William & Mary Law Review

Volume 46 (2004-2005)
Issue 4 Symposium: Dual Enforcement of Constitutional Norms

Article 7

February 2005

Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards

Jim Rossi

DUAL CONSTITUTIONS AND CONSTITUTIONAL DUELS: SEPARATION OF POWERS AND STATE IMPLEMENTATION OF FEDERALLY INSPIRED REGULATORY PROGRAMS AND STANDARDS

JIM ROSSI*

ABSTRACT

Frequently, state-wide executive agencies and localities attempt to implement federally inspired programs. Two predominant examples are cooperative federalism programs and incorporation of federal standards in state-specific law. Federally inspired programs can bump into state constitutional restrictions on the allocation of powers, especially in states whose constitutional systems embrace stronger prohibitions on legislative delegation than the weak restrictions at the federal level, where national goals and standards are made.

This Article addresses this tension between dual federal/state normative accounts of the constitutional allocation of powers in state implementation of federally inspired programs. To the extent the predominant ways of resolving the tension come from federal courts, state constitutionalism is challenged to produce its own account of its relevance in an era of federal programs. After surveying and critiquing the interpretative practices of state courts in dealing with these conflicting constitutional norms, the Article presents an institutional design account of

* Harry M. Walborsky Professor and Associate Dean for Research, Florida State University College of Law. E-mail: jrossi@law.fsu.edu. I am grateful to James Gardner, Hans Linde, Greg Mitchell, and Robert Schapiro for comments on a draft. Daniel Norris provided diligent research assistance. Thanks also for the comments made by participants at the College of William & Mary School of Law conference, "Dual Enforcement of Constitutional Norms," where a version of this article was presented. An early version was presented in 2002 at a Panel on the Administrative States, ABA Section of Administrative Law and Regulatory Practice, in Philadelphia, Pennsylvania.

state allocation of powers, which might better explain why states routinely suspend constitutional restrictions on delegation in the context of state implementation of federally inspired programs. The Article questions whether constitutional restrictions on legislative delegation have any normative basis in the context of state implementation of federally inspired programs, but also argues that it is important for state courts to answer this question as a matter of state constitutional interpretation—and not by ceding turf to federal courts under the Supremacy Clause or other federally imposed judicial interpretations.

With the post-New Deal growth of federal power, states are increasingly called on to implement federal programs. In a variety of regulatory contexts—ranging from health, safety and environmental regulation to network infrastructure and transportation—Congress and federal regulators routinely look to state and local governments to implement federal programs and regulatory goals. Often the federal government offers a "carrot" for state or local compliance, providing funding for programs such as welfare, Medicaid, or public school standards and testing. States frequently take the silver, voluntarily acquiescing to federal programs or regulatory standards that bump up against state constitutional restrictions.[1]

Even outside of the context in which a state stands to benefit financially from adopting a federal program or standard—for example, where some state or local official voluntarily endorses it—state constitutions frequently present barriers to the implementation of federal goals or the adoption of federal standards. State decisions to participate in a federal program or to adopt a federal standard may involve constitutional rights,[2] but sometimes they will conflict directly with the allocation of powers between the branches or levels of government articulated in a state constitution as well. The prototypical scenario discussed in this Article is common under federal and state statutes. Often states are asked to adopt programs that rely on, implement, or incorporate federal statutes and regulations; frequently they choose to adopt these programs. For example, a state legislature's statute regulating water pollutants might rely on definitions or standards adopted by the U.S. Environ-

1. Focusing on states trading state constitutional protections for federal revenues, William Van Alstyne has argued that state and local governments may not accept federal funds where doing so puts at risk rights that state constitutional law protects. William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303, 307 (1993).

2. For example, the Portland, Oregon police department refused to cooperate with the FBI's attempt to interview approximately 5,000 men of Middle Eastern descent, claiming that the FBI's program resulted in a type of racial profiling prohibited by Oregon law. Fox Butterfield, *A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7. This Article focuses on separation of powers issues, so discussion of state constitutional rights provisions that are more restrictive than the U.S. Constitution's protections is beyond its scope.

mental Protection Agency (EPA), or may even explicitly incorporate EPA regulations or guidance documents into state law.

Dual constitutions—federal and state—produce the prospect of dueling substantive and procedural constitutional norms between the federal and state levels of government. Cooperative federalism programs, in which the federal government relies on states or localities to adopt and/or to implement a federal goal, might run into barriers under state constitutions. Apart from cooperative federalism—in which Congress defines a regulatory end—state programs pursuing a variety of different goals may adopt federal standards in the interest of promoting uniformity and/or efficiency. The adoption of such standards presents a potential conflict with state constitutions. To the extent such state implementation of federally inspired programs complies with the processes specified under state constitutions, conflicts between state and federal law are rare. Under the Supremacy Clause of the U.S. Constitution,[3] federal substantive law often preempts contrary state substantive law. Even when there is no preemption issue, if a state has voluntarily adopted substantive federal legal standards pursuant to all applicable state constitutional and procedural law, no conflict between the state and federal constitutions arises.

At some level, however, state constitutions do present a direct legal conflict for state adoption of, implementation of, or acquiescence to, federal regulatory standards and goals. In the context of such regulatory programs, constitutional duels are most likely to arise where federal substantive standards bump up against procedural restrictions in state constitutions, such as a state constitution's allocation of power between intrastate branches of government. For instance, there may be a deficit in legislative authorization to implement federal law where a state agency lacks the appropriate legislative delegation, pursuant to its state constitution, to adopt or act in accordance with a federal statute or regulation. To be sure, conflicts can be even more direct. A state legislature may oppose the adoption or implementation of federal law by officials in a state executive branch. This not only presents a tension between the legislative and executive branches of a state

3. U.S. CONST. art. VI, cl. 2.

system of government, but it can also place a state legislature in direct confrontation with a federal statute or regulatory program.[4] For example, by instituting a state implementation plan pursuant to the Clean Air Act, a state legislature may give a regulatory agency express authority to adopt regulations that rely on definitional terms or incorporate standards in the EPA guidelines. Although such a delegation is seemingly innocuous,[5] it poses a problem under a state's constitution to the extent that the state adopts a more stringent separation of powers doctrine—the nondelegation doctrine in particular—than exists at the federal level.[6]

The relevance of state constitutional restrictions on delegation in an era of federal programs is hardly settled. Certainly, under the Supremacy Clause, the federal government has the power to override state constitutional requirements—at least structural requirements, which are purely state law—when it speaks unequivocally in establishing a federal program. The threshold for preemption of state programs is hardly settled, though, in part because of the difficult institutional issues that often arise in the implementation of state programs. Cooperative federalism programs, such as those under environmental statutes and in the telecommunications context that are touted for valuing state-centered solutions to regulatory programs,[7] present a particularly difficult challenge for state constitutions, which frequently delimit a narrow scope of authority for state and local agencies. Although a federal program

4. Many of these potential obstacles with state executive branches can apply to municipal governments as well. To the extent a municipal government derives authority from the state legislature, it may not have the authority to implement federal programs, or a state legislature can affirmatively stand in the way of a municipal government's efforts to implement a federal program.

5. For example, a state legislature may be attempting to save administrative costs by borrowing a standard from a well-informed and recognized regulatory authority.

6. For a discussion of state separation of powers doctrine, and nondelegation in particular, see Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999); *see also* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337 (1990); John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993).

7. For a discussion of the state-centered solutions of the Telecommunications Act, see Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1738 (2001).

may impliedly or expressly allow these agencies to act,[8] a state legislature might refuse to acquiesce to federal goals and thereby present a potential conflict between federal and state legislative power.

There are several ways that federal courts might resolve this conflict in our dual federal/state constitutional scheme. One approach is for a court to rely on express or implied preemption analysis to find that Congress not only allowed state regulation, but effectively authorized state agencies to regulate an activity where a state legislature has failed to do so, even though regulation would otherwise violate the state's constitution.[9] Such a finding would allow the federal program to preempt state separation of powers jurisprudence. Even without endorsing broad federal preemption of state law, one author has drawn on political process principles to argue for a normative clear statement rule that might have implications in this context: state and local agencies might be presumptively authorized to act absent a clear statement by the state legislature to the contrary.[10]

Although resorting to federal law has its appeal as a solution to these conflicts, this Article looks to state constitutions to question whether U.S. constitutional standards, such as the Supremacy Clause,[11] or externally imposed, federally inspired clear statement rules are necessary. This Article argues that state courts have a way of resolving such conflicts on their own terms as a matter of state constitutional law. I concur with the general outcome of allowing state agencies to implement cooperative federalism programs and other state-adopted federal standards. Instead of rooting federally

8. Not everyone is sanguine about the constitutional status of such arrangements under federal law. For an argument that cooperative federalism programs that rely on state implementation violate federal nondelegation principles, see Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 270-80 (1997).

9. *See* Wash. Dep't of Game v. Fed. Power Comm'n, 207 F.2d 391, 396 (9th Cir. 1953).

10. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999). The legal source of this normative presumption is unclear. In federal courts, the presumption might be based on implied preemption of state constitutions to the extent that Congress has adopted a cooperative federalism program envisioning an active state role in its implementation. In state courts, such a presumption could be the best reading of a state constitution's separation of powers.

