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Our Federalism(s)

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INTRODUCTION

Like all academics, federalism scholars typically divide into camps. Some favor state sovereignty; others favor state autonomy. Some insist that states require formal, judicially enforceable protections against federal intrusion; others favor the informal protections afforded by the political process. Some favor cooperative federalism; others are not even sure that cooperative regimes can properly be called federalism. Scholars even divide as to the source of state power in its ongoing competition with the national government. Some imagine states occupying a separate sphere from the federal government.[1] Others assume that some level of state-federal integration is not just inevitable but healthy. Still others imagine that it is useful to have states serve as fully integrated administrative units within the federal system.

When scholars write about these debates, they often write as if we must choose between these different accounts of federalism —that we need one theory to rule them all (with apologies to Tolkien). It is not surprising that federalism scholarship usually rests on this assumption. Academics mostly write about the case law. And in a given case, one usually does have to make a choice between one theory or another.[2]

In the legislative and administrative arenas, however, our choices are far more varied. We need not hew exclusively to one vision of federalism. We can choose all of them at once. And we do. Every flavor of federalism can be found somewhere in our system. Institutional structures and interactions vary dramatically from domain to domain, program to program. Substantial variegation can be found within the same statutory scheme.[3] Indeed, even in the judicial context, we can—and do—choose more than one vision

1. *See infra* notes 21-30 and accompanying text.

2. Though even in the judicial setting, it would be entirely plausible for courts to adopt different accounts of federalism in different contexts. *See infra* note 101 and accompanying text.

3. *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (canvassing the many forms of federalism that can be found in the Patient Protection and Affordable Care Act).

of federalism. "Our Federalism,"[4] in short, contains multitudes. It would be more accurate to call it "Our Federalism(s)."[5]

It would be useful if federalism debates were more attentive to the fact that there are many federalisms, not one. In this Article, I identify three main reasons why federalism debates would improve if we paid more attention to federalism's many facets. First, federalism debates have an all-or-nothing quality to them, as if different accounts of federalism are mutually exclusive. Arguments typically rest on the assumption that different forms of state power are substitutes for one another. As a result, scholars have largely neglected the possibility that these forms of state power can also be complements. Sovereignty can be leveraged to give states more power within the national policy-making process. States' status as administrative insiders can help them preserve their power outside of national policymaking. It would be useful if scholars were more attentive to the fact that the questions federalism raises need not involve an either/or answer. Often they will involve a both/and.

Second, if we paid more attention to the many forms state power can take, we would find there is a good deal more to say about federalism doctrine and theory. The dominance of the sovereignty and process federalism accounts—both of which endorse a markedly similar view of state power—has led constitutional theory to neglect the huge swaths of federalism in which the states and federal government regulate together, with the states carrying out national policy. At present, constitutional theory lacks the tools necessary to analyze these cooperative federal regimes. But although there is a great deal of room to write in these areas, scholars continue to rehearse the same, tired debates over sovereignty and process federalism that have dominated the field for decades.

Finally, greater scholarly emphasis on the many facets of federalism would help lower the stakes in ongoing debates. Although scholars often write as if we require one theory to rule

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

5. It would not be surprising that a field as complex and variegated as federalism required more than one theory to describe it. Much of constitutional law exhibits a healthy pluralism of this sort. For instance, while some have pushed a unitary conception of free speech, most accept the idea that the ends of the First Amendment are plural. *See, e.g.*, Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 n.9 (2005) (canvassing this debate).

them all, it is hard to believe they really mean it. Federalism debates are best understood not as disagreements over which model to choose but as disputes over how to strike the right balance between different types of institutional arrangements. Such debates, however, can only be hashed out in context—domain by domain, policymaking arena by policymaking arena. Generic calls for one approach or another simply cannot do the trick. Shifting the debate along these lines would lead us to focus our attention on a more productive set of questions. We would spend more of our time analyzing which flavor of federalism best fits a given context and less time pushing a single theory.

Part I of this Article maps the extant scholarship by considering what scholars believe to be the source of state power in a federal scheme. It discusses the three main accounts of state power put forward by scholars: the de jure autonomy associated with the sovereignty account; the de facto autonomy associated with process federalism; and the power of the servant, which is the best way to conceptualize state power in cooperative federal regimes. This Part concludes by noting that, as a purely descriptive matter, we see plenty of examples of each form of state power, thus belying the notion that we need to adopt one theory to rule them all. This is true not just of the legislative and administrative arenas but even of the judicial one. Part II identifies the reasons why pluralism matters—why it would be useful if federalism debates explicitly acknowledged the existence of "Our Federalism(s)" rather than continuing to fight about which theory should dominate "Our Federalism."

I. MAPPING FEDERALISM DEBATES

Federalism theory has long exhibited a healthy pluralism with regard to the *ends* federalism promotes. Federalism is thought to promote choice, competition, experimentation, and the diffusion of power. The Supreme Court reels off these arguments as easily as scholars do.[6]

6. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458-59 (1991); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 75-106 (1995); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994); Lynn A. Baker & Ernest A. Young,

The divide in federalism debates centers on the means necessary to achieve those ends. States cannot promote choice or check an overweening national government if they lack power. But federalism theory contains at least three distinct accounts about what form of power states require to fulfill their role in a federalist scheme.[7]

A. Sovereignty, Process Federalism, and the Exit Option

One major view of state power is conventionally labeled a sovereignty account. Sovereignty, of course, has many meanings in many fields. Its definition varies even within federalism theory itself. As a general matter, though, champions of sovereignty believe that federalism will succeed only if states enjoy the power to rule without interference in a policymaking domain of their own.[8]

Federalism and the Double Standard of Judicial Review, 51 DUKE L.J. 75, 136-39 (2001); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 774-79 (1995); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53-63 (2004); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-1511 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). For the case that we reel off these arguments too easily, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 318-19 (1997).

