

SANCTUARY CITIES, GOVERNMENT RECORDS, AND THE
ANTI-COMMANDEERING DOCTRINE

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ABSTRACT

The Trump Administration's policy of defunding "sanctuary cities" hinges on the validity of federal statutes, such as 8 U.S.C. § 1373, that invalidate state and local policies prohibiting public employees from sharing information in government files with federal authorities. This article argues that constitutional and quasi-constitutional doctrines regarding government records constrain federal information demands upon state and local governments. The doctrines assume heightened importance with respect to personal information obtained under grant of confidentiality, given the important state and local purposes confidentiality serves. Moreover, Congress' approach in 8 U.S.C. § 1373 and similar statutes is especially pernicious because it deprives elected officials of control over their subordinates, undermining their electoral accountability and challenging the underlying premises of the administrative state.

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I. INTRODUCTION

During his presidential campaign Donald J. Trump criticized the concept of sanctuary cities and asserted that such jurisdictions should not receive federal funds.¹ Even before the primaries began, Congress considered the Stop Sanctuary Policies and Protect Americans Act.² The bill, which was successfully filibustered,³ would have prohibited any sanctuary jurisdiction from receiving grants under the State Criminal Alien Assistance Program, the Community Oriented Policing Services Program, and the Community Development Block Grant Program.⁴

On January 25, 2017, President Trump issued an executive order, Executive Order 13768, entitled “Enhancing Public Safety in the Interior of the United States.”⁵ The Executive Order threatens to withhold funds from states and localities that fail to comply with 8 U.S.C. § 1373.⁶ The Executive Order did not specify the types and

1. Donald J. Trump, Address on Immigration in Phoenix, Arizona (Aug. 31, 2016); *Transcript of Donald Trump's Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html?_r=0 (“We will end the sanctuary cities that have resulted in so many needless deaths. Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars . . .”).

2. S. 2146, 114th Cong. (2015).

3. Stephanie Condon, *Senate Democrats Block “Sanctuary City” Bill*, CBS NEWS (Oct. 20, 2015, 2:10 PM), <http://www.cbsnews.com/news/senate-takes-up-sanctuary-city-bill-obama-issues-veto-threat/>.

4. S. 2146, 114th Cong. § 3(a)(1)–(2) (2015). The bill defined “sanctuary jurisdiction” as any

state or political subdivision that has a policy or practice in effect that: (1) prohibits or restricts information sharing about an individual’s immigration status, or (2) prohibits compliance with a lawfully issued detainer request or notification of release request.

Congressional Research Service (CRS), *Summary: S.2146 —114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2146> (last visited Jan. 3, 2018); see also S. 2146, 114th Cong. § 3(a)(2)(A)(i). Congress did not act on proposals introduced by Senator Sessions and Representative Gowdy to make cities that precluded law enforcement officers from cooperating with federal authorities ineligible for any law enforcement grant from the Department of Homeland Security and any funds allocated under the “Cops on the Beat” and the of the Immigration and Nationality Act section 241(i) programs. See S. 1640, 114th Cong. (2015); H.R. 1148, 114th Cong. (2015).

5. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). Attorney General Sessions reiterated this policy on March 27, 2017. Julie Hirschfeld Davis & Charlie Savage, *White House to States: Shield the Undocumented and Lose Police Funding*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/us/politics/sanctuary-cities-jeff-sessions.html>.

6. Exec. Order No. 13,768, 82 Fed. Reg. at 8801 (Jan. 25, 2017). Some states have considered such an approach with regard to their municipalities. See, e.g., H.B. 885, 2008 Leg., 425th Sess. (Md. 2008) (conditioning funding to localities on willingness to enforce immigration laws); A.B. 1601, 2007 Leg., Reg. Sess. (Cal. 2007) (withholding local receipt

amount of funding to be withheld.⁷ Subsequently, in response to an injunction halting enforcement of the Executive Order, Attorney General Sessions issued a memorandum stating that section 9(a) would “be applied solely to federal grants administered by the Department of Justice or the Department of Homeland Security.”⁸ In the litigation that has been pursued, courts have thus far invalidated the Executive Order without calling into question the validity of 8 U.S.C. § 1373.

Section 1373 was enacted as a part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the “Immigration Reform Act”).⁹ As the Senate Report on the provision explained:

Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of

of vehicle registration funds from cities with sanctuary policies). Colorado enacted such a measure and then repealed it seven years later. COLO. REV. STAT. § 29-29-101 (2006) (repealed 2013); see also Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567, 576 (2009) (discussing state measures designed to limit sanctuary policies). The State of Texas’ efforts to prevent Texas counties and municipalities from becoming sanctuaries is subject to ongoing litigation. See *City of El Cenizo v. State*, 264 F. Supp. 3d 744 (W.D. Tex. 2017), stay granted in part sub nom. *City of El Cenizo v. Texas*, No. 17–50762, 2017 WL 4250186 (5th Cir. Sept. 25, 2017).

7. See *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017). States and cities are preparing their response to the implementation of any such order. See, e.g., ERIC T. SCHNEIDERMAN, STATE OF N.Y. OFFICE OF THE ATTORNEY GEN., GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS 1–2 (2017), https://ag.ny.gov/sites/default/files/guidance_and_supplement_final3.12.17.pdf. Some jurisdictions have pursued suit challenging the orders. See, e.g., *City of Phila. v. Sessions*, No. 17-3894, 2017 WL 5489476 (E.D. Pa. Nov.15, 2017); *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017) (Seattle, Washington and Portland, Oregon); *City of Chi. v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017); *Cty. of Santa Clara*, 250 F. Supp. 3d 497 (Santa Clara County and San Francisco, California).

8. Memorandum from the Attorney Gen., U.S. Dep’t of Justice, to All Dep’t Grant-Making Components (May 22, 2017), <https://www.justice.gov/opa/press-release/file/968146/download> (regarding “Implementation of Executive Order 13768, ‘Enhancing Public Safety in the Interior of the United States’”).

9. Pub. L. No. 104–208, § 642, 110 Stat., 3009-546, 3009-707 (1996). In New Jersey, state legislators introduced a bill that would allow municipalities to apply for state funds to replace any funds withheld by the federal government because of the municipality’s sanctuary city status. S.3700, 217th Leg., Gen. Assemb. (N.J. 2017) (directing establishment of “a program to provide grant funding to a county or municipality that has had its federal grant funding denied or reduced based upon its status as a sanctuary jurisdiction”).

considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.¹⁰

Among other things, section 1373 provides that federal, state, or local officials “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.”¹¹

A similar provision had been enacted months before as section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the “Welfare Reform Act”),¹² which created the Temporary Assistance to Needy Families (“TANF”) program.¹³ TANF “block grants” constitute a source of significant funding to state governments.¹⁴

The term “sanctuary city” can encompass municipalities that adopt one or more of several different policies regarding undocumented aliens within their jurisdictions. One scholar has sorted “sanctuary” provisions into three categories: (1) policies that limit inquiries into immigration status; (2) policies that limit immigration-related arrests or detentions; and (3) policies that limit the information sharing with federal officials.¹⁵ Sections 1373 and 434 focus on the third category of sanctuary policies.

Sometimes states and localities pledge confidentiality of information regarding immigration status to secure cooperation from undocumented aliens.¹⁶ Such cooperation allows them to provide services to undocumented aliens residing in their communities.¹⁷ Confidentiality policies encourage undocumented aliens to provide

10. S. REP. NO. 104-249, at 19–20 (1996).

11. 8 U.S.C. § 1373(a) (2012). Responding to congressional pressure, in July 2016, the Obama Justice Department agreed to require recipients of Office of Justice Programs grants to comply with section 1373. Letter from Peter J. Kadzik, Assistant Attorney Gen., U.S. Dep’t of Justice, to the Honorable John A. Culberson, Chairman, Subcomm. on Commerce, Justice, Sci. and Related Agencies, Comm. on Appropriations, U.S. House of Representatives (July 7, 2016), https://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf.

12. Pub. L. No. 104–193, § 434, 110 Stat. 2105, 2275 (1996).

13. See Pub. L. No. 104–193, § 403, 110 Stat. 2105, 2115–24.

14. See ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVICES, FY 2015 FEDERAL TANF & STATE MOE FINANCIAL DATA 11-15 tbl.A.6 (2016), https://www.acf.hhs.gov/sites/default/files/ofa/tanf_financial_data_fy_2015.pdf.

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

16. *Id.* at 1475–83; Sullivan, *supra* note 6, at 579–83.

17. See Sullivan, *supra* note 6, at 579–83; Kittrie, *supra* note 15, at 1475–83.

information regarding criminal elements in their communities and seek the protection of authorities against people or businesses that use their undocumented status to exploit them economically and otherwise.¹⁸ Because many undocumented aliens have children who possess birthright citizenship, enabling undocumented aliens to obtain protection and assistance may be critical in terms of providing necessary care for American citizen children. Other undocumented aliens have children who grew up in the United States after they were brought into the country at an early age, and the welfare of such children may well depend on the ability to provide assistance to their undocumented parents.¹⁹

In *City of New York v. United States*,²⁰ the Second Circuit upheld section 1373 against a constitutional challenge.²¹ By Executive Order 124 issued August 7, 1989, Mayor Edward I. Koch prohibited New York City officials from transmitting information regarding any alien to federal immigration authorities unless (1) the employee's agency is required by law to do so, (2) the alien consents, or (3) the employee's agency suspects the alien of having engaged in criminal activity.²² The authority to decide whether the agency's suspicions of criminal activity warranted disclosure was lodged in designated supervisors.²³ Law enforcement authorities were not to transmit information regarding alien crime victims to federal immigration officials.²⁴ The order declared that "[a]ny service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service

18. See Sullivan, *supra* note 6, at 579–83; Kittrie, *supra* note 15, at 1475–83.

19. Such "Dreamers" were the focus of the Obama Administration's Deferred Action for Childhood Arrival program in 2012. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot. (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>, and have been the subject of legislative proposals in Congress since 2001. See Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2002). A search of Congress.gov for "DREAM Act" reveals bills in later sessions of Congress. The Department of Homeland Security ended the program on September 5, 2017. Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA), accessible at <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>. A federal court has enjoined DHS's attempted rescission, *Regents of the University of California v. U.S. Department of Homeland Security*, 2018 WL 339144 (N.D. Ca. January 9, 2018).

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

21. *Id.* at 31. The Court affirmed the District Judge's decision. *City of New York v. United States*, 971 F. Supp. 789, 791 (S.D.N.Y. 1997).

22. OFFICE OF THE MAYOR, CITY OF N.Y., EXEC. ORDER NO. 124, CITY POLICY CONCERNING ALIENS § 2(a) (1989).

23. *Id.* § 2(b).

