

**NATIONALISM AS THE NEW FEDERALISM (AND FEDERALISM AS THE NEW NATIONALISM): A COMPLEMENTARY ACCOUNT (AND SOME CHALLENGES) TO THE NATIONALIST SCHOOL**

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INTRODUCTION

When Heather Gerken asks you to get in a car, you go along for the ride. Sometime later, however, you may find yourself asking, “Why am I here?” and, then later, “Where exactly is this force of nature taking me?”

I have had the good fortune of being placed in precisely this situation, having been generously included as a fellow traveler in Professor Gerken’s account of the new “Nationalist School” of federalism.<sup>1</sup> I puzzle sometimes over whether I really belong here and where exactly the car is going. My own account of modern nationalism is more state-centered—more traditionally “federalist”—than that of the Gerken pack, although as I will detail, I believe my account is complementary to, rather than in conflict with, theirs. But the Nationalist School also has some more work to do to define its theory of nationalism and what differentiates it from what came before. It also lacks a doctrinal component, apparently intentionally, and so runs the risk of adding to the doctrinal nebulosity of a field—cooperative federalism—whose legal principles can only be described as twenty years of mush.

With the caveats that this is only a preliminary take on what is likely to be years of debate and that my own views are more in common with, than different from, those of the nationalists, this Article develops the flip side of the Gerken account—a flip side that I call “nationalism as the new federalism”—and challenges the Nationalist School to do more to back up its theory and not to give up on the doctrine.

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1. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1918 (2014).

I. THE FLIP SIDE OF THE GERKEN ACCOUNT: *NATIONALISM* AS THE NEW  
*FEDERALISM*

The essence of Professor Gerken's argument is that federalism now serves "ends" not traditionally associated with federalism at all.<sup>2</sup> These ends include enabling a voice for minorities—contra those who have historically viewed federalism as suspiciously associated with racism—and a policy churn that results in national (i.e., sometimes uniform and preemptive) "best" solutions to vexing issues of the day—contra the textbook account of federalism as preferring and entrenching ongoing interstate variation.<sup>3</sup> Her argument also rests on a "competing vision of state power."<sup>4</sup> As Professor Gerken so provocatively puts it, her account does not depend on state sovereignty but, rather, embraces the "power of the servant"—action at the local, even nongovernmental (e.g., juries) level or actions by states acting under the control of federal law. Professor Gerken argues that, so understood, federalism is the new nationalism<sup>5</sup>: federalism is simply a "means" to the more important national "end."<sup>6</sup>

My own work offers a somewhat different take on the same descriptive landscape—and this is what, at times, causes me to wonder how I got into Professor Gerken's car in the first place. Both of us are driven in part by the undoubtedly broad reach of national power today. We agree that Congress's lawmaking reach—provided that it structures its statutes correctly<sup>7</sup>—is now essentially unlimited with respect to the areas into which federal statutory power can go, including into areas of traditional state control, such as health and education. As a result, both of us view as the central question of modern federal-state relations not whether Congress can displace state law but, rather, how to conceptualize the role of the states within this federal-law-dominated legal landscape.

But I see an opportunity for *state power itself* within these national statutory schemes—power for *states qua states*—and not just a type of state activity designed to further nationalist ends. I have previously described this as

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2. Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 998 (2014).

3. *Id.* at 1003.

4. *Id.* at 998.

5. *Id.* at 997.

6. *Id.* at 998.

7. For example, the ruckus over the Commerce Power in the 2012 constitutional litigation over the Affordable Care Act, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012), would have been avoided had Congress simply used the Taxing Power to more directly accomplish its goal of bolstering the insurance industry in the face of the ACA's major insurance reforms, instead of the more indirect (Commerce-Clause-based) route of requiring everyone to get insured.

“federalism from federal statutes,” how states effectuate traditional federalism goals from the inside of federal law rather than by standing apart from it.<sup>8</sup> This is a very different conceptualization of federalism’s domain, and of its modern source, from the traditional account, but it is still a *federalism* conceptualization. I still see the states acting *as states* (and not just the Gerkenist loci for contestation and accommodation, which might not depend on these local actors being “states” at all), but doing so in a new venue. This federalism’s primary source is *Congress* and its primary domain is federal statutory law.

States now gain, not lose, from their inclusion in federal statutes as frontline administrators of federal law and—contra the position of the traditional federalists—states lose when they are left out of federal schemes altogether. States lose via exclusion because, as (federalist) Ernest Young puts it, without federal-law responsibilities, states will not have “[anything] meaningful [left] to *do*.”<sup>9</sup> In other words, the structural choice for major policy questions today is rarely—as traditional federalists would frame it—between federal regulation or state regulation. Instead, the choice is almost always between federal regulation *with* the states or federal regulation alone. Professor Gerken acknowledges this point, although she puts a national twist on it. In her Article, she posits “politics, not law” as “the real obstacle to uniformity”—an acknowledgement that Congress can fully preempt state law wherever it wants if politics allow.<sup>10</sup> I would push further to recognize that those same political considerations also incentivize Congress to *include* state actors in federal schemes, in ways that further ends that may sometimes be as federalist as they are nationalist.

For a concrete example, consider which of the following two federal programs has given states more policy influence, more autonomy, and even more sovereign lawmaking power: Medicare, the all-federal health insurance program for the elderly and disabled, or Medicaid, the federal health insurance for the poor, which is jointly administered by states and the federal government? States have had virtually no influence over the development of Medicare policy.<sup>11</sup> They pass no state laws to implement it, appoint no state cabinet members to run it, and their state courts have almost no jurisdiction over questions arising from it, despite the fact that large portions of each state’s citizenry are covered by it. In contrast, states have passed hundreds of

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8. Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 *FORDHAM L. REV.* 1749, 1749 (2013).

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

10. Gerken, *supra* note 2, at 998.

11. Gluck, *supra* note 8, at 1753, 1758.

*state* laws and *state* regulations; appointed *state* officials; and state courts have heard thousands of cases arising under *state law* as part of the states' role in Medicaid.<sup>12</sup> States have innovated in these efforts and, as a result, individual states have had an enormous influence on shaping Medicaid policy for the whole nation.

To be sure, when Congress enacted Medicaid and Medicare, Congress invaded—preempted and displaced—a legal domain (health) traditionally within the states' purview. But like Professor Gerken, I consider that initial question—the possibility of federal intervention in the first place—a ship that has since sailed. So let us ask the *next* question, the one more relevantly situated in federalism's current federal statutory domain: what would have been the result had Congress left the states out of Medicaid too? Or left the states out of the Affordable Care Act? *State law would essentially cease to be relevant on matters of health.* With these federal statutes Congress surely did take state power away with one hand; but with the other—indeed, simultaneously through the same action—Congress *preserved* the relevance and vitality of the state sovereign lawmaking apparatus in the health arena in ways that wholesale exclusion from the federal story simply could not have done.

