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A RESEARCH AGENDA FOR UNCOOPERATIVE FEDERALISTS

Ernest A. Young*

Heather Gerken was not always a federalism scholar. In fact, for years she delighted in mocking those of us who cared about limits on national power, insisting that the states were good only for picking flags and birds.¹ Now, of course, Professor Gerken is one of the brightest stars in the federalism field,² and it is a pleasure to have this opportunity to honor and take stock of her important work in this area — with only a hint of “I told you so.”

Professor Gerken’s interest in federalism is ironic not only because of her earlier views on the subject, but also because proponents of federalism on the Left remain few and far between. Although we saw a slight uptick in liberal interest in state autonomy during the dark days (for them) of the George W. Bush administration,³ much of this scholarship was politically opportunistic and largely faded with the return of good liberals to national preeminence after 2008.⁴ By and large, the conventional wisdom in the

* Alston & Bird Professor, Duke Law School. This essay is part of a *Tulsa Law Review* symposium honoring the work of Heather Gerken. I am grateful to the *Law Review* and the University of Tulsa College of Law for the opportunity to participate, and to David Houska for timely research assistance. Obviously, this essay is for Heather, my co-clerk and sister-in-all-but-birth.

1. States are not actually as good at picking birds as one might think. Seven different states claim the cardinal, and in fact, just five different birds (the cardinal, meadowlark, mockingbird, bluebird, and goldfinch) account for twenty-six states. See Frank Jacobs, *Federal Feathers*, BIG THINK (Sept. 21, 2009, 4:46 AM), <http://bigthink.com/strange-maps/412-federal-feathers> (providing a cool map, and commenting that “instead of choosing birds unique to each state, or at least not shared with other states, these insignia show an intriguing degree of overlap, and geographic contiguity”). Many are critical of the states’ choice of flags, as well. See, e.g., Peter ‘FlagDancer’ Orenski, *Controversial Indian Symbols on U.S. State Flags*, TME, <http://www.tmealf.com/ICV-23.pdf> (last visited Mar. 4, 2013); Gene Wojciechowski, *South Carolina Continues to Suffer*, ESPN (July 9, 2009), http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&id=4316170 (describing South Carolina’s continuing missed opportunity to host college sporting events on account of its decision to fly the Confederate flag).

2. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) [hereinafter Gerken, *Foreword*]; Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012) [hereinafter Gerken, *Our Federalism(s)*].

3. See, e.g., David J. Barron, *Reclaiming Federalism*, 52 DISSENT 64 (2005), available at <http://www.dissentmagazine.org/article/reclaiming-federalism>.

4. I do not use “politically opportunistic” in a pejorative sense. As I have argued elsewhere, the Framers depended on political opportunism to maintain our constitutional structure. See Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277 (2004).

legal academy is that advocacy of state autonomy retains a faint whiff of racism.⁵ I want to suggest, however, that the central irony of a leading progressive intellectual becoming fascinated with federalism is actually no irony at all. In fact, as Gerken's work makes clear, anyone seriously concerned with the well-being of minorities in a democratic society ought to be a proponent of federalism.⁶

This brief essay focuses on Professor Gerken's work, in conjunction with her former student, Jessica Bulman-Pozen, on "uncooperative federalism."⁷ This notion stresses the role of state officials involved — as they often are — in the implementation of federal regulatory and benefit schemes.⁸ Although state officials in such a role are nominally subservient to federal authority, they nonetheless retain considerable power to block or slow down the implementation of federal policy, or — even more significantly — to shape the meaning of that policy.⁹ Gerken and Bulman-Pozen shine a valuable spotlight on this previously-neglected dynamic, but they acknowledge that "there is a great deal of empirical and theoretical work needed to develop a full-blown account of uncooperative federalism."¹⁰ My task here is to identify some directions in which that work might proceed. I begin (in Part I) with an overview of Professor Gerken's federalism scholarship, then sketch out (in Part II) four distinct avenues for further work.

I. PICKLED FEDERALISM

I like to think of my old nationalist friend Professor Gerken suddenly struck blind (temporarily, of course) on the road to New Haven, as the Spirit of Federalism calls out to her in a booming voice, "Heather, Heather, why are you persecuting Me?"¹¹ But the truth is, her turn to federalism arises rather naturally from her more foundational commitments. As a scholar who began in the voting rights area, Gerken is centrally concerned with the rights of minorities and, in particular, their exercise of political power.¹² And as a former clerk to Judge Stephen Reinhardt and a great admirer of Justice William Brennan, Gerken has a soft spot in her heart for dissenters.¹³ Professor Gerken's federalism is all about affording dissenters not only a voice, but also an opportunity to develop

5. See, e.g., WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 142–43 (1964); Seth F. Kreimer, *Federalism and Freedom*, 574 *ANNALS AM. ACAD. POL. & SOC. SCI.* 66, 67 (2001) ("In my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, [federalism] was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct."). This tendency continues to besmirch contemporary debates, as defenders of the Affordable Care Act ("ACA") have sought to paint opponents of national healthcare as racists. See, e.g., Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 *B.U. L. REV.* 1723, 1746–47 (2011) (comparing Virginia's arguments against the ACA with the Commonwealth's segregationist brief in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)).

6. See Heather K. Gerken, *A New Progress Federalism*, *DEMOCRACY J.*, Spring 2012, at 37, available at http://www.democracyjournal.org/pdf/24/a_new_progressive_federalism.pdf.

7. See Bulman-Pozen & Gerken, *supra* note 2.

8. See *id.* at 1258–59.

9. See *id.* at 1271–84 (providing examples).

10. *Id.* at 1308.

11. *Cf. Acts* 9:3–4.

12. See, e.g., Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 *HARV. L. REV.* 1663 (2001).

13. Professor Gerken's love of dissent may also spring from a certain degree of personal omeriness.

and even implement their dissenting views.

As I read it, Professor Gerken's federalism scholarship has three primary elements. The first — which explains how she got into this federalism mess to begin with — stems from her work on “dissenting by deciding.”¹⁴ Gerken's basic insight was that being a *vox clamantis in deserto* only gets one so far; she focused, therefore, on institutional arrangements that actually afford dissenters an opportunity to instantiate their ideas by giving them power, albeit limited in time and/or scope.¹⁵ On juries, for example, members of minority groups may sometimes find themselves temporarily in the majority and able to act — and wield government power — based on their dissenting beliefs.¹⁶ Federalism sometimes offers a powerful version of this opportunity: groups that are in the minority nationally may nonetheless constitute a majority in a particular state, so that federalism's reservation of important governmental prerogatives to states offers those minorities an opportunity to implement their dissenting vision.¹⁷

That opportunity, in turn, may enhance dissenters' ability to gain majority support for views by demonstrating that those views are actually workable in practice — an opportunity that does not arise where dissent is confined to speech.¹⁸ As the Republican party licks its wounds after the 2012 election, for example, it can take solace in “modest gains” at the state level that will permit its next wave of national candidates to try out new ideas.¹⁹ Similarly, it seems likely that experiments by a small number of states have contributed significantly to the sea change in American public opinion about same-sex marriage. Even though most states went the other way on this issue — thirty-eight states have prohibited same-sex marriage, while only nine states and the District of Columbia recognize it²⁰ — those “dissents by deciding” in the vanguard states provided the rest of the nation with a real, live example of what the institution looks like in practice. The sky did not fall, no one turned into a pillar of salt, and many Americans seem to have concluded that these previously unfamiliar and slightly scary relationships looked like, well, families. Regardless of whether the Supreme Court decides that the Fifth and Fourteenth Amendments *require* recognition of same-sex marriage,²¹ federalism has already shifted

14. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) [hereinafter Gerken, *Dissenting by Deciding*].

15. *See id.* at 1748.

16. *See id.* at 1802.

17. *See id.* at 1754–55.

18. *See id.* at 1766; *see also* Young, *supra* note 4, at 1286 (pointing out, in this vein, that four of our last six presidents were governors of their states at a time “when their party was out of power at the national level”).

19. *See* Colleen Jenkins & Jonathan Weber, *Republicans Make Modest Gains in State Governor Races*, REUTERS (Nov. 7, 2012, 3:43 PM), <http://www.reuters.com/article/2012/11/07/us-usa-campaign-governors-idUSBRE8A629R20121107>.

20. *Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated Mar. 21, 2013). Ten other states offer some form of “civil union” or domestic partnership with nearly all spousal rights to same-sex couples. *Id.*

21. As this essay goes to press, the Court has just heard argument in *Hollingsworth v. Perry* and *United States v. Windsor*, and there is considerable uncertainty not only as to whether a majority exists to hold that equal protection of the law requires recognition of same-sex marriages, but also as to whether the Court will even reach that question in either case. *See, e.g.*, Marty Lederman, *Revisiting the Court's Several Options in the California Marriage Case*, SCOTUSBLOG (Mar. 29, 2013, 4:54 PM), <http://www.scotusblog.com/2013/03/revisiting-the-courts-several-options-in-the-california-marriage-case/>. Sig-

the ground of public debate in a fundamental way.

