018); Time Schedule Order at 1–3, City & Cty. of San Francisco v. Whitaker, No. 18-17308 (9th Cir. Dec. 4, 2018). The Third Circuit has issued its opinion, but declined to address any arguments about the validity of Section 1373 or the anti-commandeering doctrine. *See generally* City of Philadelphia v. Att'y Gen. of U.S., 916 F.3d 276 (3d Cir. 2019).

98. *See, e.g.*, Ilya Somin, *Broader Implications of the Supreme Court's Gambling Decision*, VOLOKH CONSPIRACY (May 16, 2018, 3:30 PM), https://reason.com/volokh/2018/05/16/broader-implications-of-the-supreme-cour [https://perma.cc/V2EV-YMFF].

99. *See, e.g.*, Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87, 135 (2016) ("This would sever some important

within those governments by granting discretion to low-ranking employees acting in the scope of their employment that cannot be limited by higher-ranking employers.[100] Second, Section 1373 constrains the ability of state and local lawmakers to enact certain policies that might otherwise be highly desirable in their particular political atmospheres.[101] Moreover, because there is no fact-intensive "balancing of interests" in anti-commandeering jurisprudence, any argument that Section 1373 is particularly necessary or helpful to the broader federal regulatory scheme is immediately disqualified.[102]

However, there are several counterarguments that must be addressed before concluding that Section 1373 would be invalidated in the face of an anti-commandeering claim. Although Section 1373 appears unconstitutional at first glance under traditional anti-commandeering jurisprudence, there are multiple features of this statute that might distinguish it in constitutionally significant ways from the statutes in *New York*, *Printz*, and *Murphy*. These features include (1) Section 1373's status within the uniquely broad category of federal immigration policies, (2) the fact that Section 1373 deals with information-sharing practices between governments, and (3) the possibility that Section 1373 might be construed as applying to private entities as well as government actors. This analysis addresses each of these features individually, and attempts to refute any argument that they would cause courts to reach a different outcome than in *Murphy*.

A. FEDERAL IMMIGRATION POWER

Section 1373 explicitly belongs within the category of federal regulations that comprise United States immigration policy—this is clear from both the statute's plain text and the legislative record leading up to its enactment.[103] The Supreme Court has never heard a case in which a statute

lines of authority within state government: state legislatures could not supervise state agencies or local governments, local governments could not supervise local agencies, and agency chiefs could not supervise their employees.").

100. *See, e.g.*, *id.* at 135–36.

101. *See, e.g.*, *id.* at 135.

102. Peter Margulies recently argued that if Section 1373 is read "narrowly" to emphasize its "operational values" in law enforcement, it does not violate the anti-commandeering doctrine. Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1507, 1513–1515 (2018). However, given the Court's "clear and emphatic" announcement that governmental policymaking interests have no bearing on a statute's status under the anti-commandeering principle, it seems that Margulies' conclusion cannot be correct from a doctrinal perspective. Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) (citing New York v. United States, 505 U.S. 144, 178 (1992)).

103. 8 U.S.C. § 1373 (2018); S. REP. NO. 104-249, at 19–20 (1996).

belongs to federal immigration policy but would simultaneously fail to meet the traditional anti-commandeering requirements.[104] This absence of precedent is significant because immigration policy has long been considered an extremely broad-sweeping and exclusive power of Congress. Indeed, Stephen Legomsky points out that "[o]ver no conceivable subject . . . is the legislative power of Congress more complete."[105] This notion has been called "immigration exceptionalism" because the Court's doctrines for policing federal immigration policy tend to "depart from mainstream constitutional norms."[106]

The expansive power of Congress to regulate immigration was inaugurated by the Supreme Court's decision in *The Chinese Exclusion Case* in which the Court held that "the power of exclusion of foreigners . . . [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the [C]onstitution, [and] the right to its exercise . . . cannot be granted away or restrained."[107] Similar to the anti-commandeering doctrine, the breadth of Congressional power to regulate immigration seems to have been predominantly created by Supreme Court case law—even though it may not be precisely and directly enumerated in Article I of the Constitution,[108] it is strongly implied by the constitutional structure because Congress is entitled to an "inherent power as [a] sovereign to control and conduct relations with foreign nations."[109]

The Supreme Court continues to hold that the power to regulate immigration belongs *exclusively* to the federal government.[110] Even as recently as 2012, the Court clearly announced in *Arizona v. United States* that "[t]he federal power to determine immigration policy is well settled" in addition to being "broad" and "undoubted."[111] The Court has elaborated that

104. *See generally, e.g.*, James L. Buchwalter, *Construction and Application of the 10th Amendment by the United States Supreme Court*, 66 A.L.R. FED. 2D 159 (2012 & Supp. 2018) (discussing the Supreme Court's Tenth Amendment jurisprudence).

105. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (citation omitted).

106. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584–85 (2017).

107. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

108. However, the Supreme Court's recognition of Congress's expansive ability to regulate immigration is, at least partially, informed by Article I, section 8 of the Constitution, which confers power upon Congress to "establish a uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4; Arizona v. United States, 567 U.S. 387, 394–95 (2012).

109. *Arizona*, 567 U.S. at 394–95; *see also* Toll v. Moreno, 458 U.S. 1, 11–13 (1982); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–19 (1948).

110. *See Arizona*, 567 U.S. at 394–95.

111. *Id.*; *see also Toll*, 458 U.S. at 10 ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); *Takahashi*, 334 U.S.