11. U.S. CONST. art. VI, cl. 2.

inspired regulatory programs in federal preemption doctrine or a clear statement rule constructed by federal judges, however, this Article proposes that state constitutions, properly interpreted by state courts, allow and authorize state implementation of federal programs and standards by executive branch agencies. In other words, the best normative interpretation of state separation of powers does not require state courts to cede their turf to federal courts in order to sustain cooperative federalism programs or to implement or adopt federal substantive law. State constitutions are not rendered moot by virtue of the existence of a federal program, including one that purports to authorize state agencies to act or one that provides substance for the regulatory approach adopted by state agencies. Rather than inviting broad preemption by allowing even vague federal statutes and regulations to preempt state constitutions, state courts can make state constitutions more relevant to the resolution of state/federal conflicts if they take an institutionalist strategy in interpreting separation of powers in the context of federalism programs.

Part I illustrates how cooperative federalism programs present particularly salient conflicts between state legislatures and federal goals, and discusses the two predominant solutions to these conflicts in the literature. Part II discusses the descriptive approaches state courts have adopted to deal with the problem of unconstitutional delegations by state legislatures against the backdrop of federal programs, and concludes that these strategies are unsatisfying, if not disingenuous. Part III suggests that a separation of powers jurisprudence that positions itself to address the specific institutional decision-making processes of state governments, rather than a jurisprudence featuring Lockean absolutist rules defining spheres of sovereignty, provides the most promising interpretive alternative for state courts in addressing the type of separation of powers problems presented in Parts I and II. An institutional approach to understanding the interpretation of state constitutions in an era of national programs positions a state constitution within a dual federal/state system without making it an obstacle to a federal program or allowing federal courts impliedly to preempt it.

I. DUELS BETWEEN FEDERAL REGULATORY GOALS AND STATE CONSTITUTIONS IN COOPERATIVE FEDERALISM PROGRAMS

In the past three decades, a novel approach to federalism issues has emerged as an alternative to the traditional view that federal and state governments occupy distinctive spheres of legal authority. In contrast to the traditional flavor of federalism, which relegates state and federal authorities to independent jurisdictional spheres, cooperative federalism envisions overlap between federal and state regulators as a positive. Generally, cooperative federalism has been defined as follows:

> Cooperative federalism programs set forth some uniform federal standards—as embodied in the statute, federal agency regulations, or both—but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements. This power allows states to experiment with different approaches and tailor federal law to local conditions.[12]

Such an approach recognizes that state and federal regulators do not operate in hermetically sealed jurisdictional spheres; rather, the overlap in their authority is "messy and chaotic."[13] Federal and state regulators often must work together to implement their regulatory goals.[14]

Moreover, the cooperative federalism model sees jurisdictional overlap as beneficial. It concedes a need for federal regulation, and the ideal of uniformity in general goals, but also recognizes the positive contribution states can make to the regulatory process. For example, given the reduced cost of political mobilization at the state and local levels, involving states in the regulatory process may increase participation, which can have obvious payoffs for regula-

---

12. Weiser, *supra* note 7, at 1696 (footnotes and citations omitted).

13. *Id.* at 1693.

14. Jim Chen identifies cooperative federalism in telecommunications regulation as the "Colorado school," given that some of its key proponents, such as Philip Weiser, Judge Stephen Williams of the D.C. Circuit Court of Appeals, and Dale Hatfield, have strong connections with or live in that state. Jim Chen, *Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls*, 2 J. TELECOMM. & HIGH TECH. L. 307, 313 (2003).

tory compliance, legitimacy, and efficiency. States are also more likely to experiment in a regulatory approach, trying out mechanisms that would not likely be adopted without experience by Congress or federal regulators. State enforcement and state-adopted programs encourage experimentation with different approaches and allow federal goals to be tailored to local conditions.[15]

Cooperative federalism exists under several federal statutes. For example, it was endorsed in the major environmental law statutes passed in the 1970s. Congress set forth minimum standards for environmental issues such as water pollution, but left states considerable discretion to implement the federal law. Under "savings clauses," for example, states are often allowed the flexibility to adopt more stringent environmental standards.[16] As the Second Circuit Court of Appeals describes the role of the states under this approach:

> By the contemplation of minimum federal standards, however, Congress did not intend to relegate the States to the status of enforcement agents for the executive branch of the federal government. To the contrary, it 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.[17]

In some cases, state agencies implement their own programs that exempt them from federal requirements.[18]

The Telecommunications Act of 1996 (1996 Act) also adopts a cooperative federalism solution, replacing the dual federalism model of the 1934 Telecommunications Act with a more coordinated

---

15. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 671 (2001).

16. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1370 (2000); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9614(a) (2000).

17. Mianus River Pres. Comm. v. EPA, 541 F.2d 899, 906 (2d Cir. 1976).

18. *See* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 35 (2000); *see also* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1141 (1995) (exploring how "responsibilities for environmental protection policy have been, and should be, allocated between federal, state, and local governments").

regulatory regime. With the 1996 Act—the first major overhaul of federal communications statutes in more than sixty years—Congress established a "pro-competitive, de-regulatory national policy framework" for the telecommunications industry.[19] Under the 1996 Act, incumbent providers of local telephone service are required to negotiate in good faith with new entrants to agree on the terms and conditions for any interconnection service between them,[20] submitting interconnection agreements to the relevant state public utilities commission (PUC) for approval.[21] Where the incumbent and new entrant cannot reach agreement, a party may petition the state PUC to arbitrate any dispute and,[22] if the state PUC declines to arbitrate the dispute, the Federal Communications Commission (FCC) steps in to resolve the dispute.[23] If a party believes that the arbitrated settlement does not comport with the 1996 Act, a federal district court is empowered to consider appeals, even if they are arbitrated by a state PUC.[24] This is a significant departure from the traditional process—long accepted in telecommunications and energy regulation—of appealing state PUC orders to state courts.[25]

One novel—and perhaps the most fundamental—question about such programs is how courts should resolve conflicts between federal regulatory programs and recalcitrant state legislatures which, through inaction, stand as a barrier to their implementation. For instance, if a state legislature explicitly refuses to authorize its state regulatory agency to embrace a competitive approach to local

---

19. S. CONF. REP. No. 104-230, at 1 (1996).
20. *Id.* §§ 251(c)(1), 252(a)(1) (2000).
21. *Id.* § 252(e)(1).
22. *Id.* § 252(b).
23. *Id.* § 252(e)(5).
24. *Id.* § 252(e)(6).
25. As the Supreme Court has observed:

> [The 1996 Act] broadly extended [federal] law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which—within the broad range of lawful policymaking left open to administrative agencies—are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.

AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 385 n.10 (1999).

telephony, federal and state regulators may find themselves at odds. The only way state regulators can break the impasse is by ignoring state law, including the constitutional allocation of powers delimited in a state constitution. Commentators have proposed two main solutions to this question.

The first solution relies on the Supremacy Clause, which allows Congress and federal agencies to preempt "[l]aws of any State" that contravene a federal law or regulation.[26] That Congress and federal agencies have the power to override state executive decisions has long been recognized by federal courts. For instance, in *State of Washington Department of Game v. Federal Power Commission*,[27] the U.S. Court of Appeals for the Ninth Circuit required the State of Washington to accept a hydroelectric license for the City of Tacoma over the objections of the Washington State Attorney General, who opposed the project.[28] Even though the City of Tacoma had not obtained a permit from the Washington State Supervisor of Hydraulics, as was required under a statute passed by the Washington legislature, the court held that "[t]he Federal Government's power over navigable waters is superior to that of the state."[29] Relying on the Supreme Court's decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,[30] the Ninth Circuit reasoned that any other result would give a state veto power over a federal hydroelectric project, destroying the effectiveness of the hydroelectric licensing scheme laid out in the Federal Power Act.[31]

On the federal preemption view, a federal assertion of power is justified under obstacle preemption analysis pursuant to the Supremacy Clause, however crude Congress's delegation to the federal agency or the federal regulatory action. The federal regulatory action is able to achieve supremacy status notwithstanding the

---

26. U.S. CONST. art. VI, cl. 2.

27. 207 F.2d 391 (9th Cir. 1953).

28. *Id.* at 392-93, 398.

29. *Id.* at 396 (citing McCready v. Virginia, 94 U.S. 391 (1876)).

30. 328 U.S. 152, 164 (1946) (holding that if section 9(b) of the Federal Power Act was construed to require compliance with state laws in every instance, it would make every application to the Federal Power Commission subject to state control in direct contradiction to the congressional mandate that the project be subject to "the judgment of the ... Commission"); *see also* 16 U.S.C. § 803(a) (section 9(b) of the Federal Power Act).

31. *Wash. Dep't of Game*, 207 F.2d at 396.

contrary wishes of a state legislature or a state executive. Further, the federal assertion of power prevails over, or preempts, any allocation of power among the branches and between state and local governments laid out in a state constitution.

In the face of extensive federal regulation, overlapping state regulatory requirements that conflict have been held to violate the Supremacy Clause. In his dissent to *First Iowa*, Justice Felix Frankfurter argued that applicants for Federal Power Commission licenses should be required to follow state procedural requirements, even though this might delay approval of a project, because the measure of "justice" is "deliberate speed."[32] The Court, however, appears to have rejected Frankfurter's view. The federal preemption approach to validating cooperative federalism programs is only effective if courts are extremely broad in finding state preemption of such programs, elevating regulatory expediency over state constitutional procedural requirements in this context.

