



12-2023

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Recommended Citation

Charlie Nugent, *State Officers and the Enforcement of Federal Law*, 99 Notre Dame L. Rev. 761 ().
Available at: <https://scholarship.law.nd.edu/ndlr/vol99/iss2/7>

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NOTE

STATE OFFICERS AND THE ENFORCEMENT OF FEDERAL LAW

*Charlie Nugent**

INTRODUCTION

There is an unresolved question whether the state enforcement of federal law is compatible with the structure of government that the Constitution creates for the United States. Commentators have advanced two diametrically opposed positions to justify the state enforcement of federal law. The “federal delegation” position maintains that federal executive power is the only executive power that can perform federal executive functions.¹ Proponents of this position argue that, when state officers enforce federal law, they exercise federal executive power at the pleasure of the President.² This federal delegation position, however, has not been adequately defended. There is no clear reason why the President has the authority to delegate federal power outside Article II. The “state power” position, by contrast, asserts that state executive power is sufficient to enforce federal law. Proponents of this position argue that, when state officers enforce federal law, they exercise state executive power.³ This position of state officers

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1 See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 593 (1994).

2 See *id.* at 639; see also Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 567 (2005) (noting that state officers use federal power to enforce federal law); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1991 (1993) [hereinafter Prakash, *Field Office Federalism*] (arguing that “[t]here is no explicit constitutional bar against” the federal government delegating federal executive power to state officers).

3 See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 213 (9th ed. 2022) (noting that, when state officers enforce federal law, they “get their enforcement power from their own state governments rather than from the federal government”); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 866 (1990) (noting that, when

enforcing federal law, however, also fails to withstand challenge. In recent decades, courts and commentators have suggested that only the President and validly appointed and commissioned federal officers have the authority to perform at least certain federal executive functions.⁴ In light of this view, there is a serious unanswered question whether the states' executive powers are sufficient to enforce federal law. The Supreme Court has not addressed the specific question whether the states have the power to perform federal executive functions.⁵

This Note maintains that the Constitution creates a structure of government for the United States that neither the federal delegation nor the state power position fully captures. The Constitution's arrangement of political power cannot be fully understood without resort to background law.⁶ At the time of the American Founding, one of the most important sources of background law was the law of nations. The law of nations provided rules not only for the formation of sovereign states, but also for the exercise and transfer of sovereign power. Under the law of nations, a sovereign state was formed only when people transferred sovereignty, or coercive authority, to some government institution(s). The powers transferred to a sovereign state, including the legislative, executive, and judicial powers, were necessary to perform the functions of the state. This is because a sovereign state was bound by nature to exercise its powers to fulfill its obligations. Under the law of nations, a sovereign state could transfer or alienate its powers to another,⁷ but only if it expressly received the authority to do so. Together, these principles of sovereignty help to illuminate the position of state officers within the Constitution's overall structure.

The Constitution established a new sovereign state (the federal government) and—at the same time—alienated certain powers of a preexisting group of sovereign states (the states). The people of the several states established a new sovereign state by transferring to the federal government a set of sovereign powers to regulate individuals.

state officers enforce federal law, they “draw their powers from an independent sovereign entity”).

4 See *infra* Section I.B.

5 See *infra* Section I.A.

6 Cf. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1118–20 (2017) (arguing that all forms of written law—including the Constitution—are governed by an unwritten body of law).

7 See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 524 (2022) [hereinafter Bellia & Clark, *Constitutional Law*]; Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 838 (2020) [hereinafter Bellia & Clark, *International Law Origins*].

The powers transferred to the federal government, including the legislative, executive, and judicial, were complete in themselves. Under the law of nations, therefore, the federal government's powers were necessary to perform federal legislative, executive, and judicial functions. Consistent with the law of nations, the federal government could have some ability to transfer its powers to another sovereign state. But for two reasons the federal government does not have such a profound power. First, the Constitution does not expressly grant the federal government an authority to transfer or alienate its powers to another sovereign state. Second, if the federal government had some unexpressed authority to transfer or alienate its powers to another sovereign, it would have the means to dissolve itself, which would undermine the federal government's innovative structural design. Thus, one branch of the federal government cannot transfer its powers or the powers of a coordinate branch to another sovereign state—including any of the states. Because the federal government's powers are necessary to perform federal functions, it follows that the states cannot perform federal legislative, executive, and judicial functions.

At this point, one might be wondering what constitutes a federal legislative, executive, or judicial function. Simply defined, a federal legislative, executive, or judicial function is any government action that, understood against background sources of law, requires the exercise of federal sovereignty. As this Note will argue, it is likely that all federal executive functions, which include—at their core—coercing private individuals into compliance with the law, require the exercise of federal executive power.

This Note proceeds as follows. Part I introduces the challenge of state officers enforcing federal law. Part II explains the political origins of a sovereign state's powers. The powers transferred to a sovereign state were necessary to perform its functions, and a sovereign state could transfer or alienate its powers to another sovereign state, but only if had the proper authority to do so. Part III applies the rules discussed in Part II to the Constitution. Given its vested powers and its innovative structural design, the federal government cannot transfer any of its powers to the states. Because the federal government's powers are necessary to perform federal functions, it follows that the states cannot perform federal legislative, executive, or judicial functions. Part III next shows how the arguments advanced in this Note have roots not only in deeply held notions of sovereignty, but also in American judicial thought. In early judicial opinions, at least one state court judge embraced rules of sovereignty supplied by the law of nations to hold that the Constitution required the federal government to exercise federal sovereign powers to perform federal legislative, executive, and judicial functions. Part III concludes by reevaluating (1) the state-

officer federal tax-collection debates in the *Federalist* papers and (2) early federal statutes authorizing state officers to perform certain actions. Though conventional wisdom holds otherwise, neither of these pieces of the historical record necessarily undermines my argument; that is, state officers cannot perform federal functions. Part IV applies the rules of sovereignty discussed in this Note to contemporary questions. Part V concludes by advancing functional arguments against the state enforcement of federal law.

I. THE CHALLENGE OF STATE OFFICERS ENFORCING FEDERAL LAW

In *Printz v. United States*,⁸ the Supreme Court suggested that state officers have the authority to enforce federal law if they choose to do so. Since *Printz*, however, many Justices, judges, and scholars have suggested that only the President or validly appointed and commissioned federal officers have the authority to perform at least certain federal executive functions. These developments throw a spotlight on the fundamental question whether state officers have the authority, or power, to enforce federal law.

A. *Printz v. United States*

To understand the challenge of the state enforcement of federal law, it is first necessary to appreciate the landmark decision of *Printz v. United States*. In that case, the Court suggested that state officers have the power to enforce federal law if they choose to do so. As this Section argues, however, the Court did not adequately explain why that is so. The Court, in effect, recognized that the voluntary state enforcement of federal law reduced the President's control over law enforcement, but, nonetheless, upheld the practice on largely functional grounds.

In 1997, in *Printz v. United States*, the Court addressed whether Congress could commandeer unwilling state executive officers to enforce federal law by conducting background checks on prospective handgun purchasers.⁹ The Court held that Congress could not do so on the ground that "Congress cannot compel the States to enact or enforce a federal regulatory program."¹⁰ Congressional control over state officers, the Court reasoned, would violate not only principles of federalism, but also the "separation . . . of powers between the three branches of the Federal Government."¹¹

8 521 U.S. 898 (1997).

9 See *id.* at 935.

10 *Id.*

11 *Id.* at 922. Before holding that the federal commandeering of unwilling state executive officers to enforce federal law violated the constitutional separation of powers, *Printz*

The Court began its separation-of-powers analysis by observing that “[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress.”¹² Rather, the Constitution gives the President the exclusive authority to enforce federal law. “[T]he President, it says, ‘shall take Care that the Laws be faithfully executed,’ personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the ‘Courts of Law’ or by ‘the Heads of Departments’ who are themselves Presidential appointees).”¹³ By requiring state officers to enforce federal law, the Court believed, Congress “effectively transfers [the President’s Article II] responsibility” to state officers, who are left to execute congressional legislation “without meaningful Presidential control.”¹⁴ The Court noted that “meaningful Presidential control” is likely not even possible “without the power to appoint and remove.”¹⁵ Thus, the Court concluded, “the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.”¹⁶

Justice Stevens, dissenting on behalf of himself and Justices Souter, Ginsburg, and Breyer, objected to the Court’s separation-of-powers argument.¹⁷ In essence, Justice Stevens believed that the majority’s separation-of-powers analysis proved too much. If Congress does not have the power to commandeer unwilling state officers to enforce federal law, what authority does it have to authorize willing state officers to enforce federal law? After all, when the states voluntarily enforce federal law, they do so without meaningful presidential control.¹⁸ In a footnote, the Court responded to Justice Stevens by conceding that “control by the unitary Federal Executive is . . . sacrificed

determined that federal control of state officers violated fundamental principles of federalism. *See id.* at 918–21.

12 *Id.* at 922.

13 *Id.* (citations omitted) (quoting U.S. CONST. art. II, §§ 2–3).

14 *Id.*

15 *See id.*

16 *Id.* at 923.

17 *See id.* at 939, 959–60 (Stevens, J., dissenting).

18 *See, e.g.,* Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1625 (2012) (“Regardless of whether the transfer of the authority over the execution of federal law to state officials takes place on a voluntary or involuntary basis, the net diminution of the president’s ability to oversee the administration of federal law remains exactly the same.”); Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1323 (2015) (“Whether states are required, permitted, or encouraged to enforce federal law, state officers may still choose enforcement policies that differ from those of the President. It is not clear why requiring states to enforce federal law interferes with the President’s powers more than permitting them to do so.”).

when [the] States voluntarily administer” federal law.¹⁹ But in the Court’s mind, “the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency.”²⁰ Several features of the Court’s response to Justice Stevens deserve critical analysis.

First and foremost, there is no obvious reason why Congress may deploy a “device” that reduces the President’s control over federal law enforcement. Justice Scalia—who wrote the decision in *Printz*—emphasized this point in his famous dissenting opinion in *Morrison v. Olson*.²¹ There, Justice Scalia objected to the majority’s argument that the independent counsel statute was constitutional because the statute preserved some measure of presidential control over federal law enforcement.²² It is worth quoting Justice Scalia at length on this point:

[I]t is ultimately irrelevant how much the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that “[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity.” It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether “the President’s need to control the exercise of [the independent counsel’s] discretion is so central to the functioning of the Executive Branch” as to require complete control, whether the conferral of his powers upon someone else “sufficiently deprives the President of control over the independent counsel to interfere impermissibly with [his] constitutional obligation to ensure the faithful execution of the laws,” and whether “the Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President

19 *Printz*, 521 U.S. at 923 n.12. To be sure, in this footnote, it is unclear whether Justice Scalia was referring to cooperative federalism programs where the states enforce federal law through state law, or whether he was referring to the direct state enforcement of federal law. I proceed on the latter interpretation of the footnote.

20 *Id.*

21 487 U.S. 654 (1988).

22 In *Morrison v. Olson*, the majority conceded that the independent counsel statute reduced presidential control over federal law enforcement. *See id.* at 695 (“It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity.”). Nonetheless, the Court concluded that, because the statute provided the Attorney General (and, through him, the President) “several means” of controlling the independent counsel, the statute did not unconstitutionally interfere with the President’s responsibility to oversee federal law execution. *Id.* at 696.

is able to perform his constitutionally assigned duties.” It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are.²³

If it is “ultimately irrelevant *how much* [a] statute reduces Presidential control,” then why is a federal law authorizing state executives to enforce federal law—which Justice Scalia concedes in *Printz* is a federal law that reduces presidential control over federal law enforcement—constitutional? When Congress allows a state officer to enforce federal law, Congress gives “purely executive functions” to “a person whose actions are not fully within the supervision and control of the President.”²⁴ After all, as Justice Scalia pointed out in *Printz*, state officers are neither appointed nor controlled by the President.²⁵

The *Printz* Court’s response to Justice Stevens raises a second issue. The Court believed that the states’ “consent” to the congressional device of using state officers to enforce federal law cures any of the device’s unconstitutional effects on the President’s power.²⁶ First, there is no obvious reason why Congress and the states may conspire to reduce the power of the President. In various decisions, the Court has made clear that the political branches cannot violate the separation of powers through consent.²⁷ The concern of the political branches consenting to separation-of-powers violations is augmented in the congressional power and state officer context. When Congress authorizes the states to enforce federal law, one branch of the federal government cooperates with several independent sovereign states to reduce the power of a separate and coequal branch of the federal government. The Court finds this cooperation between Congress and the states constitutional on the ground that requiring the states to “consent” to enforcing federal law makes it more difficult for Congress to reduce the power of the President.²⁸ But there is a serious question

23 *Id.* at 708–09 (Scalia, J., dissenting) (all but first alteration in original) (emphasis omitted) (citations omitted) (quoting *id.* at 691, 693, 695–96 (majority opinion)).

24 *Id.* at 708.

25 *See Printz*, 521 U.S. at 922.

26 *See id.* at 910–11 (emphasis omitted).

27 *See, e.g.,* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (“Perhaps an individual President might find advantages in tying his own hands. . . . The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.”); *New York v. United States*, 505 U.S. 144, 182 (1992) (observing that a law’s propriety under the separation of powers does not depend on whether the “encroached-upon branch approves the encroachment”).

28 *Printz*, 521 U.S. at 923 n.12.

whether this premise is empirically correct. One might imagine that the political safeguards of federalism—the role of the states in the general operation of the federal government²⁹—makes it more difficult for Congress to commandeer unwilling state executives to enforce federal law. In other words, it might take more political capital for Congress to commandeer the states, rather than to authorize them, to enforce federal law. And if it is more difficult for Congress to commandeer unwilling state executives to enforce federal law, there is a plausible argument that congressional commandeering actually protects the President's control over federal law enforcement more than congressional authorization.

One more point regarding the *Printz* decision is in order. The Court distinguished the federal commandeering of state executives from the federal commandeering of state judges. In *Printz*, the Court reviewed several Founding-era federal laws purporting to impose obligations on state judicial officers.³⁰ The Court determined that they “establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”³¹ The Court found that a congressional power to commandeer state judges “was perhaps implicit” in Article III, Section 1, which apparently makes the creation of inferior federal courts optional, and “explicit” in the Supremacy Clause, which specifically requires state judges to apply federal law over state law when the two conflict.³² A federal power to commandeer unwilling state judges to resolve federal cases, the Court believed, was “understandable” because judges were, as a historical matter, viewed “distinctively.”³³ “[U]nlike legislatures and executives,” the Court explained, judges enforced “the law of other sovereigns all the time.”³⁴ “The principle underlying so-called ‘transitory’ causes of action,” the Court continued, “was that laws which operated elsewhere created obligations in justice that courts of the forum State would enforce.”³⁵ To be sure, the Court's suggestion that the Supremacy Clause permits the federal government to commandeer state judges has long been challenged by

29 See 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, 558 (1954) (“[T]he national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.”).

30 See *Printz*, 521 U.S. at 905–07.

31 *Id.* at 907.