Make no mistake: Medicare and Medicaid are both *federal* programs, and there is no legal difference between them when it comes to formal (constitutional) definitions of federalism. They are both federal law and preemptive. But it is no fluke that Medicare is called “Medicare” everywhere but that Medicaid is rarely called “Medicaid” in the states. Medicaid bears local names, such as “TennCare” in Tennessee, and “Husky Health” in Connecticut,<sup>13</sup> which provides explanatory evidence of these programs' very state-centered identities even though, as a formal legal matter, they are indistinguishable from “purely” federal programs (because they are federal statutes too). On the *ground*—both with respect to how the programs are experienced and also with respect to what legal apparatus (state or federal) is actually crafting the policy—these two fraternal twins are anything but identical. Medicaid doesn't give us “capital F” constitutional federalism,<sup>14</sup> but it is federalism to be sure.

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12. *Id.* at 1758, 1760, 1762.

13. See Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2007 (2014); *Connecticut's Health Care for Children & Adults*, HUSKY HEALTH CONNECTICUT, <http://www.huskyhealth.com/hh/site/default.asp> (last visited Apr. 26, 2015); *What's New with TennCare*, TENNCARE, <http://www.tn.gov/tennCare/index.shtml> (last visited Apr. 26, 2015).

14. Cf. WILLIAM N. ESKRIDGE & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (elaborating a theory of “small c” constitutional law created by statutory and administrative transformations).

I do not mean to imply that courts and scholars for decades have not acknowledged the prevalence of such “cooperative federalism,” of which Medicaid is a favorite example. Some traditional federalists have also come to recognize the state power to be gained from this interactive, rather than “separate spheres,” model of state-federal relations.<sup>15</sup> But even these more expansive inquires have not grappled with what is truly provocative about an account that recognizes that states exert their greatest powers from within federal statutory schemes: namely, that this federalism’s primary source—rather than its primary antagonist—is *Congress*.

In other words—and this where I offer the complement to the Gerken theorization—I see *nationalism* as the new (new) *federalism*.<sup>16</sup> Federalism—in the sense of state power, relevance, autonomy, and sovereignty—mostly comes and goes at Congress’s pleasure. It is a question, and feature, of federal statutory design. This is what federalism looks like in the “Age of Statutes,”<sup>17</sup> and it is a powerful account that the Nationalist School appreciates, often agrees with, but does not sufficiently elevate.

## II. SOME COMMON GROUND AND THE NATIONALISM-FEDERALISM CONTINUUM

In her Childress Lecture, Professor Gerken goes farther than she has in the past to emphasize the kind of modern, federal-statute-generated *state* power that I have described.<sup>18</sup> As such, hers is a more “federalist” account of the Nationalist School than previously offered, and creates a stronger bridge between our work. There is a second important link, too. The primary thesis of the Childress Lecture is the notion of a nationalism-federalism “détente.”<sup>19</sup> I would characterize this argument as a claim that the war is no longer worth fighting because there is now too much slippage between the categories for any battlefield to be identified.

And this emphasis on the collapse of the categories, I think, is a primary reason that I am along for the ride. Because I see federalism as a feature of federal statutory design, my view of federalism *necessarily* exists within nationalism and so cannot function without a more fluid conception of both federalism and nationalism. And distinct from the traditional conceptions of

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15. See Young, *supra* note 9, at 1375–86.

16. Distinguished from the *old* “new federalism” a term typically employed to describe the Rehnquist Court’s revival of dualism in constitutional and statutory cases.

17. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (developing a new theory of judicial review for the modern era in which statutes dominate the common law as our legal system’s primary source of law).

18. Gerken, *supra* note 2, at 997.

19. *Id.*

federalism and state power, my account of statutory federalism—because it is *optional* for Congress—is neither a constant presence nor an entitlement. This is federalism by the *grace of Congress*, and so it can appear in as many different forms as the number of federal statutes. It looks different and has various levels of strength across a wide continuum of laws. Some federal statutes are national all the way down, like Medicare, while others put states at the forefront, like the Clean Air Act, while still others lie somewhere in between.

Moreover, Congress's motivations in its statutory-design choices are likely to be multiple and sometimes in tension along the nationalism-federalism continuum. My early work on this subject advanced an argument quite closely aligned with Professor Gerken's argument today about federalism as a "means" to national ends. I argued that state implementation of federal law can serve as a tool of federal statutory encroachment and entrenchment. That argument turned on the understanding that, despite the formal equivalence (in terms of federal-law preemption) of federal statutes administered entirely by the federal government and federal statutes administered largely by the states, the federal legal intrusion *seems* less invasive and tends to be more politically palatable when states are given frontline roles, thereby facilitating national-law encroachment.<sup>20</sup> Deploying state implementers also facilitates national-law entrenchment, by enmeshing the federal statute in an often-newly-created web of *state* laws and *state* bureaucracy generated to implement it. So understood, enlisting the states to implement federal law helps federal statutes get passed and makes them harder to undo. This is not exactly the same concept as Professor Gerken's "federalism as the new nationalism" because hers is, in many ways, a less cynical account—one in which local voice and variation knit together a nation, accommodate difference, and often generate good national policy. But it is nevertheless an account of how federalism (within federal statutes) furthers national power.

But unlike Professor Gerken, I also believe that state power—as an *end* worth achieving itself—is being created in these federal schemes, often simultaneous with federal encroachment, for the reasons that I have described. Indeed, four years ago, Professor Gerken and I almost wrote an article titled: "Federalism as the New Nationalism and Nationalism as the New Federalism" (an article that did not materialize entirely due to my own distractions). That hypothetical piece, as evidenced by its title, would have both illuminated these differences across our work but also painted a clear picture of how our

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20. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 572–74 (2011).

accounts rely on the slippage across the categories and the way they operate simultaneously and in tension.

It would be an intellectual and accuracy loss for the emergence of the Nationalist School to obscure this counternarrative, perhaps better described as a complementary narrative. Even as federalism may be the new nationalism, nationalism is also the new federalism.

### III. THREE CHALLENGES FOR THE NATIONALIST SCHOOL

Regardless of whether I truly belong in this car—that is, whether I am a legitimate member of the “Nationalist School” (the answer depends on the extent to which the school is capacious enough to include a more state-centered account and a true continuum across the categories)—I think the new nationalists still have some significant theoretical and doctrinal groundwork to lay. Professor Gerken lets them (and herself) too easily off the hook: announcing the emergence of the new nationalism and simultaneously declaring the time to end the war it has emerged to fight has come, without doing some work to define, defend, and differentiate the new theory. This Section focuses on three areas for future deliberation. The first is the importance of the complementary side of the nationalist account, which I already have begun to detail. The second is the need for a much more developed theory of nationalism. And the third is a challenge to the Nationalist School to engage the doctrinal questions it seems to wish to avoid and to think more about how law can contribute to creating the kinds of democracy the nationalists envision. These are, after all, matters that go to the heart of our government structure and they should not be left to judicial improvisation.

