

Federalism for the Worst Case

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ABSTRACT: Recent scholarship has argued that the United States is vulnerable to a slide towards authoritarianism and that it may possess few institutional features protecting against such a slide. This Article argues that this literature overlooks the importance of federalism. Since the founding, courts, policymakers, and scholars have envisioned federalism as a bulwark against tyranny. But this Article builds off recent comparative experiences with democratic erosion to provide a new, institutionally-focused account of this relationship, which draws out structures that other work overlooks. It highlights the importance of autonomous state officials carrying out sensitive functions in areas such as electoral administration, judging, policing, and prosecuting in blocking common pathways towards authoritarianism. Our institutional account foregrounds often-overlooked designs that protect separate structures in the states, like federal inability to remove state officials even during emergency, and it sheds new light on old doctrinal problems like the anti-commandeering doctrine. Further, it highlights a tradeoff between the costs that U.S. federalism is often seen as imposing and the significant—and unique—anti-tyranny protection that it provides during a democratic emergency. Finally, it suggests ways in which federalism might be designed abroad in contexts where democratic erosion is an especially salient risk.

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I. INTRODUCTION

Democracy in the United States, for all of its faults, has rarely seemed at risk of lapsing into authoritarianism. There have been only a few moments when the threat of executive tyranny has seemed real.¹ But according to some observers, we are now living in such a moment. They point to President Trump’s populist rhetoric; his attacks on the media and governmental institutions such as the federal judiciary, FBI, and Department of Justice; and his willingness to go to great lengths to subvert an investigation into his own

1. For example, some commentators point to the Roosevelt court-packing plan in 1937, although both the president’s motives and the context are too complex to make the example an obvious one. We analyze this example below in Section II.C.

possible misconduct, among other warning signs.² Prominent scholars have noted similarities between the rhetoric and actions of Trump and those of authoritarian leaders abroad, arguing that Trump has “clear authoritarian tendencies.”³

Is the U.S. constitutional order vulnerable to such a threat? This worst-case scenario for democracy seemed real to the Framers of the Constitution in light of experience in England and then the colonies, and they were, of course, deeply concerned with preventing their new republic from sliding into tyranny. Theoretical accounts of the anti-tyrannical protections within our governmental system abound.⁴ Indeed, some commentators have argued that U.S. constitutionalism is unduly preoccupied by what is in reality a fairly low risk, labeling the phenomenon “tyrannophobia.”⁵ But others have recently concluded that our institutional design would provide little protection against modern forms of authoritarianism.⁶ Indeed, some scholars assert that if the United States has any exceptional protections against tyranny,

2. Vivian Salama & Jess Bravin, *Trump Asserts ‘Absolute Right’ to Pardon Himself*, WALL ST. J., <https://www.wsj.com/articles/donald-trump-asserts-absolute-right-to-pardon-himself-1528116580> [<https://perma.cc/Z4XN-FARA>] (last updated June 4, 2018, 3:55 PM) (describing Trump’s assertion of the availability of a self-pardon and his description of “the investigation by special counsel Robert Mueller [as] ‘totally unconstitutional’”); see Devlin Barrett & Robert Costa, *Justice Department Heading for Clash with Trump, Lawmakers over Mueller Probe Memo*, WASH. POST (May 2, 2018), https://www.washingtonpost.com/world/national-security/trump-calls-justice-department-rigged-threatens-action/2018/05/02/6a568608-4e19-11e8-b725-92c89fe3ca4c_story.html [<https://perma.cc/5P5P-7XWE>] (discussing the Mueller investigation into potential Russian meddling in the election and Trump’s statement that “[a]t some point I will have no choice but to use the powers granted to the Presidency and get involved!”). Madeleine Albright describes President Trump as “the first anti-democratic president in modern U.S. history,” who “flaunts his disdain for democratic institutions.” MADELEINE ALBRIGHT & BILL WOODWARD, *FASCISM: A WARNING* 246 (2018).

3. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE 2* (2018). These tendencies include “reject[ing], in words or action, the democratic rules of the game,” “den[ying] the legitimacy of opponents” and the electoral system, “tolerat[ing] or encourag[ing] violence,” and “indicat[ing] a willingness to curtail the civil liberties of opponents, including the media.” *Id.* at 21–24. Levitsky and Ziblatt argue that President Trump exhibits all four of these features, as indicated by his making “the unprecedented suggestion that he might not accept the results of the 2016 election”; his repeated assertion that his opponent “ha[d] to go to jail”; the fact that he “embraced—and even encouraged—supporters who physically assaulted protesters” and offered to pay their legal fees; and his threats “to punish unfriendly media.” *Id.* at 61–64.

4. See *infra* Section II.C.

5. See Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 317 (Tom Ginsburg ed., 2012).

6. Tom Ginsburg and Aziz Huq argue that the U.S. Constitution provides real protection against the risk of sudden democratic breakdown in events like coups, but little protection against many pathways of slower democratic erosion that have occurred around the world. See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 162–65 (2018). See generally Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018) (noting various ways in which the federal courts could be attacked).

they come from its political culture and unwritten norms (themselves under threat) rather than from the constitutional design as such.⁷

We point to one aspect of constitutional design that we argue does provide heightened protection against modern forms of democratic decline: U.S. federalism. Historically, federalism has been viewed as a major protection of liberal democratic constitutionalism in the United States.⁸ Our account builds on this work, but it highlights institutional structures that have been largely overlooked. Furthermore, the recent spate of literature on democratic decline has paid surprisingly little attention to federalism. In the evocatively titled, Cass R. Sunstein-edited volume *Can It Happen Here?*, none of the contributors focus on federalism, and only a few even mention it.⁹

We provide an institutionally focused account of the relationship between federalism and tyranny, which draws out key features of the design that have not been the focus of existing work. Drawing on comparative experience, we argue that in times of crisis, state and local governments' control of the personnel engaged in the vast majority of policing, judging, and other governance, as well as key functions such as the running of elections, would meaningfully impede a consolidation of power at the federal level.¹⁰ Elections, courts, and law enforcement agencies have been frequent targets—and tools—of authoritarian movements in other countries. But in the United States, these institutions are largely located at the state (and local) level, making their capture more difficult. U.S. federalism does not necessarily insulate these actors from political control, but rather disperses them across a large number of states with different interests, thus slowing any national-level effort to capture them.¹¹ An anti-democratic executive with sufficient determination and congressional support would, given enough time,

7. See, e.g., Grove, *supra* note 6, at 468 (arguing that judicial independence in the United States rests mainly on “conventions” rather than constitutional design).

8. See, e.g., Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380 (“Perhaps the most frequently mentioned function of the federal system is the one it shares to a large extent with the separation of powers, namely, the protection of the citizen against governmental oppression—the ‘tyranny’ that the Framers were so concerned about.”); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954) (emphasizing the anti-tyranny function of federalism).

9. See generally CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018) (compiling articles dealing with American authoritarianism). For contributions in the volume that mention federalism, see Eric A. Posner, *The Dictator’s Handbook, US Edition*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA, *supra*, at 1, 11–12 (noting that “[a] dictator who sought total control over the country would need to punch through the walls created by the federal system,” and expressing skepticism that this could be done); and Cass R. Sunstein, *Lessons from the American Founding*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA, *supra*, at 57, 72, 80 (noting that the federal system was an important safeguard against tyranny for the founders and arguing that their vision has broadly held up well).

10. See *infra* Section II.B.

11. See *infra* Part III.

probably be able to achieve his or her goals. But the design of our federal system would slow this process down in ways that may prove significant. Delaying the process of consolidation of power, for example, might allow time for an opposition to regroup or for an incumbent to lose a key election.¹²

Moreover, both the constitutional text and judicial doctrines tend to prevent the federal government from interfering with these separate state officials and bureaucracies. The important provisions and doctrines—those that seem to us likely to matter in a time of democratic crisis—all relate to personnel, resources, and chains of command. The federal government cannot appoint or remove state officials or judges.¹³ It can issue regulations regarding federal elections, but it cannot displace the state role in actually administering them.¹⁴ Indeed, states and local governments administer elections for officials at all levels of government, and federal efforts to force states to change certain election procedures have largely resulted in state non-compliance.¹⁵ Additionally, because of the anti-commandeering doctrine, the federal government cannot press state and local legislatures, bureaucracies, or officials into federal service. These protections appear to be preserved even during the kind of crisis or emergency that often begets authoritarian rule.¹⁶

Thus, we offer a novel account of a potentially important benefit of U.S. federalism—and one that cannot be easily duplicated through other forms of government. Some work has argued that a federalist structure of government is not a prerequisite to, or even the best means of achieving, many of its other purported benefits, such as a more representative, experimental, and efficient democracy.¹⁷ But showing an anti-tyrannical bulwark that is hard to replicate without certain specific federalist doctrines and institutions may suggest weighty reasons for retaining certain aspects of U.S. federalism, even if the broader critique of many of the other purported benefits of U.S. federalism is correct.

We are not offering a simple defense of the status quo. First, we note in several places ways in which existing federalism structures in the United States

12. See, e.g., Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 615 (2015) (arguing that certain moves towards authoritarianism can be deterred or prevented through the adoption of doctrines and structures that act as “speed bump[s]” against them).

13. See *infra* Section III.B.1.

14. See *infra* Section III.B.3.

15. Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 755–61 (2016).

16. See *infra* Part IV.

17. See, e.g., MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 20–29 (2008) [hereinafter FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*]; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907–09 (1994) (arguing that the purported benefits of federalism can be achieved through a system of decentralization that need not be “federalism” as defined in the United States) [hereinafter Rubin & Feeley, *Federalism: Some Notes on a National Neurosis*]; *infra* Section V.C.

do not seem particularly well-suited to the threat posed by authoritarianism and could potentially be improved. Second, the same structures and doctrines that provide anti-tyranny benefits also have significant costs when democracy is not under threat. One need only look to the Jim Crow era to see that structures such as state control of elections raise risks of subnational forms of tyranny such as the repression of minority groups within a given state.¹⁸ More mundanely, having large and independent state bureaucracies can be cumbersome and inefficient.¹⁹ To borrow Adrian Vermeule's framing, we are not seeking to give an account of an "optimal" constitution, but merely exploring the ways in which it guards against one particular risk.²⁰

The rest of this Article is organized as follows: Part II describes what we mean by tyranny (and what others have meant) and explores the mechanisms through which tyranny can occur both domestically and internationally. Part III introduces our own theory, which focuses on independent structures and personnel as a tool to slow down moves towards authoritarianism. We focus on three key functions that, in the United States, are placed significantly under state or local control: judging, law enforcement and prosecution, and the administration of elections. Drawing on comparative examples, we argue that the dispersion of these functions through independent state officials and bureaucracies is a substantial check against democratic erosion. These functions are thus important examples of the independence of state bureaucracies more generally.

Part IV explores the concepts and doctrines that protect the independence of these state officials. We focus here on the anti-

18. See, e.g., THE FEDERALIST NOS. 10, 51 (James Madison) (John C. Hamilton ed., 1864) (arguing that the national government would better protect minority interests); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 367 (1997) (noting Jim Crow and observing that "the states seem to have been hard at work earning a reputation that they are hostile to civil liberty and favor parochial interests" throughout history); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 473 (2002) (observing that "vertical competition is not an unmitigated good" as most strongly evidenced by "Southern states' 'massive resistance' to federal efforts to enforce civil rights for blacks in the 1950s and 1960s"); Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1404 (1982) (noting that "[a] distinguishing feature of American democracy is that the federal government has generally been more protective of minority rights than have the states" and providing examples and citations from early state constitutions and the Jim Crow era).

19. This is a common critique of the anti-commandeering doctrine. See, e.g., Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 67 (2010) (noting the "great inefficient irony" of anti-commandeering, in that it prevents states from potentially enhancing their autonomy and achieving other goals by bargaining with federal actors for potentially more power or shared power). But see 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, 893-900 (1998) (arguing that commandeering is inefficient).

20. See ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 10-13 (2014) (arguing that much constitutional theory guards only against risks like tyranny and does not seek to optimize constitutional performance across all periods of time and events).

commandeering doctrine, which we argue plays an important function despite its well-documented downsides. In addition, we analyze the way in which the U.S. constitutional structure, in contrast to many other variants of federalism around the world, preserves the independence of state officials and bureaucracies even during crises or emergencies. This sets the stage for Part V, which situates our account within the extensive federalism and tyranny literature. We conclude by briefly exploring the implications of our analysis for federalism scholars in the United States and for constitutional designers internationally. While we would of course not argue for any simple-minded or wholesale export of the U.S. model of federalism,²¹ we do think that our analysis identifies structures and designs worth consideration in contexts where democratic erosion is a significant risk.

II. OUR DEFINITION OF MODERN TYRANNY

Within the political science and legal literatures, the concept of tyranny takes many forms, thus requiring further definition and narrowing, which we take on in this Part. We also examine the factors that have tended to replace democracy with tyranny abroad and how tyranny could—and in the past has threatened to—emerge within the United States.

A. TYRANNY AS A SUBVERSION OF THE LIBERAL DEMOCRATIC ORDER

Tyranny is a word with many meanings, both historically and today.²² We seek here to explain what we mean by the term—and what we do not—by focusing on the modern threat of democratic erosion. The term “tyrant,” as it originally appeared in Greek, referred to a relatively strong executive of the city state in the Archaic period, typically a member of a “commercially oriented” noble family who had worked his way to power by proving his trade-related prowess, rather than to an evil, all-powerful despot.²³ And many tyrant-led city states became flourishing democracies.²⁴ But by the Classical period, the term tyrant referred not to the city state leader but instead to a true despot who imposed his will on the people, as described by Aristotle.²⁵

Many modern definitions of tyranny are quite expansive, equating it with any use of power against an individual group that lacks a legal basis. For

21. See, e.g., Erin Ryan, *Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society*, 96 OR. L. REV. 123, 163 (2017) (noting that differences between American federalism and other forms of federalism “may limit the transferability of lessons from the American experience at all,” citing to “history, culture, and geography” that create greater regional diversity in places such as Europe).

22. See, e.g., Rapaczynski, *supra* note 8, at 382 (describing three different accounts of tyranny as viewed by the Framers).

23. Robert K. Fleck & F. Andrew Hanssen, *How Tyranny Paved the Way to Democracy: The Democratic Transition in Ancient Greece*, 56 J.L. & ECON. 389, 390–91 (2013).

24. *Id.* at 392.

25. *Id.* at 391.

example, Matthew Adler and Seth Kreimer define tyranny as “the unjustified responsiveness of governmental policies, or actions, or decisions, to particular groups or persons.”²⁶ Thus, the suspension of elections by a president seeking to retain power after the end of his or her term, the prohibition against transgender individuals serving in the military,²⁷ and a revocation of California’s ability to set its own air-quality standards could all be plausibly called tyrannous.²⁸ We do not claim here that federalism protects against all forms of tyranny under this broad definition. Indeed, it is well-known that federalism may enable the repression of minority groups, by making it more difficult for a central government to intervene in the event that a subnational unit represses a minority population.²⁹

We focus instead on a narrower definition of tyranny that is closer to the classical use of the term and would encompass only the first of the foregoing examples: the erosion of a liberal democratic order into a markedly more authoritarian one, particularly when carried out by a leader who first comes to power legally.³⁰ This definition parallels much of the recent scholarship, which defines tyranny or authoritarianism as the loss of democracy.³¹ We are concerned here with the preservation of competitive democracy and the extent to which federalism protects against a substantial erosion of the liberal democratic order in favor of one individual, faction, or party imposing authority throughout the country. By erosion of the democratic order, we mean the loss of core democratic institutions, such as leaders selected

26. Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 80. Indeed, in Adler and Kreimer’s view, the entity carrying out tyranny need not even be the government; they note the ways in which the tyranny of the majority, or of factions, are used within the classic definition. *See id.*

27. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *1 (W.D. Wash. Apr. 13, 2018) (describing a blanket ban on transgenders serving in the military (announced by President Trump on Twitter), Trump’s March 2018 memorandum explaining implementation of the ban, and the decision to maintain a preliminary injunction against the ban).

28. *See* Evan Halper, *Trump’s EPA Pick Casts Doubt on California’s Power to Regulate Auto Emissions*, L.A. TIMES (Jan. 18, 2017, 3:00 AM), <http://www.latimes.com/nation/la-na-pol-epa-confirmation-20170118-story.html> [<https://perma.cc/9R3P-5PT8>].

29. In these circumstances, of course, the scope of federal constitutional or statutory rights that apply across the country may matter. As an example, the federal right to travel may at least give oppressed individuals some ability to exit a repressive environment, although of course exit itself imposes significant costs on repressed individuals or groups. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 498–501 (1999).

30. *See* Adler & Kreimer, *supra* note 26, at 80 n.39 (noting that “classically” tyranny involved just the “head of state”); *see also* FEELEY & RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE, *supra* note 17, at 33 (emphasizing this description and observing that “[i]n tyranny or totalitarianism, the leader, either a single person or a small collegium, wields absolute control, at least juridically, and no entity can interpose any justified claim to resist its commands”).

31. *See, e.g.,* LEVITSKY & ZIBLATT, *supra* note 3, at 2 (equating “weaken[ing] [of] the institutional buffers of our democracy,” the loss of “laboratories of democracy,” and the weakening and distortion of democratic elections with authoritarianism); Huq & Ginsburg, *supra* note 6, at 92–96 (describing authoritarianism as the loss of democracy).

through “free, fair, and competitive elections . . . the absence of nonelected ‘tutelary’ authorities . . . that limit elected officials’ power to govern,” and “the existence of a reasonably level playing field between incumbents and opposition.”³²

This definition of tyranny³³ is one that resonates with the core concerns of the Framers. In the Federalist Papers, the threat of tyranny was focused on “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many.”³⁴ Under this view, any one branch could be a threat if not properly controlled—for example, Federalists such as Alexander Hamilton, James Madison, and John Jay, writing the Federalist Papers under the pseudonym “Publius,”³⁵ noted that the structure of the Constitution would prevent, for example, the Senate from becoming “an independent and aristocratic body” through “gradual usurpations” of power.³⁶

This kind of consolidation of power raises both a structural threat and a threat to individual rights. The structural threat, of course, is that a single leader, institution, or party that is able to consolidate power will be able to wield power unchecked. For example, such a leader may be able to take over the courts, reducing the ability of the judiciary to check illegal exercises of power. Moreover, a leader with sufficient power may also be able to distort the electoral playing field by packing courts and electoral commissions, thus helping to ensure perpetuation in office regardless of shifts in popular will.³⁷

At the same time, a regime that is able to consolidate power in this way will often crackdown on dissent, harass opposition parties, and engage in similar abuses that violate its opponents’ rights.³⁸ The violation of rights is a

32. STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 5–6 (Keith Darden & Ian Shapiro eds., 2010) (adding a fifth principle of the level playing field to four other features of democracy identified by Robert Dahl and others).

33. We follow much recent work in treating authoritarianism and tyranny interchangeably. See, e.g., LEVITSKY & ZIBLATT, *supra* note 3, at 2 (describing as “authoritarian” regimes that operate outside of the law by, for example, “rewrit[ing] electoral rules” and “rescind[ing] voting rights,” and alternately using the terms authoritarianism and tyranny to describe the same state of affairs). However, Hannah Arendt defines authoritarian governments as those with some form of hierarchical, legal power, but power that does not involve “coercion by force,” or, on the other extreme, “the egalitarian order of persuasion.” HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 92–93 (1968). Tyranny, under her definition, is distinguished from authoritarianism in “that the tyrant rules in accordance with his own will and interest, whereas even the most draconic authoritarian government is bound by laws.” *Id.* at 97.

34. D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 50 (2017) (alteration in original) (quoting THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003)).

35. THE FEDERALIST, *supra* note 18, at lxxxv.

36. *Id.* NO. 63, at 482 (Madison or Hamilton).

37. See LEVITSKY & WAY, *supra* note 32, at 9–12 (asserting that a level electoral playing field should be part of the definition of democracy).

38. See *id.*

core concern of the tyranny literature.³⁹ And institutions often counted on to protect rights, such as courts, may prove less effectual as a defense precisely because they have been coopted by the regime. Indeed, instead of helping to protect rights, captured courts may actually help to undermine them.⁴⁰ As seen in the following Section, recent international experience confirms that democracies can be undermined not just by coup, but also by this more gradual tilting of the electoral playing field, resulting in something close to tyranny in substance if not form.⁴¹ This phenomenon has become an important one in certain parts of the world, including Eastern Europe and Latin America. The election of Donald Trump has galvanized similar concerns and triggered a debate about whether the risk is a plausible one in the United States.⁴²

B. *HOW DEMOCRACIES DIE: COMPARATIVE EXPERIENCE*

Although U.S. democracy, for all of its shortcomings, has so far proven to be relatively robust, successful attempts at tyranny are fairly common comparatively. This Section explores the foreign examples, focusing on the circumstances that have tended to lead to democratic decline (or at least a meaningful threat of it), thus setting the stage for our exploration of the features of U.S. federalism that prevent or slow a slide into authoritarianism.

Recent attempts to undermine democracy have been gradual in nature, differing from sudden military coups that were historically more common.⁴³ A common path is for the president or ruling party to accumulate power by gaining control of institutions—including courts, ombudspersons, and electoral commissions—that are meant to directly or indirectly limit executive power. This control is then used to perpetuate the incumbent regime and marginalize the opposition. The resulting regime is rarely fully authoritarian. Instead, it is often what Steven Levitsky and Lucan Way have called “competitive authoritarianism”: Elections continue to be held, but with a

39. See Erwin Chemerinsky, *Federalism Not as Limits, but as Empowerment*, 45 U. KAN. L. REV. 1219, 1239 (1997); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 272–73 (2005).