32 See *id.* (first citing U.S. CONST. art. III, § 1; and then citing *id.* art. VI, cl. 2).

33 *Id.*

34 *Id.*

35 *Id.* (citing *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 247–49 (1843)).

scholars.³⁶ The Supremacy Clause requires only that state officials follow valid federal law in the performance of their duties under state law.³⁷

* * *

In sum, the Court in *Printz* suggested that state officers have the authority, or power, to enforce federal law if they choose to do so. The Court, however, did not adequately explain why that is so. There is therefore a serious unanswered question whether the state enforcement of federal law violates Article II.

B. *The Formal Challenge of State Officers Enforcing Federal Law*

The challenge of state officers enforcing federal law has been augmented in recent decades. Since *Printz*, Justices, judges, and scholars have suggested that only the President or validly appointed and commissioned federal officers have the power to perform at least particular federal executive functions. What power then do state officers have to enforce federal law?

First, some Justices have argued that private parties may not make federal rules or regulations.³⁸ Second, some Justices have suggested that only the President or federal officers may bring enforcement actions on behalf of the United States.³⁹ And third, some Justices have argued that Congress does not have the power to confer Article III

36 See, e.g., Bellia & Clark, *International Law Origins*, *supra* note 7, at 929 n.481 (“Arguments that the Supremacy Clause authorizes commandeering have conflated commandeering with the duty of state officials to follow valid federal law in the performance of their duties under state law.”); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39.

37 See Bellia & Clark, *International Law Origins*, *supra* note 7, at 929 n.481.

38 See, e.g., *DOT v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 67–91 (2015) (Thomas, J., concurring in judgment) (suggesting that only the President and validly appointed and commissioned federal officers may exercise federal regulatory power); *id.* at 56–66 (Alito, J., concurring) (same); see also *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023) (Sutton, C.J.) (noting that private entities may not exercise federal regulatory power), *petition for cert. filed*, 92 U.S.L.W. 3090 (U.S. Oct. 13, 2023) (No. 23-402).

39 See, e.g., *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720, 1741 (2023) (Thomas, J., dissenting) (determining that “Congress cannot authorize a private relator to wield executive authority to represent the United States’ interests in civil litigation”); *id.* at 1737 (Kavanaugh, J., concurring) (noting, in an opinion joined by Justice Barrett, that he agrees with Justice Thomas regarding the constitutionality of qui tam provisions); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) (suggesting that “in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States,” Congress unlawfully delegates federal “Executive power” to private parties when it authorizes them to exact “public fines”); *id.* at 209 (Scalia, J., dissenting) (noting that “[b]y permitting citizens to pursue civil penalties payable to the Federal Treasury,” qui tam provisions “turn[] over to private citizens the function of enforcing the law” without “meaningful public control”).

standing on private individuals to see that federal laws be executed.⁴⁰ In all three of these contexts, Justices have embraced some kind of executive-power nondelegation doctrine. There are two core premises that underlie the executive-power nondelegation doctrine: first, that particular, if not all, federal executive functions require an exercise of the federal executive power; and second, that the President and validly appointed and commissioned federal officers are the only government actors who may exercise that power.

Though questions implicating the executive-power nondelegation doctrine have arisen largely in the context of private entities performing federal executive functions, courts and commentators have pointed out that the doctrine logically calls into question whether state officers also have the power to perform federal executive functions. For example, in a recent judicial opinion, a federal appellate judge invoked the executive-power nondelegation doctrine, observing that, when Congress authorizes state officials to execute federal law, Congress arguably “delegate[s] Article II power to state officials.”⁴¹ Professor Jennifer Mascott has likewise commented that state officers enforcing federal law and private parties enforcing federal law raise the “same question”—that is, “how much power . . . can be vested in a non-federal actor” to enforce federal law.⁴² Other commentators have also highlighted that an executive-power nondelegation doctrine calls into question whether state officers have the power to enforce federal law.⁴³

In sum, by embracing some version of an executive-power nondelegation doctrine, many of the Justices on the Court have logically called into question whether state executives have the power to enforce federal law.⁴⁴

40 See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992) (holding that Congress cannot confer Article III standing on private parties to see that federal law is enforced); see also *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1136 (11th Cir. 2021) (Newsom, J., concurring) (“Congress may not give to anyone but the President and his subordinates a right to sue on behalf of the community and seek a remedy that accrues to the public Were Congress to confer on a private plaintiff the power to bring that kind of action, it would unlawfully authorize him to exercise Article II ‘executive Power.’”).

41 *Ammex, Inc. v. Wenk*, 936 F.3d 355, 365, 365–66 (6th Cir. 2019) (Bush, J., concurring in judgment).

42 Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 HARV. J.L. & PUB. POL’Y 837, 861 (2022).

43 See, e.g., Dina Mishra, *An Executive-Power Non-delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1595 (2015).

44 For arguments that the Court’s holding in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* also calls into question the state enforcement of federal law, see Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 FORDHAM L. REV. 2425, 2440 (2011) (“*Free Enterprise Fund* teaches that delegation outside the federal government may undermine the President’s Article II obligation to superintend

C. *Scholarship Justifying State Officers Enforcing Federal Law*

In this Section, I review two previous scholarly positions of state officers enforcing federal law. Neither position, however, adequately justifies state enforcement.

1. The Federal Delegation Position

As highlighted in the Introduction of this Note, some scholars believe that state officers enforcing federal law exercise portions of the federal executive power. In their important piece on the President's power to execute the laws, Professors Steven Calabresi and Saikrishna Prakash advanced this understanding of state officers.⁴⁵ They argued that the President “*exclusively* controls the power to execute all federal laws.”⁴⁶ As this statement reveals, Calabresi and Prakash believe (1) that federal executive power is required to enforce federal law and (2) that the President is the only constitutional actor who possesses that power. Thus, when state officers enforce federal law, they must somehow exercise federal executive power.

Calabresi and Prakash argue that the President has the exclusive authority to delegate federal executive power to state officers.⁴⁷ This understanding, Calabresi and Prakash maintain, preserves presidential control over state officers enforcing federal law. For example, though the President cannot “remove” a state officer by firing him, Calabresi and Prakash believe the President may “remove” a state officer by refusing “to allow [that officer] to exercise the federal executive power.”⁴⁸ In sum, Calabresi and Prakash believe that state officers enforcing federal law exercise federal executive power at the pleasure of the President.

This delegation position rests on the premise that the President can delegate federal executive power outside Article II. In advancing this position, however, Calabresi and Prakash fail to defend this premise. Prakash, in one separate academic work, has defended the President's unilateral power to delegate federal authority to state officers. Prakash believes that the President may delegate federal power to the states because “[t]here is no explicit constitutional bar” against it.⁴⁹ Prakash argues that, because the President delegates federal power to *federal* officers all the time, he can delegate federal power to *state*

law enforcement by robbing him of his powers to appoint and remove”); and Krotozynski, *supra* note 18, at 1626–27.

45 See Calabresi & Prakash, *supra* note 1, at 639.

46 *Id.* at 596.

47 See *id.* at 639.

48 *Id.*

49 Prakash, *Field Office Federalism*, *supra* note 2, at 1991.

officers. “If the Secretary of the Treasury may exercise federal executive power,” Prakash asks, “why not the Governor of Massachusetts, or the Atlanta police?”⁵⁰

Scholars have challenged Calabresi and Prakash on functional grounds. For example, Professor Evan Caminker has argued that the Calabresi and Prakash view of state officers enforcing federal law does not provide the President with adequate control over federal law enforcement.⁵¹ Specifically, Caminker argues that a “limited power to withdraw state officers’ federal authority is far less likely than the broader power of removal to ensure that the President retains actual control over the administration of federal law.”⁵² Because “[a] presidential withdrawal of authority . . . provides at best only a mild penalty,” Caminker believes that a withdrawal power will not “induce state officials to toe the President’s policy line and even follow direct orders.”⁵³

Putting aside the question whether Caminker is correct on this point, Calabresi and Prakash are vulnerable on formal grounds. In light of the executive-power nondelegation doctrine embraced by certain Justices, judges, and scholars, there is no obvious reason why the President has the constitutional authority to delegate federal sovereign power outside of Article II.⁵⁴

2. The State Power Position

Unlike Calabresi and Prakash, other scholars hold that the states’ executive powers are sufficient to enforce federal law. As Professor Gary Lawson has explained: “State officials . . . draw their powers from an independent sovereign entity within a system of dual governmental sovereignty”⁵⁵ Thus, when state officers perform federal executive functions, they “get their enforcement power from their own state governments rather than from the federal government.”⁵⁶

In advancing this position of state officers enforcing federal law, Lawson relies on the core premise that the states’ executive powers are sufficient to enforce federal law. He believes that, because state

⁵⁰ *Id.*

⁵¹ See Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 KAN. L. REV. 1075, 1092 (1997).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Cf. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336 (2002) (“[The] search for an express nondelegation clause . . . reflects a fundamental misunderstanding of the American Constitution.”).

⁵⁵ Lawson, *supra* note 3, at 866; see also Mishra, *supra* note 42, at 1594–95 (pointing out that state sovereign power might be sufficient to enforce federal law).

⁵⁶ LAWSON, *supra* note 3, at 213.

judicial power is sufficient to resolve cases arising under the laws of the federal government, state executive power is sufficient to enforce federal law. Specifically, Lawson maintains that, because “state judges can adjudicate federal causes of action without becoming . . . ‘judges of inferior courts,’ state officials can execute federal law without becoming ‘officers of the United States.’”⁵⁷ As support for his argument that state judges can adjudicate federal cases without becoming federal officers, Lawson cites an influential 1925 law review article published by the famous Professor Charles Warren, which argues that state judges have always had the constitutional authority to resolve all kinds of federal cases.⁵⁸

Like Lawson, other scholars have argued that, because state judicial power is sufficient to resolve federal actions, state executive power is also sufficient to enforce federal law. For example, Professor Gerard Bradley has argued:

As an original matter, Congress could have relied almost entirely upon state functionaries and courts to enforce its will, and largely did. There need not have been any federal trial courts. . . . As there may have been state court trials of federal crimes, it probably follows that there would not have been federal prosecutors. . . . Then, as now, state functionaries do not change into federal apparatchiks [when enforcing federal law]. Critically, they do not exercise either article III judicial power or article II executive power even as they execute federal law. They remain state officers subject to federal duties imposed by Congress, enforceable through judicial process ultimately in the United States Supreme Court.⁵⁹

There are two problems with Lawson and Bradley’s view of state officers enforcing federal law. First and foremost, their position is not consistent with the executive-power nondelegation doctrine. Embraced by many Justices, judges, and scholars, this doctrine logically calls into question whether state executive power is sufficient to enforce federal law. Second, Lawson relies on a conventional, although controversial, view of state judicial power. In important pieces on state courts and federal cases, Professors A.J. Bellia and Michael Collins and Jonathan Nash have challenged Charles Warren’s understanding of state judicial power.⁶⁰ Drawing on deeply held notions of sovereignty supplied by

57 Lawson, *supra* note 3, at 866–67 (footnote omitted) (first quoting U.S. CONST. art. III, § 1; and then quoting *id.* art. II, § 2, cl. 2).

58 See *id.* at 866 (citing Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 554 (1925)).

59 Gerard V. Bradley, *Law Enforcement and the Separation of Powers*, 30 ARIZ. L. REV. 801, 833 (1988).

60 See Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 977–91 (2006); Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 266–70 (2011).

the law of nations, Bellia and Collins and Nash have pointed out that the Constitution might impose enforceable limits on the power of state judges to resolve federal cases.⁶¹ In light of this view, there is a second problem with Lawson and Bradley's argument. If the Constitution, in fact, imposes substantive limits on the states' judicial power to resolve federal cases, then the Constitution probably imposes limits on the states' executive power to enforce federal law.

* * *

In sum, neither the "federal delegation" position of state officers enforcing federal law embraced by Calabresi and Prakash nor the "state power" position embraced by Lawson and Bradley adequately justifies the state enforcement of federal law. There is thus a serious need to develop a formal understanding of the role of state officials within federal administrative governance.

II. THE RIGHTS AND POWERS OF SOVEREIGN STATES UNDER THE LAW OF NATIONS

The arrangement of sovereign political power in the Constitution cannot be fully understood without reference to background law.⁶² At the time of the American Founding, one of the most important sources of background law was the law of nations. Emmerich de Vattel's treatise, *The Law of Nations*, was the most well-known work on the law of nations at the time of the Founding.⁶³ The law of nations provided rules not only for the formation of sovereign states, but also for the exercise and transfer of sovereign power.

Under the law of nations, a sovereign state was formed only when people transferred sovereignty, or coercive authority, to some government institution(s). The powers transferred to a sovereign state, including the legislative, executive, and judicial powers, were necessary to perform the functions of the state. A sovereign state, once established, was bound by nature to exercise its powers to fulfill its obligations. To be sure, under the law of nations, a sovereign state could transfer or alienate its powers to another, but only if it expressly received the authority to do so. Taken together, these principles of sovereignty help to illuminate the position of state officers within the Constitution's overall structure.

In 1788, the people of the several states transferred to a newly established sovereign state, the federal government, certain sovereign powers. These powers were complete in themselves, for the federal

61 See Bellia, *supra* note 60, at 1010; Collins & Nash, *supra* note 60, at 315.

62 See Baude & Sachs, *supra* note 6, at 1099.

63 See Bellia & Clark, *Constitutional Law*, *supra* note 7, at 526.

government was given by the people the full authority to make laws regulating persons and things in the states' territories, enforce those laws, and adjudicate disputes over those laws. Under the law of nations, the powers transferred to the federal government were, therefore, necessary to perform federal functions. As a sovereign state, the federal government could, as a theoretical matter, have some ability to transfer its powers to another sovereign state. Yet given its vested powers and its innovative structural design, one branch of the federal government cannot transfer its powers or the powers of a coordinate branch to another sovereign state—including any of the states.

This Part first describes the political origins of a sovereign state's obligations, rights, and powers. It identifies the specific obligation of a sovereign to administer justice, and the legislative, executive, and judicial rights and powers that derived from this obligation. It concludes by explaining that a sovereign state could transfer or alienate its powers to another, but only if was granted the express authority to do so.

A. The Political Origins of a Sovereign State's Rights and Powers

The formation of a sovereign state was a momentous act under the law of nations, and therefore, subject to particular rules. Under the law of nations, there were three fundamental rules regarding the formation of a sovereign state. First and foremost, a sovereign state was formed only when people transferred sovereignty, or coercive authority, to some government institution(s). Second, at the moment of its formation, a sovereign state acquired a set of obligations, rights, and powers. A sovereign state was bound by political nature to exercise its powers to perform its obligations. Third, the framers of a sovereign state could vest powers in government institutions of their choosing, and they could, of course, place limits on the exercise of those powers. This Section describes these rules.

