STATES IN THE SEPARATION OF POWERS

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INTRODUCTION

Many American lawyers think of federalism and separation of powers as separate concepts—related, perhaps, but dealing with fundamentally different problems and generating distinct bodies of law. Our Founders understood, however, that the concepts were connected. James Madison explained, at the end of *Federalist No. 51*, that federalism and separation of powers provide a "double security . . . to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself."[1] Yet even Madison gave relatively few specifics about the relationship between federalism and separation of powers—or, if you will, between the vertical separation of powers between nation and states and the horizontal relationships between distinct branches at each level of government. Nor would it have been easy to do so. The Constitution that Madison defended in *The Federalist* left much of its institutional structure to be fleshed out through legislation and practice—for example, the executive departments, the internal organization of Congress, and the structure of the Federal Judiciary.[2] And the States, which Madison made clear would be key actors in this system, were undergoing changes of their own and

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1. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

2. *See generally* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L. J. 408 (2007).

their relationship to the new national entity was yet to be established.

This essay argues that the role of states in the American separation of powers has changed over time in consequence of a general shift from one model of divided powers to another. From the beginning, American thinking about separation of powers has encompassed a tension between two organizing principles.[3] "Separated powers," on the one hand, views the branches of government as exercising entirely distinct powers—legislative, executive, and judicial—and tends to draw quite formal boundaries between those powers. "Checks and balances," on the other hand, sees the branches as operating in overlapping spheres wherein each has a hand in the others' business; this allows each branch to effectively check the other branches' exercise of power through devices like the presidential veto, legislative confirmation of executive and judicial officers, or judicial review of legislative and executive action. Both principles have been around from the beginning, but it is fair to say that separated powers predominated in the early years, while checks and balances dominates our modern institutional landscape.

This shift has fundamentally changed the role of the States as they relate to the national government. Federalism itself is no longer dominated by separated state and national jurisdiction. Cooperative federalism programs, in which state and federal agencies serve as partners implementing regulatory and benefits programs like the Clean Air Act or Medicaid, dominate much of the governance landscape. Even where state and federal institutions are formally separate and distinct—such as in criminal law enforcement, or the parallel systems of state and federal adjudication—state and federal actors generally operate hand in glove with one another. What is less appreciated is that cooperative federalism not only strips states of their traditional exclusive jurisdiction over many subjects but also makes them integral participants in the national political and administrative process. In an important sense, states have become

3. *See, e.g.*, M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

part of the horizontal separation of powers as well as the vertical. To a considerable extent, they realize their autonomy by their participation in national government.

Many scholars have celebrated cooperative federalism's departure from traditional understandings of American federalism, while others have worried whether it adequately guarantees the states' autonomy—especially over the long term.[4] I make no effort to resolve that debate here. Rather, I offer three observations. First, long-term changes in both the vertical separation of powers (federalism) and the horizontal relationships among the national branches can be understood as a shift from separated powers to checks and balances. Second, in an environment where national and state powers largely overlap, the horizontal checks and balances in the national lawmaking process become essential protections of state autonomy. Third, the States play a vital role in national politics by shaping, implementing, and sometimes resisting national policy. Crucially, when they do these things, states are not like just another federal agency or private interest group; rather, they are full-fledged governments in their own right, with their own processes of accountability and wells of democratic legitimacy.

The upshot is that state institutions and officers are quite different from the other actors in the federal governance process—federal agencies, private parties, public interest organizations, and the like—none of whom can claim public accountability and democratic legitimacy in the same way. It is time that separation of powers scholarship took more notice of federalism, just as federalism scholarship has in recent decades paid more attention to separation of powers.[5] This essay begins, in Part I, by showing how the

4. *Compare, e.g.*, Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21 (1950) ("Cooperative Federalism has been, to date, a short expression for a constantly increasing concentration of power at Washington in the instigation and supervision of local policies."), *with* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 37–44 (2010) (arguing that states can exercise "the power of the servant" within cooperative federalism structures).

5. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

transformation of federalism doctrine since the New Deal basically assimilated it to a checks and balances model of separation of powers. That model offers few formal protections to the States analogous to the old doctrine of limited and enumerated powers.[6] Part II then considers how state officers and institutions fit into the actual operation of national separation of powers, primarily in the context of cooperative federalism regimes established under federal regulatory statutes.

I. SEPARATED POWERS AND CHECKS AND BALANCES

American law has not one but two separation-of-powers traditions. The first rests, as Madison explained, on "the political maxim that the legislative, executive and judiciary departments ought to be separate and distinct."[7] "No political truth is certainly of greater intrinsic value," Madison said, "or is stamped with the authority of more enlightened patrons of liberty" than this notion of separated powers.[8] Invoking "the celebrated Montesquieu," Madison opined that "[t]he accumulation of all powers legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."[9] Subsequent jurisprudence in this tradition has focused on "determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers—executive, legislative or judicial."[10]

But despite Madison's praise for the separation principle, he acknowledged in *Federalist Nos. 47* and *48* that the Philadelphia Constitution combined governmental functions in many important

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6. For that reason, I have argued elsewhere that the enumerated powers doctrine, even in its modern atrophied form, needs to be enforced. *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1390–92 (2001).

7. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 323.

8. *Id.* at 324.

9. *Id.*

10. MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 101 (1995); *see also* Bowsher v. Synar, 478 U.S. 714 (1986) (striking down budgetary statute because it vested executive power in a legislative officer); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U.L. REV. 1377, 1390 (1994) ("[A]ny governmental power exercised in our system must be either legislative or executive or judicial.").

respects.[11] The President participated in legislation through the veto and in judging through the appointment power; Congress participated in execution of the laws and judging through confirmation of nominations; and the Judiciary participated in both execution and legislation through the interpretation of laws and judicial review of government actions. Citing the existing state constitutions, Madison explained that Montesquieu's separation principle should not be understood to insist that "departments ought to have no *partial agency* in, or no *controul* over the acts of each other."[12] He criticized efforts to ensure separation of functions through strict constitutional delimitation of powers as mere "parchment barriers" that were unlikely to sustain the division for long.[13] Instead, Madison insisted that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[14] The most important of these "constitutional means" is the partial agency that each branch has in the other branches' functions. This is the theory of checks and balances. Blurring the lines of strict separation is not merely incidental, but crucial to the way the branches check one another.[15]

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11. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 329; THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 336–37.

12. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 325.

13. THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 332–33.

14. THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 349.

15. These two models of separation of powers have spawned two arguably inconsistent lines of cases in the Supreme Court. A formalist line insists on strict separation, deciding cases largely by identifying the power that is being exercised and then determining whether the wrong branch is exercising it. *See Bowsher*, 478 U.S. at 730–32. A functionalist line of cases, on the other hand, emphasizes checks and balances by asking whether some alteration to the structure of government—such as the line-item veto or the independent counsel statute—upsets the rough balance of power among the branches. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (upholding the independent counsel statute because it did not fatally undermine the Executive's functions). But the steady erosion of strict separation in the Court's jurisprudence has not spelled the doom of formalism. It turns out that there are formalist versions of checks and balances too. For example, *INS v. Chadha*, 462 U.S. 919 (1983), struck down the legislative veto not

These two models of separation of powers find ready parallels in the constitutional theory of federalism, which is unsurprising given that federalism is simply the vertical aspect of the Constitution's general strategy of dividing powers among government institutions. On both the vertical and horizontal dimensions, strict separation has tended to lose out over time to a checks and balances model. This part briefly traces this development in the law of federalism, which has shifted from a dual federalist model to one of concurrent state and national jurisdiction. That shift, I argue, makes the horizontal checks and balances limiting national lawmaking critical to the vertical dimension of federalism.

A. Dual Federalism and Separate Spheres

When it came to federalism, the Founders emphasized separation over checks and balances. Here is Madison, for example, in *Federalist 45*:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[16]

There are, to be sure, ways in which the Constitution makes the national government dependent on the States, particularly by way of state governments' roles in choosing presidential electors, determining the electorate for federal elections, and—prior to the Seventeenth Amendment—choosing each state's senators.[17] But the

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because Congress had invaded another branch's province, but rather because it had acted without following Article I's requirements of bicameralism and presentment.

16. THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 313.

17. *See* U.S. CONST. art. I, § 2, cl. 1 (empowering states to determine who votes for members of Congress); *id.* art. I, § 3, cl. 1 (empowering state legislatures to choose the state's senators); THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 311 (noting

Federalists were wary of giving the States any sort of "partial agency" in the national government's exercise of its powers, based on bitter experience of state intransigence during the Revolutionary War and under the Articles of Confederation.[18] The Articles had left Congress dependent on the States to implement federal laws, and removing *that* sort of dependence was a central aim of the new Constitution.[19] The Tenth Amendment underscored the notion that powers were limited and divided between the national and state governments—and that each was supposed to stay in its lane.[20]

The federalism literature knows this separationist regime as "dual federalism." As Alpheus Mason described it, dual federalism contemplates "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions."[21] This notion should be distinguished from "dual sovereignty," which simply refers to the principle that the American federal system divides government power between multiple levels of government, subject to the ultimate sovereignty of the People.[22] The principle of dual sovereignty means that this division is constitutionally entrenched, but "dual federalism" is only one of a variety of forms

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that these features make the state governments "constituent and essential parts of the federal Government").

18. *See, e.g.*, James Madison, *Vices of the Political System of the United States, April 1787*, *reprinted in* JAMES MADISON: WRITINGS 69, 72–73 (Jack N. Rakove ed., 1999); *see generally* CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

19. *See* Madison, *supra* note 18, at 72–73.

20. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

21. Alpheus Thomas Mason, *Federalism: The Role of the Court*, *in* FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 8, 24–25 (Valerie Earle ed., 1968); *see also* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, *in* FEDERALISM AND SUBSIDIARITY: NOMOS LV, at 34, 36–40 (James E. Fleming & Jacob T. Levy eds., 2014); ANTHONY J. BELLIA, JR., FEDERALISM 183 (2011) ("The *dual federalism* paradigm understands federal and state governments to operate in different spheres of authority.").

22. *See* Young, *Dual Federalism*, *supra* note 21, at 37–38.

that the division could take.[23] Like the separation of legislative, executive, and judicial authority, a constitution might seek to maintain the sovereignty of both states and nation through drawing boundaries *or* by providing each set of institutions with their own means of defense.[24]

The first option—dual federalism—was the strategy of choice for much of our history, from the Founding up until the New Deal revolution in the 1930s. In *Gibbons v. Ogden*,[25] Chief Justice Marshall acknowledged that national and state authorities might regulate in the same policy space—the ferry business on the Hudson River, for example—but insisted that they exercised quite different powers. Although Article I conferred power on Congress to regulate commerce "among the several states," it conferred no general police power over health and safety of the sort belonging to New York. "The enumeration presupposes something not enumerated."[26] Similarly, in *Cooley v. Board of Wardens*,[27] Chief Justice Taney had to determine whether a state law requiring ships entering or leaving the port of Philadelphia to hire a local pilot concerned subjects "in their nature national" and thus within the "exclusive" power of Congress.[28] As these cases illustrate, a dual federalism regime tasks the courts with drawing lines between national and state power—a job that became increasingly difficult over the course of the nineteenth and early-twentieth centuries as both states and nation began to flex their regulatory powers.[29] Court decisions limiting the

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23. *See id.*

24. *See, e.g.*, *infra* text accompanying notes 68–72 (explaining how the anti-commandeering doctrine enables states to opt-out of implementing federal law).

25. 22 U.S. (9 Wheat.) 1 (1824).

26. *Id.* at 195.

27. 53 U.S. (12 How.) 299 (1851), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

28. *Id.* at 319.

29. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125; Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 258–59; *see also* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011) (discussing how a federal division of authority empowers courts to determine the boundary).

Sherman Act and striking down a federal child labor law, for example, made the exercise of this function increasingly controversial.[30]

Dual federalism was not simply imposed by courts, however. President Herbert Hoover—the technocrat who had orchestrated massive public relief efforts in Europe after World War I—found his ability to take similar action to stave off the Depression limited not so much by courts as by the national government's lack of capacity in 1929 to assume power to direct and stabilize the national economy.[31] When Congress created the Federal Communications Commission in 1934, it explicitly limited its jurisdiction to long distance telephone calls to prevent the new agency from claiming the full jurisdiction that Supreme Court decisions would have allowed.[32] Herbert Wechsler argued as late as 1954 that Congress did not simply represent state constituencies but had also internalized dual-federalism-style scruples about the appropriateness of national action in areas traditionally allocated to the states.[33]

The separation of functions between national and state governments was always clearer in theory than in practice, and the Supreme Court's efforts to draw the line floundered under perceptions that the States were unequal to the task of dealing with the Depression and that the Court's doctrine was too indeterminate to be principled.[34] Similar criticisms have been leveled at the jurisprudence of separated powers—that is, that insistence on strict separation would prevent the government from dealing with modern

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30. *See*, *e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (holding that the Sherman Act did not reach a massive merger of sugar refiners because it impacted interstate commerce only "indirectly"); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down a federal law restricting child labor on the ground that it regulated manufacturing rather than interstate commerce).

31. *See* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 55–56 (2001).

32. *See* La Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) (construing 47 U.S.C. § 152(b)).

33. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544–45 (1954).

34. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); Lessig, *supra* note 29, at 154, 176-77.

problems and that the Court has never come up with a principled and consistent line dividing legislative from executive from judicial power.[35] In any event, it seems fair to say that notions of separated power had largely given way to checks and balances, in both separation of powers and federalism cases, by the middle of the twentieth century.

B. Concurrent Jurisdiction and Vertical Checks and Balances

Dual federalism officially died in 1937, when the Supreme Court executed its "switch in time" that accepted broad national power to regulate an integrated economy.[36] We now live in a world of largely overlapping federal and state regulatory jurisdiction, with states and the national government constantly operating in the same policy spaces. The vertical separation of powers in such a world no longer rests on separation of functions, but on checks and balances.[37] Three sorts of checks are crucial: (1) the horizontal separation of powers at the national level; (2) the law of preemption, by which courts identify and resolve conflicts between federal and state law; and (3) the autonomous participation of the states in administering and challenging federal law. I briefly discuss the first two of these checks, both of which are relatively familiar in the federalism literature, in the remainder of this section. I turn to the third in the next Part.

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35. *See, e.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) ("The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers.").

36. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act's regulation of employers' practices in manufacturing); *see also* Wickard v. Filburn, 317 U.S. 111 (1942) (consolidating the Court's shift by upholding Congress's authority to regulate even small activities based on their aggregate effects on the interstate economy); Corwin, *supra* note 4, at 17 (observing that, after the New Deal revolution, "[t]his entire system of constitutional interpretation touching the Federal System is today in ruins"). Aspects of dual federalism persist in certain areas of the law, such as foreign affairs. *See* Young, *Dual Federalism*, *supra* note 21, at 57–60.

37. *See* Gerken, *supra* note 4, at 33–35 (arguing for a theory of federalism grounded in checks and balances).

The death of dual federalism—and with it, the notion that the enumeration of Congress's powers in Article I meaningfully constrains federal legislation—presented the alarming prospect that Congress might simply federalize the entire corpus of American law, leaving nothing to the States.[38] But that is not what happened. The New Deal revolution itself empowered the States to regulate the national economy by largely eliminating constraints imposed by the Due Process Clause and considerably easing those imposed by the dormant Commerce Clause; it was a revolution in favor of government at the expense of private ordering, not of federal power at the expense of the states.[39] And although federal law's coverage has expanded vis-à-vis state law over time, that expansion has been gradual and often partial. In many areas, it remains true that "[f]ederal law is generally interstitial in its nature," as Henry Hart and Herbert Wechsler put it seventy years ago, and that "Congress acts . . . against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."[40]

The constraints on this expansion are composed not of subject-matter limits but of institutional checks and balances. These are both political and procedural in nature. The political check is that, as in the horizontal separation of powers, the national Constitution gives the states an agency in the exercise of Congress's powers. Because Congress is composed of persons elected to represent their states, under rules that the states still largely control, Madison expected members of Congress to "feel a dependence" on their states and to be guided by a "local spirit."[41] Much later, Professor

38. *See* Lessig, *supra* note 29, at 154 ("The flip [by the Supreme Court] essentially ended judicially enforceable limits in the most important federalism domains; it represents a collapse of judicial restraints.").

39. *See generally* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997).

40. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953).

41 THE FEDERALIST NO. 45 (James Madison), *supra* note 1, at 311; THE FEDERALIST NO. 46 (James Madison), *supra* note 1, at 318.

Wechsler developed this observation into his influential argument about "the political safeguards of federalism."[42] The efficacy of the political safeguards remains contested; many members of Congress may be driven by loyalty to the national party or solicitous of interests within their states but not necessarily protective of state *government*'s institutional prerogatives.[43] But Congress is constrained not only by the loyalties of its members but also the procedures by which it acts. Article I creates an onerous lawmaking practice marked by multiple veto-gates, often rendering national lawmaking prohibitively difficult whether or not Congress's members feel particularly sympathetic to the states.[44]

The crucial point is that in a world of concurrent power, as Brad Clark has thoroughly explored, the horizontal separation of *national* lawmaking powers is "a safeguard of federalism."[45] And a primary threat to the federal balance arises when federal law is made *outside* the constitutionally authorized lawmaking process. Federal law made by executive decree or agency action, for example, circumvents both the political representation of the states in Congress and the onerous lawmaking procedure prescribed by Article I.[46] Likewise, federal common law generated when federal courts formulate rules of decision in areas not governed by specific federal enactments—rather than applying state law under the *Erie* doctrine[47]—

42. Wechsler, *supra* note 33; *see also* Clark, *supra* note 5, at 1342–46 (observing that the federal lawmaking process is composed of "entities structured to be sensitive to state prerogatives").

43. *See, e.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 112–17 (2001) (criticizing the political safeguards argument).

44. *See* Clark, *supra* note 5, at 1339 ("[E]ach procedure requires the participation and assent of multiple actors to adopt federal law. This creates the equivalent of a supermajority requirement and thus reinforces the burden of inertia against federal action, leaving states greater freedom to govern."); *see also* Schoolhouse Rock!, *I'm Just a Bill*, YOUTUBE (Aug. 14, 2018), https://www.youtube.com/watch?v=SZ8psP4S6BQ [https://perma.cc/T2JM-H2RE].

45. *See* Clark, *supra* note 5; *see also* Young, *Two Cheers*, *supra* note 6, at 1355–64.

46. *See* Clark, *supra* note 5, at 1374, 1433; Young, *Two Cheers*, *supra* note 6, at 1363–64.

47. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* Ernest A. Young, Erie *as a Way of Life*, 52 AKRON L. REV. 193, 203–08 (2018) (emphasizing this aspect of *Erie*).

likewise evades the federalism-protecting constraints on national lawmaking.[48] Vertical separation of powers depends on horizontal checks and balances—and, as I hope to show in Part II, *vice versa*.

The representation of the states in Congress and the need for legislation to overcome multiple veto-gates also affects the content of federal legislation that does get through. Sweeping proposals for extending federal law must often be tempered and limited in order to secure passage. Statutes empowering federal agencies to act and make law outside the Article I legislative process, like the Administrative Procedure Act,[49] thus incorporate procedural safeguards that—to at least some degree—serve to ensure deliberation and limit lawmaking. And when legislating substantively, Congress often stops far short of displacing state regulatory authority in a given area. A second crucial array of checks and balances protecting state autonomy within a world of concurrent jurisdiction thus consists in interpreting and enforcing the requirements and boundaries of federal legislation.[50]

To some extent, for example, statutory requirements in federal administrative law offset the erosion of constitutional limits that might otherwise have checked lawmaking outside the Article I process. As Cass Sunstein has observed, "[b]road delegations of power to regulatory agencies . . . have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued."[51] The major questions doctrine has strengthened this sort of judicial review by voiding executive-driven expansions of federal regulatory

48. *See* Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 67–76 (2013); Clark, *supra* note 5, at 1418–19.

