

# FEDERALISM IN CONSTITUTIONAL CONTEXT

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In *Printz v. United States*,<sup>1</sup> the Supreme Court articulated a doctrine of state autonomy that strictly barred Congress from unconditionally demanding that non-federal officials regulate private persons. I will discuss where *Printz* might fit in the larger constitutional context—in particular, how *Printz* might practically affect, and be affected by, the President's powers to execute the laws in the modern administrative state.

Briefly, I would like to make three points on the relationship between federalism and separation of powers. The first point is purely descriptive: I will suggest that state and local governments, which I will collectively call “non-federal governments,” frequently act as administrative arms of the federal government, carrying out federal laws with a great deal of discretion and very little federal executive oversight. *Printz* protects non-federal governments' practical ability to bargain for such discretion by allowing them to decline to implement federal statutes unless Congress accedes to their terms. The second point is normative: I suggest that the availability of the states to serve as a rival executive branch of the federal government, competing with the President and other federal executive officers for authority to implement federal statutes, usefully promotes separation of powers. In particular, such competition between federal and non-federal officials for implementation authority helps insure that federal laws are implemented by officials who are both faithful to the purposes of such laws yet independent from Congress. Finally, I will speculate about how state autonomy might practically affect, and be affected by, “presidential autonomy”—that is,

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1. 117 S. Ct. 2365 (holding that by demanding non-federal governments to administer background checks on prospective handgun purchasers in accordance with federal policy, Congress undermines the separation of powers).

constitutional doctrines that limit Congressional control over the federal executive branch. In particular, I will suggest that the practical value of state autonomy to state and local officials may depend on whether the President and other federal officials remain constitutionally insulated from congressional control.

### I. HOW STATES HAVE BECOME FEDERAL AGENCIES

First, consider a well-recognized fact: non-federal governments serve as agencies of the federal government by enforcing federal law with administrative actions and by promulgating regulations to fill the gaps in federal statutes. Moreover, it is common for federal executive officials to exercise only minimal oversight of such non-federal execution of federal law. In effect, state and local governments serve as a kind of "fourth branch" of the federal government, even more so than so-called independent federal regulatory agencies.

It was not always so. In the Nineteenth and early Twentieth centuries, the constitutional consensus, as expressed in the decisions of the United States Supreme Court, was that Congress could not delegate broad policy-making responsibilities to state governments. Beginning with *Gibbons v. Ogden*,<sup>2</sup> the Court curtly and without much explanation expressed such a view in the dicta of several opinions. Generally, however, the Court upheld federal delegation of power to states anyway, reasoning that such delegation involved narrowly defined administrative duties rather than "sovereign," non-delegable powers of Congress.<sup>3</sup> The Court finally struck down a federal statute as delegating excessive power to states for the first time (to my knowledge) in 1920, when the Court held in *Knickerbocker Ice Co. v. Stewart*<sup>4</sup> that Congress could not authorize states to enact workers'

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2. 22 (9 Wheat.) 1, 207 (1824) ("Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject") (emphasis added). See also *Wilkerson v. Rahrer*, 140 U.S. 545, 560-61 (1891) ("It does not admit of argument that congress can neither delegate its own powers, nor enlarge those of a state"); *United States v. Jones*, 109 U.S. 513, 518-19 (1883) (national government's "sovereign attributes" cannot "be transferred to a State").

3. See, e.g., *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905) (upholding federal delegation of power to state legislatures to regulate disposal of federal lands, because power is not "legislative character in the highest sense of the term" but rather deals with "minor matters").

