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TOWARDS A CONSTITUTIONAL ARCHITECTURE FOR COOPERATIVE FEDERALISM

PHILIP J. WEISER*

In this Article, Professor Weiser calls for a new conception of federal-state relations to justify existing political practice under cooperative federalism regulatory programs. In particular, Professor Weiser highlights how Congress favors cooperative federalism programs—that combine federal and state authority in creative ways—and has rejected the dual federalism model of regulation—with separate spheres of state and federal authority—that current judicial rhetoric often celebrates. Given the increasing dissonance between prevailing political practice and judicial rhetoric, courts will ultimately have to confront three fault lines for current cooperative federalism programs: the legal source of authority for state agencies to implement federal law, the essence of the anti-commandeering rule and Tenth Amendment doctrine, and separation of powers concerns with state administration of federal law without federal executive oversight. As Professor Weiser explains, courts can only make clear that cooperative federalism regulatory programs rest on a solid constitutional foundation by forthrightly resolving these questions with doctrines that embrace the existence of cooperative federalism. Professor Weiser thus recommends that the courts endorse a constitutional architecture that, following the *Erie* doctrine’s commitment to a cooperative judicial federalism and Albert Hirschman’s model of exit, voice, and loyalty, respects state autonomy, appreciates the importance of allowing states to opt of federal regulatory programs, and recognizes the value of state implementation of cooperative federalism statutes.

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INTRODUCTION

Unlike the case in construction, the blueprints for constitutional architecture often are not developed until after the relevant governmental structures are already put in place. Indeed, sometimes the rhetorical constitution—what courts and commentators insist are constitutional norms—deviates from the actual constitution—the governmental structures actually in place. Ultimately, the rhetoric of constitutional law must conform to the reality of government, but sometimes only after considerable confusion and litigation. In today's constitutional law of federalism, the tension continues to build...
The rhetoric of a "dual federalism" characterizes many of the Supreme Court's recent statements on the constitutional law of federalism. In short, this vision of federal-state relations views each jurisdiction as a separate entity that regulates in its own distinct sphere of authority without coordinating with the other. In reality, however, Congress continues to enact "cooperative federalism" regulatory programs that invite state agencies to implement federal law. In contrast to a dual federalism, cooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law. In particular, modern regulatory programs put in place across a variety of fields ranging from nearly all environmental programs to telecommunications regulation to health care—and those now on the drawing board, ranging from insurance regulation to tobacco regulation—all embrace a unified federal structure that includes a role for state implementation. Significantly, these programs neither leave state authority unconstrained within its domain, as would a dual federalism program, nor displace such authority entirely with a unitary federal program, as would a preemptive federalism. Preemptive federalism, like dual federalism, views the federal government and the states as two separate spheres, but instead of leaving room for state regulation, it preempts all state authority and supplants it with a unitary federal

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2. See, e.g., John C. Yoo, Sounds of Sovereignty: Defining Federalism in the 1990s, 32 IND. L. REV. 27, 41 (1998) (arguing for a dual federalism that would prevent a state from voluntarily administering a federal scheme that would limit its sovereignty).

3. The structure of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.), which provides an important role for state agencies subject to federal oversight and bureaucratic backup, provides a particularly good example of a cooperative federalism regulatory program. See, e.g., P.R. Tel. Co. v. Telecomm. Regulatory Bd., 189 F.3d 1, 14 (1st Cir. 1999) ("The [Telecom] Act exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations.").

4. See, e.g., Wendy E. Parmet, Stealth Preemption: The Proposed Federalization of State Court Procedures, 44 VILL. L. REV. 1, 4 (1999) (positing that the tobacco settlement proposed to Congress was "in some ways" a "model of 'cooperative federalism,' crafting interlocking roles for both state and federal authorities"); Susan Randall, Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners, 26 FLA. ST. U. L. REV. 625, 694-98 (1999) (anticipating a reform of the current regime of insurance regulation that would rely on a federal or interstate compact scheme of cooperative federalism).
regime. By crafting a middle ground solution between the extremes of dual federalism and preemptive federalism, Congress continues to outstrip existing constitutional rhetoric, which envisions a separation that does not exist in practice.

Future debates over federalism will increasingly confront the tension between the constitutional rhetoric and political reality of federalism. In particular, courts will confront three important questions: (1) how to evaluate the authority of state agencies to implement federal law, (2) how to justify and protect state autonomy under the Tenth Amendment, and (3) how to answer separation of powers challenges that focus on the importance of federal executive oversight of federal law implemented by state agencies. Despite increasing attention to the advent of cooperative federalism and the role of a judicially enforced law of federalism, these potential obstacles to a constitutional architecture for cooperative federalism have received very little attention.

This Article proposes a constitutional architecture for cooperative federalism that reconciles the rhetoric of current judicial doctrine and the reality of modern political practice while safeguarding the value of state autonomy. In short, this Article argues that the constitutional architecture for cooperative federalism should follow the reverse–Erie principle set forth in cases like Testa v. Katt. Under this approach, states would have the authority to implement federal law unless they had a “valid excuse” for not doing so—i.e., implementing the federal law would require a fundamental change in form of a state institution. Significantly, this model recognizes both the critical value and importance of state implementation of federal law as well as the importance of protecting state autonomy.

A reverse–Erie model not only sheds light on when state agencies can implement federal law (and when their state charters would

5. See generally Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 COLUM. L. REV. 267 (1998) (arguing for the role of state experimentalism even within a federal regulatory regime that sets certain national objectives); Roderick M. Hills, Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures’ Control, 97 MICH. L. REV. 1201 (1999) [hereinafter Hills, Dissecting the State] (arguing that state administration of federal law should enjoy a value comparable to federal deference to state authority); Larry D. Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215 (2000) [hereinafter Kramer, Political Safeguards] (criticizing advocates of a judicially enforced federalism as not accounting for the influence of political parties to protect state interests).

prevent them from so doing), it also suggests an analytical framework for a Tenth Amendment doctrine that protects state agencies from being "commandeered" into a federal regulatory program. In particular, this model suggests that states be afforded an exit right from participation in federal regulatory regimes in order to protect their ability to voice their concerns. Similarly, courts should appreciate that cooperative federalism both protects states from preemptive federalism and enables Congress to discipline federal agencies by threatening to delegate regulatory authority to the states. Thus, even where cooperative federalism programs delegate federal regulatory authority to states without federal executive oversight, such delegations should withstand any separations of power challenge. In short, if the courts fail to develop a constitutional conception of federal-state relations that is compatible with cooperative federalism, then Congress may be forced to redraft a number of important regulatory programs that rely on this concept.

Part I of this Article outlines the basic legal architecture of cooperative federalism and discusses its recent ascendance as a regulatory strategy for implementing public policy goals. Part II addresses why state agencies implementing cooperative federalism programs can rely on the enactment of a federal statute to justify taking action not otherwise contemplated by state law. In particular, Part II suggests that state agencies and courts should adopt a reverse-Erie model for determining the appropriate scope of state regulatory authority to implement federal law. Mirroring its federal counterpart (the Erie doctrine), reverse-Erie calls for a careful adaptation of state procedural rules to give effect to federal substantive rights vindicated in state court. In light of this reverse-Erie principle and Albert Hirschman's exit, voice, and loyalty model, Part III sets forth a new theoretical framework for Tenth Amendment doctrine. Finally, Part IV examines the vertical separation of powers doctrine, set forth in Printz v. United States and implicated by the enactment of cooperative federalism regulatory programs, which threatens to bar state implementation of federal law without federal executive oversight.

7. See generally Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970) (presenting a model of institutional dynamics that emphasizes the important relationship between exit and voice).

I. COOPERATIVE FEDERALISM IN THE AMERICAN REPUBLIC

Courts and commentators have become familiar with the basic model of a cooperative federalism regulatory regime in light of the increase in such legislation over the last three decades. Although there is no precise definition for which regimes fit the cooperative federalism model, the Supreme Court has suggested that this term best describes those instances in which a federal statute provides for state regulation or implementation to achieve federally proscribed policy goals. In such instances, Congress either allows states to regulate in compliance with federal standards or preempts state law with federal regulation. In a variation of this model, such as that adopted in the Medicaid Act, Congress relies on a federal regulatory agency to develop certain standards for the state agencies to follow when implementing the federal statutory scheme that provides federal funding to the states. To better appreciate the significance

9. Environmental laws provide a particularly good example of cooperative federalism in practice. See John Dwyer, The Practice of Federalism Under the Clean Air Act, 54 Md. L. Rev. 1183, 1197-98 (1995) (outlining the cooperative federalism nature of most federal environmental statutes); see also John H. Cushman, Jr., Clinton Backs Environmental Power-Sharing, N.Y. TIMES, Jan. 31, 1999, at A1 (explaining the important role played by the states in implementing federal environmental law).


11. See, e.g., FERC, 456 U.S. at 765 ("Congress could have pre-empted the field, at least insofar as private rather than state activity is concerned; PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme.").


of this emerging regulatory model, this Part outlines the rise of cooperative federalism. In doing so, however, it does not attempt to set out a comprehensive history of the cooperative federalism strategy, but merely attempts to place the current political consensus in favor of such programs in historical context.

The New Deal programs that marked the rise of the modern administrative state called for state implementation of federal programs mostly to distribute federal benefits—such as unemployment insurance and Aid to Families with Dependent Children (AFDC)—as opposed to the implementation of federal economic regulation. Although these programs involved the sharing of funding, as opposed to regulatory authority, they put the concept of a cooperative federalism on the map. The Supreme Court described AFDC, for example, as "a scheme of cooperative federalism ... [that is] financed largely by the Federal Government, on a matching fund basis, and is administered by the States." Such programs insisted on a certain level of uniformity (i.e., compliance with federal requirements), but also left important discretion with state agencies to implement the programs within federal requirements.

Beginning most notably with the environmental statutes enacted in the late 1960s and early 1970s, the federal government began to rely on state agencies to implement federal regulatory requirements."
This development was particularly significant because such measures "generally depart[ed] from the New Deal model, in which national bureaucracies directly regulated citizens and businesses in support of national policies." In the case of the Clean Air Act, for example, the statute provided for certain uniform federal standards, but left the states with considerable flexibility in addressing the statute's objectives. Similarly, under the Public Utility Regulatory Policies Act (PURPA), which sought to reduce reliance on foreign fuel by requiring that electric utilities purchase electricity from independent power producers who operated qualifying facilities, the federal government relied enormously on state agencies to implement federal requirements.

ORG. 313, 330-31 (1985) (describing the Motor Vehicle Air Pollution Control Act of 1965). In 1967, however, the tide turned towards a cooperative federalism approach, and the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (codified as amended in scattered sections of 42 U.S.C.), (and future measures) set minimum federal standards and allowed the states to enact more stringent ones. Elliott, supra, at 331. In an effective criticism of the Motor Vehicle Air Pollution Control Act of 1965, David Currie explained that "minimum federal standards are admirable, and perhaps indispensable, since the states were not doing the job. But to forbid stricter state standards is inexcusable." David P. Currie, Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption, 68 Mich. L. Rev. 1083, 1087 (1970); cf. Mianus River Pres. Comm. v. Adm'r, 541 F.2d 899, 906 (2d Cir. 1976) ("[I]t is indisputable that Congress specifically declined to attempt a preemption of the field in the area of water pollution legislation, and as much as invited the States to enact requirements more stringent than the federal standards.").

18. Light, supra note 17, at 825.

[The Clean Air Act creates a partnership between the states and the federal government. The state proposes, though the EPA disposes. The federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables for compliance . . . . The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states . . . especially when, as in this case, the agency is overriding state policy.

Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036-37 (7th Cir. 1984); see also Mianus River Pres. Comm., 541 F.2d at 906 ("[I]t is indisputable that Congress specifically declined to attempt a preemption of the field in the area of water pollution legislation, and as much as invited the States to enact requirements more stringent than the federal standards.").

22. See 16 U.S.C. § 824a-3(b) (1994); Rates for Purchases, 18 C.F.R. § 292.304 (2000); see also FERC v. Mississippi, 456 U.S. 742, 750-51 (1982) (explaining that PURPA sought to overcome both the reluctance of utilities to purchase power from non-traditional
Contrary to the suggestion of some commentators, the movement in favor of a cooperative federalism regulatory regime does not necessarily entail a "concentration of political powers in the national government." Rather, while recognizing the need for a federal framework, these regimes rely on existing state agencies to administer and implement federal law. In viewing the enactment of such a federal regulatory regime as a power grab, commentators fail to appreciate that the real authority under such regimes often rests with the states which ultimately exercise considerable discretion in making and implementing policy. Thus, even where a federal regime theoretically sets the policy, its reliance on the states to implement the law means that the states will be very influential in practice because they are afforded considerable discretion in translating broad goals into reality. This power is significant in that, by the federal government's own admission, it is almost always unwilling and/or unable to take back the power to implement cooperative federalism programs.  


24. To the extent that some intergovernmental initiatives did not fully appreciate the important role for state and local discretion, later ones have recognized that role to a much greater extent. See TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION 1 (1998) ("At a minimum [the national government's] reform initiatives [taken in the 1960s] have underscored the importance of federalism within the American system of government. From welfare and health care to environment protection, intergovernmental programs cannot be understood without an intergovernmental perspective."). In that regard, the federal government's sensitivity to state concerns appears to have increased in the mid- to late 1960s. Id. at 21 ("Backed by growing political demands from beleaguered state and local governmental officials, such sentiments inspired a stream of intergovernmental reform initiatives by the Johnson administration.").

25. See Yoo, supra note 2, at 31.


27. See David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?, 54 Md. L. Rev. 1552, 1586 (1995) (quoting an EPA official as saying "'even if only a small number of delegated states returned their programs to EPA, [the agency's] enforcement program would not be able to cope with the new responsibilities'"); Rena I. Steinzor & William F. Permattei, Reinventing Environmental Regulation Via the Government Performance and Results Act: Where's the Money?, 28 Envt'l. L. Rep. 10,563, 10,573 n.105 (1998) (quoting Carol Browner, EPA Administrator, who stated "'[t]here are some States that have seriously considered..."
The federal government's increasing willingness to allow states to superintend the implementation of federal law stems from at least two key factors. First, state governments have become increasingly competent in economic regulation and public administration. Second, the New Deal's ideological commitment to centralization began to deteriorate, as Presidents Johnson through Clinton each stressed (albeit for different reasons and with different emphasis) the important role that the states play in our federal system. To be sure, the changed dynamic in federal-state relations has not removed the role for federal standards in certain key areas, but it has given rise to returning primacy [in environmental regulation] to the Federal government. I will be very honest with you, we don't have the resources to manage even one major State if primacy were returned "). Commentators frequently echo this point. See, e.g., Hodas, supra, at 1603 ("In reality, EPA-approved states have more than primary enforcement responsibility; they have nearly exclusive governmental responsibility for [Clean Water Act] enforcement."); Robert R. Kuehn, The Limits of Devolving Enforcement of Federal Environmental Law, 70 TUL. L. REV. 2373, 2384 (1996) ("[T]he federal government cannot handle all, or even most, enforcement."); Erik R. Lehtinen, Virginia as a Case Study: EPA Should Be Willing to Withdraw NPDES Permitting Authority From Deficient States, 23 WM. & MARY ENVTL. L. & POL'Y REV. 617, 630 (1999) (arguing that the "EPA's assumption of state enforcement activities is more theoretical than real" because the EPA lacks the necessary resources); see also Maryland v. EPA, 530 F.2d 215, 227 (4th Cir. 1975) (describing the "hordes of federal employees" that would be required to enforce the Maryland implementation plan); District of Columbia v. Train, 521 F.2d 971, 981 n.17 (D.C. Cir. 1975) ("If we left [enforcement of the environmental laws] to the Federal Government, we would have about everyone on the payroll of the United States.").