#### A. *Federalism as Nationalism Tells Only Half the Story*

I already have detailed what I think, until now, has been a descriptive and theoretical weakness for the new nationalists; namely, their reluctance to fully embrace the complementary federalist component to their account. Professor Gerken’s Childress Lecture does much in this vein and so reduces my burden here. That said, it is worth pausing to further define features of the complementary account, beyond those already offered, in order to substantiate its significance.

##### 1. This Is Where Federalism’s (Not Just Nationalism’s) Key Debates Are Playing Out

One important feature of the other side of the Nationalist School’s theorization of the “federalism as nationalism” relationship is simply the greater legal prevalence of the opposite “nationalism as federalism” account. Federalism from federal statutes—nationalism as federalism—is the primary

kind of federalism that occupies the courts today and the domain in which the most important modern federalism debates are playing out. On the one hand, this prevalence offers a rebuttal to the traditional federalists, many of who refuse to acknowledge that federalism derives from federal statutes at all. But it also complicates new nationalist account, in two different ways.

First, these cases generally do not treat this kind of federalism as a “means to an end,” as Professor Gerken would.<sup>21</sup> Rather, these cases continue to emphasize the more traditional federalism value of the *states qua states*. They simply find the locus of federalism in the same modern statutory landscape from which the Nationalist School draws its more nation-centered account. One reason for this may be, as I detail below, that the legal community does not have any elaborated theory of nationalism that could be the basis of these cases in the first place, and the new Nationalist School has yet to provide one. It also may be because the majority of judges share my view of importance of assuring the enduring legal vitality of the *states qua states*.

But second and perhaps more importantly, this case law also substantiates the arguments of scholars like Ernest Young, who argues that, when it comes to federalism in the modern landscape, there is a “constitution outside the Constitution” formed by federal statutes that utilize state actors.<sup>22</sup> Those statutes and the state-federal relationships they create ultimately may have more relevance to our modern legal understanding of “federalism” than traditional constitutional law can offer. To this point, Young often cites a passage from a statutory interpretation/preemption opinion by Justice Breyer: “Indeed, in today’s world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at its edges . . . but in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.”<sup>23</sup>

Ready support for Justice Breyer’s conceptualization can be found in the recent United States Supreme Court docket. Of the twenty-six times that members of the Court invoked “federalism” over the three terms ending in 2013, all but five involved statutory—not constitutional—federalism of the kind I have described.<sup>24</sup> These were federalism questions that, unlike the constitutional variety, were not about whether Congress has the power to

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21. Gerken, *supra* note 2, at 998.

22. Ernest A. Young, *The Constitution Outside the Constitution*, 117 Yale L.J. 408, 410 (2007).

23. *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting); Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 254 (2012).

24. For details on all twenty-six references, see Gluck, *supra* note 13, at 2003–04.

regulate in a particular area but, rather, questions that asked what exactly Congress intended the role of states to be when it included states in a federal statutory scheme that all agree Congress had the power to enact.

Six of these mentions occurred in ordinary statutory interpretation/preemption cases. Preemption cases are cases about federal statutory design. They do not raise questions about Congress's power to legislate over state terrain, or even about its power to legislate on the particular subject at hand; they merely raise questions about how clearly Congress speaks to the particular issue in question. This category includes *Arizona v. United States*, the high-salience "federalism" challenge to Arizona's immigration law.<sup>25</sup> It also includes *City of Arlington v. FCC*, a fight over the federal telecommunications law. There, Justice Scalia's opinion for the Court—literally crying "faux-federalism" on behalf of the old-fashioned federalists—emphatically wrestled with but ultimately resisted the idea that "real" federalism comes into play in questions about the division of labor between state and federal agencies implementing the same federal statute.<sup>26</sup>

Another high-salience case, *Shelby County v. Holder*, concerned the special federal preclearance requirements applicable to only certain states under the Voting Rights Act.<sup>27</sup> The Court repeatedly used the term "sovereignty," but not to dispute the power of the federal government to interfere with the states' control over their own elections. Rather, the Court used the term to emphasize that "all the [s]tates enjoy equal sovereignty"—apparently *within* the confines of federal law.<sup>28</sup> Federal intrusion was not the main problem: the problem was the fact that it applied unequally (without justification, in the Court's view) to various states.

Another nine of the twenty-six "federalism" invocations, plus two more mentions only of "sovereignty," were habeas cases.<sup>29</sup> All of these habeas cases have a strong "federalism-by-the-grace-of-Congress" component: the interplay between state and federal law in many of these cases is a matter of federal statutory design, through Congress's *choice* in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to, in the Court's words, "promot[e] comity, finality, and federalism" by building deference to state procedures into the federal statute.<sup>30</sup> Other cases involved new doctrinal questions about how

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25. *Arizona v. United States*, 132 S. Ct. 2492, 2498–2501 (2012).

26. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013).

27. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618, 2619–20 (2013).

28. *Id.* at 2621–23.

29. Gluck, *supra* note 13, at 2003 n.23, 2004 n.25.

30. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011).

to parse and enforce state and federal power within statutory schemes outside of the habeas context.<sup>31</sup>

Professor Gerken resists seeing this inextricable connection between statutory-interpretation law and the kind of constitutional-democracy law she argues she is developing. She contends that my preoccupation with the law of legislation as federalism's primary modern domain is different—and in her view less complex—than the questions “about which most of the new nationalists write (those involving constitutional interpretation and democratic design).”<sup>32</sup> I resist this distinction. Professor Gerken herself acknowledges that federal statutes are the primary frameworks of her new nationalism and so, for her too, much of the time, “democratic design” is by definition, *statutory* design. It is not the Constitution that is creating the federalism here, nor is it the Constitution that is being interpreted.

I think the real difference between us is that Professor Gerken is most preoccupied with the normative question of *when* Congress should legislate preemptively, whereas I would leave that question to the political process and focus instead on the question of how to effectuate statutory meaning and elevate state power when Congress does choose to design statutes with state roles. But these are all questions about the law of statute-making. It would be a different endeavor altogether to instead try to create a brand new theory to govern *when* Congress should legislate in the first place and when Congress should resist using its acknowledged power. That might be a new layer of constitutional law, and perhaps is a seed in Professor Gerken's mind, but it is not an argument that she directly takes on her lecture.

## 2. This Is Where Federalism's Textbook Values Are Being Realized

Another important feature of the flip-side account (nationalism as federalism, rather than vice versa) is that it is in *this* context where we now see federalism's “textbook” values most often instantiated.