First, in order to form a sovereign state, a group of people were required to transfer sovereignty, or public coercive authority, to some government. Prior to the formation of a sovereign state, people lived in a state of nature where they had a “perfect liberty and independence.”⁶⁴ In other words, individuals in a state of nature lived according to their consciences. A state of nature, where people lived under no organized government, had the potential to produce chaos. Emerich de Vattel began his famous treatise on the law of nations by explaining that, in a state of nature, “if each man wholly and immediately directs all his thoughts to his own interest, if he does nothing for the sake of other men, the whole human race together will be

64 EMER DE VATTEL, *THE LAW OF NATIONS* 68 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758).

immersed in the deepest wretchedness.”⁶⁵ In order to protect themselves, therefore, a group of people living in a state of nature often joined together and formed a sovereign state.⁶⁶

A sovereign state was formed only when people transferred sovereignty, or coercive authority, to some governmental institution(s). Vattel began his analysis on the formation of a sovereign state by explaining that people in a state of nature can be deprived of their “perfect liberty and independence” only through consent. “It is a settled point with writers on the natural law, that all men inherit from nature a perfect liberty and independence, of which they cannot be deprived without their own consent.”⁶⁷ After people in a state of nature consented to form a sovereign state, they submitted to the sovereign by transferring to it coercive power (called sovereignty). “[I]t is necessary that there should be established a public authority, to order and direct what is to be done by each in relation to the end of the association. This political authority is the sovereignty; and he or they who are invested with it are the sovereign.”⁶⁸ As this reveals, the defining feature of a sovereign state under the law of nations was its coercive authority to regulate individual conduct. For Vattel, in order to form a sovereign state, it was “necessary” for people living in a state of nature to transfer to the sovereign “political authority” or “sovereignty” to “order and direct” the citizenry. Vattel repeatedly emphasized that a sovereign state’s coercive authority derived, in nature, from its framers:

[S]overeignty is that public authority which commands in civil society, and orders and directs what each citizen is to perform, to obtain the end of its institution. This authority originally and essentially belonged to the body of the society, to which each member submitted, and ceded his natural right of conducting himself in every thing as he pleased according to the dictates of his own understanding, and of doing himself justice.⁶⁹

In sum, when people living in a state of nature united together to establish a sovereign state, they had to transfer to the state sovereignty, or public authority to regulate private conduct.

The second rule was that, once a sovereign state acquired particular obligations, rights, and powers from its framers, it was bound by a sort of political umbilical cord to exercise its powers to perform its obligations. Simply put, the powers of a sovereign state were necessary to perform the functions of the state. Vattel defined an obligation as the

65 *Id.* at 72.

66 *See id.* at 67.

67 *Id.* at 68.

68 *Id.* at 81.

69 *Id.* at 97 (emphasis omitted).

“duty” to “act in such or such manner.”⁷⁰ A sovereign state’s rights and powers “result[ed] from [its] obligations.”⁷¹ Vattel defined a right as “the power of doing what is morally possible” to perform a sovereign obligation.⁷² It is worth quoting Vattel at length on the point that a sovereign state was bound to exercise its powers to perform its functions:

A political society is a moral person inasmuch as it has an understanding and a will of which it makes use for the conduct of its affairs, and is capable of obligations and rights. When therefore a people confer the sovereignty on any one person, they invest him with their understanding and will, and make over to him their obligations and rights, so far as relates to the administration of the state, and to the exercise of the public authority. The sovereign, or conductor of the state, thus becoming the depositary of the obligations and rights relative to government, in him is found the moral person, who, without absolutely ceasing to exist in the nation, acts thenceforwards only in him and by him. Such is the origin of the representative character attributed to the sovereign. He represents the nation in all the affairs in which he may happen to be engaged as a sovereign.⁷³

Several points deserve emphasis. Understood by Vattel, when people in a state of nature form a sovereign state “clothed with the public authority,” that sovereign state “becomes bound by the obligations of [the] nation, and invested with its rights.”⁷⁴ In other words, once people living in a state of nature form a sovereign state, that sovereign is the “depositary of the obligations and rights relative to government.” The people “make over” to only the sovereign “the exercise of the public authority” “as relates to the administration of the state.” The “moral person” of the state—that is, the people who form the sovereign—“acts . . . only in [the sovereign] and by [the sovereign].”

That a sovereign state must proceed through its own sovereignty to perform governmental obligations reinforced the “representative character attributed to the sovereign.” This was, Vattel explained, the idea that the sovereign must “represent[] the nation in *all* the affairs in which he may happen to be engaged as a sovereign.” As Vattel described it elsewhere, because people in a state of nature transferred sovereign power to a specific sovereign, “it thenceforward belongs to that body, that state, and its rulers, to fulfil the duties” of the

70 *Id.* at 68.

71 *Id.* at 67.

72 *Id.* at 68.

73 *Id.* at 99 (citation omitted).

74 *Id.*

sovereign.⁷⁵ In other words, because people in a state of nature transfer sovereign power to a specific sovereign state, that sovereign is bound by a sort of political umbilical cord to its framers to proceed through its powers to perform the obligations of the state.

It is worthwhile to illustrate, with an example, the principle that a sovereign state's powers were necessary to perform the functions of the state. Under the law of nations, a sovereign state had the power to naturalize foreigners. This was the power to "grant . . . a foreigner the quality of citizen."⁷⁶ Would anyone seriously contend that the United States could exercise its naturalization power to grant foreigners letters of Canadian citizenship? Of course not. As this Note will explain later, Canada, as a theoretical matter, may possess the authority to transfer its naturalization powers to the United States. The important point for now is that, under the law of nations, a sovereign state's powers were necessary to perform the functions of the state.

Another rule was that the framers of a state could vest powers in different government institutions or actors through some type of legal document, including a constitution. Vattel explained: "The authority of all over each member, therefore, essentially belongs to the body politic, or state; but the exercise of that authority may be placed in different hands, according as the society may have ordained."⁷⁷ For example, Vattel explained, the framers of a state could entrust power "to a senate, or to a single person."⁷⁸ Moreover, the people who formed a sovereign state could impose limits on the sovereign's exercise of rights and powers in its constitution:

The prince derives his authority from the nation; he possesses just so much of it as they have thought proper to intrust him with. If the nation has plainly and simply invested him with the sovereignty without limitation or division, he is supposed to be invested with all the prerogatives, without which the sovereign command or authority could not be exerted in the manner most conducive to the public welfare. . . .

But when the sovereign power is limited and regulated by the fundamental laws of the state, those laws shew the prince the extent and bounds of his power, and the manner in which he is to exert it. The prince is therefore strictly obliged not only to respect, but also to support them.⁷⁹

It is important to emphasize that, when the people vested particular institutions or actors with obligations, rights, and powers, those

75 *Id.* at 73.

76 *Id.* at 218.

77 *Id.* at 81–82.

78 *Id.* at 97.

79 *Id.* at 100–01 (footnote omitted).

institutions or actors could not delegate any responsibilities. “When a nation chuses a conductor,” Vattel explained, “it is not with a view that he should deliver up his charge into other hands.”⁸⁰ This is because the people have “intrusted the care of the government, and the exercise of the sovereign power,” to a specific institution or actor.⁸¹

Of course, no one institution or actor was expected to personally perform all the functions of the state. Accordingly, Vattel explained that a sovereign state was fully capable of appointing officers or magistrates to exercise sovereign authority. Vattel wrote: “As the sovereign cannot personally discharge all the functions of government, he should, with a just discernment, reserve to himself such as he can successfully perform, and are of most importance,—intrusting the others to officers and magistrates who shall execute them under his authority.”⁸² These officers and magistrates, Vattel continued, were “public persons who exercise[d] some portion of the sovereignty in the name and under the authority of the sovereign.”⁸³

In sum, people in a state of nature established a sovereign state only when they joined together and surrendered to the state their natural liberty. They surrendered their natural liberty by transferring to the sovereign sovereignty, or coercive authority. Under the law of nations, once a sovereign state was established, the sovereign became bound by nature to exercise its rights and powers to perform its obligations.

B. A Sovereign State’s Obligation to Administer Justice

One obligation of a sovereign state under the law of nations was the obligation to administer justice. The obligation to administer justice was arguably the most fundamental of obligations because it was the very reason that people united together in a state of nature. Vattel explained: “This obligation flows from the object proposed by uniting in civil society, and from the social compact itself.”⁸⁴ Put another way, Vattel said:

We have seen that men have bound themselves by the engagements of society, and consented to divest themselves, in its favour, of a part of their natural liberty, only with a view of peaceably enjoying what belongs to them, and obtaining justice with certainty. The nation would therefore neglect her duty to herself, and deceive the

80 *Id.* at 112.

81 *Id.* at 160.

82 *Id.* at 187.

83 *Id.* at 372.

84 *Id.* at 185.

individuals, if she did not seriously endeavour to make the strictest justice prevail.⁸⁵

In order to administer justice, a sovereign state had to make laws, enforce those laws, and adjudicate disputes over the laws. As Vattel observed: “There are two methods of making justice flourish,—good laws, and the attention of the superiors to see them executed.”⁸⁶

First, in order to administer justice, a sovereign state had to make laws regulating persons and things in its territories. Vattel defined a sovereign state’s legislative power as the right “to make laws . . . in relation . . . to the conduct of the citizens.”⁸⁷ In keeping with the rule that the framers of a sovereign state could vest sovereign power in different governmental institutions, Vattel observed that a nation may “intrust the exercise of [the legislative power] to the prince, or to an assembly; or to that assembly and the prince jointly.”⁸⁸ In sum, in order to fulfill its obligation of administering justice, a sovereign state had to make laws through the exercise of its legislative power.

Under the law of nations, a sovereign state’s legislative powers had well-defined limits. A sovereign state’s legislative powers had effect only within its own territories. This principle of legislative territoriality was so well-grounded in the early eighteenth century that it hardly needed explanation. In his famous treatise on the conflict of laws, Joseph Story observed: “It is plain, that the laws of one country can have no intrinsic force . . . except within the territorial limits and jurisdiction of that country.”⁸⁹ The laws of one sovereign state, Story continued, “can bind only its own subjects, and others, who are within its [territorial] limits.”⁹⁰

In the early and late nineteenth century, the Supreme Court emphasized that a sovereign’s legislative power operated only within its own territory. For example, in 1808, Chief Justice John Marshall explained that “the legislation of every country is territorial.”⁹¹ In 1870, the Supreme Court again observed:

If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as

85 *Id.* (citation omitted).

86 *Id.*

87 *Id.* at 95.

88 *Id.*

89 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 7, at 7 (Boston, Hilliard, Gray, & Co. 1834).

90 *Id.*

91 *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808), *overruled by Hudson v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

much a nullity as if in conflict with the most explicit constitutional inhibition. *Jurisdiction is as necessary to valid legislative as to valid judicial action.*⁹²

Accordingly, the Court in this 1870 case continued, when any sovereign government enacts a law, the “requisite legislative jurisdiction [must] exist[.]”⁹³

Although a sovereign state’s legislative authority operated only within its own territories, that power, under the law of nations, could bind a sovereign’s citizens anywhere in the world. Joseph Story explained this concept in the following way:

[N]ations generally assert a claim to regulate the rights, duties, obligations, and acts of their own citizens, wherever they may be domiciled. And, so far as these rights, duties, obligations, and acts afterwards come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement, or for protection, or for remedy, there may be no just ground to exclude this claim.⁹⁴

Thus, according to Story, the laws of all sovereigns “extend to, and bind, [their] subjects at all times, and in all places.”⁹⁵ This principle of extraterritorial legislative jurisdiction, with respect to citizens, was uncontroversial. Chief Justice John Marshall embraced this principle, explaining that “beyond its own territory,” a sovereign’s legislative power “can only affect its own subjects or citizens.”⁹⁶ In sum, in order to administer justice, a sovereign state was obligated to enact rules of private conduct through the exercise of its legislative power.

Second, in order to administer justice, a sovereign state had to enforce the laws. Vattel stated that laws “are useless, if they be not observed.”⁹⁷ All sovereign states possessed the executive power, which was quintessentially the power to execute the sovereign’s laws:

The executive power naturally belongs to the sovereign,—to every conductor of a people: he is supposed to be invested with it, in its fullest extent, when the fundamental laws do not restrict it. When the laws are established, it is the prince’s province to have them put in execution. To support them with vigour, and to make a just application of them to all cases that present themselves, is what we call rendering justice. And this is the duty of the sovereign⁹⁸

92 *St. Louis v. Ferry Co.*, 78 U.S. (11 Wall.) 423, 430 (1871) (emphasis added).

93 *Id.*

94 STORY, *supra* note 89, § 540, at 451.

95 *Id.* § 21, at 22.

96 *See Rose*, 8 U.S. (4 Cranch) at 279.

97 *See Vattel*, *supra* note 64, at 186.

98 *Id.* at 187.

Vattel thought that executing laws was a fundamental “duty of the sovereign.” Vattel and other legal commentators such as Blackstone emphasized that, once people living in a state of nature transferred executive power to some sovereign actor, that actor—and that actor alone—possessed the power to execute the laws. Vattel stated: “The execution of the laws belongs to the conductor of the state: he is intrusted with the care of it, and is indispensably obliged to discharge it with wisdom.”⁹⁹ Blackstone understood that, in the English context, “the public, which is an invisible body, has delegated all it’s power and rights, with regard to the execution of the laws, to one visible magistrate.”¹⁰⁰ As these statements make clear, once the people transfer executive power to some sovereign institution, they surrender “all [their] power[s] and rights, with regard to the execution of the laws” to that institution.

Of course, as previously pointed out, Vattel recognized that it was sometimes not possible for one sovereign actor or institution to personally perform all the state’s functions. Vattel explained that a sovereign state could always entrust law enforcement to public officers. “[M]agistrates established for the administration of justice,” Vattel explained, were “public persons who exercise[d] some portion of the sovereignty in the name and under the authority of the sovereign.”¹⁰¹ That individuals charged with executing the laws of the sovereign had to exercise the state’s authority was uncontroversial. Thomas Rutherford, an eighteenth-century scholar, explained that a sovereign’s “internal” executive power—the authority of “enforcing the duties of the several members”—was exercised only by the chief executive of the state or by officers “commissioned by the society to act with the public civil force to put the laws in execution at home.”¹⁰² These statements confirm that, in order to “put the laws [of one sovereign] in execution,” an individual must be “commissioned by the society to act with the public civil force.”

Third, in order to administer justice, a sovereign state had to provide some forum for its subjects to adjudicate disputes over the laws. Vattel characterized this as a “duty [the sovereign] owe[d] to his people.”¹⁰³ For Vattel, the best way a sovereign state could fulfill this duty was by establishing a judicial system. “The best and safest method of

99 *Id.* at 192.

100 1 WILLIAM BLACKSTONE, COMMENTARIES *258–59.

101 VATTEL, *supra* note 64, at 372.

102 2 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW 59, 476 (Philadelphia, William Young, 3d ed. 1799).

