

# THE YALE LAW JOURNAL

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## Uncooperative Federalism

**ABSTRACT.** This Essay addresses a gap in the federalism literature. Scholars have offered two distinct visions of federal-state relations. The first depicts states as rivals and challengers to the federal government, roles they play by virtue of being autonomous policymakers outside the federal system. A second vision is offered by scholars of cooperative federalism, who argue that in most areas states serve not as autonomous outsiders, but supportive insiders—servants and allies carrying out federal policy. Legal scholarship has not connected these competing visions to consider how the state’s status as servant, insider, and ally might enable it to be a sometime dissenter, rival, and challenger. The literature has not developed a vocabulary for describing how states use regulatory power conferred by the government to resist federal policy, let alone a full account of the implications of this practice. It has thus neglected the possibilities associated with what we call “uncooperative federalism.” In this Essay, we provide an initial descriptive and normative account of this undertheorized aspect of our federalism. We also explore what a strong commitment to uncooperative federalism would mean for the doctrines on commandeering and preemption, offering some counterintuitive conclusions about the ways in which weakening the protections for state autonomy might push states to engage in stronger forms of dissent.

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## ESSAY CONTENTS

INTRODUCTION	1258
<b>I. UNCOOPERATIVE FEDERALISM IN THEORY AND PRACTICE</b>	<b>1260</b>
A. Uncooperative Federalism in Theory: The Power of the Servant	1265
1. Dependence	1266
2. Integration	1268
3. Two Masters	1270
B. Uncooperative Federalism in Practice	1271
1. Licensed Dissent: Welfare to Work	1274
2. Taking Advantage of a Regulatory Gap: The Clean Air Act	1276
3. Civil Disobedience: The Patriot Act	1278
<b>II. IS UNCOOPERATIVE FEDERALISM VALUABLE?</b>	<b>1284</b>
A. Uncooperative Federalism Versus the Autonomy Model	1285
1. The Administrative Safeguards of Federalism	1285
2. Agenda Setting	1287
3. Dissent as an Act of Affiliation	1288
4. Accountability	1289
B. Uncooperative Federalism Versus the Political Safeguards of Federalism	1292
1. The Ex Post Safeguards of Federalism	1292
2. Dissenting by Deciding	1293
<b>III. DOCTRINAL IMPLICATIONS</b>	<b>1295</b>
A. Commandeering	1295
B. Preemption	1302
CONCLUSION	1307

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**INTRODUCTION**

Federalism scholarship offers two distinct visions of federal-state relations. The dominant vision depicts states as rivals and challengers to the federal government—a role they play by virtue of being autonomous policymakers outside the federal system. A second vision is offered by scholars of cooperative federalism, who argue that the dominant vision ignores the substantial portions of “Our Federalism,”<sup>1</sup> in which states are not autonomous policymakers but instead carry out federal programs. As the moniker suggests, scholars of cooperative federalism argue that states should serve not as autonomous outsiders, but supportive insiders—servants and allies to the federal government.

What is puzzling is that we rarely try to connect these competing visions and imagine how the state’s status as servant, insider, and ally might enable it to be a sometime dissenter, rival, and challenger. It is as if the state’s identity changes as it crosses from the territory of dual federalism to the terrain of joint regulation. When states are challenging federal power, we tend to depict them as autonomous sovereigns. When states are implementing federal mandates, we generally think they should act as cooperative servants. We have not, in short, fully explored the possibilities associated with what we call *uncooperative federalism*.<sup>2</sup>

Uncooperative federalism occurs when states carrying out the Patriot Act refuse to enforce the portions they deem unconstitutional, when states

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1. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

2. It appears that four legal commentators have used this term before, with three mentioning it only in passing and in the process of complaining about the notion, and none offering anything akin to the normative and doctrinal framework we offer here. See Jackson B. Battle, *Transportation Controls Under the Clean Air Act—An Experience in (Un)cooperative Federalism*, 2 LAND & WATER L. REV. 1 (1980) (describing state resistance to federal transportation controls and outlining strategies for pushing states to comply); Kirk W. Junker, *Conventional Wisdom, De-Emption and Uncooperative Federalism in International Environmental Agreements*, 2 LOY. U. CHI. INT’L L. REV. 93, 96 (2004) (arguing that the United States should use “de-emption” to allow states to sign international environmental agreements); Thomas O. McGarity, *Regulating Commuters To Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521, 1625 (1996) (warning that state resistance to clean air requirements jeopardizes progress made in this area); Karen Bridges, Note, *Uncooperative Federalism: The Struggle over Subsistence and Sovereignty in Alaska Continues*, 19 PUB. LAND & RESOURCES L. REV. 131 (1998) (describing Alaskan resistance to federal hunting and fishing regulations and proposing greater deference to Alaskan citizens). Following the lead of Nestor Davidson, see Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007), we might speculate about the possibilities associated with “uncooperative localism” as well.

implementing federal environmental law use that power to push federal authorities to take a new position, or when states relying on federal funds create welfare programs that erode the foundations of the very policies they are being asked to carry out. We see examples of uncooperative federalism in such varied arenas as immigration, healthcare, and education. In each of these fields, states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.

Most legal scholars are likely to be aware of this type of resistance, or at least unsurprised that it might occur. That makes the scholarly neglect of this topic all the more surprising. While uncooperative federalism occurs regularly within our federal system, we do not have a vocabulary for describing it, let alone a fully developed account of why it happens, what it means, and what implications it holds for the doctrinal debates in which federalism scholars routinely engage.<sup>3</sup>

The goal of this Essay is to provide an initial account of this undertheorized aspect of our federalism and to begin sketching a general theory about the relationship between the power of the sovereign and the power of the servant. We hope to convince readers that a sensible account of federalism ought to recognize that uncooperative federalism occurs in practice and to acknowledge that there are values associated with the phenomenon. In the process, we offer a new read on two of the most controversial strands of federalism doctrine—commandeering and preemption. While the Supreme Court has condemned commandeering and favored preemption, a strong commitment to the idea of uncooperative federalism would suggest that the Court has it wrong on both counts. Our doctrinal analysis also leads to a counterintuitive conclusion: while proponents of state resistance generally insist that autonomy is necessary for states to challenge the federal government, it may be that forcing states into the role of federal servants ultimately does more to foster state-centered dissent. To borrow from Albert Hirschman, uncooperative federalism values a state's voice options over its exit options.<sup>4</sup>

Two brief caveats are in order. First, the goal of this Essay is not to offer a single, authoritative account of federalism or to displace existing theories about federalism's purpose. We simply wish to foreground a set of underappreciated dynamics in our current practice and to describe the intriguing possibilities associated with state contestation when it takes place outside the terrain where

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3. Even the scholars who have thought about what we call the power of the servant have largely ignored the ways in which that power might be deployed to contest federal policy. See *infra* text accompanying notes 123-124.
  4. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

most imagine it occurs. We thus do not take on every claim about the value of autonomy in a federal scheme, but insist only that autonomy is not a necessary precondition for effective state contestation. Second, because most of the potential costs associated with state contestation have already been identified by scholars with a nationalist bent, we focus on the affirmative case for the role that uncooperative federalism can play in a well-functioning federal system. By this focus we do not mean to suggest that contestation will always be desirable; we merely argue that the benefits of uncooperative federalism have not been fully appreciated within the literature.

Part I explains why uncooperative federalism should occur in theory and describes what it looks like in practice. We analyze the three main sources of the servant's power and offer several case studies of uncooperative federalism in action. Having described the phenomenon and its root causes, we argue in Part II that uncooperative federalism offers a number of advantages over other forms of state-centered dissent. It promotes contestation and debate in the vast swaths of state-federal interactions now delineated as "cooperative federalism." It supplements the well-recognized political safeguards deployed before a statute or regulatory scheme is enacted with a set of *ex post* strategies for challenging federal policy. It helps would-be dissenters set the agenda, challenge federal policy from the inside, and build a real-world example of their views within the interstices of the federal scheme. Uncooperative federalism may even help make state and federal officials more accountable to their constituents. Part III shows that, if we value uncooperative federalism, we ought to think differently about bread-and-butter doctrinal issues like commandeering and preemption. A strong commitment to uncooperative federalism would push courts to favor commandeering and to rein in preemption—precisely the opposite of the Supreme Court's current stance. The Essay concludes by discussing some of the broader implications of our project.

## I. UNCOOPERATIVE FEDERALISM IN THEORY AND PRACTICE

As with many vaguely defined constitutional mandates, we need a set of mediating principles to translate "Our Federalism" into manageable legal doctrine.<sup>5</sup> Without an understanding of what purposes federalism serves, we

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5. For surveys of these arguments, see, for example, DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 107-40 (1995); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 *VAND. L. REV.* 1229 (1994); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 *MICH. L. REV.* 752 (1995); Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317 (1997); and Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. CHI. L. REV.* 1484 (1987).

cannot resolve disputes about how federalism should work. In describing federalism's intermediary principles, scholars toggle between two quite different visions of the state. Most theories of federalism rest upon an autonomy model that depicts states as sovereign policymaking enclaves, able to regulate separate and apart from federal interference. State autonomy helps create laboratories of democracy,<sup>6</sup> diffuse power,<sup>7</sup> foster choice,<sup>8</sup> safeguard individual rights,<sup>9</sup> and promote vibrant participatory opportunities for citizens.<sup>10</sup> So central is the notion of autonomy to most theories of federalism that Adam Cox has suggested that the mere perception that states are not autonomous might undermine their power.<sup>11</sup>

The emphasis on autonomy is particularly pronounced in a line of scholarship depicting the states as dissenters. Academics like Ernest Young and Matthew Porterfield argue that states represent an important locus for dissent and suggest that federalism doctrine should be construed to protect states' role as dissenters, much as the First Amendment protects individuals who speak against their government.<sup>12</sup> Indeed, several scholars have proposed that states should receive something akin to a First Amendment right to use their

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6. *E.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see, e.g.*, *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in part and dissenting in part); SHAPIRO, *supra* note 5, at 103; Amar, *supra* note 5, at 1233-36; McConnell, *supra* note 5, at 1498-99.
  7. *See, e.g.*, Amar, *supra* note 5, at 1236-40.
  8. This notion, which builds on the work of Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), is nicely explained by Michael McConnell. *See* McConnell, *supra* note 5, at 1494.
  9. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).
  10. *See, e.g.*, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 7 (1988); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 58-59 (2004).
  11. Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1312 (2000) ("I suggest that the anti-commandeering rule might serve to protect the capacity of the states to act as political counterweights to the federal government by preserving and reinforcing public perception of the states as credible alternative political institutions.").
  12. Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1 (1999); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1288-91, 1295-1301 (2004). In a different context, Akhil Amar has argued that states, like individuals, "must be free to speak out," drawing upon American history to show the ways in which states have played an important role in challenging slavery and other shameful practices. Akhil Reed Amar, Op-Ed., *A State's Right, a Government's Wrong*, WASH. POST, Mar. 19, 2000, at B1.

lawmaking powers to challenge national policies.<sup>13</sup> In a sense, this account simply extends the zone of the state's autonomy outside its usual bounds.

Scholars of cooperative federalism have advanced the main competitor to the autonomy model.<sup>14</sup> Given the array of regulatory programs "that invite state agencies to implement federal law," cooperative federalism scholars argue that it is a mistake to "view[] each jurisdiction as a separate entity that regulates in its own distinct sphere of authority."<sup>15</sup> These scholars emphasize integration, not autonomy; their version of federalism is aptly nicknamed "marble cake federalism" (in contrast to dual federalism's "layer cake" of clearly delineated state and federal realms of power). And they generally argue that states should serve not as rivals or challengers to federal authority, but as faithful agents implementing federal programs. Indeed, while these scholars are well aware that servant states can resist federal mandates, they tend to

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13. See Porterfield, *supra* note 12, at 23-48; cf. Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMP. L. REV. 813 (1989) (looking to the First Amendment to shield state efforts from challenge under the Foreign Affairs Clauses). Young, who offers a thoughtful analysis of the pros and cons of this approach, tentatively suggests that states might be granted a narrower First Amendment right than individuals, though he closes by observing that the anticommandeering doctrine may offer a more "workable accommodation of state and local expressive interests." Young, *supra* note 12, at 1295-1301. Others have considered the possibility of a First Amendment right for states outside the context of federalism debates. See, e.g., Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1258-66 (1991); David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006).
  14. See, e.g., DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 162 (2d ed. 1972); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES (1966); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, in COMPETITION AMONG STATE AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 87 (Daphne A. Kenyon & John Kincaid eds., 1991) [hereinafter COMPETITION AMONG STATE AND LOCAL GOVERNMENTS]; Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344 (1983); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001) [hereinafter Weiser, *Cooperative Federalism*]; Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS 15 (2001). For historical treatments, see, for example, Daniel Elazar, *Cooperative Federalism*, in COMPETITION AMONG STATE AND LOCAL GOVERNMENTS, *supra*, at 65; and Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978).
  15. Weiser, *Cooperative Federalism*, *supra* note 14, at 665.

regard this phenomenon as a principal-agent problem to be avoided, not a productive source of friction in our federalist system.<sup>16</sup>

If we lay these distinct understandings of federal-state relations side by side, an interesting puzzle emerges. Those who focus on the states' role in challenging federal policies rely heavily on the autonomy model.<sup>17</sup> They not only emphasize, but often seek to expand, the terrain in which the state wields the power of the sovereign. Those who focus on the territory where states lack policymaking autonomy, in contrast, tend to depict states as cooperative allies to the federal government—friendly servants carrying out federal mandates. They regard contestation as a threat to an integrated regime.

Missing from this literature is a fully developed account of the ways in which states playing the role of federal servant can also resist federal mandates, the ways in which integration—and not just autonomy—can empower states to challenge federal authority. We choose the term “uncooperative federalism” to describe this account because it captures what federalism scholarship has largely neglected. Scholars who endorse the normative position that states should serve as rivals and challengers to the federal government largely miss the descriptive possibility that states can do so even where they lack autonomy. Scholars who make the descriptive case for cooperative federalism, and are thus

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16. Robert Schapiro's theory of interactive federalism is perhaps the most significant departure from this pattern, as his concept of polyphony “accepts a substantial role for dissonance as well as harmony.” Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 249 (2005) [hereinafter Schapiro, *Interactive Federalism*] (noting further that state-federal relations “may indeed be confrontational rather than cooperative”). Yet even Schapiro pulls back from endorsing state contestation of federal policy, noting that conflicts between state and federal regulation “present the biggest challenge for interactive federalism.” Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2142 (2006). Moreover, in sharp contrast to our work, Schapiro devotes scant attention to the ways in which administrative channels foster contestation, focusing instead on state court enforcement of federal rights, federal court interpretations of state constitutions, and state prosecutions of federal officials. John Dwyer is the rare scholar to pay attention to those administrative channels in his excellent case study of the enforcement of the Clean Air Act. John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995). But he has not attempted to apply those insights more broadly, nor has he considered their normative and doctrinal implications. Finally, Ernest Young adverts to the power states enjoy under a cooperative federalism regime in a passing sentence while building the case for the autonomy model. See Young, *supra* note 10, at 60.
17. Even Robert Cover, whose instinct for agonistic politics resembles our own, once argued that cooperative federalism schemes were anathema to his vision of “combative federalism.” *Federalism and Administrative Structure*, 92 YALE L.J. 1342 (1983) (providing a published summary of a paper presented by Robert Cover at a Yale symposium). For a sharp response, see Rose-Ackerman, *supra* note 14.



quite familiar with the principal-agent problem, generally overlook the normative case for valuing such resistance.<sup>18</sup>

Below, we argue that contestation can and does take place in the many areas of federalism where states lack policymaking autonomy, reserving a defense of these practices for Part II. We do not quibble with the idea that sovereignty confers one sort of power, but we think it is a mistake to neglect the possibilities associated with a different sort of power—the power of the servant. Section I.A identifies the three main sources of the servant’s power. Section I.B shows how states use that power in practice.

