

Policy Analysis

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How States Talk Back to Washington and Strengthen American Federalism

by John Dinan

Executive Summary

Effective federalism requires that state officials be able to secure relief from national directives that impose undue burdens on state governments or improper constraints on state policy discretion. Many analysts focus on clearly legitimate and occasionally effective tactics such as lobbying or lawsuits. Some activists consider discredited tactics such as nullification that are a nonstarter in the 21st century. This policy analysis calls attention to various ways that states talk back to Washington using tactics that go beyond lobbying and litigation but fall short of nullification.

First, when state and federal governments both possess regulatory authority, states can enact measures decriminalizing certain practices, hoping federal executive officials will not enforce federal statutes in states with contrary policies. Second, states can decline to participate in federal programs and accept the des-

ignated penalties, hoping Congress will revise statutes or executive officials will issue rules or waivers that moderate the programs. Third, when federal judicial doctrine is uncertain or in flux, states can enact measures inconsistent with Supreme Court precedents, hoping the Court will reconsider and relax judicially imposed constraints on state policy discretion. Fourth, when federal judicial doctrine is uncertain or in flux, states can enact measures inconsistent with federal statutes, hoping the Supreme Court will invalidate or limit the reach of federal statutes. In recent years, state officials have relied on each of these tactics and with some success in responding to federal directives relating to marijuana, education, abortion, and health care, among other areas. State officials have resources to push back against national officials, thereby improving American federalism.

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State officials have several ways to moderate the effects of federal directives.

Introduction

A central challenge for the U.S. federal system is providing mechanisms by which state officials can secure relief from federal directives that impose undue fiscal or administrative burdens on state governments or improper constraints on state policy discretion. At times, federal directives are promulgated without adequate attention to the capacity of state governments to administer federal policies effectively. At other times, federal directives are issued without sufficient regard to the diversity of state political cultures or the benefits of state policy experimentation. State officials may try to preclude burdensome or constraining national directives. But they often fail because federal officials are inattentive to state concerns or are preoccupied with substantive policy goals that frequently take precedence over federalism considerations. As a result, state officials often press for relaxation or repeal of federal directives after they are issued.

State officials have several ways to moderate the effects of federal directives. Governors, legislators, and other state officials frequently engage in lobbying, whether individually or through intergovernmental organizations, and have some success in securing the repeal of federal directives. For example, governors were concerned in 2006 about a provision in a defense authorization law that increased the president's power to federalize a state national guard without gubernatorial consent. Governors made their case to members of Congress through letters and congressional testimony and persuaded Congress to repeal this provision the next year.¹ State and local officials also file lawsuits seeking redress through federal courts. In March 2013, for instance, the Iowa League of Cities persuaded a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit to set aside two Environmental Protection Agency rules regulating water treatment processes at municipally owned sewer systems,² including one rule that could have imposed \$150 billion in costs for cities around the country.³

Some observers have suggested other ways to push back against federal directives. Several authors and some public officials have sought to revive the practice of nullification; they claim state governments may respond to federal directives by declaring federal acts invalid and without legal effect.⁴ In recent years several state legislatures considered enacting such measures, particularly targeting the 2010 federal health care law. One house of a state legislature went beyond "considering" and approved a bill declaring a federal statute null and void. However, these nullification measures were eventually rejected or revised substantially to remove the offending language, so that none of these bills was actually enacted.⁵

This result is not surprising. Many Americans and almost all scholars see nullification as a discredited doctrine inconsistent with the constitutional principles underlying the American federal system. This doctrine cannot help state officials secure relief from federal directives in the 21st century.⁶

Nevertheless, state officials can respond effectively to burdensome or constraining federal directives using tactics that go beyond lobbying and lawsuits and yet fall short of nullification.

- *Decriminalization.* When state and federal governments both possess regulatory authority, states can enact measures decriminalizing certain practices, hoping federal executive officials will not enforce federal statutes in states with contrary policies.
- *Nonparticipation.* States can decline to participate in federal programs and accept the designated penalties, hoping Congress will revise statutes or executive officials will issue rules or waivers that moderate the programs.
- *Judicial Reconsideration.* When federal judicial doctrine is uncertain or in flux, states can enact measures inconsistent with Supreme Court precedents, hoping the Court will reconsider and relax judicially imposed constraints on

state policy discretion.

- *Judicial Veto.* When federal judicial doctrine is uncertain or in flux, states can enact measures inconsistent with federal statutes, hoping the Supreme Court will invalidate or limit the application of federal statutes.

States can talk back to Washington in each of these ways.⁷ I examine here various instances where states have gained relief from federal directives relating to marijuana, education, and abortion, among other policy areas. Reasonable persons can disagree about the merits of state officials' complaints and concerns regarding the federal directives issued in each of these policy areas. Nevertheless, these and other examples help us understand the kinds of leverage state officials have in pushing back against federal officials and securing modification or repeal of policies that burden states or impose unnecessary uniformity.

Decriminalization

When state and federal governments both possess regulatory authority, such as in certain aspects of criminal law, state officials may legalize for purposes of state law activities that Congress has criminalized for purposes of federal law. By itself, a state decision to legalize an activity that remains a federal offense does not have any necessary implication for the validity or enforcement of the federal statute; the practice remains punishable under federal law even if legal in a state. However, state legalization can boost the public visibility of a divergence between state and federal policy preferences and thereby pressure federal executive officials to not enforce federal law in states with contrary laws.

Marijuana Prohibition

Some state officials have for several decades objected to the Controlled Substances Act of 1970 (CSA) and its designation of marijuana as a Schedule I drug subject to federal

criminal penalties. Since the mid-1990s, officials in a number of states have challenged this federal policy, which prevents states from determining whether medical marijuana should be criminalized. Between 1996 and 2012, 18 states adopted statutes or constitutional amendments legalizing medical marijuana use and possession for purposes of state law.⁸ California was the first state to enact a medical marijuana legalization measure, through a 1996 ballot measure. Twelve more states enacted such measures between 1998 and 2008, so that by the time President Barack Obama took office 13 states had adopted such measures via the initiative or legislative process. Another five states adopted such measures during Obama's first term.⁹

By themselves these state measures do not affect the validity or enforcement of the CSA as applied to medical marijuana. Yet, their passage publicized state objections to the law and eventually gave a favorably disposed president a chance to refuse to enforce federal law in states with contrary laws.

As a presidential candidate, Obama made clear on several occasions that he opposed enforcing the CSA in states opting to legalize medical marijuana. Obama argued while campaigning in New Hampshire in 2007 that "prosecuting and raiding medical marijuana users" is "really not a good use of Justice Department resources."¹⁰ Then, in March 2008, in the lead-up to the Oregon primary, Obama confirmed that he was "not going to be using Justice Department resources to try to circumvent state laws on [medical marijuana]."¹¹

The Obama administration largely followed through on this commitment. Attorney General Eric Holder announced in October 2009, that "it will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana."¹² In an October 2009 memo, Deputy Attorney General David Ogden directed U.S. attorneys in states with medical marijuana decriminalization laws that they should "not focus federal resources in your states

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on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”¹³ To be sure, state policies establishing medical marijuana *dispensaries* are another matter, as became clear in June 2011 when Deputy Attorney General James Cole notified state officials that the Ogden policy regarding personal use of medical marijuana did not permit operation of marijuana dispensaries. The Cole Memo explained that “the Department’s view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed” but that “within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. . . . The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”¹⁴ Nevertheless, passage of state legalization measures did moderate federal enforcement of the CSA regarding personal use of medical marijuana.¹⁵