"under the Constitution the states are granted no such powers,"[112] and it has been "at pains to note the substantial limitations upon the authority of the [s]tates" in this policy arena,[113] even to the point of striking down state-created immigration laws that are entirely congruent with federal regulations.[114]

On these grounds, proponents of Section 1373 would argue that the statute is protected from invalidation under the anti-commandeering doctrine even if Section 1373 would otherwise fail the test articulated in the classic anti-commandeering cases. This argument relies on the assumption that federal immigration power is so broad that it allows the commandeering of states and localities for the purpose of enforcing immigration policy. By way of comparison, none of the statutes in *New York*, *Printz*, or *Murphy* belonged to this category of Congressional power. *New York* involved a statute that dealt with the disposal of radioactive waste, *Printz* involved a provision of the Brady Act regarding transactions for handguns, and *Murphy* dealt with a prohibition on governmental facilitation of sports gambling; these laws were all therefore enacted under Congress' separate power to regulate interstate commerce.[115]

However, while the distinction between Section 1373 (enacted as an immigration statute) and the statutes in *New York*, *Printz*, and *Murphy* (enacted pursuant to Congress's commerce power) would present interesting and novel questions for the Court, there are three apparent reasons to remain unconvinced that the distinction would allow Section 1373 to withstand an anti-commandeering challenge. First, there is the fact that the anti-commandeering principle emerges out of the Tenth Amendment, whereas the bulk of Congress's immigration power is implied by the contents of Article I and the original Constitution's overall structure. Given that the Tenth Amendment modifies all prior-existing aspects of the Constitution, this would suggest that the anti-commandeering doctrine poses a *superseding constraint* on Congress's immigration power. Second, it seems that between Congress's commerce and immigration powers, the commerce power ought to be considered the more resilient under anti-commandeering scrutiny. This is because, given the commerce power's historical pattern of

at 419 ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.").

112. *Takahashi*, 334 U.S. at 418–19.

113. *Toll*, 458 U.S. at 10.

114. *Takahashi*, 334 U.S. at 418–19.

115. Murphy v. NCAA, 138 S. Ct. 1461, 1481–84 (2018); Printz v. United States, 521 U.S. 898, 902–03 (1997); New York v. United States, 505 U.S. 144, 159–60 (1992).

expansion beyond its original bounds to allow Congress to participate in the regulation of *intrastate* economic activity, it follows that Congress must possess remarkably broad constitutional authority to regulate areas that undisputedly fall within the category of "interstate" commerce.[116] However, the anti-commandeering doctrine remained equally applicable even when Congress regulated areas that squarely qualified as "interstate" commerce in *New York*, *Printz*, and *Murphy*.

Finally, even if one accepts the argument that Congress's immigration power ought to be considered broader than its commerce power in the face of an anti-commandeering challenge, the breadth and exclusivity of Congress' power to regulate immigration speaks only to the sweeping field of potential state laws that Congress may *preempt*. The concept of preemption refers only to the federal government's ability to displace a state's laws governing private citizens; it has no bearing on Congress's ability to control state governments. Thus the contention that Congress's immigration power is more expansive than its commerce power simply entails that, when Congress regulates private actors through immigration policy, it preempts a wider range of state law that it would normally preempt when regulating private actors pursuant to its commerce power. However, no matter how broad the particular power to regulate *private actors* may be, the idea does not logically entail that the federal government may depart from other established constitutional principles—namely the anti-commandeering doctrine—by *regulating state or local governments*.[117]

An analogy may be helpful in demonstrating the force of this point. Imagine a game played by two persons, Fred and Stacey, in which there are only two rules. Rule (1) requires that Fred and Stacey share a pie, but Stacey may only consume the portion that remains once Fred is finished eating. Rule (2) requires that both Fred and Stacey use their own respective utensils to eat the pie, and may not share utensils with one another. The concept of "preemption" denotes the truism, based on Rule (1), that Stacey may only

116. *See* Gonzales v. Raich, 545 U.S. 1, 29 (2005) ("It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968)). For additional Supreme Court cases on the expanse of Congress's commerce power even with respect to intrastate activity, see generally Wickard v. Filburn, 317 U.S. 111 (1942); Katzenbach v. McClung, 379 U.S. 294 (1964).

117. *See Murphy*, 138 S. Ct. at 1481 ("[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States."); 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS (3D ED.) § 1:54, Westlaw (database updated Nov. 2019) (describing the "fundamental constitutional divide between the power of Congress to preempt . . . law through direct federal legislation, and attempts to accomplish policy goals indirectly by commandeering States to regulate as Congress directs").

eat the portion of the pie that Fred does not consume. The concept of "anti-commandeering" denotes the additional truism, based on Rule (2), that Fred may not use Stacey's utensils to consume his portion of the pie, and vice versa. It is obvious that if Fred widely preempts Stacey by consuming a great deal—or perhaps even all—of the pie, Fred still may not use Stacey's utensils to do so. It is equally clear from this perspective that even when Congress widely preempts state law, as it may in immigration policy, this has no logical bearing on Congress's ability to employ state governments to assist in the completion of its regulatory agenda. Based on this reasoning, it seems deeply implausible that the mere fact that federal immigration policy may broadly preempt state law would protect Section 1373 from invalidation under the post-*Murphy* anti-commandeering doctrine.