28. See MICHAEL S. GREVE, REAL FEDERALISM 105 (1999) ("[T]he states' enhanced professionalism, competence, and creativity are giving lie to the race-to-the-bottom notion that only federal intervention will prevent the entire country from becoming one vast Mississippi."); John P. Dwyer, The Role of State Law in an Era of Federal Preemption: Lessons From Environmental Regulation, 60 LAW & CONTEMP. PROBS. 203, 219 (1997) ("Expertise, reputational value, and human capital together may make the state regulatory system an asset that both local officials and locally based interest groups will fight to keep."); John Shannon & James Edwin Kee, The Rise of Competitive Federalism, 9 PUB. BUDGETING & FIN. 5, 15 (1989) (praising the enhanced effectiveness of state government); Keith E. Whittington, Dismantling the Modern State? The Changing Structural Foundations of Federalism, 25 HASTINGS CONST. L.Q. 483, 520-21 (1998) ("Through accident, external prodding, and internal agitation, the state governments have largely managed to shed their image as venal backwaters."). See generally Mavis Mann Reeves, The States as Polities: Reformed, Reinvigorated, Resourceful, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 83 (1990) (arguing that state governments have markedly increased their effectiveness).

29. See David B. Walker, The Advent of an Ambiguous Federalism and the Emergence of New Federalism III, 56 PUB. ADMIN. REV. 271, 271 (1996) ("The main trend [in the modern era of federalism] was an aggressive national assertion of policy leadership by both the political and judicial branches of the federal government, even as the localities and, most notably, the reformed states were taking on greater operational roles within the system.").
"a healthy appreciation" for the role that states can play in implementing federal law.³⁰

Contrary to the suggestion of some commentators, the benefits of state implementation of federal law could not simply be accomplished through decentralizing federal authority.³¹ As an initial matter, the federal government lacks the political and/or fiscal will to incur the tremendous transaction costs necessary to replace state agencies with local field offices. Moreover, such field offices would invariably be less accountable to local interests than a formally elected, autonomous governmental unit.³² Emphasizing this point, Professor Kramer explains that our constitutional commitment to federalism should be understood as "an institutional strategy formulated to assure a greater degree of decentralization than is ever likely to be seen in a unitary system."³³ To be successful, this strategy requires courts and commentators to develop a vision of federal-state relations that both facilitates state participation in federal programs and protects state autonomy—a constitutional architecture that supports the governmental structures now in place.

II. STATE ADMINISTRATION OF FEDERAL LAW AND THE REVERSE-ERIE MODEL

A central question concerning the role of state agencies in implementing cooperative federalism initiatives is under what circumstances, if any, a cooperative federalism regulatory program can justify state agency implementation of a federal law in a manner not specifically authorized under existing state law. Due to the relatively recent emergence of cooperative federalism regulatory (as opposed to funding) programs, courts and commentators have yet to

³² Kramer, Political Safeguards, supra note 5, at 223 (“It is simply naïve to imagine that federal [officials] will routinely be willing to accommodate the full range of local differences or to permit federal regulators to treat some states completely differently than others.”).
³³ Id.
pay particularly close attention to this issue or to develop a stable constitutional architecture for cooperative federalism.  

Ultimately, states must decide whether to endorse cooperative federalism as a regulatory strategy. In particular, state courts will have the final say on whether state charters designed for different historical circumstances—i.e., an era of dual federalism—should be interpreted to facilitate state agency participation in federal regulatory programs. In short, the challenge for states (or federal courts predicting how state courts would act) is to decide how, if at all, to justify state agency action necessary to implement cooperative federalism regulatory programs that lie outside those actions specifically authorized by state law.

The reverse-Erie model outlined herein provides a model for determining when state agencies can implement federal law. At bottom, this doctrine recognizes that federal law cannot provide a state agency with a jurisdictional capability that is fundamentally contrary to its charter even when that extra capability is necessary to implement federal law. Significantly, however, the reverse-Erie model justifies state agency implementation of federal law where state law does not specifically authorize the agency to take the exact measure at issue, but where the action is within the competence of the state agency.

The reverse-Erie doctrine, whose roots go back to the early part of the twentieth century, is most often identified with Testa v. Katt. In making clear that state courts must adjudicate federal law, Testa and its progeny call on state courts (or, under cooperative federalism programs, state agencies) to alter their usual practices to give effect to a federal scheme (absent a "valid excuse" for not doing so). Under this doctrine, for example, state courts hearing Federal

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34. If courts and commentators do not develop a satisfactory framework for addressing this question, the federal government may not be able to rely on some state agencies as effective partners in implementing cooperative federalism regulatory programs. As Professors Michael Dorf and Charles Sabel put it, "practice is outrunning preaching, in that crucial elements of a regime of cooperative federalism are anticipated in current legislation." Dorf & Sabel, supra note 5, at 421.


37. E.g., Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1943) (holding that state courts must "proceed in a manner that all the substantial rights of the parties under controlling federal law would be protected").
Employers' Liability Act (FELA)\textsuperscript{38} cases must substitute a federal standard for their own regular pleading rules to effectuate FELA's more generous remedial scheme.\textsuperscript{39} In so doing, the reverse-\textit{Erie} principle—like its famous namesake\textsuperscript{40}—provides an important model for accommodating conflict between federal and state authority.

The reverse-\textit{Erie} approach provides three distinct lessons for federal and state courts and agencies involved in implementing cooperative federalism programs. First, it sets forth the appropriate analytical framework for evaluating the proper scope of state agency authority to implement a federal regulatory program through adjudication. Second, it offers the appropriate guide for state agencies and courts evaluating the scope of state agency authority to implement federal law through legislative and executive action.\textsuperscript{41} Finally, as developed in Part III, the reverse-\textit{Erie} approach embodies a model of cooperative federalism that offers an alternative to the dual federalism perspective that skeptically views efforts to involve state regulatory authorities in implementing federal law and is currently informing the Supreme Court's federalism jurisprudence.

To appreciate the challenge presented by state agency implementation of cooperative federalism programs, this Part first sets out one example of this issue as raised by the Telecommunications Act of 1996 (the "Telecom Act" or the "Act").\textsuperscript{42} This Part then outlines and rejects three previously proposed solutions to resolving the issue of state authority to implement federal law. Next, this Part explains that by adopting the reverse-\textit{Erie} model, states can both protect their autonomy and support cooperative federalism. Finally, this Part notes a formal response to the issue that may be a second-best alternative to the reverse-\textit{Erie} model, as it would rely on a questionable legal fiction and complicate the administration of federal regulatory programs.

\begin{itemize}
\item \textsuperscript{38} 45 U.S.C. § 51 (1994).
\item \textsuperscript{39} See Brown v. W. Ry., 338 U.S. 294, 298–99 (1949).
\item \textsuperscript{40} Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The \textit{Erie} doctrine, as civil procedure professors regularly teach, instructs federal courts to follow state substantive law, while generally applying federal procedural law, to cases arising under diversity jurisdiction. As its name implies, reverse-\textit{Erie} requires the converse analysis for federal cases heard in state court.
\item \textsuperscript{41} Reverse-\textit{Erie} could also serve as a guide, as opposed to a mandated approach, for when states could take adjudicative action should the Supreme Court overrule \textit{FERC v. Mississippi}, 456 U.S. 742 (1982). \textit{See infra} notes 111–18 and accompanying text.
\end{itemize}
A. The Dilemma for Cooperative Federalism

Sensitive to the limits imposed by the Supreme Court on commandeering state agencies into a federal regulatory program, the Telecom Act, like other modern cooperative federalism programs, does not require state agencies to participate in its implementation. Rather, the Telecom Act offers states the opportunity to implement its essential goal of bringing competition to local telephone markets by arbitrating disputes relating to the terms under which new entrants will cooperate with incumbent providers. If state agencies agree to superintend the development of the “interconnection agreements” between the incumbent providers and new entrants (which are shaped by federal law and mandate cooperation between the incumbent provider and the new entrants), they are expected to do so in compliance with federal law. This expectation means, for example, that in instances where new entrants are entitled to collocate (i.e., gain physical access) in an incumbent telephone provider's central switching office to interconnect their lines with the incumbent’s (so the entrant’s customers can call the incumbent’s customers), the state agency will be able to order the incumbent provider to comply with the relevant requirements of the Act and FCC regulations.

Before the passage of the Telecom Act, state agencies that sought to facilitate competition in local telephone markets often took steps analogous to the types of arrangements contemplated by the Telecom Act. In Oregon, for example, the state Public Utility Commission (PUC) ordered the incumbent local telephone companies to allow competitors to physically collocate in the incumbents’ central offices so that they could access the incumbents’ customers. In response to this requirement, GTE, a telephone provider, challenged the authority of the Oregon PUC to mandate “physical collocation” on the ground that the PUC lacked the necessary eminent domain power to impose such a requirement.

43. See infra Part III.A (discussing the anti-commandeering doctrine).
45. 47 U.S.C. § 252(c)(1) (directing the Federal Communications Commission (FCC) to superintend arbitration of interconnection agreements if state agencies fail to do so).
46. See 47 U.S.C. § 251(c)(6) (Supp. IV 1998) (requiring incumbent providers to permit the “collocation of equipment necessary for interconnection”).
48. Id. at 506. Before the Telecom Act was passed, the FCC also lacked such authority. Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1447 (D.C. Cir. 1994) (invalidating FCC rules requiring incumbent providers to allow physical collocation).
Ultimately, the Oregon Supreme Court concluded that the Oregon PUC lacked such authority under its state charter and thus was not able to order this step necessary to facilitating competition in the local market (and in the market for “access” to long distance customers). 49

Under the Telecom Act, state agencies like the Oregon PUC have mandated physical collocation and other measures that the agencies would not otherwise be authorized to do under state law. 50 Relying on federal law to justify action not authorized under state law, although not a “commandeering” of state agency resources as defined in United States v. New York, 51 certainly implicates the integrity of state sovereignty. Unlike the situation in New York, however, the Telecom Act does not require states to take any particular action against their will; nonetheless, state agencies must ask whether they can take actions not contemplated by their state law charters in implementing a cooperative federalism program. Arguably, the federal government can assume that state agency implementation of federal law suggests that the agency possesses lawful authority to take the regulatory action at issue. But for state agencies in the position of the Oregon PUC, or for reviewing federal courts (or state courts, if the question of lawful authority is certified to them), the validity of regulatory actions not heretofore contemplated by state law presents a novel question.

B. Efforts To Justify State Agency Implementation of Federal Law

Given the Supreme Court’s renewed attention to principles of state sovereignty and the stakes involved in implementing

49. GTE Northwest, 900 P.2d at 506.

50. See, e.g., MCI Telecomm. Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157, 1182 (D. Or. 1999) (upholding a physical collocation requirement though not addressing the issue of whether the state agency lacked authority to impose such a requirement). More generally, the question of the lawfulness of state agency action arises whenever state PUCs rely on federal authority to regulate unregulated services or affiliates of local providers. See, e.g., Southwestern Bell Tel. Co. v. Connect Communications Corp., 225 F.3d 942, 947 & n.2, (8th Cir. 2000) (relying on federal, not state, authority to take enforcement action not justified under state law); US WEST Communications, Inc. v. MFS Intelenet, Inc., 193 F.3d 1112, 1122 (9th Cir. 1999) (upholding regulation by Washington Utilities and Transportation Commission of unregulated and deregulated services); US WEST Communications, Inc. v. Hix, 93 F. Supp. 2d 1115, 1132 (D. Colo. 2000) (upholding regulation of an unregulated US WEST directory affiliate by a state agency under federal authority); US WEST Communications, Inc. v. Minn. Pub. Utils. Comm’n, 55 F. Supp. 2d 968, 984 (D. Minn. 1999) (considering whether federal law, in the absence of state law authority, authorizes the regulation of an unregulated US WEST directory affiliate).

51. 505 U.S. 144 (1992). For a discussion of the commandeering doctrine, see infra Part III.A.
cooperative federalism programs like the Telecom Act, it is likely that some disgruntled parties will challenge the role of state agencies in implementing federal law. Although the classic commandeering challenge is unlikely to succeed where a state voluntarily agrees to implement a federal regulatory program, a voluntary assumption of power not authorized by state law raises the novel question of whether state agencies can justify their actions based on federal law. To date, courts and commentators have offered three distinct theories to justify state participation in federal regimes: (1) a “contract” theory, (2) a “preemption” theory, and (3) a “presuming institutional autonomy” theory. As discussed below, none of these theories adequately justifies state agency implementation of federal law in ways not contemplated by state law.

The use of federal contracts with state agencies does not effectively justify state agency implementation of federal programs. In certain cases, the authority of state agencies to contract with the federal government may provide a sufficiently broad authorization to engage in whatever regulatory actions are contemplated under the Medicaid Act or other cooperative federalism regimes based on federal-state agreements. Indeed, the Mississippi Supreme Court recently relied on this theory, concluding that the Mississippi Department of Health possessed the relevant authority to administer a number of federally authorized regulatory actions on the ground that it was authorized to enter into contracts with federal or state entities where doing so was in the public interest. This justification, however, applies in only the limited situations where a state agency contracts with the federal government. Moreover, taken alone, this theory might be unavailing where state law would otherwise not authorize the agency to take the action contemplated by the federal regulatory program.