40. See generally, e.g., Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673 (2015) (exploring ways in which courts, judicial review, and ordinary lawsuits can be used by authoritarian actors to consolidate power).

41. See, e.g., Huq & Ginsburg, *supra* note 6, at 122; David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 196 (2013); Varol, *supra* note 40, at 1701.

42. See LEVITSKY & ZIBLATT, *supra* note 3, at 60–64.

43. See *id.* at 3 (“More often . . . democracies erode slowly, in barely visible steps.”). Indeed, Publius presciently predicted that this would be the primary path to tyranny, noting that “[s]chemes to subvert the liberties of a great community, require time to mature them for execution”—for example, “[a]n army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time.” THE FEDERALIST NO. 26, *supra* note 18, at 217–18 (Hamilton).

playing field heavily tilted in favor of the incumbents.⁴⁴ Further, opposition parties and leaders, as a result of incumbents' power over private and public entities, often lack access to financial or media resources and face various forms of legal harassment.⁴⁵ Without attempting to give a systematic account here, we focus on several well-studied countries where regimes significantly eroded democracies, including Hungary, Poland, Turkey, Venezuela, and Ecuador.⁴⁶

The means by which the gradual erosion of democracy has occurred are varied, and usually a number of tools are used together. Would-be authoritarian leaders commonly rely on constitutional amendment and replacement to make formal changes to the constitution that increase their power and weaken opposition groups.⁴⁷ These constitutional changes have often targeted term limits, the scope of executive power, and the appointment and jurisdiction of high courts and other control institutions, for example.⁴⁸ With or without formal constitutional change, capturing key personnel is a major and inevitable part of these programs.⁴⁹ What Steven Levitsky and Daniel Ziblatt call "capturing the referees," or taking over institutions like constitutional courts, gives would-be authoritarians an increased ability to entrench themselves in power.⁵⁰ The newly captured institutions can make informal changes to the constitutional order that increase incumbent power, by, for example, upholding laws of dubious constitutionality. They can also use existing legal tools, such as defamation lawsuits and electoral deregistration, to undermine opposition parties and leaders.⁵¹ This kind of capture has figured prominently in all of the well-studied recent episodes. In cases like Venezuela, Ecuador, and Hungary, new constitution-making processes allowed leaders to replace existing officials with new ones friendlier to the regime.⁵² In Turkey, a constitutional amendment allowed the ruling party to pack the constitutional court.⁵³ In Poland, where the ruling party has been unable to use formal constitutional change because of a lack of sufficient

44. LEVITSKY & WAY, *supra* note 32, at 3–5.

45. *Id.* at 3, 9–12.

46. LEVITSKY & ZIBLATT, *supra* note 3, at 5, 78–94; Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549–56 (2018).

47. *See* Landau, *supra* note 41, at 191 (defining this as "abusive constitutionalism").

48. *See id.* at 206.

49. *See* Huq & Ginsburg, *supra* note 6, at 126 (noting that packing institutions is one pathway towards erosion of democracy).

50. LEVITSKY & ZIBLATT, *supra* note 3, at 78–79.

51. *See* Varol, *supra* note 40, at 1696–703.

52. *See* Landau, *supra* note 41, at 203–11.

53. *See* Ozan O. Varol et al., *An Empirical Analysis of Judicial Transformation in Turkey*, 65 AM. J. COMP. L. 187, 189–90 (2017) (describing the change and its effects on the court's decision-making).

votes, it has nonetheless relied on a series of dubious legal maneuvers to take over the constitutional court and other bodies.⁵⁴

From a comparative perspective, we know relatively little about whether and how federalism can check this kind of tyranny. There is a rich literature on comparative federalism,⁵⁵ but not enough examples of regimes experiencing this type of democratic erosion for us to form detailed conclusions about whether federalism is actually a check on this kind of tyranny and, if so, which forms and doctrines are most effective at playing this role. Most of the best-studied examples of democratic erosion do not involve federal systems.⁵⁶ Theoretically, however, federalism may be useful by making it more difficult for would-be authoritarian leaders to capture the personnel that they need to consolidate power.

1. Venezuela

The loss of meaningful democracy in Venezuela, which is one federal example among the recent cases, is illustrative of how federalism alone—absent certain protections found in U.S. federalism—does not check authoritarianism’s rise. When Hugo Chavez won the presidency in 1998, he faced a more complex environment than many of the other leaders surveyed here. At the beginning of his term he was confronted with not only an opposition-controlled legislature and judiciary at the central government level, but also a majority of state and local governments under the control of the opposition.⁵⁷ Chavez’s response to this dilemma is perhaps telling: He embarked on a process of constitutional replacement that was, in practice, as much about replacing hostile personnel as it was about rewriting the constitution.⁵⁸ That is, the new text did change the formal nature of Venezuelan federalism, for example, by giving the state governments less exclusive power—but the Constituent Assembly convened by Chavez and

54. See Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* 21–24 (Sydney Law Sch., Paper No. 18/01, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 [<https://perma.cc/P6WA-L2HA>].

55. For some contributions that contain many citations to the literature, see FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF TWENTY SYSTEMS (Mathias Reimann & Daniel Halberstam eds., 2014) (evaluating the “unification of laws in federal systems”); and Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism*, in COMPARATIVE CONSTITUTIONAL LAW 356 (Tom Ginsburg & Rosalind Dixon eds., 2011). See generally James A. Gardner, *The Theory and Practice of Contestatory Federalism*, 60 WM. & MARY L. REV. 507 (2018) (exploring “the tools, methods, and mechanisms that subnational units actually deploy to influence national political agendas, shape national policy making, and resist or undermine unwanted exercises of national power”); Daniel Halberstam, *Federalism: Theory, Policy, Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 576 (Michel Rosenfeld & András Sajó eds., 2012).

56. This is true of Hungary, Poland, Ecuador, and Turkey, for example. Venezuela and Russia are often categorized as federal.

57. See David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 940–48 (2013).

58. See *id.*

dominated by his forces also spent much of its time shutting down and reconstituting institutions still controlled by the opposition.⁵⁹ At the federal level, the Congress was reduced to a rump, and the Supreme Court shut down.⁶⁰ The Assembly replaced a large number of state and local officials, allowing Chavez to wield much more consolidated control of political officials at the Assembly's conclusion than he had when it began.⁶¹

There are also other differences between Venezuelan and U.S. federalism that are arguably significant—for example, electoral administration is much more centralized in Venezuela than in the United States. This has allowed the regime to more easily manipulate subsequent elections. Centralized electoral authorities have recently played a major role in the Venezuelan regime's ongoing consolidation of power: The Supreme Electoral Tribunal nullified several election results on the grounds of purported fraud when the opposition took control of the national legislature in 2015, setting in motion a series of events through which the regime would seek to nullify that institution's power.⁶² And when the opposition sought a recall vote on Maduro's mandate in 2016, the National Electoral Council delayed the process, imposed procedural requirements for the vote that would be virtually impossible to meet,⁶³ and finally stopped it entirely, again on grounds of fraud.⁶⁴

2. Russia

Russia offers another example of a federalist regime that is either a hybrid between democracy and authoritarianism or fully authoritarian in nature. The Russian Federation never fully democratized after the fall of the Soviet Union. Instead, during the 1990s when Boris Yeltsin was president, there was a struggle for order as various regions sought greater independence from the struggling central government.⁶⁵ When Vladimir Putin came to power in 2000, he embarked on an enormous campaign to consolidate

59. See Allan R. Brewer-Carías & Jan Kleinheisterkamp, *Venezuela: The End of Federalism?*, in *FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF TWENTY SYSTEMS*, *supra* note 55, at 523–25.

60. See ALLAN R. BREWER-CARIÁS, *DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ AUTHORITARIAN EXPERIMENT* 57–60 (2010).

61. See *id.*

62. See David Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 161, 169 (Mark A. Graber et al. eds., 2018).

63. See *id.* at 170. For example, the Council required that four million signatures needed to trigger a vote be collected in only three days. See *id.*

64. See *id.*

65. See Jeff Kahn, *What is the New Russian Federalism?*, in *CONTEMPORARY RUSSIAN POLITICS: A READER* 374, 377–81 (Archie Brown ed., 2001).

power, moving the country in a sharply authoritarian direction.⁶⁶ A major part of his effort was a centralization movement to weaken Russian federalism. For example, immediately after coming to power, Putin restructured the system so as to create new federal districts throughout the country (running parallel to the existing system of subnational units), and to staff these new federal districts with presidential appointees.⁶⁷ In effect, he created a parallel system of central government administration to run alongside the state governments. He also changed the composition of the upper house of parliament to replace regional officials like governors with delegates who were appointed by the president directly.⁶⁸ Furthermore, Putin strengthened a procedure through which the president could dissolve state governments,⁶⁹ and he radically overhauled the electoral laws so that members of the federal legislature were elected entirely from proportional representation off of single national lists rather than in territorial districts.⁷⁰

There was a second wave of centralization efforts in 2004.⁷¹ In 2004, the regime passed major reforms that abolished elections for regional executives and replaced them with officials appointed by the federal government. These nominees must be ratified by the state legislatures; however, if the presidential appointment is rejected by the legislature multiple times, then the president can dissolve the legislature and make the executive appointment anyway.⁷² These new presidential appointees allowed for presidential control over the regions not only in the initial appointment, but also in the decision as to whether or not an existing governor should be retained for a new term.⁷³ The executives can at any rate be replaced at any time by the president once appointed, for a vaguely-defined list of grounds.⁷⁴ And these presidentially-controlled governors can themselves remove lower level officials within their regions on similarly vague grounds.⁷⁵

The Venezuelan and Russian examples are too shot through with other variables to provide a complete comparative account of whether and how

66. See *id.* at 381–83 (describing Putin’s “reform [of] the Federation Council . . . to dismiss recalcitrant executives, legislatures, and local government officials throughout the Federation” and, under Putin, the federal Constitutional Court’s rejection of federations’ claims of sovereignty).

67. See Ekaterina Zhuravskaya, *Federalism in Russia*, in *RUSSIA AFTER THE GLOBAL ECONOMIC CRISIS* 59, 71–72 (Anders Åslund et al. eds., 2010).

68. See *id.*

69. Kahn, *supra* note 65, at 382.

70. Zhuravskaya, *supra* note 67, at 72.

71. Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT’L & COMP. L. 511, 529–31 (2008).

72. *Id.* at 530–32.

73. See Zhuravskaya, *supra* note 67, at 72, 74–76 (describing governor appointments and reappointments).

74. See Kahn, *supra* note 71, at 531 (noting “loss of trust” and “improper execution of duties” as grounds for replacement).

75. CAMERON ROSS, *FEDERALISM AND DEMOCRATISATION IN RUSSIA* 147–48 (2002).

federalism protects democracy, and how it can be put into the service of an authoritarian project. But they do suggest to us the importance of focusing on the pathways through which would-be authoritarian actors capture personnel both nationally and sub-nationally. That is, a major mechanism through which authoritarian regimes seem to co-opt federalism is by gaining control of personnel, and then using those personnel to help further consolidate power. With this in mind, we next survey and critique existing theories of the U.S. constitutional structure's role in preventing tyranny before building our own account that puts an emphasis on separate structures and personnel at the state level.

C. *THE WORST CASE: THE THREAT OF TYRANNY IN THE UNITED STATES*

Is the U.S. potentially vulnerable to the kinds of authoritarianism-by-inches described above? At the federal level, the suggestion from both design and history would seem to be yes, but it is also true that the U.S. Constitution is extremely hard to amend in comparative terms.⁷⁶ Furthermore, wholesale replacement of the U.S. Constitution seems quite unlikely, given the strength of existing constitutional culture. This does prevent leaders from achieving certain anti-democratic results that have been common elsewhere. For example, given the specificity of the two-presidential term limit in the U.S. Constitution and the difficulty of amending it, it is unlikely that a president could realistically perpetuate power using this route.

But as Tom Ginsburg and Aziz Huq have recently pointed out, in other key respects the structure of the U.S. Constitution looks as vulnerable as others that have failed to prevent democratic erosion, and in many respects more so.⁷⁷ The “worst case”—a substantial erosion of our democracy through executive consolidation of power and substantial control over all three federal branches of government, and as against the states—is unlikely but not as far-fetched as most scholars and politicians assume. The problem is that much could be achieved to make the country more authoritarian without carrying out formal constitutional change.

With respect to the consolidation of personnel—as occurred in Venezuela and Russia—this would be difficult to achieve at the state and local level, but possible at the federal level. In an example of one step toward enhanced executive control over federal officials, President Trump has relied extensively on acting executive officials, thus avoiding the advice and consent

76. See, e.g., ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 101 (2009) (finding that the U.S. Constitution is one of the most rigid in the world); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG* 160 (2006) (arguing that amendment procedures make constitutional changes “practically impossible”). But see Vicki C. Jackson, *The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 *INT’L J. CONST. L.* 575, 579 (2015) (arguing that the difficulty of amending the U.S. Constitution has been overstated).

77. See Huq & Ginsburg, *supra* note 6, at 124, 165.

of the Senate.⁷⁸ This is not due to a failure of a hostile Senate to confirm nominees for a permanent position but rather a desire to be able to act quickly and unilaterally in terms of controlling agency leadership.⁷⁹ Indeed, some have argued that the Constitution allows for this type of practice—even the appointment of permanent agency heads, despite the Appointments Clause.⁸⁰

A determined executive could also capture the federal judiciary, threatening to erase courts' critical role in enforcing constitutional limits on federal executive power. The text of the Constitution provides certain protections for federal judges by preventing them from being removed without impeachment and by protecting their salaries.⁸¹ But these protections leave open a number of routes through which judicial independence could be attacked. As Franklin Delano Roosevelt's court-packing scheme vividly illustrated in 1937, a regime controlling both the presidency and the Senate could easily take rapid control of the Supreme Court by expanding it and then appointing a welter of justices to fill newly created vacancies. After winning reelection in 1936, Roosevelt famously proposed a plan to create an additional slot on the Court for each of the six then-sitting Supreme Court justices who had been on the court for ten years and reached the age of 70.5.⁸² Roosevelt publicly claimed to be seeking to reduce the older justices' workload,⁸³ but this was an obvious fig leaf for a proposal that was instead intended to change the Court's trajectory.

The vast literature on the court-packing plan has largely concluded that it would have been constitutional.⁸⁴ After all, the Constitution says nothing about the size of the Supreme Court, and indeed, the size of the Court has fluctuated in important ways throughout U.S. history, sometimes for overtly

78. See Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 947–50 (2013).

79. See Brian Naylor, *An Acting Government for the Trump Administration*, NPR (Apr. 9, 2019, 5:01 AM), <https://www.npr.org/2019/04/09/711094554/an-acting-government-for-the-trump-administration> [<https://perma.cc/Y2D8-NF8B>] (responding to a question from Face the Nation, President Trump said “I like ‘acting’ because I can move so quickly . . . It gives me more flexibility.”).

80. See Stephenson, *supra* note 78, at 950–55 (arguing for this interpretation in the wake of Senate inaction).

81. See U.S. CONST. art. III, § 1.

82. BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* 13–14 (2009). At the time the proposal was made, the bill also would have expanded the size of the Court from nine to fifteen. *Id.* at 14.

83. *Id.* at 12–13 (noting Roosevelt's arguments regarding “[d]elay in the administration of justice” and his assertion that “[t]he personnel of the federal judiciary is insufficient to meet the business[.]”).

84. See, e.g., Grove, *supra* note 6, at 541 (“[F]ar more scholars accept the legality of court packing than jurisdiction stripping.”); Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 26 (2016) (noting that court-packing is constitutional, although arguing that “it is truly a ‘nuclear’ option” that would destroy the Court as an institution).

political reasons.⁸⁵ The ultimate checks on the proposal were political rather than legal. It received a hostile reception in Congress and was defeated in the Senate despite the strong majorities Roosevelt's Democratic party had in both chambers.⁸⁶

Court-packing is one of only several routes through which a president backed by a supportive Congress may be able to undermine judicial independence. At the Supreme Court level, laws could also be passed that drastically cut the budget of the Court (so long as salaries were not touched), and perhaps that divested the Court of jurisdiction over whole classes of cases.⁸⁷

With respect to the lower federal judiciary, judicial power is likely even weaker. Since the constitutional text does not require these courts to exist at all, Congress can arguably alter and restrict jurisdiction more freely, as well as modifying the structure of the lower federal courts.⁸⁸ More outlandishly, Congress may be able to effectively fire judges by abolishing courts, or even abolish the lower federal judiciary entirely, thus putting all lower federal judges out of work. These constitutional questions have never been conclusively decided, although most current legal and political commentators see it as probably unconstitutional for Congress to fire existing judges by abolishing their positions.⁸⁹

Viewed this way, Tara Leigh Grove is right to emphasize that what has kept the U.S. federal courts from suffering the fate of those in Poland, Turkey, and Hungary—all countries where the ruling party has made rule changes to drastically undermine judicial independence—is not a particularly robust set of constitutional rules, but more mutable political and cultural variables

85. See, e.g., JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 90–91 (2012) (noting that the Congress reduced the size of the Supreme Court after President Andrew Johnson took office in order to deny him power to fill a vacancy).

86. See SOLOMON, *supra* note 82, at 254; Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88 NOTRE DAME L. REV. 2089, 2094 (2013) (arguing that the failure of the bill was due to institutional features of Congress, particularly the committee system and the filibuster).

87. See, e.g., Grove, *supra* note 6, at 522 (arguing that there is not necessarily any clear legal norm or even convention against jurisdiction-stripping).

88. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish” (emphasis added)); Helen Norton, *Reshaping Federal Jurisdiction: Congress’s Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1010–12 (2006) (noting the theory that Congress has plenary control over the structure and jurisdiction of the lower federal courts, while also explaining potential limits on this power).

89. See Grove, *supra* note 6, at 540 (finding that there was once legitimate legal and political disagreement as to whether judges could be fired outside the impeachment process if their positions were abolished).

surrounding those rules.⁹⁰ The design of the U.S. Constitution provides no such special protection.

Indeed, in other ways, the design of the U.S. federal structure appears to be more weakly protected against the risk of democratic erosion than a number of those found elsewhere. Many modern constitutions written after World War II were crafted with a pervasive distrust of popular politics—these constitutions include a number of independent institutions, beyond courts, to protect the liberal democratic order from erosion from within. For example, modern constitutions routinely include independent electoral commissions or tribunals to protect the integrity of the vote, independent anti-corruption institutions to cleanse the political sphere, and independent ombudspersons to help protect human rights and prevent manipulation of key civil society spheres such as the media.⁹¹ Recent experience suggests that an executive can pack or defang these institutions in much the same way as courts if a regime has sufficient time, political support, and resourcefulness.⁹² Still, their existence plausibly raises the costs and time needed for an authoritarian takeover. The U.S. Constitution, however, lacks most of these non-judicial independent institutions, potentially easing the path for would-be authoritarians.

In part because of the absence of these modern anti-tyrannical institutions in the Constitution, Ginsburg and Huq argue that the U.S. constitutional structure may be at least as vulnerable to democratic erosion as constitutions found elsewhere in the world.⁹³ At the federal level, we agree. But their analysis underplays a key variable—the nature of U.S. federalism—which we think does provide enhanced protection. In the rest of this Article we explain why.

III. HOW U.S. FEDERALISM PROTECTS AGAINST TYRANNY: AUTONOMOUS STRUCTURES AND PERSONNEL

We argue that the core protection provided by U.S. federalism against tyranny lies in the large number of state and local officials, not subject to direct control from Washington, who carry out key functions that would-be

90. See *id.* at 542 (noting that the conventions protecting judicial review are “contingent” and have changed historically).

91. See Kim Lane Scheppele, *Parliamentary Supplements (or Why Democracies Need More than Parliaments)*, 89 B.U. L. REV. 795, 810 (2009).

92. In Hungary, for example, the constitutional amendments and replacement carried out by the Fidesz party not only allowed it to pack the Constitutional Court and ordinary judiciary, but also gave it power over various ombudspersons and commissions that were supposed to be independent. See, e.g., Miklós Bánkuti et al., *Hungary’s Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138, 139–42 (2012).

93. See Tom Ginsburg & Aziz Huq, *How We Lost Constitutional Democracy*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA, *supra* note 9, at 135, 152–54 (noting that elections and judicial appointments are particularly politicized in the United States, rather than being insulated from politics); Huq & Ginsburg, *supra* note 6, at 165.

tyrants cannot rapidly or easily take over. The existence of these actors serves as a kind of break on the ability of would-be tyrants to rapidly consolidate power. They at the least can significantly slow any effort towards authoritarianism. As we explain below in Part V, our theory shares an anti-tyranny focus with much historical and modern work on U.S. federalism, but it posits a different set of mechanisms. This Part briefly distinguishes our theory from others to introduce its unique contours—foreshadowing more detailed discussion in Part V—and then offers our institutional account of federalism and tyranny.

A. A NEW INSTITUTIONAL ACCOUNT

Much existing work emphasizes judicial enforcement of federalism-based limits.⁹⁴ We agree that doctrinal devices such as the anti-commandeering doctrine can play a supporting role by bolstering the independence and separation of key state officials. But our account of the anti-tyranny benefit of federalism does not depend primarily on judicially-enforced lines.⁹⁵ Indeed, the U.S. system of federalism, in which states do most of the actual governing, did not arise from, and is not maintained, primarily by doctrine. State and local governments, possessing only vague reserved powers under the Tenth Amendment, could conceivably have been overshadowed by the federal government relatively early on. They were not, however. In colonial times, the entities that would become states performed the vast majority of governmental functions,⁹⁶ and the limited conception of federal power under the Constitution that prevailed until the Civil War and, to a greater degree, the New Deal,⁹⁷ ensured their continued primacy in intrastate governance. To this day, these governments remain responsible for a vast amount of governance, both mundane and fundamental. They issue birth and death certificates and land use approvals on the one hand and imprison and even kill convicted criminals on the other. They set sales and property tax rates and operate schools. They define how corporations may be chartered and the meaning and scope of property rights. In these and other matters, they are

94. See *infra* Section V.B.

95. See *infra* Section V.A.

96. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 4–5 (1998) (noting the deep-rooted nationalist tradition within the United States, but an even older “states’-rights tradition” formed by “a series of different and distinct colonies, each founded at a different moment with a distinct character, a distinct history, a distinct immigration pattern, a distinct set of laws and legal institutions, and so on”); FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 98 (noting that “[m]ost of the decisions and virtually all of the quotidian governance occurred within the individual colonies,” within a “highly decentralized” system).