7. I have previously explored these issues in greater depth. *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010). Parts of the next Section are drawn from this article. For a sampling of other efforts to identify the many conceptions of federalism running through doctrine and scholarship, see, for example, Amar, *supra* note 6; Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285 (2008); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766-69 (2006); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 744 (2000); Byron Dailey, *The Five Faces of Federalism: A State-Power Quintet Without a Theory*, 62 OHIO ST. L.J. 1243 (2001); Gluck, *supra* note 3; Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994); Young, *supra* note 6. For a comparative view, see Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990).

8. This definition merges two different conceptions of sovereignty: one involves freedom from interference (a negative right) and the other the ability to serve as a source of law and policy (a positive right). *See* Young, *supra* note 6, at 13-14. Although the two are conceptually different, *id.*, many assume that freedom from interference does not amount to much unless there is something to do with that freedom. I therefore join scholars of many stripes in fusing these two definitions. *See, e.g.*, Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 851 (1979); Larry D. Kramer, *Putting the Politics Back*

They thus typically imagine the state and federal governments occupying separate regulatory spheres, with the state setting its own policies separate and apart from the center. Proponents of sovereignty also believe that courts ought to take a formal role in protecting these regulatory spheres.

Sovereignty's main opponents are the process federalists. They argue that federalism depends on preserving the de facto autonomy of the states, not the de jure autonomy afforded by sovereignty. Process federalists thus look not to the courts but to politics, tradition, inertia, and interdependence as the guarantors of state power. Consider Larry Kramer's seminal account. In resuscitating the "political safeguards of federalism," he argues that states can protect themselves from federal intrusion without judicial assistance.[9] He points out, for example, that the integration of the state and national parties ensures that local politicians have access to, and leverage over, national politicians.[10] So, too, Kramer argues that the important role states play in administering federal policy ensures that the national government cannot take state interests for granted.[11] The formal protections afforded by sovereignty, in Kramer's view, are unnecessary to preserve state power.[12]

Although the sovereignty account and process federalism are typically cast in opposition to one another, in fact there are deep continuities between them. Process federalists look to politics and interdependence as leverage points for protecting states from national interference, but they nonetheless conceive of power in roughly the same way that champions of sovereignty do. The de facto autonomy lauded by process federalists is markedly like the de jure autonomy lauded by sovereignty's champions. Both envision state power as the ability to preside over one's own empire rather than administering someone else's.[13] Kramer, for instance, argues that the goal of process federalism is to "preserve the regulatory

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into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215, 220-33 (2000); Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1192-95 (1977).

9. Kramer, *supra* note 8.

10. *Id.* at 219.

11. *Id.* at 279.

12. *Id.* at 286.

13. *See* Gerken, *supra* note 7, at 7.

authority of state and local institutions to legislate policy choices."[14] So, too, Ernest Young, another leading process federalist, insists that "the independent policy-making authority of state governments ... is the critical variable" for federalism.[15]

Similarly, though process federalists resist the separate spheres approach so often put forward by champions of sovereignty, a similar conception of state power undergirds their work. Members of both camps share the view that states should have control over "their" policies.[16] For instance, some process federalists argue, as does Larry Kramer, that "[a]lthough it's no longer possible to maintain a *fixed* domain of exclusive state jurisdiction it's not necessarily impossible to maintain a *fluid* one."[17] Many other process federalists suggest that the key to preserving state power is to enforce restrictions on *federal* power.[18] By limiting what the federal

14. Kramer, *supra* note 8, at 222; *see also* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1513 (1994) (arguing that a key question for process federalism is not whether the states will continue to exist but whether "they will have anything to do").

15. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358 n.42 (2001); *see also id.* at 1385. For similar views, see, for example, Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1681 (2008) (arguing that the procedural safeguards of federalism are "designed to preserve the governance prerogatives of the states"); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 786 (1982) (arguing that federalism requires that states have "the power to make decisions about ... the package of goods and services to be provided collectively[] and the allocation of governmental resources"); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 416 (rejecting a purely administrative model of federalism that would transform state institutions "into an extension of the federal bureaucratic machinery" because it would "strike at the very core of participatory politics in the United States").

16. *See* Kramer, *supra* note 14, at 1495-99. Similarly, although Young suggests that we cannot identify state policymaking arenas a priori, he argues that it is essential that we leave states with "something meaningful to do." Young, *supra* note 15, at 1385; *see also* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism,* 1999 SUP. CT. REV. 1, 3.

17. Kramer, *supra* note 14, at 1499.

18. Brad Clark, for instance, claims that the Supremacy Clause and the separation of powers promote state autonomy because they limit the federal government's reach. *See* Clark, *supra* note 15, at 1681; Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323 (2001) [hereinafter Clark, *Separation of Powers*]; Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 92 (2003) [hereinafter Clark, *Supremacy Clause*]. Stephen Gardbaum similarly argues that federalism should be based "not on policing definitive and categorical jurisdictional boundaries ... but on policing Congress's deliberative processes and its reasons for regulating." Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799 (1996). So too, Vicki Jackson eschews separate spheres but still favors policing

government can do, this strategy leaves space for the states to regulate on their own.

