

## ARTICLE

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## CAN THE STATES KEEP SECRETS FROM THE FEDERAL GOVERNMENT?

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*States amass troves of information detailing the regulated activities of their citizens, including activities that violate federal law. Not surprisingly, the federal government is keenly interested in this information. It has ordered reluctant state officials to turn over their confidential files concerning medical marijuana, juvenile criminal history, immigration status, tax payments, and employment discrimination, among many other matters, to help enforce federal laws against private citizens. Many states have objected to these demands, citing opposition to federal policies and concerns about the costs of breaching confidences, but lower courts have uniformly upheld the federal government's power to commandeer information from the states. This Article provides the first in-depth analysis of the commandeering of states' secrets. It identifies the distinct ways in which the federal government demands information from the states, illuminates the harms such demands cause, and challenges the prevailing wisdom that states may not keep secrets from the federal government. Perhaps most importantly, the Article argues that courts should consider federal demands for information to be prohibited commandeering. It suggests that the commandeering of state information-gathering services is indistinguishable in all relevant respects from the commandeering of other state executive services. The Article discusses the implications such a ruling would have in our federal system, including its potential to bolster the states' roles as sources of autonomous political power and vehicles of passive resistance to federal authority.*

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## INTRODUCTION

In the debates over WikiLeaks and similar campaigns to expose government secrets, the federal government has consistently championed the need for government secrecy.<sup>1</sup> For example, it has claimed that the leak of its confidential files has disrupted the wars in Iraq and Afghanistan, put the lives of American soldiers at risk, and strained key diplomatic relations.<sup>2</sup> But in another largely overlooked context, the federal government has actually championed the need for exposing government secrets, at least when the secrets in question are being kept by another sovereign. Across a growing set of policy domains, the federal government has been quietly ordering state governments to hand over their own confidential records to help enforce federal laws against private citizens. For example, federal agencies have demanded access to state medical marijuana registries to aid in the prosecution of suspected marijuana traffickers, city police files to facilitate the deportation of nonresident aliens, state tax rolls to investigate cases of federal tax fraud, and transcripts of state administrative hearings to pursue employment discrimination claims against private employers.<sup>3</sup>

This Article provides the first in-depth analysis of federal demands for confidential state records, demands that I call the *commandeering of states' secrets*. It traces the genesis of these demands to the federal government's information deficit vis-à-vis the states. Using a combination of government agents, the latest surveillance technology, and reports submitted by private citizens, state governments now gather massive quantities of information detailing the activities they regulate.<sup>4</sup> To name just a few, state repositories of information now include: medical marijuana registries, crime reports, professional disciplinary records, prescription records, business licenses, criminal history records, property title records, and vehicle registrations.<sup>5</sup> The states gather this information to enforce their own laws, but such data may also be used to enforce federal law. Indeed, state agencies sometimes

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<sup>1</sup> For a detailed account of the Wikileaks controversy, see generally DAVID LEIGH & LUKE HARDING WITH ED PILKINGTON ET AL., WIKILEAKS: INSIDE JULIAN ASSANGE'S WAR ON SECRECY (2011), and N.Y. TIMES, OPEN SECRETS: WIKILEAKS, WAR, AND AMERICAN DIPLOMACY (Alexander Star ed., 2011). For a sampling of legal commentary on the organization and its mission, see generally Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011) and Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753 (2012).

<sup>2</sup> See, e.g., Benkler, *supra* note 1, at 331-33.

<sup>3</sup> See *infra* Section I.C.

<sup>4</sup> See *infra* Section I.A.

<sup>5</sup> See *infra* Section I.A.

have far better information about compliance with federal regulations than do their federal counterparts. For example, many states have compiled extensive patient registries to help them enforce their medical marijuana laws. These registries contain a unique trove of information that federal agents have recently used to track down and prosecute the people who grow and distribute marijuana pursuant to state law.<sup>6</sup>

It should come as no surprise that the states do not always want to share their data with the federal government. For one thing, doing so increases the cost to the states of gathering the information in the first instance.<sup>7</sup> Citizens already have an incentive to evade state regulations and avoid detection by state regulators. This makes the task of gathering information about regulated activity enormously expensive. Commandeering states' secrets adds to that expense by giving citizens an additional incentive to conceal their activity from state regulators: doing so may dramatically reduce the chances that federal regulators will catch them. All governments rely extensively on their citizens for information. To replace or restore this vital source of information, the states would need to hire more agents, employ more technology, or make deeper concessions to encourage private reporting.

The commandeering of states' secrets also has political costs.<sup>8</sup> In many cases, it forces state officials to help advance federal policies they or their constituents deem objectionable. In addition, when the federal government orders a state official to provide information about violations of an unpopular federal law, there is also a real danger that citizens will denounce the state official for being complicit in federal law enforcement. They will label him a "snitch" and not merely a "stooge." For example, when a citizen is discovered and prosecuted by the federal government using information she submitted to her state in the course of applying for her medical marijuana distribution license, she may blame the state official who disclosed the information (especially if that official had earlier vouchsafed her confidentiality).

Despite these costs and protests by the states, legal scholars have largely ignored federal commandeering of states' secrets.<sup>9</sup> More troubling than the academic neglect, however, is the fact that lower courts have almost invariably upheld the practice, brushing aside any comparison to constitutionally prohibited commandeering on two grounds.<sup>10</sup>

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<sup>6</sup> See *infra* text accompanying note 67.

<sup>7</sup> See *infra* Section II.A.

<sup>8</sup> See *infra* Section II.B.

<sup>9</sup> See *infra* notes 166-68 and accompanying text.

<sup>10</sup> See *infra* notes 162-65, 169-71 and accompanying text.

First, some lower courts have simply presumed that providing information about violations of federal law does not amount to assisting in the administration or enforcement of federal law. These courts have made a categorical distinction between demands for information about federally regulated activity and demands for other types of administrative services. The latter are subject to the anti-commandeering rule, but the former, somehow, are not.

Second, some courts have suggested that demands for information simply do not raise the same constitutional concerns that animated the Court's rulings in *New York v. United States*<sup>11</sup> and *Printz v. United States*.<sup>12</sup> In those cases, the Court emphasized the economic and political costs commandeering imposes on the states—namely, the burden they bear in administering federal programs and the political responsibility they shoulder if those programs prove unpopular with constituents.<sup>13</sup> In essence, the lower courts have concluded that forcing states to share information either imposes no burden (since the states already have the information on hand), or imposes a trivial burden that is minimal as compared to the federal government's interest in the information.<sup>14</sup> As a result of these rulings, federal authorities may now seize and use to enforce federal law almost any information gathered by state governments.

This Article challenges the prevailing assessment of the constitutionality and resulting harms of secrets commandeering. Perhaps most importantly, it suggests that the commandeering of states' secrets should be deemed constitutionally prohibited. It argues that the distinction between demands for information and demands for other types of enforcement services has no obvious basis.<sup>15</sup> As a descriptive matter, this distinction fails to account for the bulk of what law enforcement agents actually do—gather and report information about regulated activity. As a matter of precedent, it contradicts the very holding of the *Printz* decision, which invalidated provisions of

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<sup>11</sup> See 505 U.S. 144, 149 (1992) (“[W]hile Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.”).

<sup>12</sup> See 521 U.S. 898, 933 (1997) (reaffirming the holding in *New York*).

<sup>13</sup> See, e.g., Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 16 (2004) (suggesting that the anti-commandeering rule requires Congress “to internalize the financial and political costs of its actions by prohibiting it from making state institutions enforce federal law”). For a discussion of the structural rationale behind the anti-commandeering rule, see *infra* Section III.B.

<sup>14</sup> See *infra* notes 169-75, 178-87 and accompanying text.

<sup>15</sup> See *infra* Sections IV.A-B.

the Brady Act requiring state officials to do no more than search state databases.<sup>16</sup> As a matter of history, it ignores the fact that most methods now employed to commandeer states' secrets were unknown to the Framers and emerged only in the last several decades. Most fundamentally, the distinction allows the federal government to transform state law enforcement officials into the unwitting tools of federal law enforcement—the very harm the anti-commandeering rule is designed to prevent.

The argument that states should be allowed to keep secrets from the federal government has broader implications for state power in our federal system. Among other things, the argument comes closer to realizing the full potential of *Printz*—namely, the notion that the states may engage in passive resistance to federal authority by refusing to lend their assistance to federal law enforcement.<sup>17</sup> Because enforcement arguably “controls the effective meaning of the law,”<sup>18</sup> and because the federal government's own enforcement capacity is quite limited, the states' ability to control their own executive resources gives them, or should give them, de facto control over a number of important policy domains that are formally subject to congressional regulation.<sup>19</sup> States have already begun to recognize and pursue this power, slowly pushing back against arguably oppressive federal laws and testing new solutions to common problems.<sup>20</sup> Unfortunately, however, the lower courts have undermined the states' ability to resist federal authority by allowing federal agencies to conscript their substantial information-gathering capacity.

This Article proceeds as follows. Part I explains how states successfully gather information about regulated activity and why the federal government sometimes has an interest in that information to enforce its own laws. It also details the three methods the federal government uses to compel states to provide information. Part II identifies and elaborates upon the economic

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<sup>16</sup> See Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 234 (arguing that “[i]t is [u]nclear . . . on what basis reporting requirements can meaningfully be distinguished from ‘actual administration of a federal program’” (citing *Printz*, 505 U.S. at 918)).

<sup>17</sup> See, e.g., Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1445-50, 1460-62 (2009) [hereinafter Mikos, *Limits of Supremacy*] (attributing states' increasingly successful opposition to federal laws, in part, to the Court's anti-commandeering rule).

<sup>18</sup> Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 700 (2011).

<sup>19</sup> See Mikos, *Limits of Supremacy*, *supra* note 17, at 1463-79 (arguing that states' de facto authority exceeds their de jure authority in many policy domains).

<sup>20</sup> Most notably, several states have legalized limited uses for marijuana, which the federal government unflinchingly proscribes. *Id.* at 1427-32.

and political harms caused by the commandeering of states' secrets. Part III reviews the legal challenges the states have waged against such commandeering and why the courts have rejected those challenges. Part IV re-examines the conventional wisdom that the anti-commandeering rule allows the commandeering of states' secrets. It argues that the distinction between demands for information and demands for other types of enforcement services is unsupportable and suggests instead that courts treat federal demands for information as prohibited commandeering. Such a ruling is needed to preserve the states' role as autonomous sources of power in our federal system.

## I. MONITORING REGULATED ACTIVITY

Gathering information about regulated activity is essential to good governance. Regulators need information to draft prudent regulations, to study their effects, and—most importantly, for present purposes—to observe and enforce compliance.<sup>21</sup> This Part details the strategies that states employ to gather the information they need to enforce their laws effectively. It also highlights the information advantage states sometimes enjoy vis-à-vis the federal government—namely, that states sometimes have more information about regulated activity than does the federal government. This phenomenon explains why the federal government is so interested in obtaining information from the states. In addition, this Part details the three methods by which the federal government can compel information from the states when the states demur.

### A. State Monitoring of Regulated Activity

To enforce their civil and criminal regulations, states must gather detailed information about the activities they regulate.<sup>22</sup> To gather the

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<sup>21</sup> See, e.g., Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 YALE L.J. 1111, 1114-17 (1947) (“The power of investigation is part and parcel of the prosecuting power and of the practically more important power of supervision which grows out of the prosecuting power.”).

<sup>22</sup> See, e.g., Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 584 (1994) (claiming the government would be unable “to enforce its regulatory or fiscal policies . . . without wide powers to gather information”); Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 235 [hereinafter Mikos, *State Taxation*] (“The state’s ability to deter tax evasion rests, in large part, on its powers of observation—namely, its ability to detect evasion.”); *id.* at 236 (“[T]he tax compliance literature has demonstrated just how important observing taxable activity is to curbing tax evasion. In general, tax gaps shrink the more information government receives concerning taxable activity.” (citation omitted)).

information they need, states employ two basic approaches. One approach uses government agents—assisted by technology—to monitor and observe regulated activity.<sup>23</sup> I call this the *gumshoe detective* approach to information gathering. The traditional approach to drug law enforcement is a paradigmatic example of this technique. Law enforcement agents conduct drug sweeps at schools, they use thermal imaging devices to spot marijuana grow houses, they wiretap the phones of suspected drug dealers, and they infiltrate drug cartels to set up undercover sting operations. Other agents then use the information gathered through such measures to charge, prosecute, and ultimately sanction drug offenders.

The second approach to information gathering uses private citizens to monitor and report on regulated activity, thereby supplementing surveillance by gumshoe detectives. In some situations, private citizens provide information about their own activities. For example, most of the states that permit residents to use marijuana for medical purposes require them to register with a state health agency first. Residents must provide the agency with detailed medical records that establish their eligibility for inclusion in the medical marijuana program.<sup>24</sup> In other situations, private citizens provide information about the activities of third parties. Every state, for example, requires at least some professionals, including teachers and physicians, to alert law enforcement when they suspect that a child has been abused.<sup>25</sup> All told, there are thousands of state and local statutes imposing reporting requirements on private citizens and firms. Through such reports, state and local governments maintain copious records detailing a broad spectrum of activities, such as the purchase of prescription drugs, the

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<sup>23</sup> Electronic surveillance certainly enhances the effectiveness of traditional gumshoe detective work. Governments glean enormous quantities of data from CCTV, credit card reports, and so on. In theory, government agents can mine this data cheaply to detect and sanction legal violations. See Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 322-24 (2008) (categorizing and evaluating the utility of government data mining). In reality, however, data mining is still a very poor way of identifying the perpetrators of past and future violations. The error rate for such projections can be staggeringly high, in some contexts generating 200 false leads for every violator correctly identified. See AMY BELASCO, CONG. RESEARCH SERV., RL 31786, TOTAL INFORMATION AWARENESS PROGRAMS: FUNDING, COMPOSITION, AND OVERSIGHT ISSUES 16 (2003), available at [http://usacm.acm.org/images/documents/crista\\_report.pdf](http://usacm.acm.org/images/documents/crista_report.pdf) (last visited Oct. 11, 2012).

<sup>24</sup> See Mikos, *Limits of Supremacy*, *supra* note 17, at 1428-30 (discussing medical marijuana registration systems).

<sup>25</sup> CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS 1 (2010), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf).



transfer of real property, the sale of alcohol and tobacco, the payment of sales taxes, the carrying of concealed firearms, and the use of medical marijuana, to name just a few.

Both approaches to gathering information entail substantial costs. The states spend more than \$78 billion annually on police services alone,<sup>26</sup> employing more than 900,000 agents to monitor regulated activity, to investigate suspected violations of the law, and to apprehend criminals.<sup>27</sup> Likewise, states give their residents concessions to provide information—a necessary step when the information helps the government enforce regulations against those same residents.<sup>28</sup> Sometimes states offer monetary payments for information. Consider the cash rewards police departments offer in return for tips about ongoing criminal investigations. Even more commonly, the states grant legal concessions to people who provide honest information about their own (or someone else's) activities. For example, some states with medical marijuana laws grant immunity from criminal prosecution (among other perks) only to those residents who have successfully registered to use marijuana.<sup>29</sup> And states commonly give convicted criminals a break at sentencing for providing incriminating evidence against their coconspirators.<sup>30</sup> In the alternative, the states occasionally threaten to sanction citizens who fail to provide information about unlawful behavior. Many states, for example, threaten to fine professionals who neglect to report suspected instances of child abuse.<sup>31</sup>

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<sup>26</sup> BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.1.6.2006, available at <http://www.albany.edu/sourcebook/pdf/t162006.pdf>.

<sup>27</sup> *Id.* tbl.1.26.2006, available at <http://www.albany.edu/sourcebook/pdf/t1262006.pdf>. Most of the functions categorized under “police protection” involve information gathering tasks of some sort, but police protection also includes some other enforcement tasks as well. For a detailed description of the term see *id.* app. 1 at 4, <http://www.albany.edu/sourcebook/pdf/app1.pdf>.

<sup>28</sup> Most regulations impose costs, thereby giving people an incentive to conceal their activity from government. For example, a regulation might require people to abstain from some activity they find pleasurable (e.g., a ban on using marijuana) or to pay a fee for the privilege of engaging in that activity (e.g., a tax on the purchase of cigarettes). If citizens can evade detection by government regulators, they can avoid incurring these costs.

<sup>29</sup> See, e.g., ALASKA STAT. § 11.71.090(a) (2008) (granting an affirmative defense against criminal prosecution to those individuals who register medical use of marijuana with the state).

<sup>30</sup> See, e.g., FLA. STAT. § 893.135(4) (2011) (“The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any . . . person engaged in trafficking in controlled substances.”).

<sup>31</sup> See Brad Heath, *Silent Abuses*, USA TODAY, Dec. 19, 2011, at 2A (identifying categories of professionals in each state required to report instances of child abuse). In reality, however, child abuse reporting requirements are seldom enforced. See *id.* (“Even when authorities bring criminal

Through a combination of these approaches, the states have collected massive amounts of data on the activities they regulate. Oregon, for example, has coaxed more than 54,000 of its residents to provide state regulators with detailed documentation regarding their eligibility—and arguably their intention—to use marijuana for medical purposes.<sup>32</sup> In countless other detailed files, the states have compiled information they need to detect, prosecute, punish, and ultimately deter many (though not all) violations of state regulations.

### B. Using State Monitoring to Enforce Federal Law

So far, I have focused on how the states gather information about the activities they regulate. But of course, the federal government commonly employs the same basic strategies to gather information about the activities it regulates. It has its own extensive network of law enforcement agents—approximately 120,000 strong.<sup>33</sup> Like the states, the federal government also requires private citizens to monitor and report on some of the activities it regulates. Most notably, the IRS requires employers to report the wages of their employees. These reports give the IRS the data it needs to enforce income taxes against individual employees.<sup>34</sup> Federal agencies also require firms to report on a host of other activities ranging from large cash transactions to suspicious web downloads.<sup>35</sup>

The federal government, however, has another option at its disposal: it can obtain some of the information it needs from the states. In many instances, the same information the states gather to enforce their own laws could be used to enforce federal law as well. This is hardly surprising, since

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charges for not reporting abuse, court records show most of the cases are thrown out; those that aren't, seldom lead to jail time or significant fines.”).

<sup>32</sup> OR. HEALTH AUTH., OREGON MEDICAL MARIJUANA PROGRAM STATISTICS, <http://public.health.oregon.gov/DiseasesConditions/ChronicDisease/MedicalMarijuanaProgram/Pages/data.aspx> (last visited Oct. 11, 2012) (reporting enrollment statistics for state medical marijuana registry).

<sup>33</sup> See BRIAN REAVES, BUREAU OF JUSTICE STATISTICS, BULLETIN: FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 1 (2012), <http://www.bjs.gov/content/pub/pdf/fleo08.pdf> (compiling data on federal law enforcement officers drawn in part from the 2008 Census of Federal Law Enforcement Officers).

<sup>34</sup> See Mikos, *State Taxation*, *supra* note 22, at 235-37 (discussing the federal tax reporting requirements of third-party employers vis-à-vis their employees).

<sup>35</sup> See *e.g.*, 18 U.S.C. § 923(g)(1)(A) (2006) (requiring licensed firearms dealers to report, inter alia, all sales of firearms); *id.* § 2258 (requiring internet service providers to report known violations of federal child pornography laws); 21 U.S.C. § 5313 (requiring financial institutions to report transactions involving a threshold amount of currency).

Congress and the states share concurrent jurisdiction over a broad array of issues. Indeed, in many instances, state agencies can obtain better information on jointly regulated activities than can their federal counterparts.

State agencies have this informational advantage for two primary reasons. First, the states employ a much larger network of law enforcement agents than that employed by the federal government. Indeed, state law enforcement agents currently outnumber their federal counterparts nearly nine-to-one.<sup>36</sup> This larger network generates correspondingly larger volumes of data. Second, in many domains, the states give their residents stronger incentives to provide information about their activities.<sup>37</sup> For example, most medical marijuana states give their residents a powerful incentive to register to use the drug: doing so immunizes them from criminal prosecution under state law. These residents conversely have a strong incentive to hide their marijuana use from federal authorities because admitting their use to federal agents would expose them to harsh federal sanctions.

Given this information asymmetry, it is not surprising that federal agencies demand access to the information possessed by their state counterparts. To illustrate the allure of states' secrets for federal law enforcement agencies, imagine how the information contained in a state medical marijuana registry could bolster ongoing efforts to enforce the federal ban against medical marijuana. The federal ban on marijuana is likely having only a minimal impact on the market for medical marijuana at the moment. As I have explained elsewhere,

Though the [Controlled Substances Act] certainly threatens harsh sanctions [for possession and distribution of marijuana], the federal government does not have the resources to impose them frequently enough to make a meaningful impact on proscribed behavior . . . .

Given limited resources and a huge number of targets, the current expected [federal] sanction for medical marijuana users is quite low.<sup>38</sup>

By exploiting information already gathered by the states, however, federal agents could give the federal ban more bite.<sup>39</sup> Federal agents could use

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<sup>36</sup> See *supra* notes 27 & 33.

<sup>37</sup> The federal government has adopted a number of zero-tolerance policies that discourage private citizens from providing sensitive information, leaving big gaps in its information about the activities it regulates. For an illuminating discussion of federal hostility toward needle exchange programs and other harm-reduction policies, see NAT'L RESEARCH COUNCIL, PROCEEDINGS: WORKSHOP ON NEEDLE EXCHANGE AND BLEACH DISTRIBUTION PROGRAMS 113-26 (1994).