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31. See *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391 (2013) (raising the question, in the Medicaid context, of whose job it is—the state's, the federal agency's, or the Court's—to fill gaps in cooperative statutory schemes when the statute is silent); *Douglas v. Indep. Living Center of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (raising, but not answering, the question of whether California citizens could challenge their state's implementation of the federal Medicaid statute when the federal agency itself had not chosen to challenge the state's action); *Va. Off. for Prot. & Advoc. v. Stewart*, 131 S. Ct. 1632 (2011) (raising, but not answering, the question of Congress's “power to affect the internal operations of a State,” or to give state actors power they would not otherwise have under state law). For two cases about the state-federal relationship under the Spending Clause, see *Sossamon v. Texas*, 131 S. Ct. 1651 (2011), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

32. Gerken, *supra* note 2, at 1043.

a. State Sovereignty and Autonomy from Within Federal Statutes

I have already discussed how federalism from federal statutes maintains an important role for the state sovereign lawmaking apparatus, in comparison with Congress fully displacing state law. It also should be obvious that, in an era in which the only actual choice on major questions tends to be federal law administered by the federal government or federal law administered at least in part by the states, that in such an era states will *lose* autonomy by being excluded. Consider whether states would have more policy autonomy over education by coming up with their own plans under No Child Left Behind (NCLB) or more policy autonomy by staying out of NCLB altogether and having Congress impose a uniform solution. In the health care context, the states that have had the most policy control over Medicaid are the ones that chose to *participate* in the ACA's optional expansion of that program.<sup>33</sup> Those states have used that participation to shape the program in ways that fundamentally diverge from the President's own preferences, including privatizing it.<sup>34</sup> The states that have opted out of the expansion, by contrast, have had no such leverage to alter existing Medicaid policy in those states.

b. State Experimentation Happens More Within Federal Statutes Than Outside of Them

Turning now to federalism's most famous value—the well-worn cliché of federalism as enabling the states to act as “laboratories” of policy experimentation<sup>35</sup>—political scientists and other experts have long asserted that, Brandeis notwithstanding, states are not actually the ideal experimenters when forced to go it alone.<sup>36</sup> Experimentation is expensive, and states risk losing business by experimenting when neighboring states do not.

As it turns out, states do better experimenting under the protective cover of a federal law that levels the playing field and sometimes also provides helpful financing. I have elaborated these findings elsewhere, but for familiar evidence one need only look to some of most the famous state-led policy experiments of

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33. The Supreme Court in *NFIB v. Sebelius* ruled ACA's Medicaid expansion optional. It was originally designed by Congress as mandatory.

34. Arkansas is a prime example. See Sarah Kliff, *Arkansas's Unusual Plan to Expand Medicaid*, WASH. POST: WONKBLOG (Feb. 28, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/28/arkansas-different-plan-to-expand-medicaid/>.

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

36. Gluck, *supra* note 8, at 1764 (2013); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 610–11 (1980); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 924–26 (1994). For a general overview, see David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008).

our time—including air pollution policy and the Massachusetts health reform that was itself the model for the ACA. Contrary to popular understanding, these were not traditional “federalism” experiments but, rather, were *federally* financed and federal-law protected experiments, done *under* and as part of federal statutes—specifically, the Clean Air Act and Medicaid.<sup>37</sup>

c. Diversity and Local Variation Within Federal Statutory Law

The third common bucket of core “federalism” values is the value of local variation, the notion that we cannot rely only on national-level law because our polity is too diverse for one-size-fits-all policy. I return to this point in the next Part, but the important and primary response here is that national law today not only tolerates policy variation—even internal to a single federal statutory scheme—but actively encourages it. Federal legislation today often intentionally incentivizes states to implement federal law in different ways from one another. The ACA, for example, expressly posits that insurance markets organized under the Act will look very different in different states.<sup>38</sup>

d. Why Does No One Focus on the Local Work of State Government?

Of course, it is not my claim that state governments do not have any relevance outside of federal law. No one denies that state governments control local services and decide local regulatory matters, all in their sovereign capacity. That is the everyday work of local government, and it is certainly true that such locality brings government closer to the people in ways that are productive for democracy. But it is a very interesting puzzle that *that* kind of work—the local, everyday governing work—is not at all where even old-fashioned federalists train their attention or defend as the kind of sovereignty we must value or fight to protect.

A possible explanation for the lack of interest in these everyday matters is that such local work, though critically important to daily life, does not typically give states real “power” on the national scale. For federalism to do what federalists claim it is supposed to do—among other things, serve as a check on a large national government and give the people voice in the context of the larger nation—the states need to be able to exert some *power* on the national scale.<sup>39</sup> Thus, we can emphatically say that the states can have important relevance at the local level, even in isolation, but at the same time say that they

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37. Gluck, *supra* note 8, at 1763–65.

38. Gluck, *supra* note 20, at 589–90 (describing how the ACA promotes interstate variation).

39. And for federalism to do what the new nationalists claim it is supposed to do—allow for minority voice, accommodation of difference, and productive policy development—the “government” aspect of federalism is not even essential.

cannot have significant *national* power without being players in the federal statutory game.

### B. *Nationalism Without Theory*

Professor Gerken's account of federalism, as I have noted, is different. For her, federalism is a means to an end, and that end is "nationalism."<sup>40</sup> But what she and her fellow travelers mean by "nationalism" remains unclear, in part because they are not building on any historical foundation that preexisted their new school. Searching the Westlaw database for the term "federalism" yields more hits than the system can accommodate. Searching, on the other hand, for the term "nationalism," yields only a handful of results, which are mostly about patriotism and not at all about nationalism in any sense related to federalism or the context of this discussion.

#### 1. Nationalism Has to Mean More Than Uniformity

We have elaborated theories of "Our Federalism,"<sup>41</sup> but have no theory at all of "Our Nationalism," an omission that seems remarkable. Federalism is associated with the panoply of values already discussed—separation of powers, liberty, experimentation, variation, voice, and so on—while nationalism seems associated mostly with a single value: uniformity. And indeed, the word "uniformity" comes up 1407 times in the Westlaw Supreme Court database as a justification for congressional policies or for certain types of nationalizing judicial decisions.

Can that really be it? Uniformity as the defining and sustaining feature of our nationalism? If so, then nationalism is in trouble. Uniformity no longer seems a useful concept to anchor theories of nationalism because Congress now often desires *disuniform* implementation of national law and designs statutes with prominent roles for the states to accomplish precisely that. As detailed, values like experimentation, variation, and tailoring to local circumstances are now integral components of *nationalist* policy making too. So, if nationalism's value turns on uniformity, nationalism no longer has any distinguishing feature.

In my view, the new nationalists need to come up with a deeper account of what nationalism is—what nationalism is *for*. They must do this to complement our developed theories of federalism and also illustrate what they are fighting for. Even as Professor Gerken is marvelously provocative, her own theory of nationalism (along with that of others who align themselves with her on this front)<sup>42</sup> is, I think, somewhat conventional. Although I know she would

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40. Gerken, *supra* note 2, at 1007–09.