In sum, champions of sovereignty and process federalists share a similar vision of state power, one that emphasizes autonomy over integration, independence over interdependence. Both turn on providing what Albert Hirschman might have termed an "exit option"[19]—making space for states to enact their own policies, separate and apart from the center.

The similarities between these two accounts is less surprising than one might initially think given the long and merry war between their proponents. Roderick Hills argues that process theories "are not really theories of federalism at all but theories of judicial review."[20] I would put the point somewhat differently. *Both* sovereignty and process federalism are theories of federalism. But the core difference between them turns on *how* best to protect state power, not on what form of state power we ought to be protecting if federalism's ends are to be achieved. Each is an account of what federalism is for; they are just markedly similar accounts, with both emphasizing the need to provide states with an opportunity to exit from the federal system. Their differences center on the means necessary to protect that exit option, not on the end itself.

B. Cooperative Federalism and the Power of the Servant

Recently, a third model of state power has been put forward by a burgeoning set of scholars who study cooperative federalism—those areas in which the states and federal government regulate together, with states implementing federal policy.[21] Elsewhere I

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limits on federal power. Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*?, 111 HARV. L. REV. 2180, 2231 (1998). "To make political safeguards of federalism work," she writes, "some sense of enforceable lines must linger." *Id.* at 2228; *see also id.* at 2233, 2255. Some argue that the Court has adopted a similar approach. *See* David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081, 2096 (2006).

19. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 2 (1970).

20. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 821 (1998).

21. For a sampling of this work, see DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 162 (2d ed. 1972); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW

have termed this model the "power of the servant."[22] It is a vision of state power that stands in sharp contrast to that put forward by sovereignty's champions and process federalists alike.

In cooperative regimes, states draw their power from their position as federal servants, not separate sovereigns.[23] As administrators of the federal regime, states often have a great deal of discretion in carrying out federal policies.[24] The policymaking space in which they wield power is not the separate regulatory carve-out imagined by champions of sovereignty and process federalists.[25] Instead, state policymakers wield power in the nooks and crannies of the administrative system.[26] Their power looks more like that wielded by a street-level bureaucrat than that exercised by a separate and autonomous government.[27]

In these areas, state power depends on integration, not autonomy, on interdependence, not independence.[28] States do not rule separate and apart from the system, and the power they wield is not their own. Instead, they serve as part of a complex amalgam of national, state, and local actors implementing federal policy. States thus wield the power of the insider, not the outsider.[29] In these areas, states are not exercising an exit option, but they enjoy a muscular form of voice—the power not just to complain about national

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OF GOVERNMENT IN THE UNITED STATES 60-63 (1966); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 87, 106 (Daphne A. Kenyon & John Kincaid eds., 1991); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344, 1346 (1983); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695-97 (2001); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668 (2001); Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, PUBLIUS, Spring 2001, at 15.

22. Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2634 (2006); *see also* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265 (2009). These issues are explored in greater depth in both of these pieces as well as in Gerken, *supra* note 7.

23. *See* Gerken, *supra* note 22, at 2635.

24. *See id.*

25. *See* Gerken, *supra* note 7, at 37.

26. *See id.*

27. *See id.*

28. *See id.* at 7.

29. *See id.*

policy but to set it.[30] Although states are not making policy of their own, they are part of an extremely important policy-making process —the one the national government controls. In sum, states wield power in cooperative federal regimes, but the power they wield is that of the servant, not the sovereign; the insider, not the outsider; that associated with voice, not exit.

One might, of course, wonder why this is a remotely plausible account of state power. Is the power of the servant a form of power at all? How important can it be to implement national policy when compared to enacting a policy of one's own? In a recent paper, I have argued that the power of the servant is quite important.[31] Just ask any administrative law scholar or indeed anyone who has written on the principal-agent problem. The power of the servant is different from that of the sovereign, but it is power nonetheless.

Though I have canvassed this argument extensively elsewhere,[32] to make the point here let me offer a small and necessarily stylistic set of examples of why the power of the servant matters. One reason that state servants are powerful is that the federal government depends on them to get anything done. They have a great deal of power to resist and contest the implementation of federal law. Think about the refusal of many states to implement federal environmental regulations, resistance that forced a policy change for the simple reason that the federal government could not regulate without the states.[33] Or consider the ways in which California has pushed the national government to shift its positions on emissions standards.[34] Or consider the efforts of Michigan and Wisconsin to hijack federal welfare policy, creating model regimes that helped pull down federal policy from within.[35] Or think about the ways in which states dramatically expanded the State Children's Health Insurance Program (SCHIP) in the process of administering it.[36] We

30. *See id.* at 7-8.

31. *See id.* at 33-44.

32. *See generally* Bulman-Pozen & Gerken, *supra* note 22; Gerken, *supra* 7; Gerken, *supra* note 22.

33. *See* Bulman-Pozen & Gerken, *supra* note 22, at 1276-77 n.64 (citing Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level,* 27 PAC. L.J. 1521, 1556-61 (1996)).

34. *See* Bulman-Pozen & Gerken, *supra* note 22, at 1277-78.

35. *See id.* at 1274-76.

36. *See id.* at 1281-82 (citing ELICIA J. HERZ ET AL., CONG. RESEARCH SERV., RL 30473,

see state-level variation even in routinized regulatory regimes, including the state administration of OSHA and Social Security.[37] In each of these examples, the state's power to depart from federal standards—to push back, even to resist—exists because the state is inside the system, not outside it.