<sup>38</sup> Mikos, *Limits of Supremacy*, *supra* note 17, at 1464-65.

state medical marijuana registries to track down the people who are now using, recommending, and supplying marijuana pursuant to state law at little or no cost to the federal treasury. The federal government would then need to prosecute only a handful of medical marijuana users (or more likely, their suppliers) to greatly increase the expected sanction for flouting the federal marijuana ban. In fact, the Drug Enforcement Administration (DEA) has already exploited one state medical marijuana registry to bring criminal prosecutions against marijuana distributors.<sup>40</sup>

It is important to recognize that the federal government need not resort to such tactics. By using the same means currently employed by the states, the federal government could gather essentially the same information. Congress could boost funding for various federal law enforcement agencies to enhance their capacity to monitor regulated activity directly. It could also amend federal law to give private citizens stronger incentives to supply information to federal agencies. Or, at the very least, it could offer to buy the information it needs from the states.<sup>41</sup>

The problem with any of these strategies is that they entail costs, and Congress currently has little incentive to incur such costs when it can instead “free ride” off of state information-gathering efforts. As it stands, the federal government can commandeer virtually any piece of information the states possess.<sup>42</sup> The federal government does not need to invest in its own information-gathering apparatus when it can piggyback off of the labors of state gumshoe detectives. It does not need to compromise its own stern, zero-tolerance policies to encourage citizens to supply information when it can seize the information they have already supplied to the states. And it does not need to compensate the states for their troubles. The option of seizing information in this way clearly saves the federal government the considerable financial and political costs normally associated with monitoring regulated activity. But as I show below, those costs are never really saved; they are merely shifted onto the states.<sup>43</sup>

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<sup>39</sup> That is, at least until users figure out that the federal government can exploit the information they now provide to state authorities and stop providing that information. The potential to undermine state data collection is a hidden cost of commandeering states’ secrets. *See infra* Part II.A.

<sup>40</sup> *See infra* text accompanying note 67.

<sup>41</sup> *See infra* subsection IV.C.1.a.

<sup>42</sup> *See infra* Part III.

<sup>43</sup> *See infra* Part II.

### C. *The Commandeering of States' Secrets*

This Section identifies and details for the first time the three distinct means by which the federal government demands information from the states: (1) statutory reporting requirements, (2) administrative subpoenas, and (3) grand jury subpoenas. I call these three methods collectively *the commandeering of states' secrets*. The commandeering of states' secrets occurs any time the federal government compels a state to report or disclose any information the state possesses but does not want to (and has not already agreed to) share. I distinguish this form of commandeering from situations in which the federal government merely asks for information from a state, but gives the state the option to decline the request. For the most part, my analyses and criticisms of commandeering apply to all three methods of secrets commandeering employed by the federal government. There are, however, some differences among the methods that may justify treating them separately for constitutional purposes.<sup>44</sup>

#### 1. Statutory Reporting Requirements

In the first and most commonly discussed method of commandeering, Congress orders state officials to report information to a designated federal agency.<sup>45</sup> The requirements imposed by Congress so far have concerned a variety of regulatory areas. For example, Congress has ordered state medical boards to report all denials of staff privileges to a national databank.<sup>46</sup> It has ordered state law enforcement agencies to report cases of missing children to the DOJ's National Crime Information Center.<sup>47</sup> Congress has ordered state transportation authorities to provide traffic safety data to the Secretary of Transportation.<sup>48</sup> It has compelled state public safety agencies to inform the FEMA Administrator whether local hotels are in compliance with federal fire safety guidelines.<sup>49</sup> And it has ordered state governors to report the presence of asbestos in public and private K-12 schools to the EPA

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<sup>44</sup> See *infra* Section IV.C.

<sup>45</sup> On occasion, Congress also requires states to gather information they do not already possess, potentially exacerbating the costs of commandeering. I focus on the statutory duty to report information to emphasize how that seemingly mundane duty poses serious problems for states.

<sup>46</sup> 42 U.S.C. § 11133(b) (2006) (part of the Health Care Quality Improvement Act of 1986).

<sup>47</sup> 42 U.S.C. § 5779(a) (Crime Control Act of 1990).

<sup>48</sup> 23 U.S.C. § 402(a) (Highway Safety Act of 1991) (as amended by Pub. L. 112-141, 126 Stat. 405 (2012)).

<sup>49</sup> 15 U.S.C. § 2224(a)(1) (Hotel and Motel Fire Safety Act of 1990).

Administrator.<sup>50</sup> As the Supreme Court observed in *United States v. Printz*, information reporting requirements such as these are a recent feature of federal-state relations.<sup>51</sup> Indeed, the oldest reporting requirement I could find is no more than three decades old.

The reporting requirements imposed on the states help the federal government to enforce other federal laws. Consider the duties imposed under the Hotel and Motel Fire Safety Act of 1990.<sup>52</sup> The Act's express purpose was to "save lives and protect property by promoting fire and life safety in hotels, motels, and all places of public accommodation affecting commerce."<sup>53</sup> To that end, the Act requires such places to install fire alarms and sprinkler systems.<sup>54</sup> The sanction for failure to comply is debarment from hosting federally funded meetings, conventions, conferences, and similar functions.<sup>55</sup> To help enforce that debarment sanction, the Act compels states to "submit to the [Administrator of FEMA] a list of those places of public accommodation affecting commerce located in the State which . . . meet the requirements" of the Act.<sup>56</sup> In other words, the Act requires states to identify for a federal agency every venue that complies with the federal law.

Importantly, the duties imposed by the federal reporting statutes are compulsory. The Hotel and Motel Fire Safety Act, for example, does not even contemplate that a state might refuse to provide information. I distinguish these statutory reporting requirements from congressional statutes that merely *encourage* states to report information, but refrain from compelling them to do so. As I discuss below, such voluntary reporting arrangements do not raise the same objections as do compulsory demands for state records.<sup>57</sup>

## 2. Administrative Subpoenas

In a second method of commandeering, Congress delegates authority to federal agencies to demand information from private parties and, implicitly,

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<sup>50</sup> 20 U.S.C. § 4013 (Asbestos School Hazard Abatement Act of 1984).

<sup>51</sup> See 521 U.S. 898, 918 (1997) (declining to address the validity of several federal statutes of "recent vintage" that require the participation of state or local officials in the implementation of federal regulatory schemes).

<sup>52</sup> Pub. L. No. 101-391, 104 Stat. 747 (1990) (codified in scattered sections of 5 U.S.C. and 15 U.S.C.).

<sup>53</sup> *Id.* § 2(b).

<sup>54</sup> *Id.* § 3(a) (codified at 15 U.S.C. § 2225(a)).

<sup>55</sup> *Id.* § 6(a) (codified at 15 U.S.C. § 2225a(a)).

<sup>56</sup> *Id.* § 3(a) (codified at 15 U.S.C. § 2224(a)(1)).

<sup>57</sup> See *infra* subsection IV.C.1 (identifying permissible methods of federal solicitation of state data).

state governments, for use in civil or even criminal enforcement actions. These demands are called “administrative subpoenas.” To date, Congress has passed more than 300 administrative subpoena statutes “grant[ing] some form of administrative subpoena authority to most federal agencies.”<sup>58</sup> For example, the Controlled Substances Act (CSA) authorizes the Attorney General to “subpena [sic] witnesses, compel the attendance and testimony of witnesses, and require the production of any records . . . which the Attorney General finds relevant or material” to a federal drug investigation.<sup>59</sup> Pursuant to such statutory authority, agencies generally do not need prior court approval to issue administrative subpoenas.<sup>60</sup> What is more, agencies enjoy virtually unfettered discretion in crafting the subpoenas, as long as the “evidence sought . . . [is] not plainly incompetent or irrelevant to any lawful purpose.”<sup>61</sup>

Although administrative subpoena statutes generally do not explicitly authorize their use against the states, federal agencies have increasingly exercised this subpoena power to demand confidential information from state governments. This demand occurs in two types of situations. Most commonly, federal agencies have subpoenaed confidential records from a state or local government entity that is the target of an agency’s investigation. For example, Title VII expressly grants the Equal Employment Opportunity Commission (EEOC) access to “any evidence of any person being investigated . . . that relates to unlawful employment practices . . . and is relevant to the charge under investigation.”<sup>62</sup> Pursuant to that authority, the EEOC has subpoenaed employment records from a county public utility commission,<sup>63</sup> a city police department,<sup>64</sup> and a state highway

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<sup>58</sup> U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES 6 (undated), available at [http://www.justice.gov/archive/olp/rpt\\_to\\_congress.htm](http://www.justice.gov/archive/olp/rpt_to_congress.htm) [hereinafter DOJ REPORT].

<sup>59</sup> 21 U.S.C. § 876(a).

<sup>60</sup> See DOJ REPORT, *supra* note 58, at 7 (“While an agency’s exercise of administrative subpoena authority is not subject to prior judicial approval, a subpoena issuance is subject to judicial review . . .”). Even when prior court approval is needed, there are few grounds for challenging the request. See *United States v. Markwood*, 48 F.3d 969, 976 (6th Cir. 1995) (emphasizing that a “district court’s role in the enforcement of an administrative subpoena is a limited one”).

<sup>61</sup> *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (enforcing a subpoena issued by the Secretary of Labor for payroll records of a company paying workers below the minimum wage set by the Secretary).

<sup>62</sup> 42 U.S.C. § 2000e-8(a).

<sup>63</sup> See *EEOC v. Wash. Suburban Sanitary Comm’n*, 631 F.3d 174, 185 (4th Cir. 2011) (upholding, in an Age Discrimination in Employment Act case, the subpoena of employment records of a public utility).

authority,<sup>65</sup> among many others,<sup>66</sup> for use in probing employment discrimination claims against these same government agencies.

More troublingly, federal agencies have subpoenaed confidential state records to investigate potential federal offenses committed by private citizens. In one recent case, for example, the DEA invoked the Attorney General's authority under the CSA to subpoena the Michigan Department of Community Health for portions of its medical marijuana registry.<sup>67</sup> The registry contained medical histories and other information concerning seven individuals being investigated by the DEA for marijuana offenses under federal law.<sup>68</sup> In another case, the EEOC demanded the confidential transcripts of a state unemployment compensation hearing for purposes of investigating employment discrimination claims against a private employer.<sup>69</sup> In these and other cases, the courts have upheld the subpoenas against objections from state authorities.<sup>70</sup>

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<sup>64</sup> See *EEOC v. Norfolk Police Dep't*, 45 F.3d 80, 85 (4th Cir. 1995) (enforcing, in a race discrimination case, the subpoena of the police department's policy on the reinstatement of an officer suspended for criminal violations).

<sup>65</sup> See *EEOC v. Ill. State Tollway Auth.*, 800 F.2d 656, 660 (7th Cir. 1986) (upholding, in a religious discrimination case, the subpoenas of a state agency for documents and interviews with agency employees).

<sup>66</sup> See, e.g., *EEOC v. Elrod*, 674 F.2d 601, 603, 613-14 (7th Cir. 1982) (upholding, in an age discrimination case, administrative subpoenas for the Cook County Department of Corrections' retirement policy as well as the testimony of a knowledgeable officer); *Nueces Cnty. Hosp. Dist. v. EEOC*, 518 F.2d 895, 897-98 (5th Cir. 1975) (upholding, in a discrimination case, the EEOC's authority to subpoena the personnel director of the Nueces County Hospital District to appear and provide various documents to the Commission); *EEOC v. Univ. of N.M.*, 504 F.2d 1296, 1298-99, 1306 (10th Cir. 1974) (upholding, in a national origin discrimination case, the subpoena of university personnel files for recently terminated and current faculty members).

<sup>67</sup> See *United States v. Mich. Dep't of Cmty. Health*, No. 10-109, 2011 WL 2412602, at \*1-2, \*11 (W.D. Mich. June 9, 2011) (citing 21 U.S.C. § 876 (a) and (c) as the source of the Attorney General's authority to issue and enforce subpoenas).

<sup>68</sup> *Id.* at \*1 (reporting that the subpoena sought "copies of any and all documents, records, applications, payment method of any application for Medical Marijuana Patient Cards and Medical Marijuana Caregiver cards and copies of front and back of any cards" for seven named individuals (citation omitted)).

<sup>69</sup> See *EEOC v. Ill. Dep't of Emp't Sec.*, 995 F.2d 106, 107, 109 (7th Cir. 1993) (determining that the EEOC's subpoena of unemployment compensation hearings was valid despite a conflicting state statute making such records confidential); see also *Sexton v. Poole Truck Lines, Inc.*, 888 F. Supp. 127, 131 (M.D. Ala. 1994) (refusing to quash plaintiff's discovery request for confidential licensing records maintained by the Alabama Department of Public Safety, which the plaintiff planned to use in an Americans with Disabilities Act claim against his private employer).

<sup>70</sup> See, e.g., *United States v. Colo. Bd. of Pharmacy*, No. 10-01116, 2010 WL 3547898, \*1, \*4 (D. Colo. Aug. 13, 2010) (upholding DEA subpoenas of confidential state pharmacy records in a federal investigation of possible drug offenses by three physicians).



### 3. Grand Jury Subpoenas

In the third method of commandeering, federal grand juries subpoena documents and testimony for use in federal criminal investigations.<sup>71</sup> The federal grand jury has substantial investigatory authority, and the Supreme Court has repeatedly approved the zealous exercise of that authority in criminal cases. In *United States v. Morton Salt Co.*, for example, the Court asserted that the grand jury “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.”<sup>72</sup> Then, in *Branzburg v. Hayes*, the Court emphasized that “[a] grand jury investigation ‘is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.’”<sup>73</sup> Even though the grand jury is a quasi-judicial body, it is the United States Attorney who wields the grand jury’s broad investigative powers as a practical matter.<sup>74</sup> For example, the United States Attorney may issue subpoenas on behalf of the grand jury, without its prior approval or knowledge.<sup>75</sup>

Over the past few decades, federal prosecutors have aggressively employed the grand jury subpoena power to demand confidential records from state agencies for use in investigating federal crimes committed by state agents and private citizens alike. To give just a few examples, federal grand juries have issued subpoenas for individual and business tax returns submitted to state revenue agencies;<sup>76</sup> contingency fee agreements filed in

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<sup>71</sup> See *infra* subsection IV.C.2.a.

<sup>72</sup> 338 U.S. 632, 642-43 (1950).

<sup>73</sup> 408 U.S. 665, 701 (1972) (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)); see also *United States v. Calandra*, 414 U.S. 338, 343 (1974) (stating that a grand jury “may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials”); *United States v. R. Enters., Inc.*, 498 U.S. 292, 298-99 (1991) (explaining that subjecting grand jury proceedings to various procedural rules would delay and potentially undermine the secrecy of the proceedings).

<sup>74</sup> See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 8.2(c) (3d ed. 2000) (discussing the prosecutor’s role in conducting and controlling grand jury investigations).

<sup>75</sup> See 1 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 9.2 (2d ed. 2006) (“Prosecutors do not have to obtain a grand jury’s approval before issuing subpoenas; indeed, a grand jury may not even be aware that a prosecutor is issuing subpoenas on its behalf.”).

<sup>76</sup> See *In re Grand Jury Subpoena for N.Y. State Income Tax Records*, 468 F. Supp. 575, 576-78 (N.D.N.Y.) (refusing to quash a grand jury subpoena for income tax records on file at the New York State Department of Taxation because the objective of confidentiality provisions in the tax law is “more than counterbalanced by the necessity of thorough grand jury investigations”), *appeal dismissed*, 607 F.2d 566 (2d Cir. 1979); *In re N.Y. State Sales Tax Records*, 382 F. Supp. 1205, 1206

state court;<sup>77</sup> disciplinary records maintained by a state bar association;<sup>78</sup> patient complaints submitted to a state medical ethics board;<sup>79</sup> unemployment compensation records submitted by private employers to a state industrial relations board;<sup>80</sup> and communications between a state social worker and her charges<sup>81</sup>—all for investigations of criminal misconduct by private citizens. In each case, the courts enforced the subpoenas despite vigorous objections raised by the state agencies.

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In sum, by employing large numbers of government agents and by granting regulatory concessions to induce private reporting, the states have been remarkably successful at gathering data about regulated activity. Their success has not gone unnoticed by federal law enforcement agencies, which, across a number of domains, have less information about compliance with federal law than do their state counterparts. Though the states do not always want to share their information, the federal government has three legal tools at its disposal to compel them to do so: congressionally imposed mandatory reporting requirements, administrative subpoenas, and grand jury subpoenas. It thus appears the states cannot keep secrets from the federal government.

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(W.D.N.Y. 1974) (“The powers of the federal grand jury . . . must prevail over the nondisclosure provision of . . . the New York State Tax Law.”).

<sup>77</sup> See *In re Grand Jury Impaneled* Jan. 21, 1975, 541 F.2d 373, 382 (3d Cir. 1976) (“[A]ny presumed privilege created by [the Philadelphia Court of Common Pleas] Rule 202 must yield here to the public’s interest in law enforcement and in ensuring effective grand jury proceedings.”).

<sup>78</sup> See *United States v. Silverman*, 745 F.2d 1386, 1398 (11th Cir. 1984) (upholding the validity of a subpoena because Federal Rule of Criminal Procedure 17(c) and Federal Rule of Evidence 501 prevail over “state law privileges in criminal cases,” including privileges under the Florida Bar rules).

<sup>79</sup> See *In re Grand Jury Matter*, 762 F. Supp. 333, 335 (S.D. Fla. 1991) (recognizing that the Supremacy Clause requires federal grand jury investigatory powers to prevail over conflicting state confidentiality provisions).

<sup>80</sup> See *United States v. Blasi*, 462 F. Supp. 373, 374 (M.D. Ala. 1979) (refusing to quash a subpoena as requested by the Alabama Director of Industrial Relations in spite of state legal prohibitions against such disclosure).

<sup>81</sup> See *In re Prod. of Records to the Grand Jury*, 618 F. Supp. 440, 441, 444 (D. Mass. 1985) (holding that, if a grand jury could show by affidavit the necessity of obtaining patients’ communications to social workers, then the federal government’s need for the information could override privileges of nondisclosure afforded to the Massachusetts Department of Social Services).

## II. COMMANDEERING'S HARMES

In this Part, I identify and discuss the two primary harms caused by the commandeering of states' secrets—harms that have been overlooked or misjudged by courts and legal scholars. First, commandeering states' secrets has economic costs, which drain state resources. The direct costs of complying with a federal subpoena or reporting requirement are usually trivial, but the dynamic costs are not. By increasing the incentives of citizens to conceal activity from state regulators, the threat of commandeering makes it more difficult for states to gather information in the first instance. Second, commandeering states' secrets has political costs. One such cost is that commandeering forces state officials to advance federal policies that they or their constituents may deem objectionable. A second political cost is that commandeering blurs the lines of political accountability. State officials might be unfairly blamed for providing information to federal officials and advancing controversial federal policies. Importantly, these economic and political costs correspond to the costs animating the Supreme Court's anti-commandeering decisions. They also form the normative basis for a viable constitutional federalism challenge to the commandeering of states' secrets under the anti-commandeering rule.<sup>82</sup>

### A. *The Economic Costs*

To begin, commandeering states' secrets can make it far more difficult for states to gather data about regulated activity. Commandeering states' secrets increases citizens' incentives to conceal their activity from state monitors, because it links the work of those monitors to the enforcement of federal law and the imposition of federal sanctions. As a result, states must spend more to get the same information they would have obtained without commandeering.<sup>83</sup>

As explained earlier,<sup>84</sup> individuals engaging in regulated activity have an incentive to conceal that activity from the government to evade the costs of

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<sup>82</sup> See *infra* Part IV.

<sup>83</sup> See Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1422-24 (2005) [hereinafter Mikos, *Enforcing State Law*] (explaining how imposing federal sanctions on persons convicted of state crimes may cause defendants in state cases to resist charges more aggressively, at substantial cost to state prosecutors); see also Mikos, *State Taxation*, *supra* note 22, at 258-59 (suggesting that the threat their tax databases could be commandeered would undermine state efforts to monitor and collect proposed state excise taxes on the distribution of marijuana).

<sup>84</sup> See *supra* note 28.

regulation. 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. In particular, she must consider the increase in the expected federal sanction that stems from giving the federal government access to the information. If the increase is large enough, the citizen may withhold information from the state,<sup>85</sup> thereby forcing the state to obtain the information using other, more costly means.

To see how even small changes (real or perceived) in expected federal sanctions can discourage citizens from cooperating with state officials, consider an example involving a proposed state marijuana tax.<sup>86</sup> In particular, suppose that a state legalizes the distribution of marijuana, but imposes a 10% tax on such sales—a level roughly equivalent to what it considers the harms attributable to marijuana. To help enforce the tax, the state requires all marijuana distributors to obtain a license and to record and report all sales to the state's revenue collection agency. To give this reporting requirement some teeth, the state threatens to impose a fine equivalent to 200% of unreported sales, and it employs gumshoe detectives to identify reporting violations. Suppose these detectives uncover 10% of all unreported sales. In this hypothetical, a risk-neutral marijuana distributor would have an incentive to fully report her taxable sales to the state. Doing so exposes her to a certain 10% tax on reported sales, but that is less than the expected fine of 20% (200% x 10%) on unreported sales.

Notwithstanding state law, of course, the distribution of marijuana remains a federal crime. Suppose, for ease of illustration, that the federal government threatens to impose sanctions on marijuana distribution equivalent to 100% of the value of marijuana sold. Suppose as well that the federal government can detect only 5% of all marijuana sales using its own agents. This likely would not be enough to deter marijuana distribution; it effectively amounts to a 5% tax on the drug. But suppose the United States Attorney threatens to commandeer the state's tax records to bolster enforcement of the federal ban. With those records, the federal government

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<sup>85</sup> See, e.g., John Richardson, *New Privacy Rules for Medicinal Pot Face U.S. Scrutiny*, PORTLAND PRESS HERALD (Me.) (May 14, 2011), [http://www.pressherald.com/news/new-privacy-rules-for-medicinal-pot-face-u\\_s\\_scrutiny\\_2011-05-14.html](http://www.pressherald.com/news/new-privacy-rules-for-medicinal-pot-face-u_s_scrutiny_2011-05-14.html) (reporting concerns that many patients have not signed up for Maine's medical marijuana registry because of the fear it could be exploited by the federal government).