103 VATTEL, *supra* note 64, at 187.

distributing justice is by establishing judges . . . to take cognisance of all the disputes that may arise between the citizens.”¹⁰⁴

As Justice Scalia recognized in *Printz*, the judicial tribunals of sovereign states were unique government institutions under the law of nations.¹⁰⁵ The courts of one sovereign state applied the law of other sovereigns all the time.¹⁰⁶ To put it simply, the judicial tribunals of one sovereign could, if their state permitted them to, resolve legal disputes between private individuals arising under the civil laws of a foreign sovereign. To be sure, when a sovereign state’s judicial tribunals resolved legal disputes between individuals arising under the laws of a foreign sovereign, those judicial tribunals were not really “enforcing” the laws of another. More precisely, they were enforcing the law of their own state, which authorized a form of proceeding that supplied a remedy for a legal injury arising under a foreign sovereign’s law.

To understand how the judicial tribunals of a sovereign state resolved legal disputes between individuals arising under the civil laws of another, one must first appreciate two important aspects of judicial practice at the time of the Founding. First, the local law of a sovereign state always determined whether a plaintiff had a cause of action to sue in its judicial tribunals.¹⁰⁷ Local law was the law that governed within the territorial lines of a particular sovereign state.¹⁰⁸ Recall that a sovereign state’s legislative power only had effect within its territorial limits. Local law defined the causes of action that were available to litigants in its state. Second, local forms (or modes) of proceeding supplied causes of action to litigants.¹⁰⁹ A plaintiff had a cause of action only if the local law of the sovereign state provided a form (or mode) of proceeding that supplied a remedy for the kind of injury the plaintiff had suffered.¹¹⁰ Against this background, we can readily understand the nature of state courts enforcing federal civil rights at the time of the American Founding. When the states’ judicial tribunals enforced federal rights at the Founding, they were enforcing their own laws, forms of actions, and remedies. One state court explained the concept in this way:

It is indeed true, that the interests of commerce, and the mutual advantages derived to all Nations, by their respectively protecting

104 *Id.*

105 *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 907 (1997) (saying that judicial tribunals were viewed “distinctively” under the law of nations).

106 *Id.*

107 *See* Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2078, 2091 (2017).

108 *See id.*

109 *See id.*

110 *See id.* at 2092.

the rights of property, to the citizens and subjects of each other, whilst residing or trading in their respective territories, have induced civilized Nations generally to permit their Courts to sustain suits brought upon contracts made in foreign countries, and to enforce their execution, according to their true intent and meaning; and, in order to ascertain that, *our* Courts do permit the Laws of the country where the contract was made, to be *proved* to the jury . . . as the case may be, as *facts* entering essentially into the substance of the contract. But in doing all this, they do not act . . . under the *authority*, of the Sovereign of that Nation. Nor are they exercising any portion of its Judicial power. They are only expounding, applying and superintending the execution of the Law of their *own* State, which authorises that mode of proceeding. And upon the same principle, there can be no doubt but that any contract made, or any civil right arising, under the Laws of the United States, would be enforced in our State Courts, with this additional advantage, that those Laws need not be proved, but would, under the authority of the Constitution, be judicially known to the Judges.¹¹¹

One more point regarding the scope of a sovereign state's judicial power under the law of nations is in order. A sovereign state's judicial authority, on its own, was not sufficient to enforce the criminal (or penal) laws of another.¹¹² Thus, the judicial tribunals of a sovereign state fundamentally lacked the power to resolve legal disputes arising under the penal laws of another.¹¹³

* * *

In sum, once formed, a sovereign state was bound by nature to administer justice. A sovereign state administered justice by making laws, enforcing the laws, and adjudicating disputes over the laws. Under the law of nations, the powers transferred to a sovereign state were necessary to perform the functions of the state. At the American Founding, a sovereign state's judicial tribunals were capable of resolving disputes between private individuals arising under the civil laws of another. When they did so, however, they were enforcing their own laws, modes of proceeding, and remedies.

C. *A Sovereign State May Transfer or Alienate Its Rights and Powers*

As argued, under the law of nations, the powers transferred to a sovereign state were necessary to perform its functions. A sovereign state's judicial power was capable of resolving certain legal disputes within its territory between private individuals arising under the laws

111 *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 36 (1815).

112 *See, e.g.,* STORY, *supra* note 89, §§ 619–628, at 516–22; *see also* *Rose*, 4 Va. (2 Va. Cas.) at 41.

113 *Id.*

of another sovereign state, but that was the extent of a sovereign state's authority to "enforce" the laws of another. To be sure, under the law of nations, a sovereign state could transfer or alienate its powers to another, but only if it had the express authority to do so. If it had the authority, a sovereign state could transfer or alienate its powers only through "clear and express terms."¹¹⁴

First and foremost, a sovereign state could transfer or alienate its powers to another, but only if it had the express authority to do so. The transfer of power from one sovereign to another was a momentous act. Simply put, this was because a sovereign state was giving to another the power to perform its functions. Vattel wrote that a sovereign state could transfer its powers to another if it (1) received the "express and unanimous consent of the citizens" or if (2) such a power was "expressly given [to the sovereign] by the entire body of the people."¹¹⁵ Other rules governed the actual transfer of power from one sovereign state to another. A sovereign state could transfer or alienate its powers only in clear and express terms through some kind of legal instrument, including a treaty, constitution, or statute.¹¹⁶

The people of the several states used the Constitution to transfer a set of sovereign powers to a newly created sovereign state (the federal government), and to alienate aspects of the sovereignty of a preexisting group of sovereign states (the states). The states received the "express and unanimous consent of the citizens" to compromise aspects of their sovereignty by submitting the Constitution to state conventions for ratification. Following rules regarding the transfer of power derived from the law of nations, the states alienated aspects of their sovereignty only through clear and express terms in the Constitution.¹¹⁷ Indeed, during debates over whether to ratify the Constitution, Alexander Hamilton defined the scope of the states' powers under the proposed Constitution with resort to Vattel's rules regarding the transfer of power. For example, in *The Federalist No. 32*, Hamilton made clear that the states would exercise all their preexisting rights and powers under the proposed Constitution, except as limited by express or implied constitutional prohibition. As he put it,

[The] alienation . . . of State sovereignty [under the Constitution] would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it

114 See Bellia & Clark, *Constitutional Law*, *supra* note 7, at 521; Bellia & Clark, *International Law Origins*, *supra* note 7, at 855.

115 VATTEL, *supra* note 64, at 123–24.

116 See Bellia & Clark, *Constitutional Law*, *supra* note 7, at 523–24.

117 See Bellia & Clark, *International Law Origins*, *supra* note 7, at 871.

granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant.¹¹⁸

* * *

In sum, a sovereign state was formed only when people transferred coercive authority, or sovereignty, to some government. The powers transferred to a sovereign state, including the legislative, executive, and judicial powers, were necessary to perform the functions of the state. This is because a sovereign state was bound by a sort of political umbilical cord to its framers to exercise its own powers to perform its governmental obligations. Under the law of nations, a sovereign state could transfer or alienate its powers to another, but only if it had the express authority to do so. As the following Part will argue, these rules of sovereignty help to illuminate the position of state officers within the Constitution's overall structure.

III. SOVEREIGN RIGHTS AND POWERS UNDER THE CONSTITUTION

In 1788, the people of the several states formed a new sovereign state by transferring to the federal government a set of sovereign powers to regulate private individuals. The powers transferred to the federal government, the legislative, executive, and judicial, were complete in themselves. As a sovereign state under the law of nations, the federal government was bound to exercise its own powers to perform its governmental obligations. And though the federal government could—consistent with the law of nations—possess some authority to transfer its powers to another sovereign, it does not have such an authority for two reasons. First, the people of the several states did not expressly give the federal government an authority to transfer its powers to another sovereign state. Second, if the federal government possessed some unexpressed authority to transfer its power, it would possess the power to dissolve itself, which would undermine the Framers' innovative structural design of the federal government. Thus, one branch of the federal government cannot transfer its powers or the powers of another branch to another sovereign state—including the States. Because the federal government's powers are necessary to perform federal functions, it follows that the states cannot perform federal legislative, executive, or judicial functions.

118 THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

A. *The Constitutional Structure*

The Constitution created a new sovereign state (the federal government) of limited and enumerated powers. The people of the several states established a new sovereign state by transferring to the federal government a set of sovereign powers to regulate private individuals. Understood against the backdrop of the law of nations, the federal government's powers are necessary to perform federal functions, and the federal government cannot transfer its powers to the States.

Articles I, II, and III of the Constitution established the federal legislative, executive, and judicial power structures. These powers were complete in themselves. Thus, under the law of nations, the legislative, executive, and judicial powers transferred to the federal government were necessary to perform federal functions.

Article I transferred federal legislative power to “a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹¹⁹ The federal legislative power is complete in itself, for Congress may, by law, regulate the persons and things in the states' territories. Under the law of nations, the federal legislative power is necessary to perform federal legislative functions.

Consistent with the law of nations, the Framers of the Constitution placed careful limits on the exercise of the federal legislative power. For a federal bill to become a federal law, it must pass both the House and the Senate, and then be presented to the President for his approval.¹²⁰ If the President disapproves, then a bill can only become federal law if it is approved by two-thirds of the House and Senate.¹²¹ Other constitutional features of the federal legislative process exist. The political actors responsible for making federal law—representatives, senators, and the President—are elected at different times for different terms by different constituencies.¹²² Article I thus imposes careful hurdles on the exercise of the federal legislative power to make federal law.

Article II transferred the federal executive power to a “President of the United States.” The federal executive power is complete in itself. The President has full authority to enforce the laws. Under the law of nations, the federal executive power is necessary to perform federal executive functions. The Constitution, of course, recognizes, in the words of Vattel, that the President cannot “personally discharge all

119 U.S. Const. art. I, § 1.

120 *See id.* § 7, cl. 2.

121 *See id.*

122 *See id.* §§ 2–3; *id.* art. II, § 1.

the functions of government.”¹²³ Article II thus provides an intricate process for how the federal executive power is to be exercised. Article II, Section 2 provides that the President shall have the power to appoint

Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹²⁴

The Appointments Clause specifies that only “Officers of the United States” may exercise the federal executive power on behalf of the President. Drawing on Vattel, George Washington explained of the Appointments Clause: “The impossibility that one man should be able to perform all the great business of the state, I take to have been the reason for instituting the great departments, and appointing officers therein, to assist the supreme magistrate in discharging the duties of his trust.”¹²⁵ In sum, Article II transferred the federal executive power to a President of the United States. It further specifies that only “Officers of the United States”—appointed by the President and confirmed by the Senate—may exercise portions of the federal executive power to assist the President in performing federal executive functions.

Article III transferred the federal judicial power to “one supreme Court, and [to] such inferior Courts as the Congress may from time to time ordain and establish.”¹²⁶ Like the legislative and executive powers, the federal judicial power is complete in itself. Under the law of nations, the federal judicial power is necessary to perform federal judicial functions. As previously explained, under the law of nations, the resolution of criminal actions was exclusively a government function, and therefore, the federal judicial power would be necessary to resolve (at least) federal criminal actions.¹²⁷ As it does for the federal legislative and executive powers, the Constitution provides rules for how the federal judicial power is to be exercised: only judges appointed by the

123 VATTEL, *supra* note 64, at 187.

124 U.S. CONST. art. II, § 2, cl. 2.

125 Letter from George Washington to Count de Moustier (May 25, 1789), in 10 THE WRITINGS OF GEORGE WASHINGTON 8, 10 (Jared Sparks ed., Russell, Shattuck, & Williams and Hilliard, Gray, & Co. 1836).

126 See U.S. CONST. art. II, § 1.

127 See *supra* notes 112–13 and accompanying text.

President and confirmed by the Senate,¹²⁸ who enjoy life tenure and salary protection, may exercise federal judicial power.¹²⁹

As just explained, Articles I, II, and III of the Constitution established the federal legislative, executive, and judicial power structures. These powers were complete in themselves, and, under the law of nations, they were necessary to perform federal legislative, executive, and judicial functions. I now will argue that the federal government cannot transfer its power to another sovereign state—including any of the states—for two reasons.

First and foremost, in keeping with Vattel’s rules regarding the transfer of sovereign power, the Constitution does not expressly grant the federal government the authority to transfer its powers. To recall, Vattel said that a sovereign state, in order to transfer its powers, had to have an express authority to do so.¹³⁰ Thus, one branch of the federal government cannot transfer any of its powers or the powers of another branch to the states. Second, as I will explain below, given the innovative composition and structure of the federal government, the Constitution prohibits the federal government from transferring away its powers.

Consider first whether Congress may, by statute, transfer its own powers or the powers of another branch to the states. The only legislative power granted to Congress that could be used to delegate federal powers to the states is the Necessary and Proper Clause. That clause provides that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹³¹ A federal law, passed pursuant to this statute, cannot delegate federal legislative, executive, or judicial powers to the states.

First, Congress cannot transfer its legislative powers to the states. Article I imposes careful restraints on the exercise of the federal legislative power. A congressional ability to transfer by statute the federal legislative power to the states would disempower the role of the several states in the making of federal law and dismantle the carefully calibrated federal legislative process. There is thus no possible way that the Necessary and Proper Clause gives Congress the power to delegate federal legislative powers to the states.

Second, Congress may not transfer federal executive power to the states. If Congress could transfer federal executive power to the states, it would, in effect, possess the power to appoint state officers as federal

128 See *id.* § 2, cl. 2.

129 See *id.* art. III, § 1.

130 See *supra* note 115 and accompanying text.

131 U.S. CONST. art. I, § 8, cl. 18.

officers. This is because, understood against the backdrop of the law of nations, any person who exercises the federal executive power must be a federal officer.¹³² Congress, of course, can create federal offices, but it cannot fill them. If Congress could transfer portions of the federal executive power to the states, it would possess the power to appoint federal officers. This, of course, would deprive the President of his right to choose his assistants.

Third, Congress may not transfer federal judicial power to the states. Not only would this deprive the President of his power to appoint federal judges, but it would also allow the federal judicial power to be exercised unconstrained by the constitutional protections afforded to federal judges. Article III provides federal judges with life tenure and salary protection. Allowing Congress to export federal judicial power to state judges, who are not afforded any federal constitutional protection from political pressure, would be totally repugnant to the design of Article III.

Even though Congress may not transfer the federal executive and judicial power to the states, may the President or the judiciary transfer their own powers to the states? The answer must be no. If the President could transfer its executive power to the states, it would interfere with the Senate's—and, therefore, the people's—role in the selection of those who can wield the federal executive power. And similarly, if the Judiciary could transfer federal judicial power to states, it would interfere with the President's and the Senate's—and, therefore, the people's—role in the selection of those who can wield the federal judicial power. It would also allow state judges, who do not enjoy federal life tenure or salary protection, to wield federal judicial power.