Servants are also powerful precisely because they can take advantage of the web of connective tissues that binds the periphery to the center.[38] Moreover, insider status gives state officials standing—in the colloquial sense—to challenge the center. They can voice disagreement from within the system, base their claims on shared expertise and experience, and cast that dissent in terms readily comprehensible to the relevant decision makers. Further, as Jessica Bulman-Pozen has pointed out, state servants possess not just the opportunity to challenge federal policy but the means to do so.[39] As insiders to the policy-making process, state officials—in contrast to most reformers—have access to the information and expertise they need to make good on their challenges.[40]

Servants can also set the agenda, forcing the majority to engage by enacting a policy the majority dislikes. Although we conventionally imagine free speech to be a sufficient channel for disagreement, the majority always has the power not to engage with the dissenter. Consider the iconic image of an individual exercising his First Amendment rights: someone standing on a soap box. Most people simply walk on by. The safest course for those who control national policy will almost always be not to engage with dissenters. Radio silence is a strategy used by the powerful.

States enmeshed in a federal regime thus enjoy a unique power vis-à-vis the national government. Because they are inside the national policymaking regime rather than outside, they can force the majority's engagement by implementing national policy in a

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STATE CHILDREN'S HEALTH INSURANCE PROGRAM (SCHIP): A BRIEF OVERVIEW 4-9 (2008)).

37. *See* Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 143-44 (Michael W. Dowdle ed., 2006). *See generally* John T. Scholz et al., *Street-Level Political Controls over Federal Bureaucracy*, 85 AM. POL. SCI. REV. 829 (1991).

38. *See* Gerken, *supra* note 7, at 39.

39. *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. (forthcoming 2012).

40. *See id*.

fashion that the center would reject. So-called cooperative federalism thus allows states to engage in what Jessica Bulman-Pozen and I have termed "uncooperative federalism."[41]

Finally, state servants are powerful because they serve two masters, not one—they have a power base that is different from that of the federal government. The most noteworthy examples arise when state politicians end up serving a nominally bureaucratic role. For example, Republican Governors Tommy Thompson and John Engler were charged with administering federal welfare law that had been enacted by a Democratic Congress.[42] They used that power not to further the statute's goals but to create welfare-to-work systems that would ultimately help topple the existing national program.[43] Even when state technocrats are the key decision makers, they often owe their appointments to political actors who may have quite different commitments and goals than federal decision makers.

C. Federalism(s) in Practice

The preceding Sections demonstrated that we can identify at least three different models of state power running through federalism theory: (1) the de jure autonomy associated with the sovereignty account; (2) the de facto autonomy associated with process federalism; and (3) the power of the servant, which is the best account of state power within a cooperative federal regime.[44] Importantly for purposes of this Article, each finds a number of real-world cognates. For example, states enjoy something akin to sovereignty in limited circumstances, such as when they are structuring their own governments,[45] fending off federal efforts to commandeer their staff,[46] or regulating where the federal government lacks authority to act.[47]

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41. *See generally* Bulman-Pozen & Gerken, *supra* note 22.
42. *See id.* at 1274-75.
43. *See id.* at 1274-76.
44. *See supra* Parts I.A-B.
45. *See* Coyle v. Smith, 221 U.S. 559, 563 (1911).
46. *See* Printz v. United States, 521 U.S. 898, 933 (1997).
47. *See* United States v. Lopez, 514 U.S. 549, 551 (1995).

A great deal of state regulatory activity fits the picture put forward by those who favor the autonomy model. States enjoy substantial regulatory power and independence in areas like criminal law, family law, public health, election administration, corporate law, and the like. Although the federal government can and does occasionally intervene, for the most part national policymakers have left these regulatory arenas to the states.

Finally, states serve as powerful federal servants in a wide swath of policymaking arenas, including environmental law, health insurance, welfare policy, consumer protection, financial regulation, and telecommunications. In these areas, the states are not sovereign or even autonomous in the traditional sense.[48] Instead, they serve as administrative units carrying out federal policy.

II. WHY PLURALISM MATTERS

Both in theory and practice, then, there are many federalisms, not one. As soon as one states this point, it seems obviously true, even banal. Yet much federalism scholarship proceeds on the implicit assumption that we do, indeed, need one theory to rule them all. Larry Kramer begins his article *Understanding Federalism* with the observation that "[t]alking about federalism feels a bit like joining the proverbial blind men trying to describe an elephant."[49] It would be helpful if every federalism article began with this caveat.

To be sure, the typical federalism scholar does not state explicitly that we must have one theory to rule them all. But, as others have

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48. At some level, of course, state servants enjoy autonomy in some narrow sense because they enjoy the discretion to make decisions in implementing federal policy. But as Jessica Bulman-Pozen and I have pointed out elsewhere:

> [T]his autonomy is quite different from that typically contemplated by federalism scholars. The servant's power to decide is interstitial and contingent on the national government's choice not to eliminate it. The servant thus enjoys microspheres of autonomy, embedded within a federal system and subject to expansion or contraction by a dominant master. That is not the sort of autonomy typically invoked by federalism scholars, who emphasize separateness and independence, the state's ability to govern without interference from the federal government.

Bulman-Pozen & Gerken, *supra* note 22, at 1268.

49. Kramer, *supra* note 14, at 1485.

observed,[50] too often academics write as if our options were mutually exclusive. Consider, for instance, the debate between the champions of sovereignty and the process federalists. Presumably because most of this debate has centered on judicial decisions, scholars often write as if we must make a choice, once and for all, between these two visions of state power. So, too, scholars often write as if cooperative federalism does not exist. The problem is not so much outright hostility toward cooperative federalism—though there is some[51]—but rather benign neglect.