41. Younger, *District Att'y of L.A. Cty. v. Harris*, 401 U.S. 37, 43–45 (1971).

42. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and*

resist the characterization, Professor Gerken is, in an important sense, a uniformist herself. For her, nationalism is a means to an end—a policy churn that leads to an ideal national (i.e., single) policy decision.

At the Childress Lecture, Professor Gerken responded to this criticism with the contention that the new nationalists are not uniformists because, in a given circumstance, the “ideal” policy solution might be a policy of tolerating or encouraging local variation.<sup>43</sup> But understand that such an outcome—a federal statutory policy favoring local variation—would still be preemptive (just as a federal court’s choice to use state law as the rule of decision is still federal lawmaking). The rule that is chosen does not affect the identity of its source. Here, the “nationalist” solution is still a single, nationally chosen (preemptive) policy outcome, just one that endorses disuniformity.

The Childress Lecture offers another kind of response to the uniformity charge that may be more satisfying. The new nationalists also embrace “federalism as nationalism” for the way in which it creates institutional opportunities for minorities to participate in political decision-making, which Professor Gerken calls “dissenting by deciding.”<sup>44</sup> Consistent with Professor Gerken’s emphasis on new nationalism as essential to “a well-functioning democracy,” she seems motivated at least in part by the idea that allowing for some tolerable—but *controlled*—amount of policy churn and variation internal to the polity may be the best way to build a stable nation. This merit of federalism is not limited to the nationalist account, and so is not new (which of course doesn’t diminish it as relevant for Professor Gerken). Legal historian Allison LaCroix has told a similar story about the way that (traditional) federalism helped to knit together the polity in the early years of the nation.<sup>45</sup> Many other scholars have long extolled the internal diversity that can exist even within a single federal law,<sup>46</sup> another value implicit in the Gerken account. But Professor Gerken’s version is *supervised*; hers is a safer kind of policy churn, because it occurs within a federal floor or ceiling or at least under the watchful eye of a Congress that can always preempt.<sup>47</sup>

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*Popular Perspectives*, 123 YALE L.J. 2094, 2131–33 (2014).

43. Heather Gerken, Keynote Speech at the St. Louis University School of Law Childress Lecture (Oct. 24, 2014).

44. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

45. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2093 (2014).

46. For a classic example, see Paul J. Mishkin, *The Variousness of “Federal Law”*: *Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 828–32 (1957).

47. In some regard, Mishkin’s account is similarly controlled, because federal courts are always there to manage the internal diversity of federal law. See *id.* I do not dispute Professor Gerken’s claim that this is not so different from my account in the sense that my account—because it depends on Congress—“similarly involves a national decision about whether and how

This, however, leads to a different kind of problem for the new nationalists, namely, how to reconcile the competing values internal to the account. By strengthening national power, federalism as nationalism may ultimately make it *easier* for Congress to preempt local experiments when the sweet-spot/breaking point of policy churn occurs. So the big question is how the nationalists draw the line: when to unify and when to allow for local differences? Professor Gerken doesn't offer a theory of how to determine the ideal amount of policy churn and she does not argue that there is some determinate amount of internal variation that might generally be ideal. Rather, it all seems dependent on subjective preferences about the particular policy at issue. The new nationalists will tolerate policy churn until some "ideal" policy is developed or until the amount of internal variation becomes intolerable. So in the end, the answer again seems to lie in preemptive national policymaking one way or the other.

2. Is the New Nationalism Indistinguishable from States as Laboratories Federalism?

To my view, this new account seems not very different from the Brandeisian "states as laboratories" concept—the idea that states will experiment in ways that contribute to national policy-making by trying out different policy solutions that later may be adopted by the whole. Professor Gerken and similarly situated authors resist this association with Brandeis. But it remains difficult for me to see, apart from the use of the new label "nationalism" instead of "federalism," how the prescription for good democracy that Professor Gerken offers—each state doing its own thing with a goal of creating policy churn and space for diversity that may ultimately lead to positive national policy solutions—is all that different from this traditional federalism account. Professor Gerken argues that her account offers a more expansive set of benefits than the laboratories account, including the "benefits associated with playing out political conflicts in different settings with different power dynamics," or the benefits of "regulatory overlap"<sup>48</sup> and redundancy. But I read traditional federalism theory to have always included these benefits.

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far states can vary in their implementation of federal law." Gerken, *supra* note 2, at 1035 n.158. But my account fixates on federal statutes because they are how federalism is *generated*; it does not turn on the question of when federal statutes should be *enacted*. Professor Gerken fixates on the different question of what nationalism is *for* and much seems to rest on when and why that preemptive move is made. My critique here goes not to the descriptive aspect of the account, with which I largely agree, but rather to want of more developed principles of nationalism.

48. Gerken, *supra* note 2, at 1036.

My point is not that the value of Professor Gerken's theory depends on its identification of a never-before-seen benefit; it certainly does not. Rather, it is to put pressure on the new nationalists to explain how the "nationalism" aspect of their account adds to or changes the stakes of the benefits that we already understood to be generated by the states even acting outside of a national framework.

One difference, to be sure, is that the *source* of this federalism is different from Brandeis's, whether we call this modern-source federal statutes or use Professor Gerken's broader conceptualization of a federalism "without sovereignty."<sup>49</sup> But this particular difference does not seem to be driving Professor Gerken herself or what she would argue most distinguishes her view from Brandeis's. Maybe Professor Gerken's point is simply that old-fashioned, Brandeisian federalism *always* was necessary to create the space for national policy churn, tolerance for diversity of perspectives and, when appropriate, resolution of differences. If that is the case, federalism is not the new nationalism but rather was always nationalism in the first place.<sup>50</sup>

Professor Gerken also claims that her *goals* are different from what came before. This claim raises the age-old question of what federalism is "for." In her view, federalism is a *tool* for the national end; the states *qua* states are not important along the way except insofar as their state-iness makes them effective instruments in this endeavor.<sup>51</sup> But here, too, I wonder how deeply this differs from the view of the conventional federalists. This notion that federalism serves separation of powers, recognizes geographical diversity, and gives people voice—is that not also ultimately a vision in service of a national end?

In other words, at bottom, perhaps it is just different definitions (understated and under-developed on each side) of both the nature of the *states* as means and also of the particular ends that separate the two sides. With respect to the "means," the traditional federalists, as well as I, see something special in the state *qua* states, and the kind of state power we emphasize (I from within federal statutes, the traditionalists from without) is the kind of power perhaps uniquely available to government actors. For the Gerken camp, the same "means," *includes* states but does not seem limited by that category and might even include non-governmental organizations. The new nationalists do not seem concerned with promoting or preserving state power in the traditional sense.

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49. Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010).

50. LaCroix's excellent work suggests precisely this. See LaCroix, *supra* note 45, at 2093.

51. Gerken, *supra* note 2, at 999–1000.

With respect to the ends, the Gerkenists see them as facilitating the production of good national-level policy and limiting strife in an environment prone to internal differences. The old-fashioned federalists' ends are almost the opposite—they are skeptical of federal power and most interested in federalism as a tool that limits the reach of the national government that Professor Gerken would empower. But critically, here, both sides' ends are in service of a vision of how a *national* democracy should work.