49. 5 U.S.C. §§ 551–559 (2018).

50. *See, e.g.*, Bond v. United States, 572 U.S. 844 (2014) (interpreting federal criminal statute narrowly to avoid intrusion into areas of primary state responsibility); Jones v. United States, 529 U.S. 848 (2000) (same); Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) ("[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.").

51. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 143 (1990).

authority that Congress is unlikely to have contemplated in the original delegation.[52] A variety of "nondelegation canons" play a similar role by instructing courts to construe delegations of authority to agencies narrowly when they intrude on sensitive areas, such as by significantly expanding federal regulatory authority vis-à-vis the states.[53] And although states lack a preferred position of access to the administrative process like that they enjoy in Congress, the Administrative Procedure Act does afford states opportunities to participate in agency lawmaking as well as grounds to attack its product when those opportunities are denied.[54]

The law of preemption affords an equally important set of checks on both state and national power. Preemption implements the Supremacy Clause, requiring that state law give way in the event of a conflict.[55] Federal statutory schemes are often complex, however, and the extent to which Congress intends to preempt state law is often ambiguous. Although they involve questions of statutory rather than constitutional law, how the courts resolve these interpretive questions is of immense practical importance.[56] Significantly, the Court has developed important doctrines in its preemption jurisprudence limiting the preemptive force of federal law—the longstanding presumption against preemption,[57] for example, as well as the rule that only agency actions with the force of law can

52. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2607–09 (2022); Gonzales v. Oregon, 546 U.S. 243, 274 (2006) ("[T]he background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power.").

53. *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

54. *See, e.g.*, Texas v. United States, 809 F.3d 134, 149 (5th Cir. 2015) (enjoining the Obama Administration's "Deferred Action for Parents of Americans and Lawful Permanent Residents" program for failure to comply with the notice-and-comment requirement and inconsistency with the underlying statute), *aff'd by an equally divided Court*, 579 U.S. 547 (2016).

55. *See* U.S. CONST. art. VI, cl. 2.

56. *See* Young, *Two Cheers*, *supra* note 6, at 1384–86.

57. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Young, *Preemption*, *supra* note 29, at 265–69 (discussing the role of the presumption against preemption in federalism doctrine).

preempt state law.[58] As Justice Breyer has said, "the true test of federalist principle may lie, not in the occasional effort to trim Congress' commerce power at its edges . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law."[59]

All these mechanisms of the vertical separation of powers are relatively well understood, if often overlooked. The remainder of this Essay explores a different set of dynamics stemming from the Founders' decision to "preserve[] the states as separate sources of authority and organs of administration."[60] The separate existence of the states does not set the states apart as a jurisdictional matter, with separate functions from the federal government. Rather, it allows them to participate in national politics and governance as uniquely autonomous actors.

II. THE STATES WITHIN NATIONAL POLITICS

The post-New Deal regime of concurrent state and federal regulatory jurisdiction allows each level of government to act independently within the same regulatory space, but this is not the norm. More often, the regime is one of "cooperative federalism," involving "a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law."[61] As Phil Weiser has explained, "modern regulatory programs put in place across a variety of fields ranging from nearly all environmental programs to telecommunications regulation to health care . . . all embrace a unified federal structure that includes a role for state implementation."[62]

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58. *See* Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1679–80 (2019).

59. Egelhoff v. Egelhoff, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (citations omitted).

60. Wechsler, *supra* note 33, at 543.

61. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001); *see also* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 170–71 (2009) (tracing the development of cooperative federalism).

62. Weiser, *supra* note 61; *see also* ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND

Cooperative federalism is a phenomenon of both the executive and legislative branches; it requires complementary legislation (and funding) from both Congress and the state legislatures, and it creates interlocking federal and state bureaucracies to administer the program.[63] One might describe the contemporary relationship of federal and state courts in much the same way, however. Each set of courts hears cases involving both federal and state laws, individual cases routinely move back and forth from one system to the other, and judges in each jurisdiction hearing similar sorts of cases—such as in large multidistrict litigation settings—have developed both formal and informal methods of cooperation.[64]

Some of the most interesting recent work in the federalism field has concerned the ways in which states participate in cooperative federalism programs established by Congress and overseen by federal agencies. Heather Gerken and Jessica Bulman-Pozen's account of "uncooperative federalism" has demonstrated that state officials participating in federal programs like the Clean Air Act or Medicaid are anything but passive automatons reduced to carrying out national orders; rather, the federal agency's dependency on state implementation gives state officials leverage to shape the federal program from within.[65] And Bridget Fahey's more recent work has explored the processes, both formal and informal, by which federal and state officials come to agreement on the terms of their cooperation and even engage in a hybrid "coordinated rulemaking"

HEALTHY ENVIRONMENT 9–10 (2009) (describing the Clean Water Act's statutory commitment to preserve the states' regulatory role); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 182 (1998) ("In effect, state and local governments serve as a kind of 'fourth branch' of the federal government.").

63. *See, e.g.*, Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L. J. 1320 (2023) (discussing the coordination of federal and state governments in the administrative agency context).

64. *See, e.g.*, Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1703–06 (2017) (discussing issues in coordinating federal multi-district litigation with parallel state court actions).

65. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

process.[66] Because this work bridges the divide between constitutional law and administrative law and requires intimate knowledge not only of complicated federal statutory schemes but also varying state administrative processes, it is hardly surprising that the subject is just beginning to be thoroughly explored. But any assessment of the extent to which the states' roles in federal cooperative programs serves as a check and balance to federal encroachment on state prerogative will depend on this sort of institutional detail.[67]

My focus here is on the more fundamental qualities that states bring to their roles in national politics and governance, as well as the varied ways in which they participate. Much contemporary work on separation of powers seeks to expand the lens to consider actors beyond the national trinity of President, Congress, and Judiciary by considering political parties, the civil service, organizations in civil society, and the like.[68] One leading effort to recapture a vision of mixed government within the administrative state, for example, dismisses the significance of state governments in a couple of sentences.[69] But if we are to understand the contemporary system of checks and balances in national politics and governance, we must take stock of the states.

A. States as Governments and the Transformation of Sovereignty

The first key characteristic of states as participants in the national system of checks and balances is that—unlike other institutional players in the system—they are governments in their own right, not branches or agencies of governments, with their own claims to democratic legitimacy and some measure of sovereignty.[70] This has

66. *See* Fahey, *supra* note 63.

67. *See* Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 437-38 (2013).

68. *See, e.g.*, Magill, *supra* note 35, at 605; Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

69. *See* Michaels, *supra* note 68, at 537 & n.83.