In sum, even though the law of nations allowed a sovereign state to transfer its powers to another, the federal government may not transfer its powers to any sovereign state—including the states. This is because the people of the several states did not grant the federal government, in express terms, the authority to do so. Also, if the federal government were to have an unexpressed authority to transfer its powers, it would possess the means to dissolve itself, which would thwart the Framers' innovative structural design of the federal government. Because the federal government's powers are necessary to perform

132 See VATEL, *supra* note 64, at 372. It is likely that, as an original matter, not all federal officers possess portions of the federal sovereignty. Professor Jennifer Mascott has argued that the original public meaning of the term “officer” likely encompasses any government official with responsibility for an ongoing statutory duty—including duties such as recordkeeping. See Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 450 (2018). This view, however, does not undermine the argument that any official with the ability to exercise sovereign power must be an officer.

federal functions, therefore, the states cannot perform federal legislative, executive, or judicial functions.

Recall that some commentators believe that the states' own executive powers are sufficient to perform federal executive functions.¹³³ As a formal matter, this argument must fail. Under the law of nations, the powers transferred to a sovereign state were necessary to perform its own functions. Once the people of the several states transferred powers to the federal government, those powers became the only kind of powers that could perform federal functions. To see why the states' own powers are insufficient to perform federal functions, let us examine the states' own powers.

As explained by Alexander Hamilton in *The Federalist No. 32*,¹³⁴ the states exercise only their preexisting sovereign rights and powers, except as limited by express or implied prohibition. Consider the states' preexisting legislative powers. The states retain all preexisting legislative powers, except as limited by express or implied constitutional prohibition. Because the states' preexisting legislative power is territorial, and therefore, does not have effect in other states,¹³⁵ the Constitution does not allow the states to use their own legislative power to make federal law. What if Congress asked a state to use its state legislative power to make federal law within its own territory? Could the State of New Jersey make federal law that governed only within its own territory? Of course not. The legislative power transferred to Congress, which is to be exercised in a specific manner, is the only kind of legislative power that can make federal law.

Consider next the states' preexisting executive power. As I have explained above, Professors Lawson and Bradley believe that the states' preexisting executive powers are sufficient to drive federal law into execution.¹³⁶ This argument, however, cannot be squared with the view that, under the law of nations, the powers transferred to a sovereign state were necessary to perform the functions of the state. As pointed out, Vattel and other commentators repeatedly emphasized that those individuals charged with enforcing the laws of the sovereign must exercise a portion of that sovereign's authority.¹³⁷ Lawson's and Bradley's argument is pure sleight of hand. If Congress may authorize state executives to perform federal executive functions on the premise that state executive power is sufficient to execute federal law, why cannot Congress authorize Canadian officers to perform federal executive functions? If state executive power is sufficient to drive federal law into

133 See *supra* subsection I.C.2.

134 THE FEDERALIST NO. 32, *supra* note 118, at 198 (Alexander Hamilton).

135 See *supra* notes 89–90 and accompanying text.

136 See *supra* subsection I.C.1.

137 See *supra* notes 70–75 and accompanying text.

execution, then so too is the executive power of foreign nations, which simply cannot be the case.

Interestingly, the Bill of Rights may confirm that, under the law of nations, the states' own executive powers cannot be used to enforce federal law. At the time of the American Founding, the Bill of Rights applied only to the federal government. As Chief Justice John Marshall famously explained:

The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes.¹³⁸

If state executive power could enforce federal law, what was the point of the Fourth Amendment? Could Congress seriously circumvent the Fourth Amendment's commands by authorizing only state officers to arrest federal criminal offenders? In the above language, Chief Justice John Marshall explained that the "powers [the people] conferred on [the federal government] were to be exercised by itself." This statement cannot be fully understood without reference to the law of nations. Under the law of nations, the powers of a sovereign state were necessary to perform the functions of the state. The federal government's powers were "to be exercised by itself." Congress could not so easily circumvent the Bill of Rights by exporting federal executive power to the states, which would allow them—unconstrained by the Bill of Rights—to perform federal functions.

Consider finally the states' preexisting judicial power. At the Founding, the states routinely resolved legal disputes between private individuals arising under the civil laws of the federal government. This is no surprise because—as Alexander Hamilton explained in *The Federalist No. 82*—the "judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe."¹³⁹ From the beginning, public officials recognized that the states would exercise their own judicial power in a manner consistent with the law of nations.¹⁴⁰ This meant that the states would enforce

138 *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

139 THE FEDERALIST NO. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

140 See Bellia, *supra* note 60, at 954.

federal civil rights through their own local laws—their forms of proceeding and remedies. As one state court explained:

It is indeed true, that the interests of commerce, and the mutual advantages derived to all Nations, by their respectively protecting the rights of property, to the citizens and subjects of each other, whilst residing or trading in their respective territories, have induced civilized Nations generally to permit their Courts to sustain suits brought upon contracts made in foreign countries, and to enforce their execution, according to their true intent and meaning; and, in order to ascertain that, *our* Courts do permit the Laws of the country where the contract was made, to be *proved* to the jury, or the Court of Chancery, as the case may be, as *facts* entering essentially into the substance of the contract. But in doing all this, they do not act by the *command*, nor under the *authority*, of the Sovereign of that Nation. Nor are they exercising any portion of its Judicial power. They are only expounding, applying and superintending the execution of the Law of their *own* State, which authorises that mode of proceeding. And upon the same principle, there can be no doubt but that any contract made, or any civil right arising, under the Laws of the United States, would be enforced in our State Courts, with this additional advantage, that those Laws need not be proved, but would, under the authority of the Constitution, be judicially known to the Judges.¹⁴¹

Because the states' preexisting judicial power was insufficient to resolve federal criminal actions, numerous state courts during the Founding period held that they could resolve federal penal actions only if they could exercise federal judicial power.¹⁴² For the reasons discussed above, these courts denied an authority in the federal government to transfer federal judicial power to the states.

B. *Early Judicial Opinion Upholding the Constitution's Structure*

As this Note has argued, under the law of nations, the federal government's powers are necessary to perform federal functions, and the federal government lacks the authority to transfer its powers to the states. Thus, the states cannot perform federal legislative, executive, and judicial functions. These arguments have deep roots in principles of sovereignty derived from the law of nations. They also have American historical legitimacy. After the Constitution was ratified, Congress authorized state judicial officers to arrest and commit to state prison federal criminal offenders.¹⁴³ As part of this authorization, state judicial officers (1) issued warrants for the arrest of federal criminal

141 *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 36 (1815).

142 *See, e.g., id.* at 41; Bellia, *supra* note 60, at 977–79, 978 n.125.

143 *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

offenders, (2) arrested those offenders, and (3) committed them to prison. Though this federal law was rarely challenged, numerous state judges believed that it unlawfully transferred federal power to state officers. The reasoning these judges invoked in reaching their conclusion supports the idea that state officers cannot perform federal functions. This Section will evaluate the reasoning of one judge in particular—Judge Theodorick Bland of Maryland’s Baltimore County Court. Judge Bland wrote two opinions on the question whether Congress could authorize state officers to arrest and commit to prison federal criminal offenders: first, a judicial opinion, and then, a newspaper article defending his position. Following principles of sovereignty derived from the law of nations, Judge Bland concluded that state officers had no power to perform federal legislative, executive, or judicial functions.

Judge Bland explained in his judicial opinion that the “general government being, in its nature, a limited one, it can exercise no powers but such as are expressly granted, or are essentially necessary to some given power.”¹⁴⁴ After explaining the federal government as a sovereign state of limited powers, Judge Bland next recited the “settled principle” supplied by the law of nations that the “enforcing of the penal laws of a sovereign state, belong[s] exclusively to the courts of such state.”¹⁴⁵ Thus, Judge Bland recognized that, against the background of the law of nations, the enforcement of federal penal law required an exercise of federal sovereign power. For Judge Bland, therefore, the ultimate question was whether Congress could transfer federal judicial power to state officers.¹⁴⁶ Judge Bland concluded that Congress could not transfer federal judicial power to state officers on the ground that it would violate the Constitution’s structure.¹⁴⁷ Judge Bland believed that, if Congress could transfer federal judicial power to state officers, it would “deprive the executive branch of its right of appointment; and so destroy that most valuable among the checks contained in the constitution, which provides that the law, and the executors of the law, shall emanate from different sources, so as to countervail the irregularities of each other.”¹⁴⁸

In his newspaper article, Judge Bland primarily responded to the argument that the issuance of warrants and the arrest and commitment of criminal offenders were “executive act[s],” and therefore, required

144 State v. Rutter, NILES’ WKLY. REG., Apr. 19, 1817, at 115 (Md.).

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* (emphasis omitted).

an exercise of “executive, or ministerial” power.¹⁴⁹ Judge Bland forcefully resisted this argument. After examining numerous writers on the English common law, including Blackstone, Judge Bland concluded that these functions were judicial, not executive, in nature.¹⁵⁰ For Judge Bland, however, even if the federal action in question called for an exercise of executive power, the calculus, and the end result, would not change. Judge Bland explained that “the great principles contended for” in his opinions were “not confined to mere judicial powers and officers,” but rather “embraces all, legislative and executive.”¹⁵¹ Accordingly, if the issuance of warrants and the arrest and commitment of criminal offenders required an exercise of executive power, then “[t]he ground is somewhat different, the scene is shifted—But is any thing gained? Change only a few words, and all the argument against the transfer of judicial power to a state officer, instead of being answered or weakened, rises again with renewed and added strength.”¹⁵²

After noting that Article II of the Constitution vests the federal executive power in a President of the United States, Judge Bland explained that the Constitution requires the President and federal officers to perform federal executive functions. He wrote: “The congress have no right to prescribe where *this* executive power shall or shall not vest; they may create executive *offices* and *duties*; but they must be *filled* and *discharged* in the manner prescribed by the constitution, and in no other way.”¹⁵³ Judge Bland believed that Congress could not “constitutionally pass a law declaring, that such and such persons” of other distinct “sovereignties” may “execute [the] law.”¹⁵⁴ This was because

the execution of the legislative rules of the sovereignty is not in such case refered to the . . . executive power of the same sovereignty; but to persons designated by the legislature, and who derive their authority wholly from its acts; and who are not commissioned as those are, who, alone, the constitution declares, shall be intrusted with its . . . executive power.¹⁵⁵

These statements deserve emphasis. Judge Bland clearly believed that federal executive functions—i.e., federal law enforcement—required an exercise of the federal executive power, and therefore, could only be performed by federal officers. In his words, the President and

149 Theodorick Bland, *National Question*, NILES’ WKLY. REG., Aug. 16, 1817, at 377 (emphasis omitted).

150 *Id.*

151 *Id.* (emphasis omitted).

152 *Id.* (emphasis omitted).

153 *Id.*

154 *Id.*

155 *Id.*

federal officers are the only ones who the “constitution declares, shall be intrusted with [the federal] . . . executive power.” In making these claims, Judge Bland proceeded on the fundamental premise that federal executive power is necessary to execute the federal government’s “legislative rules.” Judge Bland saw no reason to spell out this premise because it was supplied by fundamental principles of sovereignty. He believed that, when Congress authorized state officers to enforce federal law, the state officers “ha[d] no other legal existence as an officer of the union, than that which is given him by the law in which is power and person are both designated.”¹⁵⁶ In other words, when Congress authorizes a state officer to enforce federal law, he derives federal executive power from a federal statute, not from federal appointment. According to Judge Bland, this was an unlawful “transfer of power by [an] act of congress”¹⁵⁷ to the officers of another sovereign state.

Judge Bland recognized that his arguments applied to the federal legislative powers. He believed that Congress could not transfer its legislative powers to the states. “And the same kind of argument,” Judge Bland concluded, “may be used against the capacity of congress to transfer its legislative powers to the legislative functionaries of one of the states, or any other sovereignty”¹⁵⁸ Judge Bland summarized his position by saying: “[C]ongress can have no more right to authorize the legislature of a state to make laws for the union than it has to authorize any state officer to exercise judicial functions, or to execute the laws of the general government”¹⁵⁹

Judge Bland’s colleague, Judge Hanson, also thought that section 33 of the Judiciary Act of 1789 unlawfully transferred federal judicial power to state officers. In the course of his opinion, Judge Hanson wrote that, “if congress has power to return to the states judicial powers, . . . why should it not have the power of returning . . . the legislative and executive powers . . . ?”¹⁶⁰ Judge Hanson continued that, if Congress could transfer federal power to the states, then

it would necessarily follow, that our national government would present the singular anomaly of one co-ordinate branch of a government possessing, as a component part of it, the inherent constitutional means, not only of its own dissolution, but that of undermining the basis of the whole fabric, in the surrender, without the

156 *Id.* (emphasis omitted).

157 *Id.*

158 *Id.* (emphasis omitted).

159 *Id.* (emphasis omitted).

160 *State v. Rutter*, NILES’ WKLY. REG., June 7, 1817, at 231 (Md.) (opinion of Hanson, J.).

consent of the parties to the contract, who must be either the states or the people, of legislative, judicial and executive functions.¹⁶¹

Like Judge Bland, Judge Hanson recognized that federal legislative, executive, and judicial functions necessarily required an exercise of federal sovereign power. Thus, if Congress authorized state officers to perform federal executive functions, those officers exercised federal executive power. This is unconstitutional. In Judge Hanson's words, it would allow the federal government to "surrender," or delegate, its legislative, executive, and judicial functions to the states "without the consent of the parties" to the Constitution.

Judge Bland's reading of the Constitution was rooted in deeply held notions of sovereignty drawn from the law of nations. He believed that the states fundamentally lacked the *power* to perform federal legislative, executive, and judicial functions. Federal legislative functions were to be performed by Congress. Federal executive functions were to be performed by the President and federal officers. Federal judicial functions were to be performed by federal officers, including federal judges and justices of the peace. It is worth mentioning that Judge Bland never even considered the possibility that the states' own legislative, executive, and judicial powers were sufficient to perform federal legislative, executive, and judicial functions. It would be radical, for example, to argue that the states' legislative power could make federal law. So, too, then would it be radical to say that the states' executive and judicial powers could perform federal executive and judicial functions.

Of course, Judge Bland recognized, the states, like every sovereign state, have the authority to resolve disputes between private individuals arising under the civil laws of the federal government. Under the law of nations, the states' preexisting judicial power was fully capable of resolving legal disputes between private individuals arising under the civil laws of another sovereign. The state courts, Judge Bland admitted, have a "concurrent jurisdiction with the courts of the union" in federal "civil cases."¹⁶² Yet, in his words, state officers act in a "manifestly very different"¹⁶³ character when they perform a federal function. When performing a federal function, state officers act in the "character and name of the United States,"¹⁶⁴ and they necessarily exercise federal power.

161 *Id.*

162 *State v. Rutter*, NILES' WKLY. REG., Apr. 19, 1817, at 115 (Md.).

163 *Id.*

164 *Id.* (emphasis omitted).

C. *Revisiting Historical Understandings and Practices*

Proponents of the state enforcement of federal law invoke two important pieces of historical evidence in support of their position: (1) *The Federalist Papers* and (2) early congressional practice. The conventional view is that both of these pieces of the historical record prove that state officers may perform federal functions. Careful examination of *The Federalist Papers* and early congressional practice, however, does not necessarily undermine my argument: that is, the states' officers cannot perform federal legislative, executive, or judicial functions.