97. See, e.g., Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485, 1505 (1994) (noting that federalism scholars point to the 1960s or the New Deal as the point at which Herbert Wechsler’s view of federal government, in which federal lawmakers believed that “displacing state law” involved a “heavy ‘burden of persuasion’” and required “special justification,” died).

the governments that directly control most of the daily affairs of individuals living in the United States.

Critically, states control a number of core functions that both comparative experience and common sense suggest are sensitive to authoritarian takeover: the courts, electoral institutions, and key executive personnel. And while, post-New Deal, there appear to be few doctrinal barriers to a vastly larger federal government,⁹⁸ strongly entrenched norms, the enormous and wasteful expense of duplicating state institutions, and the concerted, if often disingenuous, political push for “states’ rights” post-*Brown* have helped safeguard state and local entities’ role as the primary source of most internal governance. Thus, as a practical matter, key institutions and personnel are—and are likely to largely remain—in the hands of the states and the federal executive’s control. To offer just one example, though the potential reach of federal criminal law has been essentially unchecked by doctrine for roughly 75 years, state and local criminal justice personnel and prosecutions still vastly outnumber those at the federal level despite significant increases in federal manpower as the result of efforts to combat organized crime, illegal drugs, and terrorism.⁹⁹

Furthermore, our account differs from most recent work on federalism, which emphasizes the interdependence and cooperation of the state and federal governments.¹⁰⁰ We instead focus on key areas where states maintain separation from the federal government. In this sense, our theory is worth comparing to recent work by the economist Tyler Cowen, who has argued that authoritarianism is unlikely to occur in the United States because of the sheer size of its *federal* bureaucracy.¹⁰¹ Cowen argues that a large bureaucracy will tend to prevent moves towards authoritarianism simply because it is highly unlikely that a leader could capture and subvert such a sprawling network.¹⁰² This happy deep-state narrative, however, may significantly understate the degree of control that a determined president could legally exercise over the

98. For example, *Garcia v. San Antonio Metropolitan Transit Authority* denied any “traditional” or “integral” powers of states to be protected by the judiciary. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985). William W. Van Alstyne criticized the *Garcia* decision, arguing that it gave “Congress . . . the power to decide how far the power to regulate commerce should extend.” William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1726 (1985).

99. Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or “Crying Wolf?”*, 50 SYRACUSE L. REV. 1317, 1326–29 (2000).

100. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1297, 1309 (2009); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2101 (2014); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 48, 90–97 (2011).

101. See Tyler Cowen, *Could Fascism Come to America?*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA, *supra* note 9, at 37, 37.

102. See *id.* at 37–38 (arguing that would-be authoritarian leaders “simply can’t control enough of the modern state to steer it in a fascist direction,” since the modern state “is so large and unwieldy”).

federal bureaucracy. The autonomy of the civil service rests largely on statutes or even on executive orders, and not on the constitution itself. This means that an executive, especially one working in tandem with an allied Congress, could undo many of those protections. Indeed, the Trump administration recently announced a proposed overhaul of civil service rules that critics argued would weaken protections and potentially politicize the civil service.¹⁰³

Moreover, even without congressional action, the president may be able to take certain steps by executive order or agency action—such as transfers of civil servants to undesirable or powerless positions or locations, or reorganizations—that effectively allow significant presidential control over the bureaucracy. Reports suggest that the Trump administration has also employed these steps fairly aggressively in certain agencies as part of its “dismantling [of] the ‘administrative state.’”¹⁰⁴ Thus, even a sprawling federal bureaucracy may not be much of a defense against authoritarianism because a president (and allied legislature) can find routes to place pressure on that bureaucracy.¹⁰⁵ This suggests that the separation and autonomy found in state

103. See, e.g., Noam Scheiber, *Trump Moves to Ease the Firing of Federal Workers*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/business/economy/trump-federal-workers.html> [<https://perma.cc/V9CN-X8SN>] (discussing executive orders that allow the administration to fire civil servants more quickly and easily for poor performance); Erich Wagner, *OPM Would Lose Its Independence, Service Functions under Reorganization Plan: Without Responsibilities Like Retirement Processing and Administering Employee Health Insurance, Observers Fear a More Politically Driven Agency*, GOV'T EXECUTIVE (June 21, 2018), <https://www.govexec.com/management/2018/06/under-reorganization-plan-opm-would-lose-its-independence-service-functions/149190> [<https://perma.cc/2DWT-9WQ7>] (noting that the plan would place some core functions of the independent Office of Personnel Management under more political institutions).

104. Jonah Shepp, *Trump's Effort to Purge Disloyal Civil Servants May Already Be Underway*, N.Y. MAG. (Mar. 16, 2018), <http://nymag.com/daily/intelligencer/2018/03/trump-push-to-purge-disloyal-civil-servants-may-be-underway.html> [<https://perma.cc/S6BC-XYTV>] (reviewing evidence of similar practices in the State Department against career diplomats); see also Alex Ward, *Trump Loyalists May Be Purging Career Officials at the VA*, VOX (July 18, 2018, 4:50 PM), <https://www.vox.com/2018/7/18/17587784/trump-purge-veterans-affairs-employees> [<https://perma.cc/4ESV-QUUV>] (finding that career civil servants perceived as disloyal to Trump have “been reassigned to lower-level positions”).

105. Comparative experience also suggests that the existence of a large and historically independent national state may not be a bar to authoritarianism. An important example is Turkey, which has had a large and historically capable and autonomous civilian and military state that has over time been taken over by the increasingly authoritarian regime of Tayyip Erdogan. See, e.g., Metin Heper & E. Fuat Keyman, *Double-Faced State: Political Patronage and the Consolidation of Democracy in Turkey*, 34 MIDDLE EASTERN STUD. 259, 259 (1998) (noting that “Turkey has had a strong state tradition” with an autonomous elite that acted as a modernizing force). Most recently, after a failed coup against Erdogan in 2016, Erdogan’s administration tried a large number of civil servants on dubious terrorism charges and fired a massive number of others by using emergency powers. See Aria Bendix, *Turkey Dismisses Thousands of Police, Civil Servants, and Academics*, ATLANTIC (July 14, 2017), <https://www.theatlantic.com/news/archive/2017/07/turkey-dismisses-thousands-of-police-civil-servants-and-academics/533754> [<https://perma.cc/R8D5-2796>] (finding that in one year since the coup occurred, “around 150,000 officials have been dismissed from their posts and more than 50,000 people have been jailed”).

governments and bureaucracies is fundamental, and we argue that it is this separation that makes federalism valuable as a check against tyranny.

Of course, the separation between federal and state government with respect to core state functions would mean little if those state actors lacked an incentive to intervene. Our theory is, in a broad sense, consistent with Madison's theory in Federalist 51 that "[a]mbition must be made to counteract ambition."¹⁰⁶ The Madisonian solution is structural and focuses on the incentives of different levels of government to act against aggrandizement by other levels and branches. The basic Madisonian vision has come under sharp attack in recent scholarship, with scholars questioning the assumption that different branches and levels of government will actually be willing to check overreach by other actors.¹⁰⁷ For example, Daryl Levinson and Richard Pildes argue that in the modern United States, individual actors are more likely to identify with their parties than their institutions.¹⁰⁸ They thus argue that at the federal level, the system is more of a separation of "parties" than "powers."¹⁰⁹ Congress, for instance, exercises vigorous oversight of the president under conditions of divided government, but much less under unified government when the same party controls both institutions.¹¹⁰

The same sort of logic may operate with respect to federalism. It is certainly plausible that subnational actors, too, identify more with their parties than with their institutions.¹¹¹ But even where parties are predominant, federalism retains value as a bulwark against tyranny, at least in a two-party system like that in the United States. Jessica Bulman-Pozen argues that the very tendency toward partisan identification can cause individuals to identify closely with states, particularly when the party of these individuals' choice is the minority at the national level.¹¹² In this way, federalism provides "an institutional framework for partisan identification" at the state level in

106. THE FEDERALIST NO. 51, *supra* note 18, at 398 (James Madison).

107. See ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 41 (2011) ("Madison implicitly fell prey to the fallacy of composition by supposing that the pursuit of individual ambitions by officials would ensure the pursuit of institutional ambition at the institutional level.")

108. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312-15 (2006).

109. See *id.*

110. See *id.* at 2346-47 (arguing that unified and divided government in the U.S. "generate significantly different levels of interbranch accountability").

111. See VERMEULE, *supra* note 107, at 41. There is an active debate about the extent to which partisan and other interests dominate institutional loyalty, with some important work challenging the conclusion that it does. See, e.g., David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 27-38 (2018) (arguing that officials do in fact often adopt an institutional perspective, although the effects of this are not uniformly positive); Gardner, *supra* note 55, at 524 (finding in a comparative survey that subnational units in federal polities do in fact have incentives and tools to resist federal overreach in many situations).

112. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1117 (2014) ("When one's party holds power at the national level, states may seem relatively unimportant, but when the other party takes over, they become salient.")

addition to supporting policies in opposition to those enacted at the national level.¹¹³ Given the sheer number of states, it is virtually certain that a substantial number of states will be controlled by the party out of power at the national level. And even if states controlled by the in-power party are useless as checks against federal overreach, those controlled by the out-of-power party will have great incentives to oversee the federal government and to check its abuses. Indeed, the force of the modern party system actually strengthens rather than weakens this incentive, because the importance of partisanship makes it harder for national actors to buy off opposition-controlled states.

Take as an example the way in which opposition-controlled states have become the locus of legal opposition to federal-government overreach or policies with which they disagree. The pattern is that when federal officials—especially the executive branch—do something controversial, states that disagree sue to enjoin the federal government’s actions, while states controlled by the same party as the national authorities generally do nothing.¹¹⁴ Since *Massachusetts v. EPA*, when states, local governments, and nonprofit groups sued the Bush administration to attempt to force the regulation of greenhouse gases emitted from automobiles, these maneuvers have been encouraged by Supreme Court doctrine giving states “special solicitude” in the standing analysis.¹¹⁵ During the Obama administration, for example, Republican-led states took a leading role in opposing the Affordable Care Act and, later, Obama’s executive orders creating rights for certain undocumented immigrants.¹¹⁶ During the Trump administration, Democratic-controlled states similarly have led the charge against Trump’s travel ban, against an effort to add a question on citizenship to the census, and against an attempt to reconsider greenhouse gas rules,¹¹⁷ among many

113. *Id.* at 1118.

114. *See, e.g.*, Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 852–53 (2016) (noting that the volume of state-led lawsuits against the federal government is “on the rise”).

115. *See Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007); Bulman-Pozen, *supra* note 112, at 1117 (noting policies pursued by opposing states when Presidents Bush and Obama were in office); Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENVTL. L. REV. 49, 51–54 (2018) (describing lawsuits pursued by California); Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 634–46 (2018) (describing state lawsuits against the federal government).

116. *See* Bulman-Pozen, *supra* note 112, at 1117 (describing these and other state efforts); Matt Ford, *A Ruling Against the Obama Administration on Immigration*, ATLANTIC (Nov. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/11/fifth-circuit-obama-immigration/415077> [<https://perma.cc/D3DT-7H33>]; Warren Richey, *Attorneys General in 14 States Sue to Block Healthcare Reform Law*, CHRISTIAN SCI. MONITOR (Mar. 23, 2010), <https://www.csmonitor.com/USA/Justice/2010/0323/Attorneys-general-in-14-states-sue-to-block-healthcare-reform-law> [<https://perma.cc/WM9R-SF54>].

117. *See* Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS (Oct. 27, 2017, 12:01 AM), <https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump> [<https://perma.cc/38DG-EB72>].

other challenges. And the New York Attorney General has sued the president and his charitable foundation in state court, alleging, inter alia, “extensive unlawful political coordination” between the foundation and the Trump presidential campaign.¹¹⁸ Even if partisanship now often trumps institutional interest at the state level, it may in fact sharpen the value of federalism as a check on tyranny.

We do note two key caveats about the theory we develop here. First, we make no claims that the designs we highlight are, on balance, good or bad—we simply point out that they play a significant anti-tyranny function. As Vermeule has noted, the constitution that best provides protection against a given risk is not necessarily efficient or optimal.¹¹⁹ Thus, constitutional designers may actually spend too much energy protecting against relatively low-probability downside risks of tyranny, and not enough on optimizing constitutional performance during normal times.¹²⁰ Indeed, as we point out below, many of the structures and doctrines we highlight have been heavily criticized for impeding coordination or efficiency during “normal” times, or even other kinds of crises. The decentralized structure of election management, for example, arguably increases errors, decreases efficiency, and inhibits attempts to ameliorate violations of individual rights; the inability of federal officials to “commandeer” state personnel may weaken response to natural disasters and other crises of that type.¹²¹ Perhaps a more efficient form of federalism would find ways to lessen these costs while also protecting against the very real risks of tyranny, but that is a question beyond the scope of this Article.

Second, our alternative theory of how U.S. federalism inhibits tyranny is not foolproof. The fact that thousands of local and state officials run elections makes it less likely that a president could force certain candidates to be elected, but if there are enough entities sympathetic to an effort to keep a president or party in power by breaking or altering the law, this protection, too, would break down.¹²² And the fact that the executive cannot remove state

118. Press Release, N.Y. Att’y Gen., Attorney General Underwood Announces Lawsuit Against Donald J. Trump Foundation and Its Board of Directors for Extensive and Persistent Violations of State and Federal Law (June 14, 2018), <https://ag.ny.gov/press-release/attorney-general-underwood-announces-lawsuit-against-donald-j-trump-foundation-and-its> [https://perma.cc/VG-Q9-4B5T].

119. See VERMEULE, *supra* note 20, at 10–14.

120. See *id.* at 13 (arguing “that all relevant political risks matter, and . . . a systematically precautionary and distrustful approach to the constitutional allocation of power is a mistake”).

121. See, e.g., Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1630 (2006) (criticizing the effects of the anti-commandeering rule following an event like a major terrorist attack).

122. Indeed, rare yet horrific historic examples, such as Nazism, show how mass support for tyranny can emerge. More recent examples, although far less terrible, show that this is not relegated to history. See, e.g., Nicole Pope, *Turkey: Marching Toward One-Man Rule*, 71 J. INT’L AFF. 17, 18 (2017) (describing Erdogan’s ascent “toward an executive presidency, which would give him the power to appoint ministers, dissolve parliament, and issue decrees with the force of law,”

judges slows the potential erosion of anti-tyrannical forces at the state judicial level but again does not entirely stop it; once again, if enough voters are sympathetic to a charismatic tyrant in the Oval Office, they will gradually vote in judges who will implement the tyrant's will. But the combination of these state and local powers means that rigging or suspending an election will take longer and will involve a long and arduous process rather than a rapid governmental takeover.

*B. EXECUTIVE CAPTURE OF "REFEREES:" COURTS, LAW ENFORCEMENT,
AND ELECTORAL ADMINISTRATION*

We emphasize three areas in which experience suggests that independent state bureaucracies are especially crucial to maintaining liberal democratic constitutionalism: courts, law enforcement, and electoral administration. Recent comparative scholarship suggests that these are particularly sensitive areas where independent institutions help to uphold liberal democracy, while captured or controlled institutions can be highly significant in eroding it. As Levitsky and Ziblatt note, would-be authoritarian regimes inevitably seek control over these institutions because their projects become much easier if they can "capture the referees" that are designed to act as impartial adjudicators between competing sides in a democracy, but which can help would-be authoritarians consolidate power if taken over.¹²³

Independent courts are important to liberal democratic constitutionalism because they serve to maintain limits on power and protect minority rights. On the other hand, captured courts by would-be authoritarians are often enormously valuable in an effort to erode democracy. They can both legitimize dubious maneuvers by the regime and punish and weaken its opponents in a variety of ways.¹²⁴ Law enforcement officers and prosecutors are likewise important: Police are often tasked with cracking down on the opposition during protests and other events, while prosecutors make important decisions about whether to challenge wrongdoing by those close to the regime or to bring politically motivated cases against the opposition.¹²⁵ Finally, the importance of impartial electoral administration is fairly self-evident: It provides a level playing field, whereas captured electoral overseers can do much to tilt the playing field in favor of the regime. This might be by enabling widespread electoral fraud by the regime, although much of the action often takes place before rather than on election day. Such actions could include steering money and other resources towards the incumbent

and analyzing the mass support behind this ascent, noting that "[Erdogan's] fiery rhetoric galvanizes crowds and strikes a chord in the hearts of his constituents").

123. LEVITSKY & ZIBLATT, *supra* note 3, at 78–80.

124. *See id.* at 78 ("Capturing the referees provides the government with more than a shield. It also offers a powerful weapon, allowing the government to selectively enforce the law, punishing opponents while protecting allies.").

125. *See infra* notes 167–69 and accompanying text.

party and away from challengers, allowing the regime to design voting rules that systematically favor it, and deregistering opposition candidates and parties.¹²⁶

Of course, liberal democratic constitutions are not blind to this problem. Most modern constitutions deal with it through insulation—they provide appointment procedures and tenure and removal protections that make it more difficult for temporary political majorities to capture institutions such as courts, prosecutors, and election officials.¹²⁷ Indeed, from a comparative perspective, most foreign jurisdictions do a much more thorough job of this than the U.S. Constitution. As noted in Section II.C, they not only protect courts, but also a range of other core functions like electoral commissions, prosecutors, and ombudspersons.¹²⁸ Regardless, comparative experience shows that insulating core functions often does not prevent would-be authoritarian actors from capturing them. Over time, the existing rules often give them enough routes to gain control, or these rules can be changed for ones that are more favorable for the incumbent regime.¹²⁹

The dynamics of U.S. federalism provide a different form of protection. Particularly with respect to elections, they provide much less insulation from politics—as the events show surrounding the *Bush v. Gore*¹³⁰ case reminded us, electoral administration is often highly partisan in the United States.¹³¹ But as we argue below, the existence of large structures of state-level judiciaries and electoral administrators, with which the federal government has limited

126. See Varol, *supra* note 40, at 1700–01 (noting that electoral laws and practices are “a particularly fertile ground for” a regime seeking to entrench itself in power).

127. See Scheppele, *supra* note 91, at 806–07.

128. For an analysis of these institutions in the South African Constitution, see Faraaz Mahomed, *The Fourth Branch: Challenges and Opportunities for a Robust and Meaningful Role for South Africa’s State Institutions Supporting Democracy*, in *THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH* 177 (David Bilchitz & David Landau eds., 2018).

129. See generally, e.g., Bánkuti et al., *supra* note 92 (exploring how this process occurred in Hungary); Sadurski, *supra* note 54, at 4 (showing how this process also occurred in Poland).

130. See generally *Bush v. Gore*, 531 U.S. 98 (2000) (demonstrating how the Court did not defer to the state court’s interpretation of its own laws, a core principle of federalism).

131. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 4 (2007) (arguing that “[s]tates have not learned what is arguably the primary lesson of *Bush v. Gore*: partisan officials should not run elections because of the obvious self-interest problem,” and finding that “election administration has become more, rather than less, politicized” since the decision). Florida ballots and local election-based partisanship issues once again attracted attention in the 2018 election. For example, “[Senator] Scott and incoming Florida House Speaker Jose Oliva attacked election supervisors and surmised that there has been the ‘discovery of tens of thousands of allegedly valid uncouncted ballots.’” James Call, *As Bill Nelson Fights for Political Life with Recount, Andrew Gillum May Be Looking to Future*, TALLAHASSEE DEMOCRAT, <https://www.tallahassee.com/story/news/2018/11/09/bill-nelson-fights-political-life-recount-andrew-gillum-may-looking-future-florida/1942587002> [https://perma.cc/9XB9-4EWF] (last updated Nov. 10, 2018, 8:19 AM).

power to interfere,¹³² would likely tend to slow any effort to capture the referees. Of course, this form of protection comes with other costs, which may be quite high. The importance of state judiciaries and their independence from the federal structure has at times in U.S. history frustrated enforcement of constitutional rights.¹³³ And the decentralization of election administration in the United States has been blamed for similar problems, as well as inefficiency and inequality regarding the right to vote and the conduct of elections.¹³⁴ Our claim, again, is not that these designs are optimal but merely that they provide a fairly effective form of protection against tyranny.

1. Independent State Courts

The vast majority of the administration of justice is done at the state and local rather than federal levels. Counties, municipalities, and states are, for example, the primary arbiters of criminal cases. Collectively, the 50 states in 2010 (the latest year for which data are available) employed more than 10,600 judges at the trial level and more than 1,000 judges at the intermediate appellate and highest court levels.¹³⁵ In contrast, federal trial, appellate, and Supreme Court authorized judgeships totaled 860 in 2010.¹³⁶ The annual budget of the New York state courts alone is nearly \$2 billion;¹³⁷

132. *But see* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1197–98 (2012) (arguing that under the Elections Clause states lack sovereignty in the area of elections); Weinstein-Tull, *supra* note 15, at 776 (arguing that “[t]he history of the Elections Clause as well as contemporary doctrine demonstrate that the Clause gives Congress unusually far-reaching authority to enact election law,” although exploring the importance of state and local governments in administering elections).