B. "MERE INFORMATION SHARING"

The Trump Administration has offered a novel doctrinal theory to argue that Section 1373 is not unconstitutional under the anti-commandeering rule.[118] This argument relies on language from the majority opinion in *Printz*, which suggested that federal regulations requiring "only the provision of *information* to the Federal Government," rather than "forced participation of the States' executive in the actual administration of a federal program," may withstand anti-commandeering challenges.[119] The notion is echoed in Justice O'Connor's concurrence to *Printz* when she pointed out that "the Court appropriately refrain[ed] from deciding whether . . . purely ministerial reporting requirements imposed by Congress on state and local authorities" are invalid under the Tenth Amendment.[120] These passages suggest that the Court may have identified a constitutionally-salient difference between federal statutes requiring "mere information sharing" by state and local governments on one hand, and federal statutes that require or prohibit more substantial sovereign activity on the other. Accordingly, the Trump Administration offers the following argument:

Premise$_1$: *Printz* creates a doctrinal exception to the anti-commandeering rule for federal statutes that require only the sharing of information by state and local governments.

Premise$_2$: Section 1373 deals only with the sharing of immigration-related information between the DHS and other government actors in the United States.

118. *See, e.g.*, City of Chicago v. Sessions, 321 F. Supp. 3d 855, 871 (N.D. Ill. 2018).
119. *Printz*, 521 U.S. at 917–18 (emphasis added).
120. *Id*. at 936 (O'Connor, J., concurring).

Conclusion: Section 1373 is an information-sharing statute that falls within the *Printz* exception, and therefore should withstand anti-commandeering scrutiny.

The Administration's argument is presented in syllogistic form to illustrate that its soundness depends on the truth of both Premise_1 and Premise_2; if either premise fails, the overall argument must fail as well. There is reason to doubt both premises, and the following two Sections of this Paper endeavor to rebut each in turn.

1. Premise_1: The Alleged "Exception" from *Printz*

Premise_1, or the notion that *Printz* created a doctrinal exception for "mere information-sharing" statutes, is dubious. First, as Bernard Bell notes, "[n]othing in the Constitution [itself] suggests that the federal government has been granted power over state and local recordkeeping."[121] Thus if this exception exists at all, it must be made quite clear in constitutional case law. Second, the language in *Printz* that allegedly creates the exception is not so clear. The majority in *Printz* distinguished between information-sharing statutes and statutes that force state executives to participate in federal programs, but did not actually render an opinion on whether this distinction would affect the outcomes of anti-commandeering challenges. Analogously, there is also a considerable difference between statutes that prohibit state legislative action and those that mandate state executive action—yet the Court has made explicit, in *Murphy* and *Printz* respectively, that the anti-commandeering rule applies equally to each category. Furthermore, Justice O'Connor's concurrence specifically states that the Court *refrained* from deciding whether information-sharing statutes violate the anti-commandeering principle. This suggests that at the most, the idea of a special class for "information-sharing" statutes is merely a suggestion in Supreme Court dicta, failing to rise to the level of a doctrinal exception that would guarantee the validity of Section 1373.

Beyond a textual analysis of *Printz*, Robert A. Mikos has offered a compelling argument that "the commandeering of states' secrets" is conceptually indistinguishable, in all relevant respects, from other types of prohibited federal commandeering.[122] He argues that the federal commandeering of state secrets—related to immigration or otherwise—imposes economic and political costs on state governments, and that this

121. Bell, *supra* note 20, at 1563.

122. Robert A. Mikos, *Can the States Keep Secrets from the Federal Government*, 161 U. PA. L. REV. 103, 107 (2012).

imposition by one sovereign upon another is precisely the phenomenon that the anti-commandeering rule has always been employed to prevent.[123] From the perspective of a state government, there is already a substantial economic cost of gathering information from its citizens because there is often an inherent incentive for private individuals to avoid governmental regulation.[124] If the information gathered by state governments becomes accessible by the federal government to enforce its own regulations, this increases the incentives of private individuals to conceal that same information, and correspondingly increases the information-gathering costs to state governments.[125] Similarly, the commandeering of states' secrets imposes on state governments the political cost of adhering to federal policies that they or their constituents may oppose.[126] Although these "cost" considerations appear normative in nature and are thus revisited in Part IV, Mikos points out that as a doctrinal matter, they also "correspond to the costs animating the Supreme Court's [previous] anti-commandeering decisions" invalidating federal laws; this suggests there is no meaningful distinction between information-sharing demands and other brands of federal commandeering.[127]

It warrants acknowledgement that the Administration's Premise_1 is not completely without support. Given that similar language appears in both the majority and concurring opinions to *Printz*, it does seem evident that the Supreme Court intended to leave an open question about the distinction between information-sharing statutes and other kinds of federal regulations of state governments, and that this distinction might hold some constitutional significance in anti-commandeering disputes. However, the existence of such an open question does not constitute a basis upon which we can generate clear, confident, and accurate doctrinal answers to legal questions before the courts. It certainly does not constitute an obvious doctrinal exception that would save Section 1373 from an anti-commandeering claim. Instead, the case law leaves us with exactly this: a question for which there is no obvious answer in the law. At best, the existence of such questions allows room for normative considerations about how the law ought to develop in the future. These arguments are addressed in Part IV.

Therefore, because the language in *Printz* simply does not articulate a clear exception to the anti-commandeering doctrine, and because "mere"

123. *Id.* at 106–08.
124. *Id.* at 121–22.
125. *Id.*
126. *Id.* at 126–27, 130.
127. *Id.* at 121.

information-sharing statutes appear to be indistinguishable in all relevant respects from other forms of impermissible federal commandeering, Premise_1 seems to be unsupported.