The continued vitality of the preemption approach to validating state and local agency implementation of cooperative federalism goals may be questioned in light of recent Supreme Court cases that limit federal power. *New York v. United States*[33] and *Printz v. United States*[34] both struck down federal laws that imposed duties on nonfederal officials. As Roderick Hills observes, however, the Court's anti-commandeering decisions are not necessarily fatal to the federal preemption approach to upholding the implementation of cooperative federalism programs by states:

> [F]ederal law does not require anyone to *do* anything when it preempts state laws that limit the powers of state or local officials. At most, such federal laws simply require the state to *remove* certain restrictions on the power of subordinate officials so that those officials can *voluntarily* assume federal duties.[35]

---

32. 328 U.S. at 188 (Frankfurter, J., dissenting).

33. 505 U.S. 144 (1992) (holding the "take title" provision of the Low-Level Radioactive Waste Policy Amendment Act of 1985 unconstitutional).

34. 521 U.S. 898 (1997) (holding state enforcement of the Brady Act unconstitutional).

35. Hills, *supra* note 10, at 1211.

So long as some state or local official voluntarily attempts to assume federal duties, Congress has not forced state or local action, and no commandeering threat is present.

A second approach does not imply preemption broadly but uses judicially created clear statement rules to harness state political processes to favor cooperative federalism approaches—or at least to make their rejection by recalcitrant state legislatures more affirmative and explicit.[36] In one of the leading articles on the architecture of cooperative federalism programs, Roderick Hills argues that federal authorities have the power to "delegate" federal powers to specific state and local institutions even when the state legislature has failed to make such a delegation.[37] Hills rejects as unpersuasive the absolutist "state supremacy" position as a barrier to the exercise of federal power through state institutions.[38] Instead, drawing on political process concerns, he embraces a general presumption in favor of delegating power to nonfederal governmental institutions for the purpose of promoting local self-governance.[39] His approach—a presumption in favor of the exercise of local power absent state legislative authorization to the contrary—is also compatible with allowing cooperative federalism programs some operation within a state.

Both the federal preemption approach and a judicially constructed presumption in favor of local authority allow state and local agency implementation of cooperative federalism programs to survive, even against the backdrop of contrary state laws including state constitutions which may prove limiting to local power or legislative delegations to executive agencies. Yet both approaches leave little role for state constitutions in a cooperative federalism environment. Under the preemption view, federal law crudely overrides state constitutions, even where federal law is vague. Under the state autonomy view, courts are to construct a presumption that favors local power over centralized state legislative

36. The legal source of such clear statement rules is not entirely clear. *See supra* note 10 and accompanying text.

37. Hills, *supra* note 10, at 1276-80. Hills includes in his analysis not only the scenario in which a state has refused to authorize a state agency to implement federal law, but also the scenario in which a state legislature has prohibited a state agency from acting in accordance with federal law.

38. *Id.* at 1215-16.

39. *Id.* at 1222-23.

authority, notwithstanding state constitutional law to the contrary. In both cases, therefore, state constitutional law is effectively overridden as a matter of federal law.

In this sense both approaches pose a substantial threat to state constitutions as an independent set of legal norms regarding the allocation of powers. Perhaps the laudable ends of federal programs justify the means of overriding state constitutions in the context of cooperative federalism programs. There is, however, an odd irony to these methods of sustaining cooperative federalism goals. Both methods rely on constitutional norms imposed on states from the "outside," not on legal norms that are recognized as legitimate within a state's own constitutional system of government. For any approach to regulation that purports to value local participation and political processes—as cooperative federalism does—bluntly overriding the primary source of legal legitimacy for the state's system of government is a high cost to pay.

II. INTERPRETIVE EFFORTS TO RETAIN THE RELEVANCE OF STATE CONSTITUTIONS AGAINST THE BACKDROP OF FEDERAL PROGRAMS

Despite efforts to find solutions to potential conflicts from outside of the state, state courts have developed their own methods for approaching federal programs from the inside, such as interpreting federal mandates in light of state constitutional requirements. Frequently embraced as a source of legitimacy for localized solutions to regulatory programs, state constitutions are desirable framework mechanisms for governance in three main respects. First, state political processes—governed primarily by state constitutions—are more likely to allow regulatory law solutions to adapt to local circumstances and needs.[40] Second, state political processes, as spelled out in state constitutions, are more likely to provide for adaptation and experimentation rather than a one-size-fits-all approach to regulatory problems at the national level.[41] Third, to the

40. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 7-9 (1988). For criticism of this advantage of state, as opposed to local governance, see Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994).

41. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic

extent that state political processes are more easily accessible to interest groups than the national political process, a state constitution is a framework for political legitimacy that might hold promise over the national Constitution for formulating legitimate political solutions. At a minimum, state political processes will provide jurisdictional competition with the federal government, but the legitimacy benefits of state governance might also be great.[42] State constitutions are more likely to reflect the unique institutional issues affecting state and local governments, and thus yield legitimate solutions to regulatory problems, particularly when compared to a single, one-size-fits-all solution forced onto a state from outside the structure of state government.[43]

With these benefits to state-based political processes in mind, many commentators embrace what has come to be known as "independent state constitutionalism" as a way for state courts (and federal courts borrowing from or applying state law) to stay true to the origins, purposes, and structure of a unique constitutional document.[44] Independent state constitutionalism is a challenge, as fifty state judicial systems attempt to parse meaning from fifty different constitutional texts. However, an independent state constitutionalism may allow articulation of a set of trans-state constitutional norms independent of the Federal Constitution.[45] It is important, though, to recognize what an independent state constitutionalism does and does not require. As an interpretive task, independent constitutionalism requires state courts to make sense

---

experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *cf.* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 288 (1998).

42. *See* Merritt, *supra* note 40, at 7-9.

43. *See* Hon. James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1510-11 (1998); Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 292-93 (1998); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 46-47 (1989); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 356-57 (1984).

44. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97 (2000); Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1077-79 (1997); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 439-41 (1996); Williams, *supra* note 43, at 356-57.

45. Rodriguez, *supra* note 43, at 290-91.

of a state constitution on its own terms. Independent constitutionalism does not, however, commit every state to a view of independent constitutional power.[46] State power, in other words, does not exist solely to serve the state polity; it also exists to protect individuals from tyrannical acts on the part of both state and national governments. In addition, it may also serve as a type of "cog" in the machine of a broader, more national political process.[47]

Yet efforts to legitimize cooperative federalism by crude judicial appeals to federal preemption doctrine or clear statement rules render state constitutions moot as a legal matter, leaving little role for the understanding of state constitutions as normative mechanisms of interpretation and governance. Cooperative federalism programs are often approached as federal delegations to state agencies, but similar issues arise where a state legislature delegates to federal agencies through incorporation by reference to federal regulatory standards. In contrast to the efforts to legitimize federal

---

46. Indeed, it is unclear whether states were even independent legal authorities at the time of the adoption of the Constitution. Akhil Amar adheres to the traditional view of the "legally independent status of the states prior to adoption of the Constitution ...." Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 469 n.37 (1994) (noting that the Declaration of Independence referred to "free and independent States," the Articles of Confederation expressly recognized the "sovereignty" of the states, and the Treaty of Peace with Great Britain recognized the legal independence of individual states). Other scholars, however, suggest that although the colonies may have been legally separate and independent of each other, they were not entirely sovereign states even after independence from Great Britain was declared. Instead, they became a part of a continental American political community. PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787, at 22 (1983) (noting that throughout the revolutionary period "the identification of the American states with the common cause [against the British] and membership in [the Continental] Congress worked directly against notions of truly independent statehood"); *see also* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 200-06 (1993) (arguing that the Declaration of Independence from Great Britain was not an act of independent sovereignty on the part of the colonies but was authorized by the Articles of Confederation).

47. *See, e.g.*, James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1005 (2003) [hereinafter Gardner, *State Constitutional Rights*]; *see also* James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1044-54 (1993) (arguing that state constitutions are not the embodiment of independent political values, but instead are safeguards that reinforce national political values that the federal government has failed to protect); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1166-67 (1993) (noting that state courts need not rely on "unique state sources" to support interpretation but should attempt "to realize for their own communities the ideals that are the common heritage of the nation").

programs by appeals to federal preemption or clear statement rules—in the context of state legislative delegation to adopt federal regulatory standards by reference—many state courts continue to embrace an independent state constitutionalism. For these courts, state constitutions retain their legal status, but state adoption of federal standards gives rise to special approaches to interpreting state constitution nondelegation restrictions.

A. State Separation of Powers Limits on Legislative Delegations

Judicial opinions by state supreme and appellate courts seem to recognize that, while an independent interpretive method is important, state power does not exist in complete isolation from the federal system. Scholars have suggested that state constitutional rights are not entirely independent of the U.S. Constitution's rights protections.[48] The same may also be said of structural provisions of state constitutions, such as separation of powers. In particular, state appellate court applications of the nondelegation doctrine in the context of state implementation of federal law are telling. More than their federal counterparts—which embrace a relaxed nondelegation doctrine[49]—the separation of powers doctrine as applied to legislative delegations by many state courts is much more rigid.[50]

Florida courts, for example, endorse a strong nondelegation doctrine in interpreting Florida's Constitution, sharply limiting the power of Florida's legislature to pass laws that give other branches of government, particularly the executive branch, the power to make fundamental policy choices about the regulations they adopt. According to the text of Florida's Constitution: "The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any [of the] powers appertaining to either of the other branches unless expressly provided herein."[51] Florida courts claim that this

48. *See* Gardner, *State Constitutional Rights*, *supra* note 47, at 1005.

49. In the federal system, the predominant model for reviewing delegations is often attributed to Kenneth Culp Davis, who suggested that courts uphold delegations to executive branch agencies so long as procedural safeguards, including judicial review of an agency's decisions, remain in place. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 725 (1969).