In November 2012 Colorado and Washington went even further in challenging the CSA when voters in those states approved ballot measures legalizing *recreational* marijuana possession, a development that has yet to foster a federal response. In a December 2012 interview, Obama responded to a question about the federal reaction to the passage of these two recreational marijuana legalization measures with language that echoed the October 2009 comments of Attorney General Holder regarding state medical marijuana legalization measures. Obama argued, “It would not make sense for us to see a top priority as going after recreational users in states that have determined that it’s legal.”¹⁶ Although the president’s comments were widely viewed as signaling the administration would again refuse to enforce federal law regarding marijuana use, the Justice Department has yet to issue clear guidance to U.S. attorneys in Colorado and Washington, in the way that guidance was provided in the

Ogden memo. For many, the lack of a formal Justice Department response suggests federal officials do not plan to challenge the legitimacy of these state measures¹⁷ and may not be inclined to enforce the federal statute in the face of contrary state policies.¹⁸

State challenges to federal marijuana policy illustrate the way passage of contrary state laws can increase the visibility of state concerns about federal policies and present a favorably disposed executive branch with an opportunity to refuse to enforce federal law in states with contrary policies. State legalization measures themselves had no necessary effect on the validity or enforcement of the federal ban on marijuana possession. But the executive branch has discretion in enforcing federal laws, and these state legalization measures prompted the Obama administration to exercise its discretion and allow states to maintain policies inconsistent with federal statutes.

Nonparticipation

States can challenge federal directives by declining to participate in federal programs, where possible, and accepting the penalties related to their decision. On some occasions, of course, state officials opt out of participating in a federal program without any intent to influence federal policymaking. In these cases, state officials simply weigh the costs of participation (in the form of added fiscal or administrative burdens or reduced policy discretion) against the benefits (generally in the form of additional federal funding) and conclude that it makes more sense to forego participation. For example, a number of states have declined to participate in the Adam Walsh Act Child Protection and Safety Act of 2006, which requires states to bring their sex-offender registries in line with federal requirements or suffer a loss of funding.¹⁹ Officials in some of those states disagree with the policy choices embedded in the act, such as the requirement that some juvenile offenders remain on a sex of-

fender registry for life. Other state officials are concerned about the fiscal and administrative burdens of complying with various provisions in the federal law.²⁰ There is no clear indication in this case—or in several similar cases where state officials have left federal money on the table²¹—that these state officials are seeking to change a federal policy; they are simply willing to accept the designated penalties rather than alter their policies to comply with a federal directive.

In other cases, state officials opt out of federal programs to press federal officials to moderate burdensome or constraining directives. Sometimes, state officials have the upper hand. Their participation is so critical to the success of a federal program that federal officials are willing to modify or moderate federal directives to avoid states opting out. The federal program may depend heavily on state administrative capacity and expertise for its implementation, without which, it may not fulfill its goals. In such circumstances, state officials may be able to gain concessions from executive branch officials, such as waivers from particular requirements or favorable rules regarding their implementation.

In other cases, states can cause trouble for the president if a sizable number grab public attention by refusing to participate in a program. This refusal highlights problems with the program and can push down public support for it. To avoid that, executive branch officials may issue waivers or favorable rules to obviate state officials' concerns about particular requirements of a federal program, thereby preserving public support for the overall program. Consider a different case: state officials may opt out of and thereby highlight problems with and reduce the popularity of a program opposed by the president. Thereafter, executive branch officials may be emboldened to issue waivers or favorable rules that both placate state officials and allow the administration to advance policy goals at odds with the original program. In each of these cases, state officials have influence because they publicize

concerns about a federal directive and thereby reduce public support for the program.

REAL ID Act

State officials have objected on various grounds to federal directives regarding state driver's license policy contained in the REAL ID Act of 2005. They have complained especially about the fiscal and administrative burdens imposed by the act, which directs states to require presentation of certain documents before issuing driver's licenses and demands that they follow federal specifications in designing licenses. An early report estimated costs of \$11 billion to comply with these directives.²² Moreover, state officials have noted that the penalties for noncompliance are quite heavy: residents of states failing to bring their licenses into compliance by May 2008 would be unable to use their licenses for boarding airplanes or entering federal buildings.

Between 2007 and 2012, 25 state legislatures passed resolutions or statutes opposing the REAL ID Act.²³ Although 8 of these states merely enacted resolutions urging members of Congress to work for the act's repeal, 17 states went so far as to pass statutes vowing nonacquiescence to REAL ID directives.²⁴ Some of these statutes stipulate that state officials cannot participate in implementation of the REAL ID Act. Others require that state transportation officials report any effort of federal officials to induce state participation in the REAL ID program.

Certainly these state laws opt out of the REAL ID Act and instruct state agencies to ignore its directives. But they do more. The laws seek to publicize state concerns as a way to pressure Congress and the president to repeal or relax the REAL ID Act's directives. These measures of refusal suggest that the purported benefits of REAL ID (e.g., increased national security) come at a price of added burdens on state governments and constraints on state policy discretion. Moreover, by showing that a sizable number of states are willing to pass nonacquiescence statutes and accept the penalties for non-

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participation, state officials have sought to turn public opinion against the law and build support for its repeal. They are not alone in this effort. Civil liberties groups have also worked to boost the salience of their own set of concerns. However, state officials are uniquely positioned to attract media coverage and public attention, tasks well served by legal refusals to go along with a federal directive. Toward this end, a 2007 Montana statute declares that “the purpose of the Legislature in enacting [this act] is to refuse to implement the REAL ID Act and thereby protest the treatment by Congress and the president of the states as agents of the federal government and, by that protest, lead other state legislatures and Governors to reject the treatment by the federal government of the 50 states by the enactment of the REAL ID Act.”²⁵

These laws helped state officials lobbying the Bush administration's Department of Homeland Security (DHS) secretary Michael Chertoff to accommodate their concerns about REAL ID. Bush administration officials were somewhat ambivalent about an act originally spearheaded by Wisconsin Rep. James Sensenbrenner and eventually endorsed by the president and included in a must-pass supplemental defense appropriations bill. The publicity of state concerns indicated by anti-REAL ID acts helped Secretary Chertoff to ease the law's strict compliance timeline, even in the face of resistance from the law's congressional supporters.²⁶ In March 2007, in issuing draft regulations for implementing the act, Chertoff announced that states would have 20 additional months to bring their licenses into compliance, in effect moving the original May 2008 deadline back to December 2009.²⁷ In part in response to passage of another round of anti-REAL ID acts during this period, Chertoff then gave states even more time for compliance, when he issued final regulations in January 2008 allowing that states receiving extensions from DHS would have until May 2011 to bring their licenses into full compliance.²⁸

State officials secured even more leeway from the Obama administration, whose officials largely oppose the law.²⁹ In the face of continuing state opposition, DHS secretary Janet Napolitano announced in March 2011, several months before the May 2011 deadline, that states would have even more time to comply with REAL ID directives.³⁰ Then, as this latest deadline was approaching, DHS released a December 2012 memo announcing still another delay and indicating that although 13 states had met REAL ID standards, DHS was granting a “deferment for all other states and territories.”³¹ Noting that “DHS has twice modified the statutory deadline in order to allow states more time to meet the statutory requirements of the Act,” the memo indicated that that DHS intended “in the coming weeks and months” to “develop a schedule for the phased enforcement of the Act's statutory prohibitions” and “publish a schedule by early fall 2013 and begin implementation at a suitable date thereafter. Until that schedule is implemented, federal agencies may continue to accept for official purposes driver's licenses and identity cards issued by all states.”³²

No Child Left Behind Act

State officials have expressed concerns about numerous aspects of the No Child Left Behind Act of 2001 (NCLB) in the decade since the passage of President George W. Bush's signature domestic policy initiative. They have complained in part about the administrative and fiscal burdens of carrying out the law's testing and reporting requirements. They have also pushed back against various provisions constraining state policy discretion, especially a directive that tests in reading and math be administered annually in the third through eighth grades as well as requirements to reform schools that fail to make adequate yearly progress toward bringing all students to academic proficiency.