18. For those who delight in the two-by-two matrix, the following chart roughly captures how uncooperative federalism fits within the extant scholarship. We have grouped the scholarship along two dimensions. The first is normative—do you envision a state’s proper role as rival/challenger or friend/ally to the federal government? The second is descriptive or tactical—what strategy do you believe facilitates healthy federal-state relations, one that emphasizes the power of the sovereign or one that emphasizes the power of the servant? Most scholarship falls in Boxes 1 and 4. Uncooperative federalism falls in Box 2. Interestingly, there is some work that we think properly fits into Box 3. For instance, Roderick Hills, while firmly rejecting the notion of dual sovereignty, has argued in favor of an anticommandeering rule. He favors autonomy not because it allows states to regulate separate and apart from the federal government, but because it creates the right conditions for federal-state bargaining within a cooperative (and thus integrated) federalism regime. See Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181 (1998) [hereinafter Hills, *Federalism in Constitutional Context*]; 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, 901-06 (1998) [hereinafter Hills, *Why State Autonomy Makes Sense*].

	POWER OF THE SOVEREIGN/AUTONOMY MODEL	POWER OF THE SERVANT
STATES SHOULD SERVE AS RIVALS / CHALLENGERS TO THE FEDERAL GOVERNMENT	1. Scholarship depicting states as dissenters	2. Uncooperative federalism
STATES SHOULD SERVE AS FRIENDS / ALLIES TO THE FEDERAL GOVERNMENT	3. Work suggesting that anticommandeering rules promote better bargaining between state and federal officials	4. Cooperative federalism

A. *Uncooperative Federalism in Theory: The Power of the Servant*

For those who value the role that states play in challenging federal policies, the arguments in favor of autonomy have been thoroughly developed. Autonomy prevents the federal government from quashing the opposition or playing its lawmaking trump card. It creates zones of policymaking independence where states can experiment and depart from federal norms. It gives states the freedom to speak against an overweening federal government. It even allows states to check the national government by holding federal officials accountable for abusing their power.<sup>19</sup>

Given the strong case that has been made for the power of the sovereign, it may seem counterintuitive to insist that power also resides with states when they play the role of federal servants. If autonomy and separateness free the states to serve as a counterweight to—even to dissent from—federal policy, why would we think that a state could successfully challenge the national government when it is playing the role of servant and ally?

If we look outside federalism scholarship, however, we find evocative examples of the power of the servant—the ways in which integration can serve as a distinct source of strength. For instance, much of administrative law scholarship is premised on the notion that bureaucratic servants can wield power against their political masters. Scholars have devoted a great deal of energy to thinking about whether and how Congress or the President should control administrative agencies,<sup>20</sup> and the literature on the principal-agent problem is vast and distinguished.

Similarly, scholarship on local government law has shown that cities and towns wield power without autonomy. The background rule is that localities derive all of their power from the state,<sup>21</sup> and even state-conferred home rule protections are often quite limited in scope. Thus, as Richard Briffault explains, “[L]ocalism suggests [that] subordinate units can do quite well in the political scheme of things . . . without a claim to sovereignty, and without a claim to constitutional protection against upper-level governments.”<sup>22</sup>

19. See Amar, *supra* note 5.

20. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

21. The principle is termed “Dillon’s Rule.” 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 15, at 25 (5th ed., rev., Boston, Little, Brown & Co. 1911) (1872).

22. Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1318 (1994) [hereinafter Briffault, *Normative and Formal Concerns*]; see also Richard Briffault, *Our Localism: Part I—The Structure of Local Government*

We can also see examples of what Young terms “state-centered dissent,”<sup>23</sup> as well as gentler variants of contestation, outside the realm of state sovereignty. We discuss a few of these examples in Section I.B. Before turning to those examples, however, it seems useful to explain why we think uncooperative federalism can work. What is it that gives federal servants power? How can states contest federal policy in the many areas where they lack policymaking autonomy and can be overridden by federal authorities? There are at least three reasons why we might expect the states to exercise power even as they play the role of federal servants.

### 1. *Dependence*

One main source of the servant’s power is dependence. Because the master delegates responsibility, the servant has discretion in choosing how to accomplish its tasks and which tasks to prioritize. It also has leverage. In the administrative context, for example, the fact that Congress or the President needs agencies to perform tasks creates space not just for discretionary decisionmaking but for bureaucratic pushback. Dependence is also a feature of state-municipal relations. Because the states cannot regulate every aspect of local life, in practice they have devolved significant power to localities.<sup>24</sup> Localities therefore have become accustomed to governing themselves, and this tradition has, in turn, enabled them to fend off state efforts to trump local policies.

States similarly wield power against a federal government that depends on them to administer its programs. According to Daniel Elazar’s famous study, because federal authorities rely on the states to achieve their policy goals, they listen to the concerns of the state officials and “are prepared to make concessions to their state counterparts.”<sup>25</sup> In his insightful recasting of Herbert Wechsler’s “political safeguards” argument,<sup>26</sup> Larry Kramer similarly argues that mutual dependence empowers the states. He offers an apt analogy:

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*Law*, 90 COLUM. L. REV. 1, 111-12 (1990) [hereinafter Briffault, *Our Localism*] (“If power is defined as a legally enforceable right to . . . prevail in conflicts with higher levels of government, then local governments generally lack power. . . . But if power refers to the actual arrangements for governance at the local level, then local governments possess considerable power. . . . In our system, local governments often get what they want.”).

23. Young, *supra* note 12, at 1279.

24. See, e.g., Briffault, *Our Localism*, *supra* note 22, at 17-19, 112-14.

25. ELAZAR, *supra* note 14, at 162.

26. Other efforts to revamp the argument include JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE

[W]hatever a boss's formal powers may be, there are always significant limits on his or her practical authority. Only a very bad manager fails to consider the needs and interests of subordinates or to consult them before making significant policy changes.

This consideration is especially pertinent in the administrative context, because the federal government depends so heavily on state officials to help administer its programs. Realistically speaking, Congress can neither abandon these programs nor "fire" the states and have federal bureaucrats assume full responsibility for them. The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process.<sup>27</sup>

Here it is worth emphasizing the temporal dimension of the power that federal dependence confers on state servants. Scholars often focus on the first stage of federal-state dickering, during which the national government is trying to rope states into administering its programs. Indeed, one of the best arguments for forbidding commandeering is that the federal government should be forced to internalize the costs of its regulatory schemes.<sup>28</sup> Even at this stage in the negotiations, we should not underestimate the state's power. While the federal government may threaten to administer a program itself if the state does not cede to its demands, its capacity to do so is often limited, and the state may call Congress's bluff.<sup>29</sup>

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SUPREME COURT (1980); and D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

27. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994). In many ways, Kramer's work represents the starting point for our own. But while Kramer describes the ways in which dependence empowers states to pursue their interests in a federal scheme, his work does not address the opportunities this dependence creates not just for interest-based bargaining, but also for full-out state dissent. See *infra* text accompanying notes 123-124. Similarly, Kramer's scholarship does not offer a framework for thinking about the normative and doctrinal implications of this dynamic.
28. See, e.g., Hills, *Why State Autonomy Makes Sense*, *supra* note 18; Young, *supra* note 10, at 35. For an effort to complicate and develop this claim, see Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1634-35 (2006). For a thoughtful response, see PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 704-05 (5th ed. 2006), which questions whether, "given all the other ways that the federal government may affect states," the "baseline entitlement" that Hills implies the anticommandeering rule creates is really "secure."
29. See Weiser, *Cooperative Federalism*, *supra* note 14, at 671 & n.27; see also MARTHA DERTHICK, THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS (1970)

The state's leverage over the federal government only increases after the federal government has devolved regulatory power to the state. As Kramer and other scholars emphasize, once a program has begun, state influence is locked in to some degree. Having taken on the states as partners, the national government's threat to exit becomes less credible. Moreover, the ongoing success of the program may depend on a healthy level of reciprocity.<sup>30</sup> As the years go by, we would expect federal dependence to increase as state bureaucrats develop institutional competence and area-specific expertise.<sup>31</sup>

One might wonder if we have come full circle, claiming that the servant has power because it possesses the same autonomy enjoyed by the sovereign. It would be a mistake, however, to equate the autonomy of the sovereign with the autonomy of the servant. Of course, discretion and leverage give the servant "autonomy" in a thin sense because servants enjoy *de facto* power to make some decisions on their own even though they formally report to a higher authority. But this autonomy is quite different from that typically contemplated by federalism scholars. The servant's power to decide is interstitial and contingent on the national government's choice not to eliminate it. The servant thus enjoys microspheres of autonomy, embedded within a federal system and subject to expansion or contraction by a dominant master. That is not the sort of autonomy typically invoked by federalism scholars, who emphasize separateness and independence, the state's ability to govern without interference from the federal government. Few, for example, would equate the servant's power with sovereignty, whereas autonomy and sovereignty are often conflated in traditional federalism scholarship.<sup>32</sup>

## 2. *Integration*

Another source of the servant's power is integration. When an actor is embedded in a larger system, a web of connective tissues binds higher- and lower-level decisionmakers. Regular interactions generate trust and give lower-

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(providing a case study of one state's administration of a federal public assistance program, and showing the many ways in which federal dependence on the state agency gave the state leverage over federal officials).

30. See SHAPIRO, *supra* note 5, at 123.

31. See, e.g., Dwyer, *supra* note 16, at 1224.

32. See, e.g., Young, *supra* note 10, at 13-15 (noting this phenomenon and offering his own definitions of these terms). For another effort to pull apart these two ideas, see Hills, *Why State Autonomy Makes Sense*, *supra* note 18. Autonomy has proved to be a slippery concept in many areas of the law. See, e.g., Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994) (exploring different conceptions of autonomy in the First Amendment literature).

level decisionmakers the knowledge and relationships they need to work the system.

Consider Richard Schragger's work on urban power. Challenging scholars who favor an autonomy model for empowering cities, Schragger argues that "there is no necessary relationship between the formal decentralization of power and the actual exercise of political influence, between 'legal localism' and 'political localism.'"<sup>33</sup> One piece of evidence Schragger cites is the powerful French mayoralty. Although French mayors operate in a fully centralized system, in which localities are merely charged with fulfilling state mandates, they are more powerful than American mayors, who operate in a system that confers greater urban autonomy. Some of the French mayors' power comes from dependence.<sup>34</sup> But their influence also stems from the repeated contacts fostered by a centralized system: "Central city mayors exercise[] power by developing personal relations with central administrators, by lobbying state ministries, and by influencing policy through their representation in parliament and in other national-level councils."<sup>35</sup> By contrast, Schragger argues, the weakness of American mayors stems in part from having too much autonomy rather than too little:

[U]rban leaders often do not have the local resources to address [certain] problems. Mayors thus approach the state or federal governments in the position of supplicants. Mayors come to Washington to lobby for aid or assistance, but they tend not to have ongoing relationships with federal elected officials or federal bureaucracies. Instead of being direct participants in state and federal policymaking, they are outsiders to it, only as influential as any other representative of a group or institution seeking government aid might be.<sup>36</sup>

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33. Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2561-62 (2006).
  34. *Id.* at 2561 ("[T]he key element of French mayoral power . . . was the dependence of central authorities on local cooperation to accomplish state ends."). Schragger is careful to note that another institutional difference may at least partly account for the power of French mayors: "[I]n France, elected officials can hold local and national political office simultaneously." *Id.* at 2569.
  35. *Id.* at 2561.
  36. *Id.* at 2562-63 (citation omitted). Schragger himself is at least agnostic as to whether "a unitary state or a more 'cooperative' federal system would necessarily serve cities and their mayors better." *Id.* at 2563; see also Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005) (arguing against the view that unitary regimes empower local governments more than federalist regimes).

While the absence of ongoing relationships may pose a problem for American cities, integration is a source of power for states administering federal programs. The ties that develop between state and federal administrators are strong enough that Larry Kramer terms them one of the “political safeguards of federalism.”<sup>37</sup> Indeed, so powerful are these connections that state and federal administrators of a single program may band together on the basis of their functional specialties and bureaucratic culture—a phenomenon that has been dubbed “picket-fence federalism.”<sup>38</sup>

### 3. *Two Masters*

A final advantage that states enjoy in their role as federal servants is that they serve two masters. Even when state officials carry out federal programs, their constituencies are based within the state. And those voters may have put in place political elites who have quite different views of federal policy than voters nationally,<sup>39</sup> thus creating pressure for state officials not to go along with federal authority.

The fact that state officials serve two masters gives states not only a reason to challenge federal policy, but also the power to do so. Daniel Carpenter’s

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37. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 283 (2000).
38. See, e.g., Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001) (“The phrase is meant to suggest the image of vertical posts and horizontal slats of a picket fence, with the slats representing levels of government—federal, state, local—and the posts representing functional specialties of various agencies—environmental protection, worker safety, support for indigent families, health care, housing, etc. The idea behind the metaphor is that state and federal agency experts within the same specialty—the ‘posts’ in the ‘fence’—often share more in common with each other than they do with the level of government by which they are employed.”).
39. The extent to which state cultures and politics vary is a hotly debated subject. Compare, e.g., ELAZAR, *supra* note 14, at 10–23, 84–126, with Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 948–49 (1994). At the very least, we would expect some states to be controlled by members of the party that does not currently control Congress or the presidency. If we heed Daryl Levinson’s astute reminder to pay attention to political incentives in thinking about the dynamics of federalism, see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 938–46 (2005), we might expect that political party rivalries, at least, would lead Republican-dominated states to challenge the programmatic choices of Democrat-controlled administrative agencies and vice versa. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (emphasizing the importance of partisan concerns in separation-of-powers analysis). Alternatively, we might think that what some dismiss as provincialism provides a foundation for dissent.

study of bureaucratic autonomy, for instance, found that the professional administrators who wielded the most power against elected officials were those who enjoyed an alternative power base and who were “embedded in political and social networks that reduced their dependence on elected officials.”<sup>40</sup> Such political and social networks are a given for state officials. State actors, be they legislators or bureaucrats, can thus rely on a separate power base that possesses significant resources, stability, and stature.<sup>41</sup> State officials are also accustomed to governing themselves. Even when they play the role of federal servant, they do so within a political and bureaucratic structure created at the state level. Because state officials are bureaucratic insiders who nevertheless draw power from outside the system, they have both the incentive and the political resources to challenge federal authority.<sup>42</sup>

*B. Uncooperative Federalism in Practice*

Given that states have the power, at least in theory, to contest federal policies in the territory long delineated as “cooperative federalism,” what does uncooperative federalism look like in practice? If we employ David Shapiro’s metaphor of federalism as dialogue,<sup>43</sup> imagining the states and the federal government engaged in an ongoing conversation about national policy, that dialogue falls along a continuum. At one end are the polite conversations and collaborative discussions that cooperative federalism champions. Uncooperative federalism occupies the remainder of this spectrum—from restrained disagreement to fighting words. Some state contestation is interstitial, occurring in the gaps left open, deliberately or accidentally, by federal policymakers. Other state challenges assume a stronger form, the institutional equivalent of civil disobedience.

