

2013

Response: Commandeering Information (and Informing the Commandeered)

Anthony Johnstone

Alexander Blewett III School of Law at the University of Montana, anthony.johnstone@umontana.edu

Follow this and additional works at: http://scholarship.law.umt.edu/faculty_lawreviews



Part of the [Constitutional Law Commons](#)

Recommended Citation

Anthony Johnstone, *Response: Commandeering Information (and Informing the Commandeered)*, 161 U. Pa. L. Rev. PENNumbra 205 (2013),

Available at: http://scholarship.law.umt.edu/faculty_lawreviews/79

This Article is brought to you for free and open access by the Faculty Publications at The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Faculty Law Review Articles by an authorized administrator of The Scholarly Forum @ Montana Law.

RESPONSE

COMMANDEERING INFORMATION (AND INFORMING THE COMMANDEERED)

ANTHONY JOHNSTONE[†]

In response to Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103 (2012).

INTRODUCTION

The anti-commandeering rule¹ just hit its high point. Fifteen years after the Supreme Court last held a law unconstitutional under the rule,² the Court held in *National Federation of Independent Business v. Sebelius* that the Affordable Care Act's Medicaid expansion, which conditions the continuation of Medicaid funding on a broad extension of program benefits, unconstitutionally commandeers state governments for federal purposes.³ "Congress may not simply 'conscript state [agencies] into the national bureaucratic army,' and that is what it is attempting to do with the Medicaid expansion."⁴

[†] Assistant Professor of Law, University of Montana School of Law. Former Solicitor for the State of Montana. Thanks to Benjamin Thomas and Erin Borek for editing, and to my family for their support.

¹ See *New York v. United States*, 505 U.S. 144, 161 (1992) (explaining that the federal government "may not simply 'commande[e]r the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" (alterations in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981))).

² See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that federally mandated local law enforcement background checks for gun purchases violate the anti-commandeering rule).

³ See 132 S. Ct. 2566, 2606-07 (2012) (opinion of Roberts, C.J.).

⁴ *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part) (alterations in original) (quoting *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 775 (1982)).

This was not just coercion, it was “a gun to the head.”⁵ Compared with previous anti-commandeering cases, *Sebelius* was extraordinary both because of its broad scope⁶ and because seven Justices supported the controlling reasoning.⁷ Most importantly, perhaps, the Court’s opinion assigned the question of whether to accept the Medicaid expansion to the states, where the federalism principles contested in *Sebelius* are now entering (or, given the state origins of the litigation, reentering) debates in statehouses across the country.⁸

Public health insurance is just one topic in a broader debate over the relationship between state and federal policies on guns, immigration, marijuana, marriage, physician-assisted suicide, and other political issues yet to emerge.⁹ Some of these debates reflect deep and persistent national divisions,¹⁰ while others may be moving toward a national consensus.¹¹ What distinguishes all of them, however, is that lacking direction from a polarized and paralyzed federal regime, state actors have taken a lead in

⁵ *Id.* at 2604.

⁶ *Id.* at 2630 (Ginsburg, J., dissenting) (noting that the case was “the first time ever” the Court found “an exercise of Congress’ spending power unconstitutionally coercive” of the States).

⁷ *Id.* at 2666-67 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional.”).

⁸ *Cf.* Lawrence B. Solum, *The Legal Effects of NFIB v. Sebelius and the Constitutional Gestalt* 26 (Georgetown Law Scholarly Commons, Paper No. 12-152, 2012), available at <http://scholarship.law.georgetown.edu/facpub/1098/> (“[T]he dominant constitutional gestalt has become open to challenge through formal legal argument in ordinary litigation. The [*Sebelius*] opinions have obvious and immediate relevance to formal legal argument and academic disputation, but from there their influence is likely to extend . . . ultimately to public political debate.”).

⁹ *See, e.g.*, Kit Johnson & Peter J. Spiro, Debate, *Immigration Preemption After United States v. Arizona*, 161 U. PA. L. REV. ONLINE 100 (2012), <http://www.pennlawreview.com/debates/12-2012/Arizona.pdf> (debating the Court’s opinion on immigration preemption and forecasting its impact on future state immigration laws).