The second component of Gerkenian federalism is its celebration of state-based dissent *within* federal regulatory structures.²² Morton Grodzins famously described a shift from “layer cake” federalism, characterized by a clear division of functions between the levels of government, to “marble cake” federalism, under which federal and state authorities share a mixture of responsibilities within particular policy areas.²³ This shift corresponds, in the legal literature, with the move from “dual” federalism, which required the Supreme Court to define and enforce sharp jurisdictional lines between federal and state authority, and “cooperative” federalism, which enlists state and local officials in the implementation and enforcement of federal regulatory programs.²⁴ Because cooperative federalism places state officials in a subordinate role, implementing programs developed at the national level, proponents of state autonomy have generally seen this later model as just another word for nationalism.²⁵

Professor Gerken’s work on “uncooperative federalism” questions this conventional wisdom. Writing with Jessica Bulman-Pozen, Gerken argues that “power also resides with states when they play the role of federal servants.”²⁶ This power stems from several sources. These include the “dependence” of the federal government on state officials to administer federal programs, which gives state officials both “leverage” and “discretion in choosing how to accomplish [their] tasks and which tasks to prioritize.”²⁷ State officials also derive power from their “integration” into federal regulatory schemes; “[w]hen an actor is embedded in a larger system,” Bulman-Pozen and Gerken argue, “a web of connective tissues binds higher- and lower-level decisionmakers. Regular interactions generate trust and give lower-level decisionmakers the knowledge and relationships they need to work the system.”²⁸ Finally, Bulman-Pozen and Gerken note that state officials “serve two masters” in the sense that although they are implementing federal policy, “their constituencies are based within the state.”²⁹ This gives state officials both the incentive and the power to challenge federal officials, because they are not beholden to federal officials for their positions and have alternative sources of resources.³⁰

nificantly, the oral argument in *Windsor* suggested that at least Justice Kennedy might be attracted to a resolution grounded in federalism rather than fundamental rights. See, e.g., Amy Howe, *DOMA as a States’ Rights Problem: Today’s Oral Argument in Plain English*, SCOTUSBLOG (Mar. 27, 2013, 3:20 PM), <http://www.scotusblog.com/?p=161912>. On the federalism argument against DOMA, see generally Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor, *United States v. Windsor*, 2013 WL 776446 (2013) (No. 12-307), 2013 WL 860459 [hereinafter Brief of Federalism Scholars].

22. See Bulman-Pozen & Gerken, *supra* note 2, at 1258–59.

23. MORTON GRODZINS, *THE AMERICAN SYSTEM* 8 (Daniel Elazar ed., 1966).

24. See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (describing the end of the dual federalism era); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (discussing cooperative federalism); see generally Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, NOMOS LIV (forthcoming 2013), available at <http://ssrn.com/abstract=2156351> [hereinafter Young, *Puzzling Persistence*] (contrasting these two models).

25. See, e.g., 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 (1998).

26. Bulman-Pozen & Gerken, *supra* note 2, at 1265.

27. *Id.* at 1266.

28. *Id.* at 1268–69.

29. *Id.* at 1270.

30. *Id.* at 1270–71.

Although Professor Gerken and Bulman-Pozen's discussion recognizes that there are downsides to uncooperative federalism, they plainly celebrate the ability of state officials to push back on and even occasionally thwart federal mandates.³¹ The implementary role of states in cooperative federalism arrangements thus becomes an "administrative safeguard of federalism," existing alongside the "political safeguards" emphasized by Herbert Wechsler and his followers.³² As I discuss further in Part II, much work remains to be done to determine the precise mechanisms, motivations, and effectiveness of state-centered dissent in the interstices of federal programs. There is no doubt, however, that the "uncooperative federalism" dynamic provides an important component of any understanding of the continued autonomy of state governments in an era when national power encounters few strictly legal checks.

The third component of Professor Gerken's federalism stems from her *Harvard Law Review Foreword*, which urges us to consider federalism "all the way down."³³ States are not the only institutions of decentralized power in our system, nor are they the only — or even necessarily the best — locus for dissenting by deciding. Gerken thus urges us to consider a wide range of decentralized institutions, including juries, school boards, public utility boards, "and the like," as part of a federal system, broadly construed.³⁴ This is an important insight, especially when we consider how population growth has resulted in the scale differences between the national and state governments in the Founding period being closer, in absolute terms, to the differences between states and localities today than between the nation and its component states.³⁵ I will concentrate on states in this essay because I am ultimately interested in constitutional entrenchment and localities have no independent constitutional existence in American law, but I do not mean to be read as denying the importance of still more decentralized institutions that exist "all the way down."

Professor Gerken's work not only challenges the conventional wisdom *within* federalism scholarship, it also challenges the conventional wisdom *about* federalism scholarship — that is, she tends to flip conventional assumptions about federalism's political valence on their heads. There is an obvious irony about a leading liberal intellectual writing in a vein most readily associated with John C. Calhoun. Calhoun, after all, was not

31. See *id.* at 1280–82.

32. *Id.* at 1258; see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175 (1980).

33. See Gerken, *Foreword*, *supra* note 2.

34. *Id.* at 8.

35. When Madison wrote *Federalist No. 51*, his "extended sphere" of the national polity had about 3.9 million people. *Heads of Families at the First Census 1790: Records of the State Enumerations: 1782 to 1785*, BUREAU OF THE CENSUS DECENNIAL DOCUMENTS, available at <http://www2.census.gov/prod2/decennial/documents/1790m-02.pdf>. Today, approximately that many people live in Oregon, and California is nearly ten times that big. *State and County Quickfacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Apr. 1, 2013) (2012 estimates for population of Oregon (3,899,353) and California (38,041,430)). Madison's own Virginia — the largest state in 1790 — had three-quarters of a million people, approximately the same size as present-day San Francisco or Indianapolis. *Id.* (2011 estimated population of San Francisco (812,826) and Indianapolis (827,609)); *Virginia: Basic Information*, U.S. CENSUS BUREAU, http://www.census.gov/geo/www/guidestloc/st51_va.html (last visited Apr. 2, 2013) (population of Virginia in 1790 was 821,287).

simply a champion of states' rights but also, more specifically, a proponent of innovative institutional designs meant to enable political minorities to exercise meaningful political power.³⁶ But, notwithstanding Calhoun's use of federalism to shield reactionary (and quite unappealing) practices, I do think there is a sense in which federalism *is* inherently progressive. After all, progress depends on new ideas, and it stands to reason that, at least at its birth, any new idea will be espoused by a minority.

None of this is to say — and here I renew an old debate with Professor Gerken's and my other co-clerk, Stuart Benjamin — that “progress” is inherently *good*. To a Burkean like me, “progress” is just *change*, and change is just as likely (and possibly more so) to be bad as good.³⁷ Fortunately, federalism also has an inherently *conservative* side, which is that by requiring change to be pursued in smaller jurisdictions we ensure that change proceeds incrementally and the adverse effects of bad experiments are confined.³⁸ As Justice Brandeis pointed out, one of the advantages of using *states* as policy laboratories is that they can “try novel social and economic experiments *without risk to the rest of the country*.”³⁹

The problem, of course, is that federalism slows down good changes and bad changes alike. Hence the discontent from progressives with a federalist solution on gay marriage. As that constitutional sage, Maureen Dowd, put it: “Those struck by Cupid in places like Alabama, Arkansas and Utah will long be left either moving or saying, ‘I’m deliriously, madly in love with you, but let’s leave it to the states, honey.’”⁴⁰ One reason that liberals like Ms. Dowd have little use for federalism is that they compare it with an ideal where everyone will simply do what they want (or at least the courts will make people adopt the liberal point of view). But federalism generally arises from a recognition of imperfection — either a lack of consensus in the present or a fear of centralized tyranny in the future. Outside the liberal bubble, reasonable people still disagree about gay marriage, and the Court may not be ready to impose social change on the nation.⁴¹ Those cases, Professor Gerken's work suggests, are what federalism is for.⁴²

One of the more interesting aspects of Professor Gerken's federalism, however, is

36. See 1 JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT 39–42 (Columbia, S.C., A.S. Johnston 1851).

37. See, e.g., EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 19 (Frank M. Turner ed., 2003); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1182–87 (2002) (discussing the “situational” brand of conservative ideology).

38. See Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 881 (2006) (noting that “a significant advantage of state-based reform from a conservative perspective” is that “it is inherently incremental from the perspective of the nation as a whole”).

39. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added).

40. Maureen Dowd, *Will Gays Be Punished for Success?*, N.Y. TIMES, Mar. 31, 2013, at SR11.

41. See, e.g., David G. Savage, *In Gay Marriage Cases, Court Must Balance Strong Traditions*, L.A. TIMES (Mar. 30, 2013), <http://articles.latimes.com/2013/mar/30/nation/la-na-court-gay-marriage-20130331>.