2. Premise_2: The Nature of Section 1373

The Trump Administration's Premise_2, or the assertion that Section 1373 is merely an information-sharing statute, is also suspect. That is, even if there were a doctrinal exception for certain information-sharing statutes, Section 1373 would not necessarily fall into the "safe harbor." Looking beyond the traditional anti-commandeering cases, Bell has explored three additional bodies of law that suggest there would be no special carve-out for information-sharing statutes with the particular character of Section 1373.[128] The first of these bodies is the "official information" privilege, which may be recognized at the discretion of federal judges under Federal Rule of Evidence 501 to protect state and local governments from having to reveal certain official records at the request of litigants.[129] The second is the architecture of the federal Freedom of Information Act ("FOIA"), which, while allowing widespread access to government information for the general public, recognizes that even the public's right to information "must be tempered by the government's ability to protect the confidentiality of some records."[130] The third is the legal "data protection principle, applicable to both public and private record systems, that personal information should be used only for the purposes for which it is collected."[131] Drawing on these three bodies of law related to governmental information sharing, Bell postulates the existence of a fundamental principle in the United States' legal system that aims to prevent the "frustration of the expectations of private citizens who provide confidential personal information" to government actors.[132] Therefore, "[w]hen a government holds personal information regarding an individual and needs to offer assurances of confidentiality to obtain it, that government has a special [right] to keep such information

128. Bell, *supra* note 20, at 1563.

129. *Id.* at 1563–66; FED. R. EVID. 501. This "privilege" is notably controversial because it arises out of—and thus falls under similar criticisms as—the justifications underlying the concept of an "executive privilege." Bell, *supra* note 20, at 1564. Although a specific privilege for "official information" was "incorporated . . . in the proposed Federal Rules of Evidence that the United States Supreme Court forwarded to Congress in 1973," Congress rejected this and all other specific privileges, opting instead for a "broad privilege provision" in Rule 501. *Id.* at 1565–66.

130. Bell, *supra* note 20, at 1566–67; 5 U.S.C. § 552(b)(7) (2018) (exempting "records or information compiled for law enforcement purposes" from the types of information that must be made available to the public, assuming those records or information meet certain enumerated conditions).

131. Bell, *supra* note 20, at 1569.

132. *Id.* at 1571.

confidential."[133] Bell suggests that this right may amount to a "constitutional privilege" for state and local governments, acting as independent sovereign entities, which can be invoked when the federal government demands access to such personal information.[134]

If Bell's postulate is accepted, it seems clear that Section 1373 would constitute more than the kind of simple "ministerial reporting requirement" that Justice O'Connor contemplated in *Printz*.[135] Recall that when sanctuary jurisdictions implement policies against sharing immigration-related information with ICE, they primarily justify this action based on the goal of encouraging undocumented immigrants to come forth with information about crime or other abuses in their communities; such encouragement often comes in the form of a pledge that the immigration status of these informants will not be reported to federal authorities. Section 1373 has both the purpose and effect of subverting those pledges of confidentiality by state and local governments, and therefore runs contrary to the "constitutional privilege" those governments enjoy with respect to information they have solicited from immigrant communities on a voluntary basis.[136] Therefore, Section 1373 stretches beyond imposing a duty of "mere" information sharing, because it implicates rights and principles that are not offended when governments simply seek "statistical compilations or redacted, de-identified information" from each other.[137]

In sum, the Trump Administration's argument that Section 1373 falls within an exception to the anti-commandeering rule fails in two respects. First, and most importantly, there is insufficient evidence that an exception for information-sharing statutes actually exists. The distinction between information-sharing and other kinds of federal statutes in *Printz* may present an interesting open question in the law, but falls far short of comprising a doctrinal exemption for the former. Second, even if there were an exception for statutes that "merely" require information sharing, Section 1373 falls outside of this category and would thus remain unprotected from the anti-commandeering rule. This is because Section 1373 seeks more from state and local governments than mere data or statistics; it deprives those governments of a constitutional privilege—implicit in the United States' legal system—to protect the confidentiality of personal information that is solicited from private individuals on a voluntary basis.

133. *Id.* at 1575.
134. *Id.* at 1576.
135. *See* Printz v. United States, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring).
136. *See* Bell, *supra* note 20, at 1575–76.
137. *Id.*

C. THE *RENO* EXCEPTION FOR ANTI-COMMANDEERING VIOLATIONS

The Trump Administration has offered an alternative doctrinal theory to argue that Section 1373 should withstand anti-commandeering challenges.[138] This argument arises from the Supreme Court's 2000 decision in *Reno v. Condon*,[139] articulating a narrow exception under which laws that violate the anti-commandeering rule may still be upheld. Indeed, this argument appears at first to have more force than those related to immigration policy or information sharing, because the *Reno* exception is a well-established, Court-recognized safe harbor for federal statutes that would otherwise be unconstitutional.[140]

Under precedent from *Reno*, a federal regulation of state governments may survive an anti-commandeering challenge if the regulation applies equally to state governments and private actors, such that states are not being regulated in their capacity as sovereigns.[141] In *Reno*, the challenged federal statute prohibited the disclosure and resale of personal information recorded by state motor vehicle departments.[142] However, the statute explicitly prohibited state governments *as well as private actors* from reselling this information, and included penalties that applied equally to each kind of offender.[143] Therefore, the law treated state governments as ordinary market participants without requiring them to act in their "sovereign capacity" with respect to their own citizens.[144] In particular, the Court characterized the state entities as "owners of databases" when subjected to the challenged law, rather than as government actors.[145]