4. 253 U.S. 149 (1920).

compensation statutes governing injuries in federal maritime jurisdiction. Justice McReynolds reasoned that, if Congress could delegate power over maritime matters to the states, then Congress "would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—it would defeat the very purpose of the grant [of power to Congress to regulate maritime matters]."<sup>5</sup>

The Court has never officially overruled *Knickerbocker Ice*, but two post-New Deal decisions insured that it would be relegated to desuetude. In *United States v. Sharpnack*,<sup>6</sup> the Court held that Congress prospectively could adopt state criminal laws to govern federal enclaves such as military bases; and, in *Prudential Insurance Co. v. Benjamin*,<sup>7</sup> the Court held that Congress could waive dormant-commerce-clause limits on state power and allow states to enact regulations of insurance that otherwise would violate the dormant-commerce-clause doctrine.<sup>8</sup> In other words, Congress can turn over what would otherwise be exclusively federal domains to state regulators if it chooses. Given these decisions, it is not surprising that the doctrine of *Knickerbocker Ice* has been ignored by the Court except to attract occasional ridicule from Justices who view it as a self-evidently obsolete doctrine.<sup>9</sup>

In short, it only has been in the last half-century that the Court has accepted the notion that the states can play a significant role in carrying out federal law. Moreover, it is fair to say that the Court has not fully explored the implications of cooperative federalism for the rest of its constitutional jurisprudence. Non-federal implementation of federal law has slipped into American constitutional practice with relatively little theoretical explanation or justification.

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5. *Id.* at 164.

6. 355 U.S. 286 (1958).

7. 328 U.S. 408 (1946).

8. *Id.* at 434.

9. See, e.g., John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 7 (1983) (attacking *Knickerbocker Ice* as an obsolete doctrine). Stevens attacked *Knickerbocker Ice* in *American Dredging Co. v. Miller*, 510 U.S. 443, 488 (1994) (Stevens, J., concurring) (noting that *Knickerbocker Ice* reached the "truly remarkable conclusion that even Congress could not authorize the States to apply their workmen's compensation laws in accidents subject to admiralty jurisdiction"). Without mentioning *Knickerbocker Ice*, Justice Black noted peremptorily in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 321 n.29 (1955), that the notion that a state law regulating maritime matters would be invalid even if authorized by Congress is "so lacking in merit that it need not be discussed".

There are two mechanisms by which non-federal governments become the agencies of the Congress: first, the Congress can hire state and local officials with federal grants-in-aid, and, second, the federal government can allow state or local law to displace federal regulation that would otherwise preempt such non-federal law if the non-federal law meets the standards established by Congress. These two mechanisms—the “carrot” of conditional grants and the “stick” of conditional preemption—are frequently used in tandem: Congress may allow non-federal governments to enforce its regulations only if they meet federal standards, and Congress may encourage non-federal governments to submit implementation plans by subsidizing the cost of implementation with federal grants.

Some commentators have suggested that non-federal governments have little power to bargain effectively with the federal government for implementing discretion when the federal government offers grants or threatens preemption.<sup>10</sup> There is, however, little evidence to support this view.<sup>11</sup> Contrary to popular belief, non-federal governments decline to apply for federal money when the conditions attached to the funds are too onerous.<sup>12</sup> It is plausible to believe that Congress, being aware of this possibility, is wary of imposing excessively costly conditions on federal grants that would discourage non-federal participation. Likewise, Congress is also conscious of its limited practical ability to preempt state enforcement with federal implementation of federal laws: federal implementation

10. See, e.g., RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 150-57 (1993); Lynn A. Baker, *Conditionall Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1935-39 (1995); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1989 SUP. CT. REV. 85, 100-01 (1989); William Van Alstyne, “*Thirty Pieces of Silver*” for the Rights of Your People: *Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL’Y 303, 307-10 (1993).

11. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 858-65 (1998).

12. For instance, less than half of the states have submitted plans to implement OSHA, even though the federal government heavily subsidizes such implementation. See 29 U.S.C. § 672(f)-(g) (1994); 29 C.F.R. §§ 1950-51 (1994), removed by 61 Fed. Reg. 9228, 9255 (1996); 29 C.F.R. § 1952 (1997); *Current Status of State Approved Plans*, 1 EMPL. SAFETY & HEALTH GUIDE (CCH) pp 5300-5840 (1996). Even when States accept the conditions tied to federal funds, they do so knowing that the federal government lacks adequate means by which to enforce those conditions. The requirement that states enact a 55-mph speed limit to obtain federal highway money is a case in point: several states—notably, Idaho and Montana—never seriously enforced the speed limit. See, e.g., Ashutosh Bhagwat, *Three Branch Monte*, 72 NOTRE DAME L. REV. 157, 175-76 n.100 (1996).