State responses have taken various forms. During President Bush's first term, state

leaders lobbied Secretary of Education Rod Paige to persuade him to issue interpretive rules and waivers affording states discretion in carrying out various NCLB requirements, albeit with minimal success.³³ They also filed federal lawsuits challenging the NCLB and invoking recent Supreme Court decisions absolving states of complying with certain conditions on federal grants under certain circumstances. These efforts were ultimately unsuccessful.³⁴

While lobbying and litigating, state and local officials took steps to publicize their concerns about NCLB and thereby reduce public support for the law. In 2004 and 2005, a number of state legislatures enacted statutes and resolutions opposing NCLB.³⁵ Some of these measures simply urged Congress to modify the law to accommodate state concerns. Other statutes went further. A 2005 Colorado statute authorized local school districts to “decline one or more of the funding sources of” NCLB “and thereby be exempt from the requirements of said federal act that accompany the declined funding sources and are identified by said federal act as available for exemption.”³⁶ Meanwhile, in a move that attracted the opposition of the secretary of education and thus national attention, the Utah Legislature enacted a 2005 statute directing state officials to prioritize state education objectives over federal objectives if the two conflicted.³⁷ These measures told the public that putative educational accountability would limit policy choices and add administrative and fiscal burdens. They were, in sum, political efforts to induce the secretary of education to acquiesce in state requests for exemption from the law’s burdens and constraints.

In President Bush’s second term, these efforts began to have an effect, as Secretary Margaret Spellings granted numerous waivers giving states some discretion in complying with NCLB directives.³⁸ According to Eugene Hickok, deputy education secretary at the time, Spellings was initially disinclined to accommodate state concerns. However, in response to the increasing mo-

bilization efforts of state officials and education groups, Spellings eventually went “out of her way to accommodate state requests” for waivers in order “to avert a full-scale rebellion against the law.”³⁹ Spellings issued a series of interpretive rules and waivers from NCLB requirements as a way to “keep the law from collapsing.”⁴⁰ These steps included “announcing new policies governing accountability and students in special education. She softened the department’s position on supplemental services, allowing poorly performing districts to access funds and deliver the services themselves. She announced a plan to permit states to request authority to embrace alternatives to the No Child Left Behind accountability regime.”⁴¹ Seeing a need to respond in some fashion to declining public support for NCLB, the Bush administration thereby accommodated some state officials’ concerns while preserving the overall law. Hickok concluded, “In the end, Spellings’s strategy worked. The law was not reauthorized during her tenure, nor was it discarded. At the same time, its original potential impact was surely affected. That was the price that had to be paid to ensure President Bush’s legacy remained in place.”⁴²

This trend continued in the Obama administration. In September 2011, amid continuing low public support for NCLB and with state officials in Montana, Idaho, and South Dakota signaling their intent not to comply with key NCLB requirements, Secretary of Education Arne Duncan notified state officials that they could apply for comprehensive waivers freeing them from a number of the law’s provisions, as long as they committed to meeting a series of principles set out in Department of Education materials.⁴³ Secretary Duncan explained:

I am writing to offer you the opportunity to request flexibility on behalf of your State, your LEAs, and your schools, in order to better focus on improving student learning and increasing the quality of instruction.

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This voluntary opportunity will provide educators and State and local leaders with flexibility regarding specific requirements of NCLB in exchange for rigorous and comprehensive State-developed plans designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction.⁴⁴

An August 2012 Gallup Poll memo noted that the public was at best ambivalent about NCLB and saw the law as having worsened rather than improved education. Gallup concluded, “Such ambivalence probably gives the Obama administration broad political latitude to modify NCLB through executive fits, such as the recent decision to grant states waivers from meeting the law’s key benchmarks.”⁴⁵

Some state officials initially expressed concern that in applying for these waivers they would gain flexibility regarding NCLB directives only to submit to another set of federal standards for measuring student achievement. In particular, the Department of Education required that states submitting a waiver request certify that they had adopted college- and career-ready standards in math and reading, and a leading means of meeting this requirement was to adopt the Common Core State Standards, developed by the National Governors Association Center for Best Practices and the Council of Chief State School Officers. But Secretary Duncan made it clear that adopting the Common Core State Standards was not a prerequisite for obtaining an NCLB waiver.⁴⁶ In fact, several states secured waivers without signing on to the Common Core State Standards, including Virginia, which simply explained that it was relying on college- and career-ready Standards of Learning developed on the state’s own initiative.⁴⁷ By June 2013, 47 states had applied for waivers and 38 of these state waiver requests had been granted, with several others still under consideration.⁴⁸

Judicial Reconsideration of Doctrine

The U.S. Supreme Court can issue decisions constraining state policy discretion, but judicial doctrines are not always clear and can change. States can pass laws inconsistent with doctrines that are uncertain or in flux, thereby giving the Justices an opportunity to reconsider and revise limits on the states. It is well established under the Supremacy Clause that federal court rulings take precedence over contrary state laws, constitutional amendments, or court rulings. Nevertheless, the Supreme Court has on a number of occasions reversed its own precedents, whether on account of judicial appointments that produce a differently constituted Court or because of a change of mind on the part of Justices participating in the earlier case. States can then test the waters with the new Court.

Abortion Policy

From the 1970s onward, the U.S. Supreme Court issued numerous rulings imposing constraints on state policy regarding abortion.⁴⁹ In *Roe v. Wade* and *Doe v. Bolton* in 1973,⁵⁰ the Court prohibited states from outlawing abortion prior to the point of fetal viability, which it pegged as occurring at the start of the third trimester. Then, through a series of decisions in the 1980s, including *Akron v. Akron Center for Reproductive Health* (1983)⁵¹ and *Thornburg v. American College of Obstetricians & Gynecologists* (1986),⁵² the Court invalidated various other state restrictions on abortions, including informed-consent provisions requiring a woman to be presented with information about fetal development and waiting-period requirements stipulating that an abortion can only be performed after a period of time has elapsed after a woman consents to an abortion.

State officials have enacted numerous statutes designed to present the justices with opportunities to reconsider these constraints and restore a measure of discretion to state legislatures.⁵³ In the 1980s, during a

time when the appointment of several Justices altered the composition of the Court, some states continued to enact informed-consent and waiting-period requirements as a way to generate justiciable cases that offered a reconstituted Court an opportunity to reverse its earlier rulings regarding the legitimacy of state restrictions. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), these efforts bore fruit, when the Supreme Court heard a challenge to a 1989 Pennsylvania abortion statute that imposed various abortion restrictions, including informed-consent and waiting-period requirements. In the resulting decision, the Court overturned its rulings in *Akron and Thornburgh* regarding the illegitimacy of these two requirements and thereby removed judicially imposed constraints on state policymaking.⁵⁴ The states thus succeeded in changing judicial doctrine by passing measures contradicting it. This tactic increased state policy discretion.

In recent years, states have gone even further and enacted statutes intended to present the Supreme Court with an opportunity to reconsider prior decisions barring states from outlawing abortion before fetal viability. Although the Court has through the years recognized that technological advances have shifted the point of fetal viability somewhat earlier in a woman's pregnancy, from 28 weeks after conception to around 24 weeks, the Court has not retreated from its original holding in *Roe* that states are barred from banning abortions prior to fetal viability. In 2010 Nebraska became the first state to enact a fetal-pain statute barring virtually all abortions performed after 20 weeks from conception, on the ground that a fetus is capable of feeling pain at this point. During the ensuing three years, nine other states passed similar statutes.