### 3. There Is a Spectrum of Nationalism, Too

What we probably need is a theory of nationalism capacious enough to include both sets of views, just as I have argued that our new federalism likewise sits on a broad (statutory) spectrum. A theory of nationalism that is more complex might include both Professor Gerken's rosy view of the benefits of national policy and the more cynical view of the federal government sometimes using the states to facilitate its own encroachment.

The very idea of a more capacious theory of nationalism makes another important point, one central to my own conceptualization: nationalism today works to enhance state power *even as* it expands national power. As I have detailed, federal statutory law has an enormous capacity for internal variation. Congress also often drafts federal laws that incorporate state laws by reference, another way to build local variation and state influence into national law. For example, the Social Security Act incorporates the state law definition of family,<sup>52</sup> and so the Act not only operates differently across the fifty states but its meaning is influenced at its core by the (varied) development of state law.

There is a worthy parallel to draw here between the way in which Congress has thus expanded the reach of federal statutes and the way in which the federal courts themselves expanded on their own federal power in an earlier era. And of course, both branches' actions vis-à-vis the states are important to a complete understanding of nationalism today. Paul Mishkin's famous work on the "variousness of 'federal law'" made the case that, in filling gaps in federal statutes, the federal-common-law work of federal courts need not be, and in fact should not be, completely "federal" in nature.<sup>53</sup> Drawing instead on the traditional "federalism" values, including local variation and the background norm of federal restraint, Mishkin argued that consideration of those values should drive federal judicial decisions about when to take state law as the rule of decision—for example, applying a state-law definition for an

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52. 42 U.S.C. § 416(h)(1)(A)(i) (2006) ("An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files and [sic] application . . .").

53. Mishkin, *supra* note 46, 828–32.

undefined federal statutory term. Voluntary federal judicial incorporation of state law, Mishkin argued, helps to avoid “an unwarranted intrusion into areas traditionally and properly regarded as state domain.”<sup>54</sup> Following Mishkin, Carol Goldberg-Ambrose took this point into the realm of federal-court jurisdiction, suggesting “nationalism” reasons why Congress might wish to create federal-court jurisdiction over certain questions, but still “federalism” reasons why Congress might prefer federal courts to use state law as the substantive rule of decision.<sup>55</sup>

The link to federalism by the grace of Congress should be clear. When Congress offers the states a primary federal implementation role or writes federal laws that incorporate state terms, Congress is both making new federal law but also doing it with some self-conscious restraint in a way that builds diversity and state voice into it. That restraint may be motivated by instrumental reasons as traditional federalists fear—including a desire to push federal law into areas of historic state control—or by “federalism” reasons, as I have also suggested; or by a desire to reach a single-best national policy, as Professor Gerken has urged. Most likely it is a combination of all three reasons.

#### 4. Nationalism Without the National Government

It also seems evident that we sometimes have “nationalism” in lawmaking *without* Congress or federal judge-made law at all. Taking a page from Professor Gerken, and as a mirror image to her “federalism without sovereignty,” one might call this “*nationalism without the national government*.” I introduce the concept here by way of buttressing my argument about nationalism’s complexity and illustrating the kind of further work necessary to unpack the concept.

This idea of nationalism without the national government is a point that goes beyond the way that the states, as centers of political activity, influence public debate through their positions on federal statutes in which they have no formal role.<sup>56</sup> States also do sometimes still act as first-movers, performing their traditional “states as laboratories” role, in trying out controversial policies: same-sex marriage being the most notable recent example.

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54. *Id.* at 825–26.

55. Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 566–83 (1983).

56. John Nugent and Judith Resnik have each written about how groups of state and even translocal actors together play central roles in federal statutory politics. JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 168, 214–15 (2009); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 776–80 (2008).

Sometimes, such state innovation even creates what might be understood as a different kind of “national law”—what William Eskridge and John Ferejohn have described as an informal fifty-state convergence that can make federal legislation unnecessary.<sup>57</sup> This kind of “national” lawmaking should appeal to traditional federalists, to the extent that it restrains—by obviating the need for—congressional lawmaking.

Other times, those state convergences take on a more formal character, for instance when one state models its laws after another. A striking example can be found in a slew of recent state food safety laws that condition the effective date of the state law on the adoption of a similar law by a number of other states.<sup>58</sup> State courts also must sometimes create federal common law, just as federal courts do.<sup>59</sup>

Another example of more formal action exists in the adoption by many states of Uniform Laws. The Uniform Commercial Code is the most prominent but represents only one of many such laws. These Uniform Laws exemplify how “national law”—sometimes *more intentionally uniform* than federal statutory law that depends on varied state implementation—can be created by states without Congress.

The point here is simply to push the new nationalists on the concept of “our Nationalism.” Nationalism, like federalism, now takes different forms and has many different sources. How “national” any federal statute is, in the uniformity/preemption sense, will vary across the U.S. Code. Sometimes there can be national law without a federal statute at all. Sometimes “nationalism” is the end, sometimes “federalism” is the end. Sometimes they are the means relative to one another.

### C. *Please, No More Nationalism or Federalism Without Doctrine*

One of the biggest failings of the “cooperative federalism” movement—by which I mean the second-generation federalists who fell between the old-fashioned separate-spheres types and Professor Gerken’s new nationalists—was its profound lack of doctrine. Non-dualist models of federalism have always suffered from this wishy-washiness problem when it comes to real law. This is a problem that separate-spheres federalism, which does have some well-defined doctrines like Commerce Clause doctrine, has not faced nearly to the same extent. For cooperative federalism, part of the reason for lack of doctrine is that the vast expanse of writing about interactive federalism mostly has been devoted to functional inquiries about the merits of state-federal interconnectedness or descriptive efforts illustrating those connections in

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57. ESKRIDGE & FEREJOHN, *supra* note 14, at 228–33, 240–43.

58. *Id.* at 309–48.

59. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102–04 (1962).

particular subject-matter areas.<sup>60</sup> Alongside this important work, however, little attempt has been made to generate “law” effectuating the relationships being described.<sup>61</sup>

As a result, cooperative federalism has developed no legal teeth. Consider a few of many possible examples that I have detailed elsewhere<sup>62</sup>: We have little real law to police the boundaries of Spending Clause legislation (instead we have only the “I know it when I see it” test for unconstitutional coercion applied in *NIFB Sebelius*—a test whose link to obscenity may not be accidental). We have no doctrines that govern hybrid state-federal administrative relationships, including whether state implementers of federal law receive anything like federal interpretive deference or any “process” protections when it comes to their interactions with federal agencies. And we have gaping holes in our doctrines of federal-court jurisdiction and choice of law. Consider this important question: are state laws and regulations that states enact to implement federal statutory schemes (for example, a state’s Clean Air Act State Implementation Plan) “federal” or “state” law in terms of their status for jurisdiction, applicable law, and so on? These are fundamental issues that go to the heart of how federal law is implemented and enforced today. And yet they remain unanswered.