<sup>86</sup> For an in-depth discussion of recent proposals to legalize and tax marijuana at the state level, and the overlooked obstacles the federal marijuana ban creates for state tax collection efforts, see Mikos, *State Taxation*, *supra* note 22, at 248-61.

could detect 100% of all sales reported to the state tax agency, in contrast to only 5% of all unreported sales.<sup>87</sup> In this case, the distributor would have a strong incentive *not* to report to the state agency or pay the state marijuana tax. If she reports the transactions, she now faces \$10 in state tax for every \$100 in sales plus \$100 in federal sanctions—a total expected “sanction” of \$110.<sup>88</sup> By contrast, if she does not report, she faces only \$20 in expected state sanctions and another \$5 in expected federal sanctions, for a total of only \$25 in expected sanctions. The dramatic increase in the probability of being caught and sanctioned by the federal government makes reporting extremely costly to regulated parties and seriously undermines state information-gathering programs.

Since the work product of state gumshoe detectives can also be commandeered by the federal government, this information-gathering strategy can also be undermined by federal commandeering. As discussed above, gumshoe detectives frequently depend on cooperation from private citizens—crime victims, witnesses, etc.—in conducting their investigations. Citizens may be less forthcoming, however, if the information they give to state agents is turned over to federal law enforcement. Immigrant communities, for example, seem reluctant to cooperate with local police departments because they fear local police will share information about their own (or a loved one’s) immigration status with federal immigration authorities.<sup>89</sup> In short, whether states gather information via their own agents or citizens, they will have a harder time getting that information when the federal government threatens to take it and use it for its own purposes.

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<sup>87</sup> In this example, the federal government could increase the probability of detecting unreported sales by commandeering the investigatory files of the state’s tax agency. That would increase the probability of detection for unreported sales by up to 10%, but it would not dramatically alter the incentive to report.

<sup>88</sup> Even if the federal government pursues cases against only a portion of reported sales, it could still tip the balance against reporting. Indeed, in this example, the federal government would need to prosecute only 11% of reported sales to make the total cost of reporting (here, \$21) exceed the cost of not reporting (\$20).

<sup>89</sup> See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1476-77 (2006) (“Deportation of unauthorized aliens who report crimes to the police is described [by supporters of sanctuary policies] as harming relations between the police and those citizens and legal aliens who may be family members or associates of the deported alien.” (citation omitted)); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 604 (2008) (suggesting that one rationale behind local sanctuary laws is to increase cooperation between immigrant populations and the police, presumably to increase the reporting of information relevant for law enforcement purposes).

The severity of the disruption to state information gathering depends on the marginal expected federal sanction attributable to commandeering.<sup>90</sup> The expected federal sanction due to commandeering is a function of two variables. First, it depends on the magnitude of the gross sanction that would be imposed by the federal government as a result of having the information. In some situations, of course, the federal sanction is small or even nonexistent, as is the disruption to state information gathering. In Nevada, for example, state regulators closely monitor brothels—legal in some counties—in order to protect the health of prostitutes and customers.<sup>91</sup> Among other things, the state requires prostitutes to undergo regular health tests to screen for various sexually transmitted diseases.<sup>92</sup> The state succeeds at gathering such sensitive information because (1) prostitutes gain a lucrative benefit by reporting themselves—namely, the state’s permission to engage in the sex trade; and (2) the federal government does not punish prostitution.<sup>93</sup> In other situations, by contrast, the threatened federal sanction is large, and commandeering threatens to disrupt the flow of information to the state. The federal sanctions for marijuana distribution, for example, are quite large: distributors face long prison terms, large fines, and civil forfeiture actions under federal law.<sup>94</sup> Distributors might forego reporting to state regulators—and whatever regulatory benefits such regulators offered them—to avoid these federal sanctions.<sup>95</sup> Similarly,

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<sup>90</sup> See Mikos, *Enforcing State Law*, *supra* note 83, at 1435-41 (discussing the factors in another legal context that help determine the effect of federal supplemental sanctions on a defendant’s efforts in resisting a state criminal conviction).

<sup>91</sup> For a discussion of Nevada’s unique regulatory approach to prostitution, see generally Daria Snadowsky, Note, *The Best Little Whorehouse is Not in Texas: How Nevada’s Prostitution Laws Serve Public Policy, and How Those Laws May be Improved*, 6 NEV. L.J. 217, 226-34 (2005).

<sup>92</sup> *Id.* at 227-29.

<sup>93</sup> To be sure, Congress has proscribed certain prostitution-related activities, but Nevada’s industry does not necessarily violate any of these federal laws. See, e.g., 18 U.S.C. § 1384 (2006) (banning prostitution “[w]ithin such reasonable distance of any” military base).

<sup>94</sup> See, e.g., 21 U.S.C. § 841 (enumerating penalties for the illegal distribution of controlled substances, including marijuana).

<sup>95</sup> See, e.g., Richardson, *supra* note 85. People who do not face federal sanctions—and are not affiliated with anyone else who does—presumably would not care if or how the federal government uses the information they provide. However, such disinterested third-party sources of information are likely to be rare, especially when the activity being regulated is private and consensual. In any event, even this modest source of information could disappear if the parties who do face sanctions try harder to conceal it from disinterested third-parties.

deportation is clearly harsh enough to dissuade some immigrant communities from cooperating with state law enforcement.<sup>96</sup>

Second, the disruption also depends on how much the commandeering of the state's information would increase the probability of being detected by the federal government. For example, if a citizen is sure to be caught by federal authorities anyway, the marginal cost of providing incriminating information to the state will be zero, no matter how large the gross federal sanction. She would report her activity to the state despite the threat of commandeering, as long as state law gave her sufficient inducement to do so. More realistically, however, the probability of being detected by federal authorities absent commandeering will be less than one—indeed, in many cases, the probability approaches zero.<sup>97</sup> The point of commandeering states' secrets is, after all, to boost detection of federal offenses that would otherwise escape detection or be difficult to prove.

In a related vein, the disruption also depends on citizens' expectations about whether the federal government would actually commandeer information. The federal government does not demand all of the information gathered by the states, even though it arguably could (given current law). For example, until recently, the federal government seemed reluctant to commandeer state medical marijuana registries, perhaps reflecting a reluctance to prosecute medical marijuana patients.<sup>98</sup> It stands to reason that if citizens believe the federal government will not commandeer (or use) the information, commandeering's theoretical availability will not necessarily burden state information gathering.<sup>99</sup>

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<sup>96</sup> See Mikos, *Enforcing State Law*, *supra* note 83, at 1444-56 (discussing, in a related context, the effect that deportation can have on unauthorized aliens' incentives to contest state criminal charges).

<sup>97</sup> See *supra* Section I.B (discussing the federal government's limited detection capacity).

<sup>98</sup> See Mikos, *Limits of Supremacy*, *supra* note 17, at 1443 ("As a practical matter, most people can smoke marijuana for any purpose without having to worry much about being caught and punished by the federal government.")

<sup>99</sup> For this reason, the states have enjoyed some successes in monitoring federally proscribed behaviors. In many states, for example, large numbers of residents have registered to use medical marijuana. Even these apparent successes, however, are somewhat misleading. One never knows how much information has been withheld because of the threat of commandeering. In Maine, for example, state lawmakers complained that many medical marijuana users were not registering with the state out of fears their information could be used by the federal government. See Richardson, *supra* note 85. In fact, the state abandoned the mandatory registration model due to such fears. See 22 ME. REV. STAT. ANN. tit. 22, § 2425 (9-A) (2012) ("Registration . . . is voluntary for a qualifying patient . . . . Failure to register under this section does not affect authorized conduct for a qualifying patient . . . ."). In addition, the states' successes may prove to be their undoing, because their information will be even more valuable to federal officials when it is more complete, thereby increasing the probability of commandeering.

Nevertheless, the fact that commandeering is not inevitable mitigates, but does not eliminate, the costs imposed on the states. After all, the mere threat of federal commandeering—even if it does not materialize—may be enough to discourage some citizens from supplying states with information. Maine, for example, recently ended its compulsory medical marijuana registration system in part out of concerns that the system could be co-opted and exploited by federal agents.<sup>100</sup> Barring constitutional protection for states' secrets, there can be no assurance the federal government will refrain from commandeering altogether,<sup>101</sup> and the mere threat of commandeering will continue to burden the states. In any event, as discussed above, federal agents have not hesitated to demand very sensitive information from the states in the past.

This particular cost of commandeering is very similar to the cost incurred whenever a privilege is denied. As the Court explained in *Jaffee v. Redmond*, “Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being.”<sup>102</sup> To replace the information lost due to the threat of commandeering, the states must do at least one of two things. First, states must employ more government agents to pry into regulated activity in order to inspect, investigate, interrogate, spy, etc. Or, second, states must grant information providers even deeper regulatory concessions to compensate for the concomitant exposure to federal authorities. The former tactic has obvious financial costs, and employing government agents to monitor activities closely raises serious privacy concerns as well. The latter tactic has costs that are tougher to describe and monetize, but are no less real or troubling. In essence, state regulators must adjust their laws to boost cooperation that would be forthcoming *but for* the threat of commandeering. The threat of commandeering forecloses the optimal balance the states could otherwise strike between severity and enforceability.

### B. *The Political Costs*

Commandeering states' secrets inflicts a second, and potentially more serious, harm on state officials. It forces them to help the federal government enforce and administer policies they or their constituents oppose.

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<sup>100</sup> See *supra* note 85.

<sup>101</sup> For a discussion of why the political process cannot be trusted to safeguard states' secrets, see *infra* Section IV.D.

<sup>102</sup> 518 U.S. 1, 12 (1996).



What is more, such commandeering of the states' information-gathering apparatus blurs the lines of accountability for unpopular enforcement actions.

Congress and the states disagree over how, and even whether, a wide range of private activities should be curbed. On the one hand, the federal government unequivocally bans a number of activities it deems inherently dangerous or immoral, including the distribution of marijuana,<sup>103</sup> the provision of controversial abortion procedures,<sup>104</sup> and the possession of machine guns.<sup>105</sup> On the other hand, states sometimes permit these very same activities, rejecting the federal government's harsh zero-tolerance approach, for one of two main reasons. First, like the federal government, a state might condemn an activity on deontological or instrumental grounds but nonetheless, might reject zero-tolerance as a cost-prohibitive or inefficacious solution and instead carve out a more tolerant approach that focuses on reducing the harms associated with the activity.<sup>106</sup> For example, several state and local governments have legalized Syringe Exchange Programs (SEPs),<sup>107</sup> which provide free, sterile hypodermic syringes to heroin users.<sup>108</sup> SEPs are not designed to reduce the rate of intravenous drug abuse but rather one of its most serious harms: the transmission of blood-borne diseases among syringe-sharing users.<sup>109</sup> The federal government, by

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<sup>103</sup> See, e.g., 21 U.S.C. § 841(a)(1) (2006) (declaring it unlawful "to manufacture, distribute, or dispense[] a controlled substance").

<sup>104</sup> See, e.g., 18 U.S.C. § 1531(a) ("Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.").

<sup>105</sup> See, e.g., 18 U.S.C. § 922(o)(1) ("[I]t shall be unlawful for any person to transfer or possess a machinegun [sic].").

<sup>106</sup> For a useful taxonomy of regulatory options ranging between zero-tolerance and absolute legalization, see Robert MacCoun, Peter Reuter & Thomas Schelling, *Assessing Alternative Drug Control Regimes*, 15 J. POL'Y ANALYSIS & MGMT. 330, 331-38 (1996).

<sup>107</sup> See, e.g., Lawrence O. Gostin & Zita Lazzarini, *Prevention of HIV/AIDS Among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention*, 46 EMORY L.J. 587, 667-72 (1997) (noting that 53% of the SEPs operating in North America listed in a 1996 survey were "legal" inasmuch as "they operated in states with no syringe prescription laws or under exemptions to the state prescription laws allowing the SEP to operate").

<sup>108</sup> SEPs perform several other services as well, including collecting used syringes from injection-drug users, referring participants to health care services such as drug treatment, teaching safe injection practices, and providing condoms to prevent the spread of sexually transmitted diseases. See *Syringe Exchange Programs—United States, 2005*, 56 MORBIDITY & MORTALITY WKLY. REP. 1164, 1164-67 (2007), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5644.pdf> (reporting survey results detailing the operations of SEPs).

<sup>109</sup> For a review of the public health literature discussing the effectiveness of SEPs at reducing infections, see Gostin & Lazzarini, *supra* note 107, at 678-79.

contrast, has flatly refused to fund SEPs<sup>110</sup> and has banned the sale of drug syringes<sup>111</sup> out of fears that easy access to syringes may encourage illicit drug use.<sup>112</sup> Second, in other situations, a state might not even condemn the activity that Congress restricts or forbids outright. Unlike the federal government, it might believe the activity is, on balance, beneficial or at least a matter of one's personal choice. For example, a large and growing number of states allow certain residents to use marijuana for medical purposes.<sup>113</sup> Rightly or wrongly, these states have decided that the benefits of marijuana use for qualified patients outweigh the dangers—a view the federal government has staunchly rejected.

In many policy domains, the states object to assisting the enforcement of federal law on principled, not just instrumental, grounds. In other words, they care about more than the burden such demands impose upon their monitoring efforts; they also care about how their labors are being put to use, and they strongly object to advancing federal policies they deem cruel or offensive. The struggle over immigration policy provides but one salient example. Many state and local governments object to federal deportation policy, deeming it overly harsh.<sup>114</sup> In response, a number of city governments have adopted sanctuary policies that prohibit local officials from providing information on immigration status or other city services that

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<sup>110</sup> See Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 807, 125 Stat. 786, 941 (2011) (“None of the Federal funds contained in this Act may be used to distribute any needle or syringe for the purpose of preventing the spread of blood borne pathogens in any location that has been determined by the local public health or local law enforcement authorities to be inappropriate for such distribution.”). The ban originated in 1988 and was temporarily lifted from 2009–2011. See Bob Egelko, *GOP Restores Ban on Funding Needle Exchange*, S.F. CHRON., Dec. 25, 2011, at C1 (detailing the political negotiations that led to the reinstatement of the ban).

<sup>111</sup> 21 U.S.C. § 863(a)(1) (2006) (“It is unlawful for any person . . . to sell or offer for sale drug paraphernalia . . .”). Importantly, however, Congress has empowered the states to opt-out of the federal ban. See 21 U.S.C. § 863(f)(1) (providing that the ban shall not apply to “any person authorized by local, State, or Federal law to manufacture, possess, or distribute [drug paraphernalia]”).

<sup>112</sup> See Kiran Patel, *Research Note: Drug Consumption Rooms and Needle and Syringe Exchange Programs*, 37 J. DRUG ISSUES 737, 742 (2007) (“The main disadvantage that has been highlighted regarding needle and syringe exchange and DCRs is that they encourage illicit drug use by sanitizing and legitimizing the practice.”). But see Gostin & Lazzarini, *supra* note 107, at 680-81 (reporting that studies have found no evidence that SEPs increase the number of users or frequency of drug use).

<sup>113</sup> See 17 *Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PRO-CON.ORG (last updated Aug. 13, 2012, 11:01:38 AM), [http://medicalmarijuana.procon.org/view\\_resource.php?resourceID=000881](http://medicalmarijuana.procon.org/view_resource.php?resourceID=000881) (listing U.S. jurisdictions that allow varying degrees of medical marijuana use).

<sup>114</sup> See Rodríguez, *supra* note 89, at 604-05 (discussing various motivations behind the adoption of sanctuary laws).

would assist Immigration and Customs Enforcement (ICE) in tracking down, detaining, and deporting suspected undocumented aliens.<sup>115</sup> Similarly, several state and local governments have recently denounced ICE's Secure Communities Program, which uses biometric data submitted by states to a national criminal justice databank to identify and track down deportable aliens.<sup>116</sup> In part, these noncooperation policies reflect the instrumental concern that sharing information with ICE could damage the cities' ability to enforce their own policies. For example, undocumented aliens are unlikely to report crimes to police if they fear they will be turned over to ICE; this naturally hinders the work of state and local law enforcement agencies.<sup>117</sup> But the sanctuary policies and protests over Secure Communities also reflect the view that local resources should not be used to advance what many perceive to be draconian federal immigration policies.<sup>118</sup> For example, local officials may think it unduly harsh to deport someone who has just become the victim of a crime, even if that person is in the country illegally.

In fact, the federal government seems most likely to seize information from the states in order to punish activities not punished by the states. Federal authorities may have greater need for the data states possess about such activities, given that federal policy likely encourages people to engage in detection avoidance. For example, ICE relies heavily upon state law enforcement data to enforce federal immigration laws (despite the protests noted above).<sup>119</sup> In addition, federal authorities may be more inclined to pursue enforcement actions when they know that doing so does not merely displace state enforcement. In a perverse way, a state program that gener-

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<sup>115</sup> See *id.* at 600-05 (providing an overview of the sanctuary law movement).

<sup>116</sup> See Ryan Gabrielson, *Feds Circumvent State on Immigration Fingerprint Checks*, CALIFORNIAWATCH, (Aug. 10, 2011), <http://californiawatch.org/print/11993> (reporting that three states had withdrawn from partnership with ICE, and that California was considering doing the same).

<sup>117</sup> See Rodríguez, *supra* note 89, at 604 (explaining that municipalities pass sanctuary laws to enhance trust between immigrant residents and law enforcement); see also Kittrie, *supra* note 89, at 1475 ("The predominant reason local officials give for sanctuary policies has been the desire to encourage unauthorized aliens to report crimes to which they are victims or witnesses.").

<sup>118</sup> See Rodríguez, *supra* note 89, at 604 ("[S]anctuary laws represent instances of local officials staking out political positions in some tension with federal intentions. In the case of the original sanctuary movement, for example, local officials expressed opposition to U.S. foreign policy in Central America and dissatisfaction with the government's failure to grant asylum to the victims of that policy.").

<sup>119</sup> See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Oct. 11, 2012) (identifying sixty-four state and local law enforcement agencies in twenty-four states that have delegated immigration enforcement authority).

ates information about an activity the federal government proscribes could increase the probability that federal sanctions will be imposed against the people the states deem least deserving of it (e.g., a deportable noncitizen who fully cooperates with a criminal investigation). It is a perverse outcome that state regulators must consider when gathering information about an activity that the state treats differently (and usually more leniently) than does the federal government.

Not only are states forced to advance objectionable, and what might otherwise be toothless, federal policies, but also state officials might be blamed by constituents for helping federal authorities to enforce those policies. When the federal government orders a state official to provide information about violations of an unpopular federal law, there is a real danger that citizens will denounce the official for being complicit in federal law enforcement—i.e., they will label the state official a snitch and not merely a stooge.<sup>120</sup> For example, when a citizen is discovered and prosecuted by the federal government using information she submitted to her state, she might blame the state official who disclosed the information to the federal government, especially if that official had earlier vouchsafed her confidentiality.<sup>121</sup>

It hardly seems fair to blame state officials for exposing secrets under federal court orders. State officials cannot simply disregard such orders because they can be fined or imprisoned for doing so.<sup>122</sup> Nor can state officials do much to challenge such orders; as discussed below, most challenges prove futile under the current interpretation of federal statutory and constitutional law. But as a practical matter, their constituents might easily draw the conclusion that state officials who provide information to federal authorities disregard their needs and interests.

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<sup>120</sup> The label “snitch” (i.e., informer) evokes a powerful negative connotation. *See, e.g.*, Alan Feuer & Al Baker, *Officers’ Arrests Put Spotlight On Police Use of Informants*, N.Y. TIMES, Jan. 27, 2008, Metro Section, at A25 (discussing public backlash against citizens who provide information to assist criminal investigations).

<sup>121</sup> The recent uproar over the Michigan State Attorney General’s decision to abide by a federal subpoena seeking privileged medical marijuana registration information illustrates the political dangers posed by commandeering. *See e.g.*, John Agar, *Back Off, Attorney General Urged - Lawyer Claims State’s Top Lawman Has Conflict in Medical Pot Case*, GRAND RAPIDS PRESS (Mich.), Jan. 13, 2011, at A5 (reporting that intervening counsel had criticized Michigan Attorney General for providing federal agents with sensitive information from the state’s medical marijuana registry); Barrie Barber, *Recall Targets AG’s Medical Pot Stance*, SAGINAW NEWS (Mich.), July 21, 2011, at A4 (reporting that a recall petition was launched to oust the Attorney General based on his lack of support of the state law permitting medicinal use of marijuana).

<sup>122</sup> *See infra* note 296 (identifying Federal Rule of Criminal Procedure 17(g) and various federal statutes as providing authority for such sanctions).

Moreover, state officials cannot easily warn citizens in advance of the prospects of commandeering in order to redirect blame back onto the federal government. Commandeering is unpredictable. With the exception of statutory reporting requirements, the federal government does not warn state officials that the data they are collecting will later be seized to enforce federal law. State officials have no reliable way to predict which data the federal government will seize down the road. To be sure, state officials could provide a standard disclaimer every time they seek to extract sensitive information from their citizens.<sup>123</sup> But doing so could exacerbate the economic costs of commandeering by leading citizens to overestimate the threat of commandeering.