50. *See* Rossi, *supra* note 6, at 1228-29.

51. FLA. CONST. art. II, § 3.

text prohibits the state legislature from delegating legislative authority to an executive branch agency absent specific standards and guidelines that constrain the agency. In *Askew v. Cross Key Waterways*,[52] the Florida Supreme Court held unconstitutional an environmental statute that delegated to an agency the authority to designate geographic areas of critical state concern (subject to additional planning requirements) and, in certain instances, to adopt land use regulations.[53] The statute passed by Florida's legislature contained several explicit limits on agency designation of areas,[54] but despite these limits on agency discretion in the statute, the Florida Supreme Court held the statute to be unconstitutional on nondelegation grounds. Acknowledging the inevitable need for an agency to "flesh out" policy, the court distinguished this from "making the initial determination of what policy should be."[55] Relying on a somewhat formalistic interpretation of Florida's strict separation of powers clause, the Supreme Court rejected Kenneth Culp Davis's procedural safeguards approach, holding instead that the Florida legislature must provide specific standards or guidelines to both aid and constrain the agency in exercising its discretion.[56] The presence of such standards or guidelines aids judicial review by giving courts specific criteria to apply when reviewing agency action.[57] Since *Askew* was decided in the 1970s, the Florida Supreme Court has had several occasions to revisit the doctrine and has consistently reaffirmed the constitutional need for specific standards and guidelines in legislation to validate a delegation of legislative authority to an agency.[58]

---

52. 372 So. 2d 913 (Fla. 1979).

53. *Id.* at 925.

54. The "critical state concern" designation was only allowed if: (1) the area contained or had a significant impact upon "environmental, historical, natural, or archeological resources of regional or statewide importance;" (2) the area was "significantly affected by, or [had] a significant effect upon, an existing or proposed major public facility or other area of major public investment;" or (3) the area had major development potential, such as the proposed site of a new community. *Id.* at 914 (describing FLA. STAT. ANN. § 380.05(2) (West 1975) (amended 1997 and 1998) (defining areas that may be designated areas of critical concern)).

55. *Id.* at 920.

56. *Id.* at 925.

57. *Id.*

58. *See, e.g.*, B.H. v. State, 645 So. 2d 987, 993-94 (Fla. 1994) (holding a juvenile escape statute invalid because it did not contain specific criteria or standards for the agency to apply); Chiles v. Children, 589 So. 2d 260, 266-67 (Fla. 1991) (holding that a statute

A recent Texas Supreme Court case, *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen* (*Boll Weevil*), echoes this approach, although in a slightly different delegation context.[59] A Texas statute authorized the state's Commissioner of Agriculture to recognize a private foundation that was authorized to propose geographic boll weevil eradication zones.[60] If an official zone was established, the foundation proposed assessments for cotton growers to pay subject to the growers' approval in a subsequent referendum.[61] In addition, the foundation was extended broad powers to impose penalties for late payment of assessments and to recommend to the Department of Agriculture that nonpaying growers' crops be destroyed.[62] However, apart from a referendum and a requirement that the Commissioner of Agriculture certify the private organization petitioning to become the foundation, the statute contained few checks on the foundation's powers.[63] The Texas Supreme Court invalidated the delegation to the foundation as a violation of the separation of powers clause of the Texas Constitution, observing that "[s]tate courts may have less need to reinvigorate the doctrine, since they have historically been more comfortable with striking down state laws on this basis than their federal counterparts."[64] While *Boll Weevil* addresses a legislative delegation to a private board—rather than to an administrative agency—the case illustrates how the Texas Supreme Court adopts a much more rigorous test than federal courts for evaluating whether a legislative delegation of power is constitutional.[65] Other

---

authorizing an agency to take steps to reduce the state budget violates the separation of powers doctrine because of "inadequate legislative direction"). *But see* Fla. Gas Transmission Co. v. Public Serv. Comm'n, 635 So. 2d 941, 944 (Fla. 1994) (holding that a pipeline certification statute contained sufficient standards and guidelines and thus did not violate the nondelegation doctrine).

59. 952 S.W.2d 454 (Tex. 1997).

60. TEX. AGRIC. CODE ANN. §§ 74.101-74.127 (Vernon 1995) (amended 1997).

61. *See Boll Weevil*, 952 S.W.2d at 457.

62. *See id.* at 457-58.

63. *See id.*

64. *Id.* at 468.

65. The contrast is obvious when the *Boll Weevil* case is compared to the Third Circuit's decision upholding a similar private delegation to increase beef sales in *United States v. Frame*, 885 F.3d 1119, 1127-28 (3d Cir. 1989).

states also rely on the nondelegation doctrine to invalidate legislative delegations to executive branch agencies.[66]

Another recent example of state court adjudication of separation of powers that has implications for regulatory agencies, but which relies on a theory slightly different than nondelegation, comes from California. The California Court of Appeals held recently that the structure of the California Coastal Commission—one of the most powerful land use authorities in the country—violates the California separation of powers clause.[67] In what Jonathan Zasloff describes as a "sober and workmanlike" opinion,[68] the appellate court relied on the text of California's constitution. The argument focused on how California's legislature retains the power to appoint and remove officials, which encroaches on the "execution" of the law within the executive branch—a constitutionally prohibited interference with core executive power.[69]

In terms of the results, these cases illustrate how state separation of powers doctrine constrains the power of state agencies in more rigid ways than the federal separation of powers doctrine constrains federal agencies. In reaching these results, state courts purport to rely overwhelmingly on the texts of state constitutions. As many commentators have previously concluded, however, the judicial approach to state separation of powers doctrine is not dictated exclusively by the texts of individual state constitutions.[70] States with similar textual language reach very different results, and states with different constitutional language sometimes reach the same results.[71] Thus, something other then constitutional text must be driving state courts in the separation of powers context.

---

66. *See* Rossi, *supra* note 6, at 1196-97nn. 141-58 and accompanying text.

67. Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869 (Cal. Ct. App. 2002).

68. Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1081 (2004).

69. *Marine Forests Soc'y*, 128 Cal. Rptr. 2d at 884-85.

70. *See, e.g.*, Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 602 (1994) (advising states to judge delegations of power with reference to a number of factors including legislative standards, procedural safeguards, and the complexity and sensitivity of the issue); Rossi, *supra* note 6.

71. Rossi, *supra* note 6, at 1191-1201.

B. State Nondelegation Doctrine and State Incorporation of Federal Regulatory Standards by Reference

State courts are aware of the challenge that the nondelegation doctrine presents for state constitutional jurisprudence. Decisions upholding state executive acquiescence to, or adoption of, federal programs is a context in which state courts have had to look beyond constitutional text to justify their separation of powers decisions. Where a state legislature has delegated authority to a state agency to adopt standards that are based on a federal standard or to implement a federal goal, the delegation could raise separation of powers concerns if the state, as Florida and many others do, embraces a nondelegation doctrine that makes the assignment of legislative power to the executive branch unconstitutional. Consistent with the growth of cooperative federalism, most states allow broader legislative delegations where a state legislature has assigned policymaking authority to a federal, as opposed to a state, agency.

That state courts uphold such delegations as a matter of state constitutional law—not as a matter of federal preemption or as a clear statement rule external to state constitutions—is telling of how state courts perceive the status of state constitutions in this context. State courts continue to see state constitutions as independently relevant legal documents, not something meaningless to state implementation of federally inspired programs. At the same time, the explanations state courts give for relaxing the nondelegation doctrine in this context must stand as a matter of state constitutional law. If the reasons provided by state courts fail to stand as a matter of separation of powers jurisprudence, it calls into question whether state constitutionalism can survive the challenges presented by federal programs and cooperative federalism based on the reasons state courts give for upholding delegations.

Decrying the general discourse failure of state constitutional law, James Gardner describes the general corpus of state constitutional law decisions as "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[72] State separation of

72. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

powers jurisprudence is a classic illustration of this discourse failure. Writing over forty-five years ago, Kenneth Culp Davis, then an authority in the laws governing the growing administrative state, wrote of state courts considering the nondelegation issue: "[T]he typical opinion strings together some misleading legal clichés and announces the conclusion."[73] The four main explanations for upholding the adoption of federal standards in states—uniformity, proactivity, extra-territoriality, and political expediency—illustrate the continuing bankruptcy of state constitutional law discourse in this context.

1. Uniformity

Appeals to uniformity are commonplace in state decisions addressing separation of powers challenges to state executive branch implementation of federal programs. For example, in *McFaddin v. Jackson*,[74] the Tennessee Supreme Court upheld a statute that made individual retirement plans taxable if subject to the federal estate tax but exempt if excluded from the federal estate tax. Articulating concerns of uniformity and administrative simplicity in conforming tax statutes, the court reasoned that the delegation was constitutional, despite the legislature's failure to provide adequate standards and safeguards.[75] In Florida, the Florida Supreme Court upheld a statute that made unlawful "unfair ... acts or practices in the conduct of any trade or commerce"[76] and instructed state regulators to adopt regulations consistent with those of the Federal Trade Commission.[77] The Minnesota Supreme Court implicitly endorsed uniformity when it approved as constitutional a state law incorporating the federal definition of "eligible small business" as contained in regulations of the U.S. Small Business Administration "as amended from time to time."[78] A New Jersey appellate court also cited uniformity as a basis for upholding

73. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2.07 (1st ed. 1958).
74. 738 S.W.2d 176 (Tenn. 1987).
75. *See id.* at 182.
76. Dep't of Legal Affairs v. Rogers, 329 So. 2d 257, 261 (Fla. 1976).
77. *Id.* at 267.
78. Minn. Energy & Econ. Dev. Auth. v. Printy, 351 N.W.2d 319, 351-52 (Minn. 1984).

a similar delegation.[79] Another New Jersey appellate court referenced the need for uniformity in upholding media advertising classification standards for state laws and postal regulations.[80]

Commentators have also embraced the promotion of uniformity as an accepted rationale for upholding the acquiescence to, or adoption of, federal law in the states, notwithstanding state constitutional principles to the contrary.[81] This is perhaps the least satisfying analytical approach used by state courts for upholding state agency, or, in other words, acquiescence to adoption of federal law; yet because it is preeminent, it warrants some evaluation.