133. *Cf.* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 507 (2006) (noting the prevailing view that Jim Crow era state “courts eschewed the rule of law, openly treating black people as unworthy of legal protection,” but using a line of nuisance cases to challenge that view as overly simplistic).

134. *See* Anthony J. Gaughan, *Ramshackle Federalism: America’s Archaic and Dysfunctional Presidential Election System*, 85 FORDHAM L. REV. 1021, 1021 (2016) (“The extremely decentralized nature of the American presidential election system may reflect the triumph of federalism, but it is a shambolic and ramshackle version of federalism.”).

135. *See* R. LAFONTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 5 (2012), *available at* http://www.courtstatistics.org/other-pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx [<https://perma.cc/8XD6-6D5Z>]. States are also authorized to employ more than 17,900 judges in limited jurisdiction courts, 1,013 judges in intermediate appellate courts, and 356 judges in courts of last resort. *See* NAT’L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, NUMBER OF AUTHORIZED JUSTICES/JUDGES IN STATE COURTS, 2010 (2012), *available at* http://www.courtstatistics.org/~media/Microsites/Files/CSP/SCCS/2010/Number_of_Authorized_Justices_and_Judges_in_State_Courts.ashx [<https://perma.cc/PQD9-UWWJ>].

136. *See* ADMIN. OFFICE OF THE U.S. COURTS, AUTHORIZED JUDGESHIP: FROM 1789 TO PRESENT 8, *available at* <http://www.uscourts.gov/sites/default/files/allauth.pdf> [<https://perma.cc/34YR-BYWW>].

137. *See* N.Y. STATE UNIFIED COURT SYS., BUDGET: FISCAL YEAR 2017–2018, at viii, *available at* <https://www.nycourts.gov/admin/financialops/BGT17-18/2017-18-UCS-Budget.PDF> [<https://perma.cc/2ZDH-GRJ2>].

California's courts expend more than \$3.5 billion annually.¹³⁸ And these numbers exclude sub-state courts, which are also very common. In many states all counties have courts,¹³⁹ as do large municipalities. These courts often address misdemeanors only,¹⁴⁰ but as Alexandra Natapoff documents, misdemeanor cases comprise "the vast majority of U.S." criminal cases (totaling more than ten million cases annually).¹⁴¹

The U.S. Constitution does not spell out in detail the relationship between state and federal courts. The sole provision directly relevant to these courts is the Supremacy Clause,¹⁴² which substantially *limits* these courts' independence, requiring them to "be bound" by U.S. law.¹⁴³ Much of the historical debate in this area has focused on two questions: (1) the scope of federal jurisdiction, and (2) the scope of review of state court actions by federal courts, especially the U.S. Supreme Court.¹⁴⁴ *Cohens v. Virginia*, early in the nation's history, settled the key proposition that the U.S. Supreme Court has the constitutional power to review state court decisions, including the decisions of state supreme courts.¹⁴⁵ Nonetheless, in the first few decades following the formation of the U.S. republic, state courts wielded an enormous amount of practical power because of the paucity of lower federal courts and the wording of the Judiciary Act of 1789.¹⁴⁶ The Judiciary Act of 1789 bestowed relatively limited federal jurisdiction by modern standards—for example, it gave the federal judiciary no general federal question jurisdiction.¹⁴⁷ Furthermore, it assumed that state courts enjoyed concurrent jurisdiction with federal courts in all areas where the Act itself did not create exclusive federal jurisdiction, and relatively few areas of federal law were in

138. See STATE OF CAL., GOVERNOR'S BUDGET SUMMARY—2017–18, at 113–14, available at http://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20170/Judicial%20Branch%20Summary.pdf [<https://perma.cc/W9BZ-LZSB>].

139. See, e.g., *Trial Courts—County*, FLA. CTS., <http://www.flcourts.org/florida-courts/trial-courts-county.stml> [<https://perma.cc/KW65-HL4U>] (showing that there are courts in each of Florida's 67 counties).

140. This varies from state to state, however. See, e.g., *Judicial System Structure*, SUP. CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/judsystem> [<https://perma.cc/VKK8-ENAF>] (showing that in Ohio "municipal and county courts have the authority to conduct preliminary hearings in felony cases").

141. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012) (noting that approximately one million felony cases are filed each year as compared to ten million misdemeanor cases).

142. Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2087 ("[T]he Constitution . . . is mostly silent as to the role of state courts, with the exception of the Supremacy Clause.").

143. See U.S. CONST. art. VI, cl. 2.

144. See generally Blackman, *supra* note 142 (summarizing some of these historical debates).

145. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821).

146. See Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 982–90 (2010).

147. See, e.g., Ann Woolhandler, *Powers, Rights, and Section 25*, 86 NOTRE DAME L. REV. 1241, 1242 (2011) (pointing out that the Congress did not vest the federal courts with "general federal question jurisdiction . . . until 1875").

fact carved out as exclusive in nature.¹⁴⁸ Early state courts thus routinely interpreted the federal Bill of Rights and used it to invalidate a variety of state actions, and these courts were not subject to review by the U.S. Supreme Court under the Judiciary Act.¹⁴⁹ Only when state courts interpreted the Constitution to invalidate federal action were they subject to Supreme Court oversight.¹⁵⁰

State courts have lost a considerable amount of the non-reviewable power that they once possessed. Congress created a much larger federal judiciary over time,¹⁵¹ expanded the scope of both federal jurisdiction and exclusive federal jurisdiction,¹⁵² gave the Supreme Court the power to review any state court decision addressing federal law,¹⁵³ and created and expanded rights of removal in both diversity and federal question cases.¹⁵⁴ In some areas, such as habeas corpus review of state courts, the path has been more meandering, and federal supervision has waxed and waned over time.¹⁵⁵

Of course, it is well-settled that state high courts normally retain the last word on interpretations of state law and the state constitution. This is a power that is protected by concepts like the adequate and independent state grounds doctrine, where the Supreme Court will not generally review state court decisions resting both on federal and state-law grounds so long as those state law grounds are themselves adequate to uphold the judgment and are

148. See Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–77, 78–79 (partially codified as amended at 28 U.S.C. §§ 1332–1333 (2012)) (giving federal district courts exclusive jurisdiction over matters, such as crimes and offenses on the high seas, civil maritime and admiralty cases, and all federal crimes and offenses); Blackman, *supra* note 142, at 2081–82 (describing these areas of exclusive jurisdiction created by the Act and areas in which states were given concurrent jurisdiction with the district and circuit courts).

149. See Mazzone, *supra* note 146, at 989–90.

150. See *id.* at 985–86. In 1914, Congress allowed the Supreme Court to review state court claims regarding the federal legality or constitutionality of state statutes, thus allowing the Court to “hear any decision by a state supreme court on a federal issue.” *Id.* at 990 (citing Act of Dec. 23, 1914, Pub. L. No. 224, ch. 2, 38 Stat. 790).

151. See CROWE, *supra* note 85, at 232–35.

152. See, e.g., Philip L. Merkel, *The Origins of an Expanded Federal Court Jurisdiction: Railroad Development and the Ascendancy of the Federal Judiciary*, 58 BUS. HIST. REV. 336, 337–38 (1984) (arguing that the expansion of federal jurisdiction after the Civil War was bound up with the expansion of the railroads).

153. See Blackman, *supra* note 142, at 2042–44.

154. Acts in 1868 and 1875 expanded removal to encompass most federal question and diversity cases. See Merkel, *supra* note 152, at 338.

155. See, e.g., Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 958–72 (2012) (describing existing limits on federal habeas review under the Antiterrorism and Effective Death Penalty Act and further constraints posed by the *Pinholster* case); see also Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 797–98 (2009) (documenting petitioners’ extremely low success rate in federal habeas challenges to state law decisions); Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 567–78 (1994) (describing a chain of earlier cases that substantially limited habeas review).

independent of the federal reasoning.¹⁵⁶ Some other countries' federal legal systems give the federal courts far more expansive power to review state courts' decisions. Settled doctrine in Mexico, for example, makes any misinterpretation of *state* law a violation of due process rights found in the *federal* constitution, effectively giving the federal courts the ability to review any state court decision.¹⁵⁷ This was a key tool of centralization during the authoritarian regime that governed Mexico during much of the twentieth century.¹⁵⁸ Thus, although federal reviewability of state court decision-making has increased over time in the United States, important enclaves of exclusive state power remain, particularly as compared to some other federalist systems.

But we think more important an issue underpinning these jurisdictional debates, and usually so obvious as to be left unstated: State judiciaries have an independent structure, and independent appointment and removal procedures, with which the federal government lacks the power to meddle. That is, state judges are selected through separate elections and appointment processes controlled by state governments and their people—processes over which the federal government has only minimal control. Moreover, federal officials have no say over the removal of state judges. The Constitution allows for impeachment of federal judges, but this authority does not run to state judges (or in fact to any other state official).¹⁵⁹

Strict separation of the federal government and the structure of state judiciaries is not ubiquitous even in federal regimes. Nor is the existence of a robust state-level state judicial hierarchy. There is in fact considerable variation on this question. In Russia, for example, the vast majority of judges are federal—state-level judges consist only of justices of the peace and constitutional or charter courts.¹⁶⁰ And the judges that do exist are largely under the thumb of the central administration. For example, the federal government controls the number, qualifications, and jurisdiction of the justices of the peace; the federal government also determines and pays their salaries out of the federal budget.¹⁶¹ Further, federal judges *de facto* dominate the state courts through informal mechanisms, determining their

156. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) (“Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.”).

157. See Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidentialismo*, 4 INT’L J. CONST. L. 411, 435 (2006) (explaining that “Mexican federal courts have supplanted the state courts as authoritative interpreters of the states’ own law”).

158. See *id.* at 413–14.

159. See, e.g., Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 27–29 (1988).

160. See Jeffrey Kahn et al., *How Federal Is the Russian Federation?*, in FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF TWENTY SYSTEMS, *supra* note 55, at 355, 357–59.

161. See *id.* at 378–79.

appointments and the focus of their dockets.¹⁶² The weakness of the state judiciary in Russia was part of the process through which Vladimir Putin consolidated power in Russia.¹⁶³ Some federal systems, such as Venezuela, go further and have no state courts at all.¹⁶⁴

The separation between federal and state courts is important because it limits the speed with which a tyrannical regime could consolidate power. As noted above, a would-be authoritarian executive in conjunction with a friendly Congress could potentially use a number of maneuvers to consolidate power over the federal judiciary, through cutting jurisdiction, trimming or eliminating budgets, changing structure, or court-packing.¹⁶⁵ This is true despite the existence of certain protections found in the constitutional text, which protect judicial salaries and prevent removal without impeachment. Thus, judicial independence at the federal level is really more a matter of soft norms or culture than constitutional law, and potentially subject to attack if that normative culture were to deteriorate.¹⁶⁶

But these norms, and the doctrine, remain important. An authoritarian president, even working alongside an aligned Congress, would have much less ability to quickly take over the state judiciary. He could not change its structure, reduce its budget, appoint new judges, or remove hostile ones. It is true that he could potentially take steps that would impact jurisdiction and increase the supervision which federal courts exercised over state judicial decisions. But even these means would leave in place an independent state judiciary that was still exercising critical functions.

2. Law Enforcement

Beyond courts, police and prosecutors—in other words, the general apparatus of law enforcement—may also make a significant difference in protecting or attacking liberal democratic constitutionalism. The role of the police should be obvious: They make decisions about coercion and arrests that can aid a would-be authoritarian regime in tilting the playing field in its favor by repressing the opposition.¹⁶⁷ Prosecutors likewise exercise discretion in deciding which crimes to prosecute.¹⁶⁸ Independent prosecutors may be able to hold an overreaching regime accountable, while captured prosecutors

162. See *id.* at 363–64 (discussing the informal relationship between subnational charter or constitutional courts and the national Constitutional Court).

163. See *id.* at 364.

164. See Allen R. Brewer-Carías & Jan Kleinheisterkamp, *Venezuela: The End of Federalism?*, in *FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF TWENTY SYSTEMS*, *supra* note 55, at 523, 537. There are, however, some justices of the peace under the control of municipalities. See *id.*

165. See *supra* text accompanying notes 81–89.

166. See Grove, *supra* note 6, at 473.

167. See LEVITSKY & WAY, *supra* note 32, at 59 (noting that security forces have the ability “to penetrate society, monitor opposition activity, and put down protest in all parts of the country”).

168. See Varol, *supra* note 40, at 1720.

are a very useful tool to bring politically-motivated prosecutions such as defamation and corruption claims against key opposition figures.¹⁶⁹ Even if these figures eventually win in court, merely bringing the claims may play a key deterrence effect because they can cost the figures time, money, and freedom, while often ensuring that they are ineligible to compete against the regime during the pendency of their trial.

The structure of U.S. federalism plays a meaningful role in hedging against these risks. First, the vast majority of law enforcement in the United States work at the state and local level, generally for state police, local governments, or in the offices of county sheriffs. There are more than 19,000 municipalities in the United States,¹⁷⁰ and municipalities, counties, and states are responsible for the majority of police. In 2008—the last year for which comprehensive data were available—there were more than 1.1 million police officers employed at the state and local level;¹⁷¹ 60 percent of these employees were local officers.¹⁷² In the same year there were only 120,000 full-time federal police officers—just over ten percent of the size of the state and local police force.¹⁷³

This pronounced tilt of law enforcement resources towards the state and local levels is not universal, even among federal regimes. For example, in Venezuela Hugo Chavez took major steps to centralize police forces throughout the country after a coup was attempted against him in 2002. The metropolitan police force in Caracas, which was under the command of the anti-Chavez mayor and at the time was the largest in the country, was disbanded, and a new National Police force created to stand alongside existing federal institutions like the National Guard (attached to the military).¹⁷⁴ According to the UN High Commissioner of Human Rights, these

169. *See id.* (arguing that prosecutorial “discretion enables selective enforcement,” especially in contexts where legal violations are widespread).

170. *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 77 (1990).

171. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (2011), *available at* <https://www.bjs.gov/content/pub/pdf/csleao8.pdf> [<https://perma.cc/6HSQ-965H>].

172. *Id.*

173. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 1 (2012), *available at* <https://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<https://perma.cc/7NVW-TFMA>] (including officers who primarily performed “immigration or customs inspections” in addition to “criminal investigation and enforcement,” judicial protection, Department of Interior duties on public lands, and other duties).

174. *See* Luis Cedeño, *Police Work in Decentralized Governments in Venezuela*, in *FEDERALISM: A SUCCESS STORY?: INTERNATIONAL MUNICH FEDERALISM DAYS 2016*, at 115–28 (Hanns Bühler et al. eds., 2016) (concluding that although the U.S. President lacks the power to centralize military control to this extent, President Trump has used language that perhaps hints at a desire to do so); *see also* Helene Cooper et al., *Two Years In, Trump Struggles to Master Role of Military Commander*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/politics/president>

two federally-controlled police agencies have become an important instrument in the creation of a “policy to repress political dissent and instil [sic] fear in the population to curb demonstrations at the cost of Venezuelans’ rights and freedoms.”¹⁷⁵ Reports have noted patterns of routine use of excessive force against protestors, leading to injuries and deaths, and thousands of politically motivated arrests, with detainees often being mistreated or tortured and held in inadequate conditions.¹⁷⁶ The fact that most policing is state or local in the United States plausibly makes it more difficult for a centralized actor to carry out this kind of repression.

A similar point applies to the role of prosecutors, where again most prosecutorial personnel (and most crimes) are state rather than federal. A 2007 report found about 78,000 full-time equivalent (“FTE”) personnel in state prosecutors’ offices; in contrast, that same year there were 11,392 FTE personnel in U.S. attorney’s offices nationally.¹⁷⁷ This would not, of course, prevent captured federal prosecutors from bringing politically-motivated prosecutions against members of opposition movements or parties, using a number of different federal crimes. But it might limit the extent of this to some degree, particularly since a number of the crimes commonly used for this purpose outside of the United States are state rather than federal crimes here.¹⁷⁸

Moreover, the existence of a very sizable corps of state prosecutors allows for a parallel apparatus in which regime members and allies can potentially be held accountable. Take as an example the current debate in the United States about presidential pardon power. Critics of the Trump administration have expressed concern that the president may use this power to immunize members of his administration, allies of it, and even possibly himself from

trump-military.html [https://perma.cc/QPA3-SNAR] (noting President Trump’s refusal to stop referring to “my military” and “my generals” despite military objections to this terminology).

175. OFFICE OF THE UN HIGH COMM’R FOR HUMAN RIGHTS, HUMAN RIGHTS VIOLATIONS AND ABUSES IN THE CONTEXT OF PROTESTS IN THE BOLIVARIAN REPUBLIC OF VENEZUELA FROM 1 APRIL TO 31 JULY 2017, at 33 (2017), available at https://www.ohchr.org/Documents/Countries/VE/HCReportVenezuela_1April-31July2017_EN.pdf [https://perma.cc/JU4A-6UHB].

176. See *id.*; see also *Crackdown on Dissent: Brutality, Torture, and Political Persecution in Venezuela*, HUM. RTS. WATCH (Nov. 29, 2017), <https://www.hrw.org/report/2017/11/29/crackdown-dissent/brutality-torture-and-political-persecution-venezuela> [https://perma.cc/6V CX-UZ5L] (reporting on political protests in Venezuela).

177. STEVEN W. PERRY & DUREN BANKS, U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES 1, 4 tbl. 2 (2011), available at <https://www.bjs.gov/content/pub/pdf/psco7st.pdf> [https://perma.cc/S4VV-7SQW] (reporting a total of “78,000 attorneys, investigators, paralegals, and support staff” employed in 2007); U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR U.S. ATTORNEYS, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2007, at 2, available at <https://www.justice.gov/sites/default/files/usaio/legacy/2008/06/17/07starrpt.pdf> [https://perma.cc/4T8V-NYQS] (“United States Attorneys’ offices nationwide equaled 5,707 full time equivalent (FTE) attorneys and 5,685 FTE support employees during Fiscal Year 2007.”).

178. See Varol, *supra* note 40, at 1695 (noting that criminal libel laws and ordinary crimes like trespass and fraud are often used to repress opposition groups).

federal prosecution.¹⁷⁹ Since the scope of the presidential pardon power is broad, and generally seen as non-justiciable, there may be little that can be done (other than impeachment) to directly prevent abuse of the power. But at the same time, it is important that the power only extends to “offenses against the United States,” and thus excludes the larger catalogue of state crimes.¹⁸⁰ Indeed, under the dual sovereignty doctrine—recently re-affirmed by the Supreme Court in *Gamble v. United States*—“a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute” without running afoul of the Double Jeopardy Clause.¹⁸¹ This means that an individual pardoned for a federal crime could still be prosecuted for the same action at the state level.¹⁸² Relevant state officials, including the New York Attorney General, have signaled that they are willing to prosecute regime allies under state law in this event and have sought state-level legal changes to ensure it is possible.¹⁸³

3. Election Administration

In addition to courts and law enforcement, comparative experience suggests that the manipulation of electoral rules and elections is an important tool through which modern authoritarian regimes gain power.¹⁸⁴ Thus it is significant that the constitutional design in the United States protects a relatively independent state structure in administering elections. An executive wishing to change a state election system in an attempt to guarantee a win for a favored candidate would have to contend with the 50 states—and indeed, the thousands of precincts within states— that control the election process.¹⁸⁵

States have full power over state and local elections. They enjoy this power with almost no interference from Congress, with the exception of “its ability to enforce the constitutional right to vote” under the Fourteenth Amendment and other constitutional amendments prohibiting certain forms

179. See Debra Cassens Weiss, *Trump Asserts ‘Complete Power to Pardon’: Can He Pardon Himself?*, A.B.A. J. (July 24, 2017), http://www.abajournal.com/news/article/trump_asserts_complete_power_to_pardon_can_he_pardon_himself [<https://perma.cc/GEU4-4DE4>].

180. U.S. CONST. art. II, § 2, cl. 1.

181. *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019).

182. See Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 84 n. 79 (2019) (“If the President pardons members of his administration who are convicted of federal crimes, under the current separate sovereigns exemption, individual states would still be able to charge and convict administration officials under state statutes.”).

183. See, e.g., David A. Graham, *New York’s Double-Jeopardy Loophole*, ATLANTIC (Apr. 19, 2018), <https://www.theatlantic.com/politics/archive/2018/04/schneiderman-double-jeopardy/558389> [<https://perma.cc/8QU2-9FQL>].

184. See LEVITSKY & ZIBLATT, *supra* note 3, at 87–92; Varol, *supra* note 40, at 1700.

185. See ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* 3 (2009) (describing elections as “hyperfederalized” (emphasis omitted)); Weinstein-Tull, *supra* note 15, at 752–54 (noting that “[s]tates have further decentralized election administration by delegating most election administration responsibilities to local governments”).

of discrimination in voting.¹⁸⁶ Indeed, the Framers expressly designed this allocation of power with tyranny concerns in mind. Hamilton wrote in the Federalist Papers:

Suppose an article had been introduced into the constitution, empowering the United States to regulate the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the state governments?¹⁸⁷

The federal government has greater power to intervene in federal elections, although even here the states take the lead in administration. In particular, the Constitution's Elections Clause gives state legislatures the ability to make rules for "[t]he Times, Places, and Manner of" congressional elections, although it allows the federal Congress to "make or alter" these regulations.¹⁸⁸ This power of federal intervention has been interpreted quite broadly,¹⁸⁹ and scholars have argued that much of it has not yet been used.¹⁹⁰ Nonetheless, constitutional text and history seem to confirm that the states are expected to administer federal elections, even if they are subject to potential federal oversight. Madison wrote the following in *The Federalist* 44:

The election of the [P]resident and [S]enate will depend, in all cases, on the legislatures of the several [S]tates. And the election of the [H]ouse of [R]epresentatives will equally depend on the same authority in the first instance; and will, probably, for ever be conducted by the officers, and according to the laws of the [S]tates.¹⁹¹

186. Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 106 (2017).