requires bureaucrats and other resources that Congress might simply lack.<sup>13</sup> The notion, in short, that conditional grants or conditional preemption gives Congress unlimited power to use state governments is probably incorrect. Rather, non-federal governments have the capacity to bargain hard for more implementing discretion or more federal money, or both, when they enlist to implement federal programs.<sup>14</sup>

In sum, one can regard systems of cooperative federalism as akin to the regime installed by the Articles of Confederation: Congress enacts general policies, and state and local governments carry them out. The text of the Constitution and Supreme Court precedents say relatively little about how such a system ought to operate, but non-federal implementation of federal law persists despite such absence of a constitutional framework, simply because of its practical advantages.

## II. HOW COOPERATIVE FEDERALISM PROTECTS SEPARATION OF POWERS

But what exactly are the *constitutional* advantages of a system of cooperative federalism? In particular, how does it fit into our constitutional regime of separation of powers?<sup>15</sup> Here, I will sketch the outlines of a normative argument that the possibility of cooperative federalism makes it easier to accomplish two goals of the "separation of powers" doctrine: 1) faithful execution of the laws; 2) by officials who are independent of Congress.<sup>16</sup> This account will be necessarily

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13. For example, in the early seventies the Environmental Protection Agency ("EPA") wanted to impose a transportation plan on California. Governor Jerry Brown refused to comply and challenged the EPA to preempt his decision with its own implementation plan. The EPA knew that it simply did not have the manpower and technical know-how to impose a serious transportation plan on millions of angry commuters in Southern California. The EPA immediately backed down because there was no conceivable way it could implement the plan without California's assistance and cooperation. See JAMES E. KRIER & EDMUND URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975* 233 (1977) (discussing *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975)). For other examples of failed federal efforts to install preemptive federal regulatory schemes, see Hills, *supra* note 11 at 868-69.

14. See generally Helen Ingram, *Policy Implementation Through Bargaining: The Case of Federal Grants-in-Aid*, 25 PUBLIC POLICY 499 (1977).

15. This is a question asked with particular acuity by Professor Evan Caminker in *The Unitary Executive and State Administration of Federal Law*, 45 U. KA. L. REV. 1075 (1996).

16. I will assume that the principle of separation of powers requires both fidelity and independence. If executive officials were not faithful to the spirit and letter of the

suggestive and incomplete: my goal is merely to suggest a possible connection between the notions of cooperative federalism and the duties of fidelity and independence that are at the core of any theory of separation of powers.<sup>17</sup>

The argument has two points. First, cooperative federalism helps Congress insure the faithful execution of the laws by depriving the President and the federal bureaucracy of a monopoly on implementation power. Congress can exploit competition between federal agencies and non-federal governments to insure that neither betrays the purposes of federal law. Second, given that the autonomy of state and local officials is protected under *Printz*, this extra degree of fidelity is not purchased at the expense of independence: these non-federal officials will remain independent of Congress and cannot be manipulated by Congress in ways that threaten the separation of powers implied by Article II of the Constitution.

#### *A. Achieving Faithful Execution of the Laws Through Cooperative Federalism*

First, consider how Congress' ability to bypass federal executive officials and turn federal money over to non-federal politicians might help insure that federal programs are implemented in ways consistent with Congress' beliefs and values. The main distinction between the federal executive branch and non-federal governments is the greater density of elected politicians in the latter: the federal executive is controlled by only two elected officials—the President and Vice President—whereas non-federal governments are controlled by roughly a half million elected politicians, including mayors, governors, county commissions, city councils, and state legislators. Therefore, one might expect that, when Congress

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statutes that they execute, they would be usurping the legislative prerogative to establish the basic policies of the nation. If such officials were not independent from Congress, however, then the legislative branch would usurp the executive independence. Thus, Congress cannot appoint or fire (except through impeachment) executive officials, and Congress also might be barred from insulating some executive officials from removal by the President. *See Morrison v. Olson*, 487 U.S. 654, 689-90 (1988) (suggesting that some limits on President's removal powers may violate concept of separation of powers); *Myers v. United States*, 272 U.S. 52 (1926) (invalidating a law requiring the consent of the Senate for the President to dismiss a postmaster).