The theory that the federal government’s bestowal of authority on a state entity constitutes a preemption of the state prohibition takes the preemption doctrine too far by using it to authorize, as well

52. See Ara B. Gershengorn, Note, Private Party Standing to Raise Tenth Amendment Commandeering Challenges, 100 COLUM. L. REV. 1065, 1094 (2000) (arguing that citizens and companies can raise Tenth Amendment challenges).
53. Cf., e.g., MCI Telecom. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, 340–44 (7th Cir. 2000) (rejecting a constitutional challenge to the Telecom Act on the grounds that the state commissions had waived their Eleventh Amendment immunity).
54. See Molden v. Miss. St. Dep’t of Health, 730 So. 2d 29, 35 (Miss. 1998) (“[T]he Department clearly has the authority to enter into contracts with a federal agency and adopt regulations to carry out its contractual obligations where it finds such action to be in the public interest.”).
as limit, state regulation. The dispute in *Washington Department of Game v. Federal Power Commission*,55 where the Federal Power Commission (FPC) authorized the City of Tacoma to construct a dam despite a state law barring such an action, provides an example of how this theory would work.56 In that case, the City avoided the strictures of state law by arguing that a subsequent federal action preempted the state law, even though the City was a creature of state law.57 After a procedural history that spanned ten years, the Washington Supreme Court ultimately concluded that Congress's establishment of the FPC "preempted the entire field" and displaced any state limitations that would interfere with the terms or conditions of licenses issued by the FPC.58 Echoing this conclusion, the United States Supreme Court has at least twice concluded that state receipt of a federal grant requires the state to comply with the conditions of the grant, even where they conflict with state law.59

The final strategy for justifying state agency implementation of federal programs is Professor Roderick Hills's suggestion that state agencies should be presumptively authorized to implement federal law where state enabling legislation is otherwise ambiguous on the topic.60 This approach equates preserving state participation in national programs with preventing national intrusion into state programs; consequently, it calls for the converse of the clear statement rule set forth in *Gregory v. Ashcroft*.61 Under *Gregory*, federal legislation is presumed not to limit state action unless Congress declares clearly that states are subject to its constraints.62 In arguing for a "reverse-*Gregory*" regime, Professor Hills explained that "[a]s with *Gregory*, the presumption of institutional autonomy can be justified as a way to ensure that the political process—the state political process—carefully considers an important constitutional

55. 207 F.2d 391 (9th Cir. 1953).
56. Id. at 396.
57. Id. The Washington Supreme Court viewed the matter differently than the Ninth Circuit, see *City of Tacoma v. Taxpayers of Tacoma*, 262 P.2d 214, 228–29 (Wash. 1953), but the United States Supreme Court reversed the Washington Supreme Court on the ground that the Ninth Circuit's decision precluded it from reaching a contrary result. See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340 (1958).
60. Hills, *Dissecting the State*, supra note 5, at 1246.
62. Id. at 463–64.
value—effective national spending programs—before foreclosing local participation in those programs."63

Unfortunately, none of the three theories outlined above explains why, in the Telecom Act example discussed previously, the Oregon PUC can mandate physical collocation in GTE’s central offices despite its lack of eminent domain authority under its state charter. The contract theory is of no help in the telecommunications context because the state agencies do not contract with the federal government.64 As for Professor Hills’s presumption of institutional authority theory, it would appear to be unavailing where a state supreme court has authoritatively construed a state agency’s enabling legislation.65 That is, when a state supreme court has already interpreted the relevant enabling statute (or it is unambiguous), Professor Hills’s reverse-Gregory interpretive principle does not come into play. The preemption theory comes the closest, but upon closer examination, it, too, is not quite up to the task.

Framing the question as preempting a state law bar to action is both invasive of state authority and masks the real issue. To be sure, the difference between overriding a bar to action and providing authorization may be semantic at some level—a position suggested by the Supreme Court’s decision not to adopt one perspective or the other in Howlett v. Rose.66 Unfortunately, this articulation fails to appreciate that courts must evaluate the jurisdictional capability of the state agency asked to implement federal law; this inquiry follows

63. Hills, Dissecting the State, supra note 5, at 1249.
64. More generally, the contract model, which arose out of federal funding programs, does not translate to the exercise of regulatory authority.
65. As addressed below, a particular conception of Professor Hills’s theory mirrors the reverse-Erie model outlined herein. See infra notes 127–29 and accompanying text.
66. 496 U.S. 356, 375 (1990) ("[W]hether the question is framed in pre-emption terms ... or in the obligation to assume jurisdiction over a ‘federal’ cause of action ... the Florida court’s refusal to entertain one discrete category of [42 U.S.C.] § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause."). Given the judicial fondness for employing the preemption metaphor (even it does not aptly describe authorizing an agency to take action), that may well be the term used to describe the application of the reverse-Erie model proposed in this Article. See Johnson v. Fankell, 520 U.S. 911, 921 n.12 (1997) (describing reverse-Erie doctrine as calling for preemption of inadequate state rules as opposed to authorizing, under federal law, the adequate rule); Emergency Petroleum Allocation Act of 1973, 3 Op. Off. Legal Counsel 231, 232–33 (1979) (stating that “the specificity of the preemption provision contained in the EPAA, which clearly does not contemplate the type of preemption involved here, coupled with the substantial constitutional question [of intrusion on state sovereignty] that would be presented” suggests strongly that a state official cannot be delegated authority under the Act that he could not exercise under state law).
from whether state agencies can utilize a federal authorization and is sidestepped under the preemption approach.67

To most forthrightly and accurately capture the balance between federal supremacy and state autonomy, this Article suggests that courts employ a reverse-Erie model to determine under what conditions a state agency can implement federal law that it would not be authorized to implement under state law.68 Under this model, state legislatures are always free to update their enabling legislation to make clear that the agency cannot take the action in question. Under the preemption approach, by contrast, the state legislature loses all control to define the jurisdictional capability of the state agency.69

C. The Reverse-Erie Model

Depending on the nature of the state agency's role in implementing the particular cooperative federalism program, the reverse-Erie model would apply either as a federal mandate under the Supremacy Clause70 or as an interpretive guide for state agencies or courts evaluating the scope of state regulatory authority to implement federal regulatory programs. This Section first sets out the reverse-Erie model, and then explains how it applies to state agency implementation of federal law. In so doing, it outlines an approach for putting cooperative federalism into practice and anticipates, as developed in Part III, an appropriate conception of the role for a Tenth Amendment anti-commandeering doctrine.

67. See James D. Barnett, The Delegation of Federal Jurisdiction to State Courts by Congress, 43 AM. L. REV. 852, 853 (1909) [hereinafter Barnett, Federal Jurisdiction] ("It would seem that [federal laws conferring state jurisdiction] may be logically justified only as a recognition of inherent authority of the States or as a valid delegation of judicial power.").

68. Of course, one could object to all delegations of federal power to state agencies, but this would fly in the face of the longstanding reality to the contrary. See, e.g., James D. Barnett, The Delegation of Legislative Power by Congress to the States, 2 AM. POL. SCI. REV. 347, 377 (1908) (concluding that the theory that federal authority could not be delegated to the states "has been utterly ignored, with the result that relations between the Union and the States, supposedly determined by the Constitution, have been altered by the action of congress").

69. To be sure, state agencies can decline to implement cooperative federalism programs under the Printz anti-commandeering rule, but this ability to decline the implementation function is exercised by the state executive (as opposed to the legislature) and may not allow for selective implementation. For a discussion of Printz, see infra notes 145–48 and accompanying text.

70. U.S. CONST. art. VI, cl. 2.
1. The Reverse-Erie Doctrine

Testa v. Katt set forth the foundation for the reverse-Erie doctrine by concluding that the Supremacy Clause empowers, and indeed requires, state courts to exercise jurisdiction in federal causes of action. Although Testa stated this point most forcefully, the federal courts had been building up to this conclusion for some time. In Testa, the Supreme Court held that state courts must enforce federal law, provided that the federal claim is of the "same type" as that enforced by the state court and that the state has no "valid excuse" for declining jurisdiction. In particular, Testa held that Rhode Island state courts could not decline jurisdiction to adjudicate cases under the federal Emergency Price Control Act of 1942. In so doing, Testa, its predecessors, and its progeny make clear that "Our Federalism" is a unified system, with its own jurisprudence that must sensibly integrate two different jurisdictions.

At bottom, Testa federalizes the question of what types of claims must be heard by state courts and, as explained in FERC v. Mississippi, state administrative agencies. Testa's predecessors, which involved state court adjudication of the Federal Employees Liability Act (FELA), concluded that states were required to hear

72. Id. at 394.
74. See Testa, 330 U.S. at 392-94.
75. Id. at 394.
76. Younger v. Harris, 401 U.S. 37, 44-45 (1971) ("It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.").
77. An important precedent which Testa relied on and quoted from Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1 (1912), made this very point:
The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief [to a federal cause of action]; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.
78. 456 U.S. 742 (1982).
79. Id. at 759-70.
FELA cases by analogizing them to common law negligence actions. Testa and its progeny, however, required changes in state procedure to accommodate federal rights, thereby markedly expanding the "nondiscrimination model" that some courts and commentators had adhered to before Testa. In particular, Testa requires a state to provide a "valid excuse" to justify its refusal to exercise federally conferred jurisdiction. Moreover, as some commentators have noted, Testa's underlying rationale suggests a broad rule that states should hear all federal claims, even if they do not provide jurisdiction for analogous ones. In light of its potential breadth and lack of definition, commentators have often criticized Testa as setting forth an unpredictable doctrine that is insufficiently sensitive to state interests.

Regardless of where the reverse-Erie doctrine's mandate ends, it clearly modifies the famous dictum, often attributed to Professor Henry Hart, clarifying that "[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'" That is, where state courts lack authority to enforce an

81. Bombolis, 241 U.S. at 222-23; Mondou, 223 U.S. at 56.
82. See, e.g., Dice v. Akron, Canton & Youngtown R.R. Co., 342 U.S. 359, 363 (1952) (holding that the petitioner had a right to a jury even in the absence of state statutory authorization).
83. See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 291 (5th ed. 1994) (terming "very doubtful" the non-discrimination perspective that federal law "must take the state courts as it finds them").
84. See Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 WIs. L. REV. 39, 169-70 (emphasizing that Testa made it more difficult for states to decline to adjudicate federally-created causes of action).
85. See Terrance Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 SUP. CT. REV. 187, 205 ("If the duty of the state courts to accept jurisdiction flows from the obligation to respect federal policy, there is no apparent reason why the state should not be required to accept jurisdiction even though it would not entertain an analogous forum-created right."); James D. Barnett, Comment, Enforcement of Federal Laws by State Courts, 24 OR. L. REV. 148, 155 (1945) ("[T]he Federal 'supremacy' doctrine would, logically, apply with equal force to state laws and state constitutions that might be designed to limit or abolish the jurisdiction of the state courts here considered.").
86. See, e.g., Louise Weinberg, The Federal-State Conflict of Laws: "Actual" Conflicts, 70 TEX. L. REV. 1743, 1774 (1992) (arguing that "on some occasions the Supreme Court will reach down ... and force federal procedure on state courts").
87. Felder v. Casey, 487 U.S. 131, 150 (1988) (quoting Brown v. W. R.R. Co., 338 U.S. 294, 298 (1949)). In Felder, Justice Brennan explicitly analogized the duty of state courts to adjust to the requirements of federal law to the Erie doctrine. See id. at 151 ("Just as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected."
important aspect of a federal right—say, providing a jury trial or certain equitable remedies—reverse-Erie principles require that the state court rely on federal authority to supplement its ordinary practice. The Supreme Court set forth this principle most forcefully in *Dice v. Akron, Canton & Youngtown Railroad*, which required a state court to provide a jury for FELA cases because it was "part and parcel of the substantive right," even if such a measure was not authorized by state law. In dissent, Justice Frankfurter challenged the conclusion that a state that did not discriminate against a federal claim would have to take special measures—i.e., provide a jury where it would not ordinarily do so—to enforce federal law. In so doing, he built on his dissent in *Brown v. Western Railway*, where he offered the dictum later echoed by Professor Hart—a FELA plaintiff in state court must "take the jury system as he finds it"—and underscored that state courts "are creatures of the States, with such structures and functions as the States are free to devise and define."

In *Brown*, as Justice Frankfurter highlighted, the Supreme Court crafted the reverse-Erie notion around the fiction that state court adjudication of federal law merely relies on a state law jurisdictional capacity. In part because it rests on this fiction, the Supreme Court has emphasized that reverse-Erie would not justify creating a forum out of whole cloth solely to accommodate a federal cause of action.

88. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986) (holding that in the maritime law context, reverse-Erie requires that "substantive remedies afforded by the States conform to governing federal maritime standards").

89. 342 U.S. 359 (1952).


91. Dice, 342 U.S. at 367 (Frankfurter, J., dissenting).


93. Id. at 300 (Frankfurter, J., dissenting). Frankfurter had previously stated this principle in concurrence. See Brown v. Gerdes, 321 U.S. 178, 190 (1944) (Frankfurter, J., concurring). Despite the endurance of this dictum, it does not accurately describe the law. See WRIGHT, supra note 83, at 291 (noting that federal law can compel some changes in state judicial procedure).

94. See Barnett, *Federal Jurisdiction*, supra note 67, at 860 (noting that the courts have "overlooked" the purported limitation that state court authority cannot be increased by an act of Congress).

95. Howlett v. Rose, 496 U.S. 356, 372 (1990) ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include
Similarly, as to state administrative agencies, reverse-\textit{Erie} would not justify state agency implementation of federal law where the state statutory scheme explicitly and self-consciously sought to prevent the agency from implementing the action contemplated by the federal scheme. In such cases, the state would have a "valid excuse" for declining jurisdiction to adjudicate the federal claims.

Over the lifespan of the reverse-\textit{Erie} doctrine, the Supreme Court has left the contours of the "valid excuse" doctrine largely undefined. Indeed, the Court's pre-\textit{Testa} jurisprudence also provides little guidance on the parameters of the "valid excuse" concept, as it only vaguely required that states consent to administer federal law and that the exercise of federal authority not be incompatible with state duties. In particular, the Court has upheld only three attempts to decline jurisdiction, all of which involved a rule of administration that required the Court to dismiss the case. Consequently, the doctrine remains somewhat undefined and has been able to coexist with the longstanding fiction that state courts cannot rely on federal authorization to modify their usual practice, despite the fact that the Court has required certain changes to accommodate the demands of federal law. Because of this tension, within it a requirement that the State create a court competent to hear the case in which the federal claim is presented.

96. See FERC v. Mississippi, 456 U.S. 742, 764 (1982) ("If a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals."); see also id. at 760 ("The Mississippi Commission has jurisdiction to entertain claims analogous to those granted by PURPA, and it can satisfy Section 210's requirements simply by opening its doors to claimants.").

97. See \textit{Howlett}, 496 U.S. at 378 ("This case does not present the question whether Congress can require the States to create a forum with the capacity to enforce federal statutory rights ... [that] would not otherwise be subject to the court's jurisdiction.").