¹⁰ *Compare, e.g.*, Wash. Initiative Measure No. 502 (July 8, 2011), available at <http://sos.wa.gov/assets/elections/initiatives/1502.pdf> (proposing amendments to the state code to legalize marijuana), with *Senate Advances Measure Opposing Marijuana*, IDAHO PRESS-TRIB. (Feb. 9, 2013), http://www.idahopress.com/news/state/senate-advances-measure-opposing-marijuana/article_8ea7ffac-7267-11e2-bb56-0019bb2963f4.html (“The Senate State Affairs Committee voted unanimously Friday to introduce and hold a hearing on a resolution pitched by [Senator Chuck Winder] opposing marijuana use in any form. The measure also urges President Barack Obama and the U.S. Department of Justice to enforce existing federal laws tied to moving drugs across state lines.”).

¹¹ *See, e.g.*, Ashley Parker, *Senators Call Their Bipartisan Immigration Plan a ‘Breakthrough,’* N.Y. TIMES (Jan. 28, 2013), http://www.nytimes.com/2013/01/29/us/politics/senators-unveil-bipartisan-immigration-principles.html?_r=0 (“A bipartisan group of senators unveiled on Monday a set of principles for comprehensive immigration legislation that includes a pathway to citizenship for the 11 million immigrants already in the country illegally, contingent on first securing the nation’s borders.”).

addressing these controversial issues.¹² Whether and how states can depart from, or even resist, the prevailing federal policies on these issues will be determined in part by arguments about federalism. A new wave of federalism scholarship recognizes how the evolving role of states in a dynamic federal system complicates traditional conceptions of dual sovereignty.¹³

In *Can the States Keep Secrets from the Federal Government?*,¹⁴ Robert Mikos offers an important contribution to the scholarly discussion of this growing trend by presenting two novel insights. First, Professor Mikos recognizes that information exchanged between federal and state governments is an expanding ground for conflict between federal and state policy spheres.¹⁵ Second, he observes that federal demands for state-gathered information are formally and functionally indistinguishable from other forms of prohibited commandeering.¹⁶ Both of these points will reverberate in future conversations about federalism, and I could not attempt to exhaust their implications here.

Instead, my Response will amplify and extend Professor Mikos's first point, which identifies the commandeering problem, and will suggest some limits to his second point, which proposes a judicially managed solution.¹⁷ Commandeering information should be recognized, like other forms of federal coercion of state officials, as imposing significant costs on states. Yet the costs to state autonomy from commandeering information, and the prospects that federal judges might mitigate them, are (as they are for

¹² See, e.g., ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (requiring state law enforcement officers to verify the immigration status of suspected illegal immigrants); ME. REV. STAT. ANN. tit. 19-A, § 650-A (2013) (authorizing same-sex marriage by codifying marriage as “the legally recognized union of 2 people”); OR. REV. STAT. ANN. § 127.805 (West 2012) (permitting physician-assisted suicide by allowing a capable, terminally ill patient to “make a written request for medication for the purpose of ending his or her life in a humane and dignified manner”).

¹³ See generally, e.g., Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011); 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); Ernest A. Young, *The Puzzling Persistence of Dual Federalism* (Aug. 1, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156351.

¹⁴ Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103 (2012).

¹⁵ See *id.* at 112-14.

¹⁶ See *id.* at 137-44.

¹⁷ See *id.* at 154 (“I propose that courts treat demands for information as constitutionally prohibited commandeering.”).

commandeering generally) relatively limited. Further, the costs to political accountability from commandeering information are difficult to assess, but these may be more effectively mitigated through political means. Even if Professor Mikos's conception of commandeering information is not enforced by the Judiciary, it at least helps the states (and their citizens) *recognize* that they have been commandeered.

I. COMMANDEERING'S COSTS

From a federalism perspective, Professor Mikos argues persuasively that federal use of state information is formally and functionally indistinguishable from prohibited commandeering.¹⁸ Formally, the *Printz* Court's distinction between commandeering and "the provision of information to the Federal Government"¹⁹ or, in Justice O'Connor's formulation, "purely ministerial reporting requirements,"²⁰ is not supported by the holding of *Printz* itself. The Brady Act provision at issue in the case required state law enforcement officials to "provide information that belongs to the State and is available to [law enforcement officials] only in their official capacity."²¹ The Court made clear that this informational component, and not the subsidiary duties to accept and process federal paperwork, was the primary focus of its opinion.²² The main distinction between *Printz* and the information commandeering cases discussed by Professor Mikos is that in *Printz*, the federal government did not seek the state information for its own use. Rather, it was "the whole *object* of the law to direct the functioning of the state executive"²³ Beyond this, the Court said next to nothing about the difference between the compelled gathering of information at issue in *Printz* and the compelled reporting of information at issue in the cases Professor Mikos discusses. Indeed, compelled reporting to federal officials of state-gathered information is a more straightforward example of commandeering for federal use, because the information itself passes into federal officials' hands. By the Court's own "categorical" logic, commandeering information by either compelled gathering *or* compelled reporting should be subject to the *Printz* Court's bright-line, anti-commandeering rule.²⁴

¹⁸ See *id.* at 137-44.