Uniformity is an undeniably valuable goal for any federal program. It advances predictability and certainty for private firms seeking compliance with the law across jurisdictions. It also reduces administrative costs for federal agencies attempting to monitor state compliance with federal standards or goals. For states, too, it reduces the administrative costs of regulation to the extent that a state agency can avoid reinventing the wheel on every legal or policy issue as if it were an issue of first impression.

Appeals to uniformity, however, are somewhat empty normative concepts for informing the outcome of state separation of powers jurisprudence in this context. Unlike many rights provisions of the U.S. Constitution that are incorporated into state constitutions, federal separation of powers principles are not incorporated. According to the Guarantee Clause, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government...."[82] Although one might argue that this requires some minimal level of separation of powers in the states,[83] the clause has

---

79. State v. Hotel Food Bars, 112 A.2d 726, 732-33 (N.J. 1955).

80. North Jersey Suburbanite Co. v. New Jersey, 381 A.2d 34, 38 (N.J. Super. Ct. App. Div. 1977).

81. For example, one commentator argues that courts addressing the constitutionality of such delegations should address the importance of uniformity in the area regulated. *See* Arnold Rochvarg, *State Adoption of Federal Law—Legislative Abdication or Reasoned Policymaking?*, 36 ADMIN. L. REV. 277, 298 (1984).

82. U.S. CONST. art. IV, § 4.

83. *See, e.g.*, Fox v. McDonald, 13 So. 416, 420 (Ala. 1893) (noting that the guarantee of a republican form of government vests the power of selecting governmental officers in the people, and that the power to appoint to office is not an inherently executive function); *see also* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 52 (1998) (arguing that "some measure of separation of powers in state government is ... a structural requirement of the Federal Constitution" and that the

been held enforceable only by Congress, rather than by the federal courts.[84] At best, the U.S. Constitution speaks in a "whisper" to separation of powers in the states.[85] Thus, to the extent separation of powers principles apply at all to the states, they emanate primarily from state constitutional law, not from the Federal Constitution.

The very notion of an independent set of state separation of powers norms eschews uniformity as its primary animating principle. Further, because Congress has not legislated in the interests of uniformity—since the states themselves retain legislative power—in embracing uniformity state courts are replacing Congress's failure with their own sense of what is in the interests of interstate commerce. At best, appeals to uniformity might be said to constitute an effort by a state appellate court to elevate state legislative intent over the nondelegation doctrine where, in the court's view, the legislature intended to promote uniformity (and presumably commerce) between the states. This might be good policy, and might have a grounding in some implied federal preemption argument as a matter of federal law, but it has no plausible basis in an interpretation of state separation of powers.

In the context of some state legislative delegations, particularly in the cooperative federalism contexts, appeals to uniformity may actually undermine the goals of federal programs. Cooperative federalism programs, such as the EPA's effort to establish water standards and the FCC's effort to implement competition in local telephony, embrace variation from state to state as a way of

---

Guarantee Clause is the best textual source for this requirement); Comment, *Treatment of the Separation of Powers Doctrine in Kansas*, 29 U. KAN. L. REV. 243, 246-56 (1981) (discussing the Framers' intent regarding the Guarantee Clause and separation of powers doctrine at the state level).

84. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 147 (1912) (holding that Congress's determination of whether a particular state government is "republican" in form is binding on every other department of government); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (concluding that the determination of whether a particular state government is "republican" is for Congress, not the courts, to make). *But see* Dorf, *supra* note 83, at 67 (arguing that Guarantee Clause claims may be justiciable in state court); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) (arguing that the Guarantee Clause could be used to set some minimum degree of state autonomy from federal regulation).

85. *See* Dorf, *supra* note 83, at 77 (concluding that the Constitution forecloses "only those arrangements deeply offensive to principles of representative government").

legitimizing federal goals. By suggesting that standards must be identical from state to state, uniformity may undermine the premise of cooperative federalism that state political processes are more likely than their federal counterparts to yield legitimate political solutions to regulatory programs and are more efficient at achieving compliance.

2. Proactivity

Another way state courts attempt to preserve delegations to federal agencies is to distinguish between proactive and retroactive standards by federal agencies. These courts assume that the state legislature, in approving an agency's rulemaking or regulatory powers, implicitly had knowledge of existing federal regulations. At the same time, since the state legislature could not have known about future changes to the law, these courts limit the state agency from adopting future federal agency regulations or interpretations absent new action by the state legislature.

For example, the Texas Solid Waste Disposal Act criminalized the transportation, storage, processing, disposal and export of "hazardous waste," defined as "solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency ...."[86] A Texas appellate court upheld this delegation but only with respect to existing EPA listings.[87] The court noted that this delegation "may be read to say that the legislature has delegated to the EPA the power to define hazardous waste ... and that definition may change from time to time at the will of the EPA" but it also observed that such a construction would "place in doubt" the constitutionality of the statute under Texas's strict nondelegation doctrine.[88] The court read the statute to incorporate by reference the EPA's definition of solid waste at the time of enactment of the Texas statute but not modifications adopted by the EPA afterwards.[89] On a similar rationale, the Oklahoma Supreme Court rejected a legislative delegation to the U.S. Department of

86. TEX. HEALTH & SAFETY CODE ANN. § 361.221(a)(1), (2) (repealed 1997) (current version at § 361.003(12) (Vernon 2004)).

87. *Ex parte* Elliott, 973 S.W.2d 737 (Tex. App. 1998).

88. *Id.* at 741.

89. *Id.* at 742.

Labor to set future minimum wage rates in Oklahoma.[90] Several other states have followed this approach as well, prohibiting acquiescence to, or adoption of, future federal standards but allowing incorporation of past federal law to stand.[91]

While this distinction—which draws on loose constitutional due process rhetoric—might seem to promote general fairness, as a matter of constitutional interpretation it is not at all helpful to state separation of powers jurisprudence. It relies on a fictional account of legislative knowledge of specific federal standards at the time of the passage of state legislation. More importantly, since many state courts use it as a canon of construction for upholding delegations (and limiting them), this approach relies on the judiciary to limit statutes effectively—even clear statutes to the contrary. Even though many states apply a prohibition on prospective lawmaking as a canon for upholding delegations, this is more than a disingenuous interpretive technique. This prohibition also freezes the state regulatory apparatus and may contribute to gaps in regulation, undermining other (nonconstitutional) goals of regulation, such as uniformity. For example, if used broadly to sustain state regulatory programs, this interpretive technique may result in a state having systematically lower minimum wages or outdated food and drug standards, in comparison to the federal system or other states.

3. Extra-territoriality

State courts have also found ways to interpret a delegation to a federal agency as outside the jurisdictional realm of the state nondelegation doctrine. By characterizing the regulatory action as a fact of federal, rather than state, lawmaking, states may avoid having to confront the implications of delegation to a federal agency. A recent Michigan case took such an approach. The Michigan legislature had passed a statute limiting the liability of drug manufacturers for labeling in compliance with Food and Drug Administration standards. In reviewing a nondelegation challenge to the statute under Michigan's constitution, the court held that, by

90. Oklahoma City v. Oklahoma, 918 P.2d 26, 30 (Okla. 1995).

91. *See, e.g.*, Indep. Comm. Bankers Ass'n v. State, 346 N.W.2d 737, 744 (S.D. 1984); People v. Harper, 562 P.2d 1112, 1113 (Colo. 1977); State v. Julson, 202 N.W.2d 145, 150 (N.D. 1972).

referencing FDA conclusions regarding the safety and efficacy of a drug, the legislature was merely using factual conclusions of "independent significance" that in no way constituted a delegation of legislative authority.[92]

The characterization of these issues as factual is specious. Under federal law, it is well recognized that an FDA determination regarding the safety and efficacy of a drug may be based on factual findings or inferences, but it is infused with legal and policy significance.[93] Perhaps more interesting is the suggestion that because these determinations are "independent" and nationwide, they are somehow extra-territorial—outside of the jurisdiction of a state court to make a determination that they violate separation of powers doctrine within the state. This is, of course, based on a false premise—that federal law has any significance in this context independent of a state adopting or acquiescing to it. Moreover, as a jurisdictional or sovereignty argument, this has troubling implications. It would authorize delegations not only to Congress or federal agencies but also to private out of state entities as well, such as national organizations and associations.

4. Separation of Powers as Raw Politics

Upholding state programs that implement federal goals will frequently advance state interests. Implicit to some state court opinions is the notion that state separation of powers doctrines should be relaxed wherever a state stands to benefit politically. For instance, if a state does not conform its regulations to national standards, it might face the loss of a business that relies on the predictability of regulation from state to state in deciding which markets to serve. In more explicit political confrontations, a state may face a loss of federal funding if its agencies fail to conform their regulations to national standards or guidelines. This is a strong form of the uniformity argument, but it does not embrace uniformity for the sake of efficiency and predictability. Rather, such uniformity

92. Taylor v. Smithkline Beecham Corp., 658 N.W.2d 127, 133 (Mich. 2003).

93. *See, e.g.*, Berkovitz v. United States, 486 U.S. 531, 545 (1998) (asserting "that the determination [of a proposed drug's compliance with safety standards] incorporates considerable 'policy judgment,'" according to the government).

stands to benefit a state or interest groups within a state, and thus is valued for its political consequences.