Much of uncooperative federalism takes place in the interstices of federal mandates. Sometimes dissent is licensed: Congress explicitly contemplates that states will deviate from federal norms in implementing federal policy, but states take that invitation in a direction the federal government may not

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40. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 15 (2001).

41. See, e.g., Hills, *Federalism in Constitutional Context*, *supra* note 18, at 191-92 (arguing that state officials administering a cooperative regime have a separate source of funds and incentives to challenge federal officials).

42. See *id.*; cf. Briffault, *Normative and Formal Concerns*, *supra* note 22, at 1349 (“[A]lthough the states are, for the most part, too large to provide real participatory democracy, they are more capable than local governments of being viable power centers.”).

43. SHAPIRO, *supra* note 5.



anticipate.<sup>44</sup> Interstitial dissent can also take place in a regulatory gap, when the federal government does not contemplate state variation but states have sufficient discretion that they find ways to contest federal policy. The strongest form of uncooperative federalism involves civil disobedience: states may simply refuse to comply with the national program or otherwise obstruct it.

Below we offer a necessarily abbreviated example of each type of uncooperative federalism: licensed dissent, dissent made possible by a regulatory gap, and civil disobedience. Before turning to these examples, however, we want to address a prior question: how do we distinguish between uncooperative federalism and the usual back-and-forth negotiations between two actors in a system—the type of conversations that routinely occur between states and the federal government according to scholars of cooperative federalism? After all, most cooperative federalism regimes are premised on the assumption that there will be at least some local variance. This question is likely to be particularly thorny for interstitial dissent because a partial challenge to a federal mandate may betoken cooperative bargaining, not resistance. But even state activities that look like civil disobedience may involve nothing more than states playing the role of Ferdinand the Bull to federal policymakers.

We think the best proxy for distinguishing dissent from routine negotiations is whether the state's action can be fairly understood as an effort to change national policy. An attempt to obtain an accommodation or modification of federal policy within the state should usually be understood as an example of cooperative bargaining. An attempt to contest and alter national policy is rightly understood as dissent. We are well aware how rough a cut this is. Even setting aside the fact that the state is a “they,” not an “it,”<sup>45</sup> a request

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44. One might think that “licensed dissent” is a contradiction in terms, or at least that it cannot serve as an example of uncooperative federalism. If the federal government has authorized the states to experiment, are states really contesting anything? And how does licensed dissent differ from the autonomy model? We reject the notion that state actions cannot constitute dissent if they are licensed. After all, in the rights context, we do not think that the protection afforded by the First Amendment converts dissenting speech into something else. As long as the state takes the authorization to experiment in an unexpected direction, we think it can be fairly deemed a challenge. Nor is licensed dissent the same as autonomy. As noted earlier, *see supra* text accompanying note 32, microspheres of autonomy that expand and contract with the master's will are quite different from the type of autonomy contemplated by proponents of state-centered dissent.
45. For much of this analysis, we talk about states as unitary, even monolithic, entities when of course they are not. *Cf.* Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005). State executives may disagree with state legislators, who may in turn disagree with one another and with state bureaucrats, and so forth. We speak of states as unitary

for an exception will sometimes be a form of challenge.<sup>46</sup> And even when state officials are in fact attempting to influence national policy (or, more likely, motivated by a twin desire to effect change inside and outside the state's borders), it may be hard to discern their purpose. Sometimes states will announce their intentions; other times the sheer force or intensity of state contestation will mark it as dissent. But sometimes we will not be able to tell.

While these distinctions are messy, it is not clear how much rides on providing a crisp definition of uncooperative federalism. To the extent that one is simply trying to create more room for state contestation, drawing a precise line around the category of uncooperative federalism may be unnecessary. Just as the First Amendment protects many types of speech, not just "true" dissent, so too we would expect that the most natural strategies for fostering uncooperative federalism would give the state room to bargain with the federal government and not just to challenge it. If we want to protect principled state resistance only, of course, then we are faced with a problem familiar to scholars of civil disobedience, who have devoted a good deal of energy to distinguishing between the scofflaw and the civil disobedient. The fact that the neat lines that theorists have drawn to delineate civil disobedience end up blurring in practice does not render their undertaking useless. At the very least, these challenges underscore the need to build a vocabulary for talking about uncooperative

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bodies (with intentions, no less) largely for ease of exposition, but we should note that ascribing various state officials' actions to the state itself highlights that many different actors can speak on behalf of the state. This diversity generates more channels for state dissent against federal policy and may be particularly important in the context of what we call the "administrative safeguards of federalism," where the state "administrators" of federal policy include not just bureaucrats, but legislators and executives as well. Indeed, in the case studies offered here, we see examples of executive, legislative, and bureaucratic action.

46. Much as classic instances of civil disobedience are undertaken not to exempt the actor from a certain government policy but to alter government policy, *see* *ENCYCLOPEDIA OF DEMOCRATIC THOUGHT* 60 (Paul Barry Clarke & Joe Foweraker eds., 2001) (defining civil disobedience as "the purposeful and public defiance of an established law or norm, undertaken with the intent of altering state policy"), a state's attempt to change federal policy seems importantly different from more limited efforts to carve out a unique policy within its own borders. But a request for an exemption may be premised on the idea that the national government lacks the authority to regulate or that a national norm should not exist. Imagine, for instance, an effort by Southern states to be granted an exemption from federal desegregation laws that were so bound up with claims about national identity that an exception would be tantamount to challenging the national policy. Such a request, in our view, would fairly count as dissent. A request that state officers enforcing federal regulations drive around in blue cars rather than red ones, in sharp contrast, would obviously fall outside the ambit of uncooperative federalism.

federalism and to identify the political rituals that would make state contestation legible as such.

Even without the benefit of a vocabulary or political rituals to furnish legibility, specific instances of uncooperative federalism are not hard to identify. Indeed, the examples below should offer a sense of the continuum of activities, from licensed dissent to civil disobedience, that fall within its ambit.

### 1. *Licensed Dissent: Welfare to Work*

One good example of interstitial dissent comes from the Aid to Families with Dependent Children (AFDC) welfare program, a classic instance of cooperative federalism.<sup>47</sup> Beginning in 1962, the program explicitly contemplated state experimentation, authorizing statutory waivers for “experimental, pilot, or demonstration project[s]” that are “likely to assist in promoting the objectives of [the statute].”<sup>48</sup> In the 1980s, the waiver program took off (in part due to efforts by some executive officials to change the program); by the time comprehensive welfare reform achieved national status in 1996, forty-six states had been granted waivers.<sup>49</sup>

Some states used these waivers to build the case against existing national policy. At the forefront of this movement were Wisconsin and Michigan. Officials in these states wanted to recast an entitlement for poor families struggling to raise children into a temporary grant for recipients who would quickly move into the private workforce.<sup>50</sup> Both states used their waivers to implement this vision, departing markedly from national policy. Wisconsin Governor Tommy Thompson said that his state was “build[ing] a new system ‘based upon individual responsibility and work.’”<sup>51</sup> Wisconsin, which ultimately obtained more waivers than any other state, implemented a “Work

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47. See *King v. Smith*, 392 U.S. 309, 316 (1968).

48. 42 U.S.C. § 1315(a) (2000).

49. U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: STATES’ EARLY EXPERIENCES WITH BENEFIT TERMINATION 3 (1997), available at <http://www.gao.gov/archive/1997/he97074.pdf>.

50. Of course, the states did not derive this new conception of welfare out of thin air. Many conservative thinkers and policymakers in the 1980s argued that welfare should not be an entitlement but should be connected to work requirements. See, e.g., LAWRENCE M. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP 218, 240 (1986) (advocating a “civic conception” that required “linking welfare benefits to obligations like work”); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984) (arguing that existing welfare programs disserved the interests of poor racial minorities by rewarding self-defeating behavior).

51. Patty Edmonds, *States Turn Values Rhetoric into Legislative Action*, USA TODAY, Aug. 8, 1996, at 7A (quoting Wisconsin Governor Tommy Thompson).

Not Welfare” project that required all welfare recipients to look for work and terminated AFDC benefits to recipients after two years.<sup>52</sup> Michigan similarly used federal waivers to create a welfare-to-work approach.<sup>53</sup>

While these states’ welfare-to-work projects were motivated in part by fiscal concerns, they were also bids for building a new kind of welfare system, one with a markedly different vision of welfare’s purposes. Governor Thompson argued that “[t]he states ‘have become very much activists in trying to reform social programs, to . . . set a moral tone for our society,’”<sup>54</sup> and he boasted that his state’s waivers “changed Federal law in over 200 instances in the area of welfare.”<sup>55</sup> Michigan Governor John Engler told Congress that “we can do better than the current federal system, which is a dizzying array of failed social experiments that have resulted in breaking up families, discouraging work and marriage, and destroying hope. . . . [T]his debate is about values and basic principles, about work, responsibility, freedom and independence.”<sup>56</sup> In articulating their idea of a moral society,<sup>57</sup> and in putting this idea into practice by contesting federal requirements, states like Michigan and Wisconsin played

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52. See Jason DeParle, *U.S. Authorizes Wisconsin Curb on Aid to Poor*, N.Y. TIMES, Nov. 2, 1993, at A1. The state also attempted to reshape welfare recipients’ social behavior: among other programs, “Learnfare” reduced grants for families with truant children, and “Bridefare” increased benefits for women who married the fathers of their children, while a family cap program withheld increases in benefits for children born after a family had entered the AFDC program. See Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare “Reform,”* 26 U. MICH. J.L. REFORM 741, 755-56 nn.62-64 (1993); Thomas Kaplan, *Wisconsin’s W-2 Program: Welfare as We Might Come To Know It?*, in LEARNING FROM LEADERS: WELFARE REFORM POLITICS AND POLICY IN FIVE MIDWESTERN STATES 77, 86-88 (Carol S. Weissert ed., 2000).
53. As Governor John Engler explained, the state’s AFDC recipients were required to “sign a Social Contract that committed them to either working, engaging in job training or volunteering in the community at least 20 hours per week.” *Block Grants and Opportunities for Devolution: Hearing on the Concurrent Resolution on the Budget for the Fiscal Year 1996 Before the S. Comm. on the Budget*, 104th Cong. 10 (1995) [hereinafter *Block Grants Hearing*] (statement of Michigan Governor John Engler), available at <http://www.archive.org/stream/concurrentresolu04unit>.
54. Edmonds, *supra* note 51 (quoting Governor Tommy Thompson).
55. Gary Wills, *The War Between the States . . . and Washington*, N.Y. TIMES, July 5, 1998, (Magazine), at 27.
56. *Block Grants Hearing*, *supra* note 53, at 13, 18 (statement of Governor John Engler).
57. See generally David A. Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1273 (2004) (“Public-benefits law has long been a complex fusion of expressive and functional elements. When a broad swath of policymakers and the general public focus on public benefits, they tend to set policy in order to make symbolic statements about their vision of a moral society.”).

a powerful role in reshaping national welfare policy.<sup>58</sup> Most of their goals were realized when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>59</sup>

## 2. *Taking Advantage of a Regulatory Gap: The Clean Air Act*

We can also find examples of interstitial dissent taking place within the gaps of federal environmental law. Environmental regulation has long been cooperative federalism's stomping ground. Since the 1970s, states have implemented and enforced most of the United States's major environmental statutes.<sup>60</sup> This arrangement—born in part of principle and in part of necessity—lends the states considerable leverage, which they have sometimes used to challenge and reshape federal policy.

The Clean Air Act provides an apt illustration. Under the Act, the Environmental Protection Agency (EPA) sets national air quality standards for common pollutants, but states are given discretion to implement these standards as long as their plans meet national standards; if they fall short, the EPA retains the authority to implement air quality standards itself.<sup>61</sup> Because the federal government lacks the capacity to stage a takeover, however, the EPA has not done so even when states have departed from federal policy.<sup>62</sup> States thus enjoy a “trump card” in dealing with the federal government: they are “indispensab[le]” to the regulatory scheme.<sup>63</sup>

States have not hesitated to play this trump card. In some areas, states have forced the EPA to back off of a strong regulatory position.<sup>64</sup> In others, states

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58. See, e.g., Lawrence M. Mead, *The Culture of Welfare Reform*, PUB. INT., Winter 2004, at 99, 99 (“Most people know that the state of Wisconsin led the nation in reforming welfare . . .”).

59. 42 U.S.C. § 604 (2000).

60. See, e.g., Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328; Clean Water Act, 33 U.S.C. §§ 1251-1387; Clean Air Act, 42 U.S.C. §§ 7401-7642.

61. 42 U.S.C. §§ 7409-7410.

62. See Dwyer, *supra* note 16.

63. *Id.* at 1216.

64. For example, states resisted the Clean Air Act's requirement that they create inspection and maintenance programs to monitor emissions. Several states initially refused to submit inspection and maintenance plans, while others promulgated ineffective programs, and still others later refused to amend their programs to comply with federal standards. See McGarity, *supra* note 2, at 1556-61. Although the states plainly were exercising their regulatory discretion in a manner that thwarted the federal requirement, the EPA never assumed responsibility for implementation and, in the end, caved to the states' demands. It permitted California to run a test-and-repair program despite its initial insistence that

have pushed the EPA to take a stronger regulatory stance. Take California. Under the Act, California has “super-regulator” status;<sup>65</sup> because California had already begun to regulate air pollution when the statute was enacted, Congress instructed the EPA to grant the state a waiver from the Clean Air Act’s preemption provision (which bars states from adopting their own standards for vehicle emissions) when California sought to address “compelling and extraordinary conditions.”<sup>66</sup> While this statutory exception was intended to allow California to respond to “unique problems” it faced due to its climate and topography,<sup>67</sup> from the very beginning California has used this power to drive federal policy. Other states have adopted California’s emissions standards in lieu of federal standards,<sup>68</sup> and the EPA itself has generally followed California’s lead and adopted the stricter state standards after a few years.<sup>69</sup> In recent years, California has challenged federal policy even more aggressively, as it has attempted to regulate greenhouse gas emissions that contribute to global warming. The state’s goal is clear: to implement a regulatory regime that will prod national change.<sup>70</sup> Because this

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centralized test-only centers were the sole option. When other states clamored for the same treatment, the EPA allowed any state to use this hybrid approach. *Id.* at 1623-24; *see also id.* at 1579 (describing state confrontations with the EPA as a “rout” and noting that the “EPA backed down from virtually every confrontation with state officials”).

65. Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. (forthcoming 2009) (manuscript at 12, on file with authors).
66. 42 U.S.C. § 7543(b)(1)(B).
67. H.R. REP. NO. 90-728, at 1957 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1958.
68. They are permitted to do so under 42 U.S.C. § 7543(e)(2)(B). In addition, California’s regulations achieve the status of federal law for certain purposes. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 347 (D. Vt. 2007) (noting that a California emissions standard “becomes a motor vehicle standard of the government, with the same stature as a federal regulation” vis-à-vis other federal law); *see also Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1172 (E.D. Cal. 2007) (same).
69. *See Carlson, supra* note 65 (manuscript at 18-19). Carlson describes a process of “iterative federalism,” in which the super-regulator state and the federal government spur each other. *See id.* (manuscript at 12).
70. *See CAL. HEALTH & SAFETY CODE* § 43018.5 (West 2006). As the secretary of the state environmental protection agency remarked at the signing of the bill, “The Gray Davis administration is leading the way for the country because Washington, D.C., has failed to lead.” *California Mandates Cleaner Cars by 2009*, ETHICS NEWSLINE, July 29, 2002, <http://www.globalethics.org/newsline/2002/07/29/california-mandates-cleaner-cars-by-2009>.

approach marks a clear repudiation of federal policy in a hotly contested area, it has provoked a strong response from the federal government.<sup>71</sup>

### 3. *Civil Disobedience: The Patriot Act*

The two examples above offer a glimpse of how states working in the interstices of a nationwide regime can engage in dissent. In both instances, states used the discretionary authority granted or left to them by federal law to challenge key elements of the law they were administering. In both instances, state officials self-consciously tried to build a real-world example of their contrary vision in order to generate a broader conversation about the direction of federal policy. And they leveraged their position as insiders—members of an integrated state-federal scheme—to advocate an outsider’s view.

Other state responses to federal mandates involve a still-greater degree of uncooperative behavior, akin to civil disobedience. State reactions to the Patriot Act<sup>72</sup> offer a good example. Alaska, California, Colorado, Hawaii, Idaho, Maine, Montana, and Vermont have each passed a resolution denouncing the Act as an assault on civil liberties.<sup>73</sup> While the resolutions vary in content and strength, all of the resolutions urge the U.S. Congress to amend or repeal portions of the Act that the states believe impinge on constitutional rights, and five declare that the state will not participate in enforcing these portions of the Act.

Alaska’s resolution, for example, “implores the United States Congress to correct provisions in the USA PATRIOT Act . . . that infringe on civil liberties.”<sup>74</sup> It also states that Alaska’s agencies and instrumentalities may not initiate or assist in an investigation or detention, or record or share intelligence information (including library, medical, and financial records) in the absence of reasonable suspicion of criminal activity; they may not collect information about the political, religious, or social views or activities of an individual or group unless it directly relates to an investigation of criminal activities upon

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71. See Notice of Decision Denying Waiver, 73 Fed. Reg. 12,156 (Mar. 6, 2008); Letter from Stephen L. Johnson, EPA Adm’r, to Governor Schwarzenegger (Dec. 19, 2007) (on file with authors) (noting that climate change “is not exclusive or unique to California”).

72. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 12, 18, 21, 22, 28, 31, 47, and 50 U.S.C.).

73. See Bill of Rights Defense Committee, Resolutions Passed and Efforts Underway, <http://www.bordc.org/list.php> (last visited Mar. 31, 2009) (compiling more than four hundred state and local resolutions).

74. Legis. Resolve 27, 23d Leg., 1st Sess., 2003 Alaska Sess. Laws at LR 27.

reasonable suspicion; and they may not engage in racial profiling.<sup>75</sup> Colorado and Montana's resolutions contain similar direct prohibitions,<sup>76</sup> while California and Hawaii declare that no state resources may be used for any action that would violate the federal or state constitutions, offering examples of the activities state legislators had in mind.<sup>77</sup>

Note that while the states invoke their own constitutions, this is not their only, or even their primary, source of opposition to the Act. Instead, the resolutions contest the legitimacy of the Patriot Act as *federal* law. The states position themselves as rightful interpreters of the U.S. Constitution, and they express their purposes as members of the national community, not isolated sovereigns.<sup>78</sup> Thus, for instance, the Alaska resolution states that "it is the policy of the State of Alaska to oppose any portion of the USA PATRIOT Act that would violate the rights and liberties guaranteed equally under the state and federal constitutions."<sup>79</sup> California, Maine, and Montana similarly proclaim fidelity to the U.S. Constitution,<sup>80</sup> while many of the resolutions note that state public servants have pledged to uphold the Constitution and have cast their opposition to the Patriot Act as part of this duty.<sup>81</sup> In staking the state's claim as an interpreter of federal rights, each resolution "implores" or "urges" Congress to amend or repeal the purportedly unconstitutional provisions,<sup>82</sup> and the resolutions cast the states as members of a growing

75. *Id.*

76. S.J. Res. 05-044, 65th Gen. Assem., 1st Reg. Sess., 2005 Colo. Sess. Laws 2362; S.J. Res. No. 19, 59th Leg., Reg. Sess., 2005 Mont. Laws 3042.

77. S.J. Res. 10, 2005-2006 Reg. Sess. (Cal. 2006), available at [http://info.sen.ca.gov/pub/05-06/bill/sen/sb\\_0001-0050/sjr\\_10\\_bill\\_20060221\\_chaptered.pdf](http://info.sen.ca.gov/pub/05-06/bill/sen/sb_0001-0050/sjr_10_bill_20060221_chaptered.pdf); S. Con. Res. 18, 22d Leg., Reg. Sess. (Haw. 2003), [http://www.capitol.hawaii.gov/session2003/bills/scri18\\_.htm](http://www.capitol.hawaii.gov/session2003/bills/scri18_.htm).

78. See Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1233 (2004) ("These local laws acknowledge federal supremacy in the form of the Constitution, but express independence in articulating the context and extent of constitutional rights and assert that the current federal anti-terrorism efforts violate these rights so defined.").

79. Alaska Legis. Resolve 27.

80. American Civil Liberties Union, State of Maine Resolution (Mar. 23, 2004), available at <http://www.aclu.org/safefree/resources/17492res20040323.html> (providing the text of H. Paper 1433, 121st Leg., 2d Spec. Sess. (Me. 2004), which recognizes that "the Constitution of the United States is our charter of liberty and that the Bill of Rights enshrines the fundamental and inalienable rights of Americans, including the freedoms of religion, speech, assembly and privacy"); Cal. S.J. Res. 10; Mont. S.J. Res. No. 19.

81. Alaska Legis. Resolve 27; Cal. S.J. Res. 10; Colo. S.J. Res. 05-044; Me. H. Paper 1433; Mont. S.J. Res. No. 19.

82. See, e.g., Alaska Legis. Resolve 27 ("[T]he Alaska State Legislature implores the United States Congress to correct provisions in the USA PATRIOT Act and other measures that



national community of opposition.<sup>83</sup> Needless to say, the states are invoking one of the classic tropes of the dissenter—challenging a national policy for violating the country's deeper commitments.

Note, too, that the majority of the states do more than use their bully pulpit to shout at the federal government. They also use their policymaking authority to thwart the Patriot Act's provisions, something that is possible only because the federal government relies on the states for enforcement assistance. Recent counts suggest that there are roughly ten times as many state and local full-time police officers as federal officers, and the federal government lacks the resources to implement all of the Patriot Act's provisions without state and local assistance.<sup>84</sup> Thus, the refusal of states to cooperate in a variety of activities throws a wrench into the Patriot Act's enforcement. Because the states are not autonomous sovereigns standing to one side of the federal scheme, they are able to back their rhetoric with concrete action.<sup>85</sup>

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infringe on civil liberties, and opposes any pending and future federal legislation to the extent that it infringes on Americans' civil rights and liberties.”).

83. See, e.g., Bill Analysis of S.J. Res. 10, Sen. Floor (Cal. 2006), [http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb\\_0001-0050/sjr\\_10\\_cfa\\_20060209\\_112154\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0001-0050/sjr_10_cfa_20060209_112154_sen_floor.html) (“As the United States Congress considers sections of the Act scheduled to sunset December 31, 2005, as well as new proposals that may further diminish civil rights and judicial oversight, it is critical that California join with other states and hundreds of communities in opposition to any pending or further federal legislation to the extent that it infringes on America's civil rights and liberties.”).
84. Compare U.S. Department of Justice, Office of Justice Programs Bureau of Justice Statistics, Federal Law Enforcement Statistics: Summary Findings, <http://www.ojp.usdoj.gov/bjs/fedle.htm> (last visited Mar. 31, 2009), with U.S. Department of Justice, Office of Justice Programs Bureau of Justice Statistics, State and Local Law Enforcement Statistics: Summary Findings, <http://www.ojp.usdoj.gov/bjs/sandlle.htm> (last visited Mar. 31, 2009).
85. That the states are dissenting has not been lost on supporters of the Patriot Act. During discussion of the Alaska resolution, for instance, one proponent expressed his disbelief “that responsible legislators would advocate the civil disobedience of not following federal legislation.” Comm. Minutes, Alaska H. State Affairs Standing Comm. (2003) (statement of Graham Storey), available at [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?session=23&end\\_line=02011&time=0806&date=20030506&comm=STA&house=H](http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&end_line=02011&time=0806&date=20030506&comm=STA&house=H). Unfortunately, it is nearly impossible to measure how successful state efforts have been. A primary criticism leveled at the Patriot Act is that its enforcement is shrouded in secrecy. See H.R. REP. No. 109-174, pt. 1, at 451, 469 (2005) (“The PATRIOT Act keeps secret, even from Congress, how many of the powers are being used, prohibits recipients of search orders from disclosing they even received such an order, including to their attorney, and allows the government to secretly search people's homes and seize their property.”). This secrecy makes it difficult to know how, if at all, state resistance has thwarted or modified the Act's implementation. It is clear that the states did not succeed in their ultimate goal: the Act has been reauthorized, with many of the contested provisions now established as permanent law. At a minimum, however, state

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The case studies above offer a few examples of how uncooperative federalism works in practice, but they are far from the only examples. As states assume an ever greater role in enforcing federal immigration law through partnerships with the federal government,<sup>86</sup> for instance, some states have gone further than federal law requires (for example, by sanctioning employers who hire illegal immigrants<sup>87</sup>), while others have taken the opposite stance and passed noncooperation laws that reject federal efforts to enlist state assistance in enforcing immigration law.<sup>88</sup> States have also used waivers under the State Children's Health Insurance Program to provide coverage for uninsured

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resolutions helped shape the national conversation. During reauthorization hearings, opponents frequently cited state and local resolutions. *E.g.*, 151 CONG. REC. H6228 (daily ed. July 21, 2005) (statement of Rep. Jackson-Lee); *id.* at H6243 (statement of Rep. Udall); 151 CONG. REC. S13,709 (daily ed. Dec. 16, 2005) (statement of Sen. Kennedy). Senator Feingold read each state resolution into the record. 152 CONG. REC. S1569-73 (daily ed. Mar. 1, 2006) (statement of Sen. Feingold).

86. See U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) (last visited Mar. 31, 2009) (discussing a federal program under section 287(g) of the Immigration and Nationality Act that provides for state enforcement of immigration law and listing participating states); see also Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (proposing a greater role for the states in administering and enforcing immigration law).
87. See Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (2004 & Supp. 2008); Act of Apr. 17, 2006, no. 457, 2006 Ga. Laws 105; Oklahoma Taxpayer and Citizen Protection Act, ch. 112, §§ 7, 9, 2007 Okla. Sess. Laws 545.
88. See, e.g., OR. REV. STAT. § 181.850 (2007) (providing that no Oregon law enforcement agency "shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws"); Legis. Resolve 27, 23d Leg., 1st Sess., 2003 Alaska Sess. Laws at LR 27 (same); S.J. Res. No. 19, 59th Leg., Reg. Sess., 2005 Mont. Laws 3042 (same); see also Exec. Order No. 2005-019 (N.M. 2005), available at [http://www.governor.state.nm.us/orders/2005/EO\\_2005\\_019.pdf](http://www.governor.state.nm.us/orders/2005/EO_2005_019.pdf) (ordering that state officers shall not inquire about a victim or witness's immigration status and shall not generally ask about a person's immigration status solely to determine whether there has been a violation of federal civil immigration law). See generally Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Schuck, *supra* note 86; Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367 (1999); National Immigration Law Center, *Laws, Resolutions, and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities*, <http://www.nilc.org/immlawpolicy/LocalLaw/locallaw-limiting-tbl-2008-12-03.pdf>.

adults.<sup>89</sup> They have taken advantage of their discretion pursuant to the Clean Water Act to place conditions on, or altogether thwart, federal dam projects.<sup>90</sup> They have refused to perform disability eligibility reviews for Social Security.<sup>91</sup> Despite the seemingly coercive financial strings attached, some states have resisted full implementation of the No Child Left Behind Act.<sup>92</sup> And states are fighting a spirited battle against the REAL ID Act of 2005, which imposes requirements on state forms of identification used for federal purposes.<sup>93</sup>

Other examples of uncooperative federalism may be harder to spot because they do not fit neatly into the model sketched above. For example, state decriminalization of medical marijuana, while concededly at the edges of our definition, might nonetheless be thought of as uncooperative federalism. Against a backdrop of strict federal criminalization,<sup>94</sup> thirteen states have eliminated state-level criminal penalties on the use, possession, and cultivation of marijuana by patients who have a physician's recommendation.<sup>95</sup> These state laws flout, with aspirations to change, federal drug law<sup>96</sup> and have

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89. See ELICIA J. HERZ ET AL., STATE CHILDREN'S HEALTH INSURANCE PROGRAM (SCHIP): A BRIEF OVERVIEW, at CRS-4 to CRS-9 (2008), available at <http://ccf.georgetown.edu/index/cms-filesystem-action?file=research%2Fabout+medicaid%2Fschip+overview+3-12-08.pdf>.

90. See 33 U.S.C. § 1341 (2000); see, e.g., David H. Becker, *The Challenges of Dam Removal: The History and Lessons of the Condit Dam and Potential Threats from the 2005 Federal Power Act Amendments*, 36 ENVTL. L. 811, 822 (2006).

91. See MARTHA DERTHICK, AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT 37-46 (1990).

92. See National Education Association, Growing Chorus of Voices Calling for Changes in NCLB: State Legislative Activity, <http://sites.nea.org/esea/chorus1.html#state> (last visited Mar. 31, 2009).

93. We are grateful to Peter Schuck for this example. The REAL ID Act is codified at 49 U.S.C. § 30,301 (Supp. V 2005). Eleven states have passed statutes prohibiting implementation of the Act, and an additional nine states have passed resolutions denouncing it. For an overview of state responses, see Status of Anti-Real ID Legislation in the States, <http://www.realnightmare.org/news/105> (last visited Mar. 31, 2009) (compiling state legislation).