Currently, the only way state officials can avoid serving as the tools of federal law enforcement is to take the drastic step of abandoning monitoring altogether. In practical effect, this means abandoning enforcement of the regulations for which data collection was required in the first place. Importantly, even when a state objects to the restrictions federal law imposes on a particular activity, it may still want to impose some restrictions of its own. For example, almost every state that has legalized marijuana for medicinal purposes continues to ban use of the drug for other purposes.<sup>124</sup> But abandoning data collection on medicinal marijuana renders the enforcement of this legal distinction difficult, if not impossible. What is more, state officials might be unfairly blamed for undetected and unpunished violations of state law because of the choice to abandon careful monitoring. It is not likely that constituents would understand that the threat of commandeering motivated this choice. Thus, while abandoning information gathering insulates a state official from being perceived as a snitch, it also exposes the official to being perceived as incompetent for failing to enforce state law.

The threat of having their labor co-opted for objectionable purposes puts state lawmakers in a dilemma. On the one hand, if state officials gather information on activities that are also (or someday may be) regulated by the federal government, they might later be forced to provide that information

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<sup>123</sup> For example, "WARNING: ANYTHING YOU TELL US CAN BE USED AGAINST YOU BY FEDERAL AUTHORITIES."

<sup>124</sup> See Mikos, *Limits of Supremacy*, *supra* note 17, at 1427 ("[O]utside the context of recently enacted medical use exemptions . . . marijuana remains a strictly forbidden and usually (though not always) criminal drug at the state level."). Colorado and Washington recently legalized marijuana for recreational purposes, but even these states impose some constraints on who may use and distribute the drug. See Joel Millman & Nathan Koppel, *Pot Measures' Passage Puts States in Quandary*, WALL ST. J., Nov. 8, 2012, at A14.

to federal authorities and thereby help administer objectionable federal policies. Doing so also potentially jeopardizes their own political fortunes. On the other hand, if state officials refuse to gather such information, they will undermine their own policy objectives. And they might still incur the wrath of their constituents. As it stands, state lawmakers have no easy way out of this dilemma.<sup>125</sup>

This dilemma arises in a number of contemporary policy arenas and may help to explain some otherwise puzzling choices states have made regarding the monitoring (or lack thereof) of regulated activities. Consider the example of medical marijuana. Most states that have legalized medical marijuana have adopted mechanisms to monitor the supply and use of the drug, including patient registration systems.<sup>126</sup> Compulsory registration systems help state law enforcement agents quickly, cheaply, and accurately determine who may legally possess marijuana.<sup>127</sup> The problem, of course, is that registration systems can also help federal law enforcement agents just as quickly, cheaply, and accurately sanction the same individuals.<sup>128</sup> Hence, to avoid exposing qualified patients and their suppliers to federal authorities, a few states have eschewed compulsory registration.<sup>129</sup> This approach reduces the likelihood of exposing qualified patients to federal law enforcement agents, but it also permits abuse of state medical marijuana exemptions. In a no-registration state, police must determine for themselves whether a suspect is eligible to use marijuana for medical purposes. The cost of making such determinations in the context of a criminal investigation is

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<sup>125</sup> At first glance, this dilemma resembles the thorny choice states sometimes face when Congress exercises its conditional preemption power. *See* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 765-66 (1982) (upholding a federal law giving states the choice of either considering suggested federal standards when passing utility regulations or abandoning such regulations altogether). As I explain later, however, valid conditional preemption statutes afford states some procedural protections, such as notice, that Congress sidesteps when it commandeers states' secrets. *See infra* subsection IV.C.1.

<sup>126</sup> *See* Mikos, *Limits of Supremacy*, *supra* note 17, at 1428-29 (noting that, as of 2009, ten states had adopted compulsory registration requirements).

<sup>127</sup> To determine whether someone who asserts a medical marijuana defense actually meets the eligibility requirements under state law, state police need only call a registry hotline—the determination has already been made by a civil regulatory agency. *See, e.g.*, 5 COLO. CODE REGS. § 1006-2:1.A (2011) (describing the procedures in Colorado for law enforcement to confirm an individual's medical registry status).

<sup>128</sup> Indeed, federal law enforcement agents have already sought to breach the confidentiality of state medical marijuana registries to enhance federal investigations. *See supra* notes 67-68.

<sup>129</sup> *See* Mikos, *Limits of Supremacy*, *supra* note 17, at 1429 ("California, Maine, and Washington . . . impose few formal requirements on prospective users beyond obtaining [a] physician diagnosis and recommendation.")

comparatively high,<sup>130</sup> making it expensive for police to pursue criminal charges against suspects who claim a medical need for the drug, even when their claim seems disingenuous. The lack of monitoring has contributed to abuse of medical marijuana laws in some states<sup>131</sup>—a price these states appear willing to pay to protect qualified patients and suppliers from federal law enforcement.<sup>132</sup>

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In sum, commandeering states' secrets imposes two costs on the states. First, by increasing the incentives of citizens to conceal activity from state regulators, the threat of commandeering makes it more difficult for states to gather information in the first place. Commandeering thus adds to the costs of enforcing state law. Second, commandeering forces state officials to help advance federal policies that they or their constituents deem objectionable. What is more, state officials might be unfairly blamed for providing information to federal officials and advancing controversial federal policies. Importantly, state officials cannot easily anticipate federal demands for information and cannot avoid assisting federal agents once they have already gathered information.

### III. REBUFFING STATE AUTONOMY: THE PREVAILING VIEW REGARDING DEMANDS FOR STATES' SECRETS

Not surprisingly, the states go to great lengths to block access to the most sensitive information they gather about private citizens. They frequently bar private citizens from accessing the information altogether, and they restrict government agents from accessing or using it for unap-

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<sup>130</sup> For instance, suspects could refuse to answer questions about their eligibility, full-blown judicial hearings might be required, etc. See Mikos, *State Taxation*, *supra* note 22, at 230 (discussing the higher costs associated with criminal versus civil proceedings).

<sup>131</sup> See, e.g., Erik Eckholm, *Medical Marijuana Industry Is Unnerved by U.S. Crackdown*, N.Y. TIMES, Nov. 24, 2011, at A22 (“It is . . . an open secret that a share of doctor-approved [marijuana] buyers do not have plausible medical needs.”)

<sup>132</sup> Maine, for example, has recently abandoned a short-lived mandatory registration system at least partially to prevent federal exploitation of the system. Richardson, *supra* note 85 (discussing the privacy concerns motivating the legislative change, including the possible risk of federal intervention); see also ME. DEP'T OF HEALTH & HUMAN SERVS., MAINE MEDICAL USE OF MARIJUANA PROGRAM ANNUAL REPORT 9 (2011), available at <http://www.maine.gov/dhhs/dlrs/reports/mmm-program-report-3-2011.pdf> (reporting patients' “concerns about confidentiality of their medical information . . . even though the information is protected by statute”).

proved purposes.<sup>133</sup> States may, of course, bar their own law enforcement agencies, grand juries, and courts from accessing information. But do states have any such authority vis-à-vis comparable *federal* institutions? What happens if a state does not want to give information to the federal government?

In most cases, a federal agency or grand jury must enlist the help of a federal court to enforce its demands against a recalcitrant state.<sup>134</sup> This Part discusses in detail the legal arguments raised by states to challenge demands for states' secrets. Section A examines the Supreme Court's constitutional federalism doctrines. It explains why those doctrines, as presently applied by the lower federal courts, do not stop the federal government from requiring state officials to provide information to it. Sections B and C then explain why federal statutory privileges and statutorily imposed reasonableness requirements likewise do not constrain the federal government's ability to subpoena confidential state records. Section D suggests that federal constitutional privileges—most notably, the privilege against self-incrimination—afford, at best, only very limited protection against the use of states' secrets. In summary, under extant understandings of legal doctrine, the federal government may seize almost any information the states possess and use that information to enforce federal law.

### A. *Constitutional Federalism*

The conventional wisdom is that constitutional federalism doctrines do not prohibit the federal government from forcing the states to disclose information. Here I discuss how that conclusion was established in conventional wisdom. Later, I show why this view is misguided: as a matter of both normative and positive legal theory, constitutional federalism juris-

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<sup>133</sup> For example, states strictly limit access to medical marijuana registries. Generally speaking, only designated employees of a state health agency may access the registries and then, only for approved purposes, such as verifying whether someone already under investigation is properly registered. Violation of these strict confidentiality provisions is a criminal offense. For example, the Colorado Constitution restricts access to information in the state medical marijuana registry to "authorized employees of the state health agency in the course of their official duties" and "authorized employees of state or local law enforcement agencies which have stopped or arrested a person who claims to be engaged in the medical use of marijuana . . . ." COLO. CONST. art. XVIII, § 14(3)(a). The same constitutional provision requires the state legislature to criminalize "[b]reach[es] of confidentiality of information provided to or by the state health agency." *Id.* § 14(8)(d).

<sup>134</sup> See LAFAVE ET AL., *supra* note 74, § 8.4(c) (characterizing a grand jury as powerless without the enforcement powers of the court); DOJ REPORT, *supra* note 58, at 5 ("All federal executive branch administrative subpoenas are enforced by the courts.").



prudence should and, upon closer inspection, already does, limit the federal government's power to commandeer states' secrets.

### 1. The Tenth Amendment Claim

The states have raised two basic arguments challenging federal demands for information on constitutional federalism grounds. The more common argument, prominent since the 1970s, seeks to use the Tenth Amendment as a shield against disclosure of government records.<sup>135</sup> Though the contours of the argument tend to vary, the basic claim is that the Tenth Amendment immunizes essential state governmental functions—in this case, the keeping of confidential records by state agencies—from any federal regulation.

The nebulous claim that the Tenth Amendment insulates state functions from federal regulation altogether has been discredited since *Garcia v. San Antonio Metropolitan Transit Authority*<sup>136</sup> overruled *National League of Cities v. Usery*.<sup>137</sup> In *National League of Cities*, the Court had held that the Tenth Amendment precludes Congress from enforcing federal labor laws against states in areas of “traditional government functions.”<sup>138</sup> The Court ruled that “Congress may not exercise [its Commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.”<sup>139</sup> Only nine years later, however, the Court abandoned *National League of Cities* in *Garcia*, rejecting “as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”<sup>140</sup>

In light of the quick demise of *National League of Cities*, it should come as no surprise that the lower courts have readily dismissed the Tenth Amendment challenge to demands for state records. Citing the Supremacy Clause, the courts have upheld federal demands for the confidential records of state juvenile courts,<sup>141</sup> a state attorney general,<sup>142</sup> state tax agencies,<sup>143</sup>

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<sup>135</sup> For related cases, see *infra* notes 141-49.

<sup>136</sup> 469 U.S. 528 (1985).

<sup>137</sup> 426 U.S. 833 (1976). See *Garcia*, 469 U.S. at 531 (abandoning the “function” standard first established in *National League of Cities* because it was “unworkable” and “inconsistent with established principles of federalism”).

<sup>138</sup> 426 U.S. at 852.

<sup>139</sup> *Id.* at 855.

<sup>140</sup> 469 U.S. at 546-47.

<sup>141</sup> See, e.g., *United States v. Daniels*, 929 F.2d 128, 130 (4th Cir. 1991) (“Even if the juvenile proceedings had been sealed pursuant to state law, that law could not bar consideration of them by a federal court in determining a sentence when federal law provides otherwise.”).

state medical boards,<sup>144</sup> state probation offices,<sup>145</sup> and sundry other records privileged by state law, for use in federal criminal and civil cases.<sup>146</sup> In one case, for example, the Attorney General of Illinois challenged a federal grand jury subpoena of arguably confidential records from his office on the grounds that the subpoena was “an unconstitutional federal ‘excursion’ into the territory of exclusive state sovereignty,” because “certain state functions are immune from subpoena.”<sup>147</sup> The Seventh Circuit, however, rejected his argument, holding that “[n]othing in the United States Constitution immunizes any exclusive domain of the state from the reach of a federal grand jury.”<sup>148</sup> As another court explained more recently, a state privilege law that obstructs the enforcement of a federal subpoena must give way to federal policy.<sup>149</sup> In that case, Michigan’s health agency sought to quash the DEA’s subpoena of the state medical marijuana registry, because the subpoena conflicted with a strict state confidentiality provision forbidding

<sup>142</sup> See, e.g., *In re Special Apr. 1977 Grand Jury*, 581 F.2d 589, 593 n.3, 595 (7th Cir. 1978) (asserting that the Supremacy Clause requires a state attorney general to disclose subpoenaed records of his office to a federal grand jury).

<sup>143</sup> See, e.g., *United States v. N.Y. State Dep’t of Taxation & Fin.*, 807 F. Supp. 237, 240-43 (N.D.N.Y. 1992) (finding that a state law shielding a tax agency’s records from disclosure was preempted due to a conflict with a congressional statute authorizing administrative subpoenas); *In re Grand Jury Empanelled Jan. 21, 1981*, 535 F. Supp. 537, 538-39 (D.N.J. 1982) (rejecting a Tenth Amendment challenge to a grand jury subpoena of confidential state taxpayer records); *In re N.Y. State Sales Tax Records*, 382 F. Supp. 1205, 1206 (W.D.N.Y. 1974) (“The powers of the federal grand jury, because of . . . the supremacy clause . . . must prevail over the nondisclosure provision . . . of the New York State Tax Law.”).

<sup>144</sup> See, e.g., *In re Grand Jury Matter*, 762 F. Supp. 333, 335-36 (S.D. Fla. 1991) (rejecting, in a grand jury investigation of mail fraud by a physician, the invocation of state privilege law by a state medical board to resist turning over records of patient complaints).

<sup>145</sup> See, e.g., *United States v. Simmons*, 964 F.2d 763, 769 (8th Cir. 1992) (ruling that probation records could be used to impeach a witness in a federal trial, despite a “contrary state statute” privileging the report); *United States v. Holmes*, 594 F.2d 1167, 1171 (8th Cir. 1979) (denying the existence of a “probation officer’ privilege” and asserting the supremacy of “the federal law of privileges”).

<sup>146</sup> The courts have rejected similar constitutional arguments by private litigants asserting state privileges to protect their documents. See, e.g., *Mem’l Hosp. for McHenry Cnty. v. Shadur*, 664 F.2d 1058, 1063-64 (7th Cir. 1981) (holding that in a federal antitrust suit, a state law barring disclosure of medical peer review records did not govern and was “rendered void and of no effect” by the Supremacy Clause).

<sup>147</sup> *In re Special Apr. 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir. 1978).

<sup>148</sup> *Id.* (internal citation omitted).

<sup>149</sup> See *United States v. Mich. Dep’t. of Cmty. Health*, No. 10-109, 2011 WL 2412602, at \*13 (W.D. Mich. June 9, 2011) (explaining that the state’s claim conflicted with, and was thus subordinate to, federal policy).

such disclosure.<sup>150</sup> The court rejected the claim, reasoning that the confidentiality provision

'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' by preventing the federal government from using a proper federal subpoena to obtain records which involve a controlled substance, the use of which is prohibited by federal law, i.e., marijuana and marijuana plants. The . . . confidentiality provision must be and is nullified to the extent it conflicts with the federal law by preventing the federal government's exercise of its subpoena power under [21 U.S.C.] § 876.<sup>151</sup>

## 2. The Anti-Commandeering Rule

The second and more plausible constitutional federalism argument is that demands for state agencies to provide information for use in federal investigations violate the anti-commandeering rule. The anti-commandeering rule prohibits the federal government from commanding state legislatures to enact federally scripted regulatory programs, and from commanding state executive officials to help administer federal regulatory programs.<sup>152</sup> In *Printz v. United States*, the Court invalidated a provision of the Brady Act that compelled state law enforcement agents to perform background checks on prospective gun buyers.<sup>153</sup> The process entailed searching and analyzing state criminal records databases to determine whether a prospective gun buyer was barred by federal law from completing the transaction.<sup>154</sup> In *New York v. United States*, the Court invalidated provisions of a congressional statute that compelled state legislatures to find

<sup>150</sup> *Id.* at \*1-6.

<sup>151</sup> *Id.* at \*13 (quoting *Hillsborough Cnty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985)).

<sup>152</sup> See *Printz v. United States*, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly."). For thoughtful commentary on the anti-commandeering rule, see generally Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yeskey*, 1998 SUP. CT. REV. 71; Caminker, *supra* note 16; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998).

<sup>153</sup> 521 U.S. at 935.

<sup>154</sup> See *id.* at 902-04 (describing the regulatory program imposed upon the states by the Brady Act).

storage sites for radioactive waste generated by private firms or else assume legal responsibility for such waste.<sup>155</sup>

The anti-commandeering cases seem to provide a doctrinal basis to challenge federal demands for information. As I have explained in depth elsewhere, the anti-commandeering rule effectively circumscribes federal supremacy.<sup>156</sup> Even though it neither circumscribes Congress's power over private citizens, nor insulates state functions from federal regulation altogether, the rule protects the states from being compelled to enforce federal regulatory programs. In other words, it empowers the states to engage in a form of passive resistance to federal authority—in essence, to say “no” to demands for assistance in the enforcement of federal law.

In the wake of *Printz* and *New York*, a few states have challenged federal demands for information by likening them to prohibited commandeering.<sup>157</sup> However, the courts that have addressed this argument have dismissed the comparison for at least one of two reasons. First, some lower courts have simply presumed that providing information about violations of federal law does not amount to *enforcing* federal law.<sup>158</sup> These courts have carved out a categorical distinction between demands for information about federally regulated activity and demands for other types of administrative services. The latter are subject to the anti-commandeering rule, but the former, somehow, are not.

This distinction is inspired by a short line of dicta by Justice Scalia, the author of the *Printz* majority decision. In a portion of his opinion delving into the historical practice of commandeering state executives, Justice Scalia found that the practice was exceedingly rare.<sup>159</sup> In making this conclusion, he discounted the relevance of a number of statutes cited by the government “which require only the provision of information to the Federal Government,” in part, because they “do not involve the precise issue before us here, which is the forced participation of the States’ executive in the actual administration of a federal program.”<sup>160</sup> In other words, Justice Scalia seemed to suggest that demands for information were categorically different

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<sup>155</sup> 505 U.S. 144, 150-54 (1992).

<sup>156</sup> See Mikos, *Limits of Supremacy*, *supra* note 17, at 1445-50 (describing how “the anti-commandeering doctrine constrains Congress’s preemption power”).

<sup>157</sup> See, e.g., *City of New York v. United States*, 179 F.3d 29, 34-35 (2d Cir. 1999) (rejecting the city’s claim that congressional statutes had commandeered city officials into providing immigration data to the federal law enforcement agencies), *aff’d* 971 F. Supp. 789 (S.D.N.Y. 1997).

<sup>158</sup> See *infra* notes 162-65 and accompanying text (discussing relevant cases).

<sup>159</sup> *Printz*, 521 U.S. at 918.

<sup>160</sup> *Id.* (emphasis added).

than other demands placed upon the state executive. In concurring with the Court's opinion, Justice O'Connor shared Justice Scalia's apparent reluctance to condemn information-reporting requirements. She praised the Court for "appropriately refrain[ing] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid."<sup>161</sup>

Taking cues from the *Printz* dicta, several lower courts have dismissed the notion that providing information in any way constitutes assisting the enforcement of a federal regulatory program.<sup>162</sup> In *Freilich v. Board of Directors of Upper Chesapeake Health, Inc.*, for example, the District Court of Maryland dismissed a challenge to a federal law that requires state medical boards to receive and forward adverse peer review decisions made by private hospitals to the federal government's National Practitioner Data Bank.<sup>163</sup> Calling the challenge "completely meritless," the court hastily dismissed any comparison to prohibited commandeering: "The federal government has not compelled the states to enact or enforce a federal regulatory program—rather, the government is asking the states to provide information regarding their own state administered regulatory programs. This has never been held to violate the Tenth Amendment."<sup>164</sup> In another decision, the Southern District of New York rejected a similar challenge to a federal law that requires state law enforcement agencies to report the known whereabouts of convicted sex offenders to a federal agency. The court held that because the law "only requires states to provide information rather than administer or enforce a federal program," it does not violate the anti-commandeering rule.<sup>165</sup>

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<sup>161</sup> *Id.* at 936 (O'Connor, J., concurring).

<sup>162</sup> See, e.g., *City of New York*, 179 F.3d at 34-35 (suggesting that *Printz* distinguished between federal demands for state information and federal directives to participate in a regulatory program).

<sup>163</sup> See 142 F. Supp. 2d 679, 694-97 (D. Md. 2001) (describing the relevant federal requirement and the court's reasoning for finding it constitutional), *aff'd sub nom.* *Freilich v. Upper Chesapeake Health, Inc.* (Freilich II), 313 F.3d 205 (4th Cir. 2002). For the federal requirement, see 42 U.S.C. § 11133(a)-(b) (2006).

<sup>164</sup> *Freilich*, 142 F. Supp. 2d at 697 (emphasis added). On appeal, the Fourth Circuit was comparably dismissive. See *Freilich II*, 313 F.3d 205 at 214 (finding that "more is required . . . to offend the Tenth Amendment" than the "expenditure of time and effort" to submit reports to the Board of Medical Examiners).

<sup>165</sup> *United States v. Brown*, No. 07-485, 2007 WL 4372829 at \*6 (S.D.N.Y. Dec. 12, 2007) (emphasis added), *aff'd* 328 Fed. Appx. 57 (2d Cir. 2009).

The academic literature on the anti-commandeering rule generally pays little attention to the distinction noted by the *Printz* Court.<sup>166</sup> For the most part, the scholarship addressing particular demands for information and similar practices has presumed that *Printz* settled the question of their constitutionality.<sup>167</sup> For example, one commentator has declared that “the anti-commandeering doctrine does not apply to *any* regulation of the states as the owners of databases, including federal laws requiring disclosure of information to the federal government.”<sup>168</sup>

Second, lower courts have also distinguished demands for information from demands for other services by suggesting that the former do not trigger the structural harms that animated the *Printz* and *New York* decisions. In those cases, the Court emphasized the economic and political costs commandeering imposed upon the states—namely, the burden they would bear in having to administer federal programs and the political responsibility they would shoulder if those programs proved unpopular with constituents.<sup>169</sup> In essence, several lower courts have concluded that forcing states to share information is not at all burdensome to the states,<sup>170</sup> or at least, not burdensome enough to trump the federal government’s interest in obtaining information.<sup>171</sup> It should be noted, however, that no court has yet considered the political costs of commandeering states’ secrets.