1. *The Federalist Papers*

Let us first examine *The Federalist Papers*. Prior to the Constitution's ratification, the Anti-Federalists and Federalists debated whether state officials would collect federal taxes in the new federal republic. The conventional view is that the state-officer federal tax-collection debates prove that the Constitution allows the states' officers to perform federal executive functions. For example, in his evaluation of the federal tax-collection debates, Prakash concludes: "Both Hamilton and Madison envisioned federal use of state executives to administer the new federal laws that were to be applied to individuals."¹⁶⁵ Likewise, in his dissenting opinion in *Printz*, Justice Stevens argued that, because "[o]pponents of the Constitution had repeatedly expressed fears" about "an overbearing presence of federal tax collectors in the States," they "assumed that state agents" would enforce federal law.¹⁶⁶

In my view, the tax collection debates in *The Federalist Papers* do not necessarily stand for the proposition that state officers can perform federal executive functions. The debates clearly prove that (1) the federal government could collect federal taxes through federal law and federal officers and that (2) the federal government could collect federal taxes through the states—state legislatures, state executives, and state tribunals. It is less clear whether they support the idea that state officers can directly enforce any federal law.

Consider the Anti-Federalists' fears over federal tax collection in the new Republic. In *The Anti-Federalist No. 32*, Brutus explained that the congressional "power to lay and collect" taxes would lead "to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country."¹⁶⁷ As this reveals, Brutus

165 Prakash, *Field Office Federalism*, *supra* note 2, at 1996–97.

166 *Printz v. United States*, 521 U.S. 898, 946 (1997) (Stevens, J., dissenting).

167 Brutus, Letter V, N.Y.J., Dec. 13, 1787, *reprinted in* THE ESSENTIAL ANTIFEDERALIST 102, 114 (W.B. Allen & Gordon Lloyd eds., 1985).

began with the assumption that federal officers, not state officers, would collect federal taxes. Similarly, in *The Anti-Federalist Nos. 41–43*, the Federal Farmer believed that, after the Constitution’s ratification, the federal government would “proceed[] immediately by its own laws and officers”¹⁶⁸ to enforce federal tax law.

Instead of suggesting that the federal government should use state executives to enforce federal tax law in the new republic, the Anti-Federalists suggested that the federal government ought to make federal requisitions on the states. As the Federal Farmer explained it, Congress ought to collect federal taxes “by the agency of the state governments”—that is, by state laws and state officers—“except where a state shall neglect for an unreasonable time to pay its quota.”¹⁶⁹ The Federal Farmer essentially believed that the federal government would rely on the states, as had been done under the Articles, to supply federal taxes through state institutions. Understood by the Federal Farmer, the federal government would make “requisitions . . . on the states for the monies so wanted.”¹⁷⁰ The states, acting through their own laws and officers, would then collect the assigned quotas.¹⁷¹ If the states were uncooperative—as they were under the Articles—then, the Federal Farmer recognized, the federal government could simply collect federal taxes “by its own laws and officers.”¹⁷² Following this requisition system was appealing to the Federal Farmer because it simply avoided the alternative: “[A] permanent and continued system of tax laws of the union, executed in the bowels of the states by many thousand officers, dependent as to the assessing and collecting federal taxes, solely upon the union.”¹⁷³

The Federal Farmer’s vision of tax collection is noteworthy for two reasons. First, under it, the states would enforce their own laws to achieve federal policy. This was exactly how the federal government collected federal taxes under the Articles. Furthermore, this method of federal tax collection is consistent with the principles of sovereignty discussed in this Note. The Constitution allows the federal government to rely in some situations on the states—state legislatures, state executives, and state judicial officers—to achieve federal policy.¹⁷⁴ Second, the Federal Farmer recognized that, under the Constitution, the

168 Federal Farmer, Letter XVII, COUNTRY J., Jan. 23, 1788, *reprinted in* THE ESSENTIAL ANTIFEDERALIST, *supra* note 167, at 75, 84.

169 *Id.* at 90.

170 *Id.* at 91.

171 *See id.*

172 *Id.* at 84.

173 *Id.* at 90–91.

174 *See infra* Part IV.B.

federal government could “by its own laws and officers”¹⁷⁵ collect federal taxes if the states proved uncooperative.

The Federalist Papers also discuss how federal taxes would be collected in the new federal republic. For example, in *The Federalist No. 45*, James Madison addressed Anti-Federalist fears over the congressional power to lay and collect taxes. “It is true,” Madison conceded, “that the Confederacy is to possess, and may exercise, the power of collecting internal as well as external taxes throughout the States.”¹⁷⁶ At the same time, Madison thought that “this power will not be resorted to, except for supplemental purposes of revenue.”¹⁷⁷ Madison briefly addressed the collection of these revenues. He said that “an option will . . . be given to the States to supply their quotas by previous collections of their own.”¹⁷⁸ The “eventual collection [of federal taxes],” Madison continued, “under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States.”¹⁷⁹ There is no obvious reason why Madison’s remarks here establish that state executives would directly enforce federal tax law after the Constitution’s ratification. Rather, Madison seems to endorse the Federal Farmer’s view. The states, according to their own “rules” and “officers,” would supply federal “quotas.”

In *The Federalist No. 36*, Alexander Hamilton embraced a similar understanding of federal tax collection. Hamilton began his analysis of the federal tax collection issue by addressing the argument that the federal government would not know the states’ “local details” necessary for an effective federal tax code.¹⁸⁰ In addressing this argument, Hamilton suggested: “The national legislature can make use of the system of each State”¹⁸¹ Hamilton thought that “[t]he method of laying and collecting [federal] taxes in each State can, in all its parts, be adopted and employed by the federal government.”¹⁸² In other words, Congress could simply pass federal laws that adopted state tax standards, and then have federal tax officers enforce those laws.

Next, in *The Federalist No. 36*, Hamilton addressed the question whether the federal government could make requisitions on the states for federal taxes. He thought it could, as had been done under the Articles. Indeed, Hamilton fully endorsed using “the State officers and

175 Federal Farmer, *supra* note 168, at 84.

176 THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

177 *Id.*

178 *Id.*

179 *Id.*

180 THE FEDERALIST NO. 36, at 218 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

181 *Id.* at 220.

182 *Id.*

State regulations for collecting” federal taxes,¹⁸³ since this would “avoid any occasion of disgust to the State governments and to the people” and “save expense.”¹⁸⁴ Hamilton also recognized, however, that under the Constitution, the states would have incentives to obey federal requisitions because, if they did not, the federal government could proceed through its own sovereignty to collect federal taxes. As Hamilton put it, the “existence of [regulatory] power in the Constitution will have a strong influence in giving efficacy to requisitions.”¹⁸⁵ Hamilton concluded: “When the States know that the Union can supply itself without their agency, it will be a powerful motive for exertion on their part.”¹⁸⁶

Hamilton’s understanding of federal tax collection seems to align with the Federal Farmer’s and Madison’s: Congress could rely on state institutions—state legislatures, state officers and state tribunals—to collect taxes owed to the federal government. If the states proved uncooperative, then the “Union [could] supply itself [over the people] without [the agency of the states].”¹⁸⁷ Accordingly, the tax collection discussions in both *The Anti-Federalist Papers* and *The Federalist Papers* do not necessarily prove that state executives would (or even could) directly perform federal executive functions. Rather, they prove that the federal government could proceed through its own sovereignty to collect federal taxes, or it could rely on the state institutions—state legislatures, state officers, and state tribunals—to administer federal policies.

To be sure, other statements made by Madison and Hamilton in *The Federalist Papers* more clearly contemplate the state enforcement of federal law. For example, in *The Federalist No. 45*, immediately after explaining that federal taxes would be collected through the “officers” and the “rules” appointed by the states, Madison then observed: “Indeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union.”¹⁸⁸ Read in the specific context of Madison saying that state officers could collect taxes owed to the federal government by enforcing state tax law, this statement probably reflects the idea that the states would retain concurrent authority under the Constitution. Even if it does not, it contains no direct support for the argument that state executive officers could perform federal executive functions.

183 *Id.* at 221.

184 *Id.* at 221–22.

185 *Id.* at 221.

186 *Id.*

187 *Id.*

188 THE FEDERALIST NO. 45, *supra* note 176, at 292 (James Madison).

In other passages, Hamilton appears to adopt the position that state executives could directly enforce federal law. For example, in *The Federalist No. 27*, Hamilton argued that the Constitution, “by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each [state] in the execution of its laws.”¹⁸⁹ Here, it seems that Hamilton thought the Constitution allowed the federal government to employ state executives to enforce federal law. But why? Hamilton does not clearly answer this question. Hamilton was arguing that, because the Constitution allows the federal government to operate directly on individual citizens, the federal government may use state officers to enforce federal law. It does not necessarily follow, however, that state officers have the power to perform federal executive functions simply because the Constitution allows the federal government to operate over the people.

It is worthwhile noting that, in *The Federalist No. 27*, Hamilton observed that state officers enforcing federal law would “tend to destroy, in the common apprehension, all distinction” between the federal government and the states.¹⁹⁰ According to Hamilton, the difficulty in identifying which government was accountable for the law and its execution—the federal government or the states—would give the federal government “the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State.”¹⁹¹ Prakash argues that it is “highly ironic” that some people find “such confusion constitutionally troubling” because Hamilton “welcome[d]” it.¹⁹² Hamilton, however, turned the constitutional value of political accountability on its head. Under our system, it should be easy, not difficult, to identify the political institution responsible for government action.

Another statement by Hamilton in *The Federalist No. 27* is often quoted in support of the idea that state officers may enforce federal law. It reads:

It merits particular attention . . . that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and*

189 THE FEDERALIST NO. 27, at 176 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

190 *Id.* at 177.

191 *Id.*

192 See Prakash, *Field Office Federalism*, *supra* note 2, at 1998 n.215 (emphasis omitted).

constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.¹⁹³

According to many, this passage indicates that Hamilton envisioned state executive officers enforcing federal law. But one must question whether this passage really stands for that proposition. All the passage says is that (1) federal laws will be supreme; (2) state officers are bound to respect those laws because of their oath to “support” the Constitution; and thus (3) state officers will be rendered auxiliary to the operation of the federal government.¹⁹⁴ Put another way, state legislators, executives, and judges have, by oath, a constitutional duty to follow valid federal law in the performance of their duties under state law.

Another statement made by Hamilton in *The Federalist Papers* deserves attention. In *The Federalist No. 16*, Hamilton wrote that the Constitution must be able to “carry its agency to the persons of the citizens” and “be empowered to employ the arm of the ordinary magistrate to execute its own resolutions.”¹⁹⁵ Prakash argues that, through this statement, Hamilton embraced the commandeering of state executives to enforce federal law.¹⁹⁶ Prakash simply misreads Hamilton. Read in context, Hamilton was saying that the federal government must be an *effective* government. Hamilton, in the following sentences, explained:

The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular States.¹⁹⁷

Here, Hamilton was arguing against the structure of government created by the Articles of Confederation. He was arguing that the federal government must possess “all the means” and “all the methods” of “executing the powers” it is given. Hamilton tied the “means” and “methods” to those “possessed and exercised by the governments of the particular States.” Hamilton was, in effect, saying that the federal government must have the same means and methods of law execution that the states possess. In other words, Hamilton believed that the federal government must, under the new Constitution, possess the core attribute of sovereignty—the power to coerce private conduct. Far from supporting a federal right to commandeer unwilling state

193 THE FEDERALIST NO. 27, *supra* note 189, at 177 (Alexander Hamilton).

194 See *Printz v. United States*, 521 U.S. 898, 911–13 (1997).

195 THE FEDERALIST NO. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

196 Prakash, *Field Office Federalism*, *supra* note 2, at 2001.

197 THE FEDERALIST NO. 16, *supra* note 195, at 116 (Alexander Hamilton).

executives to enforce federal law—as Prakash believes—Hamilton thought that the federal government must have the power to create a bureaucracy.

* * *

In sum, during the American Founding period, Anti-Federalists and Federalists embraced what in modern times we call cooperative federalism.¹⁹⁸ They clearly believed that the federal government could rely on state institutions—state legislatures, state executives, and state tribunals—to achieve federal policies.¹⁹⁹ It is less clear whether they supported the proposition that state executives could directly perform federal executive functions, i.e., enforce federal law. To the extent that some prominent Federalists (e.g., Alexander Hamilton) supported the state enforcement of federal law, they did not justify, with constitutional reasoning, why the officers of one sovereign state could perform the executive functions of another.

2. Early Congressional Use of State Officials

After the Constitution was ratified, Congress, by federal statute, authorized state officers to perform certain actions. These federal statutes deserve careful attention because the Supreme Court treats early congressional practice as “contemporaneous and weighty evidence” of constitutional meaning.²⁰⁰

On March 26, 1790, Congress authorized state officers to admit foreigners into citizens of the United States.²⁰¹ Specifically, Congress provided that “any alien” who met certain statutory requirements “may be admitted to become a citizen” of the United States upon “application to any common law court of record, in any one of the states.”²⁰² Thus, the First Congress purported to require state officers to grant aliens letters of federal citizenship. Viewed in light of the rules of sovereignty discussed in this Note, this federal statute probably unlawfully delegated federal power to state officers.

The Constitution transfers to the federal government the exclusive power to establish rules of naturalization. Article I, Section 8 of the Constitution vests Congress with the power to “establish [a] uniform Rule of Naturalization.”²⁰³ Article I, Section 8, by unavoidable implication, divests the states of their preexisting powers to establish

198 Krotoszynski, *supra* note 18, at 1602.

199 *See id.*

200 *Bowsher v. Synar*, 478 U.S. 714, 723, 723–24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)).

201 *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795).

202 *Id.*

203 U.S. CONST. art. 1, § 8, cl. 4.

their own rules of naturalization. Allowing the states to establish their own rules of naturalization would be totally repugnant to Congress's power to establish a uniform rule. Article I, Section 8 does not, by its own terms, transfer the federal government a power to naturalize foreigners into federal citizens. Pursuant to the Necessary and Proper Clause,²⁰⁴ however, it seems clear that Congress can constitutionally authorize Article III federal courts or non–Article III tribunals to naturalize foreigners as federal citizens. The Act of March 26, 1790, raises the specific question whether Congress has the authority to export this function to the states.

As explained, the states exercise only their preexisting rights and powers, except as limited by constitutional prohibition. Prior to the Constitution's adoption, the states' naturalization rights and powers permitted them to grant foreigners letters of state, not federal, citizenship.²⁰⁵ Thus, the Act of March 26, 1790, which authorized the states to grant foreigners letters of federal citizenship, transferred federal power to the states. This is unlawful; the federal government has no authority to transfer any of its powers to the States.