42. One misconception is that a federalism-based ruling against DOMA would hurt the constitutional case against state-law prohibitions on same-sex marriage under the Equal Protection Clause. See, e.g., *Id.* (“If marriage is indeed a matter for the states, then conservative states can argue they are entitled to preserve laws limiting marriage to a man and a woman.”). But the federalism challenge to DOMA rests on the argument that Congress *lacks power* — as a government of limited and enumerated powers — to define marriage. See Brief of Federalism Scholars, *supra* note 21. This argument would be irrelevant to the states, which possess such authority as part of their general police powers. But it says nothing about whether the states' exercise of that authority to exclude same-sex couples violates the Equal Protection Clause.

the suggestion that its value is not purely instrumental.⁴³ An instrumental account of dissent, debate, and experimentation would value those phenomena only for the purpose of identifying the “best” arrangements, which once identified are appropriately imposed across the board.⁴⁴ Hence, Justice Brandeis’s “laboratories” metaphor suggests that most policy questions may well have a “right answer” that can be identified by conducting experiments; once we know the answer, however, the obvious thing to do is to enact that answer as national policy. As Alan Tarr has recognized, “the logic of the metaphor [suggests that] the outcome of a successful policy experiment in one state laboratory should be generalizable and should lead to adoption of the same policy in all other state laboratories;” hence, “the tendency would be toward policy uniformity.”⁴⁵

Professor Gerken argues, however, that there is a further inherent democratic value to “dissenting by deciding.”⁴⁶ That value lies in meliorating the majoritarian thrust of democracy — that is, in ensuring minorities do not always have to bow to the majority will.⁴⁷ Constitutional lawyers are accustomed to thinking about this point in terms of *rights*, which shield dissenters from majoritarian dictates in certain pre-identified spheres of life, such as ideas, religious practice, or sexual privacy.⁴⁸ A more flexible approach, however, would simply require that there be some political communities small enough to allow most minorities to exercise political authority on the issues of most importance to them, thereby creating an institutional ability to vindicate a broader range of outlier preferences without needing to recognize those preferences as fundamental rights.⁴⁹ This possibility, Gerken suggests, may help make democracy tolerable to people who repeatedly find themselves on the losing end in larger political communities.⁵⁰ In a national society that seems fractured along intractable ideological lines, the federalist prescription may appeal to progressives and conservatives alike.

43. See Heather K. Gerken, *Second-Order Diversity*, 199 HARV. L. REV. 1099, 1142 (2005).

44. *Id.* at 1142–43.

45. G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 PUBLIUS 37, 42 (2001).

46. Gerken, *Dissenting by Deciding*, *supra* note 14, at 1747–49.

47. See *id.* at 1747.

48. See, e.g., *W.Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”). The actual result in *Barnette*, however, ought to remind us of the inadequacy of this conception. Although Justice Jackson wrote proudly that we do not allow the government to declare an orthodoxy, that is exactly what the Court’s actual order in *Barnette* did: it did not enjoin the Board of Education from establishing the Pledge of Allegiance as the orthodox position, but rather simply allowed the dissenting Jehovah’s Witnesses children to opt out of the ceremony. *Id.* A more secure check on government orthodoxy would have allowed the Witnesses to incorporate as a separate political subdivision that would not have asked anyone to recite a pledge — in other words, it would have used structural principles to permit the Witnesses to dissent by deciding. *But see Bd. of Educ. of Kiryas Joel Indep. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (striking down New York’s effort to allow the Satmar Hasidim this sort of local autonomy on the ground that it violated the Establishment Clause).

49. See Gerken, *Dissenting by Deciding*, *supra* note 14, at 1755–56.

50. See *id.* at 1805.

II. THE COMPLEAT (UNCOOPERATIVE) FEDERALIST

The remainder of this essay focuses on the second of the ideas discussed previously — that is, Professor Gerken’s work with Jessica Bulman-Pozen on “uncooperative federalism.”⁵¹ Professors Gerken and Bulman-Pozen correctly noted that the “administrative safeguards of federalism” remained “under-theorized” in prior work.⁵² But having made some progress on the theory, scholars of uncooperative federalism have difficult questions to address. These include (a) a set of normative questions about whether (and when) uncooperative federalism is normatively attractive; (b) questions of institutional detail concerning how uncooperative federalism actually works under particular statutory schemes and how constitutional doctrine might enhance it; (c) underlying motivational questions about *why* state officials would want to engage in uncooperative dissenting behavior; (d) whether there is a parallel phenomenon of *overcooperative* federalism; and (e) whether insights from the subfield of fiscal federalism, which emphasizes the importance of maintaining a sharp distinction between state and national finances, call into question the interlocking state and federal bureaucracies from which uncooperative federalism arises. I do not offer definitive answers to any of these questions here. My purpose is simply to illustrate some productive directions in which scholars interested in building on Gerken and Bulman-Pozen’s insights might pursue the inquiry further.

A. *When Is Uncooperative Federalism Normatively Appealing?*

As Professors Gerken and Bulman-Pozen acknowledge, one person’s “power of the servant” is another person’s “agency slack.”⁵³ When state officials charged with implementing national policy behave uncooperatively, delaying or subtly altering national goals, they act as “[un]faithful agents” to their federal principals.⁵⁴ They may, of course, be acting faithfully to the preferences of their *state*-level principals, and in any event uncooperative behavior may be beneficial to the federal system overall for all the reasons that Gerken and Bulman-Pozen identify.⁵⁵ But, a fully developed theory of uncooperative federalism will need to address the normative questions that Gerken and Bulman-Pozen bracket. Although their undertaking was understandably limited to identifying previously neglected benefits of unfaithful state agency,⁵⁶ eventually scholars will need to weigh those benefits against the costs.

A tempting answer would be to say that uncooperative federalism is beneficial to the extent that it restores an institutional balance between the national government and the states that has tilted in favor of the former, but unattractive to the extent it goes further and aggrandizes the states at the expense of the nation. But this answer implicates a perennial difficulty in federalism scholarship generally — that is, we lack both an agreed-upon baseline for the relationship between state and federal power and ready

51. See Bulman-Pozen & Gerken, *supra* note 2.

52. *Id.* at 1259, 1285.

53. *Id.* at 1265, 1285.

54. See *id.* at 1262–64.

55. *Id.* at 1285–91.

56. See *id.* at 1285.

means of measuring where the balance stands. As a descriptive matter, of course, uncooperative federalism enriches our understanding of that relationship; it is no longer possible, for example, simply to point to the prevalence of large federal regulatory programs as evidence that the times are out of joint, without acknowledging that the states may well retain significant authority within the structure of those programs.⁵⁷ But it is hard to go further without a normative baseline and good tools for measurement. That makes it hard to say not only whether the national government is “too powerful” overall, but also whether uncooperative federalism provides a necessary corrective to an overweening national government or, on the other hand, represents a counterproductive dynamic whereby entrenched state government bureaucracies thwart the implementation of Congress’ legitimate purposes.

In other work, I have suggested some rough ways of assessing the overall balance problem.⁵⁸ One might look to (1) the radical increase in the institutional capacity and prescriptive reach of the federal government vis-à-vis the states since the Founding, as well as (2) the failure of the Constitution’s original enumerated powers strategy to cabin national authority, as clues that contemporary federalism doctrine ought to look primarily to *limiting*, not *expanding* principles.⁵⁹ But this approach offers only a very rough intuition, and will convince no one who does not share my sense that the Constitution’s past allocation of authority retains some claim on us today.⁶⁰

A more fruitful approach might be to analyze particular areas of regulatory policy and ask whether the implementary role of state officials is preserving a productive interplay between state and national power or stymieing efforts by federal authorities to respond to national concerns.⁶¹ This would accord with broader theories, such as Robert Schapiro’s notion of “polyphonic” federalism, that see federalism as simply a potentially-useful set of institutional arrangements for furthering national policy goals.⁶² It would take, however, national goals as necessarily primary — an approach at odds both with the specific wording of the Supremacy Clause, which accords supreme status to national *law*, not *policy*, and with a tradition that sees checks and balances as a central virtue of a federal system.⁶³

57. An example of this is the administration of Medicaid by states. See generally APRIL GRADY, CONGR. RESEARCH SERV., RS22101, STATE MEDICAID PROGRAM ADMINISTRATION: A BRIEF OVERVIEW (2008).

58. See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733 (2005).

59. *Id.* at 1806–09.

60. See, e.g., Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997) (rejecting the efforts to adjust current doctrines in order to preserve fidelity to the Constitution’s original arrangements).

61. Stephen Sugarman has suggested another possible pathology, which is that uncooperative federalism allows national politicians to avoid responsibility for undermining national regulatory or benefit schemes by delegating implementing authority to state officials who are likely to subvert the programs in question. See Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America’s Public Income Transfer Programs*, 14 YALE L. & POL’Y REV. 123, 147 (1996) (criticizing the devolution of implementation authority over national welfare programs to the states and arguing that “by passing off the responsibility elsewhere, these legislators are hoping that the states, or at least some of them, will do the sort of dirty work that Congress dare not do”).

62. See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009) (focusing on federalism’s usefulness for furthering the national goal of protecting fundamental rights).

63. See, e.g., THE FEDERALIST NO. 51 (James Madison); Ernest A. Young, *Federalism as a Constitutional*

A variant of the question that responds to this objection would be to ask whether state officials that resist federal authority in a particular field are themselves furthering a distinctive state policy with democratic legitimacy within that jurisdiction, or instead simply thwarting federal mandates in such a way as to prevent the implementation of *any* coherent policy.⁶⁴ Even worse, state officials might be seeking to further a state policy that has been explicitly rejected as a matter of binding national law. For example, it must be acknowledged that one prominent example of uncooperative federalism is the “massive resistance” of southern officials to the Supreme Court’s decision in *Brown v. Board of Education*.⁶⁵ The federal courts that ordered southern school districts to desegregate, after all, were in no position to actually take over the administration of southern school districts on a day-to-day basis. The result was that southern officials were able to maintain a largely segregated system for decades, *Brown* notwithstanding.⁶⁶

On the other hand, uncooperative state-level behavior may supply a valuable counterpoint in an ongoing conversation over national policy. Contemporary delegation theory posits that Congress frequently punts many difficult questions of statutory detail and implementation to federal administrative agencies.⁶⁷ Much of the “uncooperation” that Professors Gerken and Bulman-Pozen describe will occur over these interstitial, but frequently critical, points.⁶⁸ Pushback from state officials against federal agency directives in these circumstances is not as obviously troubling as state attempts to evade choices that Congress itself has made; after all, Congress will generally have explicitly mandated a role for state officials working alongside federal ones.⁶⁹ And if Congress wants to evade political responsibility by punting to agencies, state agencies that are closer to the people they govern may be more appealing receivers than federal bureaucrats. Even if they are not, such bifurcated delegations may produce valuable checks and balances within the implementing bureaucracy.