24. *Id.* § 2(c).

unless such agency is required by law to deny eligibility for such service to aliens.”²⁵ Mayor Koch’s official justification for the policy noted that many city services, including police protection and education, are available regardless of immigration status, but that undocumented aliens “fail[ed] to make use of such services, largely from fear that any contact with a government agency will bring them to the attention of federal immigration authorities.”²⁶ He declared that all of the City’s residents were harmed when undocumented residents lack education, protection from crime, and treatment for illness.²⁷

The appellate panel rejected the City’s Tenth Amendment anti-commandeering challenge.²⁸ The opinion was narrowly focused; the panel emphasized the facial nature of the City’s challenge.²⁹ The panel held that neither section 1373 nor section 434 had affirmatively conscripted states, localities, or their employees into the federal government’s service.³⁰ In its view, the anti-commandeering doctrine did not invalidate federal statutes that merely precluded state and local governments’ interdiction of voluntary information sharing between state or local employees and federal immigration authorities.³¹ Otherwise, the anti-commandeering “shield” would be transformed “into a sword allowing states and localities to engage in passive resistance that frustrates federal programs.”³² It observed that “[a] system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems.”³³

The Court acknowledged that, in theory, sections 1373 and 434 could transgress the Tenth Amendment in one of two ways.³⁴ First, federal regulation of states’ and localities’ use of confidential information acquired in the course of official business might violate federalism principles.³⁵ Second, federal regulation of “the scope and nature of the duties of employees of state and local governments regarding such information” might violate federalism principles as well.³⁶ The panel noted that obtaining “pertinent information, which

25. *Id.* § 3.

26. *Id.* at 3.

27. *Id.*

28. *City of New York v. United States*, 179 F.3d 29, 33–37 (2d Cir. 1999).

29. *Id.* at 33.

30. *Id.* at 35.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 36.

35. *Id.*

36. *Id.* at 36 (describing the City’s concern as “not unsubstantial”).

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.”³⁷ However, such concerns did not require upholding New York City’s challenge. In particular, “the [challenged] Executive Order is not a general policy that limits the disclosure of confidential information to only specific persons or agencies or prohibits such dissemination generally.”³⁸ Rather, “it singles out a particular federal policy for non-cooperation while allowing City employees to share freely the information in question with the rest of the world,” making the policy solely a vehicle for “reduc[ing] the effectiveness of a federal [immigration] policy.”³⁹

In response to the decision, New York City Mayor Michael R. Bloomberg issued Executive Order 41, restricting disclosure of a broader category of information collected from persons with whom city officials interact.⁴⁰ Moreover, the disclosure applied to any potential recipient, with certain limitations.⁴¹ The Order covers disclosure of information regarding an individual’s sexual orientation, status as a domestic violence or sexual assault victim, status as a witness to a crime, receipt of public assistance, immigration status, and tax information.⁴²

President Trump’s initiative may not pass constitutional muster even if sections 1373 and 434 are valid, as the decisions resolving litigation against the initiative so far suggest. But his initiative cannot be upheld against a constitutional attack if sections 1373 and 434 are constitutionally infirm. In grappling with that question, it is

37. *Id.*

38. *Id.*

39. *Id.* at 37. As noted *infra*, there are reasons to question the court’s interpretation of New York City’s policies. The Court also rejected New York City’s argument that the challenged federal statutes violated the Republican Form of Government Clause. *Id.* at 37.

40. OFFICE OF THE MAYOR, CITY OF N.Y., EXEC. ORDER NO. 41, CITY-WIDE PRIVACY POLICY AND AMENDMENT OF EXECUTIVE ORDER NO. 34 RELATING TO CITY POLICY CONCERNING IMMIGRANT ACCESS TO CITY SERVICES (2003). New York City has modified that aspect of the order in Executive Order 41 (September 13, 2003), which covers an individual’s sexual orientation, status as a domestic violence or sexual assault victim, status as a witness to a crime, receipt of public assistance, immigration status, and all information contained in an individual’s income tax records. *Id.* § 1. One of the “whereas” clauses states that the “obtaining of pertinent information, which is essential to the performance of a wide variety of government functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved and preserving confidentiality in turn requires that governments regulate the use of such information by their employees.” *Id.*

41. *See id.* § 2.

42. *Id.* § 1.

worth considering a slightly different question: whether the federal government can require states and localities themselves to provide information regarding undocumented aliens to federal immigration authorities.⁴³

This article argues that sections 1373 and 434 unconstitutionally infringe upon the state and local sovereignty guaranteed by the Tenth Amendment and the Constitution's overall structural framework. First, the article will discuss a set of doctrines generally foreign to immigration debates, namely doctrines that set the contours of a government's dominion over records it collects and maintains. The article will then argue that federal authorities cannot constitutionally compel states and localities to report confidential personal information in their files, particularly when state and local assurances of confidentiality are a critical element of their information collection efforts. Next, the article will identify and explore a particularly pernicious effect of 1373, namely severing of the relationship between high level officials and their subordinates. Such hierarchical relationships are critical to the accountability of elected officials to the public and, in turn, appointed agency heads' accountability to elected officials. Such accountability lies at the heart of the modern administrative state. In a brief coda, the article will argue that the federal government cannot compel state and local officials to obtain and turn over to the federal government information that state and local authorities would not otherwise collect.

43. If the federal government possesses such a power, Congress, by unambiguous statute, could perhaps condition funding under particular grant programs upon compliance with those provisions. The amount of funding to states under a program like TANF is substantial. NATIONAL ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 32 (2016). Cash assistance payments, which comprise approximately twenty-five percent of TANF spending constitutes an average of 1.4% of state budgets. There is a great variation among states in terms of the percentage of expenditures accounted for by TANF expenditures, from 0.0% (Colorado, Wyoming) to 2.6% (California). *Id.* at 39. However, the financial consequences will probably not rival those that led to invalidation of the Medicaid expansion provisions in *National Federation of Independent Businesses v. Sebelius*. *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012). The Court used the State Expenditure Report, prepared by the National Association of State Budget Officers, for the relevant years to assess the financial burdens on the state in *Sebelius*. *Id.*

Given the vague nature of the Trump Executive Order, arguably *all* federal funding to a jurisdiction is at risk if a state or locality persists in precluding its employees from providing information to the federal government. A financial impact of that magnitude might equate to the financial "penalty" states risked in *Sebelius*.

II. GOVERNMENT COLLECTION OF AND EXERCISE OF DOMINION OVER INFORMATION

The federal and state governments collect an extraordinary range of information from individuals and private entities.⁴⁴ Such information collection is a critical aspect of federal, state, and local governments' exercise of regulatory authority, as well as their provision of services.⁴⁵ As Kenneth Culp Davis observed 70 years ago, "[g]athering information about regulated activity is essential to good governance[:] [r]egulators need information to draft prudent regulations, to study their effects, and . . . to observe and enforce compliance."⁴⁶ But much of the information government entities collect is personal and private.

Individuals or entities may supply information about themselves or their activities voluntarily or involuntarily. Often, government acquisition of information relies on voluntary provision of information. Such information gathering may involve promising confidentiality. Citizens may often be reluctant to provide information without assurances that its uses will be limited.⁴⁷ Sometimes provision of information is involuntary.⁴⁸ For example, the federal government and

44. See, e.g., COMM'N ON FED. PAPERWORK, A REPORT OF THE COMMISSION ON FEDERAL PAPERWORK: FINAL SUMMARY REPORT 5 (1977); Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279, 280, 284 (2015).

45. See RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS 425 (5th ed. 2009).

46. Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 YALE L.J. 1111, 1114–17 (1947); U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, REPORT OF THE SECY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYSTEMS, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS 78 (1973) [hereinafter RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS] (stating that modern organizations maintain elaborate records about the money they spend, the people they serve and the quantities of goods and services they dispense); *Shapiro v. United States*, 335 U.S. 1, 50–53 (1948) (Frankfurter, J., dissenting) (discussing the ubiquity of record keeping and reporting requirements); see also Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 108–09 (2012).

47. RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS, *supra* note 46, at 80–81 (“[C]ollecting more information than is needed for day-to-day administrative decisions may discourage people from taking advantage of the services an organization offers.”).

48. See *United States v. Balsys*, 524 U.S. 666, 681–83 (1998); *Marchetti v. United States*, 390 U.S. 39, 41–42 (1968) (stating that the statutory obligations to register and to pay the occupational tax, as required by federal wagering acts, violated defendant's Fifth Amendment privilege against self-incrimination); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 79 (1964) (“[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.”); John H. Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 160–61, 163.

state governments require individuals to complete tax returns, which seek detailed confidential personal information.⁴⁹ To obtain a driver's license, the standard form of identification in the United States, individuals must provide and update personal information.⁵⁰

Governments must also maintain the information they collect. As the United States Supreme Court noted in *Whalen v. Roe*,⁵¹ "[t]he collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, . . . and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed."⁵²

The states and the federal government adopt statutes precisely designed to control the dissemination of government records; they do so to protect important interests.⁵³ The statutes may generally authorize agency control over documents (like the federal housekeeping statute),⁵⁴ may protect particular categories of documents or information,⁵⁵ or may more generally establish standards for public access to government records (like the federal and state freedom of information act laws).⁵⁶

In general, government officials assert two types of legitimate reasons for withholding government records and information. First, statutes or judicial doctrines typically allow governments to withhold documents regarding policy debates preceding government action to ensure full and frank deliberation among policy-makers.⁵⁷ This justification for confidentiality is largely irrelevant to the dispute over sanctuary cities' confidentiality policies. Second, some information must be held confidentially because its disclosure would cause harm to certain substantive interests, like national security, personal privacy, businesses' proprietary interests, or law enforcement efforts.⁵⁸ With regard to personal information, the core justifications for conferring

49. See sources cited *supra* note 48.

50. See *Maracich v. Spears*, 570 U.S. 48, 71 (2013) ("Petitioners and other state residents have no real choice but to disclose their personal information to the state DMV, including highly restricted personal information.").

51. *Whalen v. Roe*, 429 U.S. 589 (1977).

52. *Id.* at 605.

53. Mark S. Wallace, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 149–52, 155–56 (1976); H.R. DOC. NO. 93-46, at 78 (1973) (commentary on Proposed Rule 509(b)).

54. Wallace, *supra* note 53, at 145–49 (discussing 5 U.S.C. § 301 (1970)).

55. *Id.* at 149–52, 155–56.

56. *Id.* at 152–56.

57. See *Nixon v. United States*, 418 U.S. 683, 705, 708 (1974); EDWARD J. CLEARY ET AL., MCCORMICK ON EVIDENCE § 108(a), at 266–67 (3d ed. 1984).