Despite the Court's explicit recognition of the *Reno* exception, it is analytically impossible for this exception to apply to Section 1373. It may be true, as the Trump Administration points out, that Section 1373 is similar to the statute in *Reno* insofar as it regulates states as "owners of databases."[146] However, the operative factor for applying the *Reno* exception is that the statute must *evenly regulate states and private actors*, irrespective of whether the regulation addresses owners of databases, utility providers, or

138. *See, e.g.*, City & Cty. of San Francisco v. Sessions, 349 F. Supp 3d 924, 950 (N.D. Cal. 2018).
139. Reno v. Condon, 528 U.S. 141, 143–44 (2000).
140. *See* Murphy v. NCAA, 138 S. Ct. 1461, 1478–79 (2018).
141. *Reno*, 528 U.S. at 150–51; *see also* South Carolina v. Baker, 485 U.S. 505, 511 (1988).
142. *Reno*, 528 U.S. at 143.
143. *Id.* at 146.
144. *Id.* at 150–51.
145. *Id.* at 151.
146. City & Cty. of San Francisco v. Sessions, 349 F. Supp. 3d 924, 952 (N.D. Cal. 2018) (citation omitted).

any other kind of actor.[147] The plain meaning of Section 1373 is that "government" actors cannot "prohibit" other government entities or agents from sharing immigration-related information with the DHS.[148] In other words, it prohibits governments from enacting certain statutes or rules about what government actors may and may not do. Because private actors cannot possibly create analogous regulations that affect the ability of government entities or agents to share immigration-related information with the DHS, Section 1373 necessarily applies to state governments in their capacity as sovereigns, and does not apply to private actors at all. Therefore, the *Reno* exception has no relevance to an anti-commandeering challenge to Section 1373.

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In sum, this Part has argued that from a doctrinal perspective, Section 1373 should be invalidated when faced with an anti-commandeering challenge in the higher federal courts. Supreme Court precedent from *Murphy* places this statute squarely within the category of laws prohibited by the anti-commandeering rule, and there seem to be no constitutionally-salient differences between Section 1373 and the statutes invalidated in any of the Court's earlier anti-commandeering decisions. This remains true even after considering counterarguments related to the federal government's broad power over immigration policy, the cryptic language in *Printz* regarding information-sharing statutes, and the *Reno* exception for statutes that evenly regulate state and private actors. This analysis now turns to a series of normative arguments for why Section 1373 should be invalidated.

IV. SECTION 1373 IS UNCONSTITUTIONAL: A NORMATIVE PERSPECTIVE

Before offering any normative arguments for why Section 1373 should be held unconstitutional, it is worth noting that there are two categories of normative arguments for why Section 1373 *should not* be struck down under the anti-commandeering doctrine. The first category draws on the justifications offered for the anti-commandeering rule in general, and argues that those justifications would not support the particular application of the

147. *See generally* Reno v. Condon, 528 U.S. 141 (2000) (providing that the Tenth Amendment is not violated on anti-commandeering grounds if the federal action in question evenly regulates both states and private actors); South Carolina v. Baker, 485 U.S. 505 (1988) (holding that § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act, did not violate the Tenth Amendment on anti-commandeering grounds).

148. *See* 8 U.S.C. § 1373 (2018).

rule to invalidate Section 1373. The second category argues that the anti-commandeering principle itself is unjustified, so the courts should *never* use it to invalidate federal statutes. Because the second category of argument falls beyond the scope of the present analysis, the following discussion will address and attempt to rebut only those arguments that fall within the first category; it assumes that the justifications provided for the very existence of the anti-commandeering rule are generally sound.[149] Therefore, the following discussion tracks the dominant justifications for the anti-commandeering doctrine addressed in Section II.A, and argues that each supports the invalidation of Section 1373. The arguments are categorized into political theory, political science, economics, and history, respectively.

A. POLITICAL THEORY

The first normative consideration emerges from political theory and draws on the notion that diffuse sovereign power is inherently beneficial to the protection of individual rights and liberties.[150] Although this diffusion will naturally be expected to create some inefficiency in the process of public administration, it seems generally uncontroversial to assert that meaningful checks and balances between all levels of government are desirable.[151] As

149. *See, e.g.* CHEMERINSKY, *supra* note 9, at 326–30 (discussing various normative arguments for and against the anti-commandeering doctrine in general).

150. *E.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1477 (2018). James Madison described the federal system, in addition to the separation of powers between the legislative, executive, and judicial branches of each government, as providing a "double security" for "the rights of the people." THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). On Madison's account, the justifications for federalism are the same as those underlying the separation of powers within the federal and state governments. *See id.*