98. Parmet, \textit{supra} note 4, at 15 (noting that question has been "left open" by the Testa doctrine); Martin H. Redish & Steven G. Sklaver, \textit{Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism}, 32 \textit{Ind. L. Rev.} 71, 99 (1998) (observing that the Supreme Court has given "relatively little attention to this question").


it is conceivable that the Court will cut back on the reverse-Erie principle and institute the rule that the federal government must take a state court (or administrative agency) as it finds it. To do so, however, the Court would ignore the important stare decisis rationale for maintaining a regime that the federal and state governments have relied on in enacting cooperative federalism statutes like the Telecom Act.102

2. Defining the Contours of State Regulatory Authority to Implement Federal Law

In FERC v. Mississippi,103 the Supreme Court evaluated a Tenth Amendment challenge to PURPA’s reliance on state public utility commissions to resolve disputes between incumbent providers of electric power and qualifying cogenerator and small power producers.104 In particular, the Court addressed whether “federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery.”105 Highlighting that the functions contemplated by PURPA were adjudicative in nature, the Court concluded that the Supremacy Clause’s mandate that state courts adjudicate federal law justified the federal government’s effort to enlist state agencies in advancing federal public policy (unless they had a “valid excuse” for not doing so).106 Thus, the Court suggested that the scope of state agency authority to implement cooperative federalism programs like PURPA—i.e., those requiring state agencies to undertake adjudicative responsibilities—turned on the reverse-Erie doctrine as set forth in Testa v. Katt and its progeny.107

102. Hilton, 502 U.S. at 203 (noting that stare decisis concerns weigh against a fundamental change in doctrine that would impose serious restructuring costs and require states to reexamine their statutes).
104. Id. at 759-60.
105. Id. at 761.
106. See id. at 760-62.
107. See id. In addition, the Court relied on its decision in Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 695 (1979), where it required a state agency to prepare rules that it was not authorized to do under state law. FERC, 456 U.S. at 762. In Washington State Commercial Passenger, the Court accepted the State of Washington’s argument that its authority to issue certain regulations turned on federal legal requirements, despite an earlier ruling that suggested that the Department of Game lacked authority as a matter of state law. Wash. State Commercial Passenger, 443 U.S. at 672-73, 693-94. Thus, Washington State Commercial Passenger held that the orders of a federal judge could authorize action by state officials that would not otherwise be justified under state law. Id. at 695-96.
FERC’s reliance on the Supremacy Clause to mandate and justify state agency implementation of federal law provoked two vigorous dissents. In a partial dissent, Justice Powell objected to the conclusion that federal law could “define the nature of” state administrative agencies, quoting from Professor Hart’s dictum that “[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.”108 Similarly, Justice O’Connor argued both that PURPA “conscript[ed] state public utility commissions into the national bureaucratic army” and that applying Testa to a legislative context “vastly expands the scope of that decision.”109 As these dissents foretold, the Supreme Court would continue to struggle over the next two decades to develop a stable regime for federal-state relations.

With respect to state agency implementation of federal regulatory programs, it remains unclear whether FERC will supply the appropriate guide on the legality of such action. As an initial matter, not all such programs will impose purely adjudicative responsibilities on state agencies, though the Telecom Act, for example, can be closely analogized to PURPA.110 More significantly, the Supreme Court may well narrow—if not overrule—FERC by defining “adjudicative” very narrowly in future such cases.111

As the Supreme Court appreciated in FERC, the future success of cooperative federalism initiatives will depend in part upon judicial acceptance of a default rule recognizing that state agencies enjoy greater leeway in implementing federal law than in implementing state law. In particular, such a default rule—animated by a judicial commitment to facilitate cooperative federalism (i.e., a reverse-Gregory perspective)—assumes that where a state legislature did not anticipate the changed circumstances reflected in the federal legislation, federal and state courts and agencies should not assume that the state would wish to apply an otherwise applicable state bar to action in the face of contrary federal law. At present, the courts

108. FERC, 456 U.S. at 774 (Powell, J., concurring in part and dissenting in part) (quoting Henry M. Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954)).
109. Id. at 775, 784 (O’Connor, J., concurring in the judgment in part and dissenting in part).
continue to uphold state regulatory actions based on federal authority without attempting to justify this state of affairs. If states adopt the reverse-\textit{Erie} model to address this issue, however, state agencies and courts will benefit from a doctrinal framework that demands a self-conscious balancing between protecting state autonomy and preserving the effectiveness of cooperative federalism programs.

In addition to the reverse-\textit{Gregory} value of supporting a federal initiative, states should adopt the reverse-\textit{Erie} approach because it avoids putting determinative weight on whether a state agency acts in an adjudicative or legislative context. In implementing cooperative federalism schemes, state agencies will often face the choice of developing federal rules in either an adjudicative or legislative context. By not adopting a reverse-\textit{Erie} approach for evaluating the scope of state agency legislative and executive authority to implement federal law, state courts (or federal courts anticipating what state courts would do) would create an enormous incentive for state agencies to act in an adjudicative context—so as to fall within \textit{FERC}—even where it might make more sense to proceed in a legislative fashion.

In sum, courts should interpret state enabling legislation to allow state agencies to implement the cooperative federalism statutes that they choose to administer unless doing so requires a fundamental change in form. By advancing this perspective, the reverse-\textit{Erie} approach contributes to the success of the federal regulatory program, avoids creating an anomalous incentive for implementing cooperative federalism programs through adjudication (as opposed to legislative or executive action), and presumes that the state limitation on agency action did not intend to prevent state agency

112. See supra note 50.

113. For a discussion of the reverse-\textit{Gregory} principle, see supra notes 60--63 and accompanying text.

114. This is the case in the Telecom Act context, for example, in which state agency arbitration of interconnection agreements between entrants and incumbent providers can rely in part on legislative proceedings (i.e., developing certain rules through notice and comment), can be conducted entirely in an adjudicative fashion, or may combine aspects of both arbitration and rulemaking. See AT&T Communications v. Southwestern Bell Tel. Co., 86 F. Supp. 2d 932, 952 (W.D. Mo. 1999) (noting that arbitration incorporated aspects of both adjudication and rulemaking); see also NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (holding that agencies have discretion to choose between adjudication and rulemaking); Permian Basin Area Rate Cases, 390 U.S. 747, 776--77 (1968) (allowing the Federal Power Commission to use ratemaking rather than adjudication to regulate natural gas prices); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (holding that the choice between rulemaking and adjudication “lies primarily in the informed discretion of the administrative agency”).
implementation of federal law. To give effect to this approach, state agencies might adopt one of two rationales: that the federal law preempts the old state bar or that the limitation in the enabling statute does not apply to bar the state agency implementation of federal law. Under either approach, the agency could avoid calling its enabling statute “obsolete,” but at the same time alert its legislature to the fact that it might wish to update its state law to adapt to the new legal regime.

3. Reverse-Erie: A Model for Cooperative Federalism

In the tradition of the Erie doctrine, the Supreme Court would do well to look to its flexible concept of accommodation and interest balancing to guide the valid excuse principle. Under Erie, “[f]ederal courts have interpreted” federal procedural rules “with sensitivity to important state interests and regulatory policies.” Thus, the question for federal courts confronting a possible conflict between the demands of state substantive law and federal procedural law is whether they can “give effect to the substantive thrust” of state law “without untoward alteration of the federal scheme.” Similarly,

115. Cf. Printz, 521 U.S. at 909–11 (explaining that a number of the Federalist Papers’ discussions about state involvement in federal regulatory schemes “appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government”).

116. As discussed above, the preemption method suggests a more permanent state of affairs than need be the case. See supra notes 55–59 and accompanying text. That is, under a reverse-Erie approach, a later state enactment would constitute a valid excuse; by deeming the federal act preemptive, it would suggest that the later enactment would be without effect. In addition, the use of preemption to supply legal authority where it did not otherwise exist stretches the proper conception of that doctrine. See id.; see also Matthew D. Adler & Seth F. Kreimer, The New Etiquette of Federalism: New York, Printz and Yeskey, 1998 Sup. Ct. Rev. 71, 95 (distinguishing between commandeering as a duty requiring action and preemption as a duty not requiring action).

117. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (“The combination of lack of fit and lack of current legislative support I will call the problem of legal obsolescence . . . . [T]o address the problem of legal obsolescence courts might] create a situation in which conscious legislative reconsideration of the law was made likely.”).

118. One could also argue that the process of forcing state legislatures to revisit their enabling legislation for their PUCs would not be a bad thing. While this is undoubtedly true, the confusion and disruption to cooperative federalism statutory schemes that would result from such a process would be considerable and quite costly.


120. Id. at 426. The Supreme Court took a step in the direction of applying this approach in the reverse-Erie context in Howlett, in which it explained that “[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim.” Howlett v. Rose, 496 U.S. 356, 372 (1990).
state agencies confronted with a reverse-Erie question need to ask whether the adaptations necessary to apply federal law would require an "untoward alteration" of state institutions in order to implement the federal program.\textsuperscript{121}

Under reverse-Erie principles, agencies and courts should not view the lack of authority to implement certain measures under state law as necessarily barring such activity under federal law.\textsuperscript{122} Rather, they should conclude that implementing federal law is compatible with a state agency's charter, provided that the state agency does not have to fundamentally change its form and that an enactment after passage of the federal scheme could preclude the state agency from taking the heretofore unauthorized action.\textsuperscript{123} In so doing, courts would harmonize the conflict between the tradition that federal law must take state courts as it finds them and the one that proclaims that federal law can justify alterations of state practice where necessary to effectuate a federal right.\textsuperscript{124} In addition, such an approach would

\textsuperscript{121} This balancing approach appears to be what Justice O'Connor had in mind for the now-abandoned National League of Cities regime that barred the federal government from regulating actual state governmental functions. \textit{See generally} Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (protecting states from federal regulation of "essential government functions"), overruled by Garcia v. San Antonio Metro. Transit Auth. 496 U.S. 528 (1985). In her dissent in Garcia, Justice O'Connor suggested that the appropriate constitutional rule should "weigh[] state autonomy [interests] as a factor in the balance" of whether a federal law impacting on state interests passes constitutional muster. \textit{Id.} at 588 (O'Connor, J., dissenting).

\textsuperscript{122} \textit{See} Claflin v. Houseman, 93 U.S. 130, 136 (1876) (holding that state jurisdiction is warranted where "it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case"); \textit{cf.} S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310-12 (7th Cir. 1995) (holding that a state provision addressing plaintiff settlement offers is compatible with Federal Rule of Civil Procedure 68, which only explicitly contemplates offers by defendants).

\textsuperscript{123} \textit{See} Caminker, \textit{State Sovereignty}, supra note 90, at 1030 ("Congress's power to conscript other branches does not entail the power to require fundamental restructuring of the state's administrative machinery."). In \textit{AT&T Communications v. Pacific Bell}, 203 F.3d 1183 (9th Cir. 2000), for example, the Ninth Circuit confronted this phenomenon in addressing whether state agency procedural requisites to judicial review needed to be followed in the Telecom Act context. \textit{See id.} at 1185-87. In that case, the Ninth Circuit properly recognized that the policies of the federal Act weighed against giving effect to the state rule requiring a filing of a petition for reconsideration, but its analysis more closely resembled the preemption model than a reverse-Erie approach. \textit{Id.} at 1185-87. In particular, \textit{AT&T} did not allow for the possibility that certain state procedural rules might be fundamental to the functioning of a state agency, but it is possible that the Ninth Circuit might approach the matter differently if the state agency was asked to act in a manner that would require an "untoward alteration" of its form.

\textsuperscript{124} \textit{Compare} Howlett v. Rose, 496 U.S. 356, 372 (1990) (stating that the "general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes state courts as it finds them.' " (quoting Henry M. Hart, \textit{The Relations Between State and Federal Law}, 54 COLUM. L. REV. 489, 508 (1954))), with
make clear that the *Erie* framework provides a guide that is "the very essence of our federalism," reaffirm *FERC's* endorsement of cooperative federalism, and disavow the suggestion that "Our Federalism" is one built on separate federal and state spheres of authority.

Even where the Supremacy Clause does not mandate a reverse-*Erie* approach to ascertaining the scope of state regulatory authority (i.e., for instances where the task is legislative or executive in nature), state agencies and courts would do well to use reverse-*Erie* principles to evaluate whether the agencies' state charters can tolerate taking the actions that the federal regulatory program requires. States would then recognize that the value of implementing the federal scheme justifies the exercise of authority that might not be permissible under state law. To be sure, there may well be instances where the action at issue would be utterly inconsistent with the mandate of the state agency, but in most situations the state charter will simply have failed to contemplate what the agency would do in such a situation. Thus, like Professor Hills's presumption of institutional autonomy theory, the reverse-*Erie* model outlined here (at least where the state agency is not acting in an adjudicative capacity) envisions that the states would adopt a default rule that regards state agency implementation of federal law as a value to be supported as long as it does not effect an untoward alteration of the state agency's form and mandate.

On one view of Professor Hills's theory, it would fit quite nicely with and even endorse the reverse-*Erie* model. Most fundamentally, both theories recognize the importance of construing state law to protect state autonomy and to embrace cooperative federalism.


126. See Redish & Sklaver, *supra* note 98, at 91 ("Ironically, much of the nation's history of judicial federalism similarly supports rejection of any principle of mutual exclusivity of sovereign power.").

127. See *supra* notes 60–63 and accompanying text.

128. Professor Hills captures the balance that both theories attempt to straddle: On one hand, state lawmakers—including state constitutional draftspersons—are best situated to develop institutions for local governance: they ought to have the final word in creating such institutions. On the other hand, the federal government often needs to use such institutions: presuming that such institutions maintain their independence and can compete with each other to act as agents of Congress helps protect the federal government's access to these institutions. Hills, *Dissecting the State*, *supra* note 5, at 1285.
The reverse-Erie model, however, envisions a slightly stronger default rule, providing that a state agency can implement federal law, at least provisionally, when it opts to do so—even if the relevant enabling legislation could not be interpreted to authorize the action at issue under state law. Moreover, by supplying a more developed analytical framework, the reverse-Erie model provides a clearer guide to state courts and agencies than Professor Hills's proposed approach.

Finally, the reverse-Erie model acknowledges the intrusion on state autonomy by authorizing state agencies to act in ways not permitted in the state law context but resolves this issue by incorporating Testa’s conception of the “valid excuse” as the appropriate analytical tool for defining when state agencies cannot implement federal law. In so doing, it recognizes that the “valid excuse” limitation represents the intersection between the reverse-Erie principle and the anti-commandeering rule. By permitting states to decline jurisdiction under certain circumstances, the valid excuse doctrine avoids a direct conflict with instances where certain demands of the reverse-Erie principle would intrude on “an attribute of state sovereignty reserved by the Tenth Amendment.”

D. A Formal Response to a Lack of State Authority

In the event that a state rejects the application of the reverse-Erie principle in this context or has a “valid excuse” for declining certain of the mandates set out in a cooperative federalism statute,

129. If the reverse-Erie model construes the lack of authority to take a particular action as inapplicable to the ability to take such action to implement federal law, and the presuming institutional autonomy approach could be used in such a manner, then the two approaches would run together. Professor Hills does not suggest that the reverse-Gregory principle could be used in this manner, but it is conceivable that such a canon could view the ability of states to implement federal, as opposed to state, law as a latent ambiguity and thus within its scope.

130. In a Justice Department legal opinion, the Department explained that the ability to rely on federal law, particularly in situations not envisioned explicitly by Congress, could infringe on state sovereignty: “[I]t is difficult to conceive of a more significant infringement on State authority than to conscript the Governor of a State, even a willing Governor, into Federal service in contravention of State law reserving the services of the Governor to the people of his State.” Emergency Petroleum Allocation Act of 1973, 3 Op. Off. Legal Counsel 231, 233 n.3 (1979).