The cramped nature of ongoing federalism debates provides perhaps the best evidence that academics write as if there is one federalism, not many. Below I identify three shortcomings in current debates, all of which stem from the propensity of academics to write as if we require one theory to rule them all.

A. Forms of State Power: Substitutes or Complements?

The debate between the advocates of the sovereignty model and process federalists offers a good example of why scholars would do well to pay more attention to our many federalisms. As Ernest Young has observed, this debate has typically had an all-or-nothing quality to it.[52] As a result, scholars have long overlooked sensible, middle-ground positions between its two poles. When scholars urge us to adopt one theory or another, the implicit assumption behind these arguments is that these different forms of power are substitutes for one another. Scholars usually write as if process federalism will undermine state sovereignty or vice versa.[53] In some

50. *See, e.g.*, Young, *supra* note 15, at 1350.

51. *See, e.g.*, Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559 (2000). Some evince no hostility toward cooperative federalism but simply believe that it does not count as federalism. *See, e.g.*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994) (arguing that a federal system is not one in which states function as "mere administrative units" of the federal government); *see also* Rapaczynski, *supra* note 15, at 416 (arguing that radically limiting the ability of states to tax would "make a mockery of the federalist concerns"). At the very least, cooperative federal regimes are so sufficiently outside conventional understandings that even scholars who classify these institutional arrangements as federalism nonetheless feel it necessary to defend this view. *See, e.g.*, Jackson, *supra* note 18, at 2219.

52. *See* Young, *supra* note 15, at 1350.

53. *See id.* at 1373.

instances, of course, this view is surely correct. But we have not been sufficiently attentive to the possibility that these forms of state power can also serve as complements, not just substitutes.

When the rare scholar attends to this possibility, he or she often comes up with a sensible middle-ground proposal, and often an influential one at that. Consider, for instance, Roderick Hills's astute argument that granting states formal protections from certain kinds of federal intrusions might actually serve rather than undermine the basic aims of process federalism.[54] On Hills's view, preventing the national government from commandeering state officials forces the national government to purchase rather than seize state services and thus creates the right conditions for the federal-state bargaining lauded by process federalists to take place.[55]

Similarly, think about Ernest Young's claim that judicial intervention might be helpful for process federalism. As Young observes, "[T]he debate over judicial review has taken place at the extreme end of the range of possible options.... [It] has generally been over whether we should have *any* judicial review or *none* at all; between *total* reliance in the political process to protect federalism or anything short of that."[56] Young suggests we rely mostly on the political process to protect state power while keeping "some judicial review ... as an ultimate backstop."[57] He describes his proposal as a "*Democracy and Distrust* for federalism doctrine—that is, a doctrine of judicial review constructed to protect the *self*-enforcing nature of the federalist system."[58]

Finally, consider Timothy Zick's argument that sovereignty matters even in those areas in which the states and federal government are engaged in the type of political bargaining touted by process federalists. Zick claims that sovereignty

> results in deference to and respect for states even though the Constitution does not mandate this in express terms; even though, in fact, Congress, for example, is not required to defer

54. *See* Hills, *supra* note 20, at 816.
55. *See id.* at 819.
56. Young, *supra* note 15, at 1350.
57. *Id.* at 1351.
58. *Id.* at 1395.

> or desist. Sovereignty allows the states to bargain and negotiate *as if* they occupied a position of more or less equal bargaining power.[59]

As with Hills's and Young's arguments, this point emerges only when one recognizes that it is possible for many forms of federalism to coexist.

Even outside of the sovereignty/political process debate, we see instances in which different forms of state power can serve as complements and not just substitutes. Scholars like Larry Kramer have written about what one might call the ex ante safeguards of federalism—the ways in which state officials can lobby federal officials who are passing a bill or enacting a regulation.[60] Cooperative federalism, however, extends the time horizon for states to influence federal policies.[61] It gives state officials a chance to shape federal policy *after* interest-based bargaining has concluded, providing what Jessica Bulman-Pozen and I have termed an "ex post safeguard[] of federalism."[62] Because states are insiders to the system, they have more than one bite at the apple[63]: they can influence federal policy when the statutes or regulation is passed, and they can influence federal policy once the scheme is put in place by virtue of the fact that they administer it.[64]

B. The Neglect of Cooperative and Uncooperative Federalism

Here is another example of a scholarly blind spot in federalism debates: constitutional theory's out-and-out neglect of the constitutional dimensions of cooperative federalism. Public law scholars and social scientists have long paid attention to cooperative federalism,

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59. Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 333-34 (2005). Ernie Young has similarly argued that sovereignty can play a useful role in maintaining the models of federalism that are typically cast as antithetical to the sovereignty model (process federalism, cooperative federalism, and the like) and urges scholars to recognize sovereignty's utility outside the ambit of dual federalism. Ernest A. Young, The Puzzling Persistence of Dual Federalism (2011) (unpublished manuscript) (on file with author).

60. *See, e.g.*, Kramer, *supra* note 14, at 1493; *see also* Kramer, *supra* note 8, at 279.

61. Bulman-Pozen & Gerken, *supra* note 22, at 1292.

62. For further exploration of this idea, see *id.*

63. *Id.* at 1293.