94. See 21 U.S.C. §§ 812(b)(1)(A)-(C), 841.

95. These states are Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington. In addition, Maryland allows a medical use defense in court. See MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS 5-6, 11, 14 tbl.1 (2008), available at [http://www.mpp.org/assets/pdfs/download-materials/SBSR\\_NOV2008.pdf](http://www.mpp.org/assets/pdfs/download-materials/SBSR_NOV2008.pdf).

96. California's law is the most explicit. See CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007) ("The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: . . . To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.").

prompted a range of reactions from the federal government. While Congress seems to have declared a *détente*,<sup>97</sup> the executive branch has been actively working to undermine the decriminalization efforts underway in California, the state with the most nationally visible decriminalization policy.<sup>98</sup>

As with the examples above, states decriminalizing medical marijuana exercise power within the microspheres of an integrated regulatory scheme. But here two primary foundations of the servant's power—dependence and integration—come from different sources than is the case with our other three examples. Federal dependence on the states stems from an act of omission, a failure to occupy the field, rather than an affirmative grant of power.<sup>99</sup> While marijuana regulation might initially look like dual sovereignty, the enforcement of federal law actually depends on state agents: due to limited resources, the federal government prosecutes only a small percentage of high-profile drug offenders, with roughly 99% of all marijuana arrests made by state

97. For instance, Congress has rejected proposals to increase federal enforcement resources in states with decriminalization laws. See Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 841 (2004).

98. In response to California's Proposition 215, for instance, the Office of National Drug Control Policy stated its position that a doctor's recommendation of marijuana would "lead to administrative action by the Drug Enforcement Administration (DEA) to revoke the practitioner's registration." Office of Nat'l Drug Control Policy, Notice, Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997). The Ninth Circuit upheld a permanent injunction against the policy on First Amendment grounds, with Judge Kozinski's concurrence arguing that it transgressed commandeering doctrine. *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) ("In effect, the federal government is forcing the state to keep medical marijuana illegal."). More forcefully, the DEA has targeted California dispensaries with several high-profile prosecutions. See *United States v. Rosenthal*, 266 F. Supp. 2d 1068 (N.D. Cal. 2003), *aff'd in part and rev'd in part*, 454 F.3d 943 (9th Cir. 2006); *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086 (N.D. Cal. 1998); Charlie LeDuff & Adam Liptak, *Defiant California City Hands Out Marijuana*, N.Y. TIMES, Sept. 18, 2002, at A22 (stating that California "has become the target of Bush administration efforts to crack down on the cultivation and distribution of [marijuana]" because "big raids in California are more likely to receive national attention"). In turn, California legislators have introduced a bill that would prevent state and local officers from assisting federal agents in carrying out federal drug policy that is contrary to state law. A.B. 2743, 2007-2008 Assem., Reg. Sess. (Cal. 2008), available at [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_2701-2750/ab\\_2743\\_bill\\_20080523\\_amended\\_asm\\_v97.pdf](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2701-2750/ab_2743_bill_20080523_amended_asm_v97.pdf).

99. Despite the Supreme Court's holdings that Congress has Commerce Clause authority to regulate medical marijuana, *Gonzales v. Raich*, 545 U.S. 1 (2005), and that state law is not a legal defense to a federal prosecution, *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001), state decriminalization laws remain on the books. In fact, the day after *Raich* was handed down, Rhode Island passed its medical marijuana law, and New Mexico followed suit soon thereafter. See MARIJUANA POLICY PROJECT, *supra* note 95, at 5-6, 16-17.

and local officials.<sup>100</sup> So, too, federal-state integration in this instance comes not from an explicit statutory plan, as with the examples above, but from de facto, often ad hoc cooperative schemes and multijurisdictional taskforces.<sup>101</sup> Thus, as one commentator has put it, though “some have referred to a federal ‘monopoly;’ over drug policy . . . national drug policy is more suggestive of a ubiquitous mode of ordering federal-state relations: cooperative federalism.”<sup>102</sup> And this “cooperative” structure facilitates uncooperative state action.

In the remainder of this Essay, we turn from the descriptive to the normative, as we begin to outline the case in favor of uncooperative federalism and suggest how current doctrine could be changed to accommodate and foster state dissent within the cooperative federalism framework.

## II. IS UNCOOPERATIVE FEDERALISM VALUABLE?

In light of the substantial amount of ink devoted to defending the idea that it is useful for states to serve as rivals or challengers to the federal government, we begin with the assumption, common to much federalism scholarship, that it is desirable to have some level of friction, some amount of state contestation, some deliberation-generating froth in our democratic system. The question, then, is whether those who share this vision of state-federal relations should think harder about the ways in which it can be promoted outside the realm of state sovereignty. Should we invite states to play a dissenting role only in those areas where they exercise the power of the sovereign, or should we welcome state efforts to contest federal policies in the regulatory space where they wield the power of the servant? In other words, is uncooperative federalism a valuable form of state dissent?

Uncooperative federalism fosters state challenges to federal policy in a manner distinct from both the autonomy model and its main competitor, commonly denominated as the “political safeguards of federalism.” While there is a good deal more empirical and analytic work to be done before a proper assessment of the costs and benefits of uncooperative federalism can be made,

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100. MARIJUANA POLICY PROJECT, *supra* note 95, at 8; O’Hear, *supra* note 97, at 810-12; see *Conant*, 309 F.3d at 645 n.10 (Kozinski, J., concurring) (“[F]ederal officials . . . explained that federal drug policies rely heavily on the states’ enforcement of their own drug laws to achieve federal objectives.”).

101. See O’Hear, *supra* note 97, at 818-20. The federal government also offers states grant money “for the purpose of enforcing State and local laws that establish offenses similar to offenses established in the Controlled Substances Act,” effectively bribing the states to implement federal policy. 42 U.S.C. § 3751(b) (2000).

102. O’Hear, *supra* note 97, at 806.

in this Part we sketch some preliminary lines of analysis, our own best guess as to where the empirical answers will lie, and our initial take on the normative questions. We leave a full development of these questions for future work.

As we noted in the Introduction, the costs of uncooperative federalism are familiar to scholars. Most have to do with the price of variation, agency slack, and petty parochialism. For this reason, we focus on its underappreciated benefits, in effect making the case that the phenomenon long dismissed as “agency slack” may offer a distinct set of normative benefits.

A. *Uncooperative Federalism Versus the Autonomy Model*

1. *The Administrative Safeguards of Federalism*

Perhaps the strongest reason to value the power of the servant is that it ensures that state contestation occurs in the vast regulatory swaths where states are not autonomous policymakers but instead carry out federal law. Call it the “administrative safeguards of federalism.”<sup>103</sup> Joint regulation embeds within the Fourth Branch a set of bureaucrats who are at least partially beholden to the states. These would-be dissenters wield influence over their federal bosses because the federal government depends on them to carry out its programs, and ties between federal and state officials develop over time. State bureaucrats are not the only ones who support these administrative safeguards—the state legislators and executives who consider how to respond to federal mandates are also important. Because states respond to federal policy through varied channels, including their own laws and executive orders, the integration of state and federal regulation introduces politicians as well as bureaucrats into

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103. We use the phrase “political safeguards of federalism” to refer, specifically, to the nominally political parts of the lawmaking process—for example, the interactions between state and federal party officials and the lobbying states do in Washington. Larry Kramer, in his well-known reformulation of the “political safeguards” argument, groups what we term the “administrative safeguards of federalism” under the larger rubric of the political safeguards of federalism. For our take on Kramer’s scheme, see *infra* text accompanying notes 123-124. Gillian Metzger has offered a markedly different vision of the relationship between administrative law and federalism. Rather than focus on the ways in which federal-state integration reproduces the dynamics of federalism within the Fourth Branch, she argues that federal administrative agencies can and should take into account the values of federalism (particularly the need to preserve the states’ independent regulatory power) in administering federal law. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008). For responses, see Stuart M. Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008); and Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008).

the realm of administration.<sup>104</sup> The bureaucrats who shaped Wisconsin's welfare policy and determined California's Clean Air Act emissions standards were engaged in dissent, but so too were Governor Thompson and the California legislature. Some acts of rebellion sound largely in politics, as with state challenges to the Patriot Act. Others take a far more technocratic form, as with state resistance to the inspection and monitoring mandates of the Clean Air Act.

Uncooperative federalism does not just complement the autonomy model of state contestation in terms of coverage. It also reveals an additional set of leverage points that state officials can use to push their agenda. Federal dependence on state administrators should matter not only when state and federal officials are bargaining over how to fill in the gaps of statutory mandates, but also when federal policy is made in the first place.<sup>105</sup> After all, bureaucrats are a critical part of the policymaking process. Administrators often help set policy at the statutory level through their interaction with members of the executive and legislative branches. Because federal bureaucrats depend on state actors, uncooperative federalism ensures that state interests are pursued through not only political channels, but also administrative ones. Uncooperative federalism, in short, ensures that the political safeguards of federalism are buttressed by the administrative safeguards of federalism.<sup>106</sup>

We should note that uncooperative federalism might also be thought of as part of the federalist safeguards of administration. Integrating state officials into federal administration reproduces some of the dynamics of federalism within the Fourth Branch, including its uncooperative elements. In this sense, uncooperative federalism may complement recent efforts in administrative law to create channels for debate and dissent within federal agencies.<sup>107</sup> Indeed,

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104. See *supra* note 45.

105. As Larry Kramer observes, "Because the federal government depends on state administrators to oversee or implement so many of its programs, states have been able to use their position in the administrative system to protect state institutional interests in Congress." Kramer, *supra* note 37, at 283.

106. For more on the distinction between the political safeguards of federalism and the administrative safeguards of federalism, see *infra* text accompanying notes 123-124.

107. See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Neal Kumar Katyal, *Toward Internal Separation of Powers*, 116 YALE L.J. POCKET PART 106 (2006), <http://thepocketpart.org/2006/10/26/katyal.html>. For responses, see Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007); William G. Howell, *Political Checks on a Politicized Presidency: A Response to Neal Katyal's "Internal Separation of Powers"*, 116 YALE L.J. POCKET PART 111 (2006), <http://thepocketpart.org/2006/10/26/howell.html>; M. Elizabeth Magill, *Can Process Cure Substance? A Response to Neal*

because state bureaucrats possess their own resources and political bases from which to launch criticisms, we suspect that they will often have more leverage than the typical dissenter enjoys in a fully centralized federal agency.

2. *Agenda Setting*

Another advantage associated with the power of the servant is that it enables state officials to set the agenda. The great challenge for most dissenters is to get those in power to address their concerns. Ignoring dissent is often the most effective way to undermine it. When states challenge federal policies in areas where they are autonomous sovereigns, they are in roughly the same position as individual dissenters—outside the system—thus making it easy for federal officials to pursue a strategy of avoidance.<sup>108</sup> A state may enact policies that exemplify its dissenting views, but the less the effects of those policies are felt elsewhere, the easier it is for federal officials simply to ignore the challenge. That means that the more rigid the bounds between state and federal policymaking, the less effective a state's resistance is likely to be.

Avoidance is more difficult when states are engaged in uncooperative federalism because states are administering *federal* law. The absence of uniformity, coupled with the risk that other states will demand similar exemptions, is likely to put pressure on the federal government to react. Variation, after all, can be administratively costly. Moreover, federal officials may find it irksome to see federal funds being used to thwart a statutory mandate rather than to serve it. *Modus vivendi* is less palatable when funded out of your own pocket. We thus would expect the federal government to respond in some way to a state's challenge. It might override the state, tolerate its position, or adopt the state's preferred policy. The key is that the federal government will be pressured to engage the state's position. And engagement is at least a partial victory for any dissenter.

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Katyal's "Internal Separation of Powers," 116 YALE L.J. POCKET PART 126 (2006), <http://thepocketpart.org/2006/11/2/magill.html>; and Christopher S. Yoo, *Can Interagency Dialogue Serve as the New Separation of Powers?*, 116 YALE L.J. POCKET PART 131 (2006), <http://thepocketpart.org/2006/11/2/yoo.html>.

108. As one of us has noted, however, state officials who put in place a real-life policy should still have an agenda-setting advantage when compared to conventional dissenters, who can only describe that policy in the abstract. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1762-64 (2005).



### 3. *Dissent as an Act of Affiliation*

Another reason to value uncooperative federalism is that it involves an unusual type of state challenge that harnesses the power of insider status in the service of outsider interests. Here again, uncooperative federalism serves as a useful complement to the autonomy model.

When a state uses its sovereign power to contest federal policy, it does so as an outsider to the system.<sup>109</sup> There are many advantages to dissenting as an outsider. State officials are not bound by federal program requirements, they are free to say whatever they want, and they are untainted by any association with the policies they are criticizing. There are also disadvantages associated with an outsider's status, however. State officials may be considered less knowledgeable than those who administer the program, and they may be unfamiliar to federal officials. They may be able to speak more forcefully than partial insiders, but they may also be less likely to get heard. Uncooperative federalism, in contrast, takes place in areas where states can take advantage of the connective ties that bind them to federal officials. While those ties may lead state officials to dissent in less forceful or radical terms, they should also yield knowledge of the system and personal relations with the people best positioned to change the policy. If effective dissent requires one to know both what to say and to whom to say it, uncooperative federalism ought to be fairly effective.

Integration may also lend an expressive dimension to state officials' contestation. One of the most common rhetorical devices used by dissenters is to invoke a shared commitment or community, to offer some proof of affiliation even as they challenge the prevailing view. The reason for doing so is simple: as scholars studying the dissent tradition have recognized, individuals speaking out against social policy have a greater claim to our attention if they are part of our community. An effective critic must place herself "[a] little to the side, but not outside," argues Michael Walzer.<sup>110</sup> Those who insist on separation and detachment may, by so doing, undermine their ability to dissent effectively. But "the connected critic," who retains ties to the community even as she speaks out against it, makes a powerful bid for our attention.<sup>111</sup>

State officials who implement federal law are the rough equivalent of Walzer's connected critics. They speak as both insiders and outsiders—part of

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109. States, of course, are never complete outsiders to a federal system. Nonetheless, in this context they are at least outsiders to the regulatory regime they are criticizing.

110. MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 61 (1987); *see also id.* at 55 ("Opposition, far more than detachment, is what determines the shape of social criticism.").

111. *Id.* at 39.

the federal machinery with ties to those outside it. That means that even as they articulate a dissenting view, they are still understood to be part of the national system. This connectedness may lend states “standing,” in the colloquial sense, to criticize federal policy.<sup>112</sup> Consider how much less compelling state resolutions responding to the Patriot Act would be if they invoked only state constitutions. These resolutions have force because the states are integral parts of the apparatus that administers the Act, and they appeal to the nation’s shared laws and traditions. Yet the resolutions confirm that states have enough distance from the federal government to disobey aspects of its current policy.