131. Thus, what constitutes a “valid excuse” for not relying on a federal authorization and what would constitute a commandeering of state judicial or administrative resources should be identical, though approached from opposite directions (i.e., a lack of authority versus an unconstitutional direction to a state body). See Ellen D. Katz, State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz, 1998 Wis. L. REV. 1465, 1496 (“As state has a valid excuse to refuse to hear a federal claim only when the mandatory exercise of jurisdiction would constitute commandeering.”).

state agency involvement may still be justified as "preliminary" to federal enforcement of the statutory mandates. If, for example, a state PUC could not enforce the right of an entrant into the local telephone market to physically collocate in an incumbent provider's central office, the state agency could simply establish the basic framework for this right (i.e., the price necessary to compensate the incumbent and other relevant terms and conditions) and allow the Federal Communications Commission (FCC) to enforce this right. In so doing, the state agency would merely take a "preliminary" action that would not constitute the exercise of the sovereign eminent domain authority that the state government had denied to it. Indeed, in United States v. Jones, the Court used this theory to uphold a statutory scheme that appeared to require state authorities to stand in the shoes of the federal government in an eminent domain proceeding. In particular, the Court concluded that the calculation of "just compensation" did not constitute a delegation of eminent domain power because such an action "is merely an inquisition to establish a particular fact as a preliminary to the actual taking."

This formal end run around the state authority issue would only be a second-best strategy because it entails a couple of notable limitations. As an initial matter, this justification for state agency involvement would sacrifice candor by relying on the questionable fiction that all state action was preliminary to the exercise of federal authority. More significantly, this approach would limit the ability of states to implement federal law, thus leaving states unable to enforce the federal regime and possibly discouraging states from participating at all in the federal program. In so doing, this approach would complicate matters for the regulated parties and would sacrifice some of the benefits from a cooperative federalism. Nonetheless, as an alternative to abandoning a cooperative federalism strategy altogether, this strategy may be necessary and/or appropriate in certain instances.

III. TOWARDS A TRULY COOPERATIVE FEDERALISM: THE FUTURE OF THE COMMANDEERING DOCTRINE

Although the rhetoric of some recent Supreme Court opinions addressing Tenth Amendment issues appears to endorse a model of dual federalism—two separate and distinct spheres of authority—the reality of cooperative federalism programs belies such a clean

133. 109 U.S. 513 (1883).
134. Id. at 519.
As Professor Hart explained regarding the gap between the rhetoric of separation and the reality of integration, it is a “little noticed fact of our political history how often issues which might have been resolved in favor of nation-wide uniformity have been resolved instead in favor of decentralization.”

Appreciating the integrated relationship between federal and state law, the reverse-Erie doctrine justifies state agency action to implement federal law and provides important insights into the role of state agencies in implementing cooperative federalism statutes. While federal courts have sometimes concluded, without any justification, that state agencies can take steps to implement cooperative federalism statutes like the Telecom Act that they could not otherwise take under state law, the reverse-Erie model provides a constitutional doctrine to support this instinct and delineate its limits. More significantly, such an approach anticipates and provides guidance for an emerging constitutional law of federalism that could reinforce and support the political consensus in favor of cooperative federalism. This Part develops that guidance and offers a theoretical framework for the commandeering doctrine which sustains the legitimacy of a cooperative federalism approach to regulation.

A. The State of Tenth Amendment Doctrine

It has become a truism to state that Tenth Amendment doctrine is in flux. In particular, the Supreme Court’s decisions have largely

135. See Jane Perry Clark, Joint Activity Between Federal and State Officials, 51 POL. SCI. Q. 230, 230 (1936) (“Complete independence of the federal and state governments was neither contemplated by the [Founders] nor carried out in actual administrative practice by their successors.”).

136. Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 528 (1954); see id. at 498 (“[L]egal problems repeatedly fail to come wrapped up in neat packages marked ‘all federal’ or ‘all state.’”).


138. See Adler & Kreimer, supra note 116, at 71 (“The area lacks a fabric of constitutional law sufficiently coherent and well-justified to last.”); Mark C. Gordon, Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court, 14 YALE L. & POL’Y REV. 187, 195 (1996) (observing that Tenth Amendment doctrine has been “anything but stable”); Vicki C. Jackson, Seminole Tribe, The Eleventh Amendment and the Potential Evisceration of Ex Parte Young, 72 N.Y.U. L. REV. 495, 542-43 (1997) (arguing that the Court’s federalism jurisprudence has no “substantive core” and “seems at present to be motivated by ill defined intuitions that the Court must fix some sort of balance of power between the states and national
failed to “address the problem of the underlying federal/state relationship,” thereby leaving Congress to speculate whether its vision of cooperative federalism is compatible with the Court’s emerging doctrine. The current state of judicial doctrine prohibits the federal government from “commandeering” state legislative and executive officers to implement a federal regulatory program, but its lack of definition raises more questions than it answers. Part of the present confusion is that the Court’s opinions on the subject reflect, at best, an inchoate vision of state autonomy. More troublingly, the Court’s opinions often rely on “abstract notions of dual sovereignty and political accountability to support its doctrine that the national government cannot commandeer the regulatory processes of the state and local governments.”

In justifying its “commandeering” doctrine, *New York v. United States* focused on the need to protect political accountability. Writing for the Court, Justice O’Connor offered the following explanation for the Court’s concern about political accountability:

Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officers who devised the regulatory program may remain insulated from the electoral ramifications of their decisions. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the

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local electorate in matters not pre-empted by federal regulation.\textsuperscript{143}

In short, Justice O’Connor condemned the commandeering of state governments on the ground that this practice would enable the federal government to take credit for enacting popular statutes without having to pay for them or make difficult implementation decisions.\textsuperscript{144}

In \textit{Printz v. United States},\textsuperscript{145} Justice Scalia’s opinion for the Court focused more on the “structural framework of dual sovereignty” than on the political economy of commandeering.\textsuperscript{146} In so doing, he suggested a possible return to a vision of dual federalism and the possible invalidation of cooperative federalism regulatory schemes, even if achieved through the carrots of conditional spending or the sticks of threatened preemption.\textsuperscript{147} Justice O’Connor, however, signaled that she would not go along with such an approach, concurring in \textit{Printz} to make clear that she would uphold cooperative federalism programs.\textsuperscript{148} In so doing, Justice O’Connor identified a sound theoretical basis for a constitutional law of federalism that would not protect dual federalism as an end in and of itself, but instead would ensure a truly cooperative federalism.

By tolerating federal efforts to encourage state participation in federal programs, Justice O’Connor’s vision of judicial federalism would appear not to turn on promoting political accountability or dual federalism as such, as that encouragement would undermine clear lines of accountability. Rather, Justice O’Connor’s approach would protect the ability of states to exit from a federal scheme.\textsuperscript{149} Thus, Justice O’Connor’s vision of the commandeering doctrine

\textsuperscript{143} Id. at 169.
\textsuperscript{144} This concern mirrors the accountability argument advanced by David Schoenbrod in relation to legislative delegations of authority to federal agencies. See DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION passim (1993).
\textsuperscript{145} 521 U.S. 898 (1997).
\textsuperscript{146} Id. at 932.
\textsuperscript{147} Id. It is possible that “dual sovereignty” is compatible with cooperative federalism and is not identical to dual federalism. See, e.g., \textit{City of New York v. United States}, 179 F.3d 29, 35 (S.D.N.Y. 1999) (“A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system.”).
\textsuperscript{148} \textit{Printz}, 521 U.S. at 935 (O Connor, J., concurring); see also \textit{New York}, 505 U.S. at 166 (“Our cases have identified a variety of methods ... by which Congress may urge a State to adopt a legislative program consistent with federal interests.”).
\textsuperscript{149} As discussed below, preserving an exit right is critical to fostering a healthy political economy of federalism. See infra notes 177–83 and accompanying text.
focuses more on allowing states to control their own destinies than on promoting the electorate's understanding of the respective state and federal roles, as the "erosion of political accountability is endemic to all forms of cooperative federalism." 150

B. Towards a Forthright Approach to Constitutional Federalism

Nine years after New York, the Supreme Court continues to search for a guiding framework for its Tenth Amendment doctrine. 151 Printz discussed at length the history of federal-state relations to justify its decision, but this focus does more to legitimate a judicially developed rule than to help define an emerging jurisprudence. 152

150. Hills, Cooperative Federalism, supra note 141, at 828 (emphasis in original); see also Printz, 521 U.S. at 957 n.18 (Stevens, J., dissenting) ("It doubtless may therefore require some sophistication to discern under which authority an executive official is acting, just as it may not always be immediately obvious what legal source of authority underlies a judicial decision."). More fundamentally, our system of government, in which ambition counteracts ambition, inherently sacrifices accountability concerns to serve other ends. As Professor Greene aptly explained:

By dividing powers and insisting upon a complex system of checks—bicameralism, presentment, and judicial review (not to mention federalism)—the framers ensured against [the hegemony of a particular branch or person], but simultaneously sacrificed accountability. It is pretty hard for citizens to know precisely whom to blame when something goes wrong in such a system.

Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. CHI. L. REV. 123, 177 (1994). Some commentators have suggested that this concern is misplaced because local politicians have the opportunity and incentive to correct any public misperception of whom to blame for various laws. See Caminker, State Sovereignty, supra note 90, at 1063.

151. Some commentators have criticized Justice Scalia for dressing up a rule made out of whole cloth in historical and formalist garb. See, e.g., Evan Caminker, Printz, State Sovereignty, and the Limits of Formalism, 1997 SUP. CT. REV. 199, 234-35 [hereinafter Caminker, Limits of Formalism]. As Professor Larry Kramer has explained, neither constitutional text nor history can justify an anti-commandeering rule. See Kramer, Political Safeguards, supra note 5, at 290 ("Active judicial intervention to protect the states from Congress is consistent with neither the original understanding nor with more than two centuries of practice."); Larry D. Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1503 (1995) [hereinafter Kramer, Understanding Federalism] ("[T]he test for federalism today can't turn on which approach looks more like the original scheme in some crude, surface-like manner. It must be: Which approach does a better job finding the appropriate balance between state and federal authority in today's world?"); cf. GREVE, supra note 28, at 54 (rejecting the historical and precedential basis for Printz).

Finally, some commentators have rejected the historical basis for an anti-commandeering rule, but have concluded that one can be justified on prudential grounds. See H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 VA. L. REV. 633, 635 (1993) (admitting that the anti-commandeering rule is "without a firm basis in founding-era discussion or the subsequent history of constitutional debate. Nevertheless, I argue . . . that O'Connor's conception of federalism, or something like it, can be justified on prudential grounds").

152. See, e.g., Lawrence Lessig, Understanding Federalism's Text, 66 GEO. WASH. L. REV. 1218, 1234 (1998) (arguing that Printz's result was not dictated by formalist
Ultimately, the Supreme Court must define the terms upon which the federal government and state governments can work together. Printz, unlike Justice O'Connor's approach in New York, declined to focus on functional justifications for protecting state governments from federal "commandeering" and thus provided little guidance on the Court's future direction in this area. In short, by eschewing a focus on practical governance, Printz further unsettled this area of the law and forfeited an opportunity to justify better its result as well as to provide guidance for future cases implicating alleged federal intrusions on state sovereignty.

The Supreme Court's most recent Tenth Amendment case, Reno v. Condon, suggests that an interest in practical governance may well prevail over a rhetorical commitment to dual federalism. In Reno, the Court rejected South Carolina's commandeering challenge to the Driver's Privacy Protection Act (DPPA) on the ground that the DPPA "does not require the states in their sovereign capacity to regulate their own citizens." Thus, although Reno did not directly implicate an effort to involve the states in a federal regulatory program, it did not embrace Printz's dual federalism rhetoric. Further, it suggested that the Supreme Court will not invalidate a federal regulatory program merely because it will consume a state's time and resources.

In the future, as state courts and possibly the Supreme Court address the right of the federal government to authorize state regulatory action not contemplated by state law, they will squarely confront some of the underpinnings of cooperative federalism. Moreover, because cooperative federalism relies on Testa v. Katt, the reverse-Erie doctrine, and FERC v. Mississippi, it will be far more

reasoning, but rather such reasoning was used to legitimate its "made up" anti-commandeering rule); see also Harold H. Bruff, On the Constitutional Status of Administrative Agencies, 36 AM. U. L. REV. 491, 496 (1987) ("For the Court, an important advantage of formalism is its seemingly greater legitimacy. The Court can present a decision as the natural outcome of applying the Constitution to a present day problem."). Commentators have long remarked how the Court often invoked history in less than genuine ways to justify or garner support for its opinions. See, e.g., Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119 passim (outlining various judicial misuses of history).

153. As a result, the majority opinion refused to even engage Justice Breyer on his discussion of the experience of the European Union in developing the appropriate scope of the anti-commandeering rule. See Printz, 521 U.S. at 921 n.11.

154. See Yoo, supra note 2, at 28.


difficult to dismiss on historical grounds a state agency’s reliance on federal law to take steps not specifically contemplated by state law. To be sure, courts could decide that this line of precedent was illegitimate and a deviation from the Framers’ intent. Before doing so, however, courts would likely consider the functional implications of uprooting a doctrine that has been in place for over a half of a century.158 Finally, any effort to overrule the Testa line of cases (including FERC) will need to grapple with how such a move would undermine important cooperative federalism regulatory schemes like the Telecom Act—with the net result being that the federal government would likely need to step up its efforts and establish a greater number of local field offices to administer federal law. Thus, in an irony not lost on many commentators, a constitutionalization of dual federalism might well have the unintended consequence of prodding Congress towards a preemptive federalism.159

Assuming that the Court engages in an honest and open debate over the future of “Our Federalism,” it may well focus on federalism as a means to more effective governance rather than as elevating state sovereignty to an end in and of itself. As authorities from James Madison to John Marshall to Woodrow Wilson have suggested, the appropriate constitutional status of federalism is likely to be contested again and again as each generation searches for how to use this American innovation to improve government administration.160

158. Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 724 (1988) (“[O]riginal understanding must give way in the face of transformative or longstanding precedent, a conclusion that in turn may make inevitable the unsettling acknowledgment that originalism and stare decisis themselves are but two among several means of maintaining political stability and continuity in society.”).

159. See Caminker, State Sovereignty, supra note 90, at 1002-03 (explaining that cooperative federalism can, in certain situations, preserve “a significant role for state discretion in achieving specified federal goals, where the alternative is complete federal preemption of any state regulatory role”); Roderick M. Hills, Federalism in Constitutional Context, 22 HARV. J.L. & PUB. POL’Y 181, 195 (1998) [hereinafter Hills, Constitutional Context] (arguing that if the Supreme Court ultimately raises the difficulty of involving the states in cooperative federalism statutes, “state autonomy would then truly become an empty boon to the states, for they would have autonomy to do precisely nothing, as the Congress federalized more regulatory fields without giving them any role to play”); Susan Rose-Ackerman, Cooperative Federalism and Co-optation, 92 YALE L.J. 1344, 1346 (1983) (“If the federal government begins to take full responsibility for social welfare spending and preempt the states, the result is likely to be weaker and hence less combative state governments.”). Anticipating such a development, Justice Breyer criticized Printz by asking, “Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty?” 521 U.S. at 977 (Breyer, J., dissenting).

160. See IRVING BRANT, THE FOURTH PRESIDENT: A LIFE OF JAMES MADISON 146
By recognizing the enduring nature of this debate, the Supreme Court would enhance its legitimacy by acknowledging that the future of our federalism should be open to debate about what will provide for effective governance and not decided on the basis of a historical record that is ambiguous at best. In so doing, the Court would own up to the basic value choices inherent in constructing a constitutional law of federalism. Moreover, by developing a doctrine rooted in the important values of federalism, the Court would provide helpful guidance to lower courts bewildered by the Court's current approach and would set forth a doctrine that could steady the Court's path in this important area of constitutional law.