187. THE FEDERALIST NO. 59, *supra* note 18, at 450 (Alexander Hamilton).

188. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

189. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013) (holding that the Elections Clause is "comprehensive," gives Congress the power to promulgate "a complete code for" the conduct of federal congressional elections, and is stronger than ordinary preemption (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932))); Morley, *supra* note 186, at 105. The constitutional structure for the regulation of federal presidential elections is murkier—Morley notes good textual arguments that the scope of federal intervention is narrower to that allowed in federal congressional elections, although precedent treats them identically. Morley, *supra* note 186, at 108.

190. See, e.g., Samuel Issacharoff, Commentary, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 112–13 (2013) (arguing that the Elections Clause could be used "to reach most of the major voting concerns of recent years").

191. THE FEDERALIST NO. 44, *supra* note 18, at 356–57 (James Madison).

The assumption, then, is that states would actually run elections, subject to a power of federal direction.¹⁹² Madison's statement about federal elections depending on state legislators and officials was immediately prefaced by the point that states "will have an essential agency in giving effect to the federal [C]onstitution."¹⁹³ This has, indeed, been the way the constitutional structure in this area has unfolded.

All political elections, including those for national representatives and the president, are administered by officials at the state, and more commonly the county or municipal, level.¹⁹⁴ State and local governments provide the bulk of the funding for these elections,¹⁹⁵ as well as the training required of the local officials who run the election.¹⁹⁶ The individual ultimately responsible for planning for and overseeing election processes is either an elected or appointed state politician, commission or board, or combination of the two.¹⁹⁷ The federal government is currently involved in elections only by mandating certain state and local government procedures, such as easing the registration process for overseas and military voters.¹⁹⁸ The Department of Justice oversees these mandates—and not always successfully.¹⁹⁹

Congress's attempts to legislate more uniform state and local election procedures through requirements for voter registration, absentee ballots, and voting hardware and software, among other measures, have met with some problems of compliance, in part due to states' expansive delegation of

192. See generally ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2012) (discussing the overlap between federal and state powers in handling different election subjects and suggesting more federal power than most scholars have acknowledged).

193. See THE FEDERALIST NO. 44, *supra* note 18, at 356 (James Madison).

194. See *supra* note 185 and accompanying text.

195. The federal government provides some funding through acts such as the Help America Vote Act (\$3 billion to the states), but these are not permanent allocations of funds. R. Doug Lewis, *Elections at Risk in 2012 and Beyond? Budget Reductions May Lead to New Election Problems*, in THE BOOK OF THE STATES 2011, at 227 (The Council of State Governments 2011), available at <http://knowledgecenter.csg.org/kc/system/files/Lewis2011.pdf> [<https://perma.cc/J9V3-QDSF>] ("Congress and the White House seem to have lost interest in continued federal funding for elections.").

196. In two states—New York and Nevada—the state does not provide training and leaves all election responsibilities to local officials. The majority of states require local entities to receive state-level training and certification from the state. See *Election Costs: What States Pay*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 3, 2018), <http://www.ncsl.org/research/elections-and-campaigns/election-costs.aspx> [<https://perma.cc/6ZLX-WVPL>].

197. See *Election Administration at State and Local Levels*, NAT'L CONFERENCE STATE LEGISLATURES (June 15, 2016), <http://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx#State> [<https://perma.cc/ZDW3-BHGJ>] (showing that all states either have an elected lieutenant governor or secretary of state, an appointed chief election official, an appointed board of commission, or a board or commission plus an individual official, to oversee elections).

198. See Lewis, *supra* note 195, at 227–28.

199. See *id.*; Weinstein-Tull, *supra* note 15, at 761.

election responsibilities to thousands of local governments.²⁰⁰ Controlling all of these governments from the federal level poses challenges. Although recent foreign meddling has highlighted the vulnerability of these elections to electronic and other forms of interference,²⁰¹ direct federal interference with voting results would require the executive to exert a massive, resource-intensive effort.

The effort and costs of administering elections—from presidential primaries to general and special elections—are significant, although they differ substantially by state due largely to varying numbers of voters and polling spaces. A checklist of state and local government costs shows the complex web of effort involved, from recruiting, training, and paying poll workers to covering benefits for full-time labor, owning and maintaining polling places, printing media kits and numerous types of ballots (including, increasingly, ballots in several different languages), counting ballots, and owning and maintaining voting machines, among many other requirements.²⁰² Few states collect comprehensive statistics on the cost of elections—in part due to the complexity of compiling thousands of local jurisdictional costs²⁰³—but the few that do demonstrate the types of resources that the federal government would have to invest to substantially take over elections. North Dakota estimates that its elections cost more than \$1.2 million for the primary and the same amount for the general election in 2016.²⁰⁴ In contrast, Colorado reports a per-county gross cost of coordinated

200. See Weinstein-Tull, *supra* note 15, at 753, 761. For a description of the federal statutes and states' largely successful resistance to them, see *id.* at 755–62.

201. According to indictments of the Russians involved, this meddling included, for example, using social media to “address[] divisive U.S. political and social issues,” using pages “claimed to be controlled by U.S. activists,” and “stag[ing] political rallies inside the United States, and while posing as U.S. grassroots entities and U.S. persons.” Indictment at 3, *United States v. Internet Research Agency LLC*, Case 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018), *available at* <https://www.justice.gov/file/1035477/download> [<https://perma.cc/7HB4-SNNE>]. Russian entities also disseminated Democratic National Committee e-mails and, in 21 states, hacking “voter-registration operations, state and local election databases, e-poll books and other equipment.” See Nicole Perlroth et al., *Russian Election Hacking Efforts, Wider Than Previously Known, Draw Little Scrutiny*, N.Y. TIMES (Sept. 1, 2017), <https://www.nytimes.com/2017/09/01/us/politics/russia-election-hacking.html> [<https://perma.cc/KT4Z-WSMT>].

202. See ELECTION CTR., CHECKLIST: COST OF ELECTIONS 5–8 (2010), *available at* https://www.electioncenter.org/EPC/Cost_of_Elections_8.pdf [<https://perma.cc/5R29-74P2>].

203. See *Election Costs: What States Pay*, *supra* note 196 (“Pinning down how much it costs to administer an election is notoriously difficult. Part of the difficulty is that several levels of government—states, counties, municipalities and even special districts—have a hand in running (and paying for) elections.”).

204. See N.D. SEC’Y OF STATE, SUMMARY OF NORTH DAKOTA ELECTION STATISTICS 1980–PRESENT 3, *available at* <https://vip.sos.nd.gov/pdfs/Portals/statistics-turnout.pdf> [<https://perma.cc/T78F-X93L>].

elections as high as \$807,684 in 2015 in the more populous counties.²⁰⁵ Wisconsin, which last collected data in 2014,²⁰⁶ shows total costs of \$9.7 million for elections that year.²⁰⁷

As with judges, the key point is not so much the precise contours of federal oversight of state election administration; it is more that the vast bulk of election administration occurs at the state rather than federal level, and this division of labor appears (indeed more clearly than many of the other structures we explore here) to be expressly mandated by the Constitution. Given the dynamics through which modern exercises of tyranny tend to occur, this is significant. Regimes rely on their control of electoral authorities to tilt the playing field in their favor.²⁰⁸ In clumsy cases, this may be done through outright fraud; in subtler cases, it is done through the deregistration of opposition parties and the placement of various hurdles in their access to the ballot.²⁰⁹ The decentralization of election administration makes this more difficult to carry out in the United States than it has been in many other countries.²¹⁰ A would-be authoritarian president, even aided by Congress, would have less ability to effect rapid change that would tilt the electoral playing field.

Obviously, the strong federalism in U.S. electoral administration does not prevent all efforts to tilt the electoral playing field. A series of controversies over the past several years, most notably gerrymandering and voter ID laws, have been viewed as possible efforts to gain a durable partisan advantage.²¹¹ Where these efforts are coordinated by a national-level party over a long period of time, then they could have a significant effect on the national field.

Indeed, Ginsburg and Huq point to voter ID laws and similar devices to support their contention that the effect of U.S. federalism on stopping

205. See Accountability in Colo. Elections, *Election Cost Statistics*, COLO. SECRETARY ST. (2018), <http://www.sos.state.co.us/pubs/elections/ACE/ElectionCostStatistics/atlas.html?indicator2=i0&date2=Gross%20Cost> [<https://perma.cc/HEE2-EU3C>].

206. *Election Costs: What States Pay*, *supra* note 196.

207. 2014 Spring Election: GAB-190NF Election Statistics and GAB-191 Election Specific Cost Reports, WIS. ELECTIONS COMMISSION (Mar. 31, 2014, 7:00 PM), <https://elections.wi.gov/publications/statistics/gab-190/April-2014> [<https://perma.cc/3MG3-N6ST>].

208. See LEVITSKY & ZIBLATT, *supra* note 3, at 88–92.

209. See Varol, *supra* note 40, at 1676 (noting that transparently “rig[ging] elections” is a clumsy way to maintain an authoritarian regime, and that there are subtler methods).

210. It is worth noting is that the federal House and Senate, under the Constitution, are the ultimate judges of elections to their own chambers, and also have authority under the Twelfth Amendment to count electoral votes. See U.S. CONST. art. I, § 5; *id.* amend. XII; see also *Roudebush v. Hartke*, 405 U.S. 15, 23–24 (1972) (recognizing the ultimate authority of each congressional chamber over its own returns). But using this power to overturn election counts at the end of an electoral process, absent extremely close and disputed results, would be a fairly clumsy form of voting rigging.

211. See Huq & Ginsburg, *supra* note 6, at 159 (arguing that this dynamic makes it difficult to tell whether federalism advances or slows authoritarian movement).

authoritarianism is “uncertain”²¹² because federalism could advance rather than prevent an authoritarian movement by allowing anti-democratic laws and practices to spread at the subnational level.²¹³ But the need for would-be authoritarian actors to work state by state would seem likely to slow efforts to erode democracy.²¹⁴ In contrast, in systems where movements must only capture the federal government, an anti-democratic regime may be able to make substantial changes to electoral laws and institutions with blinding speed, as recently happened, for example, in Hungary after the Fidesz party won a single election.²¹⁵ Anti-democratic change in the states is likely to be slower, unavailable in opposition-held states, and vulnerable to federal challenge unless the federal judiciary has already been captured. Such a delay can provide crucial breathing space in which a move towards authoritarianism can be defeated.

IV. PROTECTING THE INDEPENDENCE OF STATE INSTITUTIONS: ANTI-COMMANDEERING AND EMERGENCY POWER

The sensitive functions examined in the prior Section are merely a sample of the most important of many ways in which state governments have essential, separate personnel and carry out independent functions. The states contain large, separate executive branch bureaucracies that administer a wide range of duties, including such things as health, environmental protection, professional regulation, the administration of entitlement programs, and education.²¹⁶ Moreover, state and local governments include a substantial

212. See *id.* at 160–62.

213. See *id.*

214. Of course, the pace of change at the subnational level may have increased due to recent changes. As Bulman-Pozen has noted, cross-state political action is increasingly common and strong, creating a sub-national political community in which individuals discontented with national politics, or wanting to replicate successes at the national level, have a sub-national forum that is not limited to the state in which they live. Bulman-Pozen, *supra* note 112, at 1135–45. Out-of-state funds have recently dominated several high-profile state elections and referenda. See *id.* at 1135–36.

215. See Bánkuti et al., *supra* note 92, at 139–40.

216. The latest Bureau of Labor Statistics figures state that there are about 2,177,310 state government employees, 5,480,790 local government employees, and 2,005,250 employees of the federal executive branch. See *May 2018 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 999000-Federal, State, and Local Government, Excluding State and Local Schools and Hospitals and the U.S. Postal Service (OES Designation)*, BUREAU LAB. STAT., https://www.bls.gov/oes/current/naics3_999000.htm [<https://perma.cc/W76G-4BKE>]; *May 2018 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 999100-Federal Executive Branch (OES Designation)*, BUREAU LAB. STAT., https://www.bls.gov/oes/current/naics4_999100.htm [<https://perma.cc/S63S-GCPP>]; *May 2018 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 999200-State Government, Excluding Schools and Hospitals (OES Designation)*, BUREAU LAB. STAT., https://www.bls.gov/oes/current/naics4_999200.htm [<https://perma.cc/5C9R-8ZF9>]; *May 2018 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 999300-Local Government, Excluding Schools and*

cadre of separately elected state officials, including governors and lieutenant governors, other elected members of state cabinets such as Attorney Generals, members of the state legislature, mayors, and city and county commissioners.

U.S.-style federalism includes a number of features—some so deeply embedded as to generally be left unstated—that protect the independence of these bureaucratic actors and executive officials. The most obvious is independence in appointment and tenure: State officials and bureaucrats are selected in processes controlled by state constitutions, without any input from the federal government. Moreover, as introduced in Section III.B.1, the federal government lacks any power to remove state officials via impeachment or other means, even (as we detail below) during a crisis or emergency.²¹⁷

In this Part, we look at two other concepts that bolster the independence of state bureaucracies in ways that are consistent with our theory. The first is the oft-critiqued anti-commandeering doctrine of the Supreme Court, which holds that the federal government may not order state-level executive and legislative officials to carry out federal mandates. While the doctrine has commonly been faulted for creating inefficiency and reducing flexibility during crises,²¹⁸ it is potentially important for our purposes because it would prevent a captured federal government from taking over state bureaucracies. Second, we consider U.S. design and jurisprudence during periods of emergency and highlight the point—striking in comparative terms—that the independence of tenure and chain of command appears to be sustained even under exceptional conditions.

A. THE ANTI-COMMANDEERING DOCTRINE AND ITS WORKAROUNDS

The anti-commandeering doctrine prevents the federal government from forcing state and local legislative and executive officials to implement its programs.²¹⁹ The doctrine matters for our purposes because it helps to maintain the independence of the state bureaucracy, thus aiding the dispersion of core functions that makes movement towards authoritarianism less likely.²²⁰ Without the doctrine, for example, the federal government could order the vast apparatus of state and local police to implement its policies, potentially compensating for some of the size imbalance between federal and state police noted above.²²¹ We do not assert that the anti-

Hospitals (OES Designation), BUREAU LAB. STAT., https://www.bls.gov/oes/current/naics4_999300.htm [<https://perma.cc/KG3K-TGJ3>].

217. See Merritt, *supra* note 159, at 27–29 and accompanying text.

218. See Ryan, *supra* note 19, at 67 and accompanying text.

219. See, e.g., Printz v. United States, 521 U.S. 898, 925–33 (1997).

220. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2183 (1998) (noting the importance of courts' protecting states' judicial, executive, and legislative functions through the anti-commandeering doctrine).

221. Of course, just as federalism has deep flaws, as shown by historic abuses of state power, the anti-commandeering doctrine can simply accentuate these flaws. In some cases, the federal

commandeering doctrine is necessary—as noted by Malcolm Feeley and Edward Rubin.²²² Even if federal officials were able to give commands to state and local officials, there would still be a large amount of practical discretion in the hands of the state and local officials.²²³ But it is useful.

In its seminal anti-commandeering decision, the 1992 case *New York v. United States*, the Supreme Court focused specifically on the “puppetry” threat, centering its discussion around the issue of when “Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way.”²²⁴ Engaging in an extensive discussion of the Founders’ intent, the Court concluded that the history indicated a negative response to this question.²²⁵ Specifically, the Founders rejected the “New Jersey plan”—in which the states would have acted merely as implementers of federal policy, with state “judiciary and executive officers” executing federal laws as needed.²²⁶ The Founders instead chose a system in which Congress would regulate individuals directly, but lacked the power to order state legislatures “to govern according to Congress’ instructions.”²²⁷ The Court noted that Congress could use its legitimate powers, such as taxing and spending, to incentivize the states to act, but it could not simply order the states to regulate in a certain way.²²⁸ As the Court stated in the 2018 anti-commandeering decision *Murphy v. NCAA*,²²⁹ “conspicuously absent from the list of powers given to Congress [in the Constitution] is the power to issue direct orders to the governments of the States.”²³⁰

In 2007, the Court extended the anti-commandeering rule beyond concerns about the federal government forcing state legislators’ hands,

government struggles to independently fix flagrant state violations of the Constitution, as in the Jim Crow era, and could more realistically address these types of violations if it could directly commandeer state officials.

222. FEELEY & RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE, *supra* note 17, at 143.

223. *See id.* (noting that even after a command was issued, “[t]here would still remain innumerable decisions” in the hands of the lower-level official).

224. *New York v. United States*, 505 U.S. 144, 161 (1992).

225. *Id.* at 166. The recent case *Murphy v. NCAA* extended the *New York* decision to situations where the federal government orders a state legislature not to change its existing regulations, rather than to affirmatively regulate in a certain way. *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). The Court reiterated that Congress lacks “the power to issue direct orders to the governments of the States.” *Id.*

226. *New York*, 505 U.S. at 164.

227. *Id.* at 162.

228. *Id.* at 170, 176. In particular, the relevant provision ordered state legislatures either to regulate radioactive waste according to federal instructions, or to “take title” to the waste. *Id.* at 176. The Court held that either option effectively required the states to regulate in a certain way, and thus invalidated the provision. *Id.*

229. The case reviewed a federal law in which Congress, in most circumstances, prevented state governments from changing their existing laws in order to “‘authorize’ sports gambling.” *Id.* at 1468 (quoting 28 U.S.C. § 3702(1) (2012)).

230. *Id.* at 1476.

holding that Congress lacked power to commandeer state executive officials in addition to state legislatures.²³¹ In other words, Congress could not “compel[] state officers to execute federal laws.”²³² A law requiring state police to conduct background checks for gun buyers or follow an alternative system to validate the legality of a gun sale violated the anti-commandeering rule because it unlawfully “pressed [state officers] into federal service.”²³³ The Court emphasized that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”²³⁴

Printz v. United States is thus directly relevant to the situation of an executive attempting a rapid takeover of state governments.²³⁵ Compelling state legislation is one matter, but immediately enlisting state law enforcement officers to do the bidding of a federal executive could quickly wreak havoc on our democratic system. The *Printz* version of anti-commandeering makes clear that the president could not, for example, give orders to state police to repress a protest or to state prosecutors to charge certain individuals.

The anti-commandeering doctrine constructed by the Court in *New York*, *Printz*, and *Murphy* has been subject to withering critique. These critiques break down into at least three different camps. The first treats the constitutional foundations of the doctrine as suspect, deeming them to involve flawed constitutional interpretation.²³⁶ The second questions the pragmatic consequences of the decision,²³⁷ and the third asks whether the anti-commandeering doctrine is in fact effective or can simply be evaded through use of the Spending Clause and other devices.²³⁸ We treat these skeptical accounts in turn.

First, a central criticism of the doctrine is that it lacks constitutional grounding. Its putative foundation is the Tenth Amendment, which provides that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States.”²³⁹ The Tenth Amendment in this case essentially elucidates, in the view of the Court, a structural inference from the Constitution—the Constitution implies that Congress has power to operate directly on individuals in any sphere within its powers, but not generally on states themselves.²⁴⁰ Justice Alito, writing for the

231. See *Printz v. United States*, 521 U.S. 898, 935 (1997).

232. *Id.* at 905.

233. *Id.*

234. *Id.* at 922.

235. *Id.* at 898.

236. See *infra* notes 239–45 and accompanying text.

237. See *infra* notes 246–58 and accompanying text.

238. See *infra* notes 259–83 and accompanying text.

239. U.S. CONST. amend. X.

240. See Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 207–08.

majority, largely followed this reasoning in *Murphy*, noting the importance of “the basic structure of government established under the Constitution” and finding: “The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms.”²⁴¹

Critics have argued both that this approach has a poor textual foundation and that it lacks adequate support from sources of original understanding such as the Federalist Papers.²⁴² It is also infrequently invoked, although the Court recently reaffirmed and extended it.²⁴³ These critiques are largely irrelevant to the purposes of our project: Anti-commandeering can be a useful normative tool even if it lacks a proper constitutional foundation in the specific context of the United States.

However, they do raise a practical concern: If the anti-commandeering doctrine is poorly rooted and controversial, then it may provide relatively little actual protection. A would-be authoritarian president could simply rely on a captured Supreme Court to modify or eradicate the doctrine. After all, the scope of Tenth Amendment restrictions on federal government power has shown wild swings over the past several decades.²⁴⁴ It would likely not be very difficult for a captured court to scale back or eliminate the anti-commandeering doctrine given the ambiguity of the constitutional record, just as the Court previously created and discarded the “traditional governmental function[s]” test immunizing certain activities from federal regulation under the Tenth Amendment.²⁴⁵ But, even if it is conceded that the anti-commandeering doctrine has unstable and ambiguous roots in the particular context of U.S. constitutional practice, our larger point still stands: The doctrine is a useful supplemental protection for independent state bureaucracies, and would be a more useful check if it were given clearer grounding in the constitutional design. Imagine, for example, an alternative constitutional text that clearly forbade executive and legislative commandeering.

A second critique, one that is more central here, considers the practical effects of an anti-commandeering norm. The major argument in this context is that the anti-commandeering norm provides national authorities with too little flexibility, especially in times of crisis. Critics point, for example, to the

241. *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

242. *See, e.g., Caminker, supra* note 240, at 201–02; Jackson, *supra* note 220, at 2186–87 (arguing that the *Printz* decision does not clearly explain why judicial commandeering is allowed and executive commandeering is not).