In March 2013 two states enacted laws banning virtually all abortions once a fetal heartbeat is detected. Arkansas was the first state to enact such a law, when the legislature overrode Governor Mike Beebe's veto and banned abortions when an abdomi-

nal ultrasound can detect a fetal heartbeat, which can occur as early as 12 weeks after conception.⁵⁵ The North Dakota legislature approved and Governor Jack Dalrymple signed a fetal-heartbeat law that could ban abortions even earlier.⁵⁶ In a statement accompanying his signing of the law, Governor Dalrymple said the law gave the Supreme Court an opportunity to reconsider its prior constraints on state policy discretion. Noting that he had "signed HB 1456 which would ban abortions after the detection of a fetal heartbeat," the governor explained:

Although the likelihood of this measure surviving a court challenge remains in question, this bill is nevertheless a legitimate attempt by a state legislature to discover the boundaries of *Roe v. Wade*. Because the U.S. Supreme Court has allowed state restrictions on the performing of abortions and because the Supreme Court has never considered this precise restriction in HB 1456, the constitutionality of this measure is an open question.

He went on to urge that "the Legislative Assembly before it adjourns should appropriate dollars for a litigation fund available to the Attorney General."⁵⁷

It is too early to say whether these laws will work. In May 2013 a U.S. District Court judge enjoined enforcement of Arkansas's fetal-heartbeat law and a panel of the U.S. Court of Appeals for the Ninth Circuit invalidated Arizona's fetal-pain law as inconsistent with Supreme Court precedent, thereby setting the stage for appeals to the Supreme Court.⁵⁸ The success of this strategy depends on whether a majority of the current Justices are disposed to reconsider limits on state abortion bans prior to fetal viability, limits that date back to the 1973 *Roe* decision and were reaffirmed in the 1992 *Casey* decision. Such a reconsideration would likely require a change of mind on the part of at least one Justice, Anthony Kenne-

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dy, who was an author of the lead opinion in the 1992 case.

Judicial Veto of Federal Laws

State and local officials are, of course, also free to file federal lawsuits challenging federal statutes viewed as exceeding the legitimate bounds of federal power or encroaching on powers reserved to state governments. Toward that end, state and local officials have in recent decades filed lawsuits challenging the National Minimum Drinking Age Act, National Voter Registration Act (Motor Voter Act), Driver's Privacy Protection Act, and the pre-clearance provision of the Voting Rights Act, with some success in the latter case, when the Supreme Court invalidated the pre-clearance formula of the Voting Rights Act in a June 2013 decision in *Shelby County v. Holder*. But states can also enact laws inconsistent with federal statutes, especially in areas where Supreme Court doctrine regarding the reach of federal power is uncertain or in flux, as a way of boosting the likelihood that courts will deem these lawsuits justiciable and issue rulings taking their side.

Individual Insurance Mandate Provision of the Affordable Care Act

State officials objected to various provisions of the Patient Protection and Affordable Care Act of 2010 (ACA). They complained about a provision directing states to expand Medicaid coverage to include all individuals making up to 138 percent of the federal poverty level. They also objected to the law's minimum essential coverage provision mandating that nearly all persons maintain health insurance. During Congress's consideration of the law in late 2009 and early 2010, and then again after the law's March 2010 passage, various state officials questioned whether an individual insurance mandate is a proper exercise of congressional powers.⁵⁹

Florida attorney general Bill McCollum (R) led the constitutional critique of the mandate and communicated his concerns to members of Congress. In January 2010 McCollum wrote in a letter to House and Senate leaders accompanying his legal analysis: "Please find my analysis of the constitutionality of the individual mandate provisions being considered in the federal health care legislation attached. I call your attention to these legal concerns so that constitutional issues may be remedied before a final bill is negotiated." He also wrote: "I will continue to work with my Attorney General colleagues in order to pursue appropriate legal action should these provisions be in a bill that becomes law."⁶⁰ Drawing on several recent Supreme Court decisions invalidating congressional statutes on federalism grounds,⁶¹ the McCollum memo advised that the individual mandate could not be authorized under the commerce clause or taxation power. It represented an "unprecedented" exercise of power that presented a novel question of constitutional law, McCollum argued, citing a 1994 Congressional Research Service (CRS) memo, concluding: "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States."⁶² Later, a 2009 CRS report concluded that "despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance."⁶³ The McCollum memo laid out a rationale for litigation by state officials: "While affected citizens of every state may pursue judicial relief from the individual mandate provisions, states have standing to sue the federal government to protect their sovereign and quasi-sovereign interests."⁶⁴

Once it became clear that Congress would ignore state objections to the ACA, state officials sought redress in the federal

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courts. Several states passed laws declaring that state residents were not required to purchase and maintain health insurance. The Virginia, Idaho, and Utah legislatures passed Health Care Freedom Acts along these lines in the weeks prior to the ACA's final passage. Although these state measures are framed in different ways, the Virginia statute is broadly representative in declaring, with several specified exceptions, that no state resident "shall be required to obtain or maintain a policy of individual insurance."⁶⁵ In the months after the ACA took effect, five more states enacted similar measures: Georgia and Louisiana through legislative statutes, Missouri through a legislative-initiated referendum, and Arizona and Oklahoma through constitutional amendments. By 2012, 18 states had enacted health care freedom laws inconsistent with the ACA's individual mandate provision.⁶⁶

Several states also considered measures that would have revived discredited concepts of nullification by declaring the federal mandate null and void. However, they came to nothing. An Idaho nullification bill was rejected by the state senate, and a North Dakota bill was revised substantially prior to passage to remove language indicating that a state could invalidate a federal law.⁶⁷

The state laws and amendments that were enacted did not overturn the mandate; but they helped state litigation against the ACA by making it more likely that state legal challenges would meet the judicial requirements of standing and ripeness and thereby be deemed justiciable. Since the mandate does not take effect until 2014, lawsuits filed prior to that time might not meet the courts' case-or-controversy requirement. Once state laws contrary to the federal mandate were in the books, though, state attorneys general could point to their legitimate interest in securing speedy judicial determination of the legitimacy of the federal law. As Virginia Attorney General Ken Cuccinelli explained: "We'd have a conflict of laws, and then the attorney general—me— would be in a position of defending the Virginia law and also

attacking the constitutional problems with the proposed health-care bill as it stands."⁶⁸

On March 23, 2010, the day President Obama signed the ACA, Virginia attorney general Cuccinelli and Florida attorney general McCollum (and 12 other attorneys general) filed separate lawsuits challenging the constitutionality of the insurance mandate provision, and in the latter case also challenging the Medicaid expansion. The Virginia complaint argued the suit was justiciable: "Although the federal mandate does not take effect for several years, ACA imposes immediate and continuing burdens on Virginia and its citizens. The collision between the state and federal schemes also creates an immediate, actual controversy involving antagonistic assertions of right."⁶⁹

The fate of these challenges to the individual mandate has been well chronicled. Virginia initially prevailed in a ruling issued by Judge Henry Hudson of the U.S. District Court for the Eastern District of Virginia,⁷⁰ but lost on standing grounds in the Fourth Circuit Court of Appeals.⁷¹ Meanwhile, the Florida lawsuit, eventually joined by a total of 26 states as well as several individual plaintiffs and the National Federation of Independent Business (NFIB), was successful at the district court level, in a ruling issued by Judge Roger Vinson of the U.S. District Court for the Northern District of Florida,⁷² and upheld by the Eleventh Circuit Court of Appeals.⁷³ The Supreme Court agreed to hear the Florida case and issued a decision in June 2012. Although a majority of the Justices accepted the challengers' claim that the mandate lay beyond the commerce power of Congress, Chief Justice John Roberts adopted a saving construction and ruled—for a differently constituted majority of Justices—that the mandate could survive as an exercise of Congress's taxation power.⁷⁴

Few have noted the role played by state health care freedom acts in facilitating these lawsuits. In one sense, the tactic of passing laws contrary to the federal mandate succeeded. The two federal district judges who ruled on the Virginia and Florida challenges

The state laws and amendments that were enacted helped state litigation against the ACA by making it more likely that state legal challenges would meet the judicial requirements of standing and ripeness and thereby be deemed justiciable.