64. *See id.*

but constitutional theory has been slow to absorb these insights.[65] It has instead been modeled on the idea that states enjoy power by virtue of having an exit option, the ability to regulate separate and apart from the national government.[66] This vision of state power—shared by process federalists and sovereignty types alike—turns on autonomy and separateness rather than interdependence and integration, which are the hallmarks of cooperative federalism.[67] Constitutional theory rests on the assumption that federalism is intended to give states regulatory power over their own domains;[68] cooperative federalism, in sharp contrast, features a powerful national government with its finger in every pie and states wielding power that is not their own.[69] Constitutional theory emphasizes the importance of preserving an exit option for the states; cooperative federalism turns states into insiders, not outsiders.[70] As a result, constitutional law scholars have not just neglected cooperative federal regimes—some have gone so far as to question whether such regimes can be properly classified as federalism in the first place.[71]

Because of this neglect, constitutional theory lacks the tools it needs to analyze cooperative federal regimes. In these administrative structures, states are servants, not sovereigns or even autonomous entities.[72] States are not presiding over their own empires; they are administering someone else's. Even in the areas in which, at first glance, states seem to enjoy a robust form of autonomy, in fact they are often regulating in the microspheres left open by federal law.[73]

Recently, a small but burgeoning group of scholars has begun to argue that constitutional theory requires new conceptual tools to

65. For an in-depth analysis of this idea, see generally Gerken, *supra* note 7.

66. *See id.* at 7.

67. *See id.*

68. *See id.*

69. *See id.* at 19.

70. *See id.* at 14.

71. *See, e.g.*, Rubin & Feeley, *supra* note 51, at 944. *But see* Jackson, *supra* note 18, at 2219 ("A federal system might simply provide for the existence of two levels of government, with independently elected leaderships, in which the national-level government had plenary legislative jurisdiction and the subnational level had principal administrative responsibilities.").

72. *See* Gerken, *supra* note 7, at 14.

73. *See* Bulman-Pozen & Gerken, *supra* note 22, at 1268.

analyze cooperative federal regimes.[74] Much of this work emphasizes the ways in which cooperative federal regimes promote the same aims as federalism even though the power states wield looks nothing like the model that dominates constitutional theory. Just as constitutional theorists argue that an exit option allows states to serve as laboratories of democracy, sources of innovation, and regulatory rivals, scholars have recently pointed out that *joint* regulation can promote mutual learning, healthy competition, and useful redundancy.[75]

My own work has examined the uncooperative dimensions of cooperative federalism and the administrative dimensions of these bureaucratic arrangements. It has thus limned the ideas that make up the other half of constitutional theory—those that emphasize the role that states can play in shaping identity, promoting democracy, and diffusing power.[76]

Let me provide several examples in which the dominance of the exit paradigm—the notion of state power that runs through both the sovereignty model and process federalism—has limited our intellectual resources for working through a set of problems that often arise in the context of federalism debates. The first goes to the oft-stated claim that one of the purposes of federalism is to check the national government.[77] Indeed, it is commonplace to argue that national power is diffused in two ways, one horizontal and one vertical. But there is a curious difference between the ways we understand these institutional arrangements. At the horizontal level, we have long had two competing theories about how to check a government.[78] The first, separation of powers, depends on autonomy and independence. Power is diffused by having institutional actors swim in their own lanes and carry out policy in their own independent spheres. The second, checks and balances, depends on integra-

74. *See, e.g.*, Gerken, *supra* note 7, at 19-20 & n.50 (discussing this work).

75. *See id.* at 20.

76. For further discussion, see *id.*

77. This argument is drawn from Gerken, *supra* note 7, at 33.

78. These arguments are rooted in the competing positions articulated by Montesquieu and Madison. *Compare* THE FEDERALIST NO. 51, at 318 (James Madison) (Clinton Rossiter ed., 2003), *with* MONTESQUIEU, THE SPIRIT OF THE LAWS 156-66 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748). For an overview of the contemporary debate, see generally M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

tion and interdependence. Power is diffused by creating a messy structure of overlapping institutions that depend on one another to get anything done.

One model dominates the debate on the vertical diffusion of power: the exit account endorsed by process federalists and sovereignty types alike.[79] This exit account is the natural cognate to the separation of powers. Both turn on the notion that power diffusion hinges on independence, not interdependence. And both turn on formal accounts of separate policymaking spheres. Both envision power as the ability to control one's own empire. Both tend to focus on who gets to play the trump card when the center and periphery tussle—when the trick is to figure out who possesses which power, and the game ends when the trump card is played.

Absent from federalism theory is a fully theorized competing approach, the cognate to the checks-and-balances model. We do not think of voice—not even the muscular form of voice that allows for rebellious state policymaking—as a strategy for checking the national government. That is true even though the states and the federal government are often as integrated as the three branches. And yet we continue to emphasize federalism's hierarchical dimensions rather than imagining federal-state relations as we do the relations between the three branches—as a system that mixes conflict and cooperation to produce governance.

If we imagine states checking the center by exercising a muscular form of voice—challenging and resisting federal law from *within* rather than making policy outside of it—the salience of the checks-and-balances model becomes evident. As with the checks-and-balances model,[80] an account of federalism oriented around voice would suggest that power relations are contingent and fluid, so debates over jurisdicitional lines are, in some senses, beside the point.[81] And the inquiry does not end—as it does with an exit

79. *See supra* text accompanying note 19.

80. *Cf.* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 603 (1984) ("The imprecision inherent in the definition and separation of the three governmental powers contributes to the tensions among them.").