151. Indeed, the notion that every governmental system should include checks and balances on sovereign power has become a truism over the course of Western intellectual history, whether for the purpose of protecting individual liberties or preserving the existence of the government itself. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES *155 ("Thus every branch of our civil polity supports and is supported . . . by the rest: . . . they mutually keep each other from exceeding their proper limits . . . ."); NICCOLÒ MACHIAVELLI, THE DISCOURSES 109 (Bernard Crick ed., Leslie J. Walker trans., Penguin Books 1998) (1531) ("[F]or if in one and the same state there was principality, aristocracy and democracy each would keep watch over the other" (endnote omitted)); BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151–52 (Thomas Nugent trans., Hafner Press 7th ed. 1975) (1748) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive."); U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (asserting that the installation of governmental checks and balances to protect individual liberty lies at the "heart" of United Nations' mission). Even outside the United States, constitutions throughout the modern world have adopted this principle by incorporating systems of checks and balances. For examples of these constitutions, see generally GRUNDGESETZ [GG] [BASIC LAW] (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [https://perma.cc/LF3J-8SPG]; XIANGGANG JIBEN FA (H.K.); INDIA CONST.

discussed in Section II.A, this idea provides a major justification for the anti-commandeering rule. Accordingly, the question in the case of Section 1373 is as follows: does this federal prohibition undermine the vertical checks and balances between federal, state, and local governments, such that individual rights and liberties are placed in jeopardy?

Perhaps the strongest argument that Section 1373 does *not* undermine the protection of individual rights and liberties is that the statute has no practical effect on United States citizens or aliens residing legally within the country's borders. Instead, it only impacts aliens residing in the United States illegally, and these individuals have no constitutional right to withhold this information from the federal government in the first place.[152] Alternatively, one might offer the argument that *no individual*—including those who are citizens—has a right to keep his or her immigration status confidential from the federal government, because access to such information is a fundamental and necessary power of any sovereign.[153] In this sense, information about one's immigration status may differ from information about race, gender, or sexual orientation, because the latter categories implicate constitutionally protected individual rights that the sovereign lacks *a priori* power to infringe.

However, by focusing only on the absence of an individual right to withhold information about one's immigration status from the federal government, these arguments take an overly narrow view of the "rights and liberties" that federalism attempts to protect. The federal system, like the constitutional separation of powers, is justified by the maxim that any sovereign entity can threaten individual rights and liberties simply by possessing the ability to wield excessive power over individuals.[154] It follows that, as any single government body wields greater power, the body is understood to threaten individual rights and liberties to an increasing extent. Thus, federalism exists to limit the extent of each government's *ability* to wield excessive power in general.[155] On this view, the proper inquiry is not whether a law offends the principles of federalism because of its actual effect on specific legal rights, but is rather whether the law allows one sovereign body to consolidate power at the expense of another.

152. Note though that it is "well established" that all aliens on United States soil have at least *some* constitutional rights, such as the right to due process in deportation proceedings. *E.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993).

153. *Cf.* The Chinese Exclusion Case, 130 U.S. 581, 607–09 (1889) (identifying the power to control immigration as a fundamental "incident of sovereignty").

154. *See* Note, *Defending Federalism: Realizing Publius' Vision*, 122 HARV. L. REV. 745, 746, 749–50 (2008) ("Publius's justification for the states was that they would be one of the securities in his 'double security' scheme against tyranny." (footnote omitted)).

155. *Id.* at 749–50.

This author finds that while adopting the appropriate notion of "rights and liberties" that federalism aims to protect, it is evident that Section 1373 improperly undermines the diffusion of government power. Section 1373 ensures that the federal government can use state and local governments as instruments in the administration of federal public policy. Specifically, it guarantees the federal government access to all immigration-related information that is collected by any governmental actor in the country. From this perspective, Section 1373 allows the federal government to vastly expand its ability to wield power over individuals on United States soil, and it achieves this end by eliminating state and local governments' ability to resist. By analogy, this would be similar to a hypothetical scenario in which Congress passed a law prohibiting federal courts from reviewing any constitutional challenges to citizenship laws. Although such a law would not by itself directly impinge on any particular individual rights, the law seems to offend the principle that diffuse government bodies exist to check each other's power, and a breakdown in this diffusion *could* lead to eventual rights infringements. Therefore, the undermining of checks and balances between each level of government is sufficient to argue that Section 1373 ought to be struck down, irrespective of whether this particular act of undermining directly leads to the infringement of particular legal rights.

B. POLITICAL SCIENCE

The second normative consideration emerges from political science, and raises the concern that commandeering legislation would blur the distinctness of each government from the citizens' perspective.[156] That is, citizens would become unsure about which governments ought to be held accountable for which policies.[157] This "blurring" effect might then cause confusion among voters regarding when and how their votes can be effectively cast in order to preserve or alter the political status quo, which would negatively impact our system of representative democracy. Consequently, if Section 1373 creates or may create such a blurring effect, this would provide a second justification for invalidating the statute under the anti-commandeering rule.

Section 1373 almost certainly creates a blurring effect from the voter's

156. *E.g.*, *Murphy*, 138 S. Ct. at 1477. As discussed in Section III.B, Robert A. Mikos has analyzed this "blur[ring]" effect as the federal's government's imposition of "political costs" upon states and localities. Mikos, *supra* note 122, at 126–27.

157. *See, e.g.*, Amdur, *supra* note 99, at 153 ("The Supreme Court invoked this value to justify the commandeering prohibition in *New York*, reasoning that federal mandates blurred the lines of accountability between citizens and their governments, both federal and state. . . . In other words, voters will not know whom to blame." (footnote omitted)).

perspective between the federal, state, and local governments.[158] This is because Section 1373 has the effect of creating, and is indeed *intended* to create, the following scenario: individuals provide immigration-related information to state or local government officials, and this information is subsequently used by the *federal* government in its enforcement of immigration policy. Broadly described, informational inputs at the state or local level lead to enforcement outputs at the federal level. How, then, might a citizen determine which government is to be held accountable for this enforcement of immigration policy? Relatedly, how might a voter determine how her votes can best be placed to change or maintain these policies? Absent a keen understanding of constitutional law, as well as in-depth knowledge of the specific statutes and policies at issue, it is easy to imagine that these questions are daunting to the average voter. The anti-commandeering doctrine attempts to address this exact phenomenon, and should therefore be used to strike down Section 1373.