C. A Constitutional Law for Cooperative Federalism

Without a clear guiding framework for the constitutional law of federalism, it remains unclear whether the Supreme Court will ultimately promote a doctrine that facilitates a truly cooperative federalism. If the Court does so, it would do well to follow those commentators calling for a constitutional doctrine that treats federalism as a flexible principle that appreciates the importance of the states as laboratories as well as partners with the federal government in regulating interstate commerce. Significantly, such a

(1970) (quoting a letter from James Madison to Edmund Randolph that remarked "[l]et it be tried ... whether any middle ground can be taken, which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful"); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 35–36 (1996) (quoting James Madison as saying, "'In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce'"); id. at 50–51 ("Madison realized that the deeper problems of federalism would not disappear even after the Union acquired an independent power of legislation. The respective jurisdictions of national and state government could never be neatly distinguished; to some extent the boundary between them must always remain problematic."); see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1821) (Marshall, C.J.) ("We must never forget that it is a constitution we are expounding ... intended to endure for ages to come, and, consequently, to adapted to the various crises of human affairs."); Woodrow Wilson, The States and the Federal Government, 187 N. Am. Rev. 684, 684 (1908) (arguing that the question of federal-state relations "cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question").

161. See RONALD M. DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 37 (1996) (recommending that "judges ... construct franker arguments of principle that allow the public to join in the argument").

162. See Christopher L. Eisgruber, John Marshall's Judicial Rhetoric, 1996 SUP. CT. REV. 439, 477 (calling on the Court to cast aside the "tropes of twentieth-century judicial rhetoric—originalism, tradition, precedent, and doctrinal manipulation—[that] serve to legitimate the Court's power by minimizing the appearance of independent judgment").

163. See Michael C. Dorf, Foreword: The Limits of Socratic Deliberation, 112 HARV.
regime would recognize that "there must be a limit to federal power and a corresponding reservoir of state power if federalism is to have any meaning at all." In so doing, the Court would avoid two extremes, both of which bode poorly for the role of states in the federal scheme: a situation where the federal government must nationalize an area in order to be an effective regulator or one where the states are merely "branch offices" of the federal government. In a world where commerce is increasingly becoming international, thereby providing another important rationale for federal legislative involvement, it is critical that the Court develop a law of federalism that provides a sustainable role for the states.

Despite some of its recent rhetoric championing a dual federalism perspective, the Supreme Court may well still chart a constitutional doctrine that protects and facilitates cooperative federalism. In particular, the Court's decision in Reno suggests that it will not invalidate a federal regulatory regime simply because it inconveniences a state. As Professor Hills has explained, an appropriate anti-commandeering rule can respect states by supporting the cooperative federalism model that the national government "purchase" rather than "conscript" the cooperation of state agencies. The Court's recent decisions, however, have yet to

L. REV. 4, 9 (1998) (suggesting that federalism should be treated "as a flexible principle that allows decentralized experimentation, rather than as a doctrine focused primarily on the 'dignity' of states"); id. at 61 ("[T]he Court's federalism doctrines implement the notion of states as experimental laboratories imperfectly at best."); Gordon, supra note 138, at 195 (calling for a doctrine that moves away from a focus on "inviolate attributes of state sovereignty" to one that "evaluat[es] the extent to which the underlying goals of federalism may be furthered by the Court's holdings.").

164. Hills, Cooperative Federalism, supra note 141, at 816.

165. This approach would echo the Court's separation of powers jurisprudence that protects the individual branches at times when one branch aggrandizes power over the other, but recognizes that cooperation and sharing of power between them is par for the course. See Buckley v. Valeo, 424 U.S. 1, 121 (1976) (recognizing that the Framers were "practical statesmen, experienced in politics, who . . . saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively").

166. See Barry R. Weingast, The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development, 11 J.L. ECON. & ORG. 1, 4 (1995) ("[F]ederal systems are not generally sustainable if they depend solely on the discretion of the highest political authority, because that delegation of power can always be reversed."). With respect to the development of cooperative federalism statutes, a sustainable role can involve either the preservation of state law, the delegation to implement federal mandates without federal executive oversight, and/or the allowance of such oversight on the understanding that the states will be left with meaningful interpretive discretion.


168. Hills, Cooperative Federalism, supra note 141, at 817.
endorse such a vision of cooperative federalism, thus creating the possibility that the anti-commandeering doctrine may well undermine innovative forms of federal-state cooperation in the name of state sovereignty. Indeed, in light of the Court’s recent pronouncements on the subject, there is understandable cause for concern that some Justices may well support a “nondelegation doctrine” that demands that the states act only as independent sovereigns.

By concurring specially in Printz, Justice O’Connor signaled that she may set out on her own path in crafting a constitutional law of federalism. In particular, Justice O’Connor explained that cooperative federalism programs could continue in the wake of Printz, provided that state regulatory authorities “voluntarily continue to participate in the federal program.” In so doing, she responded to the dissent’s halting criticism that the Court’s holding could actually undermine federalism values by forcing the national government to create a federal bureaucracy redundant to existing state agencies in order to implement federal law. Moreover, Justice O’Connor responded to Justice Souter’s argument that the Court’s holding threatened to undermine Federalist 27’s vision of incorporating the states into the “operations of the national government” and rendering them as “auxiliary to the enforcement” of federal law by explaining that such a partnership should be by invitation, not by mandate. Finally, Justice O’Connor suggested

169. In highlighting the important role played by Justice O’Connor on these matters, I join Professor Powell in encouraging her to develop her “vision” of the judicial role in constitutional federalism—a role that I believe points to a doctrine to support a truly cooperative federalism. See Powell, supra note 151, at 689 (“Justice O’Connor has not provided a fully persuasive justification for her vision of federalism, but by the same token she has reopened the discussion along lines that seem promising.”).


171. Printz, 521 U.S. at 936 (O’Connor, J., concurring). Moreover, Justice O’Connor’s concurrence suggested that both the use of conditional funding and conditional preemption were legitimate means for the federal government to use to enlist state participation in a cooperative federalism regulatory program. See id. at 936; see also Hills, Constitutional Context, supra note 159, at 184 (noting that non-federal governments can become the agencies of Congress either under federal grants-in-aid programs or by allowing state or local regimes “to displace federal regulation that would otherwise preempt such non-federal law if the non-federal law meets the standards established by Congress”).

172. Printz, 521 U.S. at 971 (Souter, J., dissenting) (quoting THE FEDERALIST NO. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
that her vision of federalism appreciates the value of a federal-state partnership that is truly cooperative (i.e., where loyalty is earned, not required) and would not elevate the form of state sovereignty over the substance of state participation in a cooperative federalism statutory scheme.  

The truly cooperative federalist vision that Justice O’Connor appears ready to endorse suggests the value of an anti-commandeering principle that will facilitate an important political economy of federalism. In particular, such a regime would safeguard state resources from federal conscription (though not from being purchased). In her FERC dissent, Justice O’Connor made this very point, explaining that a federal regulatory scheme that enlisted state participation would absorb state resources, precluding states from “devot[ing] their resources elsewhere.” Indeed, forcing states to spend money to implement a federal regulatory program can distort the ability of a state to make its own fiscal decisions. Thus, instituting a safeguard that protects the states’ ability to say no to the federal government and to control their own fisc will “preserve their ability to negotiate with the federal government over the terms of federal-state programs.”

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173.  Printz, 521 U.S. at 936 (O’Connor, J., concurring). Numerous commentators have explained how respecting state participation in various federal regimes best serves federalism concerns. See, e.g., Richard Briffault, Federalism and Health Care Reform: Is Half a Loaf Really Worse Than None?, 21 HASTINGS CONST. L.Q. 611, 614 (1994) (“A national health care reform that combines federal and state roles would be of more benefit to the states as institutions and to the values that underlie federalism than would a purely federal program.”).

174.  FERC, 456 U.S. at 787 (O’Connor, J., concurring in the judgment in part and dissenting in part).

175.  Printz elaborated on this point, explaining that:

[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

521 U.S. at 930 (citing Deborah Jones Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 VAND. L. REV. 1563, 1580 n.65 (1994)).

176.  Deborah Jones Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 VAND. L. REV. 1563, 1571 (1994). Some anecdotal evidence, at least, suggests that states will refuse conditional aid when it is insufficient to pay for a program or buy its loyalty.  See Hills, Cooperative Federalism, supra note 141, at 862–63. Without an exit right, however, a state may not be given that option.
D. Towards a Central Constitutional Principle of Preserving an Exit Right for States

To promote a truly cooperative federalism, the anti-commandeering principle should focus on providing the states with an "exit right" from a federal regulatory program. In so doing, the anti-commandeering rule would reinforce the ability of the states to be heard in Washington. As Albert O. Hirschman so insightfully identified, the likelihood of voice relates to the ease of exit and the efficacy of one's voice in affecting change is enhanced by a credible threat to exit.\(^7\) Like the Tiebout hypothesis regarding competition between local governments, Hirschman's framework has often been applied to the horizontal relationship between localities or states.\(^8\) It has not, however, been employed to highlight the dynamics of the vertical federal-state relationship in cooperative federalism regulatory programs.\(^9\)

In developing a judicially enforced federalism doctrine, the Court performs a similar function to the one it plays in separation of powers cases.\(^10\) Consequently, it is critical that the Court develop an analytical framework that is both justifiable and reflects the current consensus in favor of cooperative federalism. The exit, voice, and loyalty model provides an important guide in this regard, as it highlights how commandeering removes exit as an option without necessarily improving the voice of state government, thus raising the chances of a "coercive federalism."

The essential rationale for not forcing states to participate in a federal scheme is to ensure that the federal government does not treat the "states purely as instruments of its national will," but rather "as partners in policy formulation and implementation."\(^11\) While

\(^{17}\) See Hirschman, supra note 7, at 36–43.

\(^{177}\) See, e.g., Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 509–43 (1991). As ProfessorBeen explained, Professor Tiebout hypothesized that the ability of citizens to move between states and localities would lead to a competition between states and localities to provide the optimal mix of services and tax policies. Id. at 507 (discussing Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416, 424 (1956)).

\(^{179}\) Professor Clayton Gillette has, however, outlined how this model applies to the city-state relationship. See Clayton P. Gillette, The Exercise of Trumps by Decentralized Governments, 83 VA. L. REV. 1347, 1410–11 (1997) (comparing the right of secession to an exit right).


\(^{181}\) Dorf & Sabel, supra note 5, at 428; id. at 430 ("Our anticommandeering principle requires only that when the federal government does find it attractive to enlist the states
some have argued that the voice of state governments will invariably be heard in Washington,182 Hirschman’s model underscores why the ability to exit provides an important check on the failure of one party to heed another’s concerns. In particular, Hirschman explains that the opportunity to exit ensures that members will be listened to, whereas individuals with no credible ability to exit can be taken for granted without fear of losing them.183 To be sure, the states generally will not want to exit and the federal government will not want to assume the responsibility of implementing the regulatory scheme, but the threat of exit can help ensure that state officials will be listened to in Washington.

The exit, voice, and loyalty model also underscores why it is important to recognize and reaffirm that the federal government’s threat to take on the regulatory task itself (through conditional preemption) as well as its willingness to “bribe” the states into implementing federal regulation (through conditional spending) are important ways that the federal government can encourage state loyalty to a federal program by enabling the states to choose whether or not to participate in that program.184 Unlike commandeering, conditional preemption and conditional spending regimes require the federal government to “internalize” the costs of administering a federal regulatory program.185 As a result, those regimes encourage the federal government to listen to the voice of the states in designing cooperative federalism programs.186

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182. See Kramer, Understanding Federalism, supra note 151, at 1503–59.
183. Hirschman, supra note 7, at 36–43.
184. As Alexander Hamilton explained, “[w]hen the States know that the Union can supply itself without their agency, it will be a powerful motive for exertion on their part.” THE FEDERALIST NO. 36, at 221 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Kansas v. United States, 214 F.3d 1196, 1203–04 (10th Cir. 2000) (upholding welfare reform law in the face of a Tenth Amendment challenge on the ground that “Kansas’ options have been increased, not constrained, by the offer of more federal dollars”); cf. MCI Telecomm. Corp. v. Pub. Serv. Comm’n, 216 F.3d 929, 938 (10th Cir. 2000) (rejecting an Eleventh Amendment challenge to the Telecom Act on the ground that “Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity”).
185. See, e.g., Dorf & Sabel, supra note 5, at 426 (“[B]oth conditional spending and conditional preemption are effective tools only to the extent that the federal government puts its money where its mandate is.”).
186. See Ronald D. Rotunda, The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions, 132 U. PA. L. REV. 289, 312–13 (1984) (“If the federal government is willing to assume the full burdens of direct regulation it will not impose regulations without carefully considering the costs involved.”).
Even assuming that such an exit right is important to the success of cooperative federalism, some have questioned whether the judiciary could competently enforce a state's right to exit from a cooperative federalism regulatory program.\textsuperscript{187} If the judiciary is unsuccessful in enforcing such a conception of the anti-commandeering regime, however, it will ultimately abandon the effort, as the pressures of litigation and experience will lead it to retire this rule.\textsuperscript{188} Thus, given the value of such a rule, the federal judiciary should endeavor to develop an analytically and functionally viable constitutional law of federalism.

By adopting a clear underlying theoretical framework for its Tenth Amendment doctrine, the Supreme Court would provide a valuable guide for lower courts addressing federalism issues. For example, under the exit, voice, and loyalty model, state agencies would be able to opt-out of a cooperative federalism regime like the Telecom Act at any point in time unless Congress made it unmistakably clear at the outset that taking on the Act's responsibilities waived a state's ability to later exercise its anti-commandeering rights.\textsuperscript{189} In essence, the federal government could condition state involvement in a regulatory regime if it made clear at the outset that the states were "locked-in" to implementing a federal program once they initially agreed to do so.\textsuperscript{190}

\begin{itemize}
  \item implementation of federal programs because they mandate, or commandeer, state agency implementation of them, it is far easier for the federal government to go ahead and approve such efforts without much consideration.
  \item \textsuperscript{187} See Kramer, Understanding Federalism, supra note 151, at 1503.
  \item \textsuperscript{188} Lessig, supra note 152, at 1235. Justice Cardozo similarly made this point, suggesting that:
  \begin{quote}
    [t]he work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years.
  \end{quote}
  BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 178 (1921); cf. Brzonkala v. Va. Polytechnic Inst. & St. Univ., 169 F.3d 820, 893 (4th Cir. 1999) (en banc) (Wilkinson, C.J., concurring) (considering whether the judicial protection of federalism constitutes an unsustainable judicial activism, and concluding that "the present jurisprudence holds the promise to be an enduring and constructive one, for its aims and means differ significantly from those of prior eras").
  \item \textsuperscript{189} Such a rule would also follow from the Court's decision in Gregory v. Ashcroft, 501 U.S. 452, 473 (1991), and the Eleventh Amendment doctrine on waivers of sovereign immunity. See supra note 53 (discussing the fate of such challenges to the Telecom Act).
\end{itemize}
In the face of constitutional attacks upon cooperative federalism programs like the Telecom Act, the Supreme Court will confront some critical issues that will help to determine whether such programs can survive (and in what form). If the Court intervenes not only to ensure a basic exit right, but to limit the ability of the federal government to bargain with states (i.e., to use its carrots and sticks), it may undermine the ability of the federal government and the states to reach a mutually acceptable agreement. Alternatively, if despite federal supremacy, the Supreme Court prevents states from relying on federal authority under all circumstances in the name of state sovereignty, states might then become far less attractive partners to the federal jurisdiction.191

IV. A THREE-DIMENSIONAL SEPARATION OF POWERS DOCTRINE

Constructing a constitutional architecture for cooperative federalism requires a new vision not only of federal-state relations, but also of the nature of separation of powers law. Traditionally, separations of powers debates have focused almost entirely on disputes among the federal branches of government or between the federal government and the states.192 When analyzing such questions, commentators tend to fall into one of two camps: formalists or functionalists.193 The formalists tend to emphasize the original

191. The permutations of this anomaly are multifold. It is conceivable, for example, that lawsuits will challenge not simply the validity of the eminent domain power, but also the adequacy of just compensation required to collocate physically in an incumbent's central office. Such a suit would raise the difficult question of whether an order to allow physical collocation would subject state agencies, the FCC, or both to damage liability. Cf. PETER W. HUBER, ET AL., THE TELECOMMUNICATIONS ACT OF 1996: A SPECIAL REPORT 18 (1996) (“[I]f the states do not respect incumbent LECs' entitlement to just compensation for intrastate collocation services, the Federal Treasury may find itself liable for the deficit on a theory that the taking has been authorized by federal authority.”).