58. See *infra* notes 83–92 and accompanying text.

such protections are to “both protect the individual’s right of privacy and secure his willing and honest response to the questions asked.”⁵⁹

Presumably, state governments possess broad power to control their own records. They possess plenary, rather than specifically enumerated powers.⁶⁰ Such plenary powers undoubtedly include collecting information and controlling its maintenance and use. Indeed, the power to compel provision of information and the concomitant dominion over the information collected surely follows from the power to regulate.⁶¹ Collecting and controlling dissemination of information is an important regulatory policy choice. But at a minimum, state and local governments’ dominion over their own records, like their dominion over their more tangible government property, flows from every government’s inherent proprietary power to control its own resources and property.⁶² Nothing in the Constitution suggests that the federal government has been granted power over state and local recordkeeping.

At least three bodies of doctrine help define a government’s powers over its own records: the “official information” evidentiary privilege, freedom of information and related public records statutes, and the fair information practice principles.

Historically control over government records, and their confidentiality, was discussed as a part of the debate regarding the existence and scope of an “official information” privilege—a debate that has lasted over 100 years. The privilege would allow the government to refuse litigants’ demands for confidential information within

59. See *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 680 (Wash. 1982), *aff’d*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The Court explained:

It is obviously the legislative purpose in enacting these protective statutes, as it was of the Congress and the courts in adopting the discovery rules, to both protect the individual’s right of privacy and secure his willing and honest response to the questions asked. In each instance, it is deemed necessary to give the protection in order to achieve the government’s objective, whether that be the facilitation of the truth seeking objective in litigation, the imposing of an income tax, care and treatment of the mentally ill, the promulgation of regulations affecting an industry, or other legitimate governmental goal.

Id.

60. See, e.g., *National Fed’n. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012).

61. Indeed, presumably the federal government’s control over information it collects and maintains is based on the Necessary and Proper Clause, *Boske v. Comingore*, 177 U.S. 459, 467–68 (1900), or is inherent in the nature of the federal government as a sovereign, because no enumerated power expressly grants the government control over its own information.

62. *Boske*, 177 U.S. at 467–68; Wallace, *supra* note 53, at 155–56 (citing various state statutes aimed at “preserving the confidentiality of documents submitted by corporations or private individuals to the government” to “encourage those making the reports to be as frank as possible”).

government files. These issues were intertwined with the concept of executive privilege, the power of the executive branch, among the three branches of government, to make such decisions at its sole discretion.⁶³

As early as 1900, the U.S. Supreme Court interpreted the federal Housekeeping Act to provide federal agencies with control over their files.⁶⁴ The Court's ruling pre-dated modern federal and state freedom of information laws designed to ensure public access to government records. The Court did not discuss whether the agency could assert a privilege in judicial proceedings that would allow it to produce documents.

In the Model Rules of Evidence, promulgated in 1942, the American Law Institute proposed both an official secrets privilege and a confidential informant's privilege.⁶⁵ The proposed official information privilege provided:

(2) A witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information, and (a) disclosure is forbidden by an Act of the Congress of the United States or a statute of this State, or (b) disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in its governmental capacity.⁶⁶

Official information included all information acquired by either a state or federal official.⁶⁷

The American Law Institute's proposals, supplemented by a required reports privilege,⁶⁸ were incorporated in the privilege rules in the proposed Federal Rules of Evidence that the United States Supreme

63. See *infra* note 79.

64. *Boske*, 177 U.S. at 469-70. The Housekeeping Act provided as follows:

The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution of its business, and the custody, use and preservation of the records, papers, and property appertaining to it.

REV. STAT. § 161 (1875). The provision was initially codified at 5 U.S.C.A. § 22, and is currently codified at 5 U.S.C. § 301. See KENNETH W. GRAHAM, JR., 26A FEDERAL PRACTICE & PROCEDURE: RULES OF EVIDENCE § 5682 (1st ed. 2017), for a discussion of the history of the Housekeeping Act and its interpretation.

65. MODEL CODE OF EVID. R. 228(2) (AM. LAW INST. 1942).

66. *Id.* The Reporter noted that the proposed rule "was not in accord with English law," but represented some of the better decisions of American courts. *Id.* R. 228 cmt.

67. *Id.* R. 228(1).

68. PROPOSED FED. R. OF EVID. 502 (Feb. 5, 1973) (privilege covering statutorily-required reports); CLEARY ET AL., *supra* note 57, § 112, at 273-74.

Court forwarded to Congress in 1973.⁶⁹ The official information privilege focused on federal government records and covered three categories of documents: (1) intragovernmental opinions and recommendations, (2) investigatory files compiled for law enforcement purposes, and (3) "information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to [the Freedom of Information Act]." ⁷⁰ While the companion state secrets privilege could be invoked only by an agency head, government attorneys could invoke the official information privilege.⁷¹ Upon sustaining any assertion of the privilege, the judge was to "make any further orders which the interests of justice require, . . . including finding against the government" on the issue for "which the evidence [was] relevant, or dismissing the action."⁷²

The proposed rules recognized a privilege allowing state and local governments to withhold the names of confidential informants.⁷³ The rules also provided a privilege shielding information individuals or entities were required to supply to government agencies.⁷⁴ With respect to such statutorily-mandated "returns or reports," the proposal would have conferred a privilege upon both the entity submitting the report and the government agency.⁷⁵ The government's privilege, though not the submitter's, depended on the existence of a law authorizing the withholding.⁷⁶

69. PROPOSED FED. R. OF EVID. 509(a)(2) (Feb. 5, 1973); Letter from Edward W. Cleary, Reporter, to Herbert E. Hoffman, Esq., Counsel for Subcomm. on Reform of Fed. Criminal Laws (Feb. 12, 1973), in *Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 8 (1973).

70. PROPOSED FED. R. OF EVID. 509(a)(2).

71. H.R. DOC No. 93-46, at 91 (1973).

72. PROPOSED FED. R. OF EVID. 509(e).

73. PROPOSED FED. R. OF EVID. 510(a). The rule conferred a privilege on such government to refuse to disclose "the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation." *Id.*; H.R. DOC No. 93-46, at 92 (1973) (stating that the rule, well-established in common law, "recognizes the use of informers as an important aspect of law enforcement, whether the informer is a citizen who steps forward with information or a paid undercover agent").

74. PROPOSED FED. R. OF EVID. 502.

75. *Id.*

76. *Id.* The commentators provided examples of several federal cases refusing to order protection of records protected by state government confidentiality laws. H.R. DOC No. 93-46, at 79 (1973).

Due to its association with the Executive Branch's assertion of executive privilege against the other branches of government and the public's right to know, Rule 508's broad official information privilege proved controversial.⁷⁷ Indeed, Congress rejected all eight proposed specific privileges (including the attorney-client, psychotherapist-patient, spousal, and clergyman privileges).⁷⁸ Congress instead opted for a broad privilege provision, Rule 501, leaving discretion to recognize and define the scope of the testimonial privileges available in federal courts.⁷⁹

In 1974, the Uniform Law Commissioners promulgated the Uniform Rules of Evidence, which rejected a broad state governmental official information privilege, recognizing only governmental privileges established by federal law or the state's constitution or statutes.⁸⁰

Though ultimately a broad official information privilege has been rejected, the rejection was largely due not so much to the concept that governments lack a strong interest in controlling dissemination of certain types of information in their files, but to a concern regarding exclusive executive branch control over such determinations.⁸¹ And even so, rules of evidence seem to respect federal and state statutes making certain government information confidential.

A second body of law, the federal Freedom of Information Act ("FOIA") and state public records laws, addresses the confidentiality of government information, albeit in a different context. FOIA seeks to resolve the public's right to information as the ultimate sovereign authority in a democracy.⁸² At their core, FOIA and similar state statutes represent an assertion of legislative authority to set general standards assuring access to information by the general public.⁸³ The right of public access is distinct from, albeit related to, the respective

77. See Margaret A. Berger, *How the Privilege for Government Information Met Its Watergate*, 25 CASE W. RES. L. REV. 775, 747, 751-52, 754, 767, 770, 777, 795 (1975).

78. See S. REP. NO. 93-1277, at 6-7 (1974).

79. FED. R. EVID. 501.

80. UNIF. R. OF EVID. 508 (1974). In 1999, the Uniform Rules of Evidence provisions were expanded to encompass the state's rules. UNIF. R. OF EVID. 508 (1999).

81. See *supra* note 77.

82. Public access laws can be grounded in principles that complement but are distinct from popular sovereignty. For a discussion of these other basis for FOIA laws, see Bernard W. Bell, "Entitlement to Public Records: Beyond Citizenship," 2015 INT'L J. ON OPEN GOV'T 311, <http://ojs.imodev.org/index.php/RIGO/article/view/24> (proceedings for the 10th International Symposium on the Law and Open Government (Paris, France), Les Editions IMODEV).

83. *Federal Public Records Law: Hearings on H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, H.R. 6172, H.R. 6739, H.R. 7010, H.R. 7161 Before Subcomm. of the Gov't Operations Comm., 89th Cong., 5, 6, 13, 15-16 (1965).*

rights of federal and state governments to obtain information held by the other,⁸⁴ and the respective rights of various branches of a government to subpoena information to carry out their respective responsibilities.⁸⁵

FOIA's framers understood the tension between public access to information and the need for confidentiality, as well as the delicate nature of that balance.⁸⁶ Indeed, in virtually every state, FOIA law reflects a recognition that public access must be tempered by the government's ability to protect the confidentiality of some records.⁸⁷ As Congressman Moss, a major advocate of FOIA, said at the beginning of the critical House Committee Hearings on the Freedom of Information Act in 1965:

A successful democracy will never be built on freedom of information achieved simply by affording to any and all persons unrestricted access to official information. Because of the scope and complexity of modern government, there are, literally, of infinite number situations wherein information in the hands of the government must be afforded varying degrees of protection against public disclosure. The possibilities of injury to private and public interests through ill-considered publication are limitless.⁸⁸

84. That said, nothing bars representatives of state governments or members of Congress from making FOIA requests.

85. FOIA does not limit the rights of a house of Congress or congressional committees from obtaining information that could otherwise be withheld under FOIA. See H.R. REP. NO. 1497, at 1112 (1966) ("Members of Congress have all of the rights of access guaranteed to 'any person' [under the FOIA], and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions."); S. REP. NO. 813, at 10 (1965); *Federal Public Records Law: Hearings on H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, H.R. 6172, H.R. 6739, H.R. 7010, H.R. 7161 Before Subcomm. of the Gov't Operations Comm., 89th Cong. 23* (1965) (Statement of Rep. Moss).

86. *Crooker v. Bureau of Alcohol, Tobacco, & Firearms*, 670 F.2d 1051, 1065 (D.C. Cir. 1981) ("FOIA was primarily envisioned as a workable disclosure statute that would eliminate the pervasive secrecy of the Federal Government. But our recognition of this explicit purpose should not obscure a secondary, but nevertheless fundamental, aspect of the bill—i.e. to exempt certain limited categories of documents from mandatory disclosure in order to protect individual rights and to permit the effective operation of the Government.").