¹⁹ *Printz v. United States*, 521 U.S. 898, 918 (1997).

²⁰ *Id.* at 936 (O'Connor, J., concurring).

²¹ *Id.* at 932 n.17 (majority opinion).

²² See *id.* at 933-34 (stating that if the informational demand were nullified, the command to destroy forms and the like was "simply inoperative").

²³ *Id.* at 932.

²⁴ See *id.* at 932-33 (rejecting a balancing analysis in favor of a categorical rule).

Functionally, the Court's suggested distinction between commandeering law enforcement and gathering information does not take account of the dynamic costs to states of gathering information subject to federal use. The conventional account offered by the courts is that such information is something like a "nonrivalrous public good" that the federal government can use with no substantial cost to the states.²⁵ Yet, as Professor Mikos demonstrates, states typically gather information to facilitate regulatory policies that reflect a compromise between intrastate public and private ends. For example, a state might legalize medical uses of marijuana on the condition that users register with and submit to regulation by the state.²⁶ The prospect that the federal government may use the state's information against the very sources of that information chills those sources' otherwise willing provision of information. This chill imposes additional costs on the state, which must either increase its own information-gathering resources or decrease the amount of information gathered. These costs are as real and significant as the costs imposed by other forms of commandeering.²⁷

The threat of commandeering imposes political as well as economic costs. By "foreclos[ing] the optimal balance the states could otherwise strike between severity and enforceability,"²⁸ commandeering state-gathered information can force states to forgo the public policy benefits that accompany that information-gathering. Taking certain policy options off the table, while forcing states "to help the federal government enforce and administer policies [that state officials] or their constituents oppose,"²⁹ imposes a political cost, which I call an "autonomy cost," on states by limiting their self-determination of policy. Professor Mikos identifies another kind of political cost incurred when the "commandeering of the states' information-gathering apparatus blurs the lines of accountability for unpopular enforcement actions,"³⁰ which I call an "accountability cost."

²⁵ Mikos, *supra* note 14, at 141.

²⁶ *See id.* at 111.

²⁷ *See id.* at 121-26.

²⁸ *Id.* at 126.

²⁹ *Id.*

³⁰ *Id.* at 127.

A. *Autonomy Costs*

Professor Mikos frames his analysis and core prescriptive claims in terms of “state autonomy.”³¹ For purposes of his analysis, Professor Mikos defines autonomy as state officials’ freedom from being used as a means toward federal ends.³² He draws this conception from *New York v. United States*, in which the Court held 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.”³³ Therefore, the Court held in *Printz*, the federal government may not “issue directives requiring the States to address particular problems” through their legislative or law enforcement authorities.³⁴ The cost that such federal directives would impose on the states is more than just the economic cost of state policies foregone in the diversion of resources to the enforcement of federal policy. This kind of commandeering also would reduce state autonomy to pursue policies that are inconsistent with those imposed by the federal government.

Consider the medical marijuana example. A state may choose to strike its own balance between the legitimate and illegitimate use of marijuana by regulating medical marijuana users through a registry, subject to the risk that federal agents will independently enforce the federal prohibition on marijuana use. But if federal agents commandeer the state registry for information on medical marijuana users, state policymakers who support medical marijuana and do not want to facilitate the federal prohibition of what they deem to be legitimate uses may be forced to discontinue the registry. Then the state must choose between strictly limiting access to marijuana through means other than a registry (for example, a general prohibition on payment for medical marijuana services and products³⁵), which effectively would bar what the state deems to be legitimate uses (for example, medical use by patients unable to grow their own marijuana), or deregulating marijuana generally, which would allow what the state deems to be illegitimate uses (for example, recreational use). As Professor Mikos

³¹ See *id.* at 133-34 (discussing the Supreme Court’s decisions that “rebuff[] state autonomy”); *id.* at 164-77 (outlining various ways the courts could restore state autonomy).

³² See, e.g., *id.* at 162-63.