A cynic might respond that if the blurring of federal and state governments is already a widespread phenomenon among the American public, this argument for invalidating Section 1373 is moot. However, survey data suggests not only that Americans are generally aware of the differences between the federal and state governments, but also that they trust the latter a great deal more than the former. For example, a national poll conducted in 2016 revealed that 55 percent of respondents favored a governmental structure in which power is concentrated at the state level, while only 37 percent of respondents favored a concentration of power in the federal government.[159] These figures are notable because a total of 92 percent of respondents were able to express a preference between the state and federal governments, indicating that Americans are aware of at least some important differences between the two sovereigns.[160] Additionally, these results convey that over half of the citizens surveyed would prefer sovereign power to be concentrated at the state level of government.[161] Further, more recent statistics indicate that roughly 67 percent of Americans have a "favorable

158. *E.g.*, *id.* at 154 (stating that in the "practice of immigration enforcement," the issue of "accountability has been a very real concern," and that local officials "bear the brunt of public disapproval" of a federal regulation); *see also* Mikos, *supra* note 122, at 126–27 ("It forces [states] to help the federal government enforce and administer policies they or their constituents oppose. What is more, such commandeering of the states' information-gathering apparatus blurs the lines of accountability for unpopular enforcement actions.").

159. Justin McCarthy, *Majority in U.S. Prefer State Over Federal Government Power*, GALLUP: POL. (July 11, 2016), https://news.gallup.com/poll/193595/majority-prefer-state-federal-government-power.aspx [https://perma.cc/6SDN-YDMT].

160. *See id.*

161. *See id*.

opinion" of their local governments, while only 35 percent of Americans feel the same way toward the federal government.[162] Again, these results suggest not only that Americans can generally differentiate between their federal, state, and local governments, but also that a significant portion of respondents favor state and local sovereigns over their federal counterparts.

These statistical figures are significant to the present analysis in at least two respects. First, they imply that constituents are able to effectively differentiate between the federal and state governments with regard to their respective functions and policies. This entails that the potential blurring effect caused by federal laws such as Section 1373 remains a viable threat to the functioning of America's multi-layered system of representative democracy, rather than a foregone concern that has been rendered moot by political disenfranchisement. Second, these figures seem to convey that Americans are overwhelmingly more trusting of their state and local governments than they are of the federal government. Just as Bell argued,[163] this contrast in levels of public trust is one of the key reasons to be wary of information sharing between sovereigns, because it suggests that a constituent may voluntarily share sensitive information with one government that she does not wish or expect to reach another. Therefore, the blurring effect of Section 1373 stands not only to cause political confusion among the electorate, but also to undermine and betray the public's relative sense of trust in local and state governments. From a perspective of political science, these are two compelling reasons to strike down Section 1373 under the anti-commandeering doctrine.

C. ECONOMICS

The third consideration arises out of economic theory (henceforth "the economic theory of legislating" or "the economic theory") and prescribes that lawmakers should only enact legislation when the social benefits outweigh the costs.[164] Under the economic theory, Congress should never be able to externalize the costs of enacting or executing its policies because this

162. Carroll Doherty, *Key Findings on Americans' Views of the U.S. Political System and Democracy*, PEW RES. CTR. (Apr. 26, 2018), http://www.pewresearch.org/fact-tank/2018/04/26/key-findings-on-americans-views-of-the-u-s-political-system-and-democracy [https://perma.cc/WV67-9GX4]. A recent report by Gallup notes that Americans' strong level of trust in local governments has seen little variation over the past two decades, whereas trust in state and federal governments has been more volatile. Justin McCarthy, *Americans Still More Trusting of Local Than State Government*, GALLUP (Oct. 8, 2018), https://news.gallup.com/poll/243563/americans-trusting-local-state-government.aspx [https://perma.cc/2L2V-FHQU].

163. Bell, *supra* note 20, at 1569.

164. *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1477 (2018).

would allow federal lawmakers to disregard those costs when deliberating about the net social value of those policies during the process of legislating. Therefore, if Section 1373 were shown to allow Congress to externalize some of the costs of enforcing federal immigration policy, the economic theory would support a judgment against the statute.

It is apparent that Section 1373 allows Congress to externalize significant costs associated with the administration of federal immigration policy. Logically, the first step to enforcing any aspect of immigration policy is the collection of records regarding the immigration status of individuals located within the country's borders. Such information is necessary to carry out any related policies such as those involving deportation or detention. However, the collection of this information would require the federal government to incur significant costs to both identify the physical location of all individuals residing within the country and verify that the collected information is accurate.[165] Additionally, the more harshly a particular administration treats aliens residing illegally within the country's borders, the more incentive those individuals have to obscure their immigration status, resulting in even greater information-gathering costs to the government.[166] Section 1373 ensures that ICE will have unfettered access to all immigration-related information that has been collected by state and local governments, which considerably reduces the cost—from the *federal* government's perspective—of having to collect this information for itself. In this respect, Section 1373 allows the federal government to disregard the true costs of administering its immigration policies by using the state and local governments as information-gathering instruments, and therefore should be struck down according to the economic theory of legislating.