17. My argument will tend, therefore, to disagree with scholars who believe that cooperative federalism can be constitutionally questionable. *See, e.g., Joshua Sarnoff, Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997).

opts for greater control of federal money by non-federal governments, it does so because it distrusts the institutional incentives of loosely supervised appointed policy experts that staff the federal government. By contrast, when Congress gives federal agencies greater power to supervise how non-federal governments expend federal funds, Congress does so because it places greater trust in the incentives of appointed policy experts to adhere to Congress' goals. The ability to choose one or the other type of institution increases Congress' power to insure faithful execution of its laws.

To illustrate how Congress' power to use non-federal governments provides Congress with a weapon with which to discipline the federal bureaucracy, consider the controversy over "community action agencies" (CAAs)—private, non-profit organizations that assisted low-income households' achievement of economic security and independence—created by the Economic Opportunity Act<sup>18</sup> (EOA) during the late 1960s. The theory underlying "community action" was that the poor would be motivated to overcome poverty through opportunities for social and political leadership. By giving the poor "maximum feasible participation" in the formulation of poverty policy, officials in President Lyndon B. Johnson's administration like Sargeant Shriver, Jack Conway, and Sanford Kravitz believed that "community action" would instill low-income persons with a sense of confidence and self-esteem that would motivate them to overcome poverty.<sup>19</sup> Based on these assumptions, the EOA bestowed federal funds on CAAs and required that low-income persons be given

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18. See Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 201, 78 Stat. 508, 516 (1964) (repealed 1981).

19. The theory of the CAA drew its inspiration from Lloyd Ohlin's and Richard Cloward's theory of juvenile delinquency, which maintained that youth from low-income households became delinquents because of their frustration at being denied opportunities for middle-class advancement. The President's Committee on Juvenile Delinquency was heavily influenced by the Mobilization for Youth program and the Cloward-Ohlin thesis of delinquency. See PETER MARRIS & MARTIN REIN, *DILEMMAS OF SOCIAL REFORM: POVERTY AND COMMUNITY ACTION IN THE UNITED STATES* 19-20 (2d ed. 1972); DANIEL P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION AND THE WAR ON POVERTY* 45-60 (1969). See also, FRED SIEGEL, *THE FUTURE ONCE HAPPENED HERE: NEW YORK, D.C., L.A., AND THE FATE OF AMERICA'S BIG CITIES* 52-55 (1997) (describing Richard Cloward's influence on the operations of the Office of Economic Opportunity). For an in-depth treatment of the Cloward-Ohlin thesis see generally, LLOYD OHLIN & RICHARD CLOWARD, *DELINQUENCY AND OPPORTUNITY* (1960).

"maximum feasible participation" in the governance of such CAAs.

But "community action" quickly became embroiled in enormous controversy. State and local officials disliked the notion that federal money would bypass them and go to some private persons over whom they had no control and whose motives they distrusted.<sup>20</sup> In reaction to the CAAs' perceived radicalism, the U.S. Conference of Mayors appointed a delegation led by Mayor Richard Daley of New York to complain to Vice President Hubert Humphrey and Office of Economic Opportunity (OEO) Director Sargent Shriver that the CAAs needed to be brought under the control of established local governments. Shriver, however, resisted the mayors' efforts to gain control over the CAAs.<sup>21</sup>

In the Fall of 1967, Congress joined the fray by enacting an amendment sponsored by Edith Green, a Democratic representative from Oregon, giving local governments control over the appointment of CAA boards. The vigorous floor debate over the Green Amendment and re-authorization of the EOA revealed deep congressional distrust of Sargent Shriver, the OEO, and, more generally, the federal policy professionals responsible for the War on Poverty and the idea of community action. Members of Congress expressed this distrust in specific accusations.<sup>22</sup> But the suspicion went beyond such specifics to a more general congressional hostility towards (in one member's words) "a poverty cult . . . composed of intellectuals from every social science discipline" who were undermining traditional