In any event, we are unlikely ever to reach full closure on these normative questions, because in order to fully establish whether and when uncooperative federalism is normatively attractive we would have to reach agreement on the most intractable underlying normative issues with federalism generally. I expect that the most fruitful lines of

Principle (unpublished manuscript) (on file with author). For a critique of the European doctrine of “subsidiarity” from a similar perspective — that is, that subsidiarity errs by asking only whether decentralized implementation would best further goals of the community as a whole — see Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place at the Wrong Time*, 43 COMMON MKT. L. REV. 63 (2006).

64. See, e.g., JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 210 (2009) (“One must obviously take care to distinguish between responsible and irresponsible use of state administrative discretion. There is nothing to celebrate when states shirk their legal responsibilities by resisting federal laws and regulations intended to remedy pressing social, economic, environmental, and other problems.”).

65. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 392–99 (1996) (quoting NUMAN BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S (1969)) (discussing the southern reaction to *Brown*).

66. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42–57 (1991).

67. See, e.g., Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7–17 (1982).

68. See Bulman-Pozen & Gerken, *supra* note 2, at 1266–67.

69. See *id.* at 1268.

inquiry will pursue a more modest agenda, focused on separating out uncooperative behavior that furthers distinctive policy agendas originating at the state level, or that checks federal agency overreaching from behavior that reflects good old agency shirking or capture, or that contravenes basic federal statutory or constitutional requirements.

B. *What Are the Mechanisms of Uncooperative Federalism?*

Although Professors Bulman-Pozen and Gerken provide a number of real-world examples of uncooperative federalism, their discussion makes clear that the opportunities for and the form taken by such behavior will vary depending on the contours of specific federal statutory schemes.⁷⁰ Future scholars need to get more specific about the various mechanisms that facilitate the states' "power of the servant."⁷¹ We need to know more about how uncooperative federalism operates in practice, so that we can assess means either to enhance or to mitigate it going forward.⁷² This second question — how to improve the relationships whereby states implement federal law — has both a doctrinal and an institutional design component. Courts may tailor their doctrinal tools to facilitate state resistance, and legislators and executive officials designing new implementation schemes should be informed by the role of those schemes as a safeguard of federalism.

Some valuable work in this vein has already been done. Fairly extensive political science literature confirms the basic insight of uncooperative federalism.⁷³ As John DiIulio and Donald Kettl put it,

[A]n entire generation of empirical research on intergovernmental affairs reveals that . . . Washington has had, and continues to have, tremendous difficulty in executing even relatively straightforward policies precisely because state and local governments enjoy such wide latitude in deciding how best to translate federal policies into action, or whether, in fact, to follow federal policies at all. The empirical evidence on this point is simply overwhelming.⁷⁴

John Nugent's recent book on the means by which states protect their interests in the national policymaking process includes a substantial chapter focusing on state implementation of federal policy.⁷⁵ Professor Nugent identified a number of specific mechanisms by which states influence federal regulation:

Participation in Agency Rulemaking;
 Influencing Presidential Executive Orders;
 Negotiation of State Implementation Plans;
 State Authority to Determine Program Funding;
 State Authority to Determine Program Eligibility;
 State Applications for Waivers of Federal Requirements; and

70. See, e.g., Sugarman, *supra* note 61, at 124 (describing federal income transfer programs as a "bewildering hodgepodge of programs, each with its own special allocation of intergovernmental relationships").

71. Bulman-Pozen & Gerken, *supra* note 2, at 1265.

72. See Young, *Puzzling Persistence*, *supra* note 24, at 45.

73. See, e.g., JOHN J. DI IULIO, JR. & DONALD F. KETTL, FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM 18 (1995).

74. *Id.*

75. See NUGENT, *supra* note 64, at 168–212.

Street-level Bureaucrats' Discretion to Implement Federal Policy.⁷⁶

There remains room, of course, for more work in this vein. In particular, it would be helpful to have comparative studies of which particular regulatory structures accord opportunities for effective state-based dissent and which leave state officials with relatively little voice. Conversely, we also need to know more about the options that national officials have for disciplining uncooperative states.

Legal scholars may have important contributions to make as the literature moves from institutional description to questions of judicial doctrine and institutional design. Professors Gerken and Bulman-Pozen took a stab at some of the doctrinal questions, proposing that courts could enhance the uncooperative federalism dynamic by strengthening the presumption against preemption of state law in statutory construction cases and by overruling the anti-commandeering doctrine.⁷⁷ Both of these prescriptions warrant further exploration. With respect to preemption, Gerken and Bulman-Pozen say that “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.”⁷⁸ I certainly agree with this prescription, having long urged the Court to strengthen its presumption against preemption⁷⁹ and to recognize, in the important category of conflict preemption cases, that such a presumption necessarily means tolerating a certain degree of conflict between federal and state policy.⁸⁰

An emphasis on preemption does not obviously fit, however, with the phenomenon of uncooperative federalism as Professors Gerken and Bulman-Pozen have described it. They place their theory in contrast to an “autonomy model” that emphasizes the independent policymaking authority of the states.⁸¹ “Preemption is a problem when viewed through the lens of uncooperative federalism,” they argue, “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.”⁸² But the administrative linkages between state and federal officials in the examples Gerken and Bulman-Pozen cite are attenuated at best.⁸³ In *Gon-*

76. See *id.* at 178–93.

77. See Bulman-Pozen & Gerken, *supra* note 2, at 1295–1307.

78. *Id.* at 1303.

79. See, e.g., Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130–34 (2004) [hereinafter Young, *Two Federalisms*]; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1381–86 (2001) [hereinafter Young, *Two Cheers*].

80. See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 264–69.

81. For development of the autonomy model, see Young, *Two Federalisms*, *supra* note 79, at 13–15. Professor Gerken’s allergy to the autonomy model rests, in my view, on a misapprehension of what it entails. The point is to stress the states’ affirmative capacity to govern and make policy choices that are responsive to their constituents, in contrast to models that stress the inviolability of state institutions and their immunity from federal commands. See *id.* This sort of autonomy is a necessary predicate to “dissenting by deciding.” The autonomy model does *not* depend on carving out distinct spheres of state responsibility, and in fact uncooperative state officials exercising their discretion as federal agents may further the cause of state autonomy to the extent that their actions enhance the states’ own authority to govern.

82. Bulman-Pozen & Gerken, *supra* note 2, at 1304.

83. See *id.* at 1305.

zales v. Oregon, the Court considered the national Attorney General's effort to preempt Oregon's law permitting physician-assisted suicide by promulgating an interpretive rule stating that certain drugs could not be used for that practice under the federal Controlled Substances Act ("CSA").⁸⁴ The Court rejected that rule as unauthorized by the CSA, noting that "[t]he structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers."⁸⁵ The CSA does not, however, establish a cooperative federalism scheme as the term is generally understood; state regulators of the medical profession are not part of an integrated enforcement bureaucracy with federal officials at the Department of Justice comparable to the integrated institutional structure created by the Clean Water Act and similar statutes.⁸⁶ Hence, Oregon's Death with Dignity Act was not an exercise of state officials dissenting in the course of their implementation of a federal regulatory regime — it was simply a free-standing state law, enacted by the state legislature.⁸⁷

Consider a paradigmatic modern preemption case like *Wyeth v. Levine*, in which the Court held the federal Food and Drug Administration's ("FDA") prior approval of a prescription drug's label did not preempt a subsequent state tort claim for failure to warn of a harmful side effect.⁸⁸ The state action alleged to be preempted in *Wyeth* did not involve state administrative officials at all; rather, the defendant drug manufacturer complained of the potential action of a state court applying principles of state common law.⁸⁹ State judges and juries do not participate in the sort of interlocking federal-state bureaucracy that Professors Bulman-Pozen and Gerken celebrate in *Uncooperative Federalism*.⁹⁰ Nonetheless, I think the preemption cases usefully point us toward a broader version of the uncooperative model. Such a model would need to encompass a creative tension not only *within* a particular federal regulatory regime, like state officials implementing the Clean Water Act under Environmental Protection Agency ("EPA") supervi-

84. *Gonzales v. Oregon*, 546 U.S. 243, 248–49 (2006); see Bulman-Pozen & Gerken, *supra* note 2, at 1305–06.

85. *Gonzales*, 546 U.S. at 270.

86. Compare The Controlled Substance Act, 21 U.S.C. §§ 801–971 (2012), with The Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012).

87. The same can be said of Professors Bulman-Pozen and Gerken's other examples. See Bulman-Pozen & Gerken, *supra* note 2, at 1306–07. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992), involved a state licensing statute with environmental requirements that the Court found preempted by federal standards promulgated by the Secretary of Labor under the Occupational Safety and Health Act ("OSHA"). *Id.* The state officials who enacted and enforced the licensing act did not do so as part of any delegated responsibility to implement the OSHA. *Id.* at 101. Likewise, the state officials who enacted the California and Massachusetts statutes found preempted in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003), and *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 371 (2000), were not charged with implementing national human rights policy in cooperation with federal officials at the state department; indeed, the Court seems to have found preemption based on a fear that *any* state involvement in foreign policy would be necessarily pernicious. Similarly, the Massachusetts law regulating tobacco ads near schools found preempted in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 532 (2001), was not part of a cooperative federalism scheme under which state officials participated in enforcing FDA regulations of tobacco products.