193. As always, relying on labels to capture the essence of different positions is fraught with difficulty. Thus, the formalist-functionalist typology should not be viewed as presenting fixed categories. Professors Lawrence Lessig and Cass R. Sunstein, for example, appear to employ a functionalist justification for unitary executive theory, though their version of the doctrine is more nuanced than the leading formalists (and representatives of the unitary position), as they do not believe that all agencies must necessarily report to and be subject to removal by the President. See Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 108-12 (1994) (suggesting that the Independent Counsel Act and the Federal Reserve's insulation from executive oversight pass muster and that the Court should enforce the unitary executive principle by requiring a clear statement that an agency should be independent of the President); see also William N. Eskridge, Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 HARV. J.L. & PUB. POL’Y 21, 29 (1998)
understanding of the Presidency and largely endorse the theory of a unitary executive. In contrast, functionalists tend to accept the emergence of novel arrangements to maintain a balance of power in the modern administrative state. Few courts or commentators, however, have carefully developed a third dimension of separations of powers jurisprudence that would govern delegations of power by the executive branch or Congress to state agencies; accordingly, few formalists or functionalists have evaluated the constitutionality of such delegations. Such a jurisprudence, which will undoubtedly be required as a result of the emerging cooperative federalism, will ultimately give rise to a new "three dimensional" separations of powers jurisprudence.

A. The Horizontal Separation of Powers Debate

The textual basis for the functionalist-formalist debate over separation of powers questions stems largely from Article II’s Vesting and Take Care Clauses. In particular, the Constitution provides that “[t]he Executive Power shall be vested in a President of the United States of America” who “shall take Care that the Laws be faithfully executed.” These commands, which do not specify how the executive must “take Care” of the faithful execution of the laws, leave considerable room for disagreement. Not surprisingly, the formalist-functionalist debate has thrived, with formalists taking the position that the President’s control of administration must be supreme and with functionalists maintaining that the Constitution (suggesting the relationship between these two approaches is not fixed); M. Elizabeth Magill, The Real Separation In Separation of Powers Law, 86 VA. L. REV. 1127, 1129 (2000) (arguing that these two approaches do not appropriately capture the real issues).

194. See Evan Caminker, The Unitary Executive and State Administration of Federal Law, 45 U. KAN. L. REV. 1075, 1076 (1997) (“Almost lost in this federalism debate is the fact that these congressional efforts to induce or coerce state administration of federal law implicate intriguing and difficult separation of powers principles.”); Hills, Constitutional Context, supra note 159, at 183 (“[I]t is fair to say that the Court has not fully explored the implications of cooperative federalism for the rest of its constitutional jurisprudence. Non-federal implementation of federal law has slipped into American constitutional practice with relatively little theoretical explanation or justification.”); Neil Kinkopf, Of Devolution, Privatization and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors, 50 RUTGERS L.J. 331, 333 (1998) (“[C]ommentators have paid scant attention to the issue of what, if any, limits the constitutional separation of powers imposes on the divestment of federal power.”).

196. U.S. CONST. art. II, § 3.
197. U.S. CONST. art. II, § 1, cl. 1.
198. U.S. CONST. art. II, § 3.
leaves considerable room for flexible arrangements between the branches. The formalists and the functionalists each see a different purpose to separation of powers doctrine. The formalists contend that accountability of each political actor represents the central value of separation of powers doctrine. Thus, for most formalists, protecting executive accountability trumps all other values, including the protection of balance between the branches. The functionalists, by contrast, emphasize the importance of balance between the branches, justifying innovations such as the legislative veto on that ground. Despite the raging formalist-functionalist debate for the past fifteen years in both the courts and the law reviews, neither side can claim victory or readily concede defeat.

199. The Appointments Clause, U.S. CONST. art. II, § 8, cl. 17, presents another potential separation of powers limit on congressional delegation of federal authority to state officials. In the case of cooperative federalism programs, however, the Supreme Court has not expressed concern with the bypassing of federal appointment authority in the implementation of federal law. See FERC v. Mississippi, 456 U.S. 742, 758-61 (1982). In short, state agency officials implementing federal law cannot be said to serve pursuant to federal law, even if they are implementing federal law and are justified in acting based on federal authority. See Buckley v. Valeo, 424 U.S. 1, 126 (1976) (holding that the Appointments Clause is implicated only where an official serves pursuant to federal law); see also Seattle Master Builders Ass'n v. Pac. N.W. Elec. Power & Conservations Planning Council, 786 F.2d 1359, 1365 (9th Cir. 1986) (holding that officials on an interstate compact council implementing federal law do not "serve pursuant to federal law" and thus that their appointment by states does not violate the Appointments Clause).

200. Because the formalists tend to stress the centrality of a unitary executive, they are often referred to as "unitarians."


202. See, e.g., id. at 1737 (explaining that the Constitution allows the legislative and executive branches to share authority in creative ways).

203. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 YALE L.J. 541, 544 (1994) ("After two hundred years, no scholarly or judicial consensus has yet emerged on this vital question of the proper scope of presidential power."); Thomas W. Merrill, The Constitutional Principle of Separations of Powers, 1991 SUP. CT. REV. 225, 226 ("The Court has alternated between the formal and the functional constructions, with a swing group of Justices evidently happy to embrace one or the other as suits the needs of the moment."); id. at 227 ("[N]either formalism nor functionalism provides a satisfactory account of the constitutional principle of separation of powers—at least as it operates in practice."). This debate has proceeded on textual, historical, and policy lines with the participants each confidently proclaiming the rightness of their viewpoint on each score. Compare, e.g., Flaherty, supra note 201, at 1755 ("[A] genuine reconstruction of the Founding belies the contention that the Founders either always or primarily viewed the doctrine of separation of powers in modern formalist terms."), with Calabresi & Prakash, supra, at 663 ("The pre-ratification history fully supports [the formalist view] and little in the post-ratification history calls [it] into question.").
The current formalist-functionalist debate and the lack of a judicial consensus can overshadow the extent to which the Supreme Court has rejected the formalist position that the modern administrative state is unconstitutional. The Court faced this question in *Humphrey's Executor v. United States* and rejected President Roosevelt's argument that the executive branch retains inherent authority to remove all executive officials at will. In so doing, the New Deal Court set forth a separation of powers jurisprudence that accepted the administrative state and protected congressional prerogatives from the potential power that a modern executive could wield in a new era. More recently, the Court's ruling in *Morrison v. Olson* again rejected the formalist position, concluding that the Independent Counsel Statute passed constitutional muster despite its limitations on executive control of the independent counsel's prosecutorial function.

Formalists and functionalists continue to debate whether the focus of modern separation of powers law should be on protecting Congress from executive aggregation or protecting the President from congressional encroachment on his or her prerogatives. Reflecting their particular brand of originalism, many formalists view the lesson of the founding—the need for a strong executive to offset the strength and ambitions of the legislature—as one that should guide today's separation of powers doctrine. Functionalists, on the other hand, might invoke either Professor Lessig's theory of translation or Professor Dworkin's concept/conception dichotomy as an alternative to a mechanistic application of the Framers' intent. According to

204. 295 U.S. 602 (1935).
205. See id. at 626-29. Although the New Deal Court appeared to protect legislative prerogatives by enforcing the "nondelegation doctrine," see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 418 (1935), this doctrine has not been used since. But see American Trucking Ass'n v. U.S. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (invoking the non-delegation doctrine to overturn federal regulation), cert. granted by Browner v. American Trucking Ass'n, 120 S. Ct. 2003 (2000).
208. Id. at 696-97. Highlighting the significance of this ruling, Dean Sullivan has suggested that the "Court's recent separations-of-powers decisions have tended toward the functional analysis." Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 94 (1995).
Lessig’s translation theory, the challenge of constitutional interpretation is to “translate” the norm of separation of powers into a new reality that differed from that at the time of the Founding, an approach that could justify a different outcome at different times on a question such as the constitutionality of the legislative veto. Alternatively, Professor Dworkin’s concept versus conception distinction might help to explain that the Founders had a concept of separation of powers that required balance among the branches (“ambition shall counteract ambition,” as Madison put it), but did not necessarily require that later generations follow their specific conception of guarding the executive from legislative encroachment.

B. A Three Dimensional Separation of Powers World?

For either the formalist or functionalist, three dimensions for separations of powers may be too much. A doctrine governing horizontal (legislative-executive) arrangements and vertical (federal-state) ones has been well recognized as serving important constitutional purposes. It remains an open question, however, whether a third dimension—federal legislative-state executive and federal executive-state executive—will soon take root. The core challenge to any delegation to state agencies stems from the concern that the implementation of federal law must ultimately reflect the judgments of the federal executive branch.

Where a federal agency enjoys residual authority to override state decisions and state agencies voluntarily accept the delegation of authority, separation of powers concerns should not bar delegation of executive authority to state agencies. By contrast, Printz anticipated and appeared to reject the proposition that Congress could delegate federal executive authority, without federal executive oversight, to state officials against their will because such delegation would violate Article II. Although Justice Scalia commented in Printz that state consent to a delegation of federal authority would mitigate Article II concerns, the rationale behind this version of an anti-delegation

have changed so dramatically since the founding that ‘framers’ intent” cannot be mechanically applied as if it settles the matter.”.

211. Lessig & Sunstein, supra note 193, at 103–04.
214. See Printz v. United States, 521 U.S. 898, 923 (1997) (suggesting that such a delegation would shatter the unity of the presidency and reduce its power).
215. See id. at 923 n.12 (suggesting possible separation of powers concerns, but noting
argument would preclude all federal delegations of executive authority to state officials.\textsuperscript{216} Conversely, if a federal agency enjoyed residual authority to take back any delegation to state agencies (which it did not in \textit{Printz}), even many formalists would not object on Article II grounds—the President's authority to execute and take care of the execution of the laws would remain intact.\textsuperscript{217}

Where a federal agency lacked the authority to oversee the implementation of federal law, many formalists would object on the same grounds that they find independent agencies antithetical to separation of powers principles. As Professors Calabresi and Prakash put it, "[t]he Executive Power Clause grants 'the executive power' solely and exclusively to the President; it gives Congress no power whatsoever to create subordinate entities that may exercise 'the executive Power' until and unless the President delegates that power in some fashion."\textsuperscript{218} Consequently, they maintain that any effort to delegate federal executive authority to a state agency would be subject to presidential nullification.\textsuperscript{219}

Finally, even some functionalists might conclude that the enlistment of state agencies to execute federal law, without federal agency oversight, would bend our constitutional scheme too far. As Professor Martin Flaherty put it, judicial intervention into separation

\begin{footnotesize}
\textsuperscript{216} See id. at 959 (Stevens, J., dissenting); Caminker, \textit{Limits of Formalism}, supra note 151, at 230–31 ("Arguably, the requirement of presidential supervision should run to \textit{all} forms of state administration of federal programs, even when the state voluntarily enacts state regulations designed specifically to serve federal objectives or satisfy federal standards."); Hills, \textit{Cooperative Federalism}, supra note 141, at 855 ("After all, every such program of cooperative federalism deprives the President of power to execute the laws just as much as congressional 'commandeering' of state governments."); Kinkopf, \textit{supra} note 194, at 381 ("[I]t is impossible to understand why it should matter [for purposes of separation of powers analysis] whether the nonfederal actor decided voluntarily to accept the administrative function or whether the nonfederal actor was forced to accept the function.").

\textsuperscript{217} As long as the President (or the executive agency under supervision) makes the delegation (and can take it back), formalists would conclude that the arrangement satisfies the separation of powers requirements. See Calabresi & Prakash, \textit{supra} note 203, at 595 (contending that the exercise of federal executive power requires Presidential delegation and oversight); see also \textit{Emergency Petroleum Allocation Act of 1973, 3 Op. Off. Legal Counsel 231, 231 (1979)} ("[S]o long as the President retains the authority to withdraw power once delegated, as he has done here, his prerogatives under Article II, § 2, cl. 2, to select and control those who will implement Federal law is preserved."). In fact, Calabresi and Prakash conclude that where a statute purports to delegate unreviewable authority to state agencies, the President inherently enjoys the authority to withdraw a delegation of federal executive authority. Calabresi & Prakash, \textit{supra} note 203, at 639.

\textsuperscript{218} Calabresi & Prakash, \textit{supra} note 203, at 581.

\textsuperscript{219} Id. at 639 ("[T]he President can refuse to allow a state officer to exercise the federal executive power, just as he can refuse to permit a purely federal officer to do so.").
\end{footnotesize}
of powers questions is justified when a court finds "a compelling violation of one of the basic values of balance, joint accountability, or sufficient energy." Although it is possible that some functionalists would thus find federal delegation to state agencies problematic on accountability grounds, most functionalists will find the innovations of cooperative federalism statutes to be an appropriate response to the modern administrative state.

C. Towards a New Dimension of Separation of Powers

Whether justified by the textual commitment to federalism or by a functionalist appreciation of the need to counteract executive control of administrative lawmaking, courts and commentators will increasingly evaluate when state agencies can implement federal law. As noted above, a particularly challenging question in this regard is whether state agency implementation of federal law without federal agency oversight violates Article II and separation of powers principles. This issue, while not given center stage (or stage right, for that matter), underpinned the debate in AT&T v. Iowa Utilities Board over how to construe the Telecom Act. Although the case nominally turned on how to construe the Act's jurisdictional provisions, the allocation of federal authority to state agencies, as urged by the states, raised an interesting Article II question. Although the majority did not engage in the debate as such, Justice Thomas, joined by Justice Breyer and Chief Justice Rehnquist, suggested in dissent that even some formalists might judge such delegations as constitutional.