#### 4. Accountability

It might seem surprising that we list accountability as one of the benefits associated with uncooperative federalism. After all, one of the more serious worries about cooperative federalism is that it blurs the lines of accountability, preventing citizens from knowing whom to blame for an unpopular policy. Accountability is considered a particularly powerful argument against commandeering (something we think a strong commitment to uncooperative federalism would favor<sup>113</sup>). On this account, when the state-federal relationship is “cooperative”—when the state and federal government are in agreement about the regulatory question—it may be fair to censure both state and federal officials for any problems that arise. When state officials disagree with their federal counterparts, however, the accountability problem is worrisome. The Supreme Court in *New York v. United States*, for instance, maintained that having states carry out federal policies with which they disagree—precisely what uncooperative federalism involves—would result in state officials wrongly “bear[ing] the brunt of public disapproval” of federal policy.<sup>114</sup>

Given how little most voters know about discrete policy issues,<sup>115</sup> we are skeptical that accountability arguments deserve as much weight as they have been given. Political accountability depends almost entirely on voters’ reliance

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112. Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2641 (2006).

113. See *infra* Section III.A.

114. 505 U.S. 144, 168–69 (1992); see *Printz v. United States*, 521 U.S. 898, 929–30 (1997).

115. See, e.g., BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007); SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* (1991); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2079–80, 2086–87 (2005).

on broadly defined partisan heuristics, not fine-grained policy judgments.<sup>116</sup> Indeed, the extant research has prompted Neil Siegel to conclude that while high-information voters should be able to identify the right culprits, low-information voters “may be largely beyond judicial or political help on the accountability front.”<sup>117</sup>

We thus think that accountability in this context is mostly an elite affair, depending largely on what Jerry Mashaw calls “soft law” — bureaucrats policing themselves based on shared professional norms, with nudges from outside advocacy groups and policymakers.<sup>118</sup> Uncooperative federalism, of course, offers significant advantages in promoting this sort of bureaucratic accountability because it takes place in the regulatory arenas where state administrators are integrated with federal ones. Professional peer pressure depends on the ties that bind bureaucrats to one another. When state bureaucrats are embedded within the federal system, they are able to develop those professional ties while still being able to rely on a separate power base. State administrators may therefore be less inhibited than their federal counterparts in challenging existing practices. But they should still be better situated to push those challenges than bureaucrats outside the system.<sup>119</sup>

Even when we can look to voters to hold officials accountable for their missteps, it is still not clear that uncooperative federalism (or, more accurately, joint regulation) falls short on the accountability measure. To the contrary, when state and federal officials disagree, joint regulation offers at least three accountability-promoting devices: information, access, and allies.

First, disagreement within a joint regulatory regime can provide a useful information-enforcing device. Accountability, of course, requires accurate information. In a complex regulatory world, it is often difficult to discern who is responsible for a problem even when the states and federal government regulate independently. When state and federal officials are at loggerheads,

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116. For an intelligent summary of the political science literature on this point, which dates back at least to V.O. Key, see David Schleicher, *Irrational Voters, Rational Voting*, 7 ELECTION L.J. 149, 153, 155-57 (2008) (reviewing CAPLAN, *supra* note 115).

117. Siegel, *supra* note 28, at 1632.

118. Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, art. 4, at 6-7, <http://www.bepress.com/ils/iss6/art4/>.

119. Joint regulation, of course, also casts state policymakers — that is, legislators and members of the executive branch — in the role of the bureaucrats. It is an open question whether the professional networks that typically develop among bureaucrats with similar training and backgrounds would extend to state politicians. Nonetheless, at the very least we would expect the repeated contacts fostered by an integrated regulatory scheme to help these state officials challenge federal administrators.

joint regulation imposes the rough equivalent of “joint and several liability” upon them. The advantage to this strategy, at least in theory, is that it creates an incentive for defendants to play the blame game among themselves, using their resources to get the goods on each other. When state and federal officials disagree, dual regulation is the political cognate to joint and several liability; it should create an incentive for state and federal officials to disseminate information about who is to blame for a problem. This means that the people with the most information about who is responsible—and the greatest ability to get that information out—will be hard at work educating voters.<sup>120</sup>

Second, accountability is not simply about knowing who is responsible, but also being able to appeal to them. And interposing the state between the people and the federal government may bolster this aspect of accountability by offering more access points for individuals who oppose federal policy—they can petition not only the federal government, but also state officials. Having more access points may not matter as much if both the states and federal government are committed to the same project. But where, as with uncooperative federalism, state and federal officials disagree, citizens and public interest groups ought to be able to find someone to help them push their cause.

This brings us to a third, related point—one that we explain in greater detail in Part III. Forcing state officials to participate in a federal scheme they oppose may generate *more* allies for the citizens who oppose the scheme. If states can simply opt out of a program with which they disagree, they may not have much incentive to devote the resources needed to mount an effective challenge to federal policy.<sup>121</sup> When state officials fear that they will suffer the political consequences of carrying out a policy that runs contrary to their constituents’ interests, they have a greater incentive to play the contrarian’s role. Those who favor the autonomy model of state dissent are absolutely correct that “sometimes it takes a government to check a government.”<sup>122</sup> But it may be that federal-state integration, rather than autonomy, creates more incentives for state governments to check the federal government. When a state finds itself entangled with unpopular federal policies, citizens demanding federal accountability may suddenly find themselves with a rather powerful ally.

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120. See *Printz v. United States*, 521 U.S. 898, 957 n.18 (1997) (Stevens, J., dissenting) (“[T]o the extent that a particular action proves politically unpopular, we may be confident that elected officials charged with implementing it will be quite clear to their constituents where the source of the misfortune lies.”); Siegel, *supra* note 28, at 1633.

121. See *infra* Section III.A.

122. Young, *supra* note 12, at 1285.

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*B. Uncooperative Federalism Versus the Political Safeguards of Federalism*

While uncooperative federalism offers a distinct set of advantages over the autonomy model, we should also note for those skeptical of that model that uncooperative federalism similarly offers some comparative advantages over one of the autonomy model's main competitors, the "political safeguards" theory, which posits that states can adequately protect their interests by lobbying Congress or relying on the partisan ties that bind state and federal officials.

*1. The Ex Post Safeguards of Federalism*

One key difference between uncooperative federalism and the political safeguards model has to do with time.<sup>123</sup> Joint regulation provides a set of ex post safeguards for state interests—protections available *after* a statute has been enacted, which extend the time horizon for state challenges. Scholars are quite familiar with the ex ante safeguards of federalism—the channels states typically use to shape federal policy, such as lobbying or intraparty bargaining. Larry Kramer, whose scholarship emphasizes the administrative dimensions of state power, has even lumped these two channels for dissent together, describing the political ties that bind federal and state officials and the bureaucratic connections forged through cooperative federalism as different features of the "political safeguards of federalism."<sup>124</sup>

Although we have no quarrel with Kramer's general approach, we think it is a mistake to conflate these two "safeguards" of federalism when focused on state-centered dissent. Here, what we think of as the "*political* safeguards of federalism"—the partisan ties to which the vast majority of Kramer's analysis is devoted—are distinct from what we have termed the "*administrative* safeguards of federalism" that arise when state officials are embedded in the Fourth Branch. Kramer is right that both political parties and administrative institutions build ties among state and federal officials and provide channels for state officials to pursue their interests. But Kramer does not focus on the state's role in contesting federal policy *after* interest-based bargaining concludes, after federal lawmakers have refused to accommodate the state's views. At this point, when the state takes on the role of the dissenter, the administrative safeguards of federalism work differently than the political safeguards of federalism.

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123. We are indebted to Daryl Levinson for helping us think through these questions.

124. See Kramer, *supra* note 37; Kramer, *supra* note 27.

To begin with, the administrative safeguards of federalism extend the time horizon for states to challenge federal policy. When states are outside the federal scheme, their best chance of challenging federal policy is likely to arise when the statute is passed or amended—times when lobbying and partisan ties ought to be particularly effective. States that will ultimately be insiders to the federal scheme, in contrast, are likely to have more than one bite at the apple. They can fight when the statute is passed. But if they lose that fight, they will still have ample opportunity to amend and challenge federal policy once the scheme is put in place. For instance, Wisconsin and Michigan successfully changed welfare policy that was statutorily entrenched.

Note how this phenomenon complicates the empirical questions involved in assessing which channels for state contestation we ought to prefer. For instance, while the *ex post* safeguards of federalism may complement the *ex ante* safeguards of federalism, they may also be substitutes. A state may be less inclined to spend political capital when a bill is enacted if it is confident it can secure the changes it wants through the administrative process. Needless to say, we can imagine quite different takes on how to assess these tradeoffs. You might prefer that states fight the good fight *ex ante*, when the Capitol provides a public stage and federal officials are hammering out broad principles. Or you might prefer these fights to happen *ex post*, when the practical stakes of the debate will be clear and the conversation will be iterative.

If, however, it turns out that the *ex post* and *ex ante* safeguards are not substitutes for one another, we face another thorny question, one well-known to scholars of dissent: how much contestation is optimal? Consider the Patriot Act resolutions we described above. If states had ample opportunity to lobby against the federal legislation, do we want them to have an additional weapon in this fight, the ability to prevent certain aspects of federal policy from being carried out on the ground? Or is the need for settlement paramount?

## 2. *Dissenting by Deciding*

Another key difference between uncooperative federalism and the political safeguards of federalism is that only the former deploys policymaking as a tool to contest federal authority. As one of us has written at length, the great advantage to casting dissent in terms of a governance decision—“dissenting by deciding”—is that it allows dissenters to offer up a real-life instantiation of

their view.<sup>125</sup> California, for instance, can show how strong environmental regulations work in practice. Michigan and Wisconsin can demonstrate that welfare to work is a viable option.

The opportunity to dissent by deciding gives uncooperative federalism an advantage over the political safeguards model. Real-world examples are quite useful in policy debates. After all, anyone pushing for change must always deal with the central question: will the new idea work? It is not hard to imagine why federal legislators and administrators would be nervous about switching to a new, untried policy in place of the current regime. In lieu of the necessarily abstract arguments that challengers typically deploy, a state can make its case by putting its ideas into practice, remapping the politics of the possible. An autonomy model, of course, allows states to do the same. The key difference is that uncooperative federalism allows the state to build that competing model *within* the federal framework. Because state administrators can show their federal counterparts precisely how the new scheme works in practice, they can provide important reassurance and guidance to federal legislators who are considering whether to change gears.

We also suspect that this unusual form of dissent will create opportunities for debate over issues that may be neglected under the political safeguards model. This is because debates among those charged with administering federal programs are likely to look different from those that typically occur among partisan officials. Uncooperative federalism will often be directed toward interstitial, secondary implementation questions—the sorts of issues that do not lend themselves to the type of grand, thematic debates that are typically aired when a statute is being passed. Consider the welfare example discussed above. State officials could and did lobby federal legislators to change welfare policy. But Wisconsin and Michigan advanced that challenge by creating their own competing regulatory schemes and showing how they worked in practice. Dissenting by deciding enabled state officials to focus on the details that are often lost in national debates, showing how broad polemics translate into concrete regulations. The debates generated by uncooperative federalism may also be less abstract than those that take place in advance of a statute's passage, as they will be informed by facts on the ground and information about how the policy works in practice.<sup>126</sup>

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125. Gerken, *supra* note 108; see also William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes (2008) (unpublished manuscript, on file with authors) (arguing that the ability to put in place a program has an important effect on debates about national policy).

126. Cf. Eskridge & Ferejohn, *supra* note 125 (emphasizing the special role that administrative agencies play in ongoing debates about national policy).

### III. DOCTRINAL IMPLICATIONS

As noted above, the purpose of this Essay is not to insist that we have discovered *the* authoritative account of federalism or to argue that the case for uncooperative federalism is so strong that it ought to displace other models of federalism. Indeed, many of the normative claims we made in Part II are contestable, and the jury is still out on most of the empirical ones. But we do think our account shows that a rich set of ideas is embedded in the notion of uncooperative federalism and calls attention to benefits that have not been fully appreciated in the existing literature.

To ground our analysis a bit, here we offer a thought experiment: if you were strongly committed to uncooperative federalism—believing that it outweighed the many other values that courts have invoked in resolving federalism disputes, that it did in fact offer the authoritative guide to “Our Federalism”—what would that mean in terms of doctrine?<sup>127</sup> The reason we offer these arguments as a thought experiment is simple: there is a difference between a needed corrective to the debate and a totalizing theory. We do not mean to claim that there is no room left for state autonomy, nor that the only role for states to play is that of the servant. But our account is designed to offer a new perspective on some of the problems federalism doctrine addresses, and we think that the best way to show why this perspective matters is to shear away (temporarily) other considerations that are usually included in the federalism equation.

In our view, a strong commitment to uncooperative federalism would lead you to conclude that the Supreme Court has two central doctrines of federalism backwards. Rather than proscribe commandeering and expansively construe preemption as it does now, a Court attentive to uncooperative federalism should allow commandeering and cabin preemption. By fostering integration and overlap in regulatory spheres, this doctrinal 180 would facilitate state dissent while pushing federal engagement with state challenges.

#### *A. Commandeering*

As set forth in *New York v. United States* and *Printz v. United States*, the Court’s anticommandeering doctrine provides that the “Federal Government may not compel the States to enact or administer a federal regulatory

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127. Federalism debates get worked out in many fora, of course, not just in the courts. Given that courts are an important referee in this area and given that doctrine is the lingua franca of the academic audience we are addressing, we think the focus on courts is warranted here.



program.”<sup>128</sup> The doctrine is one of the Court’s more popular federalism interventions, and scholars focused on the autonomy model defend it in terms similar to those invoked by the Court, charging that federal commandeering of state officials “denigrat[es] state autonomy,”<sup>129</sup> undermines political accountability,<sup>130</sup> and may even be a form of compelled speech.<sup>131</sup> The Court and these scholars cast the states as autonomous sovereigns, effective at contesting federal policy and preserving individual liberty only to the extent that they are able to govern without the federal government’s interference.<sup>132</sup>

Nationalists, needless to say, oppose the anticommandeering principle, but so do some who favor the cooperative federalism model. For instance, in response to the Court’s argument that Congress may preempt the states but not commandeer them,<sup>133</sup> the dissenting Justices in *Printz* argued that commandeering is preferable to preemption because it gives states a role in shaping national policy and lends them power they would lack were the federal government to implement the program itself: “[A] confederation that allows each of its members to determine the ways and means of complying with an overriding requisition is obviously more deferential to state sovereignty concerns than a national government that uses its own agents to impose its will directly on the citizenry.”<sup>134</sup>

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128. *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

129. Cox, *supra* note 11, at 1330; see Althouse, *supra* note 78; Young, *supra* note 12.

130. See *New York*, 505 U.S. at 168.

131. See Hills, *Why State Autonomy Makes Sense*, *supra* note 18, at 906-15; Young, *supra* note 12, at 1295-1301.

132. See, e.g., *Printz*, 521 U.S. at 918 (“It is incontestable that the Constitution established a system of ‘dual sovereignty.’”); *id.* at 932 (noting that commandeering would “compromise the structural framework of dual sovereignty”); *New York*, 505 U.S. at 162-63; Young, *supra* note 12, at 1297.

133. *New York*, 505 U.S. at 178.