87. See NAT'L ASS'N OF COUNTIES, OPEN RECORDS LAWS: A STATE BY STATE REPORT (2010).

88. *Federal Public Records Law: Hearings on H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R.*

Thus, FOIA incorporates two provisions to protect personal privacy,⁸⁹ a general provision to protect proprietary information,⁹⁰ and an exemption for law enforcement records.⁹¹ In addition, FOIA exemption 3 incorporates other specific statutes that protect various types of government information.⁹² State public access laws adopt many of the same protections.⁹³ Indeed, so powerful are these provisions that

5406, H.R. 5520, H.R. 5583, H.R. 6172, H.R. 6739, H.R. 7010, H.R. 7161 Before Subcomm. of the Gov't Operations Comm., 89th Cong. 5 (1965) ("If ours is in fact a government by and for the people, then there is a place for secrecy and a place for easy access to information about government. Democracy requires many delicate balances, and this is one. Too much secrecy, or too free access, can render a great disservice to the people.") (quoting Paul Conrad).

89. 5 U.S.C. § 552(b)(6) (2012) (exempting personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy); 5 U.S.C. § 552(b)(7)(C) (2012) (exempting law enforcement records whose release "could reasonably be expected to constitute an unwarranted invasion of personal privacy"). Many more specific statutes prohibiting disclosure, which are designed to protect privacy, such as statutes that protect the confidentiality of Internal Revenue Service records, 26 U.S.C. § 6103 (2012), are incorporated into FOIA via Exemption 3. 5 U.S.C. § 552(b)(3) (2012). States similarly provide agencies some exemptions from disclosure to safeguard personal privacy. JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* § 27:16 (3d ed. 2016).

The Court has not established a constitutional Due Process right to privacy. The major cases are *NASA v. Nelson*, 562 U.S. 134 (2011) and *Whalen v. Roe*, 429 U.S. 589 (1977).

90. 5 U.S.C. § 552(b)(4) (2012) (allowing agencies to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential"). States provide protections for such information as well. O'REILLY, *supra* note 89, § 27:15.

91. 5 U.S.C. § 552(b)(7) (2012). FOIA exemption (b)(7) is designed to permit withholding of records to protect various types of disclosure that might harm law enforcement proceedings, including confidential sources, methods, privacy, and disclosures that might interfere with ongoing investigations. *See id.* States provide similar protections. O'REILLY, *supra* note 89, § 27:17.

For some time, Exemption 2 was interpreted in a manner that allowed the government to withhold information that individuals could use to circumvent agency efforts to ensure compliance with law. *See Crooker v. Bureau of Alcohol, Tobacco, & Firearms*, 670 F.2d 1051, 1060, 1074 (D.C. Cir. 1981) (citing H.R. REP. NO. 1497, at 3 (1966)). In *Milner v. Dep't of the Navy*, 562 U.S. 562 (2011), the Supreme Court overruled that body of law on the grounds that the text of Exemption 2 did not support withholding information on such grounds. *Id.* at 573–81.

92. 5 U.S.C. § 552(b)(3) (2012). Exemption 3 protects information that is specifically protected from disclosure by other statutes that either: "(i) require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld." *Id.* For a listing of statutes recognized as Exemption 3 statutes, see U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION POLICY, *STATUTES USED BY FEDERAL DEPARTMENTS AND AGENCIES IN CONJUNCTION WITH EXEMPTION 3 OF THE FOIA AS REPORTED IN FISCAL YEAR 2014 ANNUAL FOIA REPORTS* (2014).

93. O'REILLY, *supra* note 89, §§ 27:15–17.

individuals can bring “reverse FOIA” actions to prevent agencies from releasing such information.⁹⁴ These concerns about protecting individual’s privacy or proprietary interests encompass both information that would not have been provided except for promises of confidentiality and information individuals or entities must provide to obtain some government service.⁹⁵

A third “body of law” involves a core data protection principle, applicable to public and private record systems, namely that personal information should be used only for the purposes for which it is collected.⁹⁶ In other words, derivative, *i.e.*, “secondary,” uses of information without the subject’s consent should be carefully circumscribed. The principles that have come to be known as the Fair Information Practices, as initially outlined by the Secretary of HEW’s Advisory Committee on Automated Personal Data Systems in 1973, include the admonition that “[t]here must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.”⁹⁷ While the Fair Information Practices have been stated variously over time, that basic principle remains.⁹⁸ So, for instance, the Privacy Act provides that federal agencies must advise individuals of the purposes for which their data will be employed, termed “routine uses,” and limits agency dissemination of data for other purposes. Similarly, the Health Insurance Portability and Accountability Act (“HIPAA”) regulations control secondary use of medical information.⁹⁹

94. *Chrysler v. Brown*, 441 U.S. 281, 285–86 (1979); *American Farm Bureau Fed’n v. EPA*, 836 F.3d 963, 965 (8th Cir. 2016). Typically, “reverse FOIA” suits are brought on the basis of Exemption 4, but they have been brought on the basis of other exemptions, including the exemptions designed to protect privacy. See P. STEPHEN GIDIÈRE III, *THE FEDERAL INFORMATION MANUAL* 321–24 (2006).

95. See, e.g., *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 877–79 (D.C. Cir. 1992); *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 769 (D.C. Cir. 1974). In *National Parks*, the Court noted in the legislative history the presence of “a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must.” 498 F.2d at 769. In *Critical Mass* the Court held that voluntary and involuntary disclosures of confidential business information required distinct analyses. 975 F.2d at 878. See *Marachich v. Spears*, 133 S. Ct. 2191, 2206 (2013), for compelled disclosures of personal information.

96. DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 130–31 (2008); *RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS*, *supra* note 46, at 41–42.

97. *RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS*, *supra* note 46, at 41.

98. For a discussion of various versions of the Fair Information Practices over time, see ROBERT GELLMAN, *FAIR INFORMATION PRACTICES: A BASIC HISTORY* (2016).

99. Privacy Act, 5 U.S.C. § 552(E)(3)(B) (2012); 45 C.F.R. § 164.508(a) (2017) (HIPAA regulations).

In assessing the powers of states' and localities' to withhold records or direct their employees to do so, potential differences between the positions of the national and state governments in our federal system merit consideration. The federal government's power to rebuff demands for information may exceed those of states and localities.¹⁰⁰ The Supremacy Clause might preclude states from seeking information from the federal government. But the Supremacy Clause is not to be implicated by federal requests for information from state and local governments. Moreover, privileges reflecting concerns about the relationship between the branches of the federal government do not necessarily apply to disputes between the federal and state governments.¹⁰¹ The separation of powers concerns that lie at the heart of constitutional privileges such as those conferred by executive privilege¹⁰² and the Speech and Debate Clause¹⁰³ may not fully translate into the federalism context.

Thus, in *United States v. Gillock*,¹⁰⁴ the Supreme Court rejected the argument that a legislative speech or debate privilege covering state legislators, akin to the Speech and Debate Clause protections members of Congress possess, "is compelled by principles of federalism rooted in our constitutional structure."¹⁰⁵ Given the federal preeminence mandated by the Supremacy Clause "we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators."¹⁰⁶ Moreover, it continued, "federal interference in the state legislative process is not on the same

100. In *M'Culloch v. Maryland*, for example, the Court explains why federal instrumentalities may be immune from certain forms of state taxation even though states may not enjoy such immunity from federal taxation. 17 U.S. 316, 435-36 (1819) ("The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.").

101. See GRAHAM, *supra* note 64, § 5685.

102. *Nixon v. United States*, 418 U.S. 683, 705 (1974). The Court noted that the President's implicit power to invoke executive privilege to refuse to provide certain documents and testimony arose from the supremacy of each of the three branches of government within its own sphere. *Id.* at 705 ("Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.").

103. U.S. CONST., art. I, § 6, cl. 1; see *Nixon*, 418 U.S. at 704 (listing several Speech and Debate Clause precedents).

104. *United States v. Gillock*, 445 U.S. 360 (1980).

105. *Id.* at 366-73.

106. See *id.* at 370.

constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch.”¹⁰⁷

Nevertheless, doctrines protecting the federal government’s control over its records should not be rejected as a source of guidance in assessing states’ and localities’ rights to rebuff federal demands for information. The concerns about inhibiting a government’s power to obtain information and frustration of the expectations of private citizens who provide confidential personal information apply equally at all levels of government.

III. CAN CONGRESS COMMANDEER INFORMATION FROM STATE AND LOCAL GOVERNMENT?

The federal government has broad authority to require information as a part of a scheme of regulation.¹⁰⁸ Congress can require information from corporations or similar entities engaging in interstate commerce, both because Congress has control over commerce and because those entities are not natural persons.¹⁰⁹ But states are separate sovereigns and thus have greater stature in terms of resisting imposition of record-keeping requirements. And such special solicitude is particularly appropriate when imposing such record-provision requirements upon states interferes with states’ and localities’ efforts to provide basic services pursuant to their policies.

In *New York v. United States*, the Supreme Court established the anti-commandeering doctrine based on the Tenth Amendment.¹¹⁰ The federal government can regulate states and private entities directly pursuant to the Commerce Clause and, presumably, under its other enumerated powers.¹¹¹ The federal government can even use conditional grants offered pursuant to its Spending Clause powers or the threat preempting state regulation to encourage states to regulate in accordance with federal policy.¹¹² But the federal government lacks the power to require states to exercise their regulatory powers.¹¹³ The anti-

107. *See id.*

108. *United States v. Morton Salt*, 338 U.S. 632 (1950); *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 742–47 (2d ed. 2001).

109. *Morton Salt*, 338 U.S. at 652 (discussing the Fifth Amendment).

110. *New York v. United States*, 505 U.S. 144, 162 (1992).

111. *See id.*; *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 528 (1985).

112. *New York v. United States*, 505 U.S. at 166–68.

113. *Printz v. United States*, 521 U.S. 898, 924, 935 (1997) (“We held in *New York* that 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 State’s officers directly.”); *New York v. United States*, 505 U.S. at 166.

commandeering doctrine rests on states' status as independent sovereigns protected by the Tenth Amendment as well as the need for clear lines of political responsibility and accountability.¹¹⁴ And, unlike many constitutional doctrines, the anti-commandeering doctrine establishes an absolute rule that permits no balancing.¹¹⁵

Even though political subdivisions are not always accorded the same protections as state governments under federalism doctrines, such as constitutional sovereign immunity,¹¹⁶ *Printz* applies the anti-commandeering doctrine without making such a distinction.¹¹⁷ Granted, in dealing with undocumented aliens, localities are not exclusively engaging in regulatory activities. Some aspects of localities' actions involve law enforcement activities ancillary to the municipality's regulatory powers; others involve non-regulatory actions like provision of services.