³³ *New York v. United States*, 505 U.S. 144, 166 (1992); cf. Mikos, *supra* note 14, at 163 (quoting this passage of *New York*, 505 U.S. 144).

³⁴ *Printz v. United States*, 521 U.S. 898, 935 (1997).

³⁵ See, e.g., MONT. CODE ANN. § 50-46-308(6)(a) (2011) (“A provider or marijuana-infused products provider may not . . . accept anything of value, including monetary remuneration, for any services or products provided to a registered cardholder.”).

explains, federal policy displaces state policy here not because of the independent federal law, the limited federal enforcement of which the state must be willing to bear under the Supremacy Clause, but because of the federal government's dependence on "commandeering" the state's registry to its own law enforcement uses.³⁶

Such autonomy costs may be even greater than the arguably "minimal and only temporary burden upon state officers" at issue in *Printz*.³⁷ In *Printz*, the Court noted (as an afterthought) that Montana law generally prohibited local law enforcement officers from regulating or delaying the transfer of any handgun,³⁸ a confirmation that the state officials were indeed coerced and not acting voluntarily under the federal law. The point goes beyond whether or not state actors felt federal coercion, however, and to the deeper violation of autonomy that occurs when federal officers turn a state's regulatory apparatus against itself. Whereas the primary cost to states of commandeering identified in *Printz* is the reprioritization of state economic resources away from state and toward federal policy,³⁹ regardless of whether the policies are consistent, the primary burden Professor Mikos identifies is the immediate frustration of state policy by opposing federal policy.⁴⁰ To the extent we value federalism as a protection of state autonomy, it is bad to use states as a means to federal ends, but it is even worse to use states as a means to federal ends that defeat the states' own ends. As Heather Gerken observes, "[F]reedom from interference does not amount to much unless there is something to do with that freedom."⁴¹

B. Accountability Costs

The Court explained in *New York* that "Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate."⁴² These accountability

³⁶ See Mikos, *supra* 14, at 113 ("[I]magine how the information contained in a state medical marijuana registry could bolster ongoing efforts to enforce the federal ban against medical marijuana.").

³⁷ *Printz*, 521 U.S. at 932 (quoting one of the federal government's rejected arguments).

³⁸ *Id.* at 934 n.18 (citing MONT. CODE ANN. § 45-8-351 (1) (1995)).

³⁹ See, e.g., *id.* at 930 (demonstrating that the "financial burden[s] of implementing a federal regulatory program" was a primary, anti-commandeering concern).

⁴⁰ See Mikos, *supra* note 14, at 132 ("[I]f state officials refuse to gather such information, they will undermine their own policy objectives.").

⁴¹ Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1553 n.8 (2012).

⁴² *New York v. United States*, 505 U.S. 144, 169 (1992).

costs manifest in terms of both misplaced credit to federal officials and misplaced blame on state officials. First, “[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.”⁴³ Second, as Professor Mikos explains, “[s]tate officials might be unfairly blamed for providing information to federal officials and advancing controversial federal policies.”⁴⁴ Commandeering information may aggravate these accountability problems in distinct ways not addressed by *New York* or *Printz*.

Accountability costs to states include perceptions of commandeering that unfairly credit federal officials for state enforcement.⁴⁵ In the medical marijuana example above, state officials might abandon information-gathering efforts because they would rather sacrifice their preferred policy than be blamed for being “a snitch” in Professor Mikos’s terms.⁴⁶ But at other times, federal law enforcement officials might seek credit for exposing abuses of state medical marijuana policy, for example, by bringing federal drug trafficking charges against production and distribution operations that exceed the legitimate scope under state law, where most of the detective work was a byproduct of preexisting state regulation and information gathering. Worse, such credit-shifting to federal enforcement (even if it occurs with state cooperation) might be viewed by the state’s citizens as

⁴³ *Printz*, 521 U.S. at 930. The joint dissenters in *Sebelius* summarized the accountability principle and, more importantly, suggested the weight they accord it in commandeering analysis.

When Congress compels the States to do its bidding, it blurs the lines of political accountability. . . . [W]hen the Federal Government compels the States to take unpopular actions, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. . . . If a program is popular, state officials may claim credit; if it is unpopular, they may protest that they were merely responding to a federal directive.

Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2660-61 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (internal quotation marks and citations omitted).

⁴⁴ Mikos, *supra* note 14, at 121.