Five states approved Save Our Secret Ballot constitutional amendments between 2010 and 2012 guaranteeing a right to a secret ballot in union-organizing elections.

both concluded that passage of state statutes immunizing state residents from insurance mandates played a critical role in determining that states had standing to bring these suits. In an August 2010 ruling denying the federal government's motion to dismiss the Virginia lawsuit, Judge Hudson noted that the "primary articulated objective [of the suit] is to defend the Virginia Health Care Freedom Act [VHCFCA] from the conflicting effect of an allegedly unconstitutional federal law." He noted: "The mere existence of the lawfully-enacted statute is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it."⁷⁵ Judge Hudson concluded that this collision between the state and federal statutes gave the Virginia attorney general standing to sue and, moreover, that the case was ripe for review. Similarly, in a January 2011 order granting summary judgment in the suit brought by Florida and joined by a number of other states and several private plaintiffs, Judge Vinson noted that two of the complaining states, Idaho and Utah, enacted health care freedom acts prior to the filing of the lawsuit and that was sufficient to establish their standing to sue. Recalling Judge Hudson's reasoning, Judge Vinson wrote: "I agree with Judge Hudson's thoughtful analysis of the issue and adopt it here. The States of Idaho and Utah . . . have standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors."⁷⁶

On the other hand, one of the circuit courts that heard a state-filed suit was unpersuaded by this reasoning and another circuit court found it unnecessary to decide the question. When the Fourth Circuit Court of Appeals heard the Virginia lawsuit on appeal, a three-judge panel was unconvinced that passage of a state statute inconsistent with a federal statute was sufficient to satisfy the standing requirement. Judge Diana Gribbon Motz, writing for the panel, concluded: "Contrary to Virginia's arguments, the mere existence of a state law like the

VHFCFA does not license a state to mount a judicial challenge to any federal statute with which the state law assertedly conflicts."⁷⁷ She continued: "To permit a state to litigate whenever it enacts a statute declaring its opposition to federal law, as Virginia has in the VHFCFA, would convert the federal judiciary into a 'forum' for the vindication of a state's 'generalized grievances about the conduct of government.'"⁷⁸ Meanwhile, in deciding the Florida lawsuit, the Eleventh Circuit Court of Appeals concluded it was unnecessary to determine whether state plaintiffs had standing, because other plaintiffs who had joined the suit clearly met the standing requirements.⁷⁹

Because the Supreme Court did not review the Fourth Circuit's ruling regarding the Virginia suit, choosing instead to review the Eleventh Circuit's ruling in the suit brought by Florida on behalf of 26 states, several individual plaintiffs and the NFIB, the Justices did not resolve the question of whether passing state statutes inconsistent with federal directives is sufficient to establish state standing to challenge federal statutes. It is not possible, therefore, to render a conclusive judgment on the effectiveness of this tactic for state challenges to other federal statutes; such a determination awaits a Supreme Court decision in a future case.

Union Ballots and Gun Laws

States have passed laws contrary to federal directives to foster court challenges in other areas. Five states approved Save Our Secret Ballot constitutional amendments between 2010 and 2012 guaranteeing a right to a secret ballot in union-organizing elections. These amendments were in all but one instance proposed at a time when state officials expected Congress to pass an Employee Free Choice Act (EFCA) that would have reduced reliance on secret balloting and allowed greater use of a card-check procedure in elections for determining employee representation. The EFCA seemed likely to pass since Democrats held the presidency and majorities in both houses of Congress

in 2009 and 2010. However, by the time voters approved constitutional amendments in Arizona, South Carolina, South Dakota and Utah in November 2010—Alabama voters approved a similar amendment in November 2012—the prospects of passage had declined. The Democrats lost their filibuster-proof majority in the Senate in early 2010 and then lost majority control of the House in the November 2010 election.⁸⁰

Meanwhile, nine states enacted firearms freedom acts between 2009 and 2013, exempting firearms manufactured and remaining solely within state boundaries from provisions of the National Firearms Act of 1934 and the Gun Control Act of 1968, which require manufacturers and sellers of firearms to obtain licenses and meet various other federal standards. In particular, these state laws “exempt from federal regulation under the commerce clause . . . a firearm, a firearm accessory, or ammunition manufactured and retained” in the state, as the title of the Montana act proclaims.⁸¹ The Montana statute, the first state firearms freedom act to be adopted, declares: “A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.”⁸² The remaining state acts—in Tennessee in 2009; in Alaska, Arizona, Idaho, South Dakota, Utah, and Wyoming in 2010; and in Kansas in 2013—generally proceed along the same lines, although Wyoming and Kansas take the additional and highly dubious step of authorizing prosecution of federal officials for enforcing federal firearms statutes in the face of contrary state law.⁸³

These firearms freedom acts seek to create a conflict between state and federal law in an area where Supreme Court doctrine has in recent years been in flux, thereby presenting the Court with an opportunity to limit the reach of the federal statutes. On October 1, 2009, the day the Montana law

took effect, Montana resident Gary Marbut filed a federal lawsuit on behalf of himself and two organizations, including one organization over which he presided, the Montana Shooting Sports Association (MSSA), challenging federal authority to enforce federal firearms statutes to the extent that they conflict with the Montana Firearms Freedom Act (MFFA). In a statement accompanying the lawsuit, the MSSA acknowledged that “beginning during the New Deal, federal courts have generally upheld federal commerce clause authority, initially in the 1942 case of *Wickard v. Filburn* and continuing recently with the 2005 case of *Gonzales v. Raich* . . . allowing federal regulation of medical marijuana in California.” But “other cases such as the 1995 case of *US v. Lopez* suggest that federal commerce power is not infinitely elastic, that there are limits to federal commerce power, and that it has just not yet been determined what those limits may be. The MFFA litigation is structured to clarify and affirm those limits.”⁸⁴ Accordingly, “MSSA continues to strongly urge that no Montana citizen attempt to manufacture an MFFA-covered item, even after the law takes effect today, until MSSA can prove the principles of the MFFA in court.”⁸⁵

In an October 2010 ruling, U.S. District Judge Donald Molloy of the District of Montana dismissed the lawsuit. He found that none of the individual or organizational plaintiffs had standing to sue. Moreover, the state of Montana, which had intervened in the case to defend the state law, had not adequately distinguished the case from recent decisions where federal courts upheld federal authority to regulate intrastate commerce that substantially affects interstate commerce.