134. *Printz*, 521 U.S. at 945 (Stevens, J., dissenting); see *id.* at 976-77 (Breyer, J., dissenting) (arguing that the European Union, Germany, and Switzerland allow for commandeering “in part because they believe that such a system interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary government, and helps to safeguard individual liberty as well”); Siegel, *supra* note 28, at 1634. For an insightful account of commandeering across the Atlantic that critiques Justice Breyer’s description, see Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 213 (Kalypso Nicolaidis & Robert Howse eds., 2001). For discussions reaching different conclusions about the relative merits of commandeering and preemption, see, for example, Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yeskey*, 1998 SUP. CT. REV. 71, which argues that there is not a clear difference

A strong proponent of uncooperative federalism would embrace commandeering not because it increases national power or furthers federal-state cooperation, as most proponents of commandeering would have it, but because it facilitates challenges to federal policy. That is because commandeering would lead to greater federal-state integration than exists now, embedding state officials in more units of the Fourth Branch, even when they disagree with national policy. The ways in which states have challenged federal environmental and welfare policy, as we discussed in Part I, are instructive even though these challenges did not involve commandeering (the Clean Air Act is a conditional preemption statute, while AFDC involved conditional spending). These examples suggest that commandeering would create more channels for the peculiar form of dissent that we have termed uncooperative federalism—dissent that takes place within the interstices of the federal system, vests state officials with greater agenda-setting power, and allows state bureaucrats to serve as “connected critics” within the federal system.

Indeed there is reason to think that commandeering, were it permitted, would lead to more engaged and intense forms of contestation than conditional preemption and conditional spending. These gentler efforts to rope states into the federal scheme allow states to opt out without raising any objection to the merits of federal policy; they can choose simply not to implement a federal program or turn down federal funds. By contrast, a state that is commandeered must decide at a minimum how to implement federal policy and whether to deviate from or push back against Congress’s instructions.

Commandeering may thus push states toward harder forms of dissent, perhaps even civil disobedience.<sup>135</sup> State resolutions responding to the Patriot Act, which effectively commandeers state resources by requiring state cooperation in intelligence and enforcement, offer a good example. As we discussed above, these resolutions challenge the Act by refusing state participation in enforcing provisions that state officials believe violate the Constitution. State rejections of the REAL ID Act as violative of civil rights and

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between preemption and commandeering with respect to the values of federalism; and Hills, *Why State Autonomy Makes Sense*, *supra* note 18, at 900, which states that “preemption is generally less harmful to useful state and local political activity than commandeering legislation.” *Id.* (emphasis omitted).

135. Outright noncompliance might seem to bring us full circle to anticommandeering doctrine, but state action may have a different valence depending on whether commandeering is permitted. Much as civil disobedience gains its oppositional power from the defiance of established law in an effort to change it, a state’s refusal to implement a federal mandate when it does not have permission to refuse registers more powerfully as dissent than its licensed opting out on federalism grounds, as we discuss below.

privacy interests are similarly illustrative.<sup>136</sup> Precisely because the states are implicated in these federal programs, they are driven to make claims against federal policy.

In this way, commandeering may even bolster the expressive power of states to contest federal law. As noted above, a problem with governance decisions is that they may be illegible. It will sometimes be difficult to figure out whether a state is demanding an exemption or dissenting against federal policy. A state rejecting a federal mandate on anticommandeering grounds may only be vindicating its sovereign rights. But when commandeering forms the legal backdrop, dissent materializes. By shifting the focus from whether the state is forced to comply with a federal mandate to whether the mandate is itself legitimate, the state is pushed to make an argument directed at the nation at large rather than demand a state-specific exemption or articulate state-specific values. And its standing to make those claims derives not from its separateness, but from its involvement in the federal scheme.

Note the counterintuitive relationship between the power of the sovereign and the power of the servant in this context. Opponents of commandeering often argue that it undermines the ability of states to challenge the federal government because it treads on their autonomy, coopting them into a regime they do not support. It may be, however, that the opposite is true—that “softer” protections for dissenting states can push them toward “harder” forms of dissent. Allowing commandeering may compel states to contest federal policy based on its substance, because they cannot simply opt out of its coverage. By contrast, stronger protections, like the prohibition on commandeering, may reduce conflict. In the words of one of its defenders, anticommandeering doctrine gives states “a less judgmental way to disengage from a federal program” than to challenge the federal program’s merits.<sup>137</sup> Viewed through the lens of uncooperative federalism, this is not a selling point. Providing states with the ready ability to opt out may decrease, even eliminate, their incentive to reshape or challenge federal policy, while the very threat of “being pressed into federal service”<sup>138</sup>—of having to enforce federal law—may drive states to contest such law on the merits.

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136. See *supra* note 93 and accompanying text.

137. Althouse, *supra* note 78, at 1261. Ann Althouse notes that this “less judgmental” disengagement “discourages some vigorous debate about the meaning of constitutional rights.” *Id.* at 1261.

138. *Printz*, 521 U.S. at 905.

The notion of uncooperative federalism thus offers a new angle on the compelled speech argument invoked by proponents of the autonomy model.<sup>139</sup> Stressing the role of states as effective voices of opposition to the national government, these commentators have argued that commandeering undermines the ability of state governments to speak out against federal policy.<sup>140</sup> But it may be the very fact that state governments are implicated in a federal policy that spurs them to speak up.<sup>141</sup> While autonomy scholars reasonably find it distasteful to make state officials implement federal policies they disagree with,<sup>142</sup> they ignore how this dynamic may in fact generate more democratic friction and debate over the federal scheme. We see, in short, yet another example of the classic tradeoff between voice and exit.<sup>143</sup>

Needless to say, proponents of the autonomy model may well think that the commandeering game is not worth the candle. We can imagine two variants of this argument. The first is that the power of the sovereign is so superior to the power of the servant that we would never want to trade away the former for the latter. On this view, permitting commandeering would be counterproductive because any gains in the state's ability to dissent as a servant would be offset by incursions into its autonomy. A second, more powerful argument is that nothing is gained by lifting the ban on commandeering. A critic could point out that most states agree to carry out federal programs even in the absence of commandeering, so the level of federal-state integration would not increase significantly were commandeering permitted. We also see examples of uncooperative federalism in the current regime. Why, then, should we want states to give up the leverage that anticommandeering doctrine lends them in the bargaining process?<sup>144</sup>

139. See Hills, *Why State Autonomy Makes Sense*, *supra* note 18, at 906-15; Young, *supra* note 12, at 1295-1301.

140. See, e.g., Hills, *Why State Autonomy Makes Sense*, *supra* note 18, at 911 ("It is difficult to see how [states can legislate on behalf of the federal government] without compromising their ability to lead a rhetorically effective opposition to such policies."); Young, *supra* note 12, at 1301 ("Commandeering . . . undermin[es] the ability of state and local governments to articulate a different point of view.").

141. Cf. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1076 (1995) ("[S]tate officials arguably have greater incentive to protest publicly against federal incursions that come in the form of commandeering statutes than those that are federally enforced and financed.").

142. See, e.g., Hills, *Why State Autonomy Makes Sense*, *supra* note 18, at 907.

143. HIRSCHMAN, *supra* note 4; Weiser, *Cooperative Federalism*, *supra* note 14, at 704-07 (applying Hirschman's framework to federal-state, as well as state-state, relationships).

144. See Hills, *Federalism in Constitutional Context*, *supra* note 18 (suggesting that competition between federal and nonfederal officials for implementation authority ensures faithful

As an initial matter, we note that neither claim calls into question the main thrust of our argument. As we have stated, our goal is to foreground a set of considerations that have been neglected in thinking about commandeering, not to insist that uncooperative federalism should trump the many other values at stake in every instance. Perhaps once all of those values are taken into account, anticommandeering doctrine should remain as is.

More important for this discussion, the answers to the relevant empirical questions—whether allowing commandeering would push more states to challenge federal mandates and lead to harder forms of dissent—may depend a good deal on how much power Congress currently wields under the conditional spending doctrine, which allows it to condition federal funds on states' compliance with federal mandates.<sup>145</sup> If you think states are so starved for federal funding that they cannot afford to turn down a federal invitation to join a regulatory scheme,<sup>146</sup> then commandeering probably does not matter because states have no power to bargain regardless. Whether they are commandeered or simply bribed, state officials are forced to implement a program they find distasteful, and this should push them to engage in variants of uncooperative federalism. If conditional spending is Congress's trump card, a strong proponent of uncooperative federalism and a strong proponent of the autonomy model are in roughly the same position with regard to commandeering—they are fighting about something that is beside the point.

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execution of the laws, and arguing that state and local officials are only able to compete productively with the President and federal bureaucracy because of the anticommandeering doctrine). We thank Ernest Young for pressing us on this point.

145. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987). For a sampling of the literature on conditional spending and its relationship to the values of federalism, see, for example, Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459 (2003), which criticizes the *Dole* test and proposes possible alternatives; and Siegel, *supra* note 28, at 1655–58, which compares conditional spending and commandeering.
146. See, e.g., RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 152 (1993); Adler & Kreimer, *supra* note 134, at 106; Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 196–97 (2001); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 85–87. For an argument defining the conditions in which a state is likely to be “locked in” to a program once created and thus unable to refuse federal funds going forward, see David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197 (2004).

If, by contrast, you think that the states are not so starved for federal funds that they will take any offer<sup>147</sup> (or the federal government's budget is limited enough that it cannot always make an offer), so that the anticommandeering principle gives states real leverage in negotiating with the federal government, a strong commitment to uncooperative federalism would push you to suspend the prohibition on commandeering.<sup>148</sup> This may sound surprising, but consider the following. If states have a lot of leverage in dickering with the federal government, it seems quite likely that they will negotiate exceptions and opt out of the parts of the federal program they do not like—or simply opt out of the program altogether. This means that the strongest opponents of the program will remain outside it, thereby reducing the amount of pushback offered by the states in the aggregate. As to the states that accept the federal invitation after lots of bargaining, state-negotiated exceptions and partial opt-outs will similarly reduce the extent to which states engage in dissent.<sup>149</sup>

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147. See, e.g., Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 930 (2008); Hills, *Why State Autonomy Makes Sense*, *supra* note 18, at 862. Hills notes, for instance, that more than half of the states declined OSHA funds and that Arizona initially opted out of Medicaid. Hills, *Why State Autonomy Makes Sense*, *supra* note 18, at 862–63.
148. Roderick Hills would likely take the opposite position. In his view, state officials' independence from federal mandates depends on the anticommandeering doctrine. He worries that, without *Printz*, “[g]overnors, 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,” resulting in “picket fence federalism.” Hills, *Federalism in Constitutional Context*, *supra* note 18, at 192; see also Hills, *supra* note 38, at 1227 (defining “picket fence federalism”). The key question is which way the picket fence argument cuts. As Larry Kramer observes, “bureaucratic specialization may foster close cooperation among experts at the state and federal level . . . in a way that undermines the power of elected officials at both levels.” Kramer, *supra* note 37, at 284 n.269 (emphasis added). Thus, even if picket fence federalism pulls power away from elected officials, it might reduce the power of state elected officials, as Hills suggests, or it might reduce the power of both federal and state elected officials. If the latter is more often the case, then we would want to know precisely how picket fence federalism affects the tug-of-war between state and federal bureaucrats—does it pull state officials fully into the federal orbit, or are state officials able to use professional ties to bring federal bureaucrats closer to their preferred position?
149. Of course, this argument, too, relies on empirical assumptions. For instance, states that turn down federal funds may still regret the lost funds and thus push to participate in the federal program on their own terms. If so, they may not shut up once they opt out. Rather, they may continue to dissent in the hopes that they will be able to change the program to their satisfaction. And if federal decisionmakers place a premium on 100% participation, they may well be willing to engage states that initially turned down the funds. This bargaining could look quite different from the failed *ex ante* bargaining that resulted in states opting out. At this point, a dissenting state will have established the seriousness of its opposition by putting its money where its mouth is, and both state and federal actors will be able to point to the program's implementation in participating states to concretize the debate. If federal-

It is, of course, difficult to resolve these questions in general terms. On the one hand, most states take part in joint regulatory programs even in the absence of commandeering. On the other hand, examples of civil disobedience in the cooperative federalism regime are fairly rare. Note that our best example involves the Patriot Act, which certainly has elements of commandeering even if it has not been invalidated on those grounds. We suspect that we would see more examples of civil disobedience if commandeering were permitted.

This brings us to a second observation about conditional spending: if you are strongly committed to uncooperative federalism, conditional spending is a worse option than commandeering but a better option than preemption, which we discuss in the next Section. It is worse than commandeering because it pushes state dissent behind closed doors early in the bargaining process and may even allow Congress to buy off dissent, leading states to accept conditions that they might otherwise contest.<sup>150</sup> It also muddies the distinction between dickered and dissent. But conditional spending is superior to preemption because it still embeds states in the federal regime and builds the connective ties that bind state and federal officials, whereas preemption pushes states outside the Fourth Branch.

### *B. Preemption*

If a strong commitment to uncooperative federalism would lead you to conclude that the Court should permit commandeering to foster state dissent, it would also lead you to conclude that the Court should rein in preemption doctrine. While many scholars who oppose anticommandeering doctrine favor a broad preemption principle (and vice versa), uncooperative federalism suggests that the Court has it wrong on both counts. In particular, it calls attention to a particular subset of preemption cases—state attempts to regulate in the interstices of a federal regime. While much doctrine and scholarship

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state interactions tend to take this path, conditional spending offers an additional forum for uncooperative federalism.

For the reasons outlined in the text, our best guess is still that commandeering would lead to more robust dissent than conditional spending, but even if conditional spending equally spurs uncooperative federalism, a strong proponent of uncooperative federalism might prefer commandeering on the ground that conditional spending will push states to couch their dissenting views as funding discussions rather than challenges on the merits, thereby blurring the line between dissenting and bargaining and making contestation less visible. We are grateful to Donald Elliot for pushing us on this point.

150. See *Federalism and Administrative Structure*, *supra* note 17, at 1343 (noting that cooperative spending programs may “co-opt” state opposition). For an essay casting doubt on this idea, see Rose-Ackerman, *supra* note 14, at 1347-48.

focuses on federal preemption of state tort law, uncooperative federalism underscores the value of state statutes and regulations that occupy the same terrain as federal law, and it would push the Court to tolerate a degree of conflict between such laws and their federal counterparts.