⁴⁵ The risk of wrongly assigning blame or credit runs both ways. Sometimes state officials will be unfairly credited for simply acquiescing in federal commands. For instance, the state officials who accept the Medicaid expansion created through President Obama’s healthcare reforms may take more credit than they deserve for a program largely funded with federal money. See *Sebelius*, 132 S. Ct. at 2632 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Whatever the increase in state obligations after the [Affordable Care Act], it will pale in comparison to the increase in federal funding.”).

⁴⁶ Mikos, *supra* note 14, at 131.

outsiders reining in what appears to be an “out-of-control” state policy, thus undermining the state policy’s legitimacy.

Another important distinction that makes commandeering information more costly than the commandeering at issue in *Printz* is that in *Printz*, the commandeering occurred in plain view. According to the Court, the publicity of the state official’s compelled information-collection made state citizens likely to blame the state official for the federal policy.⁴⁷ But this may overstate the amount of blame directed at the state official and understate the amount of blame redirected at the federal policy. Sheriff Printz, after all, did not need the Supreme Court to tell the gun buyers of Ravalli County, Montana, who was behind the Brady Act’s background checks,⁴⁸ and it is easy to imagine how a fiercely independent local official might have disabused anyone of the notion that he was a federal “snitch.”

Similarly, Professor Mikos explains how the Michigan Attorney General’s compliance with a federal subpoena for privileged medical marijuana registration information incited an “uproar.”⁴⁹ But this may not be representative of how the blame game works for information commandeering. Not every incident will elicit such a response. With the clandestine cooperation of certain state officials, federal officials might commandeer information out of public view through bureaucratic processes or criminal procedures that may come to light only in later enforcement actions, if at all. When information commandeering is concealed, state officials might be more willing to compromise state policy in response to federal requests—at a hidden cost to state autonomy—precisely because there is a lack of accountability and certain state officials can promote their own collateral interests through such disclosures. This may be a particular danger in the case of popularly enacted laws like many state medical marijuana policies, where there may not be a strong constituency within the state government supportive of the policy.

These dynamics of assigning credit and blame to state and federal officials complicates any assessment of proper political accountability in a federal system. As Roderick Hills explains, “one would have to bar the

⁴⁷ See *Printz*, 521 U.S. at 930 (“Under the present law, for example, it will be the [local law enforcement officer] and not some federal official who stands between the gun purchaser and immediate possession of his gun.”).

⁴⁸ See *id.* at 958 n.18 (“Sheriffs Printz and Mack have made public statements . . . denouncing the Brady Act.”).

⁴⁹ See Mikos, *supra* note 14, at 130 n.121.

federal and state governments from ever assuming any overlapping duties in order to guarantee ‘accountability.’”⁵⁰ Overlapping federal and state duties are pervasive across policy domains, however. So case-by-case constitutional adjudication may not be the most effective means of increasing political accountability, particularly for something as subtle as the benefit- and cost-shifting involved in commandeering information.

II. THE LIMITS OF THE ANTI-COMMANDEERING CONSTRAINT

The policy autonomy and political accountability costs imposed by the current intermingling of state and federal regimes means the anti-commandeering rule is an important constraint on federal policy. “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.”⁵¹ This constraint is particularly powerful when “the states’ ability to refuse to enforce federal law gives them de facto control over a number of important policy domains that are, formally speaking, subject to congressional regulation.”⁵² Yet the anti-commandeering rule did not appear as a judicially enforceable constraint until two decades ago.⁵³ For the prior twenty decades the federal government’s use of such a “highly attractive power,” was constrained only by nonjudicial (that is, political) forces.⁵⁴ And in the hands of the federal judiciary over the last twenty years, it has remained an untested and narrow constraint for at least two reasons.

First, the federal government’s commitment of its own enforcement resources is itself part of federal policy choice. Congress’s policy to prohibit marijuana use, for example, cannot be viewed in isolation from its policy to fund federal drug law enforcement at levels that in most cases decriminalize use by medical marijuana patients in the states. Planned under-enforcement may not be the most transparent or consistent means of executing federal policy, but if we credit state policymakers with rational expectations about

⁵⁰ Hills, *supra* note 13, at 828; *see also id.* (“The difficulty with such political accountability arguments is that they overlook the complexity inherent in any system of federalism that always has the potential to confuse voters and thereby undermine political accountability.”).

⁵¹ *Printz*, 521 U.S. at 922.