70. *See, e.g.*, Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) ("[T]here [can] be no loss of separate and independent autonomy to the States, through their union under the Constitution. . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

several implications for their role in implementing federal law. One is that Congress must obtain states' consent before enlisting them in this role, and federal officials have limited ability to hire and fire state personnel charged with administering parts of their program. The second is that states' distinctive grounding in democratic legitimacy may both complicate and enhance federal programs' ability to secure popular support. Finally, states exist outside the federal separation of powers in the sense that they can do things that the usual federal entities cannot, and because certain federal constitutional structural requirements do not apply to them. As I will explain, this may actually increase Congress's flexibility in designing federal enforcement regimes.

At the outset, cooperative federalism presents students with a paradox: The anti-commandeering doctrine announces a bright-line rule that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[71] And yet most federal regulatory programs are implemented by the States.[72] The explanation, of course, is that Congress may enlist states in cooperative federalism if they consent.[73] What counts as truly voluntary consent is not obvious, and Congress has many levers to induce compliance.[74] But the principle is clear that a state's participation is up to the state. It follows that federal actors

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71. Printz v. United States, 521 U.S. 898, 925 (1997); *see also* New York v. United States, 505 U.S. 144, 188 (1992).

72. *See* Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1903–06 (2019); Fahey, *supra* note 63, at 1330–52 (discussing cooperative implementation of Medicaid and other examples); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L. J. 557, 574–84 (2000) (tracing the historical growth of cooperative federalism).

73. *See, e.g.*, *Printz*, 521 U.S. at 906–11 (emphasizing the voluntary nature of early instances of state implementation of federal law); Hills, *supra* note 62, at 181 ("*Printz* protects non-federal governments' practical ability to bargain for . . . discretion by allowing them to decline to implement federal statutes unless Congress accedes to their terms.").

74. *Compare, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (upholding broad power under the Spending Clause to induce states to regulate according to Congress's wishes), *with* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (holding that the Affordable Care Act's Medicaid expansion crossed the line of coercing states to participate).

have a minimal say over which state officials are involved in implementing federal law. And although federal agencies can generally cut off federal funding to state agencies and even suspend the state's role in the program, state officials are ultimately accountable to the state government and the people of the state. As Professor Fahey has demonstrated, "the long shadow of the voluntariness principle"—enforced by the anti-commandeering doctrine—profoundly shapes the structure and practice of cooperative federalism in a variety of ways.[75]

This dynamic affords some insight into what "sovereignty" does and does not mean in contemporary American federalism. Early Americans believed that "there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself."[76] But as Timothy Zick points out, "[i]f *exclusive* dominion and control is in fact the sole basis for claims to sovereignty, then states surely cannot be deemed sovereign today."[77] As Professor Zick explains, however, sovereignty remains a useful term to the extent it captures some sense of ultimate separateness, permanence, and autonomy from national control.[78] Hence, when Justice O'Connor sought to express the states' "'residuary and inviolable sovereignty,'" she emphasized their institutional independence: "State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart."[79] State sovereignty may mean any number of other

75. Fahey, *supra* note 63, at 1364–66.

76. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (1967); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 344–54 (1969) (discussing the founding generation's adaptation of English ideas about sovereignty).

77. Timothy Zick, *Are the States Sovereign?* 83 WASH. U. L.Q. 229, 234 (2005).

78. *See id.* at 332–33.

79. New York v. United States, 505 U.S. 144, 188 (1992) (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed.,1961)).

things as well,[80] but one central thing it means is that states and their officers simply do not work for the national government.[81]

The States ultimately derive their sovereignty from their independent connection to the people. In a nod to the traditional notion of sovereignty, our Founders viewed the people as sovereignty's true repository; because true sovereignty "resides in the PEOPLE, as the fountain of government," "[t]hey can distribute one portion of power to the . . . State governments: they can also furnish another proportion to the government of the United States."[82] State governments thus derive their legitimacy from state constitutions and state elections, not from federal delegations. This may result in instances of "uncooperative federalism," in which state officials choose to undermine or obstruct federal mandates in deference to local preferences.[83] But it also may mean that state officials can tailor the implementation of federal programs to be more sensitive to local conditions and mores—thereby enhancing the legitimacy of those programs on the ground.[84]

Because they have an independent connection to the people, States offer Congress a means to delegate power without either augmenting the authority of the federal executive or undermining the independence of enforcement from Congress itself. As Rick Hills has pointed out, state implementation tends to rely on a web of officials at the state and local levels, many of whom are directly elected, rather than a federal agency staffed by appointed experts

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80. *Compare, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (holding that state sovereignty includes the principle of immunity from private suits for money damages), *with id.* at 153–54 (Souter, J., dissenting) (demonstrating that state immunity from suit under federal law is inconsistent with the Founders' theory of sovereignty).

81. *See* Ernest A. Young, *Marijuana, Nullification, and the Checks and Balances Model of Federalism*, *in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 125, 138–44 (Sanford Levinson ed., 2016).

82. James Wilson, quoted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 302, 316 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Inquirer Printing & Publ'g Co. 1888).

83. *See* Bulman-Pozen & Gerken, *supra* note 65, at 1271–74.

84. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987).

and (distantly) accountable only through the elected President.[85] Professor Bulman-Pozen has likewise noted "a host of practical reasons" why Congress "often turns to the states":

> [B]ecause they have relevant expertise; because they have in place an administrative apparatus that the federal government lacks; because relying on states will be cheaper or will foster experimentation; because states can be "force multipliers" that amplify enforcement of federal law; because congressional delegations fight to protect existing state programs from federal preemption; [or] because of a more diffuse interest in devolution.[86]

Such delegations may, moreover, "foster[] the sort of vigorous, visible public debate about federal law that our horizontal system of checks and balances aspires to generate."[87]

The states' separate existence also opens up additional possibilities for institutional design of regulatory programs. The Clean Air Act, for example, requires the national Environmental Protection Agency to set air quality standards for each pollutant, but it authorizes the states to devise their own implementation plans ("SIPs") to reach those standards.[88] Depending on their preferences and diverse regulatory philosophies, some states may choose market-based solutions while others pursue more traditional command-and-control approaches.[89] Congress may also create a form of cooperative federalism by employing state courts to enforce federal law. In recent years, for example, the Supreme Court has held that

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85. *See* Hills, *supra* note 62, at 186 ("The main distinction between the federal executive branch and non-federal governments is the greater density of elected politicians in the latter.").

86. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 475 (2012).

87. *Id.* at 499.

88. *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1193-95 (1995).

89. *See, e.g.*, Eric M. Patashnik, *The Clean Air Act's Use of Market Mechanisms*, in LESSONS FROM THE CLEAN AIR ACT: BUILDING DURABILITY AND ADAPTABILITY INTO US CLIMATE AND ENERGY POLICY 201, 205-08 (Ann Carlson & Dallas Burtraw, eds., 2019) (discussing some states' adoption of cap and trade systems to regulate emissions).