<sup>166</sup> One notable exception is Caminker, *supra* note 16, at 234; *see id.* (arguing that “it is [u]nclear . . . on what basis reporting requirements can meaningfully be distinguished from ‘actual administration of a federal program.’” (citing *Printz*, 521 U.S. at 918) (majority opinion)). For an elaboration of this point, *see infra* Section IV.A.

<sup>167</sup> *See, e.g.*, Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 374 n.332 (2003) (“In *Printz v. United States*, the Court suggested that a constitutional prohibition against the federal ‘commandeering’ of state officials does not extend to federal mandates requiring state data collection and maintenance.”); Kittrie, *supra* note 89, at 1492 (arguing that the “enactment of federal legislation specifically requiring state and local officials to disclose . . . information to the federal government” would be constitutional). *But see* Rebecca E. Zietlow, *Federalism’s Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 166 n.165 (2002) (noting that the *Printz* Court did not resolve whether demanding information possessed by a state agency would constitute commandeering).

<sup>168</sup> Kittrie, *supra* note 89, at 1492 (emphasis added).

<sup>169</sup> *See, e.g.*, Young, *supra* note 13, at 16 (stating that the anti-commandeering doctrine requires Congress to internalize the costs of its own programs, rather than passing them on to the states).

<sup>170</sup> *See, e.g.*, *In re Special Apr. 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir. 1978) (suggesting that “the impact of a subpoena on state functions is markedly different from the *Usery* direct system of regulation that requires a reallocation of state resources”).

<sup>171</sup> *See, e.g.*, *In re Grand Jury Subpoena for N.Y. State Income Tax Records*, 468 F. Supp. 575, 577 (N.D.N.Y.) (holding that the state interest in fostering truthful tax reporting by promising confidentiality is “more than counterbalanced by the necessity of thorough grand jury investigations into violations of federal law”).

To reach the conclusion that demands for information do not consume state resources in the way that demands for other services do, these lower courts have emphasized that the federal government generally demands information that a state already has on hand. In such a situation, to these courts, commandeering is not necessarily harmful because the state would not need to expend resources to get the information, and therefore, would not need to divert resources from local priorities to satisfy federal demands.<sup>172</sup> In economic terms, the information sought is a nonrivalrous public good. The federal government's use of the information does not detract from the state's use of it. For example, the federal government could use a state's investigative files in a federal prosecution against Joe Smith, and the state could use the same files to prosecute Joe Smith as well.<sup>173</sup>

In the *Freilich* case, for example, the court struggled to discern, amid a lack of presented evidence, how "requiring state medical boards to forward information on to a national data bank would be burdensome or would impede state sovereignty."<sup>174</sup> In another case, the court brushed aside concerns over the federal government's demand that a state report information about sex offenders in its jurisdiction to the FBI, because it was "information that the state officials will typically already have through their own state [sex-offender] registries."<sup>175</sup>

Similarly, some legal scholars, while acknowledging that *Printz* may not have definitively resolved the constitutionality of demands for information, have nonetheless expressed support for such a rule on the grounds that demands for information are not harmful. Professor Rick Hills, for instance, has argued that Congress should be allowed to commandeer some information from the states in certain circumstances, such as demands for information that will not require states to issue commands to their own citizens or for information states possess that the federal government has no

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<sup>172</sup> Protecting state prerogatives is frequently cited as one of the rationales behind the anti-commandeering rule. *See, e.g.,* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1583 (1994) (arguing that the Supreme Court should protect the autonomy of the states, "especially the right of state voters to set their own legislative agendas and choose tasks for their own government administrators").

<sup>173</sup> Such prosecution by separate sovereigns does not violate the Double Jeopardy clause of the Constitution. *See* *Heath v. Alabama*, 474 U.S. 82, 89 (1985) ("[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922))).

<sup>174</sup> *Freilich v. Bd. of Dirs. of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 697 (D. Md. 2001).

<sup>175</sup> *United States v. Brown*, No. 07-485, 2007 WL 4372829 at \*5 (S.D.N.Y. Dec. 12, 2007)

other way of obtaining.<sup>176</sup> Similarly, Professor Vicki Jackson has suggested that “relatively minor recordkeeping, record-checking, or information-providing” demands should be distinguished from “*more substantial impositions* on state resources involving matters that (even if directed at executive officials) come close to the core of legislative responsibilities.”<sup>177</sup> But these commentators do not provide any sustained or detailed analysis to support their assertions.

To be sure, a few courts have recognized the dynamic costs that commandeering can impose on the states. Yet, these courts have nonetheless upheld demands for information by finding those costs eclipsed by the federal government’s interest in obtaining information. In one prominent case, *City of New York v. United States*, the Second Circuit dismissed New York City’s challenge to provisions of two 1996 congressional statutes that gave the Immigration and Naturalization Service (INS) greater access to confidential state records concerning the immigration status of residents.<sup>178</sup> The Illegal Immigration Reform and Immigrant Responsibility Act, for example, provides: “[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, of any individual.”<sup>179</sup> The city objected to sharing the information it had acquired concerning the immigration status of crime victims and certain other persons. Since 1989, it had a policy that forbade city employees from providing such information to the INS.<sup>180</sup> It brought a facial challenge to the information disclosure provisions of the federal laws,

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<sup>176</sup> See Hills, *supra* note 152, at 933-34 (providing a theoretical framework to justify these exceptions to the anti-commandeering rule); see also Mary D. Fan, *Reforming the Criminal Rap Sheet: Federal Timidity and the Traditional State Functions Doctrine*, 33 AM. J. CRIM. L. 31, 69-72 (2005) (suggesting that Congress could commandeer states to provide uniform criminal history information because of the strong need for such information in federal criminal prosecutions).

<sup>177</sup> Jackson, *supra* note 152, at 2253-54 (emphasis added).

<sup>178</sup> 179 F.3d 29, 35 (2d Cir. 1998) (rejecting the city’s challenge to provisions of the 1996 Welfare Reform Act and the 1996 Immigration Reform Act).

<sup>179</sup> Pub. L. No. 104-208, § 642(a), 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.); see also Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 434, 110 Stat. 2275 (codified as amended in 8 U.S.C. § 1644) (imposing a similar prohibition).

<sup>180</sup> *City of New York*, 179 F.3d at 31-32 (discussing an Executive Order issued by then-Mayor Edward Koch).



drawing heavily from the Court's new anti-commandeering decision in *Printz*.<sup>181</sup>

After suggesting that *Printz* was inapplicable to demands for information, the court nonetheless proceeded to apply a balancing test pitting the city's interest in confidentiality against the federal government's apparent need for the information in dispute.<sup>182</sup> The court did recognize an abstract concern for maintaining the confidentiality of state records:

The City's concerns [over the federal requirements] are not insubstantial. The obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved.<sup>183</sup>

Nevertheless, it downplayed the city's concerns because the confidentiality policy apparently applied only against the INS. To the court, the fact that the city freely shared the same information among its own agencies suggested that the marginal harm of disclosing it to the INS was minimal.<sup>184</sup> The court suggested that so far as the city's only rationale for non-disclosure was "to reduce the effectiveness of a federal policy,"<sup>185</sup> its concerns were illegitimate and entitled to no weight whatsoever: "The City's sovereignty argument asks us to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs."<sup>186</sup> The court found that, "[a]bsent any cooperation at all from local officials, some federal programs may fail or fall short of their goals," so the federal government must be allowed to commandeer information from the states.<sup>187</sup>

I will argue that the distinction between commandeering of other state services and the commandeering of the states' information-gathering

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<sup>181</sup> The city contended that the Tenth Amendment "includes the power to choose not to participate in federal regulatory programs and that such power in turn includes the authority to forbid state or local agencies, officials, and employees from aiding such a program even on a voluntary basis." *Id.* at 34.

<sup>182</sup> *Id.* at 34-35.

<sup>183</sup> *Id.* at 36.

<sup>184</sup> *See id.* at 37 ("[T]he Executive Order does not on its face prevent the sharing of information with anyone outside the INS.").

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 35. In this passage, the court fundamentally misconstrues the essence of the anti-commandeering rule, which authorizes passive resistance to federal authority. *See infra* Section IV.B.

<sup>187</sup> *City of New York*, 179 F.3d at 35.

capacity is entirely unpersuasive: demands for state information *should* be considered prohibited commandeering, regardless of the impact on federal enforcement or the state's motivation for nondisclosure. Indeed, this view is arguably more consistent with the precise holdings of and instrumental rationale underlying the Court's anti-commandeering precedent. As it stands, however, no federal court has yet ruled that information-reporting requirements imposed by Congress, executive agencies, or grand juries violate constitutional federalism doctrines in general or the anti-commandeering rule in particular. Similarly, legal scholars have largely overlooked the harms of commandeering states' secrets and have neglected to scrutinize the judicial decisions upholding the practice.

### B. Statutory Privileges

In the alternative, states have sought to argue that federal common law, statutory law, or both privilege the information states treat as confidential. As one court has surmised, however, "courts consistently have rejected the view that state records are privileged from disclosure even in cases in which state law prohibited the disclosure of the records."<sup>188</sup>

Federal Rule of Evidence 501 governs the recognition of privileges in federal proceedings.<sup>189</sup> It does not enumerate any privileges, but instead instructs the courts to develop a federal common law of privilege using "reason and experience" as their guides.<sup>190</sup> Generally speaking, the Supreme Court, citing the well-worn notion that privileges hinder the judiciary's truth-seeking function, has discouraged the recognition of federal privileges pursuant to Federal Rule of Evidence 501.<sup>191</sup> Consequently, the federal courts have spurned the vast majority of privileges that apply to proceedings governed by state law.<sup>192</sup> For example, the federal courts have allowed

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<sup>188</sup> *In re Special Apr. 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir. 1978) (internal citations omitted); see also Glenn A. Guarino, *Authority of Federal Grand Jury to Subpoena Documents of State or Local Agency*, 64 A.L.R. FED. 901 (Supp. 2012) (collecting cases that consider the authority of federal grand juries to subpoena state information).

<sup>189</sup> FED. R. EVID. 501.

<sup>190</sup> *Id.* This is the standard that applies to issues governed by federal substantive law. For issues governed by state substantive law, the courts are instructed to apply state privilege law. *Id.*

<sup>191</sup> See, e.g., *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

<sup>192</sup> The psychotherapist-patient privilege, *Jaffee v. Redmond*, 518 U.S. 1 (1995), attorney-client privilege, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and spousal privilege, *Trammel v. United States*, 445 U.S. 40 (1980), are among the few evidentiary privileges now recognized by federal courts.

government agents and private litigants to lay bare private conversations between physicians and their patients,<sup>193</sup> peer reviews of tenure and performance evaluations,<sup>194</sup> and the legislative acts of state lawmakers,<sup>195</sup> notwithstanding the existence of state laws expressly privileging such information.

More particularly, the federal courts have rejected or limited the two privileges that typically shield the records kept by state agencies from disclosure in state proceedings. Consider, first, the required reports privilege, which bars disclosure of confidential records submitted by private citizens to state agencies.<sup>196</sup> It is designed to encourage candid reporting about regulated activities.<sup>197</sup> Most states allow the collecting agency to deny access to private litigants and other state actors. But the federal courts generally have not allowed state agencies to withhold the same information from federal law enforcement agents and courts. The courts have ordered state agencies to turn over sundry reports submitted by private citizens on promise of confidentiality, including medical marijuana registration forms,<sup>198</sup> driver's license applications,<sup>199</sup> income tax returns,<sup>200</sup> and contingency fee agreements,<sup>201</sup> among others.

To be sure, as a matter of comity, the federal courts do give *some* consideration to the states' interest in obtaining honest, accurate information from their residents—the central purpose served by the required reports privilege. But that interest seems always to give way when federal authorities assert (1) a plausible need for the information contained in the reports and (2) an inability to obtain that information by some other, equally conven-

<sup>193</sup> See *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977) (“The physician-patient evidentiary privilege is unknown to the common law.”).

<sup>194</sup> See *Univ. of Pa. v. EEOC*, 493 U.S. 182, 195 (1990) (dismissing a comparison to privilege governing jury deliberations and holding that “[a] privilege for peer review materials has no similar historical or statutory basis”).

<sup>195</sup> See *United States v. Gillock*, 445 U.S. 360, 368 (1980) (“[T]he fact that there is an evidentiary privilege under the Tennessee Constitution . . . which [a state legislator] could assert in a criminal prosecution in state court does not compel an analogous privilege in a federal prosecution.”).

<sup>196</sup> For background on the required reports privilege, its purposes, and its origins, see 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § 502 (2d ed. 2011).

<sup>197</sup> *Id.*

<sup>198</sup> *E.g.*, *United States v. Mich. Dep't of Cmty. Health*, No. 10-109, 2011 WL 2412602, at \*14 (W.D. Mich. June 9, 2011).

<sup>199</sup> *E.g.*, *Sexton v. Poole Truck Lines, Inc.*, 888 F. Supp. 127, 130 (M.D. Ala. 1994).

<sup>200</sup> *E.g.*, *United States v. King*, 73 F.R.D. 103, 109 (E.D.N.Y. 1976).

<sup>201</sup> *E.g.*, *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373, 383 (3d Cir. 1976).

ient, means.<sup>202</sup> This leaves the bulk of states' secrets vulnerable to exposure. The few occasions on which the courts have denied access to these reports have involved rather unusual scenarios where either the federal official's need for the records was not apparent<sup>203</sup> or Congress had expressly privileged state records<sup>204</sup> or equivalent records submitted to federal agencies.<sup>205</sup>

Consider next a number of related privileges that apply to official information. Inter alia, these official information privileges bar the disclosure of information gleaned by government agents during law enforcement investigations, such as the names of cooperating witnesses and the contents of wiretapped communications.<sup>206</sup> Like the required reports privilege, the official information privileges are designed to encourage cooperation with government authorities.<sup>207</sup> And like the required reports privilege, they may be defeated whenever the federal government demonstrates a need for information that outweighs the damage done to state law enforcement.<sup>208</sup> For example, federal courts have ordered state law enforcement agencies to reveal the names of their confidential informants<sup>209</sup> and to disclose the results

<sup>202</sup> See, e.g., *King*, 73 F.R.D. at 105 ("A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." (emphasis added)); see also *Mem'l Hosp. v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) (quoting *King* to assert that federal courts should consider "the law of the state in which the case arises in determining whether a privilege should be recognized as a matter of federal law"). As one court has acknowledged, "there is almost always such a cost to the special federal interest in seeking the truth in a federal question case." *ACLU of Miss., Inc. v. Finch*, 638 F.2d 1336, 1343 (5th Cir. 1981) (citation omitted).

<sup>203</sup> See, e.g., *In re Grand Jury Subpoena Dated Nov. 14, 1989*, 728 F. Supp. 368, 373 (W.D. Pa. 1990) (noting that evidence sought by the federal government was cumulative and could be obtained elsewhere).

<sup>204</sup> For example, Congress has privileged the records of patients in drug treatment programs. See *Confidentiality of Alcohol and Drug Abuse Patient Records*, 42 C.F.R. § 2.1(a) (2011). The pertinent regulations forbid disclosure of the identity, diagnosis, and treatment of any patient, except under very narrow circumstances. See *Id.* § 2.65(d). Interestingly, state governments may expand the scope of the privilege. In other words, the states may prohibit disclosure of patient records that would otherwise be permitted by federal regulation. See *id.* § 2.20 ("If a disclosure permitted under these regulations is prohibited under State law, neither these regulations nor the authorizing statutes may be construed to authorize any violation of that State law.").

<sup>205</sup> See *In re Hampers*, 651 F.2d 19, 23 (1st Cir. 1981) (holding that the federal government must follow the same rules mandated by Congress for discovery of federal tax records when it instead seeks access to state tax records).

<sup>206</sup> See generally WEINSTEIN & BERGER, *supra* note 196, § 509.

<sup>207</sup> *Id.* § 509.21.

<sup>208</sup> See, e.g., *Nat'l Cong. for Puerto Rican Rights ex rel. Perez v. City of New York*, 194 F.R.D. 88, 95-96 (S.D.N.Y. 2000) (discussing the factors to be considered in such a balancing test).

<sup>209</sup> See, e.g., *In re Grand Jury Investigation (Detroit Police Dep't Special Cash Fund)*, 922 F.2d 1266, 1270-72 (6th Cir. 1991) (outlining the justifications for this type of compelled revelation). *But see In re City of New York*, 607 F.3d 923, 944-45 (2d Cir. 2010) (upholding a city

of internal investigations to federal agents.<sup>210</sup> These disclosures have been required despite claims that such information is privileged under state law.

### C. Statutory Reasonableness

State agencies have been somewhat more successful in challenging the reasonableness of federal subpoenas. Federal Rule of Criminal Procedure 17(c) authorizes federal courts to quash a grand jury subpoena that is “unreasonable or oppressive,”<sup>211</sup> and courts have upheld the power to quash administrative subpoenas on similar grounds.<sup>212</sup> In a handful of cases, states have successfully challenged federal subpoenas as unreasonable,<sup>213</sup> but these cases remain the exception.

The Supreme Court has set a very high bar for demonstrating that a subpoena is unreasonable.<sup>214</sup> From the start, courts are to presume that a subpoena is reasonable.<sup>215</sup> To rebut that presumption, the party challenging the subpoena must make a showing that the subpoena is vague, that the materials sought by it are irrelevant to the federal government’s investigation, or that compliance with the subpoena would be unjustifiably burdensome.<sup>216</sup> States are rarely able to meet this burden.

police department’s claim to law enforcement privilege in a civil rights action where the plaintiffs sought disclosure of undercover investigative files in pretrial discovery proceedings).

<sup>210</sup> See, e.g., *United States v. O’Neill*, 619 F.2d 222, 229-30 (3d Cir. 1980) (denying a city’s attempt to claim privilege over materials sought by a federal civil rights commission), *order vacated*, 619 F.2d 222 (3d Cir. 1980); *EEOC v. City of Milwaukee*, 919 F. Supp. 1247, 1249 (E.D. Wis. 1996) (refusing to quash subpoenas filed by the EEOC that sought confidential city records concerning an internal investigation into employment discrimination claims against a police department).

<sup>211</sup> FED. R. CRIM. P. 17(c)(2).

<sup>212</sup> See *Hughes*, *supra* note 22, at 587 (“[T]he law pertaining to judicial scrutiny of . . . civil investigative demands has been patterned on older principles applicable to the grand jury and, indeed, now almost exactly mirrors the standards for challenging a grand jury subpoena.” (internal citations omitted)). However, courts have no apparent authority to enjoin a statutory reporting requirement simply for being unreasonable.

<sup>213</sup> See, e.g., *In re Grand Jury Subpoena for THCF Med. Clinic Records*, 504 F. Supp. 2d 1085, 1090 (E.D. Wash. 2007) (quashing a federal subpoena as unreasonable for having marginal relevance to a federal investigation).

<sup>214</sup> See, e.g., *United States v. R. Enters., Inc.*, 498 U.S. 292, 306 (1990) (Stevens, J., concurring in part and concurring in the judgment) (commenting that, in the grand jury context, “the law enforcement interest will almost always prevail, and the [subpoenaed] documents must be produced”).

<sup>215</sup> At least, that is what they are *supposed* to do. See *id.* at 301 (majority opinion) (noting that the lower court in the case had placed the initial burden of proving reasonableness on the government).

<sup>216</sup> See *id.* at 299-301 (discussing the limits on the investigatory powers of the grand jury).

Nonetheless, some lower courts have avoided the seemingly inescapable conclusion that federal subpoenas are reasonable by suggesting that a subpoena could also be deemed unreasonable if it seriously undermined a privacy interest and only nominally advanced a federal investigation.<sup>217</sup> If this test sounds familiar, it should: the same basic test is used to assess a privilege claim under Federal Rule of Evidence 501. That does not mean, however, that a court applying the reasonableness test under Rule 17(c) would necessarily reach the same conclusion regarding a subpoena's enforceability.

Indeed, in *In re Grand Jury Subpoena for THCF Medical Clinic Records*, the first case to review a grand jury subpoena of a state medical marijuana registry, the state successfully challenged a federal subpoena under Rule 17(c)—but *not* under Federal Rule of Evidence 501—by claiming that compliance with the subpoena would jeopardize its medical marijuana program and violate registrants' privacy interests.<sup>218</sup> The subpoena at issue sought registration documentation on seventeen named patients from the state of Oregon. The grand jury was investigating the patients' suppliers but not the patients themselves; it sought the patients' help in proving its case against the suppliers. According to the court, the problem was that the registration documentation contained private information which, by the federal government's own admission, would not advance the grand jury's investigation. Oddly enough, the government already had the names of the patients in the registry. When the government was prompted at oral argument to explain why it wanted the registration documentation anyway, its only response was that it needed to update its contact information for the patients—a task that could just as easily have been accomplished by looking in a phone book.<sup>219</sup>

Though the *THCF* decision constitutes a victory for states, it is a very limited one. The decision hinges on a not-so-universally accepted argument that essentially transforms a losing statutory privilege claim into a winning

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<sup>217</sup> See *In re Grand Jury*, John Doe No. G.J.2005–2, 478 F.3d 581, 585 (4th Cir. 2007) (“[S]ome courts have recognized that Rule 17(c) enables district courts to quash a subpoena that intrudes gravely on significant interests outside of the scope of a recognized privilege, if compliance is likely to entail consequences more serious than even severe inconveniences occasioned by irrelevant or overbroad requests for records.” (citing *In re Grand Jury Matters*, 751 F.2d 13, 18 (1st Cir. 1984))).