⁵² Mikos, *supra* note 14, at 163-64 (citing Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1463-79 (2009) [hereinafter Mikos, *Limits*]).

⁵³ *See* New York v. United States, 505 U.S. 144, 175 (1992).

⁵⁴ *Printz*, 521 U.S. at 905; *see also id.* at 953 n.12 (Stevens, J., dissenting) (“[A]n entirely appropriate concern for the prerogatives of state government readily explains Congress’ sparing use of this otherwise ‘highly attractive’ power.” (citations omitted)).

the effects on state policy of federal underenforcement, as we should, we also should credit federal policymakers with the converse understanding. In other words, with minimal judicial engagement, the anti-commandeering constraint on federal policy enforcement has largely been self-imposed by the federal policymakers themselves.

Second, when Congress does make a policy choice to recruit state assistance in the enforcement of federal policy, it has several means of doing so outside of commandeering.⁵⁵ Congress can avoid the anti-commandeering constraint through the spending power,⁵⁶ conditional preemption,⁵⁷ generally applicable laws,⁵⁸ and the civil rights enforcement powers.⁵⁹ While the Supreme Court has been careful to characterize the exercise of these powers as “voluntary state participation,”⁶⁰ “incidental,”⁶¹ or (in the case of civil rights enforcement) “remedial, rather than substantive,”⁶² in effect they can be just as coercive as commandeering. For example, the federal government could recruit state assistance in enforcing a marijuana prohibition by denying new federal criminal justice funding to states and localities that legalize medical marijuana,⁶³ or, more drastically, by imposing a generally applicable law requiring all persons to report knowledge of marijuana transactions.⁶⁴ Such laws result in economic and political costs to state

⁵⁵ See Mikos, *supra* note 14, at 166-72.

⁵⁶ See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

⁵⁷ See *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 765-66 (1982).

⁵⁸ See *New York*, 505 U.S. at 177.

⁵⁹ See *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966).

⁶⁰ *Printz v. United States*, 521 U.S. 898, 923 n.12 (1997).

⁶¹ *Id.* at 932.

⁶² *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

⁶³ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (opinion of Roberts, C.J.) (“Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).

⁶⁴ See e.g., *Reno v. Condon*, 528 U.S. 141, 151 (2000) (explaining that a law requiring states and private database owners to obtain the consent of citizens before disclosing their information “does not require the States in their sovereign capacity to regulate their own citizens,” but rather regulates the state activity in the same manner as private activity). Professor Mikos suggests the Supreme Court’s recent holding that the Commerce Clause does not authorize Congress to compel activity may rule out a generally applicable crime-reporting requirement. See Mikos, *supra* note 14, at 170 n.324 (citing *Sebelius*, 132 S. Ct. at 2589). Even so, a hypothetical medical marijuana reporting requirement might be sufficiently tailored to a triggering use of the channels or instrumentalities of interstate commerce.

autonomy, law enforcement benefits to federal policy, and confusion over political accountability that are similar to those of commandeering.

Given the narrow constraint imposed by the anti-commandeering rule, is its extension by the courts to federal use of state information desirable or likely? For the reasons discussed above, I believe Professor Mikos has made a compelling case that the logic of the anti-commandeering rule should be extended to commandeering information.⁶⁵ But it is unclear how effective such an extension would be in protecting state autonomy to pursue policies in conflict with federal policy. Many of the federal reporting requirements Professor Mikos discusses are minor and unlikely to pose sharp conflicts with state policy.⁶⁶ These requirements therefore are likely to go unchallenged or be easily replaced by voluntary (or funding-conditional) reporting by states. Others, like the Equal Employment Opportunity Commission's administrative subpoena power in investigations of employment discrimination claims against state agencies⁶⁷ or grand jury subpoenas in criminal investigations⁶⁸ are generally applicable requirements that often are exempt from the anti-commandeering principle.⁶⁹

That leaves mainly the case of *Printz* itself, and Professor Mikos's example of medical marijuana registries.⁷⁰ The rarity of reported federal subpoenas of medical marijuana registries suggests that the federal threat of commandeering such information may not pose a widespread and unconstrained threat to state autonomy.⁷¹ Federal law enforcement agencies may not rely that heavily on state secrets concerning medical marijuana patients. For example, the subpoena of the Michigan Department of Community Health that Professor Mikos discusses⁷² sought registry information for just seven out of as many as 70,000 registered medical marijuana users in the state—that narrow request surely reflects some measure of federal deference

⁶⁵ See Mikos, *supra* note 14, at 161.