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20. This distrust of professional politicians was exacerbated by the tendency of some CAAs—notably, the Mobilization for Youth program in New York City and the community action agency of Syracuse, New York—to adopt confrontational tactics such as rent strikes against public housing authorities or printing leaflets calling for demonstrations. See MOYNIHAN, *supra* note 19 at ch.6; DAVID M. WELBORN & JESSE BURKHEAD, *INTERGOVERNMENTAL RELATIONS IN THE AMERICAN ADMINISTRATIVE STATE: THE JOHNSON PRESIDENCY* 69 (1989). Politicians were especially alarmed by the voter registration campaigns conducted by some CAAs, protesting (not without reason) that the campaigns were motivated by the desire to enroll as many of their political opponents as possible on to the rolls. See 115 CONG. REC. 28,020 (1967) (remarks of Rep. Murphy and Rep. Scott).

21. DAVID M. WELBORN & JESSE BURKHEAD, *supra* note 20, at 69-71 (1989).

22. For instance, representatives charged that Sargent Shriver had discouraged the recital of the pledge of allegiance to the flag in schools receiving EOA funds, see 115 CONG. REC. 32,683 (1967) (remarks of Rep. Quillen), and that the OEO had encouraged riots and paid for the legal defense of rioters. See *id.* at 32,656 (1967) (remarks of Rep. Gurney).

values of discipline and education.<sup>23</sup> In particular, members repeatedly denounced the OEO for allowing federal funds to be “used . . . to develop a political power block” and “force political, economic, and social changes in the community.”<sup>24</sup>

The Green Amendment was a product of this suspicion towards the ideological assumptions of federal administrators. The supporters of the Green Amendment argued that, by placing the CAAs under the control of politicians who were subject to electoral pressures,<sup>25</sup> the Green Amendment would insure that the program would earn “public acceptance and greater public support.”<sup>26</sup> Bypassing federal administrators was a way in which Congress could insure fidelity to federal goals without micro-managing the policy choices of the implementing agency, and because non-federal governments were under closer control of politicians subject to electoral pressures, Congress felt that it could trust cities and states more than Sargent Shriver and the OEO.

I do not mean to suggest that Congress always achieves fidelity to its policies by favoring non-federal politicians over federal executive officials. The opposite is often the case. Sometimes Congress achieves fidelity to its policies by subordinating non-federal officials to the control of agency specialists who are immune from local electoral pressures. For instance, it is a familiar point that non-federal politicians have strong incentives to use federal grants for local economic development, even when Congress intends such funds to be used to assist low-income households.<sup>27</sup> To prevent this abuse

23. *Id.* at 32,703 (1967) (remarks of Rep. Williams). Opponents of the Green Amendment argued that, by turning over the program to the mayors, the Congress would give control over federal money to “Tammany Hall,” the “smoked-filled rooms . . . and political clubhouses” that would “completely submerge community groups and the poor.” *Id.* at 32,637 (remarks of Rep. Hawkins and Rep. Reid).

24. *Id.* at 32,703 (1967) (remarks of Rep. Broyhill). *See also id.* at 28,020 (1967) (remarks of Senator Scott) (criticizing the OEO for running its voter registration program in a partisan manner); *Id.* at 28,026 (1967) (remarks of Senator Cooper) (reporting that some VISTA volunteers incorrectly believed that their chief function was to arouse the poor politically rather than correct the circumstances that caused poverty); *Id.* at 28,021 (1967) (remarks of Senator Murphy) (arguing that a non-partisan voter registration drive can develop into partisan operation and that OEO funds would be better spent on educational and job development services).

25. *Id.* at 32,641-42 (remarks of Rep. Dent).

26. *Id.* at 32,645 (remarks of Rep. Albert).