<sup>218</sup> 504 F. Supp. 2d at 1090.

<sup>219</sup> *Id.* (“Normally, phone records, driver's licenses and motor vehicle records are not confidential sources of such information. The Government has not shown why it needs to obtain all of the addresses and phone numbers from the State of Oregon and the THCF Medical Clinic rather than from some other source.”).

statutory reasonableness claim—a controversial move that, if widely adopted, could render federal privilege law largely irrelevant. The *THCF* court also may have assigned too much weight to the states' interest in promoting participation in its medical marijuana program. After all, Congress has found that marijuana has no medical benefits,<sup>220</sup> so any action that stops seriously ill people from using the drug would actually be a good thing from the federal government's perspective (the appropriate lens through which to view reasonableness claims). In any event, the facts of the *THCF* case are *sui generis*. The decision does not suggest that all (or even any other) subpoenas of records held by states could be successfully challenged under Rule 17(c) or under the comparable test applied to administrative subpoenas. All that a grand jury needs to do is demonstrate some plausible need for the information being subpoenaed. A more carefully crafted subpoena—i.e., one seeking limited information the federal government did not already have on hand—should satisfy the demands of reasonableness.<sup>221</sup> Indeed, it is telling that a federal district court in Michigan subsequently refused to quash a nearly identical administrative subpoena of a state's medical marijuana registry on reasonableness (or privilege) grounds.<sup>222</sup>

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<sup>220</sup> See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (noting that “for purposes of the Controlled Substances Act, marijuana has ‘no currently accepted medical use’ at all” (quoting 21 U.S.C. § 812 (2000))).

<sup>221</sup> Like *THCF*, most cases that find a subpoena unreasonable have emphasized that the federal government's interest in obtaining the information was very weak. See, e.g., *United States v. Bergeson*, 425 F.3d 1221, 1222-23 (9th Cir. 2005) (quashing a subpoena of nonprivileged testimony of a federal public defender on reasonableness grounds while emphasizing that the government had other less invasive means to acquire the information); *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 927 (7th Cir. 2004) (finding a subpoena unreasonable where the federal government sought a hospital's abortion records for use in a suit challenging the constitutionality of federal partial-birth abortion law, and noting that the government's attorney “drew a blank” at oral argument when asked what he hoped to learn from the records), *affg Nat'l Abortion Fed'n v. Ashcroft*, 2004 WL 292079 (N.D. Ill. 2004).

Courts generally uphold subpoenas—no matter how sensitive the information sought—as long as the government can demonstrate *some* need for the evidence. See, e.g., *In re Grand Jury Proceedings*, 801 F.2d 1164, 1169-70 (9th Cir. 1986) (upholding a subpoena seeking patient charts and records in a federal drug case against a physician); *In re Grand Jury Subpoenas*, 438 F. Supp. 2d 1111, 1121 (N.D. Cal. 2006) (upholding a subpoena seeking the names of a newspaper's confidential sources for a grand jury's investigation of the Bay Area Laboratory Co-Operative's steroid distribution).

<sup>222</sup> *United States v. Mich. Dep't of Cmty. Health*, No. 10-109, 2011 WL 2412602, at \*14 (W.D. Mich. June 9, 2011).

#### D. *The Privilege Against Self-Incrimination*

Constitutional federalism doctrine and federal statutes, as presently construed, provide, at best, limited protection for the states' interest in refusing to supply information to the federal government. As an alternative tactic, the states could try to assert the interests of private citizens in non-disclosure to bar the federal government from using certain types of information gathered by the states. Most promisingly, this could be done by asserting the Fifth Amendment privilege against self-incrimination on behalf of citizens whom the states have compelled to provide information. This constitutional privilege limits *how* the federal government may use such information and thus might ameliorate some of the harms imposed by commandeering. However, the privilege is too limited to eliminate those harms altogether, and there is no other constitutional right currently recognized that prevents the federal government from exploiting what the states know about the private lives of their citizens.

The Fifth Amendment privilege against self-incrimination bars the government from using the compelled testimony of a witness in a criminal case against that witness.<sup>223</sup> For example, the federal government may not compel *W*—say, by threatening imprisonment—to testify about his drug distribution activity, only to use that same testimony to criminally prosecute him for drug crimes. Importantly, the federal government may not use *W*'s testimony if it has been compelled by a state government.<sup>224</sup> In other words, as long as *W*'s testimony was compelled by some sovereign's legal process, no other domestic sovereign may use it in a criminal proceeding against *W*.

The privilege thus limits the way that the federal government may exploit the information states compel their citizens to provide. First, the act of

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<sup>223</sup> See U.S. CONST. amend. V (proclaiming that no person shall be "compelled in any criminal case to be a witness against himself").

<sup>224</sup> The Supreme Court confronted a case involving just this scenario. See *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964). In *Murphy*, the state compelled testimony from a witness by offering him immunity from state charges in exchange for his testimony; the witness still refused to testify because his testimony could have incriminated him on federal charges. *Id.* at 53-54. He was held in contempt of court, and the Court vacated the conviction. *Id.* at 78. However, the Court held that the witness should be given the chance to testify again and granted him immunity from federal prosecution for his testimony because it had been compelled by the state. *Id.* at 79. The rule was motivated by the concern that the federal government could otherwise circumvent this privilege by asking states to compel incriminating testimony from a witness, on promise of immunity from state charges, and then use the testimony against the witness in a federal criminal proceeding. See Peter Westen, *Self-Incrimination's Covert Federalism*, 11 BERKELEY J. CRIM. L. 1, 13-14 (2006) (discussing the rationale behind *Murphy*).



submitting information to state agencies and the submitted information itself are typically testimonial in nature.<sup>225</sup> What is more, courts have held that reporting information is compulsory in many contexts, at least for purposes of the self-incrimination clause.<sup>226</sup> In many states, residents who fail to report stand to lose important legal benefits<sup>227</sup> or face civil sanctions.<sup>228</sup> Hence, in those situations where reporting constitutes compelled self-incrimination, the federal government may not use the information citizens submit to state agencies to criminally prosecute those citizens.

Nonetheless, the privilege against self-incrimination provides at best limited protection for the states' interest in secrecy. For one thing, the privilege does not stop the federal government from using compelled testimony in any *civil* proceeding against a witness.<sup>229</sup> Indeed, this explains why the states may compel their citizens to report in the first instance—as long as they do so only for regulatory purposes, the use of such testimony does not implicate the Fifth Amendment.<sup>230</sup> In other words, the federal government may use information a state has compelled from its citizens to help impose a variety of ostensibly civil federal sanctions upon them.<sup>231</sup> The list of civil sanctions the federal government could levy includes the revocation of government benefits, such as public pension payments;<sup>232</sup> the termination of government employment and debarment from participation

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<sup>225</sup> See *Schmerber v. California*, 384 U.S. 757, 763-64 (1966) (“[T]he protection of the privilege reaches an accused’s communications, whatever form they might take . . . .”).

<sup>226</sup> Compulsion exists anytime the government imposes a penalty for exercising the right to remain silent. See *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (“[T]he Fifth Amendment guarantees . . . the right of a person to remain silent . . . and to suffer no penalty . . . for such silence.”); see also *Garner v. United States*, 424 U.S. 648, 650 (1976) (noting that the threat of possible future criminal prosecution constitutes compulsion for purposes of asserting privilege); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (plurality opinion) (discussing “[t]he threat of disbarment and the loss of professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege”); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (holding the threat of loss of government employment unconstitutionally coercive).

<sup>227</sup> See, e.g., ALASKA STAT. § 11.71.090(a)(1) (2008) (requiring state registration for a defendant to assert the medical marijuana defense).

<sup>228</sup> See *supra* note 31, and accompanying text.

<sup>229</sup> See, e.g., *Allen v. Illinois*, 478 U.S. 364, 374-75 (1986) (permitting compelled testimony in civil commitment proceeding).

<sup>230</sup> See, e.g., *Balt. City Dept. of Soc. Servs. v. Bouknight*, 493 U.S. 549, 556 (1990) (“The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State’s public purposes unrelated to the enforcement of its criminal laws.”).

<sup>231</sup> The test for distinguishing between regulatory and punitive sanctions is laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

<sup>232</sup> See, e.g., *MacLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1063 (Mass. 2000) (holding that revocation of a public employee pension is civil in nature).

in federal programs;<sup>233</sup> the deportation of noncitizen residents;<sup>234</sup> the revocation of DEA registration;<sup>235</sup> and even lengthy civil confinement;<sup>236</sup> to name just a few. Importantly, even though they do not implicate the Fifth Amendment, these sanctions may deter citizens from cooperating with their states just as much as do criminal sanctions.

A second shortcoming stems from the personal nature of the privilege against self-incrimination: It protects the witness alone and not anyone else who is incriminated by the witness's testimony.<sup>237</sup> Hence, the federal government could use the compelled testimony of *W* to prosecute *D*. For example, when the federal government subpoenas a state's medical marijuana registry, it may compel registered patients to identify their suppliers (persons who are far more appealing targets to federal prosecutors anyway). Indeed, many states employing a medical marijuana registry already require patients to submit incriminating information about other persons (physicians, caregivers, and suppliers) during the application process.<sup>238</sup> To short-circuit patients' Fifth Amendment objections, the federal government would only need to grant them "use immunity"—essentially a promise not to use their testimony against *them* in any future criminal case.<sup>239</sup>

Apart from the Fifth Amendment, there is no other individual right the states could assert on behalf of citizens that would prevent the federal government from exploiting states' secrets. Most tellingly, the Supreme Court has flatly rejected the notion that the Due Process clause gives citizens a fundamental right to privacy in delicate information they might want to keep out of the hands of the government. In *Whalen v. Roe*, the Court upheld a New York statute that required physicians to report all

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<sup>233</sup> See, e.g., *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (finding debarment to be remedial in nature).

<sup>234</sup> See, e.g., *Smith v. INS*, 585 F.2d 600, 602 (3d Cir. 1978) ("A deportation proceeding is civil in nature, not criminal. Thus, an alien can be required to answer questions about his status and his right to remain in the country, as long as the answers would not subject him to criminal liability. These responses can be used to prove deportability.")

<sup>235</sup> See, e.g., *Hoxie v. Drug Enforcement Admin.*, 419 F.3d 477, 483 (6th Cir. 2005) (holding that privilege does not apply in a hearing about revocation of prescription authority).

<sup>236</sup> See, e.g., *Allen v. Illinois*, 478 U.S. 364, 372 (1986) (holding that privilege does not apply to a hearing regarding civil confinement).

<sup>237</sup> See *Couch v. United States*, 409 U.S. 322, 328 (1973) ("The Constitution explicitly prohibits compelling an accused to bear witness 'against himself'; it necessarily does not proscribe incriminating statements elicited from another.")

<sup>238</sup> E.g., OR. REV. STAT. § 475.309(2) (2007) (requiring applicants to identify, inter alia, their physicians, designated caregivers, and sources of supply).

<sup>239</sup> See 18 U.S.C. §§ 6002–6003 (2006) (providing for use immunity). The Supreme Court has held that use immunity satisfies the demands of the Fifth Amendment. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

prescriptions for Schedule II controlled substances to a state health agency.<sup>240</sup> State law enforcement agents used those reports to help identify and prosecute suspected drug abusers.<sup>241</sup> The Court recognized that patients have an interest in keeping their most personal information from the government and in making important medical decisions free of the fear of embarrassing disclosures.<sup>242</sup> Nonetheless, the Court found no constitutional violation in the reporting scheme:

[D]isclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.<sup>243</sup>

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In sum, the federal government may expose states' secrets. Constitutional federalism doctrines, as presently construed, do not bar the commandeering of states' secrets. The courts have presumed that *Printz* does not apply to demands for information, either because such demands do not compel states to assist in the enforcement of federal law or because they do not burden state governments. There is also no federally recognized privilege that would necessarily stop federal authorities from obtaining state records for purposes of enforcing federal law. Courts have occasionally quashed federal demands for state records on reasonableness grounds. But reasonableness claims are unlikely to prevail against most demands. The privilege against self-incrimination does impose some limits on how the federal government may use certain types of information possessed by the states, but those limits are sparse and easily circumvented.

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<sup>240</sup> 429 U.S. 589, 603-04 (1977).

<sup>241</sup> *Id.* at 595.

<sup>242</sup> *Id.* at 598-600.

<sup>243</sup> *Id.* at 602 (internal citation omitted). In any event, recognizing a broad constitutional right against disclosure would be a double-edged sword for the states: on the one hand, it might allow them to withhold information from the federal government; on the other hand, it might also allow citizens to withhold information from the states, as well.

#### IV. RESTORING STATE AUTONOMY: A NEW APPROACH TO SAFEGUARDING STATES' SECRETS

This Part contains the core prescriptive claims of the Article. I suggest that the conventional wisdom has misjudged the commandeering of states' secrets. The courts have made a false distinction between the services commandeered in *Printz* and the services commandeered by statutory reporting requirements, administrative subpoenas, and grand jury subpoenas. Providing information about federally regulated activity is tantamount to assisting in the administration or enforcement of federal law. Just as importantly, compelling states to provide such information incurs the same structural harms as compelling them to provide other services.

In a nutshell, I propose that courts treat demands for information as constitutionally prohibited commandeering. I make the case for applying the anti-commandeering rule and address the appropriateness of its application to the three forms of commandeering states' secrets. I then address some potential exceptions and objections to my proposal. Lastly, I briefly consider some political solutions as alternatives to my proposal.

##### A. *What It Means to Enforce or Administer Law*

As discussed above, some lower federal courts have summarily dismissed challenges to demands for information on the ground that the *Printz* Court already approved of them.<sup>244</sup> In *Printz*, Justice Scalia suggested that federal laws that “require only the provision of information to the Federal Government[] *do not involve the precise issue before us here*, which is the forced participation of the States' executive in the actual *administration* of a federal program.”<sup>245</sup> And in her concurrence, Justice O'Connor approved of “refrain[ing] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.”<sup>246</sup>

The problem is that the Supreme Court has never actually held that demands for information are constitutionally permissible. The *Printz* Court's cursory remarks do not instruct the lower courts to exempt federal demands for information from the constitutional prohibition against commandeering. At most, the remarks suggest that the Court may have thought such demands could (somehow) be distinguished from the com-

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<sup>244</sup> See *supra* subsection III.A.2.

<sup>245</sup> *Printz v. United States*, 521 U.S. 898, 918 (1997) (emphasis added).

<sup>246</sup> *Id.* at 936 (O'Connor, J., concurring).

mands issued under the Brady Act. As a result, the *Printz* Court may have thought it wise to leave the door open for the lower courts to consider the issue more thoroughly in subsequent cases. But the lower courts never took up that task. Instead, most of them have simply presumed that *Printz* conclusively decided the matter and have upheld federal demands for information on that basis alone.

Outside of some exceptions discussed later, *Printz* invalidated federal commands that require the states to participate in the enforcement or administration of a federal regulatory program. The scope of the anti-commandeering rule thus hinges on what it means to “enforce” or “administer” federal law. Unfortunately, the *Printz* Court did not expressly elaborate upon those key terms. The lower courts have simply glossed over this important issue and presumed that providing information about regulated activity (somehow) does not amount to participating in the enforcement or administration of federal law.

The lower courts’ presumption appears to rest on a narrow conception of enforce as “to compel obedience.”<sup>247</sup> A few courts have employed this particular conception when interpreting the term “enforce” in a handful of congressional statutes ranging from the CSA to the Employee Retirement Income Security Act (ERISA).<sup>248</sup> If accepted for purposes of the anti-commandeering rule, this conception would seemingly forbid Congress only from compelling state officials to compel their own citizens to do (or not do) something. For example, a congressional command to a state official to seize a medical marijuana dispensary and arrest and restrain its proprietor would clearly constitute a command to enforce federal law—i.e., the official would be obliged to compel the proprietor’s obedience with the federal CSA.

It is far from clear, however, that the Supreme Court had such a narrow conception in mind in the anti-commandeering cases. To begin, the Court used the term “enforce” interchangeably with other terms like “adminis-

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<sup>247</sup> BLACK’S LAW DICTIONARY 608 (9th ed. 2009) (defining “enforce”).

<sup>248</sup> For instance, 21 U.S.C. § 885(d) (2006) grants immunity from criminal prosecution to any state or federal official “engaged in the enforcement” of state or federal drug laws. Some courts have interpreted “enforcement” to mean “to compel compliance with the law.” *E.g.*, *United States v. Rosenthal*, 454 F.3d 943, 948 (9th Cir. 2006). Courts have arrived at similar interpretations under provisions of ERISA. *See, e.g.*, *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987) (“[A]n action ‘to enforce’ means an action to compel someone to do something or not to do something, such as make contributions, that ERISA or the plan requires be done or not done.”).

ter”<sup>249</sup> (as in, to administer federal law) and “execute”<sup>250</sup> (as in, the executive functions of a state), and these terms do not necessarily have the same restrictive definition as “enforce.” In common usage, these terms simply mean to perform a task or duty—and surely, even running a simple search of a state database entails performing a task or duty.

More importantly, the actual holding of *Printz* suggests a broader conception of the term “enforce” and of the reach of the anti-commandeering rule. Indeed, *Printz* easily could be read to condemn rather than to spare demands for information, notwithstanding the dicta noted above. The reason, as Dean Evan Caminker has surmised, is that “the primary duty imposed by the Brady Act itself is a ‘reporting’ requirement of sorts.”<sup>251</sup> The *Printz* Court even acknowledged that the “central obligation” imposed by the Brady Act upon Chief Law Enforcement Officers (CLEOs) is to “make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.”<sup>252</sup> In an earlier portion of the opinion, the Court had similarly noted that CLEOs were required only “to *provide information* that belongs to the State” and “to conduct investigation in their official capacity, by *examining databases and records*.”<sup>253</sup> Importantly, the Court noted that the Brady Act “*does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful*; he may notify the firearms dealer to that effect, but is not required to do so.”<sup>254</sup> In other words, CLEOs were not required to compel anyone else to do (or not do) anything, e.g., to forego a proposed firearm transaction.

It is hard to fathom what sort of principled distinction could be drawn between the actual duties imposed by the Brady Act and the duties imposed by congressional reporting requirements, administrative subpoenas, and grand jury subpoenas discussed herein. Consider, for example, the subpoena issued by the DEA requiring a Michigan state agency to search its medical marijuana registry and provide the DEA “copies of any and all documents,

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<sup>249</sup> See OXFORD ENGLISH DICTIONARY 162 (2d ed. 1989) (defining “administer” as “to carry on, or execute (an office, affairs, etc.)”).

<sup>250</sup> See BLACK’S LAW DICTIONARY, *supra* note 247 (defining “execute” as “to perform or complete (a contract or duty)”).

<sup>251</sup> Caminker, *supra* note 16, at 235.

<sup>252</sup> *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting 18 U.S.C. § 922(s)(2) (1994)).

<sup>253</sup> *Id.* at 932 n.17 (emphases added).

<sup>254</sup> *Id.* at 903 (emphasis added).

records, applications, payment method of any application for Medical Marijuana Patient Cards and Medical Marijuana Caregiver [C]ards and copies of front and back of any cards” pertaining to seven named individuals under federal investigation.<sup>255</sup> Like the background check provisions of the Brady Act, this subpoena required the state to search for and provide information it had gathered in its sovereign capacity to assist federal agents in detecting and sanctioning violations of federal law.

Further undermining the case for a narrow application of the anti-commandeering rule, the *Printz* Court rejected the notion that information-reporting requirements could be distinguished from demands for other state services on the basis of historical practice.<sup>256</sup> To be sure, the federal government has demanded information from the states more commonly than it has demanded other services. But the federal government’s growing penchant for commandeering states’ secrets is no reason to absolve that practice from constitutional prohibition.<sup>257</sup> Most statutory reporting requirements are of distinctly modern origin. They have been adopted as part of The Asbestos School Hazard Abatement Act of 1984, The Health Care Quality Improvement Act of 1986, The Crime Control Act of 1990, The Hotel and Motel Fire Safety Act of 1990, and The Highway Safety Act of 1991, among others.<sup>258</sup> Indeed, in *Printz*, Justice Scalia downplayed the constitutional significance of such statutes, arguing,

Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice.<sup>259</sup>

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<sup>255</sup> *United States v. Mich. Dep’t of Cmty. Health*, No. 10-109, 2011 WL 2412602, at \*1 (W.D. Mich. June 9, 2011).

<sup>256</sup> In *Printz*, the Court cited the dearth of congressional legislation commandeering state executives and legislatures, particularly during the Founding era, to help justify its anti-commandeering rule. 521 U.S. at 905-18. It reasoned that “if . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.” *Id.* at 905.

<sup>257</sup> The Court has not shied away from invalidating modern practices it deems constitutionally suspect merely because they have become commonplace. *See, e.g., INS v. Chadha*, 462 U.S. 919, 944 (1983) (holding legislative veto provisions, which appeared in nearly three-hundred congressional statutes, unconstitutional).

<sup>258</sup> *See supra* subsection I.C.1.

<sup>259</sup> 521 U.S. at 918.

Likewise, statutes authorizing administrative agencies to subpoena records are now commonplace, but those statutes are also of relatively recent vintage. The first notable administrative subpoena statute appeared in 1887,<sup>260</sup> but until 1943, the administrative subpoena power was quite narrow,<sup>261</sup> and it is not even clear when it was first employed to obtain records from an unwilling state.