Before moving on from the economic theory, a counterargument must be acknowledged. This counterargument posits that Section 1373 does not actually force other governments to incur administrative costs that they would not have otherwise incurred, so Congress is not *imposing* costs on those other governments, but rather taking advantage of political reality by ensuring that the current costs of federal immigration policy stay lower than they would be if information-sharing practices were more restricted. However, this argument fails because it misinterprets the full "economic cost" of federal immigration policy. When the federal government requires that it be given full access to all immigration-related information collected

165. Amdur, *supra* note 99, at 149 (pointing out that "the federal government [cannot] use its own agents to achieve the same effect. The cost would be orders of magnitude higher than is currently devoted to all federal law enforcement combined.").

166. *See* Mikos, *supra* note 122, at 121–22.

by state and local governments, this increases the incentive for undocumented immigrants to obscure their immigration status from *all* government officials at *any level*.[167] Again, this is especially true under the Trump Administration, which has taken a notably harsh stance against aliens illegally residing in the United States.[168] Correspondingly, the cost of gathering this information increases as a result of Section 1373, so an additional cost of information gathering *has* been imposed on state and local governments that were already gathering the same information as part of their own administrative agendas.[169] Because state and local governments experience this marginal increase in costs as a result of federal legislation, Congress necessarily fails to internalize those costs, and so the economic theory must disapprove of Section 1373.

D. HISTORY

As a final consideration, this author would suggest an additional, historical argument for why Section 1373 ought to be struck down. It first bears notice that the Framers seem not to have contemplated the permissibility of federally-imposed information-sharing statutes such as Section 1373, so there is probably no strong "originalist"-style argument to be made regarding the constitutionality of this particular law.[170] However, there may be a historical clue in the fact that the Framers, when adopting the new federal structure, intentionally rejected the New Jersey Plan at least partially out of a concern that it would lead to "coercion" of the states by the federal government.[171] Thus, although the Framers may not have considered information-sharing statutes specifically, it seems reasonable to infer that any federal prohibition on the legislative activities of states would run contrary to the Framers' intent in rejecting the New Jersey Plan because such statutes amount to one government's exercise of sovereign authority over another. It appears that federally-imposed prohibitions on *any* state sovereign power—including the states' ability to restrict the flow of their own information to the federal government—would violate Hamilton's principle

167. *Cf. id.* at 122 ("Commandeering introduces new costs into a citizen's decision calculus. A citizen who is deciding whether to divulge information requested or demanded by a state official now must consider how that information will be used by both state *and* federal authorities.").

168. *See, e.g.*, Haley Sweetland Edwards, *'No One is Safe' How Trump's Immigration Policy is Splitting Families Apart*, TIME (Mar. 8, 2018), http://time.com/longform/donald-trump-immigration-policy-splitting-families [https://perma.cc/3K8V-L29E] ("A major consequence of this new policy has been an explosion of fear among immigrant communities . . . .").

169. Mikos, *supra* note 122, at 121–22.

170. *See, e.g.*, 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, *supra* note 35, at 255–56.

171. *Id.* at 255–56, 313.

that the *people* are "the only proper objects of government."[172] Therefore, to the extent that one views history itself as a basis for providing normative answers to constitutional questions, these historical considerations may lend additional support to the arguments in favor of striking down Section 1373.

CONCLUSION

In sum, this Paper has addressed an open and pressing question in American constitutional law: whether Section 1373, which prohibits state and local governments from restricting the flow of immigration-related information to the DHS, violates the newly-expanded anti-commandeering rule under the Supreme Court's *Murphy* decision. In answering this constitutional question, this Paper has argued that Section 1373 is subject to anti-commandeering challenges and should be invalidated on that basis. The argument has proceeded in three stages. First, this Paper argued that precedent from *Murphy*, which expanded the anti-commandeering doctrine to cover federal statutes that prohibit state sovereign activities, necessitates that Section 1373 is now subject to anti-commandeering challenges. Second, it argued that from a doctrinal perspective, Section 1373 should be struck down because it fails to qualify for any exceptions to the anti-commandeering rule—its status as a federal immigration law and an information-sharing statute do not provide sufficient grounds for an exemption from otherwise-established constitutional principles. Finally, this Paper argued that several normative considerations arising out of political theory, political science, economics, and history also support the invalidation of Section 1373.

The argument presented in this Paper bears a great deal of importance to the sanctuary jurisdiction disputes currently before the First, Second, Seventh, and Ninth Circuit Courts of Appeal. Although the federal district courts have thus far enjoined the Trump Administration from withholding federal funds from sanctuary jurisdictions, they have done so primarily on the theory that this executive action violates the "separation of powers" principle. And while the Third Circuit upheld most of the district court's injunction, its opinion did not consider any anti-commandeering arguments. Therefore, these holdings offer a relatively tenuous victory for sanctuary jurisdictions while sidestepping the underlying question of whether Section 1373—an extant federal law that maintains force against state and local governments irrespective of the Trump Administration's activity—is itself unconstitutional. This Paper's conclusion urges the higher federal courts,

172. THE FEDERALIST NO. 15, *supra* note 36, at 109.

including the Supreme Court if necessary, to directly address the constitutionality of Section 1373 as part of the sanctuary jurisdiction litigation, and to render the statute unconstitutional under the anti-commandeering rule as expanded by *Murphy*.