Article III limits Congress's ability to authorize private enforcement of federal consumer protection statutes in cases where the private plaintiffs have not yet sustained any actual injury.[90] But such private suits are a viable option in at least some state courts, which are not limited by Article III.[91]

More generally, cooperative federalism may allow Congress to check the President at a time when the notion of independent federal agencies has become increasingly controversial. Recently, the Supreme Court has invalidated aspects of the design of several federal agencies in which Congress sought to insulate agency officials from presidential removal,[92] and originalist scholars have argued for a strong unitary-executive principle requiring all federal executive officials to be removable the President's pleasure.[93] President Trump seems determined to test the constitutionality of federal independent agencies.[94] But state officials implementing federal law do so pursuant to agreements between their governments and the

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90. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208–13 (2021) (holding that plaintiffs lacking actual present injury lack standing to seek statutory damages under the Fair Credit Reporting Act); *see also* Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1245–49 (11th Cir. 2022) (rejecting standing under the Fair Debt Collection Practices Act where plaintiff had not sustained any actual injury).

91. *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211 (2021); Rebekah G. Strotman, Note, *No Harm, No Problem (In State Court): Why States Should Reject Injury in Fact*, 72 DUKE L. J. 1605, 1609–10 (2023).

92. *See* Collins v. Yellen, 141 S. Ct. 1761 (2021) (invalidating the for-cause removal provision governing the single director of the Federal Housing Finance Agency on the ground that it interferes with the President's removal power); Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (invalidating for-cause removal provision protecting the CFPB's single Director from presidential removal).

93. *See* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023).

94. *See, e.g.*, Jonathan H. Adler, *Dellinger v. Bessent Disappears Allowing Wilcox v. Trump to Train Sights on Humphrey's Executor*, THE VOLOKH CONSPIRACY, March 6, 2025, at https://reason.com/volokh/2025/03/06/dellinger-v-bessent-disappears-allowing-wilcox-v-trump-to-train-sites-on-humphreys-executor/ [https://perma.cc/V58R-548E] ("[A] clear challenge to *Humphrey's Executor* is coming into focus."); *see also* Bamzai & Prakash, *supra* note 93, at 1759-60 (arguing that the Court "seems keen to prune (or root out) cases like *Humphrey's Executor v. United States*" and hold that independent agencies "are executive through and through").

federal government;[95] their power to execute these agreements stems from their state constitutions, not "the executive power" vested in the President under Article II.[96] Because they do not exercise the *federal* executive power, state officials are not subject to presidential appointment or removal—and they do not receive emails from Elon Musk's Department of Government Efficiency.[97] Congress can thus achieve more independence in the enforcement of federal law than the unitary-executive principle may permit, and perhaps insulate some aspects of enforcement from executive branch efforts to trim the bureaucracy, by shifting enforcement authority to state officials.[98] In this sense, the separateness of state governments adds to Congress's flexibility rather than restricting it.

Finally, the States are popularly accountable to a distinct electorate from the national one. Each state slices the American partisan divide differently,[99] with the result that states are less afflicted by the fifty-fifty gridlock that prevails at the national level. This may allow Congress, on some issues, to delegate around the hyper-polarized divisions at the national level; by leaving red, blue, and purple states discretion in implementing statutory mandates, national

95. *See* Fahey, *supra* note 63, at 1354–55.

96. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

97. *See, e.g.*, Brian Schwartz & Scott Patterson, *Musk Says Federal Workers Must Detail 'What They Got Done'—or Risk Losing Job*, WALL ST. J. Feb. 23, 2025, at https://www.wsj.com/politics/policy/musk-says-federal-workers-must-detail-what-they-got-doneor-risk-losing-job-5eaba57a [https://perma.cc/9HT6-M9XE].

98. *See generally* Bulman-Pozen, *supra* note 86, at 486–98. In an oft-overlooked passage in *Printz v. United States*, Justice Scalia argued that the unitary executive principle "would be shattered . . . if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws." 521 U.S. 898, 923 (1996). The need to secure state consent does impose some check on this congressional option. *See* Hills, *supra* note 62, at 186. Moreover, state officials are subject to a democratic check on their actions—just not through the President. In any event, one suspects that the reason this passage in *Printz* is so often overlooked is that, taken seriously, it would require the Court to invalidate a vast array of well-established cooperative federalism programs. It would also call into question federal law's pervasive use of private attorneys general and citizen suits, which are also not generally subject to Presidential control.

99. *See generally* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. Rev. 1077 (2014).

partisans can achieve at least partial victories and secure opportunities to implement their programs on the ground. This sort of devolution may also increase the legitimacy and effectiveness of national governance by taking certain particularly divisive issues off the federal table.[100]

B. Resources, Financial and Political

In many cases, it seems likely that state implementation will be less attractive to Congress than implementation by federal officials who *do* work for the national government. According to political scientists John DiIulio and Donald Kettl, "empirical research on intergovernmental affairs reveals that . . . [the states'] wide latitude in deciding how best to translate federal policies into action, or whether . . . to follow federal policies at all" causes "tremendous difficulty in executing even relatively straightforward [federal] policies."[101] One might ask, why does Congress put up with it? The short answer is that the difficulty of federalizing enforcement altogether will generally outstrip the inconvenience of tolerating state foot-dragging or dissent.

The problem is not a constitutional one, at least in the narrowest sense. It is hard to think of a federal cooperative federalism program that Congress would lack the enumerated power to implement directly, using federal officials and federal resources. And in fact the statutes creating these programs typically do allow the lead federal agency to re-federalize the program in a particular state if that state's implementation efforts fail to conform to federal requirements.[102] But "[i]n practice . . . the federal government rarely reassumes program control in this way, and sanctions such as

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100. *See* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 55 (2018) ("Federalism can operate as an important safety valve in polarized times, lowering the temperature on contentious national policy debates and creating opportunities for policymaking that may be impossible at the national level.").

101. JOHN J. DIIULIO, JR. & DONALD F. KETTL, FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM 18 (1995).

102. *See, e.g.*, Dwyer, *supra* note 88, at 1198.

withdrawing federal funds are also rare."[103] This is because federal agencies lack the resources to take sole responsibility for enforcement in most states. "In a very basic sense," political scientist John Nugent concludes, "the executive branch of the federal government simply cannot carry out all the tasks that Congress asks of it without help from subnational and private entities."[104]

National dependence on state enforcement extends to areas that are not formally part of cooperative federalism regimes. For example, federal and state law enforcement authorities share concurrent jurisdiction over a broad range of criminal matters, but both the statutory provisions they enforce and the structures of investigation, prosecution, and punishment are formally separate. In practice, there is a great deal of cooperation at each stage.[105] When a state decides to opt-out of a particular type of enforcement, however—by repealing state-law prohibitions on the recreational use of marijuana, for example—it becomes nearly impossible for federal authorities to maintain enforcement of a federal prohibition that remains on the books.[106] Generally speaking, the national government has a hard time enforcing federal law when state and local authorities are unwilling to assist.