In *Printz*, the Justices debated, but did not decide whether anti-commandeering principles allowed states and localities to disregard federal statutes requiring them to share information with federal authorities. The Government and at least two amici raised concerns regarding application of the anti-commandeering principle to such statutes.¹¹⁸ In his opinion for the Court, Justice Scalia distinguished federal statutes that "require only the provision of information to the Federal Government," from the statutes in question in *New York v. United States* and *Printz*, which required state participation "in the actual administration of a federal program."¹¹⁹ In a separate concurrence, Justice O'Connor pointedly noted that the Court had

114. *New York v. United States*, 505 U.S. at 168-69.

115. *See id.* at 178; *Printz*, 521 U.S. at 931-32 (commandeering offends the "very principle of separate state sovereignty . . . and no comparative assessment of the various interests can overcome that fundamental defect").

116. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (holding that a local school board is more like a municipal corporation or other political subdivision of a state than an arm of the state, and therefore, it is not entitled to Eleventh Amendment sovereign immunity); *Lincoln Cty. v. Luning*, 133 U.S. 529, 530 (1890) (holding that a federal court has jurisdiction in a suit against a municipal county because the county is not protected by the Eleventh Amendment).

117. *Printz*, 521 U.S. at 931 n.15. The dissenters noted this point. *Id.* at 955 n.16 (Stevens, J., dissenting).

118. Brief of Amici Curiae Senators Herb Kohl et al. in Support of Respondent at *6, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503); Brief of Handgun Control, Inc. et al. as Amici Curiae in Support of Respondent at *14, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503); Brief for the United States at *31, *31 n.21, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503).

119. *Printz*, 521 U.S. at 918, 926. He did so to dismiss the importance of statutes requiring provision of information in his argument that there is no history of statutes in which the federal government commandeers states.

“appropriately refrain[ed] 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.”¹²⁰ She specifically referenced a statute cited by the Government and amici, 42 U.S.C. § 5779(a), which requires that state and local law enforcement agencies report cases of missing children to the Department of Justice.¹²¹

In *Reno v. Condon*, the Court reviewed Congress’ power to exercise control over states divulging the contents of an important state database, namely driver’s license records.¹²² The Driver’s Privacy Protection Act (“DPPA”) limited state government release of information to others as well as third party acquisition and sale of such data.¹²³ The Government initially argued that the Act could be upheld based upon Congress’ Commerce Clause and Fourteenth Amendment Enforcement Clause powers.¹²⁴ After failing to prevail in the lower courts on the latter, the Solicitor General relied solely on the Commerce Clause in the Supreme Court.¹²⁵ The Supreme Court upheld the law.¹²⁶ It rejected the Tenth Amendment challenge because, it said, Congress was regulating the state merely as a database owner, not as a sovereign.¹²⁷ The Court’s analysis is somewhat questionable for two reasons. First, Department of Motor Vehicles records are exclusively maintained by states; no private entity maintains such records. Second, the regulation of drivers, which is accomplished through

120. *Id.* at 935 (O’Connor, J., concurring).

121. *Id.* at 935 (O’Connor, J., concurring). The dissenting Justices also cited 42 U.S.C. § 5779(a), in arguing that “[t]he fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations, such as . . . reporting traffic fatalities . . . and missing children, . . . to a federal agency.” *Id.* at 955 (Stevens, J., dissenting) (citations omitted).

122. *Reno v. Condon*, 528 U.S. 141, 143 (2000).

123. See 18 U.S.C. §§ 2721–2725. See also *Maracich v. Spears*, 133 S. Ct. 2191, 2206 (2013) (“Petitioners and other state residents have no real choice but to disclose their personal information to the state DMV, including highly restricted personal information. The use of that information by private actors to send direct commercial solicitations without the license holder’s consent is a substantial intrusion on the individual privacy the Act protects.”).

124. *Reno*, 528 U.S. at 148 n.2.

125. *Id.* at 148, 148 n.2.

126. *Id.* at 147–48.

127. *Id.* at 151 (“Like the statute at issue in [*South Carolina v. Baker*], 485 U.S. 505 (1988)], the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”).

licensing, is unquestionably an exercise of the sovereign power of state governments to regulate who can drive and under what limitations.¹²⁸

Robert A. Mikos cogently argues that distinguishing compelled state regulation and compelled state information-sharing under the anti-commandeering doctrine is largely unwarranted.¹²⁹ Neither the Court in *Printz* nor Mikos in his seminal article address a different implication of recognizing a federal power to control a state's choice regarding its records, namely, federal statutes that *preclude* state governments from releasing information.¹³⁰ *Requiring* the state to *divulge* information, even if only to the federal government, accords with the presumption of openness of public records and the "public right to know." *Precluding* states and localities from providing information runs counter to such a presumption of openness, and indeed may frustrate state open records acts. For example, a provision of the Homeland Security Act of 2002 prohibits states and localities from releasing critical infrastructure data provided by the federal government.¹³¹ Similarly, a Department of Homeland Security regulation prohibits release of information regarding inmates held on behalf of federal immigration authorities.¹³² Section 236.6 was held to preempt New Jersey's Right-to-Know Law and Jailkeeper's Law, and was upheld against a Tenth Amendment challenge.¹³³

Both federal provisions described above arguably address information in which the federal government has a predominant interest. Section 133(a)(1) protects the federal government's interest in

128. Granted, drivers' licenses also serve a second function as identification, and some states provide identification to non-drivers through their divisions of motor vehicles.

129. Mikos, *supra* note 46, at 107 ("[T]he distinction between demands for information and demands for other types of enforcement services has no obvious basis."). See also 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'" (quoting *Printz v. United States*, 521, 505 U.S. 898, 918 (1997))).

130. That being said, one provision of the Brady Act, the statute invalidated in *Printz*, did require the local "chief law enforcement officers" to destroy the records of their background checks on potential gun owners if they decided not to object to the purchase. 18 U.S.C. § 922(s)(6)(B)(i) (2012); *Printz*, 521 U.S. at 934. The invalidation of other portions of the Act made it unnecessary for the Court to address that provision. *Printz*, 521 U.S. at 934.

131. 6 U.S.C. § 133(a)(1) (2012).

132. 8 C.F.R. § 236.6 (2017).

133. *ACLU v. County of Hudson*, 799 A.2d 629, 638–39 (N.J. Super. Ct. App. Div. 2002) (finding then-effective N.J. Right-to-Know Law, N.J. STAT. ANN. § S.A. 47:1A–1 to –4 (2002), and the New Jersey Jailkeeper's Law, N.J. STAT. ANN. § 30:8–16 (2002), preempted).

controlling information voluntarily supplied to it by others.¹³⁴ The Department of Homeland Security regulation involves prisoners over whom federal immigration officers have exclusive authority.¹³⁵ But could Congress impose obligations on states to keep secret information that state and local governments acquire and use in administering their own programs? Such a power would raise serious questions, questions the Court largely avoided in *Reno v. Condon* by characterizing the DPPA as a generally-applicable law covering both private and public entities.¹³⁶

In any event, many of the information statutes raised by amici in *Printz* deal with information that fundamentally differs from information regarding a particular individual's undocumented status. They involve either information that is not personal, like a list of places of public accommodation or a list of waste sites, or information to be incorporated into statistical compilations.¹³⁷ Even if the anti-commandeering doctrine permits such information statutes, it should invalidate a requirement that a state or local government provide confidential personal information of a type typically provided under some reasonable expectation of confidentiality.

When a government holds personal information regarding an individual and needs to offer assurances of confidentiality to obtain it, that government has a special need to keep such information confidential.¹³⁸ Such personal information can be distinguished from

134. The statute's limitations do not apply to homeland security information a state or locality obtains from another source. 6 U.S.C. § 133(c) (2012) ("Nothing in this section shall be construed to limit or otherwise affect the ability of a State [or] local" government from acquiring or using critical infrastructure information by means other than those set forth in the information-sharing provisions of section 133).

135. See 8 C.F.R. § 236.1 (2017).

136. 528 U.S. 141, 150 (2000).

137. Among the examples the Government and amici provided in *Printz* were 23 U.S.C. § 402(a) (2012) (mandating that States report traffic fatalities), 15 U.S.C. § 2224 (2012) (mandating that States must submit to the federal government lists of places of public accommodation); 42 U.S.C. § 6991c (2012) (requiring States to create inventories of underground storage tanks and submit them to a federal agency); 42 U.S.C. §§ 11001, 11003 (2012) (requiring comprehensive data collection and reporting, as well as the creation of state emergency response commissions, with respect to the release of hazardous substances). See, e.g., Brief for the United States at 6–8, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503).

Some of these requirements may be justified as a part of a program that either places conditions on grants made to states under the program or that allows the states to regulate in lieu of federal preemption, both of which are permissible under the anti-commandeering doctrine.

138. Theoretically, the Fifth Amendment provides a justification for allowing state and municipalities to withhold such information. Foreign nationals do have the right against self-incrimination that bars the use of compelled statement in criminal trials. *In re*

statistical compilations or redacted de-identified information.¹³⁹ Individuals can claim less of a privacy interest in such statistical or de-identified information. FOIA case law makes exactly this critical distinction.¹⁴⁰ Moreover, release of statistical or de-identified information is far less likely to harm the state or municipality's ability to offer reasonable assurances of confidentiality to obtain necessary personal information.

Thus, information about undocumented aliens may be such that states and localities possess a constitutional privilege, as independent separate sovereigns to withhold such information.¹⁴¹

Federal systems typically involve some mixture of cooperation and competition.¹⁴² While the Constitution may assume some level of cooperation between federal and state authorities,¹⁴³ as the *City of New*

Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 177, 200 (2d Cir. 2008). However, Fifth Amendment rights are "personal"; they can be invoked only by the individual implicating himself. Mikos, *supra* note 46, at 152. And while deportation is a serious consequence, the Fifth Amendment protects individuals against implicating themselves only with regard to *criminal* activity. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984). Nor does the Fifth Amendment allow others to avoid providing information. See Mikos, *supra* note 46, at 150–52.

139. See RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS, *supra* note 46, at 80–82, 85–86 (recommending separate collection of information for statistical purposes and for day-to-day administrative decisions).

140. The Supreme Court has interpreted Exemption 6 as covering only information that is linked to an identifiable person. See, e.g., *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175–76 (1991); *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 n.4 (1982); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 375–76 (1976). And the Privacy Act applies only to records about a person that include "his name, or the identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(4) (2016).

141. Critics might argue that the legality of a person's presence in the United States cannot qualify as confidential information because unlawful conduct can never be considered "private." Of course, the Supreme Court found that individuals have a sufficiently strong privacy interest in their criminal records to allow the federal government to withhold "rap sheets" pursuant to FOIA's privacy exemptions. Granted those records did not involve ongoing unlawful conduct. Nevertheless, unlawful presence in the country may provide a basis for deportation, if immigration authorities conclude that the person cannot establish a basis to remain, but is not itself a crime. Moreover, so long as persons or entities interacting with the individual have no affirmative obligation to report a person's unlawful presence in the United States, they should be able to consider the person's immigration status confidential, particularly if it is irrelevant to such person or entities' purposes.

142. RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 122–23 (3d ed. 2008) ("[V]irtually all federations combine elements of cooperation and competition.").

143. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). Cooperative federalism was not a part of the original "dual" conception

York v. United States Court noted, influential commentary during the Founding period suggests that the Framers intended the states to serve as an independent counterweight that would resist federal overreaching.¹⁴⁴ For example, Alexander Hamilton explained:

[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.¹⁴⁵

In pursuing their sanctuary policies, states and localities are engaged in precisely this counterbalancing role.¹⁴⁶

But does recognizing an anti-commandeering doctrine protecting personal information maintained by state and local governments mean that *federal courts* cannot compel production of such information? Many cases in which state or local governments assert something akin to an official information privilege involve civil rights claims. In that context, courts have concluded that state confidentiality interests must yield to federal policy.¹⁴⁷ But that is precisely the context in which

of federalism, characterized by discrete spheres of federal and state responsibility; it is an artifact of the 1930's. See Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 622–24 (1978).

144. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”); THE FEDERALIST NO. 51, 323 (James Madison) (C. Rossiter ed., 1961) (stating that separation of powers and federalism provide “a double security” protecting “the rights of the people[.] . . . [t]he different governments will control each other, at the same time that each will be controlled by itself.”); see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1261–64 (2009) (offering an account of the ways states can both participate in federal programs and resist federal mandates).

145. THE FEDERALIST NO. 28, at 180–81 (C. Rossiter ed., 1961).

146. Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 605 (2008) (“[W]oven into these policy objectives are political judgments that reflect a broader kind of ideological conflict expressed across the federal-state-local axis: sanctuary laws represent instances of local officials staking out political positions in some tension with federal intentions.”).

147. *United States v. Phx. Union High Sch. Dist.*, 681 F.2d 1235, 1238 (9th Cir. 1982) (holding that state governmental privilege could not be asserted in federal inquiry into

Congress can proceed despite the anti-commandeering doctrine.¹⁴⁸ Moreover, court orders differ from statutes and regulations in fundamental respects. Courts can craft their orders in the context of particular cases; legislators and agencies pursuing rulemaking cannot. Courts can issue protective orders that both limit further dissemination of information and control the receiving parties' dominion over the information;¹⁴⁹ legislators or agencies may find imposing such controls more difficult. Moreover, court-compelled production of records is less intrusive, at least when directed toward a government entity as litigant. The government entity may decide to withhold the evidence and suffer the adverse litigation consequences, such as voluntary withdrawal of the suit, adverse inferences, or entry of judgment against it.¹⁵⁰

Generally applicable federal statutory requirements fall outside the anti-commandeering doctrine.¹⁵¹ But there is no generally applicable requirement to report provision of services to or interactions with undocumented individuals, nor any generally applicable law preventing

racial discrimination in schools); *Kelly v. City of San Jose*, 114 F.R.D. 653, 656 (N.D. Cal. 1987) (stating that state privilege law cannot be used to prevent federal inquiry into police abuse in a civil rights action); *see also* *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 202 (1990) (rejecting private university's claim of a privilege to refuse to disclose confidential peer review materials).

148. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59, 65–66 (1996); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453–56 (1976); *Ex parte State of Virginia*, 100 U.S. 339, 345–48 (1880); *see also* Caminker, *supra* note 129, at 238–40 (sounding a cautionary note).

149. FED R. CIV. P. 26(c)(1)(E)–(G); *see also* *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2208 (1984).

150. *See* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 5:60 (4th ed. 2013). *But see* *United States v. Reynolds*, 345 U.S. 1, 12 (1953). Proposed Rule 509 provided so explicitly. PROPOSED FED. R. OF EVID. 509(e) (Feb. 5, 1973). The Model Rules of Evidence do so as well. MODEL CODE OF EVID. R. 228(2) (AM. LAW INST. 1942). In other areas, the existence of government choice makes it less coercive. Conditional grants are consistent with the Tenth Amendment only so long as they serve to induce, not coerce, state and local government, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–81; *Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937). The Court held that the Taxing Power, but not the Commerce Clause Power, could reach inaction because the former leaves regulated entities a choice while the latter does not. *Sebelius*, 567 U.S. at 573–74.

151. *New York v. United States*, 505 U.S. 144, 160 (1992). Application of such generally applicable principles is governed by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (distinguishing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)); *see also* *Reno v. Condon*, 528 U.S. 141, 146, 151. Mikos contends that some broadly applicable information-sharing requirements should not be considered “generally applicable” because “information that a state gathers in its sovereign capacity is, by definition, a demand for information private citizens could not possess.” Mikos, *supra* note 46, at 170.

corporations from prohibiting their employees from using customer information to inform immigration authorities of the presence of undocumented aliens.¹⁵²

So far, the anti-commandeering principle has been applied to Congress' exercise of its Commerce Clause powers. Perhaps the anti-commandeering doctrine does not apply when the federal government exercises its authority over immigration and naturalization.¹⁵³ With respect to interstate commerce, states enjoy substantial concurrent powers with the federal government.¹⁵⁴ The federal government's powers over immigration and naturalization, on the other hand, are inherent in national sovereignty, namely the power to control entry into the United States by aliens, and the conditions under which they remain.¹⁵⁵ And traditionally, at least vis-à-vis assertions of individual rights, the federal government's authority has been viewed as plenary in a way that expands the federal government's powers beyond its ordinary bounds.¹⁵⁶

New York v. United States and *Printz* suggest that Congress has the power to commandeer under the Extradition Clause. However, the Extradition Clause, unlike the federal government's powers over immigration and naturalization, involves constitutionally imposed

152. There are generally applicable requirements regarding the immigration status of an entity's employees, but sanctuary cities presumably comply with generally applicable federal statutes requiring verification of a potential employee's immigration status.

153. Caminker, *supra* note 129, at 242 ("Justice Scalia's opinion in *Printz* invites future courts to consider whether the general anti-commandeering rule is overridden by particular constitutional provisions other than the two he mentioned, the Supremacy and Extradition Clauses.").

154. *Cooley v. Board of Wardens*, 53 U.S. 299, 320 (1851). States possess broad power to regulate commerce which has implications for interstate commerce so long as they do not discriminate against interstate commerce, *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988); do not regulate in ways in which the burden upon interstate commerce grossly outweighs the legitimate local regulatory concerns, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); do not regulate in ways that have extraterritorial effects or subject interstate commerce to conflicting state regulations, *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 88 (1987); or in ways that are animated by an animus toward interstate commerce, *Kassel v. Consolidated Freightways*, 450 U.S. 662, 676, (1981); *Kassel*, 450 U.S. at 681–87 (Brennan, J., concurring); *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

155. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) ("[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government" that federal policy in this area always takes precedence over state policy); see also Huyen Pham, *The Inherent Flaws In The Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 987–91 (2004).

156. See generally David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 594–97, 599 (2017).

obligations exclusively directed at states to enforce mutual obligations between the states.¹⁵⁷ Presumably Congress may “commandeer” states, *i.e.*, control their exercise of regulatory powers, to protect individual rights pursuant to the Enforcement Clauses of the Reconstruction Amendments and similar constitutional amendments that secure individual rights against state infringement. Such distinctions do not suggest that Congress’s powers to commandeer otherwise vary depending on the source of federal power. Nothing inherent in the power over immigration and naturalization suggests that state governments have any obligation to assist the national government in implementing its powers.¹⁵⁸ Indeed, two scholars suggest that though the dominant federalism paradigm in most areas is one of “cooperative federalism,” the federalism paradigm embraced by judicial doctrine in the immigration context is “dual federalism,” under which federal and state sovereignty has been regarded as exclusive.¹⁵⁹

IV. PRECLUDING STATE CONTROL OVER STATE EMPLOYEES

So far we have analyzed whether Congress can compel state and local governments themselves to provide personal information about identifiable individuals to federal immigration officials. But section 1373 does not impose such a requirement.¹⁶⁰ Rather it prohibits states and localities from interfering with individual public employees’ disclosure of such information.¹⁶¹ Can Congress constitutionally preclude state and local governments from exercising control over their

157. *New York v. United States* says that state courts may, in effect, be “conscripted” by the federal government to ensure the supremacy of federal law guaranteed by the Supremacy Clause, and that federal courts may order state officials to comply with binding federal law. 505 U.S. 144, 178–79 (1992).

158. Interestingly, however, the Court in *Printz* addressed a statute that seemed to involve local officials in providing assistance to immigrants. *Printz v. United States*, 521 U.S. 898, 916 (1997) (discussing Act of Aug. 3, 1882, ch. 376 §§ 2 & 4, 22 Stat. 214). The Act had provided for state officials “to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid[.]” to inspect arriving immigrants and exclude any person found to be a “convict, lunatic, idiot,” or indigent; and to send convicts back to their country of origin “without compensation.” *Id.* While the majority dismissed the assertion that the statute commandeered local officials, because it merely empowered the Treasury Department to enter into contracts with willing localities to perform such functions, the statute might be used as a basis for treating regulation of immigrations as a distinctive under the anti-commandeering doctrine. *Id.* at 916.

159. Rubenstein & Gulasekaram, *supra* note 156, at 603–04.

160. See 8 U.S.C. § 1373(a) (2012).

161. *Id.*

own employees' use of information they possess solely by virtue of their government employment?¹⁶²

Requiring states and localities to allow public employees' disclosure of information to the federal government may appear a lesser affront to federalism principles than requiring the state to provide such information directly. Surely fewer records the state wishes to withhold will be divulged under the former rule. Indeed, if compelling states and localities themselves to provide information does not transgress federalism principles, merely protecting state and local employers who provide such information despite their government employer's contrary policies would seem constitutional *a fortiori*. In other words, the power to compel state and local governments to divulge the information would encompass the "lesser" power of preventing those governments from prohibiting public employees from doing so.¹⁶³ And if, as argued above, the federal government were prohibited from ordering the state to provide information, it may seem more respectful of state sovereignty to merely prevent states and localities from interfering with individual public employees' decisions to provide such information.¹⁶⁴ However, depriving a sovereign of the right to control its employees has implications beyond the state's loss of control over its confidential records; such an act severs the hierarchical relationship between senior agency officials and their subordinates.

As early as 1900, the Supreme Court recognized federal agencies heads' power to control their subordinates' disclosure of the agency's records.¹⁶⁵ In *Boske v. Comingore*, the Supreme Court upheld a Treasury regulation restricting a revenue officer's disclosure of tax information.¹⁶⁶ Revenue Agent Comingore had been subpoenaed in a state court proceeding.¹⁶⁷ The Court said "the Secretary, under the

162. It is not clear how frequently employees of sanctuary city governments provide information to federal authorities without authorization.

163. Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 227 (1994) (stating that the proposition that the greater includes the lesser is tremendously attractive to lawyers and judges, but is a "trap" because it is sometimes false).

164. *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) ("[The challenged statutes] do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS." (citing *Printz v. United States*, 521 U.S. 898, 917-18 (1997))).

165. *Boske v. Comingore*, 177 U.S. 459, 470 (1900). Granted, the case pre-dated the development of the robust contemporary First Amendment Doctrine. See Wallace, *supra* note 53, at 142, for a general discussion.

166. *Boske*, 177 U.S. at 470.

167. *Id.* at 462.

regulations as to the custody, use, and preservation of the records, papers, and property appertaining to the business of his department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue."¹⁶⁸ The Secretary may "reserve for his own determination all matters of that character."¹⁶⁹ The Court cautioned:

Reasons of public policy may well have suggested the necessity, in the interest of the government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded. Besides, great confusion might arise in the business of the department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates.¹⁷⁰

In *U.S. ex rel. Touhy v. Ragan*, the Court reaffirmed agency heads' power to determine subordinates' responses to judicial subpoenas.¹⁷¹ In short, an agency is permitted to "centraliz[e] the determinations of when to assert and when not to assert a privilege."¹⁷²

Frequently, on both the federal and state level, the power to obtain information is accompanied by a provision prohibiting unauthorized

168. *Id.* at 470. The Court also noted that "great confusion might arise in the business of the department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates." *Id.*

169. *Id.*

170. *Id.* at 469-70.

171. *United States ex rel. Touhy v. Ragan*, 340 U.S. 462, 468 (1951) ("When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious.").

An agency head's personal consideration of whether to release or withhold information is also important to ensure that when the government withholds information, it has compelling and legitimate reasons for doing so. Thus, in some circumstances, not only does an agency head have the power to make a decision regarding disclosure of information, the agency head has an obligation to personally make such a determination only after giving the matter personal consideration. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); Wallace, *supra* note 53, at 166.

172. *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961); *accord* *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793 (D.C. Cir. 1971).

disclosure of that information.¹⁷³ And the federal FOIA confers upon *agencies*, not individual employees, the discretion to release records that may be withheld pursuant to a FOIA exemption.¹⁷⁴ Indeed, an individual agency official's unauthorized disclosure of records protected by an exemption to a third party would frustrate the mechanisms established to protect the privacy and proprietary interests of private citizens. Executive Order 12600 enables private citizens to assert such rights by challenging an agency's decision to release information in response to a FOIA request before the agency actually does so.¹⁷⁵

Moreover, high-level officials' promulgation of rules controlling dissemination of information is essential to ensuring that undocumented immigrants who interact with the government receive consistent and equal treatment. Line officials' adherence to rules promulgated by superiors furthers consistent treatment of those who interact with the agency.¹⁷⁶ Allowing public employees to divulge information regardless of contrary state or local agencies' policies

173. Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 YALE L.J. 1111, 1149 (1947) ("Statutory provisions making it a misdemeanor for any officer or employee of an agency improperly to disclose information are very common."); Wallace, *supra* note 53, at 149–52 (listing statutes preserving the confidentiality of airplane accident reports, tax returns, Veterans Administration benefit claims records, visa records, and Census reports); *id.* at 155–56 (state laws); H.R. DOC. No. 93-46, at 78 (1973).

174. *McLean v. Dep't of Homeland Security*, 135 S. Ct. 913, 922 (2015) ("A statute that exempts information from mandatory disclosure may nonetheless give the agency discretion to release that exempt information to the public. In such a case, the agency's exercise of discretion has no effect on whether the information is 'exempted from disclosure by statute'—it remains exempt whatever the agency chooses to do."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 293–94 (1979); *EPA v. Mink*, 410 U.S. 73, 80 (1973) (citing S. REP. NO. 813, at 3 (1965)).

175. See *Chrysler*, 441 U.S. at 317–18; Exec. Order No. 12600, 52 Fed. Reg. 23781 (1987). Section 1 provides that each agency "shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information . . . when those records are requested under the Freedom of Information Act . . . if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records." 52 Fed. Reg. 23781 (1987).

176. *Boske v. Comingore*, 177 U.S. 459, 470 (1900) ("[G]reat confusion might arise in the business of the department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates."); *Sun Ray Drive-In Dairy v. Oregon Liquor Control Comm'n*, 517 P.2d 289, 293 (Or. Ct. App. 1973) ("Written standards and policies are essential to assure an acceptable degree of consistency of practice among the personnel of the agency."); 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 975 (Guenther Roth & Claus Wittich, eds., 1978) ("Bureaucratization offers above all the optimum possibility for carrying through the principle of specializing administrative functions according to purely objective considerations"; such as, "according to calculable rules and 'without regard to persons.'").

increases the possibility that the confidentiality with which the state or local agency treats records will turn on the individual idiosyncrasies of relatively low-level line officials.

In at least some circumstances, when information to which the employee is privy involves the misuse or misappropriation of government funds, official resources, or government power, allowing the federal government to ensure employees' ability to disclose such misdeeds would seem to be essential.¹⁷⁷ The federal government and many state governments have provided statutory protection for whistleblowers, employees who divulge information about their agencies without authorization to report fraud and abuse either to other governmental authorities or to the public.¹⁷⁸ And *Sabri v. United States*¹⁷⁹ holds that the federal government has a sufficient interest in the integrity of government officials who receive and disburse federal funds pursuant to federal programs, to enact criminal prohibitions punishing state and local public employees who take bribes. The federal criminal prohibition may constitutionally apply even when the bribery is unrelated to the state or local official's responsibilities under the federal program.¹⁸⁰

Moreover, since *Boske* and *Touhy*, the Supreme Court has recognized public employees' First Amendment right to speak on matters of public concern and thereby catalyze or participate in public

177. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance.").

178. 5 U.S.C. § 2302(b)(8) (2012). Section 2302 prohibits government agencies from taking reprisals against employees who disclose information that the employee "reasonably believes" reveals "any violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Whistleblower Protection Act of 1989, 103 Stat. 16 (codified at 5 U.S.C.A. § 1201 Note); H.R. REP. NO. 100-274, at 18-20 (1987); S. REP. NO. 100-413, at 2-5 (1988); President George H.W. Bush, Remarks on Signing the Whistleblower Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 515 (Apr. 10, 1989). However, if the information is "specifically prohibited by law" or is classified, the employee may reveal the information only to Special Counsel [for the Merit Systems Protection Board] or the agency's Inspector General. 5 U.S.C. § 2302(b)(8) (2012). For a general discussion of the federal whistleblower statute and its limitations, see *Garcetti*, 547 U.S. at 440 (Souter, J., dissenting).

Many states have whistleblower statutes. See NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE WHISTLEBLOWER LAWS (2010), <http://www.ncsl.org/research/labor-and-employment/state-whistleblower-laws.aspx> (last visited Feb. 24, 2017); see also *Garcetti*, 547 U.S. at 440 (Souter, J., dissenting).

179. 501 U.S. 600 (2004).

180. *Id.* at 605-06.

debate.¹⁸¹ “The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.”¹⁸² The Court has repeatedly asserted that given their government positions, public employees are particularly likely to make valuable contributions to public debate.¹⁸³ The First Amendment protections for public employee speech apply equally on the federal, state, and local levels.¹⁸⁴ The federal government could attempt to characterize section 1373 as a focused statutory protection of state and municipal employees’ First Amendment rights, which coincidentally ensures that the public within those jurisdictions remains informed about the state’s or locality’s actions regarding undocumented aliens. Facilitating such public employee speech might also be viewed as a means of ensuring that state and local government do not engage in waste, fraud or abuse in administering federal programs.

But the First Amendment protection for public employee speech is focused on enabling public employees to participate in public debate,¹⁸⁵ rather than enabling such individuals to covertly disclose information to another level of government. Moreover, government entities have greater leeway in disciplining public employees for disseminating confidential personal information within government files.¹⁸⁶ The information section 1373 allows state and local employees to divulge deals with individuals, and reveals nothing about the actions of the relevant state and local governments that those governments have not already officially acknowledged, namely that they provide services to residents within the jurisdiction regardless of their immigration status. Moreover, the immigration authorities to which employees could provide information presumably have little authority to police

181. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 465–66, (1995); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568, 574–75 (1968).

182. *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014); *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam).

183. *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) (“Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”); see *Pickering*, 391 U.S. at 572 (“Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”).

184. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010).

185. *Pickering*, 391 U.S. at 572–73; *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that the *Pickering* balancing test applies only when an employee speaks “as a citizen upon matters of public concern” rather than “as an employee upon matters only of personal interest”).

186. See *Harman v. City of New York*, 140 F.3d 111, 119, 122–23 (2d Cir. 1998).

municipal and state governments' provision of services and response to local crimes, even when services and police protection are provided to undocumented aliens.¹⁸⁷

A government's broad power to control employee speech when employees speak in their official capacity falls outside the First Amendment protections for employee speech. The employee speech protected by section 1373 should be considered "official" speech, though the current Free Speech Clause jurisprudence may leave the issue in doubt.¹⁸⁸ Courts will presumably categorize as "official speech," subject to government control, a state or local employee's forwarding of information to federal authorities during on-duty hours or while using government facilities and resources.¹⁸⁹ Even if the information is forwarded during off-duty hours without use of government facilities, however, disclosing such information should be considered government speech because the employee has access to such information only as a result of encountering it during his or her official duties.¹⁹⁰ As one state supreme court has postulated,

A persuasive argument can be made that when persons are required to give information which they would otherwise be entitled to keep to themselves, in order to secure a government benefit or perform an obligation to that government, those receiving that information waive the right to use it for any purpose except those which are authorized by the agency of government which exacted the information.¹⁹¹

However, a recent Supreme Court opinion, *Lane v. Franks*, suggests otherwise; it suggests that access to information by virtue of one's official duties is not dispositive. The case involves unusual circumstances—the termination of a public employee for his testimony

187. See Sullivan, *supra* note 6, at 579–83; Kittrie, *supra* note 15, at 1475–83.

188. See Lane v. Franks, 134 S. Ct. 2369, 2377–78 (2014); Garcetti v. Ceballos, 547 U.S. 410, 422–23 (2006).

189. See sources cited *supra* note 188.

190. See Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV 185, 190–92 (2007); Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1540 (2008). Vladeck relies on *Garcetti* for this proposition, though his interpretation appears to be undercut by *Lane*. See sources cited *supra* note 188; accord *Printz v. United States*, 521 U.S. 898, 932 n.17 (1997) ("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.").