That the Act of March 26, 1790, unlawfully transferred federal naturalization power to the states should not be viewed as radical. This federal statute was rarely, if ever, challenged on constitutional grounds—until the late nineteenth century, when the states began to refuse to grant foreigners letters of federal citizenship. At that time, courts were faced with the question whether Congress could require state judicial officers to perform federal naturalization functions. In the course of answering that question, at least one state court judge suggested that Congress could not lawfully authorize the states to perform federal naturalization functions. Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, for example, believed that the authority to grant foreigners letters of federal citizenship was “vested exclusively in the general government.”²⁰⁶ He explained that, if the state “courts or magistrates” are to “have any authority on the subject,” they must derive that power “from the general government.”²⁰⁷ Chief Justice Shaw characterized the naturalization authority of the states as “powers given to state courts” by a statute of Congress.²⁰⁸ Given its historical pedigree, Chief Justice Shaw thought that it was

204 *Id.* cl. 18.

205 JOHN P. SANDERSON, *REPUBLICAN LANDMARKS: THE VIEWS AND OPINIONS OF AMERICAN STATESMEN ON FOREIGN IMMIGRATION* 104 (Philadelphia, J.B. Lippincott & Co. 1856).

206 *In re Stephens*, 70 Mass. (4 Gray) 559, 561 (1855).

207 *Id.*

208 *Id.* at 562.

inappropriate to question the ability of Congress to transfer naturalization powers. He wrote that

in the earlier stages of the general government, before the line which defines the distinction between the jurisdiction of the United States and that of the several States . . . it was not unusual for congress, as matter of convenience perhaps, and not regarding this distinction very strictly, to vest certain powers, in the courts and magistrates of the several states, not of their own constitution and appointment.²⁰⁹

Chief Justice Shaw, we can reasonably assume, thought that early federal laws authorizing state officers to perform federal naturalization functions unlawfully transferred federal power to the states.

Another early federal law related to naturalization—the Act of June 18, 1798—required state judicial officials “to certify and transmit” applications of citizenship to the Secretary of State, along with information about “the name, age, nation, residence and occupation, for the time being, of the alien.”²¹⁰ In modern terms, this federal statute is a reporting requirement, and therefore, it is consistent with my theory. A state officer does not exercise federal power when he passes information along to the federal government.

Early Congresses imposed obligations on state judges unrelated to naturalization. For example, one early federal law required state judicial officers to adjudicate disputes between commanders of vessels and their crew members. The Act of July 20, 1790, stated that “if the mate or first officer under the master, and a majority of the crew of any ship or vessel . . . discover that the said ship or vessel is too leaky” to proceed on the water, then the master of the vessel must allow the crew to have their claim adjudicated before either a federal or state judicial officer.²¹¹ Once a claim was brought before a federal or state judicial officer, that officer would order three qualified people to prepare a report on the vessel’s condition, which the court would review.²¹² After reviewing this report, the judicial officer would issue an order regarding “whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made or deficiencies supplied where the ship or vessel then lays.”²¹³ In essence, the Act of July 20, 1790, gave crew members a federal right to have their vessels adjudged seaworthy against their masters. Because the states’ preexisting judicial power was capable of resolving legal disputes between private individuals arising under the civil laws of the federal government,

209 *Id.* at 561–62.

210 Naturalization Act of 1798, ch. 54, § 2, 1 Stat. 566, 567 (repealed 1802).

211 Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 132.

212 *Id.*

213 *Id.*

it is very likely that the Act of July 20, 1790, is consistent with the rules laid out in this Note.

Section 7 of the Act of July 20, 1790, specifically regulated the contracts between seamen and vessel masters. Section 7 provided that

if any seaman or mariner, who shall have signed a contract to perform a voyage, shall, at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of peace within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter²¹⁴

Some scholars believe that this statute delegated federal law enforcement functions to the states. For example, Professor Harold Krent believes that section 7 “certainly” delegated “criminal law enforcement” functions to state officers.²¹⁵ This conclusion is unwarranted. Properly understood, section 7 gave federal justices of the peace a specific mode to enforce contracts between seamen and their masters—arrest. At the time of the Founding, state justices of the peace could enforce federal civil rights (contracts, for example) only through their own local forms of proceeding.²¹⁶ Thus, if one local form of proceeding of a state authorized, as a contract remedy, the arrest of an individual, then a state officer could arrest a deserting seaman. Analyzing section 7, Judge Semple of the General Court of Virginia observed in 1821: “If tribunals or officers of another sovereignty be resorted to, on principles of comity, to enforce [this] contract specifically, they could only act in the manner and by the course of proceeding sanctioned by the sovereignty to which they belonged.”²¹⁷ Judge Semple was saying that, when state officers enforce contracts between seamen and their masters arising under section 7, they can act only in accordance with their own local forms of proceeding. Thus, understood within the historical context of 1790, when the Act of July 20 was enacted, section 7 did not necessarily unlawfully delegate federal law enforcement functions to the states.

Another early federal law required state judges to collect proof of the claims of Canadian refugees who aided the United States in the Revolutionary War.²¹⁸ The “evidence of [these] claims” would be evaluated by the Secretary of War and the Secretary and Comptroller of

214 *Id.* § 7, 1 Stat. at 134.

215 Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 305 (1989).

216 *See supra* notes 139–41 and accompanying text.

217 *Ex parte* Pool, 4 Va. (2 Va. Cas.) 276, 292 (1821) (Semple, J., dissenting).

218 *See* Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 547, 548.

the Treasury.²¹⁹ These federal officials would “examine the testimony, and give their judgment what quantity of land ought to be allowed to the individual claimants, in proportion to the degree of their respective services, sacrifices and sufferings.”²²⁰ As the text of this statute reveals, federal officials reviewed facts and evidence gathered by state officials and then used their independent judgment to disburse public land to individual claimants. Again, this statute is perfectly consistent with my theory. A state official exercises no portion of the federal sovereignty when he gathers facts. A state officer would, however, act unlawfully if he were allowed to exercise coercive authority under federal law and disburse federal lands or monies to individual claimants.

IV. CONTEMPORARY IMPLICATIONS

As this Note has argued, the federal executive power is necessary to perform federal executive functions, and the federal government cannot transfer any of its powers to the states. Accordingly, state officers cannot directly enforce federal law. Even though state officers cannot perform federal executive functions, the states may help the federal government achieve federal policies. Unless limited by constitutional prohibition, the states may incorporate federal law into state law. This allows state institutions—state legislatures, state executives, and state judicial tribunals—to enforce federal law *through state law*. Second, there is good reason to believe that the states can allow their executive officers to hold dual offices under the federal government.

A. *State Officers and Federal Executive Functions*

The core constitutional problem arises when state officers coerce individuals into compliance with federal law, or impose coercive consequences or penalties on individuals for failure to comply with federal law. Consistent with the law of nations, these are core federal law enforcement functions that require an exercise of federal executive power. This Section briefly highlights contemporary instances in which state executives perform core federal law enforcement functions, and therefore, unlawfully exercise federal power.

First and foremost, there is a serious issue when state officers bring enforcement actions on behalf of the United States to collect monetary penalties owed to the federal government. Since the 1960s, Congress has authorized state officers to bring enforcement actions against

219 *Id.* § 4.

220 *Id.*

private individuals for violations of federal law.²²¹ For example, the Consumer Financial Protection Act of 2010 (CFPA) authorizes the states—both state attorneys general and state regulators—to bring enforcement actions against individuals to address violations of federal consumer-financial laws.²²² In enforcing this law, state executives may collect monetary penalties in federal or state court.²²³ The act of imposing coercive consequences on private individuals for the failure to comply with federal law constitutes quintessential federal law enforcement. Consistent with the principles discussed in this Note, there is a serious argument that federal enforcement actions performed under the CFPA (and other similar statutes) by state executives are invalid.

Furthermore, there is a serious problem when state officers administer federal regulatory programs by enforcing federal law. To appreciate the nature of regulatory enforcement, consider *Printz*. In that case, Congress required state executives to implement the Brady Handgun Violence Prevention Act.²²⁴ That Act required state officers to conduct background checks on prospective handgun purchasers.²²⁵ In concluding that Congress could not commandeer unwilling state executives to enforce federal law, the *Printz* Court emphasized that consenting state officers could voluntarily enforce the Brady Act.²²⁶ The function performed by state officers under the Brady Act is quintessential law enforcement. State officers coerce private individuals into compliance with federal law. Properly understood, under the law of nations, this function requires an exercise of federal power, and therefore, can only be performed by the federal government. As this Note will show in the following Section, the Constitution allows the federal government to ask the states to advance the objectives of the Brady Act through state law.

To be sure, the arguments advanced in this Note do not call into question state officers assisting the federal government in federal law enforcement. In recent decades, Congress has imposed “reporting requirements” on the states. These laws require state officers to share information to designated federal agencies.²²⁷ Concurring in *Printz*, Justice O’Connor noted that the majority’s decision prohibiting the

221 See PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 39 tbl.2.4 (2015) (collecting federal laws authorizing states to represent the United States in litigation).

222 See 12 U.S.C. § 5552(a)(1) (2018).

223 *Id.*

224 See *Printz v. United States*, 521 U.S. 898, 902–04 (1997).

225 *Id.* (citing 18 U.S.C. § 922(s) (1994))

226 *Id.* at 910–11.

227 See Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 115 (2012).

federal commandeering of state officers did not call into question federal reporting obligations; these obligations, Justice O'Connor argued, were "purely ministerial."²²⁸ Assuming that these laws do not violate the anticommandeering rule,²²⁹ the states may continue to pass information to the federal government, consistent with the principles in this Note. State officers do not "enforce" these laws; they do not use coercive authority in passing information to the federal government. Instead, when state officers comply with federal reporting obligations, they follow federal law in the performance of their duties under state law.

B. The Residual Authority of the States to Enforce Federal Law Through State Law

As argued, under the Constitution, the states exercise all their preexisting rights and powers, except as limited by express or implied constitutional prohibition. From the Founding, it was well understood that the states possessed some residual authority to advance federal policies through state law. This is because, simply, the states remain free to incorporate federal standards into state law, except as limited by constitutional prohibition.

For example, in 1797, the Mayor's Court of Philadelphia addressed whether the State of Pennsylvania could criminalize conduct that was also criminal under federal law.²³⁰ In the case, *Commonwealth v. Schaffer*, the defendant was charged with forgery under state law; he argued that the crime was federal and therefore should be enforced by federal officers in federal court.²³¹ The court rejected this argument, holding that the states could criminalize forgery even if it was also criminal under federal law. The court did so on the ground that the Constitution did not divest the states "of a jurisdiction of which, at the time it was made, it found the state constitutionally possessed."²³² In keeping with the interpretive principles embraced by Hamilton in *The Federalist No. 32*, the court stated:

But the present case is not one of those which comes within the exceptions of that writer. 1st. The jurisdiction of this crime is not exclusively granted to the union. 2d. It is not prohibited to the

228 *Printz*, 521 U.S. at 936 (O'Connor, J., concurring).

229 *But see* Mikos, *supra* note 227.

230 *See* *Commonwealth v. Schaffer*, 4 U.S. (4 Dall.), at xxvi, xxvii (Mayor's Ct. Phila. 1797).

231 *See id.*

232 *Id.* at xxix.

states. 3d. Nor, if it is granted to the union, is it a case where a similar authority in the states would be incompatible.²³³

As this early judicial opinion reveals, the states remain free under the Constitution, unless limited by express or implied prohibition, to advance federal policies by incorporating federal law into state law.

The idea that the states generally have the authority to incorporate federal law into state law has lately received scholarly criticism. In a recent article, Professor Ronald Krotoszynski argued that, after *Free Enterprise Fund* held that Congress may not insulate executive officers from the President's removal power by two layers of tenure protection, the Constitution renders cooperative-federalism programs unconstitutional.²³⁴ In cooperative-federalism programs, the states generally incorporate federal standards into state law and then enforce those state laws, thereby advancing federal policy.²³⁵ In effect, then, Krotoszynski believes that the states possess no power to incorporate federal policies into state law. Allowing the states to incorporate federal policy into state law, Krotoszynski believes, would interfere with the President's power to oversee federal law execution.²³⁶ There are at least two problems with Krotoszynski's argument. First, Krotoszynski misunderstands the nature of the law enforcement actions performed by state officers when participating in cooperative-federalism regimes. Second, Krotoszynski assumes that the states possess an unlimited residual authority to advance federal policy by incorporating federal law into state law.

First, Krotoszynski misunderstands the nature of the law enforcement actions performed by state officers when participating in cooperative-federalism regimes. Specifically, Krotoszynski believes that state officers enforce *federal*, not *state*, law when participating in cooperative-federalism programs. He maintains that "cooperative-federalism programs violate the separation-of-powers doctrine by unconstitutionally exporting the execution of federal law to state-government officers."²³⁷ This statement is simply unwarranted. State officers generally enforce state law that incorporates federal standards when participating in cooperative-federalism programs.

Second, Krotoszynski wrongly assumes that the states, as part of their residual sovereignty, possess an unlimited authority to advance federal policies. Krotoszynski believes that cooperative federalism encourages "Congress to cannibalize federal executive authority by simply asking states to administer federal functions, such as defense,

233 *Id.* at xxx; see THE FEDERALIST NO. 32, *supra* note 118, at 198 (Alexander Hamilton).

234 See Krotoszynski, *supra* note 18; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483–84 (2010).

235 See *id.* at 1602.

236 See *id.* at 1625.

237 *Id.* at 1669.

foreign relations, immigration, or the enforcement of federal criminal laws, on a voluntary basis.”²³⁸ “The use of voluntary cooperative-federalism programs,” Krotoszynski argues, “could, in effect, deny the [P]resident any meaningful role in the day-to-day operation of core executive duties.”²³⁹ Underlying this argument is the premise that the states possess an unlimited authority to incorporate federal policies regarding national defense and foreign relations into state law. This premise, however, is inconsistent with fundamental principles of constitutional interpretation. As noted, in *The Federalist No. 32*, Alexander Hamilton explained that the Constitution prohibits the states from taking sovereign action in three ways. As he put it:

This exclusive delegation, or rather this alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.²⁴⁰

With these principles in mind, Krotoszynski overestimates the states’ authority to advance federal policy interests. According to Krotoszynski, cooperative federalism encourages “Congress to cannibalize federal executive authority by simply asking states to administer federal functions, such as defense, foreign relations, immigration, or the enforcement of federal criminal laws, on a voluntary basis.”²⁴¹ There are several problems with this statement. First, the Constitution expressly prohibits the states from performing various functions related to defense and foreign relations.²⁴² Second, the Constitution, by unavoidable implication, places several additional limitations on the power of the states to perform functions implicating foreign relations.²⁴³ Third, the states’ preexisting authority undoubtedly permits them to regulate immigration and criminal law, except as limited by express or implied constitutional prohibition.²⁴⁴ And so, if the federal government wanted to encourage the states to adopt federal immigration or

238 *Id.* at 1663.

239 *Id.*

240 THE FEDERALIST NO. 32, *supra* note 118, at 198 (Alexander Hamilton).

241 Krotoszynski, *supra* note 18, at 1663.

242 See U.S. CONST. art. I, § 10 (placing numerous express limits on the power of the states to engage in functions related to defense and national security).

243 See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840) (plurality opinion) (holding that the Constitution, by unavoidable implication, divests the states of their preexisting power to extradite criminals to foreign nations).