This is perhaps the most ambitious normative basis for relaxing separation of powers in the name of federal programs. It seems, however, to have more horsepower than it needs in order to deal with the specific problem of delegation of authority to adopt federal standards. It reduces much state constitutional law, and separation of powers doctrine in particular, to nothing more than raw politics. Indeed, many political scientists see formal divisions of governmental power as rendered irrelevant by the rise of political parties.[94] Perhaps reduction to politics is the best result for which any theory of allocation of power between the branches of government in states might hope, but at some level it calls into question whether we ought to continue to have separation of powers doctrine at all in the states. Without some principled normative basis, however, courts should not selectively reduce some separation of powers issue conflicts to political ones while treating others as legal conflicts. Although separation of powers principles are often contested, they play a fundamentally important role in organizing and defining the powers of state governments and in lending legitimacy to the internal political processes of states. If state constitutionalism is to have any hope as an independent interpretive enterprise, it must either make some effort to articulate the allocation of powers outside of crude appeals to politics or abandon the nondelegation doctrine altogether.

III. A SOLUTION FROM WITHIN: SEEDS FOR AN INTERPRETIVE THEORY OF SEPARATION OF POWERS FOR A SYSTEM OF DUAL CONSTITUTIONS

The reasons state courts provide for upholding state legislative delegations to agencies to implement federal programs all assume that state constitutions are independent. They also all implicitly treat state constitutions as isolated sources of sovereign power. A

94. THEODORE LOWI, THE END OF LIBERALISM 47-54 (2d ed. 1979); E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 78-96 (1960); *see also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (noting that the rise of political parties damaged the natural and beneficial opposition between state and federal powers).

more nuanced interpretive approach would not view state constitutions as isolated but as part of a complex institutional scheme in which shared authority is more commonplace.[95] If understood as responding to specific institutional problems in the design of state governments, state separation of powers doctrine could provide a superior interpretive starting point for state courts faced with nondelegation issues involving federally inspired regulatory programs. A normative focus on institutional issues would not relegate state constitutions to the superfluous status of the federal preemption and clear statement approaches to upholding the pursuit of federal goals and standards by state agencies.

A. Normative Foundations of the Nondelegation Doctrine

The purposes of separation of powers in general, and the nondelegation doctrine in particular, are many. The classical liberal, or libertarian, perspective sees constitutional restrictions on legislative delegation as applying a rigid separation of functions between a legislature and other governmental branches in order to protect individual liberty.[96] While the classical liberal account is popular, it has also been criticized for its adherence to formal rules of separation between the branches of government without regard to function.[97]

---

95. *See, e.g.*, Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 659 (2000) (contrasting the deference state courts give to other branches of government with the lack of deference the Supreme Court gives to Congress and the President); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 89 CAL. L. REV. 1409, 1415-16 (1999) (addressing concerns over complex, simultaneous adjudication of federal and state constitutional claims).

96. This perspective is most commonly associated with Locke and Montesquieu. Locke regarded the legislative power as supreme but did not believe that it should be arbitrary. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 135-137 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690). Montesquieu justified separation of powers on the grounds that it protects against the encroachment of individual liberty by government. He wrote that "[w]hen legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them." MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1752).

97. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

Most contemporary liberal accounts of separation of powers, by contrast, focus on the non-rights based functions of nondelegation, such as enhancing accountability. Some functionalist accounts emphasize how nondelegation protects legislative accountability by ensuring a tight connection to majoritarian electoral processes,[98] while other accountability advocates see more complicated links to electoral values,[99] or endorse a welfare-based definition of accountability.[100] Still others see separation of powers as primarily concerned with promoting efficient government.[101] Certainly, where one places the functional emphasis influences how strongly one views the role of constitutional restrictions on legislative delegations, but the nondelegation doctrine has been defended on both libertarian and functionalist grounds.

One recent functionalist account of the nondelegation doctrine creatively and usefully blends the incomplete contracts and interest group accounts of lawmaking to argue that the nondelegation doctrine enhances welfare by preserving majoritarian checks on lawmaking. Scott Baker and Kimberly Krawiec argue that legislation can be understood as a type of incomplete contract between legislators and interest groups that participate in the lawmaking process.[102] In their view, the nondelegation doctrine serves as a type of "penalty" default rule, by which courts declare unconstitutional statutes that are passed by a legislature in order to shift or avoid

---

98. DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 99-107 (1993); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732 (1999).

99. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 81-82 (1985) (arguing that agency delegation should be done with reference to specific legislative mandates in order to prevent "broad policy choice by administrative officials").

100. This is the view that legislative delegations "conceal[] political transfers from the public, making it more difficult for the public to interefere with [them]," at some cost to social welfare. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1746 (2002).

101. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST APPROACH TO DELEGATION UNDER SEPARATION OF POWERS (1999); JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO 14-26 (1996); JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 15 (1986).

102. Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 664-65 (2004) (considering incompleteness to be a result of public choice theory).

responsibility.[103] By requiring majoritarian processes—a legislative vote, for example—to more fully constrain an executive decision maker, such a penalty has the effect of limiting the manipulation of the legislative process by powerful interest groups seeking to maximize their ability to capture, or control, the executive branch at the cost of majoritarian processes.

Understanding nondelegation as a type of penalty default rule for interest groups in the political process assumes that lawmaking responsibility is clearly within the constitutional ambit of a single branch of government—the legislature. Separation of powers principles delimit the respective spheres of authority for legislative and executive branches of government, but the incomplete contracts argument for a nondelegation doctrine should not be taken too far. In addition to looking at legislation as a type of incomplete contract, as do Baker and Krawiec, economists have suggested that constitutions may also be understood as a type of incomplete contract in which elected officials are offered incentive-laden schemes with payoffs but all future states of affairs are not specified.[104] On this account of constitutions, separation of powers can be understood as a set of default rules designed to fill the gaps of an incomplete contract that exists between the legislature and the executive. A rigid separation of powers that splits decision making between the branches, as is present in many states, might promote accountability by ensuring clarity of authority for both the legislative and executive branches, which increases the majoritarian accountability behind fundamental policy choices by the legislative branch.

At the same time, rigid separation of authority to protect a tight relationship with majoritarian elections through the institution of the legislative branch is not always sufficient to protect accountability. If branches of government with opposing interests are allowed to make independent claims on public resources without any joint decision making, common pool problems might lead to decreases in accountability. The budgeting process is a good example of such an occurrence. Suppose that one decision-making body—the executive—has complete control over the size of the budget, while another

---

103. *Id.* at 665.

104. Torsten Persson et al., *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163, 1165 (1997).

body—the legislature—has control over its composition. In a perfect world, voters would know which branch is accountable for which decision, but informational asymmetries between legislators and voters (or between the executive and voters) can lead to informational rents that have disastrous consequences for voters.[105] Similarly, once a legislature has made a delegation decision, authority is frequently shared between the executive branch, charged with enforcing and implementing the law, and the legislative branch, which retains authority over budget and control over statutory criteria. Features such as checks and balances can be understood as a way to elicit information from voters in democratic processes where there is a conflict between the branches.[106]

Thus, while a bargaining framework may provide some support for a nondelegation doctrine, it must also consider the role of checks and balances in a political system. Overlaps in authority between the executive and legislative branches can provide such checks and balances by promoting a type of competition that can elicit information from voters to keep executive and legislative officials more accountable. For example, even lawmaking power delegated to the executive branch may be subject to majoritarian processes in national presidential elections.[107] This may be one reason that federal courts refuse to accept the strong nondelegation doctrine that some commentators urge as a penalty default.[108]

B. Extending a Normative Account of Nondelegation to the States

In many state constitutional systems, however, the checks and balances counterargument against a nondelegation doctrine is weaker due to unique institutional features of state governments. For example, to the extent that an executive branch is unilateral, the political process can more systematically elicit information from voters to dissipate informational rents that result from delegation. If, however, an executive branch is not unilateral, the political process may not naturally provide clear checks and balances. If

105. *Id.* at 1166.

106. *Id.*

107. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152-56 (1997).

108. *See* Baker & Krawiec, *supra* note 102.

legislators are term-limited, or legislatures meet infrequently, interest groups may be able to take advantage of informational asymmetries, persuading agencies to adopt policies with little or no scrutiny by voters. An analysis of the benefits of separation of powers doctrines, such as the nondelegation doctrine, in the states must begin by focusing on institutional features that distinguish the design of state governments from the federal government.

The designs of political institutions in many state constitutions differ fundamentally from their design within the Federal Constitution. Key institutional differences between the federal and most state legislative systems suggest that at the state level, more information about executive agency regulation is likely to be hidden from voters. One difference is that state legislatures are in session for shorter periods than the U.S. Congress, and thus, state legislative assemblies are less likely to have familiarity with issues and time to evaluate bills than members of Congress. For example, the Texas legislature sits for 120-day sessions once every two years.[109] Florida has a sixty-day session; only about forty-five are working days. New Mexico's sessions are only sixty calendar days in odd-numbered years, while in even-numbered years, sessions are limited to only thirty days and the focus is mainly on fiscal matters.[110] Many other state legislatures have similarly short sessions.[111] Term limits, widely endorsed in states, exacerbate the effect of the information asymmetry between legislative and agency decision makers. A short legislative session might make delegation to an executive branch more practical, but most state courts have not endorsed delegation for this efficiency purpose. Instead, state courts adhering to a strong nondelegation doctrine sacrifice the potential efficiencies associated with delegation to ensure that the legislature, rather than an agency, makes key policy decisions. This safeguards against lessening the accountability provided through legislative elections.