The grand jury could pose a special exception. Grand juries have exercised broad investigative powers since well before the founding of the nation,<sup>262</sup> and the Fifth Amendment expressly mandates their use in most federal criminal proceedings.<sup>263</sup> It might be argued that the Fifth Amendment authorizes the grand jury to demand assistance—informational or otherwise—from the states in conducting its criminal investigations. I discuss such an exception below. For now, however, it is worth noting that this exception to the anti-commandeering rule would only apply to demands made by federal grand juries and would not apply to demands made by administrative agencies or Congress.

In lieu of the lower courts' narrow conception of enforcement, I espouse a broader vision that includes the *gathering and reporting* of information, even if these tasks do not directly involve compelling a citizen to do (or not do) anything. This conception not only seems more consistent with the actual holding in *Printz*, but it also reflects a more robust understanding of what law enforcement entails. For one thing, gathering and reporting information—via inspections, investigations, surveillance, etc.—about regulated activities is a quintessential task of *law enforcement*. To say that law enforcement excludes these tasks is to ignore much of what law enforcement agencies actually do. Indeed, the very definition of the term “law enforcement” is the “*detection and punishment of violations of the law.*”<sup>264</sup>

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<sup>260</sup> Hughes, *supra* note 22, at 587 n.37.

<sup>261</sup> See *id.* at 587-88 (“[T]he early cases on administrative subpoenas displayed judicial reluctance to grant broad enforcement.”).

<sup>262</sup> LAFAVE ET AL., *supra* note 74, § 8.2(c) (discussing the view that “the early history of the grand jury clearly establishes the legitimacy of its extensive investigative authority. The power of the grand jury to compel testimony was recognized well before the adoption of the Constitution . . . .”); see also *Blair v. United States*, 250 U.S. 273, 280 (1919) (“At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States.”).

<sup>263</sup> See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .”).

<sup>264</sup> BLACK’S LAW DICTIONARY, *supra* note 247, at 964 (emphasis added). Courts have employed even broader definitions of the term. See, e.g., *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1272 (2011) (Alito, J., concurring) (“The ordinary understanding of law enforcement includes



Under this view, law enforcement entails a series of interwoven tasks. The gathering of information is, of course, a crucial first step in that process; everything else, including prosecution and punishment, necessarily follows it.<sup>265</sup>

This broader conception of enforcement and of the reach of the anti-commandeering rule also avoids some of the puzzling results that might otherwise arise under the lower courts' reasoning. For example, if the anti-commandeering rule merely bars Congress from requiring state officials to force ordinary citizens to do (or not do) something, Congress could presumably require those officials to perform *any other task* that does not require them to compel action (or inaction) from their citizens. Congress would not be limited to demanding information from the states. For example, it could presumably force state officials to perform other time-intensive tasks, such as clerical work, janitorial services, and so on. It seems difficult to imagine that the *Printz* Court would have embraced such a narrow rule.

#### B. *The Structural Harms of Commandeering States' Secrets*

Not only is commandeering states' secrets conceptually indistinguishable from commandeering other enforcement services, but the burdens it imposes on state officials and the damage it inflicts on their relationships with their constituents are also the very same harms that animated the Court's decisions in *New York* and *Printz*. In particular, the *Printz* Court warned that, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."<sup>266</sup> Likewise, the *New York* Court remarked that

where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials . . . remain insulated . . . . Accountability is thus diminished when, due

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not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security.").

<sup>265</sup> See, e.g., Fan, *supra* note 176, at 52-53 (discussing how one piece of state-gathered information—the criminal “rap sheet”—shapes federal law enforcement decisions about search, arrest, prosecution, and sentencing).

<sup>266</sup> *Printz v. United States*, 521 U.S. 898, 930 (1997).

to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . . .<sup>267</sup>

Requiring states to provide information about regulated activity forces them to absorb some of the financial costs of enforcing federal law that should be borne by the federal government instead. As discussed above, commandeering states' secrets makes it more difficult for the states to gather information about and from their citizens. When the threat of commandeering looms, states need to hire more law enforcement agents or grant deeper regulatory concessions to gather the same quantum of information.<sup>268</sup> This added burden, properly conceived, is a cost of enforcing federal law against private citizens, rather than a cost of bringing the state itself into compliance with federal law.<sup>269</sup> In the logic of *Printz* and *New York*, the burden should be borne by the federal government.

The lower courts have plainly misjudged the harmfulness of commandeering states' secrets. In their decisions rejecting challenges to federal demands for information, the lower federal courts have almost uniformly assumed that the burden of providing information is minimal or even non-existent. In so doing, they have emphasized that the federal government is seeking only information already on hand.<sup>270</sup> In other words, the state need not expend any additional resources tracking down marijuana distributors, undocumented aliens, tax cheats, and so on, because that information is already in its files. To comply with an order seeking information already on hand—a tax return, a criminal record, a medical marijuana registration form, a license application, an environmental audit, etc.—a state official would usually need only to type a few keystrokes on a computer—a burden, to be sure, but apparently not one of constitutional magnitude.

These courts' myopic focus on the immediate burden of compliance ignores the dynamic costs of commandeering discussed above. Commandeering information already on hand cannot, of course, impair the state's ability to gather *that* information; after all, citizens cannot take back information they have already submitted to a state. But commandeering

<sup>267</sup> *New York v. United States*, 505 U.S. 144, 169 (1992).

<sup>268</sup> See *supra* Part II.A.

<sup>269</sup> The costs associated with bringing a state into compliance with federal laws that properly apply to it do not raise constitutional concerns, at least under existing jurisprudence. See *Reno v. Condon*, 528 U.S. 141, 150 (2000) ("We agree with South Carolina's assertion that the [Driver's Privacy Protection Act's (DPPA)] provisions will require time and effort on the part of state employees, but reject the State's argument that the DPPA violates the principles laid down in either *New York* or *Printz*.").

<sup>270</sup> See *supra* Section II.A.

does burden state efforts to gather information. Citizens might refuse to submit information in the future if they know their submissions could later be used against them by federal authorities.<sup>271</sup>

Interestingly, the federal courts have not been oblivious to the dynamic costs of information expropriation when those costs are borne by the federal government. In a number of prominent cases, the federal courts have denied state actors access to the privileged records of federal agencies, due to concerns that the states' use of those records would burden the federal government.<sup>272</sup> In *Pierce County v. Guillen*, for example, a plaintiff sought access to confidential reports submitted by a county to the federal Department of Transportation (DOT).<sup>273</sup> The reports allegedly discussed the dangerous condition of a local roadway on which the plaintiff's wife had been killed in an automobile accident.<sup>274</sup> The county submitted the report to the DOT to qualify for federal highway safety improvement grants.<sup>275</sup> Congress had required submission of the reports in order to help the DOT allocate scarce federal grant funds, but it realized that the information contained therein could also prove useful in pursuing negligence claims against the governments providing the information.<sup>276</sup> Hence, to encourage reporting, Congress had designated that the reports would be privileged.<sup>277</sup> Nonetheless, the state court hearing the plaintiff's tort suit against the county ordered disclosure of the report.<sup>278</sup> The county appealed, and, in a unanimous decision, the *Guillen* Court held that Congress could prevent a state court from commandeering information submitted to a federal agency.<sup>279</sup> In so doing, the Court cited the federal government's concern that giving state courts access to the reports would deprive Congress of

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<sup>271</sup> See Richardson, *supra* note 85 (discussing reports that some Maine residents have refused to sign up for the state's medical marijuana registry due to fears that confidential registry information could be seized by federal authorities).

<sup>272</sup> See, e.g., Sewell Chan, *The Mayor Has Nothing but Harsh Words for a Gun Bill Before Congress*, N.Y. TIMES, Mar. 29, 2006, at B5 (reporting that the Bureau of Alcohol, Tobacco, Firearms and Explosives would not disclose gun trace data that New York City wanted to use in a civil nuisance lawsuit against gun dealers and manufacturers); David Kocieniewski, *I.R.S. Sits on Data Pointing to Missing Children*, N.Y. TIMES, Nov. 12, 2010, at A1 (reporting that the IRS refused to share federal tax return data that could have helped state law enforcement track down abducted children).

<sup>273</sup> 537 U.S. 129, 136-37 (2003).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 136.

<sup>276</sup> *Id.* at 134.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 138-40.

<sup>279</sup> *Id.* at 145-46.

useful information, in essence, because local governments would be reluctant to submit candid reports they knew could later be used against them.<sup>280</sup> The federal government's concern seems legitimate, and the Court's opinion, at least on policy grounds, appears sound.<sup>281</sup> Unfortunately for the states, however, if the roles of the governments had been reversed in *Guillen*—that is, if a federal court or agency had sought access to a report made to and privileged by a state government—the information would not have been safe.

It is true that these dynamic costs are imposed only indirectly. A state incurs them only if its residents decide to clam up and the state also decides to invest more to restore the flow of information. The economic costs imposed by the Brady Act were arguably more direct. The Act required the state to process a background check anytime a resident sought to purchase a firearm. It is not obvious, however, that the distinction, assuming it exists, has any constitutional significance. The drain on a state's budget is the same. Moreover, it is not necessarily true that the budgetary impact is somehow more avoidable in the context of secrets commandeering. A state cannot realistically underfund agencies that gather information for vital state programs any more than it could underfund the CLEOs who were ordered to search state databases.<sup>282</sup> Both moves would help the state avoid the economic costs of enforcing federal law, but both would also seriously undermine the enforcement of state law.

In any event, commandeering states' secrets also imposes the second type of cost that animated *Printz*—the political cost that state officials endure when they are forced to help administer objectionable and unpopular federal laws. No less than other forms of commandeering, the commandeering of states' secrets threatens to undermine the states' roles as autonomous sources of policymaking authority and vehicles for passive resistance to federal law. It is a bedrock feature of our federal system that states may pursue their own approaches to regulating the activities of private citizens,<sup>283</sup> even when—within certain bounds—those approaches conflict with

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<sup>280</sup> *Id.* at 147.

<sup>281</sup> *But see* Lynn A. Baker, Lochner's *Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727, 751 (2005) (criticizing the Court's decision and arguing that federal privileges should not bind state courts).

<sup>282</sup> Recall that CLEOs were required to make only a "reasonable effort" to conduct searches of databases. *United States v. Printz*, 521 U.S. 898, 933 (1997). The reasonableness of any effort would seemingly depend on the resources that a CLEO has at her disposal—the fewer her resources, the more reasonable it would be for her to forego a search altogether.

<sup>283</sup> *See, e.g., Printz*, 521 U.S. at 928 ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is

federal policy.<sup>284</sup> In *New York v. United States*, for example, the Court insisted that “even 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.”<sup>285</sup> This concept of state autonomy includes a number of features. Most importantly for present purposes, the states may refuse to lend their assistance to federal law enforcement.<sup>286</sup> This laudable feature of our federalism forces “Congress to internalize the financial and political costs of its actions.”<sup>287</sup> It cannot shift these costs onto the states by “compel[ing] the States to enact or administer a federal regulatory program”<sup>288</sup>—a move that would dramatically expand the federal government’s power vis-à-vis the states and their citizens.<sup>289</sup>

The importance of protecting the states’ ability to control the use of their own law enforcement resources cannot be overstated. Congress’s prescriptive authority is expansive, to the point that it is difficult to imagine issues on which Congress does not have authority to legislate.<sup>290</sup> But because enforcement arguably “controls the effective meaning of the law,”<sup>291</sup> the states’ ability to refuse to enforce federal law gives them de facto control

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no more compatible with this independence and autonomy that their officers be ‘dragooned’ . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.” (internal citations omitted); *New York v. United States*, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).

<sup>284</sup> See, e.g., Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 440 (2002) (“Collective autonomy describes . . . the freedom of the people of a state . . . to adopt public policies that suit them even though such policies are at odds with national preferences or the preferences of other states.”); see also Mikos, *Limits of Supremacy*, *supra* note 17, at 1445-50 (discussing conditions under which state laws that conflict with federal policies are constitutionally immune from preemption).

<sup>285</sup> *New York*, 505 U.S. at 166. For a detailed discussion of how the anti-commandeering rule protects state autonomy, see Mikos, *Limits of Supremacy*, *supra* note 17, at 1445-62.

<sup>286</sup> *Printz*, 521 U.S. at 935 (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”).

<sup>287</sup> *Young*, *supra* note 13, at 16.

<sup>288</sup> *New York*, 505 U.S. at 188.

<sup>289</sup> *Printz*, 521 U.S. at 922 (“The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”).

<sup>290</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 49 (2005) (O’Connor, J., dissenting) (suggesting that the Court’s holding “threatens to sweep all of productive human activity into federal regulatory reach”).

<sup>291</sup> *Lemos*, *supra* note 18, at 700.

over a number of important policy domains that are, formally speaking, subject to congressional regulation.<sup>292</sup> The federal government's capacity to enforce laws on its own is quite constrained, in large part because of its limited capacity to gather information about all of the activities it regulates.<sup>293</sup> In the enforcement gaps that inevitably arise, the states can play a meaningful governance role—one not scripted by Congress—and can foster the benefits commonly attributed to a federal regime, such as preference satisfaction, experimentation, and tyranny prevention, among others.

Unfortunately for the states, however, the lower courts have seriously undermined their ability to refuse assistance and passively resist federal authority by allowing federal agencies to conscript their information-gathering capacity. Indeed, some courts have missed entirely one of the key points behind the anti-commandeering rule and the point of state autonomy more generally. These courts have dismissed as illegitimate, for constitutional purposes, the notion that state officials may refuse to provide assistance to the federal government out of mere contempt for its policies.<sup>294</sup> As a result, state officials may be pressed into performing tasks essential to the enforcement of federal laws they and their constituents deem objectionable. What is more, those state officials may be blamed, criticized, and mistrusted for doing so.<sup>295</sup>

### C. *The Contours of the Proposed Anti-Commandeering Rule*

I propose that courts deem federal demands for state information to be prohibited commandeering. To prevail, a state would need to demonstrate only that it is being compelled by the federal government to provide information.<sup>296</sup> It could object to providing information on any grounds, including opposition to the substance of federal law, and that objection

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<sup>292</sup> See Mikos, *Limits of Supremacy*, *supra* note 17, at 1463-79 (arguing that states' de facto authority exceeds their de jure authority in many policy domains).

<sup>293</sup> See *supra* Section I.B.

<sup>294</sup> See *supra* Section III.A.

<sup>295</sup> See *supra* Section II.B.

<sup>296</sup> The demands discussed throughout the Article are plainly compulsory. State officials may be sanctioned for defying a federal subpoena or court order. See FED. R. CRIM. P. 17(g) (authorizing contempt sanctions to enforce court subpoenas); DOJ REPORT, *supra* note 58, at 11 ("Most statutes authorizing administrative subpoena enforcement in federal district court authorize the court to impose contempt sanctions upon a recipient who continues to refuse to comply even after a court order of compliance.").

could take any form.<sup>297</sup> Importantly, the state would not need to demonstrate any harm from commandeering, for the *Printz* Court made it clear that “no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”<sup>298</sup>

Interpreted to bar demands for states' secrets, the anti-commandeering rule would force Congress to absorb the full costs of administering federal regulatory programs. Such a rule would give Congress the incentive to choose the least costly method of acquiring the information needed to enforce its own legislation<sup>299</sup>: (1) hire more federal gumshoe detectives, (2) offer more regulatory concessions to entice private reporting to federal agencies, or (3) purchase the information from the states (an option discussed below). The rule would also ameliorate the accountability concerns surrounding commandeering. State officials could refuse to help enforce unpopular federal laws, without necessarily abandoning enforcement of local laws.<sup>300</sup>

My proposal, however, would not preclude all federal efforts to extract information from the states. The Court has recognized several exceptions and limitations to the anti-commandeering rule that, for present purposes, I would apply to demands for information as well. These exceptions permit Congress to pressure, and, in some circumstances, even *compel* states to supply information to the federal government, without running afoul of the rule. In the subsections below, I briefly discuss those exceptions, their scope, and their implications for my analyses. I also briefly elaborate upon a potential grand jury exception to commandeering claims, suggested above. Lastly, I discuss, and squarely reject, a separate exception, seemingly recognized by lower courts and advanced by some legal scholars, that would permit commandeering of states' secrets out of sheer necessity. As I argue, such an exception is unnecessary and flatly inconsistent with Supreme Court precedent.

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<sup>297</sup> Most importantly, this means that a state would not need to demonstrate that the information was formally privileged by state law—a determination that seems largely irrelevant to the constitutionality of the federal government's demand.

<sup>298</sup> *United States v. Printz*, 521 U.S. 898, 935 (1997).

<sup>299</sup> Cf. D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 661-62 (1985) (suggesting that Congress would legislate more efficiently if it were required to bear the full costs of its legislative programs).

<sup>300</sup> For a discussion of the dilemma state regulators now face without the protection of such a rule, see *supra* Section II.B.

## 1. Existing Exceptions to the Anti-Commandeering Rule

### a. *Conditional Spending/Preemption*

First, Congress may coax information from the states by offering them conditional grants of federal funds or regulatory powers.<sup>301</sup> So long as Congress gives the states a constitutionally sufficient alternative to providing information, it does not run afoul of the anti-commandeering rule.<sup>302</sup> In the logic of the Court, “[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”<sup>303</sup>

Invoking its conditional spending power, Congress could give the states the choice between accepting federal money in return for providing information or foregoing federal money and keeping the information secret. Indeed, Congress has employed this method to coax information from states in a number of statutes. Consider, for example, the Solid Waste Disposal Act Amendments of 1980.<sup>304</sup> The Act provides that “[e]ach state shall . . . compile, publish, and submit to the [EPA] Administrator an inventory describing the location of each site within such State at which hazardous waste has at any time been stored or disposed of.”<sup>305</sup> Though this provision contains mandatory language (“shall”), the following section clarifies that the reporting duty applies only if a state wants federal grant funds.<sup>306</sup>

Similarly, pursuant to its conditional preemption power, Congress could arguably give the states the choice between not gathering information at all,<sup>307</sup> or sharing all information they do gather. Congress has not actually

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<sup>301</sup> See *New York v. United States*, 505 U.S. 144, 171-73 (1992) (distinguishing conditional spending and preemption from prohibited commandeering).

<sup>302</sup> See *id.* at 175-76 (finding the choices offered to the states inadequate because Congress could not constitutionally impose either of the options upon the states).

<sup>303</sup> *Id.* at 168.

<sup>304</sup> Pub. L. No. 96-482, 94 Stat. 2334 (1980) (codified in scattered sections of 42 U.S.C.)

<sup>305</sup> 42 U.S.C. § 6933(a) (2006).

<sup>306</sup> *Id.* § 6933(c). If a state refuses to undertake the task, the Act also provides that the EPA Administrator must step in to compile the inventory. *Id.* § 6933(b).

<sup>307</sup> I say “arguably” because at least one notable jurist has expressed doubts about Congress’s ability to impair state efforts to glean information needed to enforce state laws. See *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) (“By precluding doctors, on pain of losing their DEA registration, from making a recommendation that would legalize the patients’ conduct under state law, the federal policy makes it impossible for the state to exempt the use of medical marijuana from the operation of its drug laws. In effect, the federal government is forcing the state to keep medical marijuana illegal. But preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being



employed the conditional preemption power in this way, but to illustrate how it would work, suppose Congress threatened to preempt state laws that compel medical marijuana dispensaries to apply for a license from the state. This is something Congress arguably could do, although it would be controversial and likely politically infeasible. Of course, Congress does not really want to scuttle state information gathering—it wants the information for itself, after all. But Congress could use the threat of preemption to pressure the states into sharing their secrets. Indeed, the Court has upheld equally stark proposals against constitutional challenge. In *Federal Energy Regulatory Commission v. Mississippi*, for example, Congress offered the states the unpalatable choice between abandoning regulation of power plants or regulating them only after considering federal guidelines.<sup>308</sup> Neither choice was particularly appealing to the states, but since Congress could preempt all state regulations, the former option made the choice set constitutionally adequate.<sup>309</sup>

Programs like these should be upheld as long as the inducement is not coercive and does not violate any other requirement imposed by the Court.<sup>310</sup> Among other things, Congress must clearly provide advance notice to the states any time it seeks to extract concessions from them using its conditional spending and preemption powers.<sup>311</sup> In the present context, this means that Congress must clearly lay the states' options on the table before the federal government demands information. The failure to do so vitiates the conditions—in this case, the duty to provide the information.<sup>312</sup>

Importantly, most federal demands for information discussed herein could not be characterized as conditional spending or preemption programs, for Congress has not actually given the states constitutionally adequate notice that they must provide information to the federal government—i.e.,

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forced to regulate conduct that it prefers to leave unregulated.”), *aff'g* *Conant v. McCaffrey*, 2000 WL 1281174 (N.D. Cal. 2000).

<sup>308</sup> *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 764-66 (1982).

<sup>309</sup> *Id.* at 764.

<sup>310</sup> *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987) (discussing constitutional requirements for conditional spending programs); *see also* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 (holding that the “threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion” of the Affordable Care Act).

<sup>311</sup> *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (“States cannot knowingly accept conditions of which they are ‘unaware’ or which they are ‘unable to ascertain.’”); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (holding that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously”).

<sup>312</sup> *Murphy*, 548 U.S. at 296-97.

notice that occurs *before the federal demand for information actually arises*. As discussed earlier, the federal government seldom warns the states that it will expropriate information they have not yet collected. Instead, it commonly catches state regulators unawares, demanding information only after it has already been collected. Indeed, the federal government has a strong incentive to conceal the threat of commandeering from state regulators until after they have gathered it, in order to ensure that the states continue to gather information that serves federal law enforcement priorities. At present, even the most sophisticated state officials have only a vague understanding that the information they are now gathering *could* later be commandeered.