244 See *supra* notes 117–18 and accompanying text.

criminal standards, it could do so consistent with the Constitution. This would not “cannibalize” the President’s power, as Krotoszynski maintains, because the states would be enforcing their own laws. That the federal government and the states may, sometimes, enforce the same laws is a necessary byproduct of the innovative structure of government that the Constitution creates for the United States.

C. *Dual Office Holding Under the Constitution*

At the time of the Founding, public officials recognized that the Constitution allows state officers to hold dual offices under the federal government. For example, after Virginia ratified the Constitution, the Virginia legislature enacted a state law prohibiting public officers from holding dual offices under the federal government.²⁴⁵ As Virginia believed in 1788, there may be good reasons for prohibiting state officers from holding dual offices under the federal government. That does not mean, however, that dual office holding is *per se* unconstitutional.

If the federal government wants state officers to perform federal executive functions, then the President can appoint, and the Senate can confirm, a state attorney general, or some other state official. A validly appointed and commissioned state officer, controllable by the federal executive, can enforce federal law.²⁴⁶

V. FUNCTIONAL ARGUMENTS AGAINST THE STATE ENFORCEMENT OF FEDERAL LAW

As a functional matter, there are several good reasons why the Constitution prohibits state officers from performing federal executive functions. First, the state enforcement of federal law undermines the functional role of the federal government in establishing uniform national policy. Second, the state enforcement of federal law undermines certain normative values traditionally offered in support of the constitutional separation of powers and federalism. This Section considers three such values—structural constraints on the coercive exercise of government power, political accountability, and democratic decisionmaking.

245 Act of Dec. 8, 1788, ch. 38, § 2, 1788 Va. Acts 18; *see also* Jackson v. Rose, 4 Va. (2 Va. Cas.) 34, 40 (1815) (“And we know that if any Judge of this State were to accept of either commission, or compensation, from the General Government, he would by that act vacate his office.”).

246 *See* Collins & Nash, *supra* note 60, at 301 (observing that, if the states “tolerate . . . dual office-holding by their officials,” then the federal government may allow state officers to perform federal enforcement functions).

A. *The Functional Role of the Federal Government*

As a matter of constitutional structure, the political branches of the federal government are exclusively responsible for establishing uniform national policy. Congress creates national policy by enacting federal law, and the President develops that policy by enforcing the law.²⁴⁷ The state enforcement of federal law significantly interferes with the federal government's constitutionally prescribed role of establishing uniform federal policy.

First, state enforcement gives individual state actors, usually attorneys general, the ability to develop federal enforcement policy on a national level. For example, Professor Margaret Lemos has documented how state officers can alter federal enforcement policy by “generating judicial decisions that clarify the scope of [federal] law.”²⁴⁸ Lemos tells the story of how a group of states in the 1980s sued various insurance companies for violations of federal antitrust law. The states had urged the Department of Justice to pursue similar claims, but it refused to do so.²⁴⁹ That was a policy choice made by the President. The President, acting through the Attorney General, decided for some reason that federal law should not be enforced in a particular manner. Nonetheless, Lemos continues, the states won, and their lawsuit resulted in a Supreme Court decision that broadly interpreted the federal law at issue.²⁵⁰ Lemos concludes this story by observing that federal officers today rely on this decision to bring federal antitrust suits.²⁵¹ As this story reveals, the state enforcement of federal law—specifically, a group of states's decision to interpret and apply federal law in a particular manner—can help to shape federal enforcement policy on a national scale.

While one might not have any particular issue with state officers developing federal enforcement policy, there are troubling aspects to it. As then Professor Elena Kagan explained: “[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.”²⁵² The

247 See *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (“[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive . . . action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.”).

248 Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 740 (2011).

249 *Id.*

250 *Id.*

251 *See id.*

252 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001).

state enforcement of federal law severs the “electoral link”²⁵³ between the President and the federal bureaucracy, allowing nonfederal actors to create federal policy based on “parochial interests.”

Second, and relatedly, the state enforcement of federal law allows fifty states to develop different federal policies within their own borders. Proponents of the state enforcement of federal law defend against this critique by arguing that it is no critique at all. They believe that leaving the states to develop different federal policies within their borders promotes federalism values. For example, Lemos says that “[b]y authorizing states to enforce federal law, Congress can harness state enforcers’ local perspectives in the development and application of federal law.”²⁵⁴ These federalism-based arguments, however, ignore the fundamental idea that federal law is supposed to be *uniform*. As I have explained above, the Constitution generally allows the states to incorporate federal law into state law. Thus, the states can stamp local values on federal law by simply incorporating federal law, with local interests attached, into state law.

Finally, the state enforcement of federal law makes it exceedingly difficult for Congress to oversee federal law enforcement. As the primary political actor responsible for setting national policy, Congress has the constitutional authority—even duty—to supervise the executive branch. Congress influences the enforcement of federal law through, among other means, appropriations, oversight hearings, and interbranch dialogue.²⁵⁵ It is significantly more difficult for Congress to supervise fifty states, and their respective executive agencies, than it is for Congress to supervise one executive branch. Proponents of state enforcement even concede that the state enforcement of federal law “lacks an equivalent mechanism of centralized national control.”²⁵⁶

B. Normative Values

In addition to undermining the functional interests of the federal government, the state enforcement of federal law undermines the normative values traditionally offered in support of the constitutional separation of powers and federalism. This Section focuses on three normative constitutional values: structural constraints on the coercive exercise of government power, political accountability, and democratic decisionmaking.

253 *Id.* at 2332.

254 See Lemos, *supra* note 248, at 756.

255 See Jack M. Beer mann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

256 Lemos, *supra* note 248, at 718.

First, the constitutional separation of powers and federalism impose structural constraints on the exercise of coercive power. James Madison famously made this point in *The Federalist No. 51*:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.²⁵⁷

As Madison believed, the structure of government that the Constitution creates for the United States makes it really difficult for government to interfere with the “rights of the people.” There is no doubt that the constitutional separation of powers makes it difficult for the federal executive to coerce private conduct. Constrained by congressional resources, the President must decide how best to allocate enforcement resources. The state enforcement of federal law shatters these internal constraints by making it easier for the federal government to see its laws enforced. Proponents have long justified state enforcement on the ground that it helps the federal government in law execution. For instance, proponents have said that it “bring[s] more allies”²⁵⁸ to federal law enforcement; adds more “cops on the beat;”²⁵⁹ multiplies “by fifty the number of officials” to enforce federal law;²⁶⁰ increases “the odds of successful enforcement” against individuals;²⁶¹ and encourages the states to “pick up [the] slack when the federal Government fails to enforce.”²⁶² As these statements reveal, the primary goal of state enforcement is to bolster federal law enforcement efforts without funding them. Yet, by making it easier for Congress and the President to see that federal law is enforced, state enforcement shatters the Constitution’s internal constraints on law enforcement.

Second, the constitutional separation of powers and federalism facilitate political accountability. Alexander Hamilton, for example,

257 THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

258 Lemos, *supra* note 248, at 713 (alteration in original) (quoting 153 CONG. REC. 36236 (2007)).

259 *Id.* at 701 (quoting 153 CONG. REC. 36359 (2007)).

260 *Id.* at 713 n.67 (quoting *Consumer Product Safety Commission Reauthorization: Hearing on H.R. 3343 and H.R. 3443 Before the Subcomm. on Com., Consumer Prot., & Competitiveness of the Comm. on Energy and Com.*, 100th Cong. 236 (1987) (statement of Pamela Gilbert, Staff Attorney, U.S. Public Research Interest Group)).

261 *Id.* (quoting 149 CONG. REC. 25548 (2003)).

262 *Pennsylvania v. Navient Corp.*, 967 F.3d 273, 286 (3d Cir. 2020).

defended the President's unitary structure on the ground that it promoted political accountability. Hamilton explained: "But one of the weightiest objections to a plurality in the executive, and which lies as much against the last as the first plan is that it tends to conceal faults and destroy responsibility."²⁶³ With a plural executive structure in place, Hamilton believed

[i]t . . . becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author.²⁶⁴

Hamilton continued that

the plurality of the executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number as on account of the uncertainty on whom it ought to fall; and, second, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.²⁶⁵

When the states enforce federal law, who should the people blame? The President? Or the states? Who has the responsibility for bringing the enforcement action? Did the President oversee the states' decision to enforce federal law? Or did the states choose to enforce federal law without the President's knowledge? Judge Bland, in his judicial opinion previously discussed, argued that the state enforcement of federal law undermined political accountability. He began by saying that "[a]mong the various principles, arising out of our peculiar and inestimable form of government, there is perhaps, no one more obvious or more valuable than the principle of *responsibility*."²⁶⁶ If, Judge Bland continued, the federal government is "allowed to use the officers of any other independent sovereignty than their own, for the purpose of . . . executing their laws, this principle of *responsibility* is certainly very much impaired, if not totally destroyed."²⁶⁷ Because the state enforcement of federal law "tends to enfeeble" or "destroy" the "great principle [of responsibility]," Judge Bland concluded that "we should all unite in expelling [it], as the implacable enemy of all our political

263 THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

264 *Id.* at 428.

265 *Id.* at 428–29 (emphasis omitted).

266 *State v. Rutter*, NILES' WKLY. REG., Apr. 19, 1817, at 115 (Md.).

267 *Id.*

institutions.”²⁶⁸ Even Alexander Hamilton, who apparently embraced some state enforcement in *The Federalist Papers*, recognized that it blurred the accountability lines between the federal government and the states. He argued that state enforcement would “tend to destroy, in the common apprehension, all distinction” between the federal government and the states.²⁶⁹ Hamilton believed that the state enforcement of federal law would give the federal government “the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State.”²⁷⁰ As a keen lawyer, Hamilton flipped the value of political accountability on its head. Under the structure of government that the Constitution creates, it should be easy, not difficult, to identify the government that is responsible for coercive action.²⁷¹

In *Printz*, the Court believed that the commandeering of state executives undermined political accountability. The Court stated:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.²⁷²

The Court applied these principles of political accountability to the Brady Act, the federal law at issue that required state officers to conduct firearm background checks. The Court observed that it would be “the [state executive] and not some federal official who stands between the gun purchaser and immediate possession of his gun.”²⁷³ It would be “the [state executive], not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.”²⁷⁴

These arguments apply with equal force to the voluntary state enforcement of federal law. First, by permitting the states to enforce

268 *Id.*

269 THE FEDERALIST NO. 27, *supra* note 189, at 176 (Alexander Hamilton).

270 *Id.* at 177.

271 In recent years, some of the states have refused to enforce federal law on the ground that it would undermine political accountability. *See, e.g.*, Gurbir S. Grewal, Off. of the Att’y Gen., Attorney General Law Enforcement Directive No. 2018-6 (rev. ed. Sept. 27, 2019) (“[The state enforcement of federal immigration law] blur[red] the distinctions between state and federal actors and between federal immigration law and state criminal law”).

272 *Printz v. United States*, 521 U.S. 898, 930 (1997) (citing Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994)).

273 *Id.*

274 *Id.*

federal law, members of Congress can take credit for solving problems without having to ask their constituents to pay for the solutions with higher taxes. When the states sue on behalf of the federal government, the federal government achieves rigorous law enforcement without funding it. And second, when state officers voluntarily enforce federal law, it is still the states, and not the federal government, standing between the citizen and the federal government's regulatory objectives. It is irrelevant whether the states volunteer to enforce federal law or are commandeered to do so. Whenever the states enforce federal law, the lines of political accountability drawn in the Constitution become less "distinct" and less "discernible."²⁷⁵

Finally, the constitutional separation of powers and federalism promote democratic decisionmaking at both the federal and state levels of government. As noted above, the President is constrained by resources in law enforcement. Proponents of the state enforcement of federal law often argue that the federal government, by authorizing state officers to enforce federal law, can bolster the President's resources at no additional cost.²⁷⁶ There are, however, good democratic reasons why the Constitution prohibits the federal government from asking the states' officers to enforce federal law. It is up to Congress to provide the President with resources adequate to enforce the laws. The people of the several states, acting through their elected representatives in the Congress, must decide whether to provide the President with additional funding.

Of course, one might reasonably fear that, if state officers cannot enforce federal law, Congress will enlarge the size of the federal government.²⁷⁷ There are a few responses to this fear. First, the federal legislative process is cumbersome and difficult. As a theoretical matter, there are probably enough constraints on federal lawmaking to prevent Congress from creating unnecessary officers. One early state judge addressing the state enforcement of federal law observed that the federal legislative process would encourage Congress to "avoid all unnecessary expense, and the creation of useless officers to eat up the substance of the people."²⁷⁸ Second, even if Congress creates additional federal agencies/officers to assist the President in federal law enforcement, the people of the several states can rest easy, knowing that their voices, expressed through their democratically elected representatives, were heard.

Enforcing the Constitution's limits on the ability of state officers to perform federal executive functions also facilitates democratic

275 *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

276 Lemos, *supra* note 248, at 701, 713.

277 *Printz*, 521 U.S. at 959 (Stevens, J., dissenting).

278 *Ex parte Pool*, 4 Va. (2 Va. Cas.) 276, 290 (1821) (Semple, J., dissenting).

decisionmaking at the state level. As explained, except as limited by constitutional prohibition, the states remain free to incorporate federal regulatory and criminal policies into state law. When the President is constrained by resources and cannot enforce particular federal laws, the states—the state legislatures, state executives, and state judicial officers—may advance federal policies by incorporating federal standards into state law.²⁷⁹ This encourages the federal government and the states to work together to promote the national good.

CONCLUSION

Courts and commentators have not adequately justified the state enforcement of federal law. In *Printz*, the Supreme Court suggested that state officers have the power to enforce federal law if they choose to do so. However, it did not defend why that is so on formal grounds. Commentators have also failed to adequately justify the state enforcement. Two diametrically opposed positions have emerged. The “federal delegation” position asserts that federal executive power is the only kind of executive power that can perform federal executive functions. Proponents of this position argue that, when state officers enforce federal law, they exercise federal executive power at the pleasure of the President. The “state power” position, by contrast, asserts that state executive power is sufficient to perform federal executive functions. Proponents of this position argue that, when state officers enforce federal law, they exercise their own state executive power. This Note has argued that the Constitution creates a structure of government for the United States that neither the federal delegation nor the state power position fully captures. In 1788, the people of the several states established a new sovereign state by transferring to the federal government a set of sovereign powers to regulate individuals. The powers transferred to the federal government, including the legislative, executive, and judicial, were complete in themselves. Under the law of nations, the federal government’s powers were necessary to perform federal legislative, executive, and judicial functions. At the moment of its formation, the federal government became bound by nature to exercise its powers to perform its functions. It is true that the law of nations allowed one sovereign state to transfer or alienate its powers to another. But, because of its vested powers and its unique structural design, the federal government does not have such a profound authority. The states lack the *power* to perform federal functions, including federal executive functions.

279 See *Arizona v. United States*, 567 U.S. 387, 417–37 (2012) (Scalia, J., concurring in part and dissenting in part).