1. The Formalist Justification

In considering the nature of federal-state relations under the Telecom Act, Iowa Utilities Board evaluated, albeit implicitly, whether a regime where states implemented federal law without federal agency oversight was sensible and constitutionally permissible. In particular, the states argued that the Act called for exclusive state oversight over the proper pricing methodology for access to the local telephone network because, in that area, Congress

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220. Flaherty, supra note 201, at 1828.
221. See Hills, Cooperative Federalism, supra note 141, at 816 (proposing a functionalist approach to cooperative federalism and criticizing the formalist approach of dual sovereignty).
223. Id. at 402 (Thomas, J., concurring in part and dissenting in part).
trusted the state agencies and not the FCC.\textsuperscript{224} By concluding that the Act left the FCC with complete residual authority to implement all of its terms (including the pricing standard for unbundled network elements), the Court sidestepped the question of whether unreviewable state implementation of federal law passes constitutional muster.\textsuperscript{225}

In dissent, Justice Thomas addressed the constitutional issues implicated in state administration of federal law head on, concluding that there is no “principle of federal law that prohibits the States from interpreting and applying federal law” and that it is, in fact, well settled that they can, provided that they do so voluntarily.\textsuperscript{226} To justify state agency exercise of federal executive authority, Justice Thomas invoked the constitutional significance of federalism, suggesting that “basic principles of federalism compel us to presume that the States are competent” to act in this area.\textsuperscript{227} In so doing, Justice Thomas aligned himself with Professor Harold Krent, who has suggested that delegations of federal executive authority to states can be justified as “furthering the federalism values in our constitutional framework” and thus are sufficient to “override the Article II interest in exclusive executive control of administrative authority.”\textsuperscript{228}

\textsuperscript{224} Id. at 384–85.

\textsuperscript{225} The majority opinion chose to put “constitutional impediments aside,” ruling on statutory interpretation grounds, in part because the Court was “aware of no similar instances in which federal policymaking has been turned over to state administrative agencies,” let alone without federal agency oversight. \textit{Id.} at 385 n.10. In so doing, the opinion did not even invoke the interpretive canon that courts should construe statutes to avoid constitutional difficulties. See \textit{Jones v. United States}, 526 U.S. 227, 239 (1999) ("Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (internal citations omitted)). It is worth noting, in this regard, that the majority was well aware of the separations of power issues that lurked in this case. \textit{See}, e.g., Lyle Denniston, \textit{When Congress Plays Telephone}, AM. LAW., Dec. 1998, at 72, 73 (noting Justice Ginsberg's comment at oral argument that the States' argument contemplated a "truly novel regime, one in which a federal law being administered with 'no federal executive presence' in the scheme").

\textsuperscript{226} \textit{Iowa Utilities Board}, 525 U.S. at 412 (Thomas, J., concurring in part and dissenting in part) (citing \textit{United States v. Jones}, 109 U.S. 513 (1883)).

\textsuperscript{227} \textit{Id.} at 411 (Thomas, J., concurring in part and dissenting in part).

\textsuperscript{228} Harold J. Krent, \textit{Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government}, 85 NW. L. REV. 62, 83–84 (1990); \textit{id.} at 106 ("Almost by definition, delegations to state governments and Indian tribes embody federalism principles .... Rather than decide what is best for the Indian Tribes and states concerning matters of local interests, Congress .... [by delegating authority] to states, municipal governments, and Indian Tribes allow[s] citizens to have a more direct voice in shaping federal policies that touch their lives."). The Sixth Circuit's resolution of this issue appears to rely on a similar line of reasoning. \textit{See} \textit{Ky. Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.}, 20
Justice Thomas's dissent in *Iowa Utilities Board* also referenced history and precedent to justify the delegation of federal executive authority to state agencies. In particular, he quoted at length from *United States v. Jones*, in which the Court observed that "from the time of its establishment that government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents." Indeed, the historical pedigree of delegation of federal power to state officials dates back to the Supreme Court's acceptance of delegating federal prosecutorial discretion to state prosecutors in *Houston v. Moore*. As Professor Krent has explained, this practice long ago established the legitimacy of assigning the administration of federal law to state officials beyond executive control.

Finally, by highlighting that the states are interpreting and applying federal law, Justice Thomas did not leave himself much room to suggest that the federal Telecom Act simply constrains the state agencies from acting under state law—an interpretation that might avoid the separation of powers dilemma of delegating unreviewable federal executive authority to a state agency. Professor Evan Caminker, in confronting the separation of powers question raised by cooperative federalism regimes like the Telecom Act, offered this solution, suggesting that state administration merely involves the development of interstitial state law that need not be reviewed by the federal executive. This explanation, however, is unsatisfactory on several grounds, at least with regard to the Telecom Act: it does not fit with federal judicial review of state agency decisions; it does not explain why the federal act would explicitly preserve state authority to supplement federal law; and it does not
justify state implementation of federal law that it is not otherwise authorized to apply.\footnote{236}

For formalists like Justice Thomas, Chief Justice Rehnquist, and Professor Krent, the federalism justification, along with the fact that Congress is not assuming executive authority, provides an important formal distinction to avoid the Article II concern set forth in \textit{Printz}. For Justice Scalia, the need for a unitary executive may well be categorical and not subject to being balanced against or distinguished by the presence of countervailing factors.\footnote{237} Indeed, in \textit{Morrison v. Olson},\footnote{238} Justice Scalia dissented on this ground, noting that the presence of formal removal power (which he rightly noted was highly unlikely ever to be exercised) could not justify Chief Justice Rehnquist's position that the Independent Counsel law did not violate Article II.\footnote{239} Thus, if \textit{Morrison}'s acceptance of formal distinctions and a balancing of competing interests proves to be a guide for future separation of powers decisions, Justice Thomas and Chief Justice Rehnquist may well conclude that delegations to state agencies, even without federal agency review, pass constitutional muster. Justice Scalia, by contrast, may once again carry the unitary executive flag in dissent and insist upon a categorical vision of federal executive power.\footnote{240}

2. The Functionalist Justification

In addition to preserving state agency discretion, congressional authorization of selected statutory provisions solely to states also serves Congress's purpose of keeping executive authority in check and promoting vertical competition between federal, state, and local

\footnote{236} See supra Part II.
\footnote{238} 487 U.S. 654 (1988).
\footnote{239} Id. at 703–04 (Scalia, J., dissenting). Alternatively, the Court could follow Professors Eskridge and Ferejohn’s suggestion that “\textit{Chadha}'s reliance on the very specific statements of the Framers is ahistorical, given the vast changes in United States government in the modern administrative state. Those changes ... suggest the superiority of an understanding of the Framers' expectations that is pitched at a more general level.” William N. Eskridge, Jr. & John Ferejohn, \textit{The Article I, Section 7 Game}, 80 \textit{GEO. L.J.} 523, 527 (1992).
\footnote{240} In so doing, Justice Scalia would follow the approach of Judge Jerry Jones, who recently concluded that \textit{qui tam} actions violate the Take Care Clause. See Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 530 (5th Cir. 1999) (“Congress cannot be delegating to relators the President's power and duty to take care that the laws be faithfully executed, for Congress may not delegate purely executive power without the acquiescence of the Executive.”).
agencies. Particularly in implementing complex statutes such as the Telecom Act, Congress may wish to put federal agencies (and executive branch officials) on notice that it can invite state participation as a substitute for federal executive implementation. As Professor Hills put it, "intergovernmental competition is useful, because it allows Congress to bypass federal officials who fail to implement federal policy faithfully and instead to delegate power to other nonfederal officials who demonstrate greater fidelity to federal policies." Moreover, such a system uses interjurisdictional competition to keep each jurisdiction on its toes, encouraging each to be more efficient and responsive in carrying out its objectives.

For the functionalist, the involvement of state agencies might well be appealing for the same reasons as the legislative veto, namely that it provides an innovative structural solution to address the challenge of keeping executive authority in check. Such measures may be particularly justified in the modern administrative state, in which Congress delegates considerable authority to the federal executive branch to implement complex cooperative federalism statutes like the Telecom Act. Indeed, one could view delegations to state agencies as an alternate means of capturing some of the benefits of the legislative veto, which was Congress's first strategy for

241. Hills, Dissecting the State, supra note 5, at 1204; see Hills, Cooperative Federalism, supra note 141, at 883 ("The history of cooperative federalism is, in part, a history of struggles between elected policy generalists—mayors, governors, state legislatures, and city councils—and federal agency specialists for greater control over federal programs, with Congress favoring one or another type of organization depending on the political climate and perceived regulatory needs."); Hills, Constitutional Context, supra note 159, at 187 ("The ability to choose [federal or state agencies to implement federal law] increases Congress' power to insure faithful execution of its laws.").

242. VINCENT OSTROW, THE POLITICAL THEORY OF THE COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT 130 (1987) ("A highly federalized system of administration takes advantage of overlapping jurisdictions to generate competitive pressures toward increasing efficiency and responsiveness in the operation of service-delivery systems."); see id. at 136 ("The power of a buyer is significantly enhanced if the buyer can act through the collective agency of an association in bargaining with a monopolist or with the freedom to choose from the services provided by several potential monopolists who compete with each other for the favor of a common clientele in overlapping markets."); Richard B. Stewart, Federalism and Rights, 19 GA. L. REV. 917, 918 (1985) ("Political competition among jurisdictions—vertically between national and state governments and horizontally among state and local governments—is often a healthy antidote to monopoly.").

243. See Flaherty, supra note 201, at 1834 (suggesting that functionalists should applaud legislative efforts to balance executive authority).

244. Id. at 1820 ("With the New Deal, and the attendant death of the nondelegation doctrine, the giveaway of what had been seen as legislative authority (or something close) became massive."); id. at 1827 ("In its first year of publication, significantly 1939, the CFR consisted of sixteen volumes; last year it had expanded to 200 volumes.").
responding to the growth of executive power in the modern administrative state. Significantly, this innovation would not include the step of aggrandizing its own power (via a legislative veto) in order to address the enhancement of executive branch authority.

Ironically, some formalists may accept the functional explanation that the "innovation" of delegating executive authority to state agencies represents a tolerable remedy to the initial constitutionally questionable step of tolerating broad delegations to administrative agencies. Indeed, in a world where even many formalists accept the realities of the modern administrative state and appear disinclined to support a robust nondelegation doctrine, some formalists may ultimately conclude that they owe it to the legislative branch to tolerate innovations that involve a new dimension in separation of powers yet do not implicate the infirmities of a legislative veto solution. Any other resolution of the issue would put Congress in

245. See INS v. Chadha, 462 U.S. 919, 967-75 (1983) (White, J., dissenting) (documenting the enactment of statutes containing legislative vetoes, the earliest of which was enacted in 1932).

246. See Hills, Constitutional Context, supra note 159, at 190 ("The beauty of cooperative federalism, from a constitutional perspective, is that it gives Congress a way to achieve the faithful execution of the laws that minimally compromises the independence of the executive officials from Congress."); Lessig & Sunstein, supra note 193, at 114 (explaining that the significant difference between cases invalidated on separation of powers grounds and those which passed constitutional muster is that in the former cases "Congress attempted to give itself a degree of ongoing authority over the administration of the laws"). In this sense, reliance on state agencies represents just the type of innovation that Professor Ackerman may have in mind when he calls on constitutionalists to "extend their thinking to embrace the distinctive structural problems involved in controlling the fourth branch of government: the bureaucracy." Bruce Ackerman, The New Separation of Powers, 113 HARV. L. REV. 634, 691 (2000).

247. See Eskridge & Ferejohn, supra note 239, at 533 ("In the modern administrative state[,] most 'lawmaking' is accomplished by agencies under the authority of statutory delegations."); Greene, supra note 150, at 124 ("If we accept sweeping delegations of lawmaking power to the President, then to capture accurately the framers' principles—principles that deserve our continuing adherence—we must also accept some (though not all) congressional efforts at regulating presidential lawmaking.").

248. In Mistretta v. United States, 488 U.S. 361 (1989), the Supreme Court, over a lone dissent by Justice Scalia, concluded that the delegation of lawmaking authority to the Sentencing Commission passed constitutional muster under the nondelegation doctrine. Id. at 374. In so doing, the Court explained that "in an increasingly complex society Congress obviously could not perform its functions absent an ability to delegate power under broad general principles," and virtually any broad principle passes the constitutional standard. Id. at 372-73; see also OPP Cotton Mills, Inc. v. Adm'r of Wage & Hour Div., Dep't of Labor, 312 U.S. 126, 145 (1941) (observing that "[i]n an increasingly complex society Congress obviously could not perform its functions" without delegating details of regulatory scheme to executive agency).

249. Significantly, an assignment of interpretive authority to state agencies does not transgress the "anti-aggrandizement" principle that prohibits Congress from arrogating non-legislative powers to itself (such as with the legislative veto). See Kinkopf, supra note
an uncomfortable position: relinquish more authority to the federal executive branch or limit the subjects on which it legislates. 250

Finally, a tolerance for delegating authority to state agencies without federal agency oversight would grant Congress important latitude in designing cooperative federalism statutes. Without such toleration, only federal agencies will be able to determine what issues should be left to state agency discretion, thereby entrusting the executive branch with a judgment that Congress may itself wish to make in certain situations. Moreover, Congress may also choose to employ variations on this scenario, including a “springing grant of residual authority” that would only authorize federal agency rulemaking at a future time in order to allow for “percolation” of different approaches to a particular issue. In short, as with a restrictive approach to when state agencies can administer federal law, a requirement that federal executive agencies must be able to oversee state implementation of federal law will hinder the development of cooperative federalism regulatory programs.

CONCLUSION

With many cooperative federalism programs firmly in place and new initiatives on the drawing board, the Supreme Court would take a radical step if it undermined the very foundation of such programs. Nonetheless, courts and commentators cannot assume without developing a principled framework that cooperative federalism programs rest on a solid foundation. Under a reverse-Erie framework that balances federal supremacy and state autonomy, states can embrace the importance of state administration of federal law while protecting state autonomy through the valid excuse doctrine and an anti-commandeering principle structured around the exit, voice, and loyalty model. In a similar acknowledgement of the importance of cooperative federalism, the Supreme Court should make clear that our constitutional commitment to federalism and effective governance justifies state agency administration of federal law not subject to federal agency review.

In setting forth the legal architecture for cooperative federalism, the Supreme Court should acknowledge the benefits and historical

194, at 347 (noting that this principle “has no application to assignments outside the federal government”).

250. See Flaherty, supra note 201, at 1827 (“[D]elegation may have come about because the world became too complicated for Congress to handle alone, but it also enabled Congress to address more than it ever otherwise would have on its own.”).
pedigree of state administration of federal law. In so doing, it should afford states the ability to adopt a reverse-\textit{Erie} approach to evaluating their authority to implement federal law and should craft Tenth Amendment and separations of powers doctrines that endorse the model of cooperative federalism. If the Court rejects this path and insists on a clean separation of federal and state authority, Congress may eventually confront the difficult task of designing new regulatory regimes without the ability to rely on the states as partners, ultimately leaving the states with less authority to implement key regulatory programs.