⁶⁶ See *id.* at 115-16 (discussing the Health Care Quality Improvement Act of 1986, the Crime Control Act of 1990, the Highway Safety Act of 1991, the Hotel and Motel Fire Safety Act of 1990, and the Asbestos School Hazard Abatement Act of 1984); see also *id.* at 166 (discussing the funding-conditional reporting requirement of the Solid Waste Disposal Act Amendments of 1980).

⁶⁷ See *id.* at 117-18.

⁶⁸ See *id.* at 119-20.

⁶⁹ See *id.* at 168-70 (discussing exemptions from the anti-commandeering rule for generally applicable reporting requirements); *id.* at 172-73 (explaining why one might argue that "investigative commands issued by grand juries should not be subject to the anti-commandeering rule").

⁷⁰ See *id.* at 170.

⁷¹ However, such a threat to state autonomy would occur if the federal government were using confidential means to commandeer information and avoid accountability. See *supra* Section I.B.

⁷² See Mikos, *supra* note 14, at 118.

toward the state's medical marijuana regime.⁷³ Even if negating state medical marijuana policies were a federal law enforcement goal, it would be easy enough to accomplish under current law without the benefit of the states' secrets. The federal government could pursue producers, physicians, and distributors whose businesses give them public profiles and thus make them more susceptible to federal prosecution than registered medical marijuana users.

Where federal law enforcement does intrude more significantly on state autonomy, federal judges who are unwilling to limit their own subpoena powers under a statutory standard of reasonableness⁷⁴ are unlikely to limit federal information-commandeering powers under a categorical constitutional rule.⁷⁵ Thus, the prospects of the Supreme Court extending *Printz* to Professor Mikos's medical marijuana anti-commandeering case may be similar to those of the Court extending the federalism principles of another gun regulation case, *United States v. Lopez*,⁷⁶ to another medical marijuana case, *Gonzales v. Raich*, in which the Court disappointed *Lopez* supporters by upholding Congress's Controlled Substances Act.⁷⁷ With the notable recent exception of *Sebelius*, judicial safeguards of federalism typically have more bite in narrow, symbolic cases (like gun possession in school zones and temporary background checks) than in larger cases that threaten to undermine long-settled national policies (like the Controlled Substances Act or administrative subpoena power).⁷⁸

⁷³ See *United States v. Mich. Dep't of Cmty. Health*, No. 10-109, 2011 WL 2412602, at *6 & n.5 (W.D. Mich. June 9, 2011).

⁷⁴ See Mikos, *supra* note 14, at 144-49.

⁷⁵ See *id.* at 154-55 (explaining that even though the *Printz* Court "never actually held that demands for information are constitutionally permissible," most lower courts have "simply presumed that *Printz* conclusively decided the matter and have upheld federal demands for information on that basis alone"); *id.* at 164 ("[T]he lower courts have seriously undermined [the states'] ability to refuse assistance and passively resist federal authority by allowing federal agencies to conscript [the states'] information-gathering capacity").

⁷⁶ See *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding unconstitutional a federal law banning gun possession in school zones, which "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce").

⁷⁷ See *Gonzales v. Raich*, 545 U.S. 1, 23 (2005) (finding that a federal law banning marijuana possession is constitutional because "comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce").

⁷⁸ Cf. Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1348 (2000) (arguing the anti-commandeering rule's "expressive character may do more than would some other rule to protect an important aspect of each state's role in our federal structure").

CONCLUSION

My disagreement with Professor Mikos concerns the efficacy of his judicial means, rather than the importance of his federalism ends. Professor Mikos's analysis of the potential costs, both economic and political, imposed by federal use of state information seems correct. I am less confident that his prescription of an extended anti-commandeering rule is an effective remedy. The anti-commandeering principle in practice is too limited to protect against the most common incursions against state policies, and its extension along the lines suggested by Professor Mikos may be judicially intractable. The abstract and malleable concept of autonomy makes a particularly weak foundation for judicial enforcement of an asserted categorical rule with no textual basis, and only a contested structural basis, in the Constitution. Yet if he is correct about what is at stake for state autonomy when the federal government commandeers states' secrets, then the structural protections against federal use of state information should stop neither at the anti-commandeering principle nor at states' secrets.⁷⁹ The depth of Professor Mikos's diagnosis of what ails state policy autonomy and political accountability may call for a more ambitious, though less justiciable, federalism cure.