81. Alex Aleinikoff and Robert Cover begin with a very different example—federal-state interactions in the habeas context—but propose a similar conception of federalism, one "premised upon conflict and indeterminacy ... in which neither system can claim total sovereignty." Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas*

account of federalism and the separation of powers[82]—with the conclusion that one institution gets to trump another.[83] Cogovernance is instead the model: an ongoing, iterated game in which what matters is how the two institutions partner with one another. The key is not to figure out who wins but to figure out how to maintain a healthy tension between state and national institutions.

Just to ground this a bit more, let me give a concrete example of the potential payoff associated with thinking in these terms. There is a seemingly endless debate on how to strike the balance of power between the states and federal government.[84] Those who worry about state power almost invariably propose an exit option: enlarging the policymaking empires over which states preside. And although some—like the dissenters in the anticommandeering cases[85]—invoke the interests of the state in challenging an exit-like solution, they do not even have a vocabulary to make that claim, let alone a familiar set of arguments to rehearse. In *Printz v. United States*[86] and *New York v. United States*,[87] for instance, the majority drew upon a deeply intuitive, historically rooted argument about the value of sovereignty, of preserving an exit option for the states. While the dissenters were feeling their way around some of the arguments I have discussed, they made those arguments piecemeal instead of drawing upon a well-established doctrinal analogue like checks and balances in making their case.[88]

Corpus and the Court, 86 YALE L.J. 1035, 1048 (1977).

82. *Cf.* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 94 (2009) ("Dualist federalism is a zero sum game, a battle over territory that demands a victor.").

83. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1736 (1996) (arguing that the checks-and-balances approach simply focuses on "maintaining a basic equilibrium among the branches" rather than on allocating particular powers to particular branches)*; cf.* Strauss, *supra* note 80, at 604 (arguing that the checks-and-balances approach reflects "a process not an institution, with impermanence of resolution not only inevitable but desirable as an outcome").

84. *See supra* Part I.

85. *See, e.g.*, Printz v. United States, 521 U.S. 898, 943 (1997) (Stevens, J., dissenting) ("There can be no conflict between ... duties to the state and those owed to the Federal Government because Article VI unambiguously provides that federal law 'shall be the supreme Law of the Land,' binding in every state.").

86. *Id.* at 918-19 (majority opinion).

87. 505 U.S. 144, 156 (1992).

88. *See, e.g.*, *Printz*, 521 U.S. at 946-47 (Stevens, J., dissenting).

Here is another example in which constitutional theory has missed an important insight due to its neglect of cooperative federalism. Scholars have argued that the separation of powers safeguards federalism.[89] But no one has thought to argue the reverse. That is unsurprising given the dominance of the exit model in federalism debates. Within constitutional theory, states are simply understood to be *outside* of the national system and thus irrelevant to the distribution of power *among* the three branches of the federal government.[90]

Jessica Bulman-Pozen, however, has recently argued that in cooperative federal regimes, states *can* play an important role in maintaining the balance of power and checking a too-powerful executive branch.[91] Because states help administer federal policy, they can serve as "champions of Congress, both relying on congressionally conferred authority and casing themselves as Congress's faithful agents."[92] As Bulman-Pozen observes,

> when we turn our attention to cooperative federalism, the distinctive way states foster the separation of powers becomes visible. Cohabitating a statutory scheme with the federal executive, states challenge not the raw exercise of federal power, as traditional accounts of federalism would have it, but rather the faithfulness of the executive to the statutory scheme.[93]

It is not just constitutional theory that would benefit from greater attention to cooperative federalism. Consider the work of Abbe Gluck in the field of legislation.[94] Whereas the work described above concerns the distribution of power between the states and federal government, Gluck's work attends to the interpretive questions that arise in cooperative federal regimes. For instance, in *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, Gluck argues that legislation theory and doctrine have simply neglected the fact that "[e]very branch of state government is ... in the midst of creating,

89. *See, e.g.*, Clark, *Separation of Powers, supra* note 18, at 1323-26.
90. *See* Gerken, *supra* note 7, at 34.
91. Bulman-Pozen, *supra* note 39.
92. *Id.* (manuscript at 3).
93. *Id.*
94. *See* Gluck, *supra* note 3.

implementing and interpreting federal statutory law."[95] As a result of this neglect, writes Gluck, "we have virtually no doctrines or theories that acknowledge, much less account for, the role of state implemented in the hermeneutical project of federal statutory construction," nor "do we have any doctrines that recognize, much less negotiate, the relationship between state and federal agencies" with concurrent authority.[96]

Gluck's work on cooperative federalism even offers a potential lesson for constitutional theory. Adam Cox has argued that the best explanation for the Court's anticommandeering rule is as an expressive norm, one that "preserv[es] and reinforc[es] public perception of the states as credible alternative political institutions."[97] Interestingly, Gluck sees expressive dimensions in cooperative regimes, which arguably fall at the other end of the state power spectrum. She argues that federal regimes that allow for both state-run and federal-run programs have expressive dimensions because they acknowledge the states' traditional role in regulating in a policy arena even as the federal government moves into it.[98] In this way, she claims, these schemes can be both "boundary shifting" and "federalism respecting."[99]

What is noteworthy about all of this work is how recent it is. Cooperative federalism has long been a subject of scholarly attention, but it is only recently that constitutional theory has paid attention to the ways in which cooperative regimes serve as sources of innovation and regulatory competition. We have thought about the role states play in checking the national government since Madison, but it is only recently that we have paid attention to the uncooperative dimensions of cooperative federalism. We have spent decades identifying the best institutional strategies for checking a powerful executive, but it is only in 2011 that a scholar directed our attention to the role states can play in doing so. We have long written about the ways that federal administrative agencies inter-

95. *Id.* at 537.
96. *Id.* at 537-38.
97. Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1312 (2000).
98. Gluck, *supra* note 3, at 585.
99. *Id.* at 586.

pret federal law, but the ways in which *states*' agents do so had been neglected until last year.