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103. NUGENT, *supra* note 61, at 178. For example, the EPA website's page listing all petitions to withdraw state authority to implement the National Pollutant Discharge Elimination System identifies no petitions that have been granted. *See NPDES State Program Withdrawal Petitions*, EPA, https://www.epa.gov/npdes/npdes-state-program-withdrawal-petitions [https://perma.cc/P6K9-4ATC] (last visited Sept. 9, 2024).

104. NUGENT, *supra* note 61, at 173; *see also* Samuel H. Beer, *The Adoption of General Revenue Sharing: A Case Study in Public Sector Politics*, 24 PUB. POL'Y 127, 162 (2000) ("As the federal government in the Great Society period extended its responsibilities by means of state and local governments, it also became dependent upon them for the successful discharge of those responsibilities."); Bulman-Pozen, *Separation of Powers*, *supra* note 86, at 462 ("The very growth of the federal administrative state has swept states up as necessary administrators of federal law.").

105. *See generally* Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1041 (2023) (concluding that "cooperative federalism has triumphed" in federal criminal law).

106. *See* Young, *Marijuana*, *supra* note 81; Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009).

The availability of resources to governments at each level of government thus forms an important element of vertical checks and balances in a federal system.[107] One can see this in comparative perspective in the European Union. The EU is generally considered to be less centralized than the United States, despite the fact that its foundational treaties grant Brussels roughly equivalent enumerated powers to Congress, and the European Court of Justice has adopted the principle that European law displaces inconsistent law in the member states.[108] One primary reason is the considerably smaller governmental capacity of the EU, as reflected in its employment and budget.[109] The EU employs just over 60,000 persons, roughly equal to the State of North Carolina, and it spent €170.6 billion (approximately $180 billion) in 2022—about midway between the budgets of Texas and New York.[110] France, by contrast, spent €608.6 billion in the same year.[111] It's hard to be an

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107. *See* Blondel, *supra* note 105, at 1044.

108. *See* Ernest A. Young, *A Comparative Perspective*, *in* OXFORD PRINCIPLES OF EUROPEAN UNION LAW 142, 177 (Robert Schutze & Takis Tridimas, eds., 2018); Andrew Moravcsik, *The European Constitutional Settlement*, *in* 8 MAKING HISTORY: EUROPEAN INTEGRATION AND INSTITUTIONAL CHANGE AT FIFTY 23, 25 (Sophie Meunier & Kathleen R. McNamara eds., 2007) ("The EU remains, despite a few federal elements, essentially a confederation of nation-states.").

109. *See* Young, *Comparative Perspective*, *supra* note 108, at 158; Moravcsik, *supra* note 108, at 34 ("[T]he EU does not (with a few exceptions) enjoy the power to coerce, administer, or tax.").

110. *See Jobs & traineeships in European Union institutions*, EUR. UNION, https://european-union.europa.eu/live-work-study/jobs-traineeships-eu-institutions_en [https://perma.cc/8JPV-6HLK] (last visited Sept. 9, 2024); *Current Employee Statistics*, N.C. OFF. OF STATE HUM. RES., https://oshr.nc.gov/work-nc/employee-statistics/current-state-employee-statistics [https://perma.cc/4AAJ-28E5] (visited Sept. 9, 2024) (reporting 56,556 employees in state agencies, with an additional 20,403 in the state universities, as of July 2024); *Budget of the European Union*, WIKIPEDIA, https://en.wikipedia.org/wiki/Budget_of_the_European_Union [https://perma.cc/C3NM-3C8F] (last visited Sept. 9, 2024); *List of U.S. state budgets*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._state_budgets [https://perma.cc/9A2X-UHXZ] (last visited Sept. 9, 2024).

111. Statista Research Department, *Total public spending in France form 2010 to 2022*, STATISTA (July 4, 2024), https://www.statista.com/statistics/463358/total-public-spending-france/ [https://perma.cc/D5UH-7MKM].

overweening central sovereign when your federation's subunits dwarf your governmental capacity.

The governmental capacity of the United States government is considerably greater, of course, but as already discussed it is not equal to the task of federalizing all the governance tasks currently entrusted to state implementation in cooperative federalism regimes. Congress could, in principle, alter these facts. No obvious constitutional principle requires the national government to transfer $1.2 trillion to state and local governments annually or forecloses it from preempting an even greater proportion of the revenue base for federal taxation.[112] But the existing structure—high federal taxes relative to state taxation, large grants-in-aid to states in return for implementation of most federal regulatory programs—was deemed necessary to secure broad political support for those programs and would surely be extremely difficult to radically alter.[113]

C. State Public Litigation

Litigation is an important part of our system of checks and balances because it enlists the judiciary to check unlawful behavior by the other branches. Although American law has embraced judicial review on behalf of private parties, it has generally been leery of allowing branches of the national government to sue one another in court.[114] Critics of inter-branch litigation have often argued that public institutions lack the kinds of personal injuries that enable private parties to sue, and they have urged that the political branches should use "political remedies" to settle disputes about the meaning of federal law.[115] States have seemed to occupy a

112. *See Staff Working Paper Series: State and Local Government Grants in the Federal Budget*, HOUSE BUDGET COMM. (Sept. 27, 2023), https://budget.house.gov/resources/staff-working-papers/staff-working-paper-series-state-and-local-government-grants-in-the-federal-budget [https://perma.cc/6BAD-Q9XX] (showing $ 1.193 trillion in federal grants to state and local governments in 2022).

113. *See, e.g.*, Beer, *supra* note 104, at 131 (discussing the political incentives to use state and local government to deliver welfare services).

114. *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997) (rejecting standing of members of Congress to challenge the Line Item Veto Act).

115. *See, e.g.*, Walter Dellinger, *House Republicans' misguided Obamacare lawsuit*, WASH. POST (Aug. 16, 2015), https://www.washingtonpost.com/opinions/the-houses-

middle ground in this discussion. They lack many of the obvious political remedies against the national government that Congress might have in a dispute with the President; States can't retaliate against the executive by refusing to confirm appointments or raise the federal debt ceiling, for example. And it is often easier to identify traditional injuries attributable to the federal policies that states wish to challenge.[116]

State public law litigation challenging national policies has become considerably more common in recent years—and also more controversial. During the Obama Administration, Texas Attorney General (now Governor) Greg Abbott famously described his typical workday as, "I go into the office, I sue the federal government and I go home."[117] Blue state attorney generals have been equally active during Republican administrations.[118] In the first months of the new Trump Administration, for example, blue state attorneys general have brought a wide range of cases challenging the President's executive orders.[119] The partisan cast of many state

misguided-obamacare-lawsuit/2015/08/16/4d95e3ca-34a8-11e5-94ce-834ad8f5c50e_story. html (arguing that legal disputes between the political branches should be resolved by political means).

116. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (finding that Massachusetts had standing to challenge EPA's failure to make rules reducing greenhouse gases based in part on the threat that sea level rises attributable to climate change would flood public lands). The propensity of the federal government to file its own lawsuits against states also complicates any effort to argue that state vs. nation suits should be categorically nonjusticiable. *See, e.g.*, United States v. Abbott, 110 F.4th 700 (5th Cir. 2024) (en banc) (reversing grant of preliminary injunction in U.S.'s suit against Texas to prohibit installation of a floating barrier to prevent unlawful immigration across the Rio Grande).

117. Sue Owen, *Greg Abbott says he has sued Obama administration 25 times*, POLITIFACT (May 10, 2013), http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration-/ [https://perma.cc/NL3R-BRTW].

118. *See, e.g.*, Steve LeBlanc & Bob Salsberg, *Massachusetts' Maura Healey helping lead effort to litigate Trump*, BOSTON.COM (Dec. 18, 2017), https://www.boston.com/?post_type=post&p=6259485 [https://perma.cc/9M9BGA4X].

119. *See, e.g.*, David Zimmerman, *Blue States Sue Trump Administration over Executive Order Ending Birthright Citizenship*, NAT'L REV., Jan. 21, 2025, at https://www.nationalreview.com/news/blue-states-sue-trump-administration-over-executive-order-ending-birthright-citizenship/ [https://perma.cc/ZY3Y-YKFU]; *Democratic states sue Trump*

challenges to federal policy, as well as their sheer volume,[120] had already prompted a rising chorus of criticism of state-driven public litigation even before the current wave of litigation.[121]

Maggie Lemos and I have argued elsewhere that much state-led public law litigation would occur anyway, at the behest of private individuals and non-governmental organizations like the Institute for Justice or the American Civil Liberties Union, even if states were somehow disabled from bringing such lawsuits.[122] And state governments compare quite favorably—in terms of expertise and accountability—to private plaintiffs.[123] The important point for present purposes, however, is that it is precisely the states' role as integral institutional players within the system of national governance that gives rise to their role as public litigants. When state officials work hand in glove with federal regulators within a cooperative federalism regime, and even when they are performing public functions within the same policy space as federal regulators, states are much more likely to be adversely affected by a change in federal policy than most persons.[124]

Consider Texas's challenge to the Obama Administration's action conferring lawful presence on several million undocumented aliens. Although no private individual was likely to assert a plausible injury that could establish standing to challenge the conferral of lawful status on another person, states were differently situated. A

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administration over order to halt funding for gender-affirming care, ASSOCIATED PRESS, Feb. 7, 2025, at https://www.nbcnews.com/nbc-out/out-politics-and-policy/democratic-states-sue-trump-administration-order-halt-funding-gender-a-rcna191257.

120. *See Litigation Tracker*, JUST SECURITY, at https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/ [https://perma.cc/FD9Q-PX2J] (visited March 7, 2025) (tracking 106 challenges to executive actions by the Trump Administration).

121. *See, e.g.*, Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015, 2031 (2019) ("Article III courts do not exist to resolve the policy disputes between governments."). *But see* Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023 (2017) (praising state suits as an aspect of the vertical separation of powers).

122. *See* Lemos & Young, *supra* note 100, at 106–09.

123. *See id.* at 113–17.

124. *See generally* Young, *State Standing*, *supra* note 72.

state has legal obligations to protect, educate, and provide certain other services—such as issuing a driver's license, in Texas—to all persons lawfully within its territory.[125] The Administration's allegedly unlawful expansion of that category of persons thus imposed costs on Texas that sufficed to establish injury for purposes of Article III standing.[126] Acknowledging that injury required no "special solicitude" for state plaintiffs, but rather a simple recognition that states have a broad range of responsibilities that may give rise to injuries when the legal environment changes.[127]

For good or ill, litigation has long been a part of our constitutional system of checks and balances. Congress has enacted statutes—such as the Klu Klux Klan Act and the Voting Rights Act—authorizing lawsuits by both the Justice Department and private individuals to check the unlawful exercise of state authority.[128] Suits under these provisions vindicate not only the voting rights of particular individuals but also the federal interest in fair voting procedures and the supremacy of federal law. Congress did not entrust these constitutional values to "political remedies" simply because the suits targeted the unlawful acts of institutional defendants. It is hard to think of a reason why converse suits, instituted by state governments to check unlawful *national* action, should be foreclosed where states can meet the ordinary requirements for standing and a cause of action.[129] In an era of congressional gridlock and increasingly adventurous exercises of executive authority by administrations of both parties, the role of state governments in enforcing the separation of powers has never been more vital.

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125. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (holding that the Fourteenth Amendment obligated Texas to provide public schooling to the children of undocumented immigrants).

126. *See* Texas v. United States, 809 F.3d 134, 155–62 (5th Cir. 2015), *aff'd by an equally-divided Court*, 579 U.S. 547 (2016).

127. *See id.* at 1900–02; *see also* Katherine Mims-Crocker, *Not-So-Special Solicitude*, 109 MINN. L. REV. 815 (2024) (demonstrating that courts frequently ignore any notion of "special solicitude" in state standing cases and, even when they purport to apply it, it never makes a dispositive difference).

128. *See* 42 U.S.C. § 1983; 52 U.S.C. § 10308(d).

129. *See* Young, *State Standing*, *supra* note 72, at 1910–21.

CONCLUSION

Perhaps in a world of strictly separated powers, horizontal separation among the branches of government could be kept separate from vertical separation between the nation and the states. But if that vision ever worked in practice, it has long since been overtaken by the development of governance at both levels. Madison anticipated that development by articulating a different vision of overlapping and mutually limiting institutions, and he included the states in that vision by emphasizing their agency in constituting the national government.

This essay has offered an account of how the demise of dual federalism in the mid-twentieth century brought states firmly into a world of concurrent federal and state jurisdiction in which checks and balances—not separation—define both horizontal and vertical separation of powers. In that world, horizontal separation of powers at the national level helps preserve vertical separation between the nation and the states, and the states likewise participate in the system of checks and balances at the national level. They participate, however, not as another branch or agency but as separate and complete governments, with their own constitutional structure and unique claims to democratic legitimacy. That separate and indefeasible existence, not any exclusive claim to some particular kernel of regulatory authority, is the core meaning of "state sovereignty" in our contemporary federal system. But because the states' governmental character makes them particularly effective participants in our pluralist system, the states' sovereignty enhances the stability of the system as a whole.