243. *See Murphy*, 138 S. Ct. at 1476, 1478–79, 1481.

244. *Compare Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding that the Fair Labor Standards Act could not be applied to state employees working in “traditional governmental functions”), *with Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531, 555–56 (1985) (abandoning the traditional governmental functions test as “unworkable” and holding that the political process provides sufficient protection to the states).

245. *See Garcia*, 469 U.S. at 531.

jurisdictional mess that was created after Hurricane Katrina and argue that the anti-commandeering norm helped to undermine coordination and reduce efficiency, observing that the same problems could in other emergency responses.²⁴⁶ There is little question that this critique has some force. However, our analysis suggests a tradeoff between the kinds of norms that would be useful during normal times, and perhaps even during certain crises such as Katrina,²⁴⁷ and those norms that help to prevent the extreme threat of tyranny. That is, the anti-commandeering doctrine may well impose high costs, but it also has the benefit of dispersing power in ways that makes an authoritarian outcome less likely.

A related point stems from considering the anti-commandeering norm in comparative perspective. Justice Breyer, in his dissent in *Printz*, noted that many other federal systems, such as Germany, Switzerland, and the European Union, lack such an anti-commandeering principle.²⁴⁸ These systems tend to forgo a large federal bureaucracy and instead rely on enforcement by subnational entities.²⁴⁹ Thus, the functioning of the system depends on subnational actors carrying out orders given by national authorities. Moreover, they tend to allow subnational units to participate directly in policymaking at the national level.²⁵⁰ Breyer argues that such a system may actually be viewed as more protective, rather than less protective, of state interests, because it allows states to play a large role in enforcing federal law, and thus lets them adapt central orders to local conditions, and temper enforcement in the name of local interests.²⁵¹ In contrast, the anti-commandeering doctrine

246. See *Printz v. United States*, 521 U.S. 898, 939–40 (1997) (Stevens, J., dissenting) (arguing that emergencies “may require a national response before federal personnel can be made available to respond”); Siegel, *supra* note 121, at 1630 (considering the negative effects the rule might have in the event of a terrorist attack); see also Ryan, *supra* note 19, at 74–76 (noting “rare circumstances” in which states should perhaps have a weaker entitlement to sovereignty, such as after emergencies such as Katrina, but noting that in most cases, states could and likely would simply choose to waive their sovereignty and request more federal intervention).

247. See, e.g., Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS. U. PUB. L. REV. 313, 318 (2015) (questioning the value of “hamstring[ing] federal officials with a bright-line rule that bars federal commandeering of state and local police” during emergencies).

248. See *Printz*, 521 U.S. at 976–77 (Breyer, J., dissenting).

249. See *id.*; see also Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 213, 215–16 (Kalyso Nicolaidis & Robert Howse eds., 2001).

250. See Halberstam, *supra* note 249, at 235–38.

251. See *Printz*, 521 U.S. at 976–77 (Breyer, J., dissenting) (arguing that proponents of the alternative model “believe that such a system interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary government, and helps to safeguard individual liberty as well”); see also Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 142, 145 (Gregory A. Caldeira et al. eds., 2008) (arguing that “horizontal” federalism like that in the United States, where “[c]entral and . . . state governments are independent,” produces less powerful states than “vertical” federalism such as that found in Germany and Switzerland, where “the central government

creates pressure to expand the federal bureaucracy, since it now becomes the main option for the enforcement of federal programs.²⁵²

The Breyer view is not unreasonable. German federalism was designed this way after World War II, with input from the United States, precisely so as to reduce the risk of authoritarian overthrow and tyranny that the country had experienced at the hands of the Nazis.²⁵³ Some case study research also seems to support the basic point: The German/Swiss model actually provides for stronger rather than weaker power for states vis-à-vis the federal government.²⁵⁴ This is particularly true because the systems generally have rules or norms in which the central government provides only the broader outlines of policy, while the subnational units fill in the details.²⁵⁵ Indeed, a major critique of the model is that it tends to create a joint-decision trap where too little change from the status quo occurs.²⁵⁶

But this does not mean that Breyer's critique of the anti-commandeering doctrine is correct in the U.S. context. The major problem with his argument is that it ignores context. It is not just that the United States has a distinct tradition of federalism, as Scalia notes in his majority opinion in *Printz*.²⁵⁷ The key point instead is that the U.S. system lacks key elements of the German/Swiss model. The United States does not have subnational units participating directly in national-level governance, especially after the Seventeenth Amendment replaced appointment of Senators by state legislatures with direct election in 1913.²⁵⁸ And it already has a very large federal bureaucracy. In such a context, eliminating the anti-commandeering doctrine would be unlikely to do much to restrain the growth of the federal bureaucracy. But it would give a would-be despot an additional tool with which to consolidate power rapidly.

A third critique of anti-commandeering is that the doctrine is effectively toothless because it can be worked around using other devices like the Spending Clause.²⁵⁹ It is of course true that the purposes of the doctrine can

largely acts through the constituent units of government"). Jessica Bulman-Pozen and Heather Gerken make similar observations. See *infra* notes 361–66 and accompanying text.

252. See *Printz*, 521 U.S. at 977 (Breyer, J., dissenting) ("Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty?").

253. See Halberstam, *supra* note 249, at 214–15.

254. See Halberstam, *supra* note 251, at 145.

255. See *id.*

256. See Fritz W. Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239, 267 (1988).

257. See *Printz*, 521 U.S. at 921 n.11.

258. See Halberstam, *supra* note 249, at 237.

259. See, e.g., Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1305 (1999) (concluding that anti-commandeering is a "[r]elatively weak bright-line doctrine[]"); Ryan, *supra* note 19, at 78–79 (observing that "[i]f constitutional law permits state-federal bargaining around

often be achieved in other ways.²⁶⁰ Most obviously and importantly, Congress can use the spending power to bribe states into carrying out federal programs, or to take money away from them if they fail to do so. The *New York* case, for example, explicitly upholds a different part of the law that conditions the receipt of money on states taking certain action.²⁶¹ The *South Dakota v. Dole* case does the same by upholding a provision conditioning five percent of federal highway funds on states raising their drinking ages.²⁶² Thus this point again has some force, but in the tyranny context the anti-commandeering doctrine still retains real value. Workarounds such as the Spending Clause are real, but imperfect: Requiring a workaround—and, particularly, one that requires affirmative state consent to federal intervention—at least raises the costs of authoritarian moves and may slow them down, while giving states more room for resistance.

Under modern doctrine, Congress can essentially use the spending power for any purpose, but there are some restraints on its use.²⁶³ We are skeptical that some of these limits would have much force in a context where there was a threat of tyranny. Conditional spending—programs where Congress requires that states carry out certain actions in order to receive federal funds—are only constitutional if there is a nexus between the spending program and the required action.²⁶⁴ However, this requirement has been interpreted so broadly as to effectively be toothless in all but the most

Tenth Amendment defined zones under the spending power, why should the states' Tenth Amendment anti-commandeering entitlement be different?").

260. It is notable and potentially problematic that the anti-commandeering principle may not apply in the same way to two of the sensitive functions we laid out above—state administration of elections and state judges. See *Printz*, 521 U.S. at 907, 914–15 (noting that the Constitution, and the Supremacy Clause in particular, may “permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power” and that the Elections Clause may envision state election officials acting under federal direction during federal elections). The scope of the problem here is unclear, since the application of anti-commandeering to either actor is still shrouded in ambiguity. See *Blackman*, *supra* note 142, at 2127–28 (arguing that state courts must be non-discriminatory against federal claims, but that judicial sovereignty inhibits other attempts at judicial commandeering such as Congress prohibiting state courts from hearing certain classes of state claims); Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 101–03 (2016). Our analysis offers some normative reasons to apply anti-commandeering principles rigorously to both sets of actors.

261. See *New York v. United States*, 505 U.S. 144, 173 (1992).

262. See *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

263. See *id.* at 207 (noting that spending “must be in pursuit of ‘the general welfare,’” but that “courts should defer substantially to the judgment of Congress” on this point). Scholars have also proposed interpretations of the Spending Power that would essentially prevent it from being a workaround. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995) (arguing that Congressional Spending Clause actions that “regulate the states in ways that Congress could not directly mandate under its other Article I powers” should be invalid).

264. See *Dole*, 483 U.S. at 207–08.

egregious cases.²⁶⁵ Similarly, the Court reaffirmed in *National Federation of Independent Business v. Sebelius* that spending conditions must not be “coercive,” but even after *Sebelius*, the requirements for coercion are quite ambiguous.²⁶⁶ The coercion requirement may at least help to set a limiting principle for certain cases where, as in *Sebelius*, the unconstitutional threat involved loss of all federal Medicaid funds, the effect on state budgets would be drastic.²⁶⁷

The key restriction for our purposes instead is structural—the spending power is a congressional power in Article I, and the Court has consistently held that spending conditions must be clearly authorized by Congress in order to be constitutional, so the states can understand the consequences of their decisions.²⁶⁸ They cannot, in other words, be imposed unilaterally by the president, but must instead be the product of a clear statement of Congress. In this case, the separation of powers is potentially useful as a protection of federalism principles. The requirement of congressional approval, of course, will be more or less onerous depending on the political context. But in most cases, it would be expected to slow any effort to dragoon state officials or programs into federal service. This delay will at least sometimes prove significant.

The recent case law surrounding sanctuary cities illustrates the importance of the clear statement requirement. The Trump administration has announced since its inception that it would crack down on cities that declined to cooperate in enforcement of immigration laws in a number of different respects.²⁶⁹ However, directly forcing cooperation in many cases would likely fall afoul of the anti-commandeering doctrine. Thus, the main tool used by the administration to date has been the Spending Clause. But

265. See *id.* at 208–09 (finding that raising the drinking age is related to safe highway driving, and thus can be conditioned on loss of federal highway funding); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 466 (2003) (arguing that courts’ interpretation of the *Dole* nexus made the doctrine toothless).

266. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579–80 (2012) (holding that the Affordable Care Act’s conditioning of all existing Medicaid funding on the expansion of Medicaid was coercive). The dissent also noted ambiguities in the coercion analysis. *Id.* at 642–44 (Ginsburg, J., dissenting) (“[T]he coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation.”).

267. *Id.* at 581–85; see also Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003, 1020–24 (2014) (analyzing the coercive conditions test developed by the *Sebelius* majority); Dale B. Thompson, “Unmistakably Clear” Coercion: Finding a Balance Between Judicial Review of the Spending Power and Optimal Federalism, 50 SAN DIEGO L. REV. 589, 603–05 (2013) (same).

268. See *Dole*, 483 U.S. at 207 (holding that if Congress desires to condition funding on particular regulation, “it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation’” (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))).

269. See *infra* note 270 and accompanying text.

these efforts to “defund” sanctuary cities have for the most part been struck down because courts have found insufficient authorization from Congress.

For example, in January 2017, just after inauguration, President Trump issued an executive order instructing agencies to take steps to ensure that cities noncompliant with a provision of federal immigration law, 8 U.S.C. § 1373, would generally be “not eligible to receive Federal grants.”²⁷⁰ This federal law, in turn, required that cities “not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”²⁷¹ A number of cities in California sued to enjoin the executive order, and a federal district judge in California issued a preliminary injunction in April 2017 and a permanent one in November 2017.²⁷² The Court found several major problems with the order. For example, it held that the order seemed to condition compliance with federal law on eligibility for all federal grants, and that such a broad order fell afoul even of the relatively toothless nexus requirement.²⁷³ Further, the Court emphasized that the order was unconstitutional because it was not clearly stated by existing congressional law.²⁷⁴ The Court noted that § 1373 imposed a prohibition on states and localities, but did not state that the consequence of non-compliance would be loss of federal funds.²⁷⁵ Thus, the absence of clear and express congressional authorization was key to the Court’s striking down the law.

Similarly, the clear statement rule played a central role in litigation brought by the City of Chicago against a revised set of Department of Justice rules for certain public safety grant programs.²⁷⁶ The rules conditioned eligibility for grants on compliance with § 1373. However, they also imposed certain other requirements on cities, including that they notify the federal government before certain prisoners are released from custody, and that they allow federal agents to have access to state and local prison and detention facilities.²⁷⁷ The district allowed the condition on § 1373 to stand because it found that existing law already expressly required recipients of the grant at issue to comply with all relevant federal law, including § 1373.²⁷⁸ However, it

270. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

271. 28 U.S.C. § 1373(a) (2012).

272. See *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017) (granting preliminary injunction); *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017) (granting permanent injunction).

273. See *Trump*, 275 F. Supp. 3d at 1214.

274. *Id.* at 1212–14 (finding that the executive order violates the separation of powers).

275. See *id.* at 1213 (“The Executive Order’s attempt to place new conditions on federal funds is an improper attempt to wield Congress’s exclusive spending power and is a violation of the Constitution’s separation of powers principles.”).

276. See *City of Chicago v. Sessions*, 888 F.3d 272, 284–85 (7th Cir. 2018).

277. *Id.* at 278–79.

278. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 945–46 (N.D. Ill. 2017).

granted a nationwide preliminary injunction against enforcement of the other conditions because it found that they were not clearly expressed in any existing federal law,²⁷⁹ and the Seventh Circuit affirmed that grant.²⁸⁰

The clear statement rule of the Spending Clause thus suggests how structural requirements related to the separation of powers can reinforce federalism-based limits in circumstances raising risks of tyranny. Congress likely would have the constitutional power to pass many new laws expressly conditioning eligibility for federal funds on compliance with various aspects of cooperation with federal immigration law. But it has not done so, and passage of any law of this kind seems highly unlikely. In many cases, requiring that the president work through Congress will significantly raise the costs of carrying out policies that might erode the liberal democratic framework. Even if the requirement does not ultimately stop passage, it may slow it, providing more time for changes in power to occur or for the opposition to organize. We recognize, of course, that the requirement for clear congressional approval will not matter in all cases. Where the president has overwhelming congressional support, requiring congressional approval may mean less. In this sense, the choice to require Congress to weigh in on decision-making is always context sensitive.²⁸¹ But the requirement is significant nonetheless in many realistic political contexts involving a threat of centralization of power.

Finally, we note that some commentators may overemphasize the similarity of the Spending Clause workaround to flat commandeering, even in cases where the former route is available. The two routes are not equivalent, perhaps especially in cases involving the threat of tyranny. The second route allows the federal government to give orders to state and local officials. The first at least gives them a choice as to whether or not to comply. The threat of loss of funds is of course significant, but recent political experience suggests that states and cities will pay this cost in certain circumstances, especially where the opposition is highly politically charged. Consider, for example, the large number of red states (still 14 as of January 2020) that have refused to expand Medicaid even though they were being offered a very large pot of additional money by the federal government.²⁸² Similarly, a number of states and cities have threatened to continue their sanctuary policies even if federal

279. *Id.* at 943.

280. *See Sessions*, 888 F.3d at 283–87.

281. *See generally* Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from Hamdan*, 91 MINN. L. REV. 1451 (2007) (pointing out that the value of the separation of powers depends on the President's partisan and other influence over the legislature).

282. *See, e.g.*, Abby Goodnough, *Complicated Politics of Medicaid Expansion Are Playing Out State by State*, N.Y. TIMES (Feb. 10, 2015), <https://www.nytimes.com/2015/02/11/us/complicated-politics-of-medicaid-expansion-are-playing-out-state-by-state.html> [https://perma.cc/SU3J-CWDN].

funds were cut off.²⁸³ Some of this of course may be posturing, but we suspect that at least in a highly charged atmosphere involving substantial polarization, it is not unlikely that a state or city would bear even a significant loss of funds instead of acquiescing in sensitive federal policies.

B. EMERGENCY POWERS

Just as the anti-commandeering doctrine does important work in terms of protecting the institutional role of local and state governments in key policy matters, we think it important that the independence of state officials and bureaucracies in the United States generally cannot be pierced even in times of emergency. Federal systems around the world of course often establish separate appointment and command structures for federal and state bureaucracies. But a number of these systems also contain special rules for emergency situations, which allow the federal government to intervene in state governance in exceptional situations, such as where there is a risk of civil disorder. India offers one example—Article 356 of the Indian constitution gives the Indian president the power to dissolve the state government and take direct control over state affairs, thus instituting presidential rule, in certain vaguely defined circumstances.²⁸⁴ Thus, the Indian constitution expressly creates an avenue through which the central government can collapse the separation between federal and state governments in times of emergency. And this power has been extensively used through time, in virtually every Indian state. Commentators have noted a heavy risk of abuse of the mechanism. National majorities, for example, often use it to dissolve opposition-led governments and to consolidate power.²⁸⁵ During the tumultuous rule of Indira Gandhi between 1966 and 1977, which was the closest the country has come to a dictatorship since independence, the mechanism was used numerous times.²⁸⁶ The Supreme Court of India subsequently placed important restrictions on the use of the mechanism via caselaw,²⁸⁷ but the conditions under which it can be triggered remain fairly broad.²⁸⁸

283. See, e.g., Reuters, *10 'Sanctuary Cities' Face Loss of \$2.3B in Federal Funds*, NEWSWEEK (Jan. 26, 2017, 10:42 AM), <https://www.newsweek.com/10-sanctuary-cities-face-loss-23-billion-federal-funds-548572> [<https://perma.cc/6L96-7XPR>].

284. INDIA CONST. art. 356.

285. See, e.g., Bhagwan D. Dua, *Presidential Rule in India: A Study in Crisis Politics*, 19 ASIAN SURV. 611, 612 (1979) (“[I]n the majority of the cases presidential rule has been used for partisan reasons.”).

286. See *id.* at 611–12, 615 (noting that Indira Gandhi also used the emergency powers provision to repress “dissent against her autocratic rule”).

287. See generally *S.R. Bommai v. Union of India*, (1994) 2 SCR 644 (India) (finding the clause can be invoked by the President in only limited circumstances).

288. Russian federalism contains some similar provisions. Russian law passed early in the presidency of Vladimir Putin gives the President the ability to dissolve state legislatures, remove governors, and take direct control of regional governments under certain exceptional conditions,

The U.S. Constitution is famously terse in its statement of emergency powers, and it typically grants the powers to Congress. This requires some federal-level consensus before the federal government exercises emergency powers. The main emergency clause in the Constitution is the Suspension Clause, which allows for the suspension of the privilege of writ of habeas corpus “in cases of Rebellion or Invasion [when] the public Safety may require it.”²⁸⁹ Furthermore, the Militia Clause allows Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”²⁹⁰ Finally, the Third Amendment gives Congress the power to prescribe laws for the quartering of troops during wartime and with the owner’s consent during times of peace.²⁹¹ Aside from these three clauses, the Constitution is silent on the scope of federal power during emergencies. This is in sharp contrast to many other constitutions around the world, which contain express and detailed emergency provisions outlining, for example, the conditions under which emergencies can be declared and extended, the duration of emergencies, and the rights that may be suspended or limited during their pendency.²⁹²

It is, of course, very difficult to determine whether the United States’ terse approach, a more elaborated approach, or something else entirely provides the optimal model of emergency powers.²⁹³ An argument against the elaborated model, for example, is that the existence of express emergency clauses encourages them to be used too often—a common situation in Latin American history, where constitutions are full of express emergency clauses.²⁹⁴ But the U.S. model contains a large amount of ambiguity, which

such as when they are grossly violating federal law. See JEFFREY KAHN, *FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA* 262 tbl. 8.4 (2002). The process is quite cumbersome (it requires the approval of a court for example) and thus infrequently used; nonetheless, it was relevant as part of a package of carrots and sticks through which Putin has centralized power. See Gulnaz Sharafutdinova, *Gestalt Switch in Russian Federalism: The Decline in Regional Power Under Putin*, 45 *COMP. POL.* 357, 359 (2013).

289. See U.S. CONST. art. I, § 9, cl. 2. The Suspension Clause is ambiguous in terms of its application to Congress versus the President. See *infra* notes 295–99 and accompanying text.

290. U.S. CONST. art. I, § 8, cl. 15.

291. See Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 *STAN. L. REV.* 1005, 1030 (2011) (arguing that the Third Amendment expressly limits the President, requiring that Congress, not the President, shall determine how troops are to be quartered).

292. See John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 *INT’L J. CONST. L.* 210, 230–31 (2004) (detailing constitutional mechanisms for controlling emergency powers).

293. See, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1097–99 (2003) (arguing that the best approach would be for the Constitution to be inflexible during emergencies, but for the legal order to sanction law-breaking ex post in certain conditions).

294. See BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* 395 (1993) (doubting that design does much to restrain abuses during states of emergency once they are a part of the constitutional framework).

may also at times encourage abuses.²⁹⁵ The Suspension Clause, for example, is found in Article I, suggesting that suspension of habeas corpus is a congressional power, but this is not actually explicit in the text. President Lincoln used this ambiguity at the beginning of the Civil War, when he suspended habeas corpus unilaterally.²⁹⁶ This maneuver was struck down by a circuit court headed by the Chief Justice of the U.S. Supreme Court in *Ex parte Merryman*, but the Lincoln administration ignored the decision.²⁹⁷ Cases like *Youngstown Sheet*, which involved a challenge to the president's authority to take control of steel mills during wartime,²⁹⁸ and *Dames & Moore*, which addressed the president's power to unilaterally resolve an international hostage crisis with Iran,²⁹⁹ demonstrate the difficulties that both courts and political actors have had in delineating the scope of emergency executive power in the United States.