---

109. *See* TEX. CONST. art. III, § 5; *see also* Bruff, *supra* note 6, at 1346 (discussing the potential impact of this institutional feature on Texas nondelegation doctrine).

110. *See* ALAN ROSENTHAL, THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS, PARTICIPATION, AND POWER IN STATE LEGISLATURES 128 (1998).

111. *See* 32 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 64-67 (1998-99); *see also* Alan Rosenthal, *The State of State Legislatures: An Overview*, 11 HOFSTRA L. REV. 1185, 1187-1204 (1983) (noting that, historically, less time was spent in session by state legislatures but that the trend since the 1960s has been toward more in-session time).

Other institutional design features also illustrate why such a safeguard on legislative accountability may be necessary in the states. Although in many states legislative staff is extensive, most states provide members of the legislature minimal staff assistance in exercising their lawmaking function.[112] Also, because of geographic proximity and economic and cultural similarities, the organization and mobilization of interest groups, such as farming or tobacco interest groups, is much easier at the state than the national level. Given lower costs of organization and mobilization, such interest groups are more likely to influence the political process at the state level than at the federal level.[113] Aware of this phenomenon at the time of the nation's founding, Madison wrote: "The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States ...."[114] Madison derided the tendency of state legislators to sacrifice the interests of their state for the particular and separate views of their counties and localities.[115] Factions increase the likelihood of capture of the state legislative process—particularly delegation to an agency controlled by a small but powerful constituency. Modern state legislatures undergo a high degree of turnover vis-à-vis the U.S. Congress,[116] contributing to the likelihood that the state legislative process will produce laws that are the product of highly organized special interest groups representing a small but vocal group of the legislature's constituency.

At the federal level, delegation of decision-making authority to agency decision makers can have pro-democratic effects, in part because the unitary executive provides some degree of streamlined

112. *See* ALAN ROSENTHAL, LEGISLATIVE PERFORMANCE IN THE STATES: EXPLORATIONS OF COMMITTEE BEHAVIOR 149-51 (1974).

113. For over thirty years, economists and political scientists have recognized and explored the role of interest groups in influencing the political process and its outcomes. *See, e.g.*, GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). The insights of economists such as Stigler have been applied by modern political scientists writing in the field of public choice. *See* MASHAW, *supra* note 107; Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746, 1747 (1998) (book review).

114. THE FEDERALIST NO. 10, at 173 (James Madison) (David Wootton ed., 2003).

115. *See* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON 26 (1994).

116. *See* ROSENTHAL, *supra* note 112, at 67-80 (describing the influence of term limits and other factors on the degree of professionalism in state legislatures).

accountability to the President for agency policy decisions.[117] Even though the President is not aware of most agency decisions, the President often is held accountable by the media, Congress, and the public at large for the positions of agencies within his branch. Many suggest that the U.S. Constitution envisions such a unitary executive.[118]

Although a few states follow this approach,[119] most states do not embrace a unitary executive.[120] In Texas, for instance, the long ballot provides for the separate election of officials such as the Lieutenant Governor, the Attorney General, the Comptroller, the Treasurer, and the Land Commissioner.[121] Florida also has a plural executive branch, providing for separate and independent election of a Governor, an Attorney General, a Chief Financial Officer, and

---

117. *See* MASHAW, *supra* note 107.

118. *See generally* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158-59 (1992) (discussing the implications of various Article III constructions on readings of Article II and concluding that broad, legislative jurisdiction-stripping power necessarily implies a unitary executive reading of Article II); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991-92 (1993) (noting that the Framers believed that the President should be the exclusive party held accountable for the administration of federal law).

119. The Pennsylvania and Virginia executives are almost entirely unitary, providing for general election of the Governor, Lieutenant Governor, Attorney General, and a few other officers. *See* PA. CONST. art. 4, §§ 1, 4.1, 5, 18 (providing for the election of a Governor, Lieutenant Governor, Attorney General, Auditor General, and State Treasurer); VA. CONST. art. 5, §§ 2, 13, 15 (providing for the election of a Governor, Lieutenant Governor, and Attorney General). Some of the more recent state constitutions also provide for a unitary executive. *See* ALASKA CONST. art. III, §§ 3, 8 (noting the only elected officials are the Governor and Lieutenant Governor, who run together on a single ticket); HAW. CONST. art. V, § 6 (providing that heads of all principal departments will be nominated by the Governor and confirmed by the Senate); IOWA CONST. art. IV, §§ 2, 17-4.22 (including provisions similar to those in Alaska, but also providing for election of a Secretary of State, Auditor, and Treasurer); MD. CONST. art. II, § 10 (including provisions similar to those in Hawaii); N.J. CONST. art. V, § 4, ¶¶ 2, 3 (same).

120. All but four states provide for independent election of lower (or co-equal) executive branch officials, and many provide for popular election of executive offices. *See* 32 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 38-40 (1998-99). The plural executive branch is largely a result of turn-of-the-century progressive constitutional reform. *See* Rogan Kersh et al., *"More a Distinction of Words than Things": The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 29-35 (1998).

121. *See* TEX. CONST. art. IV, §§ 1, 2 (providing that the Attorney General, Comptroller of Public Accounts, and Commissioner of General Land Office be elected statewide along with the Governor and Lieutenant Governor and that the Secretary of State be appointed by the Governor); *see also* Bruff, *supra* note 6, at 1347.

a Commissioner of Agriculture.[122] Alabama provides for separate statewide election of a Governor, Lieutenant Governor, Attorney General, State Auditor, Secretary of State, State Treasurer, Superintendent of Education, and Commissioner of Agriculture and Industries.[123] Most other states have similar provisions providing for independent election of statewide executives, although the listing of executives varies from state to state,[124] and a handful of states with older constitutions provide for election of some executive officers by the legislature.[125] Among states that deviate from the unitary executive model in their constitutions, the governor's power to lead and supervise bureaucracy is reduced,[126] although political scientists observe great variations in the degree of reduced leadership and supervision.[127] Regardless of the variations of degree across the states, in most states the ability of a governor to oversee

---

122. *See* FLA. CONST. art. IV, §§ 4, 5; *see also* Richard Scher, *The Governor and the Cabinet: Executive Policy-Making and Policy-Management*, *in* THE FLORIDA PUBLIC POLICY MANAGEMENT SYSTEM: GROWTH AND REFORM IN AMERICA'S FOURTH LARGEST STATE 73 (Richard Chackerian ed., 2d ed. 1998).

123. *See* ALA. CONST. art. V, §§ 112, 114-116.

124. *See* ARIZ. CONST. art. V, § 1; ARK. CONST. art. VI, §§ 1, 3; CAL. CONST. art. V, § 11; COLO. CONST. art. IV, §§ 1, 3; CONN. CONST. art. 4, §§ 1, 3, 4; DEL. CONST. art. 3, §§ 10, 19, 21; GA. CONST. art. V, § III, ¶ 1; IDAHO CONST. art. IV, § 1; ILL. CONST. art. V, § 1; IND. CONST. art. 6, § 1; KAN. CONST. art. I, § 1; KY. CONST. § 91; LA. CONST. art. IV, § 3; MICH. CONST. art. V, § 21; MINN. CONST. art. V, § 1; MISS. CONST. art. 5, §§ 133-134; MO. CONST. art. IV, § 17; NEB. CONST. art. IV, § 1; NEV. CONST. art. 5, § 19; N.M. CONST. art. V, § 1; N.Y. CONST. art. V, § 1; N.D. CONST. art. V, § 2; OHIO CONST. art. III, § 1; OKLA. CONST. art VI, § 4; OR. CONST. art. VI, § 1; R.I. CONST. art. IV, § 1; S.C. CONST. art. VI, § 7; S.D. CONST. art. IV, § 7; UTAH CONST. art. VII, § 1; VT. CONST. ch. II, §§ 43, 47-49; WASH. CONST. art. III, §§ 1, 3; W. VA. CONST. art. VII, § 1; WIS. CONST. art. VI, § 1; WYO. CONST. art. IV, § 11.

125. *See* ME. CONST. art. V, pt. 2, § 1; pt. 3, § 1 (providing for legislative election of the Secretary of State and Treasurer); MASS. CONST. pt. 2, ch. 2, § 4, art. I (providing for legislative election of the Secretary, Treasurer and Receiver General, Commissary General, Notaries Public, and Naval Officers); N.H. CONST. pt. 2, art. 67 (providing for legislative election of the Secretary of State and Treasurer); TENN. CONST. art. VII, § 3 (providing for legislative election of the Treasurer or Treasurers, and Comptroller of the Treasury).

126. An example is Florida. Richard Scher observes that, although Florida's governor is historically weak in power relative to other state governors, reforms to budgetary power have strengthened the power of Florida's governor since 1968. *See* Scher, *supra* note 122, at 79.