My biggest concern about the new Nationalist School is that it will ultimately suffer from precisely this same weakness. If it does, it will similarly be consigned to an abstract rhetorical concept with no real-world bite. Professor Gerken does not seem as perturbed by this possibility as I am and instead seems almost to embrace it, or perhaps sees it as a necessity. She argues that “[today’s federalism] is premised on practice as well as presumptions” and suggests that the new landscape she describes may not be amenable to doctrinal rules.<sup>63</sup> “[A]t the end of the day,” she says, “much of ‘Our Federalism’ requires little more than muddling through.”<sup>64</sup>

To me, this is entirely unacceptable. But I can see why the Gerkenists might be less emotional about it. If federalism is simply a means not an end, then perhaps one does not need real doctrines to protect it. So understood, federalism is not “special”—it may even be interchangeable with other tools that might produce the same ends.

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60. See, e.g., Kristin H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012).

61. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005).

62. Gluck, *supra* note 13, at 222–43 (laying out fifteen such unanswered questions about modern federalism doctrine).

63. Gerken, *supra* note 2, at 999.

64. *Id.*

But I would urge the new nationalists not to give up on the doctrines so quickly. Why not, instead, ask oneself *what are the kind of conditions of state-federal interaction we are trying to create and what legal doctrines could further those conditions?* That will require these nationalists to be more specific about their theory of nationalism. What conditions do they need to create the “robust democracy” they say is their goal? Is it merely the space for internal variation and dissent with a backstop of preemption? Why wouldn’t legal doctrine work in that context? Part of the concern seems to be that legal doctrine cannot operate where categories are slippery. But why? If some statutes aim to encourage local variation and other statutes aim to end it with a preemptive “final” solution, why not simply use *statutory interpretation doctrines* to divine what animates Congress’s design along the nationalism-federalism spectrum in a particular circumstance?

Professor Gerken’s response to this seems to be that she is less interested in determining what Congress wants, and more interested in determining what the balance between state and federal should be. She also argues that determining what Congress wants is a question of statutory interpretation and is a lot easier to answer than the “constitutional law and democratic design” question of what the balance should be. I am not sure that is truly the case and it seems too easy a way out. Statutory interpretation has famously been one of the most inconsistent areas of law, one of least amenable to “real” legal doctrine. Constitutional boundaries have been easier to fix. Nor am I sure that what Professor Gerken really ultimately wants is to develop new constitutional boundaries. My guess is that she may ultimately look to ways that courts can influence congressional lawmaking involving the states—“democratic design”—whether by presumptions or other resistance norms that have long been the bread and butter of statutory interpretation.

#### IV. SOME DOCTRINES FOR THE FEDERALISTS FROM FEDERAL STATUTES

I will conclude by “walking the walk” and trying to illustrate what I mean by developing doctrine by thinking through the kinds of conditions of state-federal interaction one wishes to encourage. Because I believe in preserving the federalism within federal statutes, the doctrinal moves that I would advance will look different than Professor Gerken’s likely would. My doctrinal aim is to enhance state power within national law.

Take the administrative law doctrines. Administrative law is critically important in the statutory era. *Chevron* deference—the rule that requires federal courts to accord deference to reasonable federal agency statutory interpretations when federal statutes are ambiguous<sup>65</sup>—does an enormous

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65. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

amount of work in resolving statutory cases. But there is no set of administrative deference principles that likewise takes into account the fact that Congress sometimes delegates decision-making to the states. Instead, the lower federal courts have done precisely what Professor Gerken suggests. They've muddled through, in the process creating an unequal, uniform, and incoherent body of federal case law on the question of what standards apply to state implementation decisions of federal law.<sup>66</sup>

Likewise, we have no set of doctrines that govern the federal-law-implementation- bargaining process between the federal government and the states. Many federalism scholars are now writing about, for example, "waivers as the new federalism,"<sup>67</sup> but waivers by and large happen in a big black box, with no transparency, no process, and no guiding doctrine. If one believes that the key to state power is inside federal law, then a regularized set of rules for negotiating waivers seems essential.

Another bucket of doctrinal questions goes to the question of state law and its enduring importance in a landscape dominated by federal statutes. When I first started writing on this topic, I was of the same view as Professor Gerken: that sovereignty is both unimportant and perhaps absent from this new (new) federalism landscape. But after examining this landscape in more detail, my views have changed. As detailed at the outset of this Article, my view is now that *state law*—the product of the state sovereign apparatus—has a great deal to gain from the version of nationalism that I have offered.

As a topical example, assume that Congress instead of enacting the very state-reliant ACA, had simply nationalized the entire system, creating what effectively would be "Medicare for all," as many advocates had urged. What relevance then would state law carry in the health landscape? *It would be nothing*. There would be no state laws, no state regulations, no state officials, and no state court work on the broad swaths of health policy—from insurance markets to medical service delivery—that the ACA covers. Period.

Instead, because Congress *chose* to give the states such a central role in the statute, we now have hundreds of state laws and state regulations and many

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66. Compare, e.g., *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495–96 (9th Cir. 1997) (no deference to state implementers) with *Bell South Telecomms., Inc. v. Sanford*, 494 F.3d 439, 449 (4th Cir. 2007) (*Skidmore* level deference). For more examples, see Gluck, *supra* note 20, at 611–12.

67. For a few of many recent examples, see Samuel Bagenstos, *Federalism by Waiver After the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 227 (Nathaniel Persily et al. eds., 2013); Theodore Ruger, *Health Policy Devolution and the Institutional Hydraulics of the Affordable Care Act*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 359 (Nathaniel Persily et al. eds., 2013); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 *COLUM. L. REV.* 265 (2013).

new state government positions created because of this federal statute but at the same time wholly autonomous from it. State courts for years to come will be busy adjudicating these cases. These state laws, regulations, cabinet positions, and court decisions that the ACA has generated are formally identical to any “ordinary” state laws, regulations, cabinet positions, and court decisions. The federal statute has empowered and enlarged the state sovereign apparatus.

So for someone who wishes to take a more federalist view of this nationalism, what doctrines would better advance the state sovereignty within these federal schemes?