88. *Wyeth v. Levine*, 555 U.S. 555, 581 (2009).

89. *Id.* at 597–98.

90. The closest that state and federal courts come to such a relationship is probably in the criminal context, where the lower federal courts engage in collateral review of state convictions via the writ of habeas corpus. See, e.g., 28 U.S.C. § 2254 (2012); *Brown v. Allen*, 344 U.S. 443, 463–64 (1953) (holding that federal courts exercising habeas review may relitigate issues already considered by the state courts). The uncooperative federalism model may well offer an interesting lens for assessing this relationship.

sion, but also *between* state and federal regulatory regimes involving multiple kinds of institutional actors operating within the same policy space.

Wyeth is a good example. As the Court noted,

[T]he FDA traditionally regarded state law as a complementary form of drug regulation. The FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times. Thus, the FDA long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation.⁹¹

The Court's description of FDA and state tort regulation as "complementary" masks the fact that there is a conflict here: the FDA had approved Wyeth's label as adequate, while state tort law threatened to conclude that it was inadequate.⁹² What Bulman-Pozen and Gerken's model of uncooperative federalism adds to traditional discussions of preemption, then, is a necessary tolerance for conflict between federal and state policy. The prescription drug regime works, as the Court points out, precisely because it allows state courts to come in after a tragic accident and determine that the FDA's initial judgment on a warning label was insufficient to protect the public.⁹³ In other words, public safety benefits from the potential for disagreement between state and federal regulators, and that disagreement may well be informed by the fact that state regulators are often different sorts of institutions — e.g., judges and juries — than federal agencies.

Uncooperative federalism thus has the potential to enhance our understanding of preemption doctrine in ways that go beyond Professor Bulman-Pozen and Gerken's defense of the presumption against preemption. I am more skeptical of their criticism of the anti-commandeering doctrine, which holds that Congress may not *require* state officials to implement federal law.⁹⁴ Gerken and Bulman-Pozen argue for a regime in which Congress *could* commandeer state officials: "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."⁹⁵ They explain that:

While autonomy scholars reasonably find it distasteful to make state officials implement federal policies they disagree with, they ignore how this dynamic may in fact generate more democratic friction and debate over the federal scheme. We

91. *Wyeth*, 555 U.S. at 578–79 (citations omitted). See also Brief for Constitutional and Administrative Law Scholars as Amici Curiae Supporting Respondent at 28–30, *Wyeth v. Levine*, 555 U.S. 555 (2009) (No. 06-1249).

92. *Wyeth*, 555 U.S. at 558–59.

93. *Id.* at 574–76.

94. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992). See also Young, *Puzzling Persistence*, *supra* note 24, at 22.

95. Bulman-Pozen & Gerken, *supra* note 2, at 1297.

see, in short, yet another example of the classic tradeoff between voice and exit.⁹⁶

This “No Exit” theory of commandeering makes sense if we envision the alternative to be a world in which the national government simply implements federal regulatory regimes on its own.⁹⁷ And it may well be that, in some cases, Congress will respond to its inability to commandeer by creating an exclusively federal administrative bureaucracy. But it is hard to think of many examples.⁹⁸ Even before *New York* and *Printz* articulated the anti-commandeering doctrine, the overwhelming majority of federal enforcement regimes did rely on state cooperation and secured that cooperation through either conditional spending or conditional preemption — that is, states agreed to implement federal law either to secure federal funding or to avoid being subject to a federal regulatory regime in which they had no say.

It seems more likely, then, that states generally will agree to implement federal regulatory schemes, but that the anti-commandeering doctrine allows them to bargain more effectively over the shape of those schemes and state officials’ role within them. Under current law, federal officials must consider the views of state officials during at least two stages. In the pre-legislation stage, federal officials must design federal regulatory schemes in such a way as to attract state participation — and probably in consultation with state officials.⁹⁹ In the implementation stage, interactions between federal and state officials take place in the shadow of state exit options — that is, if state officials can credibly threaten to cease participation, federal officials must either compromise or contemplate implementing the federal scheme on their own.¹⁰⁰ Given that federal agencies typically do not have the resources (administrative or political) to implement most federal programs on their own, the threat of state exit seems likely to enhance state voice.

At the end of the day, the entitlement to commandeer, just like the entitlement to impose exclusively federal regulation, might not be exercised very often even if it were formally available. But as work on the Coase theorem has demonstrated, the initial allo-

96. *Id.* at 1299 (citations omitted).

97. See, e.g., *Printz*, 521 U.S. at 959 (Stevens, J., dissenting) (“By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State’s rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.”).

98. The federal Department of Health and Human Services has announced that it will enforce the market reform provisions of the Affordable Care Act in at least four states, but only after those states declined the option to implement the Act themselves. See Jason Millman, *Feds Will Need to Enforce ACA Reforms in 4 States*, POLITICO (Mar. 19, 2013, 4:43 AM), <http://www.politico.com/story/2013/03/feds-must-enforce-aca-reforms-in-four-states-89041.html>. In *Printz* itself, the federal statute envisioned using state and local officials to conduct background checks on would-be firearms purchasers only for an interim period until a fully federal computer database would be up and running. See *Printz*, 521 U.S. at 902–03. But it seems unlikely that Congress made this choice in response to the anti-commandeering doctrine, which at that point had not been extended to state executive officials. And in any event, *Printz*’s holding hardly put an end to federal-state cooperation in the field of firearms enforcement. See, e.g., Bureau of Alcohol, Tobacco, & Firearms, NAT’L INTEGRATED BALLISTIC INFO. NETWORK, <http://www.nibin.gov/> (last visited Mar. 4, 2013) (describing institutional framework for federal, state, and local cooperation in tracing firearms ballistics information).

99. See, e.g., NUGENT, *supra* note 64, at 116–18, 180–82 (describing state participation in the drafting of federal legislation and in the promulgation of federal administrative rules).

100. See, e.g., John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1224 (1995) (“Although it has as much legal authority as it needs, the federal government cannot implement its air pollution program without the substantial resources, expertise, information, and political support of state and local officials.”).

cation of an entitlement does have distributional effects on the bargains eventually reached through negotiation.¹⁰¹ We would thus expect the balance of power between federal and state officials to be affected by whether, as a baseline, Congress begins with the power to commandeer or the states begin with the power to walk.

A final line of doctrinal inquiry concerns a power that Professors Bulman-Pozen and Gerken do not address — the spending power. Congress has extensive power to require states that accept federal funding to comply with certain conditions, even if Congress would lack the power to impose those conditions directly.¹⁰² The states' desire to maintain federal grants thus gives federal officials a powerful source of leverage in their interactions with state officials.¹⁰³ One of the looming questions in federalism jurisprudence over the past quarter century has concerned whether there are, in fact, any constitutional limitations on this power. It seems likely that, from an uncooperative federalism perspective, we should favor some degree of limitation on the conditional spending power in order to ensure that federal officials cannot simply overwhelm state officials' disagreement through fiscal sanctions.¹⁰⁴

Uncooperative federalists will particularly want to address the Supreme Court's recent decision in *National Federation of Independent Business v. Sebelius* (“*NFIB*”), which somewhat surprisingly struck down a spending condition requiring states to participate in a significant expansion of Medicaid or risk forfeiting *all* federal Medicaid funding.¹⁰⁵ Two variables seemed important to the Court in *NFIB*: first, the dollar amounts involved were very large,¹⁰⁶ and second, the Medicaid expansion provisions of the Affordable Care Act (“ACA”) imposed new conditions on old money. They did not, in other words, simply condition the additional Medicaid funding provided by the ACA on states' agreement to participate in the expansion, but they required non-participating states to forego pre-existing Medicaid funding as well.¹⁰⁷ If the first of these variables — the sheer amount of money involved — turns out to be critical, then *NFIB*'s Spending Clause holding may turn out to be a ticket for this day and train only. But if the old money/new money distinction has legs, then this may allow the states to effect partial opt-outs from federal spending programs. That potential should be of interest to uncooperative federalists because it would allow state officials implementing federal programs a considerably greater degree of flexibility to disagree with elements of federal policy

101. See, e.g., Donald H. Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427, 432–33 (1972).

102. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (providing a test for the use of the federal spending power to bring about state regulatory action); Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1995).

103. See, e.g., Baker, *supra* note 102, at 1935–54 (exploring the reasons why national authorities have so much leverage over the states through conditional spending).

104. See generally Young, *Two Federalisms*, *supra* note 79, at 141–47.

105. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012).

106. See *id.* at 2604 (“A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs.” (internal citation omitted) (quoting *Dole*, 483 U.S. at 211)).

107. See *id.* at 2607 (“Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).

without exiting the program altogether.

Finally, the most important avenues of inquiry may involve not judicial doctrine, but the institutional design questions that arise in the course of fashioning and revising cooperative federalism arrangements. I have argued elsewhere that the vast majority of institutional arrangements that “constitute” our federalism are embodied not in the canonical Constitution itself, but rather in the statutory and regulatory arrangements that establish the federal bureaucracy and its relationship with state law and institutions of state government.¹⁰⁸ The fact that so much of our federal architecture is not constitutionally entrenched suggests that constitutional lawyers should spend more time thinking about institutional design.¹⁰⁹ In particular, uncooperative federalists should consider how federal regulatory schemes could be designed to promote constructive disagreement between state and federal officials. Thus far, for example, we know relatively little about which particular institutional structures might maximize opportunities for state officials to voice their disagreement and implement their own distinctive versions of federal policy while nonetheless minimizing opportunities to simply shirk or pursue idiosyncratic agendas with little grounding in the state political community. Professors Gerken and Bulman-Pozen have taken the essential first step by offering an account of why uncooperative state behaviors may be legitimate; what remains is to investigate how to facilitate and channel state disagreement into its optimal form.