Marbut tried to establish standing by telling the Bureau of Alcohol, Tobacco, and Firearms (ATF) that he intended to manufacture and sell within state boundaries a “Montana Buckaroo” gun made of materials from Montana. The ATF responded that Marbut’s plans required a federal license. However, Judge Molloy concluded that this

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exchange did not establish standing for any of the plaintiffs.⁸⁶

Turning to the substantive question, Montana argued that “Commerce Clause principles, more than other constitutional tenets, are susceptible to possible shifts and nuances at the margin,” and therefore recent federal decisions are “not controlling as to the question of whether the conduct covered by the MFFA is within the Commerce Clause power of Congress.”⁸⁷ However, Judge Molloly concluded that under current U.S. Supreme Court doctrine, recently reaffirmed in the 2005 Raich ruling, the federal government was clearly authorized to regulate intrastate commerce with substantial effects on interstate commerce.⁸⁸

This ruling is now on appeal to the Ninth Circuit Court.⁸⁹ If the case reaches the Supreme Court, the plaintiffs will face significant obstacles in changing judicial doctrines about the commerce power. State officials seeking to limit federal authority through passage of firearms freedom acts face a tougher task than those who sought to challenge the health care mandate by enacting health care freedom acts. The latter were intended to present the Court with an opportunity to rule on a novel question—whether federal authority under the commerce clause authorizes regulation of individuals’ decision not to purchase a product—whose outcome did not have clear implications for any previously passed federal statutes. By contrast, the firearms freedom statutes are intended to present the Court with an opportunity to reverse longstanding and recent precedents with large implications for federal statutes in other policy areas. To be sure, the Court has in recent decades signaled a willingness to impose meaningful limits on federal power, as in the 1995 Lopez case and 2000 Morrison case, both of which imposed limits on congressional regulation of non-economic activity. But even after issuing these rulings, the Court reaffirmed in Raich in 2005 that the federal government retains authority to regulate intrastate economic activity that affects interstate commerce.⁹⁰

Conclusion

In considering the ways state officials can challenge burdensome or constraining federal directives, many analysts focus on lobbying and lawsuits, which are clearly legitimate and occasionally effective, or on nullification, which is a nonstarter for state officials seeking repeal or relaxation of federal policies in the 21st century. In this policy analysis, I have explored a middle ground where state officials challenge federal directives in ways that go beyond and in some ways supplement intergovernmental lobbying and litigation without invoking the specter of nullification. Although states have no power to invalidate a federal statute, regulation, or ruling, they can enact measures inconsistent with federal directives for the purpose of inducing federal executive officials or federal judges to modify or moderate burdensome or constraining policies.

At times, state officials can take steps to induce executive officials to exercise discretion in enforcing federal statutes or issue rules or waivers moderating their effects. This is the path taken by states that have legalized medical marijuana and, more recently, recreational marijuana. They gave a sympathetic president the chance to avoid enforcing a federal marijuana prohibition in states with contrary laws. A somewhat different path has been taken by states that have opted not to comply with REAL ID and No Child Left Behind directives and accept the designated penalties. In opting out or threatening to opt out of participation in these programs, state officials boosted the visibility of their concerns about these directives and played a part in sapping public support for them. That potential loss of support pressured administration officials who were unsympathetic to state concerns to waive or delay implementation of these directives and also enabled sympathetic administration officials to moderate these policies.

At other times, state officials can enact statutes inconsistent with judicial prec-

edents or congressional statutes, at least in areas where judicial doctrine is unclear or in flux, so as to offer the Supreme Court an opportunity to relax judicially imposed constraints or an occasion to invalidate or limit the applicability of congressional statutes. This is the path taken, most notably, by states that enacted abortion laws imposing informed-consent and waiting-period requirements in the face of contrary judicial precedents, in what turned out to be an ultimately successful effort to generate cases presenting a reconstituted Court with an opportunity to reverse earlier rulings and return discretion to states. Meanwhile, states that enacted health care freedom acts sought to present the Supreme Court with an opportunity to consider the legitimacy of the individual mandate provision of the Affordable Care Act, by posing what the Congressional Research Service deemed to be a novel question of constitutional law. By themselves, these state laws exempting residents from insurance mandates are unenforceable, as they are preempted by the contrary federal statute. But their passage facilitated state-filed lawsuits challenging the legitimacy of the insurance mandate by enabling federal district judges to deem these lawsuits justiciable, even though this turned out not to be essential to satisfying the requirements of justiciability in the key federal circuit court ruling or in the Supreme Court.

This policy analysis has examined how state officials can challenge federal directives. Those challenges can be important. They can help correct national policies that impose undue fiscal or administrative burdens on the states or improperly limit their policy choices. States do have ways to affect laws prior to their enactment, but sometimes the effects of policies are not adequately considered during lawmaking or only become apparent after a law has been passed. Knowing how state officials can talk back to Washington and understanding how they have done so effectively can foster a better federalism for America.

Notes

1. John Dinan, "The State of American Federalism, 2007–2008: Resurgent State Influence in the National Policy Process and Continued State Innovation," *Publius* 38 (Summer 2008): 383–84.
2. *Iowa League of Cities v. EPA*, No. 11-3412 (8th Cir., March 25, 2013).
3. The rules were promulgated in letters sent by the EPA to the Iowa League of Cities. The 8th Circuit Court of Appeals determined that in promulgating both of these rules the EPA had failed to follow proper procedure, and in promulgating one of these rules the EPA had exceeded its statutory authority. On the potential impact if these rules had been applied to cities across the country, see "Iowa Cities Win Appeal of EPA Wastewater Rule," *Des Moines Register*, March 27, 2013, <http://www.desmoinesregister.com/article/20130327/NEWS01/130327003/Iowa-cities-win-appeal-of-EPA-wastewater-rule?Frontpage>.
4. See especially Thomas E. Woods Jr., *Nullification: How to Resist Federal Tyranny in the 21st Century* (Washington: Regnery Publishing, 2010).
5. Matthew Spalding, "Rejecting Nullification: Idaho Draws the Constitutional Line," *The Foundry*, March 2, 2011, <http://blog.heritage.org/2011/03/02/rejecting-nullification-idaho-draws-the-constitutional-line/>; Matthew Spalding, "Nullification Fails, Again (This Time in North Dakota)," *The Foundry*, May 3, 2011, <http://blog.heritage.org/2011/05/03/nullification-fails-again/>.
6. John Dinan, "Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism," *Albany Law Review* 74, no. 4 (2011): 1637–69.
7. In focusing on the ways states "talk back" to federal officials, I draw on Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Washington: Brookings Institution Press, 2001), pp. 40–41.
8. A chronology of state enactment of medical marijuana decriminalization measures is available at "18 Legal Medical Marijuana States and DC," *MedicalMarijuanaProCon.org* (updated February 22, 2013), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.
9. *Ibid.*
10. Quoted in Jacob Sullum, "Medical Marijuana Muddle," *Reason* (January 2010), <http://reason.com/archives/2009/12/29/medical-marijuana-muddle>.