191. *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 681 (1982).

against another employee in a public corruption trial.¹⁹² Shortly after being hired as the Director for a statewide program for underprivileged youth, Lane discovered that Alabama State Representative Suzanne Schmitz was a “no show” employee.¹⁹³ Lane fired Schmitz. A federal grand jury subpoenaed Lane to testify, and ultimately indicted Schmitz for collecting a salary paid for by federal funds while providing no services of value.¹⁹⁴ Under subpoena, Lane testified at Schmitz’s trial about the events that lead to Schmitz’s termination.¹⁹⁵ Lane was ultimately terminated,¹⁹⁶ allegedly in retaliation for his testimony.

The Supreme Court held that “[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes,” even if it concerns information learned during employment.¹⁹⁷ The Court explained that “[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”¹⁹⁸ Moreover, the Court continued, it would be “antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim.”¹⁹⁹ Thus, the case should not stand as a blanket rejection of the principle that provision of confidential personal information in government files ordinarily qualifies as official speech that the government employer can circumscribe.

Doctrines outside the context of control of government information suggest the critical nature of senior government officials’ control over their subordinate’s actions. In the federalism context, *National League of Cities v. Usery*²⁰⁰ is particularly relevant. Though overruled *with regard to generally-applicable federal statutes*, such as the Fair Labor Standards Act, *National League of Cities v. Usery* suggests that states

192. *Lane*, 134 S. Ct. at 2369.

193. *Id.* at 2375.

194. *Id.*

195. *Id.*

196. *Id.* at 2375–76.

197. *Id.* at 2378.

198. *Id.* at 2379.

199. *Id.* at 2380.

200. *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

have a substantial interest in structuring their relationship with their own employees.²⁰¹ In particular, one

attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.²⁰²

Surely, taking steps to ensure that such employees protect confidential information citizens entrust to the government and ensuring employee loyalty and allegiance to the local government ranks as highly as deciding the pay and hours of such employees. Indeed, determining an employee's authority to disclose information is an aspect of defining the employees' duties.

Cases embracing the unitary theory of the Executive Branch on the federal level similarly suggest the importance of subordinates' accountability to senior officials in terms of democratic governance and the responsibilities of high-ranking government officials.²⁰³ Indeed, erosion of the bond between state and local officials and their subordinates would create the types of concerns that have animated the Supreme Court's response to interference with the Presidential control over Executive Branch officials. For instance, in *Printz v. United States* itself, the majority noted that the power to commandeer undermined the constitutional framework because it allowed Congress to use state officials, who could not be controlled by the President, to act on behalf of the federal government.²⁰⁴ Similarly in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,²⁰⁵ the majority found the double level of tenure protections unconstitutional because it excessively insulated members of the Executive Branch from the President.²⁰⁶

201. *Id.* at 845, 848.

202. *Id.* at 845.

203. See *Printz v. United States*, 521 U.S. 898, 922–23 (1997). The unitary theory is controversial, at least in its pure form, compare Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994); but even its weaker forms suggests problems with severing the connection between senior government officials and subordinate ones.

204. 521 U.S. at 922–23.

205. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

206. *Id.* at 496. "Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Id.* at 498 (quoting THE FEDERALIST NO. 72

State and municipal chief executives' power to control their employees' actions and the concomitant electoral accountability for such subordinate's actions is no less significant. Granted, many states do not have a unitary executive.²⁰⁷ Nevertheless, the interest in some electorally accountable high level official or body having the power to control lower level government employees seems no less critical on the state and local levels than on the federal level.²⁰⁸

Even in terms of the accountability theory underlying the anti-commandeering doctrine, prohibiting states and municipalities' exercise of authority over their own employee's dissemination of information is a more serious intrusion than compelling the state to provide the information itself. Highly visible disputes between elected state and municipal officials on one hand, and federal officials on the other, over federal demands for information enhance the political protections of federalism by making the confrontation more visible. Federal policy that facilitates the surreptitious flow of sensitive information from low-level state and local officials to federal immigration authorities encourages more opaque information transfers whose very lack of transparency will render the disclosure issue less salient to constituents.²⁰⁹ And indeed, allowing low-level employees to act on their own deprives the state or local body politic of "the ultimate decision as

(Alexander Hamilton)); see also *Free Enter. Fund*, 561 U.S. at 499 ("One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.").

207. COUNSEL OF STATE GOVERNMENTS, BOOK OF THE STATES 2016, at tbl.4.9, <http://knowledgecenter.csg.org/kc/content/book-states-2016-chapter-4-state-executive-branch>.

208. Indeed, *Free Enterprise* is based on the Clause that the President is vested with "the executive power." U.S. CONST., art II, §1, cl. 1. Indeed, arguably a fundamental attribute of a bureaucracy is hierarchical control by superiors over subordinates through written rules. See *Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n*, 517 P.2d 289, 293 (Or. Ct. App. 1973) ("An administrative agency cannot properly perform its duty under the law unless employees at all levels work toward the same objectives under a clear direction of policy from the head of that agency."); JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 26 (1983); WEBER, *supra* note 176, at 956–58 (discussing six characteristics of bureaucracy, including "[t]he principles of office hierarchy and of channels of appeal [] [which] stipulate a clearly established system of super- and sub-ordination in which there is a supervision of lower offices by higher ones").

209. See *New York v. United States*, 505 U.S. 144, 168–69 ("[I]n such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.").

to whether or not the State will" share information with the federal government.²¹⁰

The *City of New York* court's objection to the Koch Executive Order seemed less focused on the general proposition that certain information should be considered confidential, than on the principle that state and local governments cannot treat the federal government with special and unique hostility. In particular, the City of New York could not make information public to all individuals and entities (in other words, "the world") except for the federal government.²¹¹ Granted, most provisions regarding confidentiality do not focus on one particular recipient of the information. Nevertheless, the *City of New York* court's analysis suffers from three defects. First, state and local refusal to share information because of a disagreement with the federal government over a particular policy is consistent with the creative tension between state and federal governments that the Framers expected.²¹² Second, state and local limitations on provision of information regarding immigration status is likely subject to implicit constraints on dissemination of information for purposes unrelated to government (as well as general statutory constraints). Third, special and focused state and local limitations upon employees' provision of information to immigration authorities are justified because such transfers are (1) of particular concern to providers of the information and (2) particularly likely to be considered justified by employees hostile to their own state or local government's position.

The theory of creative tension between the federal government and the state governments justifies allowing state and local governments to act with particular hostility to federal policies that they consider unjust and likely to impose problems that the localities will be left to solve. Given the federal government's special powers to threaten individual liberties, powers foreign to private entities, state governments may

210. *Id.* at 168. ("By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.").

211. Indeed, under Fourth Amendment doctrine, government entities are entitled to "most favored nation" status. See Bernard W. Bell, *Theatrical Investigation: White-Collar Crime, Undercover Operations, and Privacy*, 11 WM. & MARY BILL RTS. J. 151, 198 (2002) [hereinafter Bell, *Theatrical Investigation*]; Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 776 (1999) [hereinafter Bell, *Secrets and Lies*]. In particular, information exposed to any other person or entity is information that is no longer shielded by a "reasonable expectation of privacy." See Bell, *Theatrical Investigation*, *supra*, at 188–206; Bell, *Secrets and Lies*, *supra*, at 762–73.

212. See *supra* text accompanying notes 142–46.

need to take actions uniquely targeted at the federal government to maintain their constitutional role as a counterweight.

It is unlikely that the City's policy authorized City employees to divulge to everyone except the federal government the immigration status of every person with whom that city employees had interacted. Presumably, disclosure of personal information, particularly in a way that would cause such individuals harm, would not be authorized (without some public purpose). In addition, presumably, employees who did so without authorization would be disciplined for misfeasance.²¹³

The focus on provisions of information to federal immigration officials is entirely reasonable and does not merely reflect animus toward the federal government, or even federal immigration officials. It is perfectly reasonable to specify a policy of non-disclosure of personal information held by the government to a particular recipient when the potential recipient is the one about which providers of the information are most concerned. Potential sharing of information with federal immigration authorities is likely to lead to a significantly increased reluctance to share the information with state and local officials. Additionally, because state and local officials are most likely to consider themselves justified in breaching a private individual's confidence when reporting an individual's immigration status to the federal government, as opposed to some private entity or individual, disclosures to federal officials, particularly immigration officials, might well warrant special treatment.²¹⁴

V. REQUIRING STATES TO COLLECT INFORMATION

After *City of New York v. United States*, New York City adopted a new Executive Order directing city employees to refrain from obtaining information regarding the immigration status of individuals with which they dealt.²¹⁵ Other jurisdictions may have followed New York City in

213. Indeed, just the year before, another panel had identified a "network" of federal and state statutes and regulations protecting the confidentiality of child welfare records. See *Harman v. City of New York*, 140 F.3d 111, 115, 119 (1998).

214. Indeed, under some conditions, the city would share information about the immigration status of undocumented residents that it would probably not share with others. See OFFICE OF THE MAYOR, CITY OF N.Y., EXEC. ORDER NO. 124, CITY POLICY CONCERNING ALIENS §2(a) (1989).

215. See *id.* The order provided:

A City officer or employee, other than law enforcement officers acting in furtherance of law enforcement operations, including criminal investigations, shall not inquire about a person's immigration status unless:

(1) Such person's immigration status is relevant to the determination of program, service or benefit eligibility, or is relevant to the provision of City services; or

simply not collecting such information. Does anti-commandeering prohibit the federal government from requiring states to obtain such information?

Requiring states and localities to expend resources to collect and maintain information is a greater intrusion than merely requiring such entities to supply information they collect and maintain for their own reasons. Indeed, *Printz* itself involved imposition of an obligation on local law enforcement officers to obtain certain information.²¹⁶

Moreover, as shown above, the decision to collect information is a substantive policy choice that involves considering several factors. At the most basic level the government must balance its need for information against the burden imposed on the individuals in supplying it. But beyond the compliance burden, the government must consider individual's concerns regarding their loss of control over sensitive information and the possible repercussions of such loss of control." If state and local officials conclude that having particular sensitive personal information is undesirable and indeed counter-productive, it is not clear why the federal government should be able to require state or local information gathering under the implicit national power to control immigration. Indeed, the accountability concerns raised in *New York v. United States* and *Printz* would seem to apply in such circumstances. State and local officials may well be blamed for the decision to collect, maintain, and transmit to the federal government confidential personal information about the jurisdiction's residents or others with whom the jurisdiction interacts.

VI. CONCLUSION

In short, the provisions of Executive Order 13768 regarding defunding states and localities that fail to comply with 8 U.S.C. §1373 rests on uncertain ground. Section 1373 probably violates the anti-commandeering doctrine. And in any event, it seeks to do indirectly what Congress probably cannot do directly—require state and local jurisdictions to turn over information regarding undocumented aliens with whom they interact.

(2) Such officer or employee is required by law to inquire about such person's immigration status.

Id.

216. See *Printz v. United States*, 521 U.S. 898, 962 (1997).