C. *What Are the Wellsprings of State-Based Dissent?*

Thus far we have largely taken for granted the probability that state officials implementing federal law will have their own distinctive values, preferences, and policy agendas, and that they will seek to influence the implementation of federal law in ways that respond to these preferences. In this section, however, I want to ask where those distinctive preferences come from, and what they can tell us about the nature and value of state-based dissent.

We might begin with a prior question: why *value* state-based dissent? Much of the literature on state policymaking under the auspices of federal regulatory and benefit programs stresses Justice Brandeis’s notion of the states as laboratories,¹¹⁰ which suggests that states may use the leeway afforded them in implementing federal law to develop policy innovations that might then prove suitable for uniform adoption at the national level.¹¹¹ States may also disagree with their federal counterparts not so much because they have some distinctive innovation they wish to try out, but simply because they are closer to the on-the-ground realities of policy implementation. Some of the pushback by state administrators against aspects of the No Child Left Behind program seems to have fit this

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

109. See Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399 (2008).

110. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

111. See, e.g., Sugarman, *supra* note 61, at 140 (“Federalism is often lauded as a spark for innovation and experimentation in government. . . . The notion seems to be that . . . over time, one would expect a convergence on policies that prove successful.”).

description, for example.¹¹² State-based dissent may also arise because state officials have different constituencies. Many state executive officials are independently elected and thus have a different perspective than federal bureaucrats. Moreover, a given state may reflect a different mix of policy preferences than the nation as a whole, so that state officials may feel pressure to bend policy in a somewhat different direction than that preferred by the supervising federal agency.

The different reasons to value state-based dissent thus reflect divergent sources for state disagreements with federal officials. And each distinct source of state-based dissent raises different issues for students of uncooperative federalism. When we value state experimentation, for example, the question will be how to design federal programs to encourage innovation, evaluate its results, and integrate the lessons of state experiments into national policy. When state administrators have better access to the facts and practical realities of implementation, on the other hand, the issue will be how to ensure a prompt feedback loop between on-the-ground implementers and national policymakers, while ensuring that we do not build in so much leeway as to create opportunities for shirking and sheer recalcitrance.

Different issues arise when state-based dissent stems from the distinct constituencies of state officials. Contemporary administrative law is dominated by questions about the legitimacy and accountability of federal agencies,¹¹³ which are staffed exclusively by appointed officials, most of whom serve at the pleasure of the President. State officials are not only not under the thumb of the President, but they are, in many cases, independently elected; most states, in other words, do not have a unitary executive.¹¹⁴ State officials who are not directly accountable to the President and have their own source of electoral legitimacy are exotic animals in the administrative law zoo, and modern administrative law needs to take into account that officials of this kind play a prominent role in the administration of federal law.¹¹⁵

Finally, there is the fact that state officials' constituencies will frequently have preferences that diverge from the aggregate national preferences reflected (hopefully) by national statutory schemes and agency positions. This may occur simply because the state political community will reflect a different mix of partisan affiliations, interest groups, and ethnic, religious, and racial identities than does the overall national electorate. On this view, states are different from one another simply because they slice the national electorate in different ways. As Michael McConnell has shown, this non-uniform geographical distribution of preferences affords decentralized governments a chance to please a higher proportion of the electorate than would be possible if a uniform

112. See NUGENT, *supra* note 64, at 195–200.

113. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

114. See, e.g., Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1347 (1990).

115. A related problem concerns judicial review of actions by state officials implementing federal law. Such review performs an analogous function to review of federal agency action under the Administrative Procedure Act ("APA"). But cases construing private rights to sue state officials charged with responsibilities under federal regulatory schemes generally have not proceeded with the APA analogy in mind. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

policy were mandated from Washington, D.C.¹¹⁶ The question will be when it is legitimate for policy to vary to reflect these local differences, and when such dis-uniformities go too far to undermine the federal scheme.

It is possible, however, that preferences of state officials diverge from those of federal officials, not simply because each state encompasses a different mix of Republicans and Democrats, Catholics and Protestants, etc., but also because states embody a distinctive and meaningful identity of their own. As a native Texan, I find this possibility more plausible than does Professor Gerken, who had the misfortune to grow up in Massachusetts and now lives in Connecticut. Much of the contemporary federalism literature takes for granted that meaningful state political communities do *not* exist; Edward Rubin, for example, has confidently asserted that

At present, the United States is a socially homogenized and politically centralized nation. Regional differences between different parts of the nation are minimal, and those that exist are based on inevitable economic variations, rather than any historical or cultural distinctions. . . . With the minor exceptions of Utah and Hawaii, there is no American state with a truly distinctive social profile. . . . Our political culture is more uniform still. . . . Most important, the primary political loyalty of the vast majority of Americans is to the nation.¹¹⁷

Rubin's assertion will no doubt seem intuitive to many law professors, who tend to move around a lot and focus on matters of national law. But it is nonetheless an empirical assumption offered without any sort of empirical proof. And it flies in the face of a great deal of counter-evidence. That counter-evidence, which I survey at some length elsewhere,¹¹⁸ includes public opinion research indicating that a person's state is a strong predictor of partisan and ideological affiliation, even after controlling for economic, demographic, and similar factors;¹¹⁹ survey evidence that Americans tend to place considerably more trust in their state and local governments than in the federal government,¹²⁰ and that they value the autonomy of state governments even when that autonomy may cut against their substantive political views;¹²¹ an extensive political science literature on state political culture;¹²² and a longstanding literary tradition celebrating the distinctiveness of particular states.¹²³

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

117. Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 45-46 (2001).

118. See Ernest A. Young, *The Volk of New Jersey? Sovereignty and Political Community in Europe and the United States* (Summer 2008) (unpublished manuscript) (on file with the Harvard Law School Library).

119. ROBERT S. ERIKSON, GERALD C. WRIGHT & JOHN P. MCIVER, *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* (1993).

120. See Megan Mullin, *Federalism*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 209 (Nathaniel Persily et al. eds., 2008).

121. See Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589 (2007).

122. See, e.g., DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984); Samuel C. Patterson, *The Political Cultures of the American States*, 30 J. POL. 187 (1968).

123. See, e.g., *STATE BY STATE: A PANORAMIC PORTRAIT OF AMERICA* (Matt Weiland & Sean Wilsey eds., 2008); *THESE UNITED STATES: ORIGINAL ESSAYS BY LEADING AMERICAN WRITERS ON THEIR STATE WITHIN THE UNION* (John Leonard ed., 2004).

The point of interest for uncooperative federalists is that state-based dissent may be more effective to the extent that it is grounded in a meaningful state political community, rather than merely arising from a divergence of the state-level correlation of political forces from those prevailing at the national level. If state officials' disagreements with federal mandates arise from something enduring in the character of a particular state, for example, one would expect those disagreements to survive changes in administration at the state level. More fundamentally, Albert Hirschman's work — on which Professor Gerken frequently relies¹²⁴ — suggests that “loyalty” is often necessary to activate “voice.”¹²⁵ As he explains, we might ordinarily expect persons discontented with some aspect of a governmental regime simply to exit; loyalty is what encourages them to stay and instead work to reform the regime from within.¹²⁶ Adventurously, if we value state-based dissent, then perhaps we should consider ways to *strengthen* the state-level political community.

D. *What About Overcooperative Federalism?*

States will not always resist enforcing federal law. In fact, they may sometimes wish to enforce federal law more aggressively than do federal officials. We might describe this phenomenon as “overcooperative federalism.”¹²⁷ What happens when states exercise the “power of the servant” to be overzealous, rather than shirking their duty? As the distinguished federalism scholar Shel Silverstein put it, “some kind of help is the kind of help that helping’s all about. And some kind of help is the kind of help we all could do without.”¹²⁸

Recent disputes over state efforts to enforce federal immigration laws illustrate this point. Federal law sharply limits the number of legal immigrants who may come to the United States and prohibits them from working legally if they do come to our country.¹²⁹ But the federal Executive has generally exercised considerable discretion concerning the rigor with which these laws are enforced and the federal resources devoted to such enforcement.¹³⁰ In recent years, however, a number of states have displayed an interest in playing an enforcement role in this area.¹³¹ Sometimes, the states have followed the traditional pattern of cooperative federalism. Federal law presently allows states to enter into agreements with federal immigration authorities whereby states exercise delegated

124. See, e.g., Gerken, *Our Federalism(s)*, *supra* note 2, at 1556.

125. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 76–100 (1970).

126. *Id.* at 77–79.

127. I am indebted to Rocio Perez, Duke Law '11, for this term and its application to immigration enforcement.

128. Shel Silverstein, *Helping*, in FREE TO BE . . . YOU AND ME 60–61 (Carole Hart et al., eds., 1974).

129. See 8 U.S.C. § 1324(a) (2012) (imposing sanctions for employers who hire illegal workers).

130. See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (“The dynamic nature of relations with other countries require the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy with respect to these and other realities.”).