11. Quoted in Stephen Dinan and Ben Conery, "DEA Pot Raids Go On; Obama Opposes," *Washington Times*, February 5, 2009, <http://www.washingtontimes.com/news/2009/feb/05/dea-led-by-bush-continues-pot-raids/?page=all>.
12. Quoted in Carrie Johnson, "U.S. Eases Stance on Medical Marijuana," *Washington Post*, October 20, 2009, 1A.
13. Deputy Attorney General David W. Ogden, "Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," October 19, 2009, <http://blogs.justice.gov/main/archives/192>.
14. Deputy Attorney General James M. Cole, "Memorandum for United States Attorneys on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use," June 29, 2011, <http://justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>.
15. The president was asked in an April 2012 interview whether he had in fact followed through on his campaign commitment "that you would not 'use Justice Department resources to try and circumvent state laws about medical marijuana,'" when reports indicate that "your administration is launching more raids on medical pot than the Bush administration did." The president responded: "What I specifically said was that we were not going to prioritize prosecutions of persons who are using medical marijuana. I never made a commitment that somehow we were going to give carte blanche to large-scale producers and operators of marijuana dispensaries." Obama maintained that he had therefore followed through on his campaign promise, in that "there haven't been prosecutions of users of marijuana for medical purposes." But he distinguished cases involving personal use of medical marijuana from cases involving large-scale dispensaries distributing marijuana more broadly. He argued: "The only tension that's come up—and this gets hyped up a lot—is a murky area where you have large-scale, commercial operations that may supply medical marijuana users, but in some cases may also be supplying recreational users." Jann S. Wenner, "Ready for the Fight: Rolling Stone Interview with Barack Obama," *Rolling Stone*, April 25, 2012, <http://www.rollingstone.com/politics/news/ready-for-the-fight-rolling-stone-interview-with-barack-obama-20120425>.
16. Devin Dwyer, "Marijuana Not High Obama Priority," ABC News, December 14, 2012, <http://abcnews.go.com/Politics/OTUS/president-obama-marijuana-users-high-priority-drug-war/story?id=17946783#.UWHizTcWD6c>.
17. An April 2013 Congressional Research Service (CRS) report concluded that these state legalization measures are likely not preempted by federal law. The CRS report concluded: "it would appear that those aspects of the Colorado and Washington laws that remove state penalties for possession of marijuana may properly be characterized as an exercise of the state's 'power to decide what is criminal and what is not.' Neither law purports to shield its residents from the legal consequences of violating federal law. Given both the limitations on congressional power imposed by the Tenth Amendment and preemption precedent arising from challenges to state medical marijuana laws, it would appear unlikely that a reviewing court would invalidate either Colorado or Washington's decision to simply exempt certain marijuana-related conduct from state penalties under state law." Todd Garvey, *State Legalization of Recreational Marijuana: Selected Legal Issues* (CRS Report for Congress, April 5, 2013), <http://www.fas.org/sgp/crs/misc/R43034.pdf>, p. 12 (internal citation omitted).
18. John Ingold, "Four Months after Marijuana Legalization Vote, Feds Remain Mum," *Denver Post*, March 7, 2013, http://www.denverpost.com/breakingnews/ci_22732299/four-months-after-marijuana-legalization-vote-feds-remain.
19. They lose 10 percent of Byrne Justice Assistance Grants. See Mary Branham, "States Must Choose: Lose Grant Funding or Face Higher Costs," *Capitol Ideas* (March/April 2013), http://www.csg.org/pubs/capitolideas/enews/issue47_3.aspx.
20. These concerns are detailed in Maggie Clark, "States Still Resisting National Sex Offender Law," Stateline.org, October 1, 2012, <http://www.pewstates.org/projects/stateline/headlines/states-still-resisting-national-sex-offender-law-85899420374>.
21. Sean Nicholson-Crotty, "Leaving Money on the Table: Learning from Recent Refusals of Federal Grants in the American States," *Publius* 42 (Summer 2012): 449–66.
22. Priscilla M. Regan and Christopher J. Deering, "State Opposition to REAL ID," *Publius* 39 (Summer 2009): 484–87.
23. National Conference of State Legislatures, *State Legislative Activity in Opposition to the Real ID Act*, June 2012, <http://www.ncsl.org/documents/standcomm/sctran/REALIDComplianceReport.pdf>.
24. *Ibid.*
25. An Act Opposing the Implementation of the

Federal REAL ID Act and Directing the Montana Department of Justice Not to Implement the Provisions of the Federal Act, HB 287, 60th Legislature of Montana (2007).

26. The tensions between Rep. Sensenbrenner and DHS officials regarding the pace of implementing REAL ID are discussed in Peter Katel, "REAL ID: Will the New Driver's License Law make Americans Safer," *CQ Researcher*, May 4, 2007, <http://photo.pds.org:5012/cqresearcher/document.php?id=cqresrre2007050400>.

27. Dinan, "The State of American Federalism," p. 384.

28. Eric Kelderman, "REAL ID Showdown between States, Feds Averted—For Now," Stateline.org, April 6, 2008.

29. The Obama administration's opposition to the law is detailed in Spencer H. Hsu, "Administration Plans to Scale Back REAL ID Law," *Washington Post*, June 14, 2009, A3.

30. Mike M. Ahlers, "Obama Administration Delays Rule to Improve Driver's License Security," CNN.com, March 5, 2011, <http://edition.cnn.com/2011/POLITICS/03/04/real.id/index.html>.

31. Department of Homeland Security, "DHS Determines 13 States Meet REAL ID Standards," December 20, 2013, <http://www.dhs.gov/news/2012/12/20/dhs-determines-13-states-meet-real-id-standards>.

32. Ibid.

33. Eugene W. Hickok, *Schoolhouse of Cards: An Inside Story of No Child Left Behind and Why America Needs a Real Revolution* (Lanham, MD: Rowman & Littlefield, 2010), pp. 109–10.

34. Lawsuits were filed by Connecticut attorney general Richard Blumenthal and by school districts in Michigan, Texas, and Vermont in conjunction with affiliates of the National Education Association. See Martha Derthick, "Litigation under No Child Left Behind," in Martin West and Joshua Dunn, eds., *From Schoolhouse to Courthouse: The Judiciary's Role in American Education* (Washington: Brookings Institution Press, 2009): 213–37.

35. Bryan Shelly, "Rebels and their Causes: State Resistance to No Child Left Behind," *Publius* 38 (Summer 2008): 446–47.

36. Colorado Legislature, SB 05-050, Section 1 (2005).

37. "Utah Passes Bill to Trump 'No Child' Law,"

Education Week 24 (April 27, 2005): 22.

38. These waivers are discussed in detail in Sandra Vergari, "The Limits of Federal Activism in Education Policy," *Educational Policy* 26 (January 2012): 20–22. Scholars who have viewed the issuance of these waivers as a response in part to passage of state nonacquiescence measures include Shelly, "Rebels and their Causes," p. 447; Dale Krane, "The Middle Tier in American Federalism: State Government Policy Activism During the Bush Presidency," *Publius* 37 (Summer 2007): 455.

39. Hickok, *Schoolhouse of Cards*, p. 128.

40. Ibid.

41. Ibid.

42. Ibid., p. 129.

43. Sam Dillon, "State Challenges Seen as Whittling Away Federal Education Law," *New York Times*, August 15, 2011, p. A15.

44. Education Secretary Arne Duncan, "Letter to Chief State School Officers," September 23, 2011, <http://www2.ed.gov/policy/gen/guid/secretter/110923.html>.

45. Lydia Saad, "No Child Left Behind Rated More Negatively than Positively," Gallup, August 20, 2012, http://www.gallup.com/poll/156800/no-child-left-behind-rated-negatively-positively.aspx?utm_source=email-a-friend&utm_medium=email&utm_campaign=sharing&utm_content=morelink.

46. Alyson Klein, "Duncan: States Don't Need to Join Common Core for Waiver," *Education Week*, August 18, 2011, http://blogs.edweek.org/edweek/campaign-k-12/2011/08/duncan_states_dont_need_to_joi.html.

47. Elle Moxley, "Core Question: Will 'Pausing' Common Core Cost Indiana its NCLB Waiver," stateimpact.npr.org, May 24, 2013, <http://stateimpact.npr.org/indiana/2013/05/24/core-question-will-pausing-common-core-cost-indiana-its-nclb-waiver/>.