27. The classic statement of these state and local incentives to avoid redistribution of wealth is PAUL E. PETERSON, *CITY LIMITS* (1981). *See also* PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 27-34 (1995) (explaining pressures on state and local governments to

of Congress' purposes, Congress can give appointed agency experts greater control over the federal program.<sup>28</sup>

Such a strategy differs from the Green Amendment in that it expresses distrust of non-federal politicians' incentives and trust of appointed policy experts. But, in a more general sense, the strategy of giving more control to agency experts resembles the strategy of the Green Amendment in its emphasis on choosing institutions rather than specific policies. Rather than attempting to micro-manage implementation of federal policy, these methods select institutions with the institutional culture that Congress wants to encourage. More generally, Congress can achieve fidelity to the spirit of federal laws by playing non-federal and federal governments off against each other, favoring one or the other based on whether Congress wishes to encourage the "expert" or "populist" institutional "style." Congress can discipline either type of organization—federal agency or non-federal politicians—by threatening to replace one with the other if it misbehaves.<sup>29</sup>

### *B. Achieving Independent Execution of the Laws Through Cooperative Federalism*

The beauty of cooperative federalism, from a constitutional perspective, is that it gives Congress a way to achieve the faithful execution of the laws that minimally compromises the independence of the executive officials from Congress. In this sense, cooperative federalism is more sensitive to the values of separation of powers than more traditional methods of congressional oversight over the execution of the laws.

To understand this point, consider how Congress might

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avoid redistribution of wealth to low-income households). It is commonplace that these incentives lead state and local officials to use federal grants for non-redistributive purposes, even when such grants are intended to benefit low-income households. For instance, Senator William Proxmire held hearings to denounce local politicians' habitual diversion of Community Development Block Grant money from assistance of low-income neighborhoods to economic development. For an account of such hearings, see MICHAEL J. RICH, *FEDERAL POLICYMAKING AND THE POOR: NATIONAL GOALS, LOCAL CHOICES, AND DISTRIBUTIONAL OUTCOMES* 341-42 (1993).

28. See PAUL E. PETERSON, BARRY G. RABE, & KENNETH K. WONG, *WHEN FEDERALISM WORKS* 189 (1986) (noting that "federal redistributive programs are implemented more successfully if they can be buried within the routines of established organizations controlled by professionals who are well-removed from local political pressures").

29. Cf. SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 137-51 (1978). Rose-Ackerman asserts that the best way to avoid corruption is to create redundancy in executive officials; when multiple officials provide the same service, the competition between them makes the taking of bribes more difficult.

attempt to monitor federal agency behavior without using cooperative federalism. Congress, as a whole, obviously cannot monitor the thousands of agency actions that dozens of federal agencies take every year. Therefore, close supervision of federal agencies practically requires that Congress devolve enormous discretion to individual congresspersons, such as subcommittee chairs, who then insure that agencies within their subcommittee's jurisdiction comply with federal standards. But subcommittees' close supervision of agencies gives individual congresspersons the opportunity to meddle with agencies' specific decisions in order to benefit key constituents or their congressional districts. Congresspersons may exert informal pressure through telephone calls, subcommittee hearings, appropriations riders, etc., to engage in casework for individual constituents seeking favorable action on government benefits or to target federal money to specific congressional districts. One might argue that this sort of meddling by individual congresspersons in specific agency actions is objectionable on general grounds of policy.<sup>30</sup> But, apart from policy, it makes a mockery of the notion that the legislative branch ought not to control the execution of the laws.<sup>31</sup>

By contrast, when Congress delegates regulatory power to state and local governments, it is much harder for individual congresspersons to exert such informal influence over state and local officials. Such officials either are themselves elected politicians (mayors, governors, and so forth), or they are controlled by elected politicians. Unlike federal agency officials, these non-federal politicians have several institutional incentives to resist individual congresspersons' efforts to meddle with the implementation of the laws. First, non-federal politicians are less vulnerable to congressional appropriation riders, because they have a separate source of funds (namely, state and local taxation). Second, non-federal politicians, unlike federal agency officials, have electoral incentives to steal credit

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30. See generally Bruce CAIN, JOHN FERREJOHN, & MORRIS FIORINA, *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* (1987); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

31. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 50-55 (1995) (explaining how Congress can interfere with the executive role through legislative oversight hearings, the appropriations process, and Senate confirmation hearings).

from federal congresspersons for expenditures of federal money within their electoral district.<sup>32</sup> Third, non-federal politicians frequently are political rivals of their congressional delegation who relish the chance to stage a public showdown against congresspersons.<sup>33</sup> Therefore, it is much more difficult for individual subcommittee chairs to pressure a governor, a state legislature, or mayor—not to mention the National Conference of State Legislatures, the National League of Cities, the National Conference of Mayors, or the National Governors Association—than it is for a subcommittee chair to pressure, say, a field office chief or regional director for a federal agency.