131. See *id.* at 2497 (stating that in 2012 Arizona enacted a state statute directed specifically at “discourage[ing] and deter[ing] the unlawful entry and presence of aliens and economic activity of persons unlawfully present in the United States”) (internal quotation marks and citation omitted).

enforcement authority under federal supervision.¹³² But some states have attempted to enforce federal immigration laws outside this explicit delegation of federal authority, without direct federal supervision.¹³³ Most prominently, Arizona and several other states have enacted state law prohibitions that largely mirrored federal immigration laws and charged state executive officials with far-reaching authority to enforce those prohibitions.¹³⁴ Although the U.S. Supreme Court struck down much of the Arizona statute in *Arizona v. United States*,¹³⁵ that decision seems unlikely to end the national debate over state enforcement of restrictions on illegal immigration.¹³⁶

Other examples of potentially overcooperative federalism exist that may have a different valence politically. State attorneys general frequently sue to enforce federal law on behalf of their citizens, providing a level of enforcement beyond that achieved by federal governmental enforcement standing alone.¹³⁷ State attorneys general may also use their investigatory powers under *state* law to bring violations of federal law to light and pressure federal regulators to act.¹³⁸ As Attorney General of New York, for example, Eliot Spitzer famously exposed abusive practices on Wall Street in the face of perceived abdication by the federal Securities Exchange Commission.¹³⁹ Any of these activities may well be unwelcome to federal regulators in particular circumstances.

In these sorts of contexts, overcooperative federalism may serve important separation of powers values. State enforcement of federal law in cases like Arizona's poses a potentially valuable check on the national executive's discretionary enforcement of federal law. We ordinarily think of prosecutorial discretion as a central component of executive authority; anything that interferes with that discretion seems like an undesirable — and potentially unconstitutional — intrusion on that authority. But the President and his officers exercise enforcement discretion in a wide variety of forms, and not all of them fit comfortably with traditional notions of prosecutorial discretion. It may be that some of these more adventurous forms of discretion — such as the power not to defend a congressional enactment that the President thinks is unconstitutional,¹⁴⁰ or an effort to make federal immigration policy more lenient generally by reining in enforcement¹⁴¹ — are themselves valuable in some circumstances. But it may also be valuable to have an ex-

132. These agreements take place under § 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. 8 U.S.C.A. § 1357(g)(1) (2012).

133. See *Arizona*, 132 S. Ct. 2492.

134. *Id.* at 2497.

135. *Id.* at 2510–11.

136. The Court's decision left one important provision of the Arizona law in place, pending as-applied challenges once the law is enforced. *Id.* at 2510. Moreover, the Court rejected a federal preemption challenge to another Arizona law regulating *employment* of undocumented aliens a year earlier in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). For a survey of states with similar legislation and pending challenges to that legislation, see *State Omnibus Immigration Legislation and Legal Challenges*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 27, 2012), <http://ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx>.

137. See generally Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 488 (2012).

138. *Id.* at 492–93.

139. See, e.g., Justin O'Brien, *The Politics of Enforcement: Eliot Spitzer, State-Federal Relations, and the Redesign of Financial Regulation*, 35 PUBLIUS 449 (2005); Michael S. Greve, *Free Eliot Spitzer!*, AEI ONLINE (May 1, 2002), <http://www.aei.org/article/economics/free-eliot-spitzer/>.

140. See, e.g., Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012).

141. See *Arizona*, 132 S. Ct. 2492.

ternal check on those discretionary judgments.¹⁴²

While a state's decision to enforce federal law may well conflict with the executive's determination that the underlying statute is unconstitutional or does not make good policy sense, that determination may itself be in conflict with Congress's judgment. To the extent that the national Executive's discretion not to enforce federal statutes strengthens the President's hand vis-à-vis Congress, then, *state* enforcement of those statutes may shift the balance back in Congress' favor.¹⁴³ Whether such shifts are desirable is, of course, another question. Congress has other means of checking executive non-enforcement through oversight, confirmation hearings, and budgetary processes.¹⁴⁴ As the Arizona example illustrates, however, we need to consider state enforcement potential as one more possible limitation on Executive non-enforcement.

E. Let Them Eat Marble Cake? Challenges from Competitive and Fiscal Federalism.

Federalism scholarship has long been dominated by baking metaphors. Commentators often described the *ancien régime* of dual federalism, which divided the world into separate and exclusive spheres of national and state authority as a "layer cake."¹⁴⁵ Morton Grodzins then famously described the cooperative federalism that succeeded dual federalism as "marble cake," with state and federal activity pervasively swirled around and blended together.¹⁴⁶ By celebrating the state-protective aspects of cooperative federalism regimes, Professor Gerken places herself firmly in the marble cake camp. But despite Gerken's well-deserved reputation as a great cook, it is not entirely clear that marble cake is something that good federalists ought to swallow. Marble cake might be more like, well, *fruitcake* — good looking on the outside, but nearly indigestible once one digs in.

The foundational question is whether uncooperative federalism is really a theory of federalism at all. That word, of course, can and has been used in a number of senses. I use it here in the sense that Dean Rubin and Professor Feeley do, that is, that "federalism" requires some degree of constitutional entrenchment in order to distinguish it from mere "decentralization."¹⁴⁷ I take that to mean that the federal arrangement must not on-

142. This is especially true if we limit the standing of other actors to defend government policies. *See, e.g.*, Brief for Court-Appointed Amica Curiae Addressing Jurisdiction, *United States v. Windsor*, 2013 WL 776446 (2013) (No. 12-307), 2013 WL 315234 (challenging the standing of the Bipartisan Legal Advisory Group to defend DOMA where the Department of Justice has elected not to defend the statute). Defense by other actors would itself serve as a valuable check on the Executive's power not to defend statutes.

143. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) (arguing that congressional commandeering of state executive officers to enforce federal law violated separation of powers principles because it rendered Congress less dependent on the President).

144. *See, e.g.*, 19 U.S.C. §3807 (2012) (on congressional oversight).

145. *See* GRODZINS, *supra* note 23, at 8.

146. *Id.*

147. MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 16 (2008) (arguing that, under federalism, "there must be some types of decisions that are reserved to the subsidiary governmental units and that the central government may not displace or countermand;" that is, "the subsidiary units possess rights against the central government"); *see also id.* at 20–21 ("Decentralization, in contrast, is a managerial strategy by which a centralized regime can achieve the results it desires in a more effective manner. . . . [T]he central government decides how decision-making authority will be divided between itself and the geographical subunits."). Other scholars have offered similar definitions. *See, e.g.*, RIKER, *supra* note 5, at 11 (defining federalism as existing when the "autonomy of each government in its own sphere" is

ly be difficult to change,¹⁴⁸ but also that it must impose some meaningful constraint on actions by the central government. A federalism theory that fails to impose such a constraint is not “federalism,” but nationalism.

Not all contemporary federalism theories can pass this test. My colleague, Neil Siegel, writing with Robert Cooter, has developed a sophisticated theory of “collective action federalism” suggesting that Congress’s Article I powers should be judged as extending to all cases where national action addresses collective action problems that make state-level action difficult.¹⁴⁹ But because the test turns on essentially policy-based considerations, Professors Siegel and Cooter advocate that courts largely defer to Congress on whether such collective action problems actually justify any particular federal action.¹⁵⁰ The result is a test that has little chance of meaningfully constraining national power. Not entirely surprisingly, for Siegel and Cooter, their analysis turned out to be extremely useful in supporting the Obama Administration’s healthcare legislation,¹⁵¹ but it is not evident that it would impose much of a limit on national initiatives.

Is uncooperative federalism likewise just another theorization of unlimited national power? An uncooperative federalist might answer this worry in several different ways. The first might emphasize that uncooperative federalism is an account of the power and influence that state-level implementers of federal legislation have within our federal system; it does not overtly purport to address how other aspects of our federalism, such as the role of courts in enforcing limits on national power, should operate. In this, it is unlike most contemporary accounts of the “political safeguards” of federalism, which generally argue that because aspects of the national political process effectively protect state governmental interests, *therefore* the courts should not enforce constitutional limitations on national power.¹⁵² Although Professor Gerken has generally taken traditional nationalist positions rejecting strong judicial review of federalism questions, her theory of uncooperative federalism does not compel that view.¹⁵³ One might well celebrate the abil-

protected by a constitutional “guarantee”).

148. I have argued elsewhere that the *degree* of entrenchment in a federal system is necessarily more complex and multi-layered than the binary entrenched/unentrenched dichotomy that Dean Rubin and Professor Feeley posit. See Ernest A. Young, *What Does it Take to Make a Federal System? On Constitutional Entrenchment, Separate Spheres, and Identity*, 45 TULSA L. REV. 831, 837–39 (2011).

149. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010).

150. *Id.* at 180.

151. See, e.g., Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012); Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 L. & CONTEMP. PROBS. 29 (2012); Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591 (2011).

152. See, e.g., CHOPER, *supra* note 32, at 380; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000). Herbert Wechsler’s earlier articulation of the “political safeguards” theory did *not* take this position, arguing only that “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interests of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.” Wechsler, *supra* note 32, at 559. Professor Wechsler denied “that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation.” *Id.*; see also Young, *Two Federalisms*, *supra* note 79, at 70–79 (discussing Wechsler’s theory).

153. As I have already discussed, Professors Bulman-Pozen and Gerken do argue that courts should reject the anti-commandeering doctrine on the ground that commandeering will tend to force state officials into closer

ity of state bureaucrats to conduct guerrilla warfare against federal mandates within the structure of federal regulatory programs while still insisting that, say, the Commerce Clause also limits the scope of those programs. (That would be my own position.)