By way of very non-exhaustive illustration, we might develop, as I have argued elsewhere,<sup>68</sup> a *Chevron* analogue for state implementers of federal law. We might impose process or other requirements on federal agencies to guide the administrative waiver and implementation process. As two recent and path-marking efforts in this regard by Congress, it is worth drawing attention to the new provisions in the ACA governing Medicaid demonstration waivers and also the special deference rules enacted as part of Dodd-Frank. With respect to the waivers, as Sidney Watson has insightfully pointed out, the ACA directly responds to the above-noted concerns about waivers being negotiated behind closed doors with no process constraints. The ACA for the first time makes waiver applications public, sets forth what must be specified, requires CMS to be similarly specific and publicly disclose what is being approved and why, along with public comments, and requires CMS to create a process for notice and comment at both the state and federal levels.<sup>69</sup>

With respect to the deference rules, Congress set forth a special deference doctrine in Dodd Frank to guide the state-federal relationship in the implementation of that statute. The statute directs courts to depart from the strong presumption of *Chevron* deference to federal agency implementation when the federal agency would interpret the statute in ways that would preempt state consumer financial laws.<sup>70</sup> Both of these examples—the ACA

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68. Gluck, *supra* note 20, at 601–06.

69. See Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 10201(i) (2010) (amending § 1115 of the Social Security Act, 42 U.S.C. § 1315 (2012) on Medicaid demonstrations); Sidney D. Watson, *Out of the Black Box and Into the Light: Using Section 1115 Medicaid Waivers to Implement the Affordable Care Act's Medicaid Expansion*, YALE J. HEALTH POL'Y L. & ETHICS (forthcoming 2015). See also ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 267–68 (2011) (discussing the state-federal administrative bargaining process).

70. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111–203, § 1044(a), 124 Stat. 1376, 2015–16 (2010) (to be codified at 12 U.S.C. § 25b) (stating that a court reviewing the Comptroller of the Currency's decision to preempt a state consumer financial law “shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with

waiver provisions and the Dodd-Frank administrative-preemption provision—are instances in which Congress has proposed new doctrines to advance federalism within federal statutes.

Consider another example by way of another answer. Assume that the state of Missouri enacts a state statute to implement the federal Clean Air Act. Eventually that statute gets challenged in court. Which court should hear that case? The answer depends on one's view of what the Missouri legislature is doing. If one views the Missouri legislature as creating *federal* law, as simply acting as a servant for the federal government, then perhaps one would permit removal of the case to federal court as a federal question. But if one views the Missouri legislature as making *state* law—or if one wishes to *encourage* a view of the laws that states make in service of federal law as state law, then one might adopt a very different rule of federal-question jurisdiction that views these as state-law, not federal-law, questions and keeps them in state courts.<sup>71</sup>

At the moment, there is no clear doctrinal answer to this question and many others like it, a point I have elaborated elsewhere.<sup>72</sup> I believe these doctrinal gaps exist not because there are no doctrines to be had, as Professor Gerken suggests,<sup>73</sup> but rather because we are experiencing an identity crisis. Or at least a theory of nationalism-federalism that remains not fully developed. There is a profound ambiguity about what's going on here that goes directly to the slippage between the categories that Professor Gerken's lecture so brilliantly highlights. When it comes to understanding the nature of these state law moves in service of federal law—whether they are state moves, federal moves, or something in between—we just do not know or are not ready to answer.

Part of the blame must be placed on the old-fashioned federalists. They have been so focused on keeping the federal government out of lawmaking entirely that they haven't focused at all on how to preserve state power when it is too late to prevent federal incursion. In other words, they haven't recognized these questions of how to empower state law within federal administration and federal law implementation as “federalism questions” in the first place.

But federalism questions they most certainly are. As another bucket of examples, states have their own different principles of agency deference, their own standards of review, and their own rules of statutory interpretation—and

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other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.”); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 581 (2012).

71. For a more developed doctrinal argument for such an approach, see Gluck, *supra* note 13, at 2022–43.

72. *See id.*

73. Gerken, *supra* note 2, at 999.

these do not look the same as their federal counterparts. But federal courts adjudicating cases involving state implementation of federal law often apply *federal* standards of review, *federal* deference doctrines, and even *federal* statutory interpretation doctrines to these *state laws*.<sup>74</sup> Those choice-of-law decisions may make sense for those in Professor Gerken's car if the aim is a national end (and there, by the way, is how *doctrine* could be made in support of that position). But if the goal is, as mine is, to find the federalism within federal statutes, then legal doctrine might recognize those state statutory implementation rules as *state* law that needs to be respected and effectuated even in a federal statutory era.

When federal courts decide cases involving state legislation—even state legislation that implements federal law—a state-centered doctrinal approach would say that federal courts must apply *state* standards of review, *state* agency deference rules, and *state* interpretive doctrines, among other state decision-making rules. Let's not forget the most famous federalism rule of all: the *Erie* Doctrine, which requires federal courts to apply state-law principles to decide state-law questions,<sup>75</sup> but which somehow has fallen under the table when it comes to its distinctly modern application to these statutory decision-making doctrines.<sup>76</sup>

At the same time, the states should bear some burdens themselves if they are to be empowered in this way. For instance, states may deserve to be held more accountable than they have been for their efforts in service of federal law. At the moment it is very difficult to directly challenge state implementation of federal-law. The Supreme Court has strongly hinted that when a federal agency is in the picture, any challenge to an implementation effort should be framed as a challenge to the federal agency, rather than to the underlying state decision.<sup>77</sup> Thus, if a citizen wishes to challenge Missouri's laws implementing Medicaid as inconsistent with the terms of the Medicaid statute, but the United States Department of Health and Human Services has

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74. I have detailed these decisions in Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1927–58 (2011), and Gluck, *supra* note 20, at 609–15. See also Josh Bendor & Miles Farmer, Note, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 YALE L.J. 1280, 1295–306 (2013) (discussing other decision-making rules, such as standards of review).

75. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72–78 (1938).

76. Gluck, *supra* note 13, at 2036–37.

77. *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1210 (2012). Cf. *Armstrong v. Exceptional Child Ctr., Inc.*, No. 14-15 (U.S. Mar. 31, 2015) (leaving open the possibility of a challenge to such state implementation at the discretion of the Court's equity powers).

not objected to the state program, there is currently no obvious legal avenue to bring a direct challenge to the states.

As part of treating the states as sovereigns within federal schemes, however, legal doctrine could facilitate direct challenges that hold the states accountable for such decisions. To paraphrase a great thinker (Spiderman): with great power should come great responsibility.<sup>78</sup>

#### CONCLUSION

In the end, what we have is an identity crisis and a lack of theory. What is state, what is national, what is both?<sup>79</sup> In this sense, Professor Gerken's groundbreaking work is spot-on in insisting that we dismantle the divide between the categories. The harder question is where her car is going. To give us a new state of the legal order, the new nationalists need to give us a theory, a reason, and a doctrine to believe in.

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78. See Stan Lee, Steve Ditko, & Art Simek, *Amazing Fantasy, no. 15, SPIDERMAN!* (Marvel Comics Aug. 1962) reprinted in, 1 *ESSENTIAL SPIDER-MAN* (1997) (“[W]ith great power there must also come—great responsibility.”).

79. Judith Resnik was one of the first to ask this question. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *YALE L.J.* 619, 620–21 (2001).