48. U.S. Department of Education, "ESEA Flexibility," <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>.

49. It is worth noting that reasonable persons might well come to different conclusions about the merits of state officials' concerns about federal directives in this policy area, no less than in each of the other policy areas treated in this analysis. The point is not to endorse any particular position on this or any other policy area but

- rather to provide examples of the various ways that state officials have sought to influence national policy and have been successful.
50. 410 U.S. 113 (1973).
 51. 462 U.S. 416 (1983).
 52. 476 U.S. 747 (1986).
 53. Neal Devins, *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate* (Baltimore, MD: Johns Hopkins University Press, 1996), pp. 63–66.
 54. 505 U.S. 833 (1992). The Court’s reversal of its prior holdings regarding the illegitimacy of state-informed consent provisions is found on p. 882. The Court’s reversal of its prior holdings concerning the impermissibility of waiting-period provisions is found on p. 885.
 55. Erik Eckholm, “Arkansas Adopts a Ban on Abortions after 12 Weeks,” *New York Times*, March 6, 2013, <http://www.nytimes.com/2013/03/07/us/arkansas-adopts-restrictive-abortion-law.html?pagewanted=all>.
 56. John Eligon and Erik Eckholm, “New Law Bans Most Abortions in North Dakota,” *New York Times*, March 26, 2013, <http://www.nytimes.com/2013/03/27/us/north-dakota-governor-signs-strict-abortion-limits.html?emc=eta1>.
 57. North Dakota Office of the Governor, “Governor Provides Statement on Signed Bills,” March 26, 2013, <http://governor.nd.gov/media-center/news/governor-provides-statement-signed-bills>.
 58. Erik Eckholm, “Abortion Law in Arkansas Is Blocked by U.S. Judge,” *New York Times*, May 17, 2013; Fernanda Santos, “Arizona Law on Abortions Struck Down as Restrictive,” *New York Times*, May 21, 2013.
 59. State officials’ concerns about these aspects of the ACA and their efforts to influence the shape of the law while it was debated in Congress in 2009 and 2010 are detailed in John Dinan, “Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act,” *Publius* 41 (Summer 2011): 395–420.
 60. The letter and the accompanying memo, Florida Attorney General Bill McCollum, *Constitutional Analysis of the Individual Mandate in the Federal Health Care Legislation*, January 19, 2010, are available at [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7ZUMNW/\\$file/HealthCareMemo.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7ZUMNW/$file/HealthCareMemo.pdf).
 61. Mainly *U.S. v. Lopez* (1995), invalidating the Gun Free School Zones Act of 1990, and *U.S. v. Morrison* (2000) striking down the civil-remedy provision of the Violence Against Women Act of 1994.
 62. Robert Hartman and Paul van de Water, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (Congressional Research Budget Office Memorandum, August 1994), <http://www.cbo.gov/publication/15010>.
 63. Jennifer Staman and Cynthia Brouger, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (Congressional Research Service Report for Congress, July 24, 2009), assets.opencrs.com/rpts/R40725_20090724.pdf, p. 3. The 2009 report went on to say about the proposed individual mandate: “Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or service.” *Ibid.*
 64. McCollum, *Constitutional Analysis of the Individual Mandate in the Federal Health Care Legislation*.
 65. The Virginia statute is codified at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+38.2-3430.1C1>.
 66. These measures are all discussed in Richard Cauchi, “State Legislation and Actions Challenging Certain Health Reforms” (National Conference of State Legislatures, updated March 2013), <http://www.ncsl.org/issues-research/health/state-laws-and-actions-challenging-ppaca.aspx>.
 67. On the Idaho and North Dakota measures, see James H. Read and Neal Allen, “Living, Dead, and Undead: Nullification Past and Present,” *American Political Thought* 1 (Fall 2012): 263–64.
 68. Quoted in Andrew Cain, “Cuccinelli ready to defy federal health-insurance mandate,” *Richmond Times-Dispatch*, February 4, 2010, http://www.timesdispatch.com/news/cuccinelli-ready-to-defy-federal-health-insurance-mandate/article_d9b2b1ed-348d-58ee-a167-2627c3bee023.html.
 69. *Commonwealth v. Sebelius*, No. 3:10-CV-00188-HEH (original complaint), p. 2.
 70. *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).
 71. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011).
 72. *Florida v. HHS*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

73. *Florida v. HHS*, 648 F.3d 1235 (11th Cir. 2011).
74. *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012).
75. *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (N.D. Fla. 2010), p. 605.
76. 780 F. Supp. 2d 1256, p. 1272.
77. 656 F.3d 253, at p. 269.
78. *Ibid.* p. 271 (internal citation omitted).
79. In a joint opinion, Judges Joel Dubina and Frank Hull wrote: “Although the question of the state plaintiffs’ standing to challenge the individual mandate is an interesting and difficult one, in the posture of this case, it is purely academic and one we need not confront today. The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim—as is the case here—we need not address whether the remaining plaintiffs have standing.” *Florida v. HHS*, 648 F.3d 1235, p. 1243.
80. The question remained as to whether some of the language in the Save our Secret Ballot amendments created a conflict with existing federal statutes, particularly the National Labor Relations Act (NLRA). In May 2011, the U.S. National Labor Relations Board filed suit against Arizona on the ground that the state’s recently enacted constitutional amendment was preempted by the NLRA. However, in a ruling issued in September 2012, U.S. district judge Frederick Martone of the District of Arizona was unconvinced that the state measure would be enforced “‘in a way that creates a conflict’ with the NLRA” and he therefore declined to find that the Arizona amendment “on its face, is preempted by the NLRA,” even as he made clear that his ruling “should not be construed to foreclose as-applied challenges if and when they materialize.” *NLRB v. Arizona*, No. CV 11-00912-PHX-FJM (D.Ariz. Sept 5, 2012).
81. The statute is available at <http://data.opi.mt.gov/bills/2009/billhtml/HB0246.htm>.
82. *Ibid.*
83. The Wyoming statute, whose relevant provision is section 6-8-405 (b), is available at <http://legisweb.state.wy.us/2010/Engross/HB0095.pdf>. The relevant provision of the Kansas statute, the Second Amendment Protection Act, is section 7, available at http://www.kslegislature.org/li/b2013_14/measures/documents/sb102_enrolled.pdf. In an April 26, 2013, letter to Kansas Governor Sam Brownback contending that the recently enacted state law was unconstitutional, Attorney General Holder focused particularly on this section that sought “to criminalize the official acts of federal officers.” The attorney general’s letter, and the governor’s letter in response, are discussed in David Sherfinski, “Eric Holder to Kansas Governor: New State Gun Law Unconstitutional,” *Washington Times*, May 2, 2013.
84. “Gun Groups File Lawsuit to Validate Montana Firearms Freedom Act,” October, 1, 2009, <http://firearmsfreedomact.com/2009/10/01/gun-groups-file-lawsuit-to-validate-montana-firearms-freedom-act/>.
85. *Ibid.*
86. Memorandum and Opinion Granting Defendant’s Motion to Dismiss, *MSSA v. Holder*, <http://firearmsfreedomact.com/updates/MSSA%20v.%20Holder%20-%20108.%20Memorandum%20&%20Opinion%20Granting%20Def.%27s%20Mx%20to%20Dismiss%20-%20101810.pdf>, p. 3.
87. State of Montana Brief in Intervention in *MSSA v. Holder*, <http://firearmsfreedomact.com/updates/MT%20AG%20MtD%20brief.pdf>, p. 13.
88. Memorandum and Opinion Granting Defendant’s Motion to Dismiss, *MSSA v. Holder*, pp. 6–8.
89. For a review of the March 2013 oral arguments, where plaintiffs sought “to force a loss in the Ninth Circuit so that they would be able to petition the Supreme Court for certiorari to reconsider and overturn its expansive post-New Deal Commerce Clause precedent, including *Gonzales vs. Raich* and the infamous *Wickard vs. Filburn*,” see Nick Dranias, “Oral Arguments or a Way Station to the Supreme Court?” Goldwater Institute, March 10, 2013, <http://goldwaterinstitute.org/blog/oral-arguments-or-way-station-supreme-court>.
90. These and other federalism decisions are discussed in John Dinan, “The Rehnquist Court’s Federalism Decisions,” *Publius* 41 (Winter 2011): 158–67.

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