This independence of non-federal governments from Congress, however, depends entirely on the doctrine of state autonomy expounded in *Printz*. If Congress could force state and local governments to carry out federal programs, then Congress could also bar governors and mayors from interfering with state and local agencies' efforts to enforce federal law. In effect, Congress could liberate appointed state and local officials from the control of elected politicians like mayors and governors, fund such ostensibly non-federal agencies with federal grants, and thereby insure that the state or local agency remained fully responsive to individual congresspersons who chaired the subcommittees that controlled the flow of federal grant revenue. Governors, mayors, and other political generalists would be the titular heads of the non-federal agencies, but, in practical effect, they would lose control over these institutions.

Such a regime, popularly known as "picket fence federalism" in the jargon of intergovernmental relations aficionados,<sup>34</sup> destroys the independence of non-federal governments from

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32. TIMOTHY CONLAN, FROM NEW FEDERALISM TO REVOLUTION: 25 YEARS OF INTERGOVERNMENTAL REFORM 41-2 (1998) (describing congressional opposition to block grants as rooted in desire of Congress to take credit for federal spending).

33. Donald Haider once cited "Eggers law" specifying that a senator's contempt for the governor of his or her state is equal and opposite to the contempt of the governor for the senator from that state. DONALD HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING 98-101 (1974). For an account of some famous rivalries between Senators and Governors from the same state, see JAMES PATTERSON, THE NEW DEAL AND THE STATES 84-90 (1969) (describing struggles to control federal grant revenue between Governor Chandler and Senator Alben Barkley (Kentucky) and Governor Johnson and Senator Edward Costigan (Colorado)).

34. TERRY SANFORD, STORM OVER THE STATES 80 (1967).

Congress and thereby undermines federal separation of powers. By cutting out the non-federal elected politician, picket fence federalism cuts out the actor who has the greatest incentive to prevent individual congresspersons from micromanaging the agency's operations. *Printz* is important because it prevents Congress from shunting aside non-federal elected politicians without their consent.<sup>35</sup> In this sense, Justice Scalia is perfectly correct to argue as he did in *Printz* that the doctrine of state autonomy is essential to insure that cooperative federalism does not undermine the doctrine of separation of powers.<sup>36</sup>

### III. HOW SEPARATION OF POWERS MAY PROTECT FEDERALISM

I wish to conclude with a purely speculative point, for which I will claim the prerogative of a symposium participant to dispense with the usual demands of student law review editors of support with excessive footnotes. The point is that the value of state autonomy to state governments may be heavily dependent on the Court's willingness to enforce doctrines of separation of powers against Congress. Put another way, state autonomy may depend on presidential autonomy.

Why? One might speculate that Congress will be willing to use non-federal governments to execute federal programs just so long as Congress believes that it gains better control over the implementation of federal law by using the states and local governments rather than federal agencies and field offices. In the case of the Green Amendment, for instance, Congress turned the Community Action program over to the mayors and governors because of its greater distrust of OEO officials such as Sargent Shriver. If Congress could maintain total control over the federal agencies without using the states, then one might guess that it would do so. After all, as noted above, autonomous state and local politicians can be an insufferable thorn in Congress' side: they hog the limelight when federal

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35. Of course, Congress can purchase such consent by making federal grants conditional on state and local politicians relinquishing political control over the state and local agencies that handle the federal grants. But such a purchase will cost Congress plenty: governors and mayors will decline the grant unless it is large enough to compensate them for the loss of political influence that the grant condition imposes on them. See Part I *supra* for a discussion of this point.