The clear notice rule helps to alleviate the political accountability problems that otherwise plague commandeering. It ensures that state officials can make regulatory decisions based on full information. State officials will know the price that the state must pay to monitor federally regulated activity. Constituents will know whether the information they provide to the state is going to be forwarded to the federal government. And if state officials nonetheless make a choice their constituents oppose—either to collect, or not to collect, information—those officials will not be unjustifiably blamed for that choice. But because Congress has not actually disclosed the threat of commandeering *ex ante*, most extant demands for state information cannot be treated as permissible conditional preemption/spending legislation.

#### b. *Generally Applicable Reporting Requirements*

Second, Congress may impose duties on the states that it also imposes upon private citizens—i.e., duties that are generally applicable.<sup>313</sup> In other words, Congress may demand information (or other services) from the states so long as it demands the same information (or services) from private citizens. This exception to the anti-commandeering rule is based on the notion that the states will have powerful political allies who can help

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<sup>313</sup> See *United States v. Printz*, 521 U.S. 898, 932 (1997) (“Assuming all the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments.”); *New York v. United States*, 505 U.S. 144, 160 (1992) (“Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws.”).

forestall passage of unduly burdensome commands in the national political process.<sup>314</sup>

Congress already subjects the states to some generally applicable reporting requirements,<sup>315</sup> and the Court has upheld this practice. In *South Carolina v. Baker*, a case decided prior to *Printz*, the Court upheld a federal statute which ordered the states—alongside all bond issuers—to record the names of bond owners and forward that information to the IRS, in order to help it collect federal taxes on bond income.<sup>316</sup> Similarly, in *Reno v. Condon*, a decision postdating *Printz*, the Court upheld a federal statute that required states—alongside other database owners—to obtain the consent of citizens before selling their information.<sup>317</sup> Both decisions stand for the simple proposition that laws of general applicability do not violate the anti-commandeering rule when they are applied to the states.<sup>318</sup> In other words, they do not create a carte blanche exception to the anti-commandeering rule for all federal reporting requirements.

Though Congress may use this exception to circumvent the anti-commandeering rule in some cases, it is important to note that the exception currently does not—and, more fundamentally, could not—justify most of the demands for states' secrets discussed throughout this Article. For one thing, many of the demands currently imposed on the states have not been made generally applicable. Nearly every statutory reporting requirement discussed above, in subsection I.C.1, for example, is aimed exclusively at the states; Congress does not require comparable reporting by private citizens.<sup>319</sup>

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<sup>314</sup> See Jackson, *supra* note 152, at 2207 (suggesting that “statutes that fall on private and public interests may be more likely to be closely politically monitored and contested; the legislative process is ‘safeguarded’ from imprudent decisions not only by the states’ representation but also by the general public’s representation”). *But see* Adler & Kreimer, *supra* note 152, at 113-15 (rejecting this rationale for the exception).

<sup>315</sup> For example, states are required to report the incomes of employees to the IRS, as are private employers. See 26 U.S.C. § 6051(a), (d) (2006).

<sup>316</sup> 485 U.S. 505, 527 (1988).

<sup>317</sup> 528 U.S. 141, 151 (2000).

<sup>318</sup> See *Baker*, 485 U.S. at 514-15 (“Such ‘commandeering’ is, however, an inevitable consequence of regulating a state activity.”); see also *Condon*, 528 U.S. at 151 (“But we need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the DPPA is generally applicable.”).

<sup>319</sup> Even demands that do apply to private citizens fail for a different reason: Congress has not (yet) clearly stated its intent to apply them to the states as well. The clear statement requirement stems from a long line of cases in which the Court has refused to apply federal regulations to the states absent Congress’s express imprimatur thereon. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (dismissing an age discrimination lawsuit brought by state judges on the grounds that Congress had not plainly stated its intent to apply the Age Discrimination in Employment Act protections to the state courts). For example, the Attorney General’s

Even more fundamentally, some demands made by the federal government could never be considered generally applicable. To illustrate, a demand for information that a state gathers in its sovereign capacity is, by definition, a demand for information private citizens could not possess.<sup>320</sup> For example, Congress could not force a state to disclose the contents of its medical marijuana registry, for that information is owned exclusively by the state and was obtained by promising inducements—such as immunity from prosecution—that only the state could grant.<sup>321</sup> Similarly, the *Printz* Court explained, “the suggestion that extension of [the Brady Act] to private citizens would eliminate the constitutional problem *posits the impossible*.”<sup>322</sup>

The Brady Act does not merely require CLEOs to report information in their private possession. It requires them to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigation in their official capacity, by examining databases and records that only state officials have access to.<sup>323</sup>

These limitations should protect many of the most sensitive states’ secrets from commandeering, even if they leave some states’ secrets exposed.<sup>324</sup>

power to issue administrative subpoenas in controlled substances investigations, as discussed earlier, could be considered generally applicable—it says, “any records.” But Congress did not clearly state its intent to make that power applicable to state government records. Thus, even if the Attorney General demanded information from a state that a private party might also possess (e.g., an employee drug test), the subpoena might still be quashed on the grounds that it failed to satisfy the clear statement requirement.

<sup>320</sup> Cf. Jackson, *supra* note 152, at 2207 (suggesting that generally applicable statutes protect states because the required duties are “unlikely to be aimed at uniquely governmental functions of states”). As Professors Adler and Kreimer note, however, “the concept of ‘general applicability’ is not pellucid.” See Adler & Kreimer, *supra* note 152, at 111 (discussing problems courts must confront in determining whether a duty is generally applicable).

<sup>321</sup> Focusing on the means used to gather data is one way, though not the only way, to identify information obtained in the states’ sovereign capacity.

<sup>322</sup> United States v. *Printz*, 521 U.S. 898, 932 n.17 (1997) (emphasis added).

<sup>323</sup> *Id.*

<sup>324</sup> *National Federation of Independent Business v. Sebelius* may have further limited the reach of this exception. A slim 5–4 majority of the Court drew a sharp distinction between regulating the activity of private citizens and compelling such activity. 132 S. Ct. 2566, 2589 (2012). The Court found that Congress could not compel citizens to “do things that would be good for them or good for society”—for example, to buy health insurance—even though “[t]hose failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce.” *Id.* Under the Court’s reasoning, it would seem that Congress could not impose a duty on all citizens to report violations of federal law. This would, of course, make it impossible for Congress to apply a *generally applicable* reporting duty to state law enforcement agents.

c. *The Reconstruction Amendments*

Third, Congress may commandeer the states pursuant to its powers under the Reconstruction Era Amendments.<sup>325</sup> Section Five of the Fourteenth Amendment, for example, empowers Congress to “enforce’ by ‘appropriate legislation’ the constitutional guarantee that no State shall deprive any person of ‘life, liberty, or property, without due process of law,’ nor deny any person ‘equal protection of the laws.’”<sup>326</sup> The basis for this exception is straightforward: the Reconstruction Amendments changed Congress’s relationship vis-à-vis the states, affording Congress greater powers than it otherwise enjoys in executing its Article I authority.<sup>327</sup>

When implicated, this exception would clearly permit the federal government to demand information from the states. Indeed, the federal government could plausibly demand any enforcement service it wanted from the states, not just information gathering. But this exception is limited in important ways by the Court’s narrow construction of Congress’s enforcement powers, and thus does not pose a serious threat to most states’ secrets. In the Court’s view, Congress is “limited to enacting laws that prevent or remedy violations of rights already recognized by the Supreme Court. Moreover, . . . [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>328</sup>

This interpretation substantially narrows the universe of states’ secrets Congress could seize pursuant to Section 5. Under Section 5, for example, Congress could subpoena state election records for the purpose of investigating claims of civil rights violations levied against a city election commission.<sup>329</sup> This alleviates one of the prime objections to the application of the anti-commandeering rule to the provision of information: the notion that the rule would insulate state officials from federal investigation into their abuses of constitutional rights. At the same time, however, the federal

<sup>325</sup> See Adler & Kreimer, *supra* note 152, at 119-26 (noting that there is a general consensus that Congress’s Reconstruction Amendment powers are not constrained by the anti-commandeering rule).

<sup>326</sup> *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997) (quoting U.S. CONST. amend. XIV, § 5).

<sup>327</sup> See Adler & Kreimer, *supra* note 152, at 126-31 (discussing the justification behind the exception).

<sup>328</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 297 (3d ed. 2006) (quoting *City of Boerne*, 521 U.S. at 520).

<sup>329</sup> See, e.g., *In re Cohen*, 62 F.2d 249, 251-52 (2d Cir. 1932) (upholding grand jury subpoenas, issued against the president of the New York City Board of Elections, seeking election records for the purpose of investigating civil rights violations).

government could not subpoena state records to investigate violations of federal law that do not also amount to violations of constitutional rights, including, most importantly, violations of federal law committed by private citizens.<sup>330</sup>

d. *State Judges*

Fourth, the anti-commandeering rule does not circumscribe Congress's power to command state judges to perform judicial functions, such as hearing federal causes of action. The Framers envisioned that Congress would rely extensively upon state courts, and thus, implicitly gave Congress more authority over state courts than it has over state legislators and state executive officials.<sup>331</sup> Article III, for example, empowers Congress to create the lower federal courts, but does not require it to do so.

Nonetheless, even assuming that providing information to Congress or a federal agency is a judicial function, Congress's unique power vis-à-vis state judges does not pose a serious threat to states' secrets because state judges possess only a small fraction of the total store of information states now gather. In other words, Congress might order state judges to turn over some criminal records, court judgments, and similar documents in their possession.<sup>332</sup> But it could not order them to provide the far more voluminous records maintained by state regulatory agencies, including medical marijuana registries, prescription drug records, business licenses, environmental audits, tax filings, and other records not submitted to state courts.

2. New Exceptions to the Anti-Commandeering Rule

a. *Grand Juries*

More interestingly for present purposes, courts could craft a new exception permitting commandeering by federal grand juries. To be sure, the harms imposed by grand jury subpoenas are essentially identical to the harms imposed by statutory reporting requirements and administrative subpoenas. But subpoenas issued by a federal grand jury arguably could be treated differently. For one thing, grand jury investigations are authorized by the Constitution itself. In other words, one might suppose that the Fifth

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<sup>330</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 620-24 (2000) (holding that Section 5 does not empower Congress to regulate private persons).

<sup>331</sup> See Caminker, *supra* note 16, at 213-17 (discussing, but also critiquing, this exception).

<sup>332</sup> See Fan, *supra* note 176, at 70 ("Congress could mandate that state courts retain, in scanned retrievable form, prescribed judicial records made or used in adjudicating guilt.").

Amendment authorizes the grand jury to commandeer information—or even other investigatory services—from states for use in its investigations. As one prominent group of criminal procedure scholars has written, “the early history of the grand jury clearly establishes the legitimacy of its extensive investigative authority.”<sup>333</sup> By contrast, neither of the other two methods of commandeering states’ secrets is authorized directly by the Constitution. Both statutory reporting requirements and administrative subpoenas are creatures of congressional statute. In addition, both methods were likely unknown to the Framers. Most accounts suggest Congress began to impose information reporting requirements on the states in the 1980s.<sup>334</sup> It did authorize administrative subpoenas decades earlier—still recently, in constitutional terms—but the practice was narrowly circumscribed until at least the 1940s.<sup>335</sup>

On the basis of this textual and historical distinction, one might argue that investigative commands issued by grand juries should not be subject to the anti-commandeering rule, though I leave full consideration of the issue for another day. If a court were to adopt such an exception, however, it is essential that it also enforce long-standing restrictions on the scope of the grand jury’s investigative powers. Perhaps most importantly, it must not allow the grand jury to be used to pursue purely regulatory investigations.<sup>336</sup> This limitation preserves the original role of the grand jury and helps prevent the federal government from using the grand jury exception to sidestep the limits I propose on its civil enforcement powers, namely, statutory reporting requirements and administrative subpoenas.

#### b. *Necessity*

A final argument sometimes employed in support of a broad power to commandeer states’ secrets emphasizes the federal government’s apparent need for the information possessed by the states. Some lower courts have emphasized this need as grounds for compelling states to provide information to federal agencies.<sup>337</sup> In *City of New York v. United States*,<sup>338</sup> discussed above, the Second Circuit explicitly resorted to such reasoning. It

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<sup>333</sup> LAFAVE ET AL., *supra* note 74, at § 8.2(c).

<sup>334</sup> *See supra* subsection I.C.1.

<sup>335</sup> *See supra* subsection I.C.3.

<sup>336</sup> *See, e.g.*, BRENNER & SHAW, *supra* note 75, at § 8.6 (discussing limits on a grand jury’s authority to conduct civil investigations).

<sup>337</sup> *See supra* Section III.A.

<sup>338</sup> 179 F.3d 29 (2d Cir. 1999).

suggested that the federal government could compel states to divulge their secrets any time it needs that information to enforce federal law.<sup>339</sup>

To begin, the argument that necessity could ever justify commandeering states' secrets is misguided. The Supreme Court has made this clear: "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."<sup>340</sup> In other words, once the determination is made that compelling a state to divulge secrets is tantamount to commanding them "to administer or enforce a federal regulatory program," the anti-commandeering rule is plainly violated. This *per se* rule spares the courts the nettlesome task of trying to weigh the complex harms identified herein against the probabilistic benefits to federal enforcement.

In any event, commandeering states' secrets is not really ever necessary, because Congress can always resort to other, more appropriate means to gather the information it needs.<sup>341</sup> To be sure, it is currently impossible without the help of the states for the federal government to track down and punish many people who are violating federal law. But the fault lies with Congress, not the states. Congress can bolster the federal government's own information-gathering apparatus, for example, by hiring more agents. Or it can try to persuade the states to provide the information by offering them grants.<sup>342</sup> The problem with current interpretations of the anti-commandeering rule is that they give Congress no incentive to do these things. Indeed, if anything, the necessity exception would give Congress the incentive to depend even more heavily on the states in order to make its need for the states' information all the more apparent. As discussed above, forcing Congress to employ noncoercive means would help to ensure, via the political process, that the benefits of using the information to enforce federal law exceed the added costs of gathering it.

At bottom, states should be allowed to refuse federal demands for information that are based on no more than the federal government's asserted need for the information. No doubt, this will hamper the enforcement of

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<sup>339</sup> *Id.* at 35 (holding that the states could not forbid voluntary sharing of information because it would allow them to "frustrate effectuation of some [federal] programs").

<sup>340</sup> *New York v. United States*, 505 U.S. 144, 178 (1992).

<sup>341</sup> *Cf. Hills*, *supra* note 152, at 857-58 (arguing that commandeering is generally not necessary because Congress can use its spending powers and conditional preemption to achieve its desired ends).

<sup>342</sup> In some cases, Congress could resort to one of the other exceptions to the anti-commandeering rule as well, such as investigating claims that state officials have violated the constitutional rights of citizens.



some federal laws, especially against private citizens. But this is a feature of our federal system and a necessary consequence of the anti-commandeering rule itself. Congress must provide for the enforcement of federal laws; it cannot shift that burden onto the states, even out of necessity.

#### D. *The Lack of Realistic Political Alternatives*

Convincing the federal courts that, as a matter of precedent, logic, history, and constitutional structure, the Constitution empowers the states to keep secrets from the federal government is not the only possible way to address the problems caused by the commandeering of states' secrets. Here, I briefly consider the steps that Congress and the Executive branch could take to address these problems. As I suggest, however, none of these political strategies holds the same promise as a judicially enforced constitutional prohibition on commandeering. Therefore, it is all the more imperative to find a judicial fix.

Congress could rescue state lawmakers by creating a new statutory privilege that would shield states' secrets from disclosure to the federal courts, federal agencies, and even Congress.<sup>343</sup> Congress could tailor the new privilege to provide the same, more, or less protection than the anti-commandeering rule discussed above.

Congress, however, has no obvious incentive to bail out state regulators and to assume the costs of enforcing federal law now borne by the states. Commandeering poses serious problems for state lawmakers, but it is generally a boon for Congress. It augments federal law enforcement and the effectiveness of federal regulations at no cost to the federal treasury. To be sure, the tactic can (and does) sometimes backfire, such as when a state abandons or foregoes monitoring of federally proscribed behavior due to concerns about the federal government's interest in the data.<sup>344</sup> But members of Congress are not likely to be blamed for any perceived deficiencies in state regulatory programs, even if those deficiencies are caused in large part by the threat of commandeering.

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<sup>343</sup> See Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 777 (1999) ("Rule 501 provides for continuing recognition of privileges, immunities, and non-disclosure provisions by federal statute . . . . Additionally, Congress can enact privilege-like confidentiality statutes through its general law-making powers and in the Federal Rules of Evidence.").

<sup>344</sup> For a discussion of how Maine recently abandoned its medical marijuana registry requirements due, in part, to concerns that the federal government would seek to exploit the information it was collecting, see *supra* note 99.

To some extent, officials in the Executive branch could also protect states' secrets by simply declining to exercise their expansive subpoena powers against the states. It stands to reason that if these officials realized that their demands for sensitive information jeopardized federal objectives—namely, by pushing states to forego monitoring of and state-imposed restrictions upon federally proscribed behaviors—they might refrain from subpoenaing state records in the first instance, even if neither Congress nor the courts stood in their way.<sup>345</sup>

Experience, however, highlights the peril of relying exclusively on agency self-restraint to protect highly sensitive information.<sup>346</sup> The peril lies in the fact that internal (i.e., voluntary) guidelines do not legally bind the hands of executive officials. Internal guidelines cannot be enforced by the courts, and thus may be ignored or abandoned by the Executive at will.<sup>347</sup> In any event, even if senior executive officials remain committed to respecting states' secrets, they cannot guarantee that every federal employee will necessarily do the same. The DOJ employs ninety-two United States Attorneys, each of whom operates largely independently of Washington. The DOJ leadership would have a difficult time making sure that each United States Attorney (along with other DOJ employees) strictly obeys the letter and spirit of the guidelines.<sup>348</sup> In addition, hundreds of other executive branch officials are empowered by statute and regulation to issue administrative subpoenas.<sup>349</sup> It seems a stretch to say that anything short of judicially enforced restrictions could prevent all of them from commandeering states' secrets.

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<sup>345</sup> Cf. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (suggesting that federal prosecutors would refrain from subpoenaing news reporters for their confidential sources if they thought the subpoenas would damage the news-gathering function).

<sup>346</sup> See, e.g., RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 637-38, 666 (2008) (finding that the DOJ regularly subpoenas news reporters, notwithstanding DOJ Media Guidelines ostensibly designed to curb the practice); see also Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 640-46 (2011) [hereinafter Mikos, *New Approach*] (suggesting that the federal campaign against medical marijuana has continued largely unabated, despite a recent DOJ memorandum arguably designed to curtail enforcement actions against individuals acting in compliance with state law).

<sup>347</sup> See Mikos, *New Approach*, *supra* note 346, at 641 ("[E]ven assuming the [DOJ's] Non-Enforcement Policy toward medical marijuana more plainly and forcefully sought to foreclose prosecutions, there's arguably nothing that a federal court (or criminal defendant) could do to enforce it against the DOJ.").

<sup>348</sup> See *id.* at 643-46 (discussing the DOJ's inability to control federal prosecutors because of monitoring costs, unclear state laws, and other factors).

<sup>349</sup> See DOJ REPORT, *supra* note 58, at 7 ("Most administrative subpoena authorities have been redelegated by the entity head to subordinate officials within the entity.").

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In short, commands to provide information look the same and generate the same problems as did the commands invalidated in *Printz* and *New York*. Such commands force states to participate in the administration of and bear some of the financial and political costs of federal regulatory programs. The courts should treat demands for information as prohibited commandeering. Congress should be able to obtain information from the states only by using one of the recognized exceptions to the anti-commandeering rule. The case for judicial intervention is even more apparent once we consider the lack of obvious incentives for Congress or the executive branch to address the problems created by the commandeering of states' secrets.

#### CONCLUSION

Through a variety of measures, the states are amassing troves of information detailing the regulated activities of their citizens, including activities that violate federal law. Not surprisingly, the federal government is keenly interested in obtaining this information. Using statutory reporting requirements, administrative subpoenas, and grand jury subpoenas, it has commandeered states' secrets for use in federal criminal and civil investigations.

Such commandeering imposes two costs on the states. First, by stoking the incentives of private citizens to conceal their activity from state regulators, commandeering makes it more difficult for the states to gather information in the first instance. Commandeering thus adds to the already hefty financial and privacy costs of enforcing state law. Second, commandeering forces state officials to help advance federal policies they or their constituents deem objectionable. What is more, state officials might be unfairly blamed for providing information to federal officials and advancing controversial federal policies.

Despite these objections, the lower courts have uniformly upheld federal demands for information. The courts have presumed that the anti-commandeering rule does not prohibit such demands, either because providing information about regulatory violations does not entail assisting in the enforcement of federal law or because the benefits of information expropriation outweigh the costs. The job of protecting state information falls instead to a patchwork of federal statutory and constitutional privileges for which federalism is at best a secondary consideration. This patchwork provides only limited protection for states' secrets and thus means that almost any information collected by the states—information that is essential

for the enforcement of state law and that can only be gathered by making assurances of its confidentiality—can be exploited by federal officials.

This Article argues that the conventional wisdom is wrong: states should be allowed to keep secrets from the federal government. It grounds that claim in a careful reading of the Court's anti-commandeering decisions, a fuller recognition of the tasks that executive officials regularly perform, and a deeper appreciation of the structural harms that demands for information inflict. This Article suggests that federal demands for information should be considered prohibited commandeering. In all important respects, the commandeering of the states' information-gathering services is indistinguishable from the commandeering of other law enforcement services. Until the courts act to constrain this troubling practice, the states will not be able to fulfill their roles as autonomous sources of regulatory power and vehicles of passive resistance to federal authority.