For our purposes, the key principle is that despite all this ambiguity, it is largely clear that the U.S. federal government lacks the power found in other constitutions to intervene in the structure or functions of state government during an emergency. There appears to be no crisis exception to the anti-commandeering doctrine.³⁰⁰ Similarly, there appear to be no exceptions to

295. See, e.g., Gordon G. Young, *Youngstown, Hamdan, and "Inherent" Emergency Presidential Policymaking Powers*, 66 MD. L. REV. 787, 790–96 (2007) (emphasizing the ambiguity of the leading *Youngstown* framework for restraining presidential power).

296. See James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASSOC. 47, 49–55 (2008) (describing President Lincoln's orders).

297. See *Ex parte Merryman*, 17 F. Cas. 144, 151–52 (C.C.D. Md. 1861) (No. 9,487); Dueholm, *supra* note 296, at 49.

298. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 590 (1952) (holding that the president lacked the power to seize a steel mill in the face of a threatened work stoppage during the Korean War).

299. See *Dames & Moore v. Regan*, 453 U.S. 654, 654–58 (1981) (holding that the president had the power to transfer Iranian assets located in the United States and to transfer claims against Iran pending in U.S. courts in order to resolve a hostage crisis).

300. Although there is ambiguity. The Stafford Act, which is a major piece of emergency relief legislation, contains provisions allowing the president to exercise certain emergency powers, usually when requested by a governor. See 42 U.S.C. § 5191(a) (2012). However, the Act allows the president to act unilaterally (without the request of a governor), in areas “for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.” *Id.* § 5191(b). The meaning of this phrase is unclear, and it has never been interpreted by a court. See RYAN, *supra* note 192, at 25. Ryan, writing about the aftermath of Hurricane Katrina, suggests that the Act (if constitutional) could have been interpreted to allow aggressive and unilateral federal action, including something not far off from federal commandeering of state assets. See *id.* at 25–27. The discussions at the time focused on the somewhat different question of whether the federal government could bring in troops without the consent of the state governor; both an opinion of the Office Legal Counsel and John Yoo (in an editorial) argued that the answer was yes, but the Bush administration ultimately declined to act accordingly. See *id.* at 25 n.118, 27 n.126; John

the rules prohibiting federal intervention in either the appointment or removal procedures for state legislative, executive, and judicial officers.³⁰¹ In other words, and unlike many other federal systems around the world, the U.S. Constitution appears to protect a separate state structure absolutely, even in cases of emergency or crisis.³⁰²

Maintaining this separation even during emergency has costs. Critics of the anti-commandeering doctrine, for example (beginning with Justice Stevens in dissent to the *Printz* decision itself) have argued that certain kinds of emergencies like major terrorist attacks or large-scale natural disasters require the coordination and efficiency that federal commandeering could help provide.³⁰³ But from the perspective of protecting against tyranny, the presence of a bright-line rule without any exceptions is a major advantage. As noted above, comparative experience shows that would-be authoritarian actors tend to utilize ambiguous emergency provisions in order to punish political opponents and consolidate power by, for example, removing sub-national opponents from office or taking over their functions.³⁰⁴ The conditions under which an emergency can be declared are usually difficult to define and thus can easily be manipulated. Would-be authoritarian actors are in fact often expert at manufacturing and exploiting a discourse of crisis and

Yoo, *Editorial, Trigger Power*, L.A. TIMES (Oct. 2, 2005), <https://www.latimes.com/archives/la-xpm-2005-oct-02-oe-yoo2-story.html> [<https://perma.cc/3CNM-PK2S>].

301. We note the potential relevance of the Guarantee Clause, which states that “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.” U.S. Const., art. IV, § 1. In Argentina, a similar clause has been used with relative frequency to authorize aggressive interventions into state government structure, ostensibly to restore Republican government, but often in an abusive manner. *See, e.g.*, Mario D. Serrafiero, *La Intervencion Federal en Argentina: Experiencia y Jurisprudencia* (2009) (unpublished manuscript), *available at* http://www.forum.fed.org/libdocs/Misc/Arg8_Serrafiero%20paper%20Esp.pdf [<https://perma.cc/UD8T-EESM>]. The Guarantee Clause has long been held nonjusticiable, making judicial intervention to prevent abuse less likely. *See Luther v. Borden*, 48 U.S. 1, 47–48 (1849).

302. We concede of course the federal government could take actions during emergencies that would place significant pressure on state governments. As noted above, the Stafford Act has been interpreted by some authorities to allow the federal government to send troops into states affected by natural disasters unilaterally, without the consent of the governor of that state, in order to coordinate relief efforts and carry out other tasks. *See supra* note 300. But this is different from placing state officials under federal control or removing them.

303. *See Printz v. United States*, 521 U.S. 898, 941 (1997) (Stevens, J., dissenting). *But see* Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1253–56 (2004) (arguing that the doctrine should be preserved in absolute form despite these costs because doing so will help to protect rights).

304. *See* Bruce Ackerman, *States of Emergency*, in *CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA*, *supra* note 9, at 221, 223 (arguing that invocation of emergency could be used to mount “a full-scale presidential assault on our liberal democratic tradition[s]”).

emergency for political gain.³⁰⁵ The fact that the U.S. president and Congress very likely cannot interfere with state structure even during emergency is an important protection against the risks of democratic erosion. Indeed, the rules noted above providing for separate state structures in key areas like courts, elections, and executive bureaucracies would mean very little if those rules could be breached during states of emergency.³⁰⁶

V. BEYOND EXISTING ACCOUNTS OF FEDERALISM AND TYRANNY

In the foregoing two Parts, we have sketched out our theory of how independent state bureaucracies, particularly those in control of sensitive areas of governance, serve an anti-tyranny function. In this Part, we explain why our theory not only builds off of, but goes beyond, existing accounts of the relationship between federalism and tyranny.

Defenders of U.S. federalism have long justified it in part as a bulwark against tyranny. Our country's unique version of federalism is, of course, a compromise between the original "anti-federalists"—those in support of very strong state rights—and the federalists, who championed a balance between state and national control.³⁰⁷ Federalists such as the authors of the Federalist papers (collectively called Publius) largely won the battle, with their favored system ultimately emerging from the constitutional convention. And Publius, to a large extent, focused on the ability of a shared federal-state structure to avoid the types of monarchical tyranny from which they had escaped.³⁰⁸ But

305. See BENJAMIN MOFFITT, *THE GLOBAL RISE OF POPULISM: PERFORMANCE, POLITICAL STYLE, AND REPRESENTATION* 43 (2016) (exploring the ways in which populist leaders perform and exploit the concept of crisis for their political advantage).

306. We do note that there is one potentially important exception to the rules that prohibit federal officials from federalizing state personnel during a crisis: The Calling Forth Clause, which gives Congress the authority "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15. As Stephen Vladeck has explained, the Clause has limited practical importance today. Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1102 (2008). Because the state National Guard units that have supplanted militias are composed of personnel who are also simultaneously enlisted in the federal reserve, the Supreme Court has held "that the National Guard is not the 'militia' to which the Calling Forth Clause refers, and . . . [its] deployment is therefore not limited to the three situations outlined by the constitutional text—executing the laws of the Union, suppressing insurrections, and repelling invasions." *Id.* This interpretation guts a check on the federal government's power to implement martial law, and as Vladeck notes, "[t]he Court's conclusion that the Clause in no way constrains the domestic use of the federal regulars runs deeply contrary to the prevailing understanding at the Founding." *Id.* at 1107.

307. *Would You Have Been a Federalist or and Anti-Federalist?*, BILL RTS. INST., <https://billofrightsinstitute.org/would-you-have-been-a-federalist-or-an-anti-federalist> [<https://perma.cc/VF2X-KPCP>] (describing the terms anti-federalist and federalist as used in the 1780s).

308. Some of these tyrannical abuses had been corrected in England, and the U.S. Constitution in part borrowed from these British protections. See Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 925–29 (2012) (describing Darnel's Case, (1627) 3 Cobbett's St. Tr. 1 (K.B. 1627) (Eng.) and the Petition of Right, 1627, 3 Car., c. I, §§ 5, 8 (Eng.)).

as we note in more detail here, the Founders' classical accounts rely on mechanisms that are probably unrealistic under modern conditions.

We also argue that the major modern theories of how federalism prevents tyranny overlook or underplay key institutional features. Theories of federalism that rely primarily on judicial enforcement of separate spheres at the federal level—for example, those that focus primarily on constitutional provisions and associated doctrines that purportedly protect state sovereignty—rightly emphasize the importance of separation between levels of government, but may prove inadequate during times of authoritarianism, given the ease with which the judiciary might be coopted by such a movement. Those that rely on “political safeguards” of state representation in federal institutions seem increasingly unrealistic as descriptions of the political world in which we live, particularly during times in which democracy is under stress. And those emphasizing “cooperative federalism”—noting intertwinement, cooperation, and conflict between federal and state institutions—address important features of our federalist system that are relevant to preventing tyranny, but they have not comprehensively connected these features to anti-tyrannical functions. Our account thus builds on these accounts but varies in certain respects from all of them.

Finally, in this Part we provide another counter-argument to the critique that federalism plays no useful function in the contemporary United States—an argument made most forcefully by Feeley and Rubin.³⁰⁹ Many other federalism scholars have responded to this critique by noting the importance of having two sovereigns—states and the federal government—as backstops, or “alternative locations of independently derived government power,” when governance goes wrong at one level or another.³¹⁰ We build upon these

309. See FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 152.

310. RYAN, *supra* note 192, at 41–42 (describing how states and the federal government can alternately step in when regulatory failure, constitutional violations, or tyrannical threats occur); JACKSON, *supra* note 220, at 2218–19 (providing the “alternative locations” point and responding to Rubin and Feeley by arguing that if states were “not guaranteed existence within defined borders . . . a national government unhappy with decisionmaking in its centrally defined administrative units could simply reorganize the political boundaries of those units to create more compliant decisionmaking, or to isolate ‘troublemakers.’” (footnote omitted)); *cf.* MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 2 (1999) (responding to Feeley and Rubin’s critique by arguing that it misses the “central point” of federalism, which is “to provide citizens with *choices* among different sovereigns, regulatory regimes, and packages of government services”). Kirsten Engel homes in on a particular type of backstop that she calls “dynamic federalism”—when states and the federal government both have authority over a matter and “function as alternative centers of power.” Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176 (2006). Many of the situations that we describe could be case, in a way, as dynamic—both the federal government and states have jurisdiction over aspects of elections, for example, although the states have largely ignored federal directives in the area of elections. But we focus particularly on states’ functional role in exercising jurisdiction and how even if the federal government wanted to take over more of the states’ authority in an area, it would be difficult from a practical perspective.

responses with a focus on states and local governments as separate institutions with separate practical functions, which emphasizes how this division can specifically address threats of tyranny. We argue that while Feeley and Rubin may well be correct with respect to many of the functions optimistically purported to be played by federalism, the anti-tyranny function played by U.S. federalism's protection of core state functions is real and cannot easily be duplicated through alternative institutional arrangements.

A. ACCOUNTS OF THE FOUNDERS

The Madisonian vision of the U.S. federalist system remains important in setting out the basic framework through which states resist tyranny. As we pointed out above, the Madisonian idea of ambition checking ambition retains importance, and indeed perhaps gains importance, in a world where partisan rather than institutional interests are paramount.³¹¹ But the Founders are less compelling in laying out the precise mechanisms through which this resistance will occur. The authors of the Federalist Papers suggest two main accounts of precisely how states might help block tyranny: (1) by competing with the federal government for voters' affections and (2) by serving as "guard dogs," warning of possible "tyrannical encroachments by the national government."³¹²

The Founders' first account is that states would compete "vertically" with the federal government for voters' loyalties and thus resist potential tyrannical incursions by the national government.³¹³ These Founders envisioned a back-and-forth push and pull of federal and state powers as voters switched allegiances, which would keep the federal government in check. Madison—the author of the vertical competition model—also emphasized other divisions of power that would help to check overreaching by one department or level of government, including the separation of powers at the federal level and the existence of numerous citizen "interest and sects," which would protect against an over-powerful majority.³¹⁴

Some more recent accounts agree that vertical competition is a viable means of protecting against tyranny, arguing that voters do in fact alternate between favoring expanded federal or state control, as evidenced by the

311. See *supra* Part III.

312. Note, *Defending Federalism: Realizing Publius's Vision*, 122 HARV. L. REV. 745, 746 (2008).

313. THE FEDERALIST NO. 17, *supra* note 18, at 154–55 (Alexander Hamilton) (arguing that because the states govern so many of people's daily affairs and regulate "all those personal interests, and familiar concerns, to which the sensibility of individuals is more immediately awake," the states will receive more "affection, esteem, and reverence towards the government" than will the federal government, and that states will find it "far more easy . . . to encroach upon the national authorities, than for the national government to encroach upon the state"); THE FEDERALIST NO. 51, *supra* note 18, at 400 (James Madison) (noting that "the power surrendered by the people, is first divided between two distinct governments," and "[h]ence a double security arises to the rights of the people. The different governments will control each other . . .").

314. THE FEDERALIST NO. 51, *supra* note 18, at 401 (James Madison).

dramatic swing from broad national power under the New Deal and a revival of states' rights in the Reagan era.³¹⁵ Additionally, Ilya Somin, although noting states' weakened incentives to vertically compete with the federal government given strong federal power, identifies two remaining incentives for states to continue to compete.³¹⁶ These include situations when different political parties are in power at the local and federal levels, and when states "compet[e] with the federal government in [providing] public services" and attract interest groups "that prefer state services" and then lobby for less federal incursion into particular state policy areas.³¹⁷

Other modern theories have vertical competition undertones. Scholars like Daniel Elazar argue that states' "civil societ[ies]"—areas in which groups within the state are more aligned "with their immediate compatriots" rather than "their counterparts in other states"—give states a viable means of competing with federal control.³¹⁸ Many of his examples are decidedly negative ones, but he notes how political consensus within a state "enhances the possibility for the people and interests" dominating "the state's political system to speak in the name of their state."³¹⁹ Finally, in some respects, proponents of federal-state dual sovereignty also fall within the modern vertical competition camp, in that they argue—looking to the Founders' accounts, among others—that there is a way to draw a line between federal and state powers rather than treating all state powers as subsumed within federal supremacy.³²⁰

We suspect that vertical competition would be of only limited use in fending off a modern push towards authoritarianism. Say, for example, that a state government sought to fight back against a tyrannical federal government by passing new laws expressing alternative visions on key questions.³²¹

315. See, e.g., Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 349–53 (2003) (noting "macrolevel shifts in popular sentiment and in regulatory power that have occurred over the course of the nation's history," including, for example, limited state powers after the New Deal but a revival under the Reagan Administration, and arguing that "[h]istory clearly suggests, therefore, that the state and federal governments continue to compete for supremacy in the public's eyes"); see also Rapaczynski, *supra* note 8, at 389–91.

316. See Somin, *supra* note 18, at 471 (noting weakened incentives due to the Supremacy Clause and federal taxation powers).

317. *Id.* at 472.

318. DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 11 (1966).

319. *Id.*

320. See, e.g., RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 76 (1987) ("At the very least, the Founders' emphasis, again and again, upon 'limited' federal powers, upon preservation of the States' jurisdiction over 'internal,' 'local' matters that operate only within a State's borders, counsels against an over-generous construction of federal powers.").

321. This mirrors an argument by Hamilton, who notes that the states are heavily involved in governing everyday affairs, occupying a territory of regulation that the federal government is relatively uninterested in taking over. See THE FEDERALIST NO. 17, *supra* note 18, at 153–54 (Alexander Hamilton). Further, even if the federal government due to "lust of domination,"

Whatever the merits of this approach in the eighteenth and nineteenth centuries, the allocation of powers between the states and the federal government is now so slanted towards the federal side as to render vertical competition fundamentally unfair. Given relatively expansive judicial understandings of the Commerce Clause and the spending, taxing, and foreign affairs powers,³²² states have almost no areas left where they have exclusive powers of governance. In any area where power is concurrent, of course, the federal government can preempt state legislation by using the Supremacy Clause. Thus, “[t]here is no guarantee . . . that the state and federal governments will remain viable competitors against one another or that citizens will remain able to allocate power between the two sovereigns in ways they deem advantageous.”³²³ Moreover, a Congress and Supreme Court working alongside a tyrannical executive could stop any effort at vertical competition—the first by enacting laws that preempted attempted state legislation, and the second by upholding that legislation and thus an expansive view of federal power.³²⁴

The second classical account argues that states would act as guard dogs by keeping a close eye on the federal government’s actions and sounding a warning when government overreach appeared imminent. Specifically, Hamilton suggested that state “legislatures will have better means of information” than “the people at large” and “will . . . afford complete security against invasions of the public liberty by the national authority” because “they can discover the danger at a distance” and “adopt a regular plan of opposition,” including coordinating with other states in opposition to federal attempts at the usurpation of power.³²⁵

Again, though, the account of states as guard dogs is imprecise. It is unclear in the theory what special powers states would have to take action once they sounded the alarm. Legislation aimed at curbing federal overreach could be met with preemptive federal legislation under the Supremacy

attempted to take over these functions, “the people of the several states” would somehow push back against this effort. *See id.* at 154; *see also id.* NO. 28, at 228–29 (Alexander Hamilton).

322. Publius recognized these federal powers (noting the government’s control over “[c]ommerce, finance, negotiation, and war”) and that they could expand even further to everyday “internal concern” but only to the extent that the public trusted the federal government. *See THE FEDERALIST NO. 17*, *supra* note 18, at 153 (Alexander Hamilton); *see also id.* NO. 27, at 222 (Alexander Hamilton); *Defending Federalism: Realizing Publius’s Vision*, *supra* note 312, at 753 (noting these arguments).

323. Pettys, *supra* note 315, at 353.

324. Recent state defiance of federal marijuana law tests this assertion. If states’ vertical competition becomes adequately entrenched, this makes efforts to preempt state law and enforce this preemption more difficult. *See, e.g.*, Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1477–79 (2009) (describing how states’ legalization of marijuana might reflect and reinforce changing norms about marijuana use and concluding that this could “even hamstring Congress’s already limited ability to impose legal sanctions on those who violate the federal ban”).

325. *See THE FEDERALIST NO. 28*, *supra* note 18, at 228–29 (Alexander Hamilton).

Clause or could be held preempted by national courts based on existing legislation.³²⁶ States do, of course, have some special powers under modern doctrine—for example “special solicitude” in the standing analysis, which has made states an important site of resistance to federal action through the filing of lawsuits³²⁷—but, in many ways, they would seem to be a site for the rallying and coordination of public opinion, in fact one of many such sites. Indeed, in the modern period, it is unclear why states would necessarily have better information than a host of other civil society and media actors that monitor the actions of the federal government.

B. MODERN ACCOUNTS OF FEDERALISM AND TYRANNY

Modern theory, in turn, suggests at least three primary routes through which federalism might protect against tyranny: judicial enforcement of boundaries between state and federal authority; “process federalism,” including political safeguards such as state representation in federal institutions; and cooperative federalism arrangements. We address each of these broad families of theories in turn.

1. Judicially Enforceable Federalism Constraints

A first set of theories focuses on judicial enforcement of the separation of powers between federal and state governments. These theorists emphasize two points: first, the idea that certain state and federal powers are separated (dual federalism) and second, that this separation should be enforced by the courts.³²⁸ Our analysis is consistent with this work in emphasizing the importance of separation in protection against tyranny. However, we deemphasize—without ignoring—judicial review as a protection for the separation, stressing instead other institutions.

Since the 1990s, the Supreme Court has engaged in what a number of commentators have deemed a “federalism revival” by placing limits on the federal government’s enumerated powers in ways that have been celebrated by these theorists.³²⁹ The Court has expressed its view that the judicial

326. *Defending Federalism: Realizing Publius’s Vision*, *supra* note 312, at 762 (noting that “while Publius clearly recognized the need for this guard dog, the *Federalist Papers* does not offer a solution to the problem of cooption via the Supremacy Clause”).

327. See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); Lin & Burger, *supra* note 115, at 72.

328. For dualist accounts of various stripes, see, for example, Pettys, *supra* note 315, at 362 (arguing that if states are to effectively persuade citizens in ways that counter federal arguments, they need areas of protected sovereignty); and Schapiro, *supra* note 39, at 247–48, 264–73 (arguing that dual federalism continues to influence court decisions and pointing to most scholarship on the values of federalism, such as protecting liberty and creating a laboratory of the states, as presenting a dualist version of federalism).

329. See, e.g., Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 800, 805 (2006) (arguing that the Rehnquist Court revived federalism only to the extent necessary to properly protect rights of all the states by adding limiting principles to federalist decisions).

enforcement of the lines separating federal and state authority protects liberty. For example, in *Gregory v. Ashcroft*, the Court held that the Age Discrimination in Employment Act (“ADEA”) did not apply to preempt a mandatory retirement age for judges in a state constitution, and justified this decision in part with a concern about tyranny: “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”³³⁰ Citing Hamilton and Madison, the Court thus argued that its efforts to maintain a system of “dual sovereignty” in which the states possessed a sphere of autonomous action were key to protecting against tyranny.³³¹ Similarly, in *New York v. United States*, the Court justified its enforcement of limits on federal power as a “protection of individuals” by “secur[ing] to citizens the liberties that derive from the diffusion of sovereign power.”³³²

Judicial enforcement of limits on federal power is not irrelevant, and indeed, the functional institutional roles of local and state governments that we focus on would erode over time without judicial policing. Judge-made doctrines can deepen settled understandings of the limits on federal power; they can also raise the costs of government action in ways that potentially slow movement towards authoritarianism or require additional procedural hurdles before problematic moves can be carried out. But we think it would be profoundly unwise to put too much emphasis on the judicial enforcement of limits on the allocation of federal power. The primary reason for this reservation is that those allocations themselves are usually quite imprecise, and in many systems—not just the United States—they have shifted heavily towards centralization over time.³³³ Thus, it is easy for a determined central government to push the envelope by passing new legislation. If central courts—especially supreme or constitutional courts—are controlled by the regime, then they will uphold these efforts and increasingly limit the sphere through which subnational governments could even exercise resistance.