36. *Printz v. United States*, 117 S. Ct. 2365, 2378 (1997).

pork is channeled through non-federal governments; they deprive individual congresspersons of opportunities for casework; they loudly complain about unfunded federal mandates; and they threaten to turn down federal grants unless Congress gives them more political control over the programs funded by the grants. But for the fact that federal agencies can be even more unsympathetic to congressional policies, it is difficult to see why Congress bothers to use state and local governments at all.

In other words, congressional willingness to use non-federal governments to implement federal programs is a direct function of the alternatives available to Congress. In particular, one might speculate that, if Congress could deprive the President of effective control over executive agencies and instead give itself (through subcommittees) the effective power to manipulate specific decisions by federal agencies, then one might think that Congress would have no need to bargain with the States. Why would Congress negotiate with belligerent, recalcitrant, electoral rivals like governors and mayors when it has pliable federal agencies to do its bidding? For example, if Congress could simply have sacked Sargent Shriver and staffed the OEO with its own selected persons, it is unlikely that Congress would have so willingly deferred to the wishes of Mayor Richard Daley in the Green Amendment.<sup>37</sup>

Constitutional doctrines that deprive the Congress or its subcommittees of this sort of power, therefore, indirectly promote the value of state autonomy by increasing Congress' willingness to accept state implementation. The Court bars Congress from (1) firing or hiring the personnel of federal

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37. It is sometimes asserted that Congress might still delegate powers of federal programs to non-federal governments to insulate itself from the voters' hostility if the programs turn out to be unpopular: on this theory, the voters will blame the states rather than Congress for the perceived failure of the program. See, e.g., Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 285 (1990). According to Macey, "deferring a controversial regulatory matter to the states may insulate Congress from political fallout even more effectively than turning the matter over to an administrative agency," because "Congress is perceived as having more control over the actions of administrative agencies than of state legislatures." Macey cites nothing whatsoever as support for this statement. Moreover, there is no reason to believe that Congress cannot achieve precisely the same electoral insulation simply by using independent regulatory agencies, which, after all, lack electoral incentives to embarrass Congress with complaints about unfunded mandates.

agencies;<sup>38</sup> (2) insulating *all* federal executive officials from presidential removal;<sup>39</sup> or (3) exercising a one-house veto of specific executive agency decisions.<sup>40</sup> These doctrines all lessen Congress' powers to control the federal executive branch: they promote some degree of presidential and bureaucratic autonomy from Congress. Therefore, they make Congress all the more willing to allow states and local governments to carry out federal law. By contrast, constitutional doctrines that did not deny such powers to Congress also would give Congress greater incentive to bypass the non-federal governments and implement federal law with federal agencies alone: state autonomy would then truly become an empty boon to the states, for they would have autonomy to do precisely nothing, as the Congress federalized more regulatory fields without giving them any role to play. In short, just as separation of powers depends on state autonomy, one also can argue that state autonomy's value depends on separation of powers. In our regime, the doctrines are inextricably linked to each other.

#### IV. CONCLUSION

The point of this discussion is to suggest how federalism in constitutional context requires attention to the doctrine of separation of powers. Once one realizes that non-federal governments play a role in executing federal law (as suggested in Part I), one must ask whether such a role is consistent with our regime of separated powers. And, once one sees how our current practice of cooperative federalism might help advance such a regime of separated powers (as I argue in Part II), one must go further and ask whether the regime of separated powers helps advance the doctrine of federalism and state autonomy. As I suggest (but certainly do not prove) in Part III, it is quite possible that both doctrines—separation of powers and state autonomy—have practical value only if one accepts both simultaneously. The most interesting future research on

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38. See *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress can not reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment).

39. See *Morrison v. Olson*, 487 U.S. 654 (1988); *Myers v. United States*, 272 U.S. 52 (1926).

40. See *INS v. Chadha*, 462 U.S. 919 (1983) (holding that resolution by one house to veto an order by an executive branch official is essentially a legislative act and as such is unconstitutional and not in conformity with U.S. CONST. art. I, § 7).

the topic of constitutional federalism, I believe, will have to treat constitutional structure as a seamless web by examining precisely this question.