127. *See* Thad L. Beyle, *Governors*, *in* POLITICS IN THE AMERICAN STATES 301 (Virginia Gray et al. eds., 1990); Joseph A. Schlesinger, *The Politics of the Executive*, *in* POLITICS IN THE AMERICAN STATES 207 (Herbert Jacob & Kenneth N. Vines eds., 1971); Julia E. Robinson, *The Role of the Independent Political Executive in State Governance: Stability in the Face of Change*, 58 PUB. ADMIN. REV. 119, 120 (1998) (demonstrating the different roles of state executives as compared with federal executives and arguing this difference has the effects of responsiveness and innovation in the states).

executive policymaking is weak relative to that of the President. From an accountability perspective, this makes delegation more suspicious in the states than at the federal level.

Because of institutional design differences between the federal system and that of many states, and because of the way these differences reduce majoritarian checks on delegations, state courts have stronger accountability-based reasons for endorsing the nondelegation doctrine than their federal counterparts.[128] In the states, delegation is more likely to result in informational asymmetries, hiding policy choices from voters and majoritarian processes. State legislatures, and often agencies, are more prone to faction than the U.S. Congress or federal agencies. As has been recognized since James Madison penned Federalist No. 10, the costs of organizing and mobilizing local factions are lower at the state level than in national politics. Moreover, state legislatures, in session for very limited terms, are not as effective as Congress at providing political oversight for agencies' policy decisions. In addition, at the state level, agencies are less accountable to an executive leader than are federal agencies, and judicial review of agency decision making is much less rigorous at the state than at the federal level.

Combined, these factors allow state political processes to send a less complete set of informational signals to voters than may occur at the federal level. The nondelegation doctrine may help to clarify these signals. At the state level, the nondelegation doctrine may play a more important role in minimizing the ability of interest groups to convince a legislature to delegate primary policy decisions to the executive branch. The nondelegation doctrine serves to focus these interest groups—and voter attention more generally—on the legislature. Delegation is a terrific strategy for any private interest group that is not successful in obtaining what it wants from the legislature.

Even if an interest group can obtain what it wants from the state legislature, because of lower transparency and greater future control, it might prefer an agency solution to a legislative solution. Because states feature less direct electoral accountability in the

128. Joshua Sarnoff, by contrast, suggests that we invalidate cooperative federalism programs as a matter of federal nondelegation doctrine. Sarnoff, *supra* note 8, at 210-11. It strikes me as overkill, though, to invalidate a federal program that provides more safeguards, under state procedures, than most federal agency programs.

executive branch, interest groups may be able to extract informational rents from the executive that are not available from the legislature. Separation of powers and the nondelegation doctrine might thus be understood as responding to this particular governance failure in state democracies. By contrast, in the federal system, where national presidential elections serve to promote executive accountability and where interest groups that are successful in states lack power or cancel each other out in the federal lawmaking process, the need for a nondelegation doctrine is less salient.[129]

When compared to competing explanations provided in the written judicial opinions of state courts, this account provides a superior method for understanding the outcome of constitutional challenges to state delegations in the context of federally inspired regulatory programs—including the adoption of federal standards and cooperative federalism goals. Separation of powers in the states serves to enhance the accountability of the legislative process by eliciting information about important policies from voters and minimizing the opportunities for rent-seeking by interest groups. The information that can be gained from voters in the states by invalidating delegations is more likely to be useful to the state legislative process than it is to Congress. Further, the costs of organizing and mobilizing interest groups are lower at the state as opposed to the federal level. While a powerful interest group with parochial interests may be successful in influencing policy at the local or state level, in national politics that same interest group may have little or no power, or its influence may be diffuse.[130] Thus, there is little need for a nondelegation doctrine even to be applied to a state legislature's delegation to a federal agency. In such a context, there is a clearer majoritarian check on the federal executive than would have generally existed had the state executive adopted the same standard. Because interest groups are

129. In a similar vein, Edward Swaine recently has argued that Congress's delegations to international bodies, such as the WTO and the U.N., are constitutional to the extent that they provide a bulwark against concentration of political power that is consistent with the ambitions of federalism. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

130. For a defense of Dillon's rule as a limit on the power of local government based on similar concerns, see Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1994).

more diffuse and thus far less likely to play a major role in federal regulatory processes, there is nothing to be gained by a nondelegation doctrine limiting interest group domination of legislative bargaining at the state level. Put simply, state separation of powers in such contexts has little or no purpose, and its application should be suspended to the extent it poses any conflict.

The relaxation of the nondelegation doctrine in the context of state acquiescence to, or adoption of, federal programs can thus be understood within state separation of powers itself—not by making some broad policy appeal to uniformity, by creating a legislative fiction, by redefining law or policy as fact, or by turning separation of powers into nothing more than a political bargaining chip. Such an analysis would suggest that state legislatures may delegate to state agencies the power to adopt ready-made federal standards without regard to retroactivity concerns. To be sure, states might make such delegations for a variety of different policy reasons, including some that might not be geared towards national uniformity or administrative efficiency. Some interest groups may even be organized around federal programs from which they benefit, and they would be encouraged to lobby state legislators for their adoption. A state political process—not a nondelegation doctrine—would be the most effective way to guard against interest group politics in such delegations. Adding an executive branch role into their implementation would enhance, rather than reduce, the chances of publicly transparent reasons for adopting the federal standards.

Cooperative federalism programs often involve a fundamentally different kind of delegation—from Congress to a state agency—but also frequently depend on affirmative state legislative support. Recalcitrant state legislatures can serve as barriers to the implementation of such programs, and a similar set of state nondelegation concerns exacerbates their influence. The institutional design account of state separation of powers suggests that state courts can find a normative constitutional solution for cooperative federalism programs from within a state rather than ceding to federal courts the preemption or political process override of a state's constitution.

This approach shares the political account of the raw politics assessment of separation of powers without sacrificing all legal

constraints on government power.[131] Rather, it gives courts a more principled basis for recognizing when the raw politics assessment of separation of powers doctrine might have some useful role to play in the states. While an institutional design account is deferential to national politics, and thus consistent with efforts to introduce humility and deference into public law,[132] it also recognizes that state constitutions do not always require deference to legislatures on issues of delegation, and it gives them some principled basis for understanding when deference is appropriate. Politics has a place in state and national processes, but the institutional design account also allows state constitutions some modest role in constraining it and provides a baseline for delimiting when politics might eclipse legal constraints. In states that do not endorse the nondelegation doctrine as a matter of state constitutional interpretive practice, it would seem that the political process has completely supplanted any legal restriction on legislative delegation of authority to adopt federal standards or to implement cooperative federalism programs.

An institutional design account of state separation of powers is very much in line with what other commentators have urged in this unique constitutional interpretation context. G. Alan Tarr, for instance, has argued that, given the unique features of state constitutional structure, states require a "distinctive" separation of powers jurisprudence.[133] Dan Rodriguez has argued for a "trans-state" constitutionalism.[134] In echoing these efforts, I do not intend to argue that a one-size-fits-all approach to legal doctrine on all nondelegation constitutional questions is appropriate. Rather, the challenge for "trans-state" separation of powers is to identify what makes it distinctive from the federal system in normative ways that might be generalizable across some, if not all, states. Political science provides a fertile starting place for any such interpretive theory; specifically, a study of the power and effects of interest groups in state political processes provides the seed for a theory of

131. *See supra* Part II.B.4.

132. *See* Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1574-75 (1988).

133. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 7-8 (1998). As Tarr notes, "[s]tate governments are not restricted in the purposes for which they can exercise power—they can legislate comprehensively to protect the public welfare ...." *Id.* at 7. For a classic description of this feature of state governments, see W.F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 205 (1915).

134. Rodriguez, *supra* note 43, at 290-91.

state separation of powers that is both distinctive from federal political processes and generalizable across states. Such an account requires careful study of how interest group participation in state politics, and in the unique institutional settings of state government, might call for a different allocation of powers than other institutional settings, such as our federal system of government. Although this Article applies this insight to separation of powers between state legislative and executive branches, such a project may even have implications for other structural doctrines of state constitutional law that balance or mediate participation in state and federal political processes, such as the political question doctrine and questions concerning standing.

CONCLUSION

Echoing prominent appellate lawyer John Frank, who describes state constitutional law as "a sort of pallid me-tooism,"[135] Dan Rodriguez suggests that state constitutional law, in its present form, is but a minor part of our national "constitutional order."[136] Appeals to federal preemption and clear statement rules in federal courts as ways of overcoming the obstacles posed by state constitutions in a dual constitutional lawmaking structure threaten to reduce its role even further.

Yet federal programs need not render moot the legal status of state constitutions. As many state courts recognize, state constitutions continue to play an important role in organizing political processes in the adoption of federal standards. Their role is equally, if not more, important where state agencies are implementing federal programs of a cooperative federalism nature. Richard Briffault has suggested that a more sophisticated federalism would not see all decentralized power as homogenous, but would recognize distinctive features of state and local power, which are often in conflict.[137] Particularly where states implement federal goals or simply borrow federal standards, a more sophisticated account of state power would recognize that state legislatures and executive officers also have distinctive features and frequently conflict over

135. *See* John P. Frank, *Book Reviews*, 63 TEX. L. REV. 1339, 1340 (1985).
136. Rodriguez, *supra* note 43, at 272.
137. *See* Briffault, *supra* note 40, at 1305.

implementation issues. For state constitutions to retain their relevance against the backdrop of such conflicts, a more nuanced interpretive account is needed. The challenge is for state courts to develop an interpretive strategy for preserving their own state-specific constitutional values while also recognizing the larger objectives of federal regulatory programs and goals. For state systems, an institutional account of separation of powers holds greater promise than its competitors as an interpretive strategy for state courts as they struggle with this task.