Some strains of the literature on judicial enforcement of federalism constraints provide important foundations for our theory, however. For example, Vicki Jackson’s focus on the importance of courts in protecting states’ constitutionally-protected “legislative, executive, and judicial functions” through doctrines such as anti-commandeering is largely concordant with our analysis.³³⁴

330. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

331. *See id.* at 457–59.

332. *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

333. *See, e.g.*, Sullivan, *supra* note 329, at 805 (noting that the “federalist revival was not as sweeping as it might appear” and left most exercises of federal power unchallenged).

334. Jackson, *supra* note 220, at 2183.

2. Political Safeguards

An alternative to judicial enforcement of limits is suggested by the political safeguards of federalism theory, a strand of “process federalism” that has mainly been used to argue that judicial enforcement of federalism-based limits on national power is unnecessary.³³⁵ This theory could also be viewed as an anti-tyranny mechanism, however. The core argument of this family of theorists is that states check federal power through their influence on the national political process. Herbert Wechsler, for example, has argued that the mere fact that states exist—and pre-existed the federal government as sovereigns—created a tradition of respecting state interests at the federal level,³³⁶ and that state control of congressional districting and many other aspects of selecting national politicians preserves an important balance between national and state powers.³³⁷ Key to this theory is the fact that citizens of each state—not the people as a whole—select senators and representatives, and so, too, select a President through the Electoral College or the House.³³⁸ Although Congress represents the people of the United States, each individual within Congress represents the people of his or her state,³³⁹ and thus national policy is a grand compromise of diverse state perspectives.³⁴⁰

Jesse Choper has similarly asserted that “[n]umerous structural aspects of the national political system serve to assure that states’ rights will not be trampled.”³⁴¹ Choper viewed the Senate as “a national legislative guardian against usurpation of state interests,” as the Constitution’s “unalterable” requirement for equal representation of all states in the Senate shows.³⁴² He noted that the House of Representatives, too, in having at least one representative from each state as well as offering opportunities for state delegations to vote in blocs, protects state interests.³⁴³ And he emphasized the

335. See, e.g., Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 14 (2010) (describing process federalism as “emphasiz[ing] that power diffusion depends on preserving de facto autonomy for the states, not the de jure autonomy afforded by sovereignty” and that “politics, tradition, inertia, and interdependence”—not the courts—preserve state power).

336. Raoul Berger similarly argues that the states “came first,” asserting that through the Declaration of Independence and beyond “[t]he people acted severally, through the medium of their individual colonies, just as the later ratification of the Constitution was not by the people of the entire Union but by the people of the individual States.” BERGER, *supra* note 320, at 26.

337. Wechsler, *supra* note 8, at 544–50.

338. See *id.* at 546; see also ELAZAR, *supra* note 318, at 145 (emphasizing that state and local interests are “represented by the congressmen acting singly” and observing that these congressmen can cause federal bureaucrats to consider state and local needs).

339. See Wechsler, *supra* note 8, at 546 (“Though the House was meant to be the ‘grand depository of the democratic principle of the government,’ as distinguished from the Senate’s function as the forum of the states, the people to be represented with due deference to their respective numbers were *the people of the states.*”).

340. See *id.*

341. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 176 (1980).

342. *Id.*

343. *Id.* at 177.

states' role in the Electoral College, which places "states directly in a nominee's path to the White House."³⁴⁴ Choper further observed that national senators and representatives historically were predominantly graduates of "state and municipal offices," thus suggesting a "basic state orientation of the houses of Congress."³⁴⁵

In an updating of the political safeguards theory, Larry Kramer rejected Wechsler and Choper's accounts of precisely how political protection of state interests occurred at the federal level.³⁴⁶ But Kramer nonetheless found adequate safeguards to be in place, focusing not on the formal selection mechanisms for federal politicians, but instead on the party system.³⁴⁷ In Kramer's view, the decentralized nature of U.S. parties means that federal candidates are reliant on state party members to aid them in winning elections, forming "a political culture in which members of local, state, and national networks are encouraged, indeed expected, to work for the election of candidates at every level."³⁴⁸ Thus, federal officials feel and retain an allegiance to the states and states' rights. Additionally, Kramer observes that Congress relies heavily on federal agencies to do much of its bidding, and federal agencies, in turn, enlist state administrators to implement many federal programs, thus giving states important powers.³⁴⁹

The Supreme Court has at times adopted the political safeguards of federalism view. In rejecting the federalism theory that certain "traditional" or "integral" governance functions remain within the protected realm of the states, for example, the Court argued that the Framers instead protected the states through "the structure of the Federal Government itself."³⁵⁰ More recently, the Court has adopted a more skeptical view of political safeguards theory.³⁵¹ For our purposes, the key question is whether political safeguards would provide effective protection against the threat of tyranny we focus on in this Article. There are good reasons to think the answer would be no. The classical theory, as Kramer notes, depends largely on the formal selection process for members of Congress.³⁵² But this dynamic is actually far stronger in many other systems around the world. In Germany, for example, members of the upper chamber of the national legislature serve openly as delegates of

344. *Id.* at 179.

345. *Id.* at 178.

346. Kramer, *supra* note 97, at 1520.

347. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 221 (2000).

348. *Id.* at 279.

349. *Id.* at 284.

350. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47, 550 (1985).

351. See *Printz v. United States*, 521 U.S. 898, 939, 956 (1997) (Stevens, J., dissenting) (arguing that the majority, in adopting the anti-commandeering principle, was ignoring structural safeguards that adequately protected federalism interests).

352. Kramer, *supra* note 347, at 223.

the subnational units and vote as members of those units and according to instructions given by them.³⁵³ In such a system, the subnational units truly do participate directly in the formulation of national-level policy. In the United States, this kind of direct intermediation of the subnational units in national-level policymaking has never really occurred and is particularly unpersuasive since the passage of the Seventeenth Amendment, which replaced appointment of Senators by state legislature with their direct election.³⁵⁴

Kramer's updating of the theory to focus on parties long provided a better description of U.S. politics. But U.S. parties have become increasingly centralized through time, rendering local politics less important. Part of this shift is explained through greater polarization and sorting of the two parties into ideologically coherent units.³⁵⁵ Part of it may be a result of changes in technology and social organization. And part of it may emanate from changes in campaign finance which have made candidates less dependent on the support of local party structures because they can rely more heavily on alternatives such as wealthy donors wielding Super PACs.³⁵⁶ The result may be that states no longer have such a plausible claim to being represented adequately through the party system either. In times of tyranny, we suspect that these forces centralizing politics may be especially powerful. Populists, for example, are adept at using the means of communication to whip up majoritarian sentiment.³⁵⁷ In effect, they may be very good at accentuating trends towards the nationalization of politics. Indeed, during emergencies, when tyranny may be a larger threat (despite the U.S. Constitution's limited provisions for emergency power), state efforts to resist federal control have been, in part, blunted by state voters' nationalist sentiments.

3. Cooperative Federalism

Finally, a third major strand of federalism theory, associated with the massive "cooperative federalism" literature, focuses on intertwinement rather than separation between the federal and state governments, and some of this

353. See, e.g., Halberstam, *supra* note 249, at 235–36.

354. Even before passage of the Seventeenth Amendment, Halberstam argues that U.S. Senators were less subject to control by their state governments than those found in Germany. For example, they "were not subject to recall by the State legislatures that appointed them, did not have to develop a joint position on behalf of their State, and were not officially members of State governments when they came to Washington." *Id.* at 237.

355. See, e.g., DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* 31–35 (2018) (arguing that state and local issues have increasingly been dominated by the national political parties).

356. See Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781, 783–85 (2013) (arguing that *Citizens United v. FEC* and the corresponding rise of Super PACs have eroded the political safeguards of federalism by making candidates less dependent on the state party apparatus to receive funding).

357. See MOFFITT, *supra* note 305, at 87 (explaining the importance of mass media communication to populist leaders).

scholarship explores how this connection can protect against tyranny. It has documented the central role that states play administratively in terms of carrying out federal directives or,³⁵⁸ in some cases, pushing back against them. Elazar, although describing states as civil societies with powerful abilities to resist federal government directives, hones in even more closely on states' power through their role as entities who share integral governance functions with the federal government.³⁵⁹ Under this view, the federalist system, in which nearly all governance functions are shared within a non-centralized system, "maintain[s] the liberties of the people from vitiation through the consolidation of power into hands far removed from popular control"³⁶⁰

Jessica Bulman-Pozen similarly views state interests as being heavily intertwined with and inseparable from national ones, in part administratively—"state administration of federal law injects diversity and competition into federal schemes"³⁶¹—but also from a partisan perspective, in that both states and federal actors often advance state causes at the federal level.³⁶² For example, she notes that federal actors are heavily involved in state referenda, and state and federal party members often take states' sides in fights against the executive, such as California suing the Bush Administration to allow the state to regulate greenhouse gas emissions, or Arizona's defense of its immigration laws against the Obama Administration.³⁶³

In another strain of scholarship focusing on states' role, but less directly on partisanship, Bulman-Pozen and Gerken note the ability of states, as entities operating within cooperative federalism schemes, to meaningfully push back against federal directives, thus "provid[ing] a set of ex post safeguards for state interests."³⁶⁴ Indeed, states exercising powers delegated from the federal government have sometimes simply refused to implement federal mandates—such as states refusing to conduct disability reviews under

358. See, e.g., Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 584–88 (2011) (noting the many forms of cooperative federalism and exploring implications for court interpretation of statutes and deference to federal or state implementers); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665–67 (2001) (arguing for broader court recognition of state autonomy under the Constitution given the reality of the federal government's extensive reliance on states to implement federal law through cooperative federalism); see also Kramer, *supra* note 97, at 1543–46 (focusing on the importance of "administrative sharing"—the fact that the federal bureaucracy relies heavily on the states to administer federal law).

359. ELAZAR, *supra* note 318, at 33 (focusing on the "sharing of functions by all levels of government" in the American federal system).

360. *Id.* at 47.

361. See Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1946 (2014).

362. Bulman-Pozen, *supra* note 112, at 1117.

363. *Id.* at 1135–36.

364. See Bulman-Pozen & Gerken, *supra* note 100, at 1292.

Reagan's Social Security Act—thus curbing federal power.³⁶⁵ Under Bulman-Pozen and Gerken's account, the fact that states implement federal policy and are crucial to the federal bureaucracy makes them more powerful than if they were solely autonomous actors. When a state dissents from the federal law that it and 49 other states implement, the federal government must respond and react, lest the 49 other states respond and follow the dissenting state's lead.³⁶⁶ Erin Ryan likewise emphasizes the ways in which federalism-related programs are a product of negotiation in which the states are far from powerless to shape both policymaking and enforcement.³⁶⁷

In an account of states' role in combatting potential federal overreach—particularly by the executive—Bulman-Pozen argues that states can check the federal executive against overreach into other federal branches. This point provides an important foundation for our argument. As we noted above in Part II, a determined executive would have to control both the federal government and the states in order to fully erode democracy. The executive would need sympathetic federal courts and a compliant Congress, and Bulman-Pozen argues that states push back against this horizontal control. For example, exercising their delegated authority under statutes, states often use the courts to protect federal statutes (and thus the cause of Congress itself) from executive agencies' attempted expansion of power through statutory interpretation and enforcement.³⁶⁸ Partisanship also plays an important role in this account. Even if all three branches of the federal government are dominated by the same party—thus threatening a situation in which courts and Congress simply bow to the whims of the executive—“there will never be party unity between the federal government and all fifty states,” and thus “partisan resistance to the federal executive will arise even during periods of unified federal government.”³⁶⁹

This strain of work is very useful to our own approach since it suggests the ways in which the existence of large state bureaucracies can serve as a check on federal power. For example, Elazar notes “greater state expenditure of funds but also an increase in the number and quality of the personnel involved in carrying out the states' operations” under a cooperative federalist system, which he believes enhances state powers.³⁷⁰ But we think that much of the cooperative federalism literature places too much emphasis on

365. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 482 (2012). States also sometimes defy direct instructions from Congress—including those issued both under delegated responsibilities and more directly—as evidenced by widespread noncompliance with federal election directives. See *supra* note 260 and accompanying text.

366. Bulman-Pozen & Gerken, *supra* note 100, at 1287.

367. See Ryan, *supra* note 100, at 1. See generally RYAN, *supra* note 192 (describing the states' power in the federal system).

368. See Jessica Bulman-Pozen, *supra* note 365, at 459.

369. *Id.* at 462.

370. See ELAZAR, *supra* note 318, at 57–58.

intertwinement while underplaying spheres of state autonomy, at least in the context of tyranny.³⁷¹ The benefits of cooperative federalism, such as greater efficiency, could be achieved through a system that was decentralized rather than federalist, where subnational units were delegated certain powers from the center that could be revoked.³⁷² Yet such a system would provide much less protection against tyranny because the delegations could easily be changed or revoked by the center at any time. What matters, in other words, is not just that state/federal policymaking is a product of intertwined interests, but also that the states retain autonomous control over their own bureaucracy and over certain sensitive functions.

C. *THE UNIQUE ANTI-TYRANNY FUNCTION OF FEDERALISM*

Some recent scholarship has questioned the benefits of U.S. federalism.³⁷³ The most thorough such account is provided by Malcolm Feeley and Edward Rubin, who critique U.S. federalism by arguing that it serves no useful purpose in the modern United States. They argue that almost all of the assumed benefits of federalism, such as heightened democratic participation, greater efficiency, and experimentation, could better be provided through other institutional arrangements.³⁷⁴ We believe, however, that the anti-tyranny function of U.S. federalism through the mechanisms that we have identified cannot easily be replicated outside of a federal system.

Feeley and Rubin define federalism as a system where geographically-defined subnational units have “definitive rights” against, and “partial autonomy” from, the center.³⁷⁵ Using this definition, they distinguish federalism from several other forms of government, such as decentralization, where the central government devolves some power to subnational units voluntarily and as “a managerial strategy by which a centralized regime can achieve the results it desires in a more effective manner,” and local democracy, where at least some subnational leaders are elected by members of that subnational unit.³⁷⁶ They find that systems of decentralization and

371. This growing literature is authored by scholars such as Bulman-Pozen, Gerken, Rodríguez, and Ryan, among others, who recognize states as cooperative actors but also entities that retain a variety of important independent roles within a cooperative system. Bulman-Pozen & Gerken, *supra* note 100; Rodríguez, *supra* note 100; Ryan, *supra* note 100.

372. See FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 28–29.

373. See, e.g., Rubin & Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note 17, at 907–08 (“[F]ederalism in America achieves none of the beneficial goals that the Court claims for it.”). See generally Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980) (concluding that the experimentation supposedly encouraged by federalism is largely illusory).

374. See Rubin & Feeley, *Federalism: Some Notes on a National Neurosis*, *supra* note 17, at 907–08.

375. See FEELEY & RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 12, 20.

376. See *id.* at 12–37.

local democracy could better offer the major purported benefits of U.S. federalism, such as providing laboratories of democracy, increased efficiency, and greater popular participation and involvement.³⁷⁷ And they argue that federalism only fulfills one real purpose—it serves as a “tragic compromise” in cases where a single nation is desired, but the members of subnational units retain distinct social and political identities and thus would engage in conflict absent autonomy.³⁷⁸ In cases where members of subnational units no longer have greatly distinct social and political identities, as they argue is the case in the United States, concepts of federalism are merely “vestigial” and should be entirely abandoned.³⁷⁹

Feeley and Rubin rightly point out that some of the purported modern benefits of federalism are overstated and could be provided by other systems of government. However, we think that resistance to national-level tyranny is a key exception: Here we believe that certain forms of federal structure provide benefits that could not easily be replicated by the other systems they describe.³⁸⁰ As elaborated above, federal structures are useful in resisting national-level efforts at establishing authoritarian regimes where the states have separate structures in key areas like courts, electoral commissions, and policing. The existence of these independent structures makes them potential sites for resistance that can slow efforts to erode liberal democratic constitutionalism. In comparative terms, U.S. federalism is reasonably well positioned to maintain separate state structures in these core areas.

Achieving protection of this sort, moreover, likely requires a federal system under the Feeley and Rubin definition: one where subnational units have some enforceable autonomy rights against the center.³⁸¹ Decentralization, for example, will not suffice because in those cases powers are given to subnational units merely as a matter of whim of the center, rather than as a matter of right.³⁸² The flexibility of such a system may increase its

377. See *id.* at 80–81; see also Barry Friedman, *supra* note 18, at 319 (arguing that we know very little about whether federalism actually provides the benefits it is purported to provide).

378. FEELEY & RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE, *supra* note 17, at 53.

379. See *id.* at 152 (“[F]ederalism is vestigial in the United States . . . [and] is a historical memory that no longer serves any political purpose . . .”).

380. We are not the first to critique Feeley and Rubin on the grounds that they understate the benefits of a specifically federal structure. See, e.g., RYAN, *supra* note 192, at 38; Jackson, *supra* note 220, at 2217–22.

381. FEELEY & RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE, *supra* note 17, at 12, 16, 20.

382. See *id.* at 21 (noting that decentralization is a “managerial strategy” and that under it, “the central government decides how decision-making authority will be divided between itself and the geographical subunits”). David Fontana, for example, has recently highlighted the pervasiveness of “federal decentralization” in the United States—the practice through which federal agencies are dispersed geographically throughout the country. See generally David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727 (2018) (detailing the history of federal decentralization in the United States). This practice might provide key benefits associated with

efficiency, but it will also make it more vulnerable to tyrannical imposition because rights and even positions in subnational units can come under easy attack.³⁸³ A unified central government can simply abolish the decentralized structures that previously existed and accrete power to itself.

What Feeley and Rubín call “local democracy,”³⁸⁴ or the direct election of subnational officials, is probably more useful for anti-tyranny purposes. Where mayors and governors have direct electoral legitimacy, they will likely be more likely to serve as sites of resistance. Feeley and Rubín also note that such a conception could be defended through a set of rights that focused on the electoral sphere—for example, on the fairness of the processes through which these actors are elected and their protection from arbitrary removal—rather than on the rights of subnational units as such.³⁸⁵ But as we have argued, while the existence of elected subnational officials is a key part of the protection that federalism provides, it is not the whole story. Also important are separate structures of state judges, police, and bureaucrats, for example. It is difficult to envision how to make these structures meaningfully independent without employing federalism.

VI. CONCLUSION

In this Article we have argued that the dispersion of key functions in American federalism such as judging, law enforcement, and election administration to independent bureaucracies and officials plays an important role in slowing any erosion of democracy. Moreover, this is a function that could not easily be replicated through another system of government, such as decentralization, but rather requires the states to have considerable autonomy vis-à-vis the federal government. In sum, we think that federalism is perhaps the most meaningful constitutional design feature for preventing authoritarianism within the United States.

We highlight a set of structures and rules embedded in U.S.-style federalism that are often overlooked, including tenure rules and emergency powers, and we shed new light on old but unsettled issues such as the anti-

federalism, but it probably plays much less of an anti-tyranny function. Central government officials can of course give orders to decentralized federal agencies. And certainly, by statute and often through mere executive decision-making, decentralized agencies could be abolished or restructured, and recalcitrant state and local officials transferred or dismissed.

383. See Jackson, *supra* note 220, at 2218–19 (“Were the states not guaranteed existence within defined borders . . . a national government unhappy with decisionmaking in its centrally defined administrative units could simply reorganize the political boundaries of those units to create more compliant decisionmaking, or to isolate ‘troublemakers.’” (footnote omitted)).

384. FEELEY & RUBÍN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE*, *supra* note 17, at 30–32.

385. See *id.* at 143 (conceding that local democracy might imply some protection against “national intrusions on the subunits’ electoral processes” such as “suspend[ing] state elections, replac[ing] elected state officials with federal appointees, or alter[ing] the structure of state elections”).

commandeering doctrine. Our work does not, of course, resolve normative debates about federalism or its institutional design in the United States, but it does highlight the functions and tradeoffs played by these features. Whether many of these features are worth the cost may well depend on how significant a risk executive tyranny actually is in the United States.

Our analysis may also have implications for the design of federal systems outside of the United States, especially in contexts where tyranny and authoritarianism are clearly substantial risks. The U.S. approach of dispersing power over elections, prosecution, and other sensitive functions among many relatively-politicized actors stands in contrast to the more common comparative design of placing those functions inside a more centralized but highly insulated tribunal, ombudsperson, or commission.³⁸⁶ We demonstrate the ways in which certain design choices found in these other federal systems—for example, the weakness of subnational courts and the scope of emergency powers over subnational units—can have significant effects on the ability of federalism to act as a bulwark against tyranny. Yet the strongest anti-tyranny protection may be provided by a constitutional design that both disperses power among many sub-national actors *and* gives a high degree of insulation to the actors wielding that power, or in other words, which combines the virtues of both approaches. For comparative constitutional lawyers, these kinds of choices and questions are worth attention.

Finally, our study offers food for thought on how the U.S. model could provide stronger protection against democratic erosion. We have noted that certain institutional features, like anti-commandeering, may be poorly rooted or have exceptions that could undermine some of their utility.³⁸⁷ More ambitiously, if, taking our account in conjunction with that of Feeley and Rubin, we have identified the *only* major function of federalism that cannot be readily served by alternative forms of government,³⁸⁸ then we can begin to think about how to reduce the injustices and inefficiencies of our current system without sacrificing federalism's protective function. That, however, is an issue for another day.

386. See *supra* Section II.B.

387. See *supra* Section IV.A.

388. See *supra* Section IV.A.