Today's deep and increasingly sectional disagreements on guns, immigration, marijuana, marriage, physician-assisted suicide, and other policies exerts a centrifugal force on national politics that often overwhelms the capacity of the federal government to resolve them. Where broad new policy settlements on these controversial issues are impossible now, narrower settlements may be reached in the states first. Professor Mikos urges the federal courts to use the anti-commandeering principle to clear a wider space for these settlements to occur.⁸⁰

⁷⁹ For example, despite Professor Mikos's agreement with *Pierce County v. Guillen*, 537 U.S. 129 (2003) as a policy matter, see Mikos, *supra* note 14, at 161-62, the state autonomy costs of the underlying policy are significant. See *Guillen*, 537 U.S. at 145-46 (holding that a federal law barred a state court from using a county's report submitted to the Federal Department of Transportation as a condition for state funding). A federal privilege against the use of state-generated information in state (not federal) court is roughly equivalent to commandeering (or otherwise coercing) the state legislature to enact the same privilege. Thus, "preempting information" may reduce state autonomy in certain policy domains as much as commandeering information. As another example, federal law preempts state campaign finance disclosure laws, depriving states of an option for more effective disclosure requirements in state campaigns of federal candidates. See 2 U.S.C. § 453 (2006); see also William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 376 (2000) (suggesting that "[t]he regulation of campaign finance of federal elections matters could be devolved to the states").

⁸⁰ Mikos, *supra* note 14, at 178.

Although I do not agree with him—in fact, *because* I do not agree with him—that the federal courts in general, and the anti-commandeering rule in particular, are likely to be especially effective agents toward such a reordering of federal and state power,⁸¹ I think other public officials, particularly state officials, should take the problem he has identified all the more seriously. With his powerful analysis of the costs of commandeering information, Professor Mikos can better inform the commandeered.

* * *

Whether the judicial or political process is the primary safeguard of federalism, more attention should be paid to how the states themselves participate in those processes. In the judicial process, after all, it was elected state attorneys general and sheriffs who saw the legal and political opportunity to stand for federalism in *New York*, *Printz*, and *Florida v. Department of Health and Human Services*.⁸² Even if federal courts do not adopt Professor Mikos's proposed rule, his conception of commandeering can facilitate political discourse on federalism outside the courts by providing an expanded vocabulary of federal coercion for state officials and voters to use in defending and advancing state autonomy.⁸³ Indeed, federalism is thriving at least as much outside the courts as in them: the decision in *Raich* has not slowed the adoption of medical marijuana laws in the states, nor even marijuana legalization in Colorado and Washington.⁸⁴ In this and other emerging policy domains, states are betting that federal officials' political will to invade their autonomy is as limited as the federal courts' constitutional power to safeguard it. To the extent this opens the channels of state politics

⁸¹ For a view less agnostic on the issue than my own, see Mark Tushnet, *Judicial Enforcement of Federalist-Based Constitutional Limitations: Some Skeptical Comparative Observations*, 57 EMORY L. J. 135, 143-44 (2007) (“[T]he courts will never conduct a ‘federalism revolution.’ Their interventions will have no systematic effects on the operation of our federal system.”).

⁸² *Florida v. Department of Health and Human Services* was consolidated with *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

⁸³ State court judges could use this vocabulary too. Compare Mont. Cannabis Indus. Ass'n v. Montana, 286 P.3d 1161, 1171 (Mont. 2012) (Nelson, J., dissenting) (concluding that a state court “decree in favor of the medical marijuana grower, caregiver, provider, or user is consequently meaningless because their activities are illegal [under federal law] regardless”), with Mikos, *Limits*, *supra* note 52, at 1423-24 (arguing that despite Congress's ban on marijuana, states may continue to legalize the drug because Congress cannot preempt state laws that merely permit—by inaction—private conduct deemed objectionable by the federal government).

⁸⁴ See COLO. CONST. art. XVIII, § 16; Wash. Initiative Measure No. 502 (July 8, 2011), available at http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.

to negotiate diverse compromises between federal and state policy free of the rigid dictates of federal doctrine, that can be a good thing for federalism.

Preferred Citation: Anthony Johnstone, Response, *Commandeering Information (and Informing the Commandeered)*, 161 U. PA. L. REV. ONLINE 205 (2013), <http://www.pennlawreview.com/responses/3-2013/Johnstone.pdf>.