A second possible answer would argue that, in practice, the administrative safeguards of federalism are more *effective* in preserving state autonomy than judicially-enforced principles like the enumerated powers doctrine. That is certainly possible; I have argued elsewhere that the Supreme Court's efforts to narrow the Commerce Clause, for example, have not done much for state autonomy and are unlikely to ever go very far.¹⁵⁴ But until some serious empirical work is done — and intractable problems like how to *measure* state autonomy are overcome — it will be hard to know for sure.

In any event, uncooperative federalists need to confront serious doubts about the intermixing of national and state authorities that cooperative federalism entails. Two particular challenges have been salient in the recent literature. The first arises from proponents of what we might call “competitive,” or perhaps even “libertarian” federalism.¹⁵⁵ In a powerful and closely argued recent book, my friend Michael Greve has argued that rather than aggrandizing national authority, cooperative federalism in fact allows states to behave as “cartels” that then use national authority to suppress competition among state jurisdictions.¹⁵⁶ The Clean Air Act, for example, releases states that prefer higher levels of pollution regulation from the threat of economic competition from states that would, absent the federal floor, opt for lower levels of regulation (and taxes to pay for it).¹⁵⁷

In Professor Greve's account, cartel federalism is driven primarily by the breakdown of clear jurisdictional boundaries between national and state authority.¹⁵⁸ The old regime of dual federalism, Greve argues, forced states to compete with respect to all the regulatory matters within their sphere.¹⁵⁹ Once national regulatory authority came to overlap with state authority, however, powerful states could band together to impose national standards that prevent competition.¹⁶⁰ It is not clear, however, how the second key aspect of modern cooperative federalism — the actual implementation of national law by state officials which forms the predicate for Gerken and Bulman-Pozen's theory — contributes to this problem. Returning to exclusive regulatory spheres, as Greve somewhat wistfully suggests,¹⁶¹ would eliminate opportunities for uncooperative implementation

contact with federal ones, and this will enhance the opportunity of the former to play their uncooperative role. See Bulman-Pozen & Gerken, *supra* note 2, at 1259. But this (in my view, unpersuasive) point is hardly a core implication of their theory.

154. See Young, *Two Federalisms*, *supra* note 79, at 135–141.

155. See Abigail R. Moncrieff, *Cost-Benefit Federalism: Reconciling Collective Action Federalism and Libertarian Federalism in the Obamacare Litigation and Beyond*, 38 AM. J.L. & MED. 288, 289 (2012) (using the term “libertarian federalism” to describe the view that “federalism exists for reasons other than efficiency of regulation and particularly that the Founders created the federal structure for the protection of liberty [and that] there is inherent value to state power that ought to be preserved against national encroachments”).

156. MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 7–8 (2012).

157. See *id.* at 281–82.

158. *Id.* at 7–8.

159. *Id.* at 66–68.

160. *Id.* at 68–69.

161. *Id.* at 84.

by state officials, but Greve acknowledges that there is really no going back to dual federalism.¹⁶² If that is true, then the uncooperative aspects of contemporary marble cake federalism may provide a means of injecting some state-level competition back into Greve's cartelized system. State officials might, in other words, use their agency slack to tweak national policies in pro-competitive ways so as to get a leg up on other states. This possibility bears further exploration by scholars concerned about the anti-competitive aspects of national standards.

A more direct critique of cooperative federalism arises from the literature on fiscal federalism. A perennial problem in federal systems concerns the autonomy of state spending and borrowing decisions. In most federal systems around the world, the central government explicitly or implicitly guarantees the debts of its subnational units.¹⁶³ The risk in such a system, however, is that the subnational units will take advantage of this arrangement by over-borrowing and over-spending, secure in the knowledge that the central government will bail them out.¹⁶⁴ In order to solve this moral hazard problem, most systems also give the central government a large degree of control over the subunits' spending and borrowing decisions.¹⁶⁵ Alexander Hamilton advocated such a regime for the American states in the early Republic when he persuaded Congress to assume the states' Revolutionary War debts and sought to impose broad national authority over their finances.¹⁶⁶

Hamilton's call for national authority over state spending and borrowing was rejected, however, and since the assumption of the Revolutionary War debts, our federalism has taken a quite different course. A second state debt crisis occurred in the 1840s, and Congress rejected state pleas for a bailout.¹⁶⁷ It has since maintained a credible "no bailout" commitment, allowing multiple state debt defaults in the late nineteenth century and another during the Depression, all largely without federal intervention.¹⁶⁸ In the absence of a central bailout, states find themselves subject to market discipline; their cost of borrowing, for example, will reflect the market's perception of each particular state's fiscal probity rather than hopes of a national rescue. Hence, Jonathan Rodden's recent analysis of state bond yields, credit default swaps on state debt, and state credit ratings demonstrates that financial markets continue to assess the creditworthiness of states individually.¹⁶⁹ By contrast, the German *länder* — whose debts are guaranteed by the central government — all have the same credit rating regardless of fiscal condition and spending practices.¹⁷⁰

162. *Id.* at 354.

163. Paul E. Peterson & Daniel Nadler, *Freedom to Fail: The Keystone of American Federalism*, 79 U. CHI. L. REV. 251, 253 (2012).

164. Jonathan A. Rodden, *Market Discipline and U.S. Federalism*, in WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS 123, 124 (Peter Conti-Brown & David A. Skeel, Jr. eds., 2012).

165. Peterson & Nadler, *supra* note 163, at 253–54.

166. Rodden, *supra* note 164, at 124.

167. JONATHAN A. RODDEN, HAMILTON'S PARADOX: THE PROMISE AND PERIL OF FISCAL FEDERALISM 57–64 (2006).

168. Peterson & Nadler, *supra* note 163, at 264–65.

169. Rodden, *supra* note 164, at 137–40.

170. RODDEN, *supra* note 167, at 160–62.

The point is that either of these arrangements — central bailouts paired with controls on decentralized borrowing and spending, or no controls paired with a credible “no bailout” commitment — can work, but blurring them is dangerous. As Michael Greve has observed, “[t]he fundamental fiscal federalism dilemma is between a credible central commitment against bailouts and central control over subordinate governments’ fiscal affairs.”¹⁷¹ And cooperative federalism models *do* blur these two alternatives by merging governmental responsibilities between the state and national levels. When states spend large proportions of their resources implementing *national* laws, it is hard not to see the national government as at least partly to blame for high levels of state expenditures. And when national authorities depend on state officials to implement national policy, it is hard to believe that Congress would not intervene in a state fiscal crisis that threatened state administrative capacities.¹⁷²

Hence the problem for uncooperative federalism: notwithstanding the advantages that such a model affords for state autonomy, it also relies on a set of institutional arrangements that threaten the structure of state fiscal sovereignty and accountability. The national government has already engaged in a variety of “soft bailouts” in connection with the present recession,¹⁷³ and although the capital markets appear to still regard its basic “no bailout” commitment as credible, that situation will not continue indefinitely as state and national governments grow even more financially interdependent. This is not, of course, necessarily a bad thing. One could see the erosion of the commitment against bailouts as a necessary predicate to a sounder, more Hamiltonian scheme of fiscal federalism. But a central government that guarantees state debt will be forced to exert control over state finances or risk ruin, and it is far from clear that the decrease in state autonomy arising from *that* development would not swamp the advantages to states stemming from uncooperative federalism.

At the end of the day, I do not mean to argue that a model emphasizing the administrative safeguards of state autonomy is “fruitcake federalism.” As throughout this essay, my goal is primarily to identify areas for further exploration. Scholars should investigate, for instance, whether cooperative federalism arrangements can be designed to strengthen opportunities for state competition and to maintain the fiscal separation and transparency that underpin our system of fiscal federalism. Now that Professors Gerken and Bulman-Pozen have identified the advantages of state administration of federal law, however, those advantages need to be assessed with a clear-eyed view to the downsides of such arrangements as well.

CONCLUSION

One of the principal virtues of a federal system is that it helps people of differing views live together and cooperate on certain projects but agree to disagree on others. I am not surprised by Professor Gerken’s turn to federalism as a primary field of inquiry

171. Michael S. Greve, *Our Federalism is not Europe’s. It’s Becoming Argentina’s*, 7 DUKE J. CONST. L. & PUB. POL. 17, 39 (2012).

172. Emily D. Johnson & Ernest A. Young, *The Constitutional Law of State Debt*, 7 DUKE J. CONST. L. & PUB. POL. 117, 147–48 (2012).

173. *Id.* at 137–38.

because federalism speaks to one of her own virtues, which is not simply to respect but to *befriend* persons with differing views, even in the face of disagreement on basic political issues. It is not clear that she and I agree on any matters of substance other than that David Souter is the greatest Supreme Court Justice and Buffy the Vampire Slayer is the greatest TV show. But I am proud to say that we have been the closest of friends for almost twenty years, and our political differences have never mattered a bit.¹⁷⁴

On a national scale, this is one of the most important things that federalism does: it allows people of differing views to bracket many of their disagreements in order to live together in a national community predicated on values that do enjoy a broader consensus. This is not federalism's only virtue, but it is an important one — and one that plays a central role in Professor Gerken's scholarship. This conflict-mitigating virtue is worth attending to in a time of considerable division and rancor in our national politics. Tolerating a certain degree of state-by-state divergence on issues of the day may help lower the stakes on some of the issues that divide us. While Gerken celebrates the role of disagreement and bureaucratic infighting in our federal system, at the end of the day her vision of federalism is anything but uncooperative.

174. Which is not to say that differences of opinion on other issues, such as the appropriate level of chitchat in a shared office in chambers, have not caused a certain degree of friction.