C. Context, Not Contests

One might respond that even if federalism scholars have neglected certain topics in the field, that neglect has been benign. On this view, federalism scholars *should* write as if we require one theory to rule them all. Much of federalism scholarship has centered on the case law. And in a given case, of course, courts typically do end up choosing one theory or another.

That answer, however, strikes me as insufficient. In the legislative and administrative arenas, there is no requirement that we adhere to a single model of federalism. And, indeed, we do not. As noted above,[100] every flavor of federalism can be found somewhere in our system. We talk about "Our Federalism," but in fact it would be more accurate to describe our system as "Our Federalism(s)."

Scholars may even overestimate how important it is for the *courts* to hew to a single theory of federalism. The Court has cycled between theories of federalism for the last forty years. Although the result has been some embarrassingly inconsistent opinions, one could certainly imagine an intellectually coherent account for why the Court would invoke the sovereignty model in some instances and an autonomy model in others.[101] So, too, one could easily imagine thinking differently about federal-state relations in the context of cooperative federalism than one does in the context of more conventional federal-state interactions.

I suppose one might reject pluralism on the ground that there is only *one* theory of federalism that adequately protects state power. Needless to say, such an argument would involve an extremely strong causal claim. To make such a claim, one would need to show not just that one's theory is superior in a given context but that it

100. *See supra* text accompanying notes 9-12.

101. For example, even ardent process federalists are willing to stipulate to the notion that states require some basic attributes of sovereignty that are enforceable in court. Some scholars believe that we need a guarantee that the national government will not respond to state challenges by dissolving the states and argue that such a guarantee defines the metes and bounds of federalism. *See, e.g.*, Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1335-44 (1994); Jackson, *supra* note 28, at 2217-19; Rapaczynski, *supra* note 15, at 362.

is superior across enough contexts to justify its adoption. Moreover, given that our current system embraces many forms of state power, one would also have to have some kind of account to explain why we have not yet gone to hell in a handbag.

I doubt that most scholars, when pressed, would insist on making claims as strong as these. Sovereignty types would surely acknowledge that not every area in which states regulate needs to be protected by formal rules.[102] Proponents of process federalism would surely recognize that the states require at least some formal protections against federal intrusion.[103] And although cooperative federalism has had an uneasy relationship with constitutional theory, few are interested in calling for its abolition.[104]

Instead, scholars' claims are best understood not as strong causal claims about the imperatives associated with one vision of federalism or another but as claims about how best to balance these three models of state power. The arguments are not about which theory ought to rule them all but about whether and when courts or policymakers should put their thumb on one side of the scale or the other.

Even here, we can see the impulse to emphasize one theory over others. These claims are typically cast as arguments for "more" sovereignty protections or "less" reliance on the courts to police federal-state relations. This type of argument, though, inevitably boils down to claims about balancing costs and benefits. Such arguments are thus highly likely to turn on contingency and context; it is hard to imagine resolving any such debate at the high level of generality at which these arguments are typically pitched. Scholars ought to spend more time on context and contingency. After all, any argument about the need for "more" of one approach or another implicitly assumes that it is acceptable for some federal-state interactions to fall outside one's preferred model. Once one has offered that concession, it is hard to imagine that one could write sensibly about the right outcome in a given case without taking into account the policymaking arena in which one operates.

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102. *See, e.g.*, Zick, *supra* note 59, at 333-34.
103. *See, e.g.*, Young, *supra* note 15, at 1350, 1395; *see also* sources cited *supra* note 101.
104. *But see* Greve, *supra* note 51, at 559.

And yet scholars continue to make these arguments in markedly generic terms.[105]

Were scholars to write in this more pluralist vein, arguments about federalism would be less about contests and more about context. We would not see intellectual death matches between different accounts of state power but would instead encounter nuanced claims about what form of state power is most appropriate in a given circumstance. Debates would involve not an either/or but a both/and.

CONCLUSION

Federalism debates have long proceeded on the assumption that we require one theory to rule them all. The premise is questionable, and the results have been at least mildly disappointing. Although we have certainly had a full vetting of some issues in constitutional theory, we have missed too much. Because scholarship has proceeded on the assumption that different forms of state power are substitutes for one another, we have not thought hard enough about the ways in which they might be complements. Because scholars have focused so heavily on state sovereignty and autonomy, we have missed the many ways in which the states' roles as servants can serve the overarching goals of federalism. Because debates about federalisms have been pitched as contests between different theories, we have not paid sufficient attention to the context in which one account or another is most likely to succeed. Perhaps now is the time to think harder about Larry Kramer's elephant metaphor.[106]

Such an approach would certainly be more in keeping with the spirit of federalism scholarship generally. One of the most deeply admirable things about federalism scholars is that they recognize that the *ends* of federalism are plural. It is thus odd that so many members of the field still spend an inordinate amount of time writing as if there is only one *means* to those varied ends. A wee bit of pluralism on the means side of the debate would be most welcome.

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105. I have done so myself. *See* Gerken, *supra* note 7, at 71.

106. *See supra* text accompanying note 49.