Courts recognize both express and implied preemption. The former occurs when Congress includes preemptive language in a statute, while the latter captures both field preemption (when a federal regulatory scheme is so pervasive that courts infer that Congress did not want the states to supplement it) and conflict preemption (when compliance with both federal and state regulations is impossible or when state law is an obstacle to accomplishing Congress's objectives).<sup>151</sup> Both express and implied preemption have assumed an expansive breadth. In recent years, the Supreme Court has found preempted state regulations governing tobacco advertising near schools,<sup>152</sup> business relationships with Burma,<sup>153</sup> the training of hazardous waste site workers,<sup>154</sup> oil tanker safety,<sup>155</sup> vehicle emissions,<sup>156</sup> and employers' use of state funds to deter union organizing.<sup>157</sup> The Court's readiness to find field preemption and its capacious view of what constitutes an obstacle for purposes of conflict preemption have led some commentators to argue that there is a presumption in favor of preemption, despite the Court's refrain to the contrary.<sup>158</sup>

While this wide-ranging preemption doctrine certainly does not lack detractors,<sup>159</sup> by and large these critics tell only part of the story. Many oppose

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151. An important debate has emerged concerning the power of federal agencies to preempt state law. See, e.g., Symposium, *Ordering State-Federal Relations Through Federal Preemption Doctrine*, 102 NW. U. L. REV. 503 (2008). Although this debate raises an interesting set of questions, for the purposes of our brief discussion, we lump together federal congressional and agency action.
  152. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).
  153. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).
  154. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992).
  155. *United States v. Locke*, 529 U.S. 89 (2000).
  156. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004).
  157. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008).
  158. E.g., Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002). The Court's readiness to find state law preempted also shapes express preemption doctrine, making it more likely to read preemption clauses broadly. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 9, 67-68 (2007).
  159. In fact, one could easily be forgiven for believing the doctrine has no proponents. For a sample of the critiques, see Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004); Stephen A. Gardbaum, *The*



the doctrine because it narrows the areas in which the state can exercise policymaking autonomy. By trimming back federal preemption, these scholars argue, the courts can ensure that states are allowed to have different policies from the nation at large, or at least that they “retain something meaningful to do,” in the words of Ernest Young.<sup>160</sup>

A strong commitment to uncooperative federalism would similarly push against broad preemption on the grounds that it deprives the states of something to do. But it envisions a different “something” than the autonomy model. Preemption is a problem when viewed through the lens of uncooperative federalism not because it deprives states of the chance to regulate separate and apart from the federal scheme, but because it pushes states to the edges of national policymaking and reduces the number of ties that bind state and national officials.<sup>161</sup>

While our aim is not to advocate a particular doctrinal standard,<sup>162</sup> we do wish to note how different preemption doctrine would look if the values of uncooperative federalism were at the fore. For instance, courts would rely on a presumption against preemption, which has been an on-and-off feature of preemption jurisprudence. But they would not tether the presumption to states’ “historic police powers.”<sup>163</sup> Instead, a more absolute presumption would underscore that states can regulate jointly with the federal government and would establish that a degree of conflict between state and federal policy does not necessarily mean state law must cede.

More broadly, uncooperative federalism would generate a very different understanding of proscribed conflict for purposes of implied preemption. That is no small thing. The touchstone of implied preemption analysis is conflict. A strong commitment to uncooperative federalism would lead courts to grant states more leeway to regulate in the same areas as Congress and to tolerate a more substantial degree of contestation. Attempts to nullify federal law would

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*Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); Schapiro, *Interactive Federalism*, *supra* note 16; and Young, *supra* note 10.

160. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1385 (2001).

161. One might also worry, as does Susan Rose-Ackerman, that federal preemption can “reduce the financial and political resources at the disposal of state governments” and result in “weaker and hence less combative governments.” Rose-Ackerman, *supra* note 14, at 1346.

162. For one doctrinal fix, see Hills, *supra* note 158, at 54-68, which argues for a *Chevron*-style default rule of deference to state governments acting against a backdrop of ambiguous federal law.

163. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In at least one case, the Court has invoked the presumption against preemption as a general rule of construction, although it went on to note that this presumption applied “particularly” in cases involving historic state police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

still be preempted, but states would have considerably more room to push back against federal law in its interstices. A preemption doctrine informed by values of uncooperative federalism might resemble what we sometimes see when Congress has itself insisted upon the preservation of state laws occupying the same area it is regulating.

To ground this idea a bit, consider an example. The Controlled Substances Act (CSA) includes a savings clause providing that its provisions shall not be construed as indicating a congressional attempt “to occupy the field . . . to the exclusion of any State law on the same subject matter” unless state and federal law so conflict “that the two cannot consistently stand together.”<sup>164</sup> The Act also explicitly incorporates state regulation in certain areas—for instance, licensing physicians to dispense drugs.<sup>165</sup>

In 2001, pursuant to the CSA, Attorney General John Ashcroft promulgated an Interpretive Rule that would have prohibited doctors from prescribing regulated drugs for use in physician-assisted suicide, despite an Oregon law that permits the practice. In *Gonzales v. Oregon*, the Supreme Court sustained a challenge to the Interpretive Rule, in part because it trampled on state power.<sup>166</sup> The Court spoke the language of dual sovereignty, noting that “the structure and limitations of federalism” allow the states “great latitude under their police powers” and that, respecting this, the CSA “manifests no intent to regulate the practice of medicine generally.”<sup>167</sup> But while the Court spoke in the cadence of sovereignty, the logic of its decision turned on the level of integration between state and federal enforcement. As the Court stated, “The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States’ police powers.”<sup>168</sup> Because of this reliance, the states were permitted to regulate despite a comprehensive federal law.

Oregon’s Death with Dignity Act was surely not anticipated by the CSA; the state used the power of the servant to advance a distinct agenda and to intervene in Americans’ “earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”<sup>169</sup> And the Court was willing to read preemption doctrine narrowly in order to facilitate that debate. Uncooperative federalism would lead courts to reach a similar conclusion even

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164. 21 U.S.C. § 903 (2000).

165. *See id.* §§ 802(21), 823(f).

166. 546 U.S. 243 (2006).

167. *Id.* at 270 (quoting *Medtronic*, 518 U.S. at 475).

168. *Id.*

169. *Id.* at 249 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

when Congress has not been explicit. As Oregon's example suggests, such a doctrinal shift would enhance states' ability to flesh out an alternative vision of a federal policy, particularly by working within the gaps left by federal law.

Note also that a narrow preemption doctrine would strengthen the state's ability to set the agenda. Under current preemption doctrine, state law may be preempted without any congressional attention to the specific subject matter.<sup>170</sup> A more limited preemption doctrine, by contrast, would require Congress engage more directly with state policies it wished to override.<sup>171</sup>

Reining in preemption would also increase the expressive power of states to engage in dissent. Current preemption doctrine pushes states to avoid casting outlier policies as challenges to the federal scheme and to describe their regulatory activities as entirely distinct from federal law in order to avoid the federal trump.<sup>172</sup> As a result, preemption doctrine may obscure state motivation and render dissent illegible. Was the Illinois law mandating additional training of hazardous waste site workers at issue in *Gade v. National Solid Wastes Management Ass'n*<sup>173</sup> an effort to challenge OSHA's weak standards or was it simply about protecting the general public, something that falls outside OSHA's concerns?<sup>174</sup> Were the California and Massachusetts statutes considered in *American Insurance Ass'n v. Garamendi*<sup>175</sup> and *Crosby v. National Foreign Trade Council*<sup>176</sup> challenges to ineffective national foreign policy concerning Holocaust-era insurance policies and human rights abuses in Burma, or were they focused on discrete concerns about disclosure and business practices?<sup>177</sup> Was Massachusetts's regulation of tobacco

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170. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding preemption despite the federal statute's saving clause that explicitly preserved state common law causes of action).

171. Cf. *Hills*, *supra* note 158, at 4 (“[A] presumption against federal preemption of state law makes sense . . . because state regulation makes Congress a more honest and democratically accountable regulator of conduct throughout the nation. To reverse the usual formula, national values are well protected by the states' political process.”).

172. This is not to say that casting state law as having a different purpose from federal law is necessarily effective. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105-06 (1992) (noting that state law cannot avoid preemption simply because it serves a different objective from federal law).

173. *Id.*

174. The district court apparently thought the latter and therefore held that the state statute was not preempted, but the Supreme Court reversed. See *supra* note 172.

175. 539 U.S. 396 (2003).

176. 530 U.S. 363 (2000).

177. While the *Garamendi* dissent seemed to regard California's disclosure law as a response to inaction at the national level, see 539 U.S. at 430 (Ginsburg, J., dissenting), it nonetheless

advertisements in *Lorillard Tobacco Co. v. Reilly* a response to the federal act's relatively weaker proscriptions, or was it instead meant to target underage smoking?<sup>178</sup> We cannot answer these questions in part because preemption doctrine gives states every incentive to conceal their distaste for federal policy and to spin state law as entirely distinct from, rather than closely related to, federal law. Pruning back preemption doctrine would thus create more channels for state dissent while helping ensure that it is understood as such.

## CONCLUSION

States use their power as federal servants to resist, challenge, and even dissent from federal policy. This form of resistance, however, is a surprisingly neglected topic in contemporary federalism scholarship. Those scholars most interested in the states' role as rivals or challengers to the federal government tend to focus on the power of the sovereign, the areas in which the states are autonomous policymakers outside the federal regulatory scheme. Those scholars most interested in the role states play within the realm of federal regulation, in contrast, largely depict states as "cooperative" friends and allies to the federal government. As a result, little thought has been devoted to considering how the state's status as servant, insider, and ally might enable it to be a sometime rival, challenger, and dissenter. We do not even have a working vocabulary for describing this phenomenon, let alone an account of why it happens, what it means, and what implications it holds for federalism doctrine.

This Essay represents a first step toward developing such an account. It compares the distinct powers that the state wields as sovereign and servant. It begins to sketch a normative argument for why uncooperative federalism might be useful in a well-functioning federal system. And it explains what a strong commitment to uncooperative federalism would mean for the commandeering and preemption doctrines, offering some counterintuitive

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stressed the fact that the California law concerned disclosure, rather than litigation, and therefore occupied a distinct space from federal law, *id.* at 441.

178. 533 U.S. 525 (2001). Massachusetts argued that Congress was addressing concerns about smoking and health, while it was addressing the prevalence of underage smoking. *Id.* at 548. The state also argued that its law was not preempted because it governed the location, rather than the content, of the advertising. *Id.* at 594-97 (Stevens, J., dissenting). Thus, in attempting to make a colorable claim that state regulation was not preempted, Massachusetts denied the existence of dialogue between its own policy and the federal regulation.

conclusions about the ways in which softening the doctrine that protects state autonomy might push states to engage in harder forms of dissent.

We have deliberately offered a simplified account of uncooperative federalism in order to present our thesis in a clear and crisp form. Needless to say, the phenomenon is much more complex, and there is a great deal of empirical and theoretical work needed to develop a full-blown account of uncooperative federalism. For instance, while we have offered a series of plausible hypotheses about the dynamics of uncooperative federalism, more must be done to test their general validity and to identify the particular contexts in which they do not apply. Case studies are likely to be especially important, as every administrative scheme is different and the conditions of bargaining between the states and the federal government vary widely from context to context.<sup>179</sup> Case studies would be particularly helpful in adding needed texture to the story about states we have offered here.<sup>180</sup> We have spoken as if the state is an “it” rather than a “they” for ease of exposition,<sup>181</sup> but there is a good deal to be said about why embedding a variety of state officials (with a variety of motivations and sources of power) into a federal administrative scheme could generate more channels for—and forms of—state-centered dissent. Moreover, the leverage the federal government exercises over states—not to mention the means by which it does so (categorical grants, block grants, conditional preemption)—varies from context to context.<sup>182</sup>

This Essay also raises a number of interesting institutional design questions that are yet to be answered. For instance, we might imagine state resistance being directed through three channels—political, administrative, and judicial.<sup>183</sup> Our focus in this Essay has been on the first two channels, but it

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179. For a good example of this sort of contextual analysis, see Siegel, *supra* note 28.

180. See, e.g., Bruce Ackerman & James Sawyer, *The Uncertain Search for Environmental Policy: Scientific Factfinding and Rational Decisionmaking Along the Delaware River*, 120 U. PA. L. REV. 419 (1972) (analyzing the structure of the Delaware River Basin Commission and identifying ways in which division of labor between state and federal officials undermined the Commission’s goals).

181. See *supra* note 45.

182. See, e.g., Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL’Y REV. 297 (1996).

183. There has been a good deal of writing on state courts as a site of resistance—specifically, state court interpretations of both federal law and state constitutions that conflict with federal interpretations. See, e.g., JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 228–72 (2005); Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); Robert M. Cover

would be useful to think of how all three work together to facilitate state contestation. There is also additional work to be done in thinking about what we term the “administrative safeguards of federalism,” a project that Larry Kramer (and Morton Grodzins before him) began,<sup>184</sup> but that remains unfinished, particularly to the extent that it complements recent scholarship on promoting dissent within administrative agencies. And more analysis could shed light on the tradeoffs we have flagged (for example, between autonomy and integration, between the political safeguards of federalism and the administrative safeguards of federalism, and between different types of contestation). We would also like to explore the connections between our project, with its focus on integration and conflict, and separation-of-powers scholarship, the other main line of structural analysis in constitutional law. There, too, we see a deep tension between the two main theories for ensuring that “ambition counteracts ambition”—one that emphasizes autonomy and independence, and another that depends on integration and interdependence.<sup>185</sup> Further, just as we value dissent for a variety of reasons (it creates a vibrant marketplace of ideas, it is a form of self-expression, and so forth), we might value state contestation for a variety of reasons (it creates a more vibrant political discourse, it diffuses power, and so forth). Different theories as to why we value state contestation might result in different strategies for promoting it.<sup>186</sup>

There is more doctrinal work to be done as well. In this Essay, we have painted with a broad brush. It is easy to imagine, however, that doctrinal

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& T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003 (2003); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959). See generally Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) (discussing the value of complex concurrency in the American legal system).

184. GRODZINS, *supra* note 14; Kramer, *supra* note 37; Kramer, *supra* note 27.

185. The classic formulation of these competing visions comes from James Madison. See THE FEDERALIST NOS. 47 & 48 (James Madison). For a markedly different approach to the relationship between cooperative federalism and separation of powers, see Hills, *Federalism in Constitutional Context*, *supra* note 18, at 181, which states that “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.”

186. For instance, if we value state contestation because it contributes to the marketplace of ideas, we are likely to prefer strategies that make disagreement visible (like loosening preemption rules so that states do not need to cloak their challenges in ill-fitting regulatory garb).

solutions will turn on factors we have omitted in our discussion. For instance, one's view of commandeering in the service of uncooperative federalism might well turn on *which* state actors are being commandeered.<sup>187</sup> Similarly, there are other doctrinal areas where a strong commitment to uncooperative federalism might matter.<sup>188</sup>

Further, there is important normative work to be done on two questions we do not answer here: (1) when states should and should not cooperate with federal mandates, and (2) how the federal government should respond to state resistance. Finally, there is a broader theoretical project, central to one of our research agendas: defining the relationship between the power of the sovereign and the power of the servant, between autonomy and integration. That project suggests that it is time to move beyond the autonomy model in a variety of constitutional settings.<sup>189</sup> All these examples suggest that uncooperative federalism represents a rich vein for scholars to mine.

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187. Cf. Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (arguing that Congress should be able to commandeer state executives and state courts, but not state legislatures).

188. For instance, such a commitment might buttress judicial skepticism of § 1983 actions designed to tamp down on state departures from federal programs. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997). Conversely, a strong commitment to uncooperative federalism might push against “hard look review” in cases like *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), in which federal agencies respond to state resistance. See, e.g., Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992). We are indebted to Jerry Mashaw for suggesting both examples.

189. See, e.g., Gerken, *supra* note 108; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005); Heather K. Gerken, *Toward a New Theory of Minority Empowerment: Elections and Governance* (2009) (unpublished manuscript, on file with author).