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ARTICLE

CONSENT PROCEDURES AND AMERICAN FEDERALISM

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CONSENT PROCEDURES AND AMERICAN FEDERALISM

Bridget A. Fahey*

Cooperative federalism programs and spending grants are like contracts. There is a federal offer and a state acceptance; there are terms and conditions, obligations and penalties. And there is a “meeting of the minds” — a moment when the states consent to a federal offer and the deal is done. But because the states are not monolithic actors — and many officials, acting through many different political processes, could conceivably speak for the state — the federal government establishes procedures that dictate which state actors may consent on the state’s behalf and how.

I call these “consent procedures.” These procedures are ubiquitous: they appear in every program and facilitate every grant that requires voluntary state participation. But they are not innocuous. Some require a particular state officer to serve as the state’s spokesperson. Others require the states to express their consent by proceeding through certain state-level processes. Still others automatically enroll the states and infer their ongoing consent from their failure to opt out. In Professors Richard Thaler and Cass Sunstein’s popular framing, Congress controls the “choice architecture” within which states make the decision to join or reject voluntary cooperative programs. Like “choice architecture,” consent procedures do more than operate as processes for registering state consent. Many also shape how states internally discuss, deliberate, and decide whether to join federal programs. They affect the formation as much as the expression of state consent.

This Article is the first to identify and critically analyze these procedures. It canvasses their many forms and features. It contextualizes them in the Court’s federalism jurisprudence and identifies potential constitutional concerns. It asks whether and under what conditions they are consistent with the core values of American federalism. And it describes ways that different stakeholders — Congress, federal agencies, and the states — can navigate them going forward. The federal government’s largely unnoticed ability to set consent procedures is a consequential feature of twenty-first-century federalism. Federal-state collaboration is increasingly Congress’s regulatory model of choice, and the terms of these collaborations will be the federalism fight of this new century. Consent procedures force to the forefront fundamental questions about the degree of autonomy, self-determination, and respect the states deserve when they are negotiating, defining, and agreeing upon the terms of their cooperative ventures — questions that become more pressing with each legislative session.

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INTRODUCTION

Cooperative federalism programs and conditional spending grants are like contracts between the states and federal government.¹ There is a federal offer and a state acceptance; there are terms and conditions, obligations and penalties. And there is a “meeting of the minds,” a moment when the states consent to a federal offer and the deal is done. But because the states are not monolithic actors — and many officials, acting through many different political processes, could conceivably speak for the state — the federal government embeds what I call “consent procedures” in cooperative federalism statutes and regulations that dictate which state actor gets to accept the federal offer and how.

Take, for instance, the exchange provisions of the Patient Protection and Affordable Care Act² (ACA). The offer: state control over the health exchange the Act creates for each state. The conditions: compliance with federal quality, access, and governance rules. But *how* does a state accept? According to the statute, states can agree to establish exchanges only “at such time and in such manner as the Secretary [of Health and Human Services (HHS)] may prescribe.”³ HHS, in turn, requires states to consent by submitting a technical document called a “Blueprint Application” along with a “Declaration Letter” signed by the state’s governor.⁴ It is the state’s governor, in other words, who gets to accept the federal offer.

Requirements like this are not merely academic. In late 2012, Mike Chaney, Mississippi’s elected insurance commissioner, sent a letter and Blueprint Application to HHS declaring Mississippi’s “intent to implement and operate a State-based Exchange.”⁵ Three months later, HHS rejected the application because it did not follow HHS’s pre-

¹ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (describing cooperative programs as being “in the nature of a contract: in return for federal funds, the [s]tates agree to comply with federally imposed conditions”).

² Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

³ 42 U.S.C. § 18041(b) (2012).

⁴ DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., BLUEPRINT FOR APPROVAL OF AFFORDABLE STATE-BASED AND STATE PARTNERSHIP INSURANCE EXCHANGES 4 (2012) [hereinafter BLUEPRINT FOR APPROVAL], <https://www.cms.gov/CCIIO/Resources/Files/Downloads/hie-blueprint-11162012.pdf> [http://perma.cc/3DKT-ZKR4].

⁵ Letter from Mike Chaney, Comm’r of Ins., Miss. Ins. Dep’t, to Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Ctrs. for Medicare & Medicaid Servs., U.S. Dep’t of Health & Human Servs. (Nov. 14, 2012), <https://www.mid.ms.gov/pdf/ExchDecLtr.pdf> [http://perma.cc/DT3A-ZVLF].

scribed consent procedures.⁶ HHS noted that the agency had issued “detail[ed] requirements” for approval to run a state-based exchange, including the requirement that a “State’s Declaration Letter must be signed by the State’s Governor.”⁷ Although Chaney was a statewide elected official, with broad jurisdiction over insurance-related issues in Mississippi, the federally dictated consent procedure deemed only the governor authorized to speak for the state.

This is not a unique situation. In every program and for every grant that relies on the states’ voluntary participation, the federal government decides how the states volunteer: which official or institution gets to speak for the state, how the decision is presented to that speaker, what process the speaker must use to communicate the state’s decision, and the timeline on which the decision must be made. In Professors Richard Thaler and Cass Sunstein’s popular framing, Congress and federal agencies control the “choice architecture” within which states make the decision to join or reject cooperative programs.⁸

Some consent procedures are deferential: they require, for instance, that a state’s indication of consent be “submitted by the State agency that is eligible to submit the plan.”⁹ Others are highly intrusive — such as, for instance, procedures that require *federally* designated state officials to follow *federally* designated state-level processes as a predicate to expressing the state’s consent.

Medicaid’s original consent procedure, which is also used for the frequent amendments to state programs, is one example. It requires a state’s Medicaid agency to prepare an application or an amendment to

⁶ Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Ctrs. for Medicare & Medicaid Servs., U.S. Dep’t of Health & Human Servs., to Mike Chaney, Comm’r of Ins., Miss. Ins. Dep’t (Feb. 8, 2013), <https://www.cms.gov/CCIIO/Resources/Files/Downloads/ms-exchange-letter-02-08-2013.pdf> [<http://perma.cc/F55L-9MAL>]. The Centers for Medicare & Medicaid Services have expressed a willingness to work on alternative arrangements if “the Governor of [a] State believes that another entity is the appropriate authority” to enter into a state partnership exchange. BLUEPRINT FOR APPROVAL, *supra* note 4, at 6 n.5. The essential consent power, however, still rests with the governor since even under this redesignation scheme, the decision to cede authority is committed only to the governor and no other state official can consent without her approval. No state’s governor has elected to use this redelegation option. With the exception of Mississippi, every letter expressing the state’s consent to building its own exchange was submitted by the governor. For copies of the state declaration letters, see *State Health Insurance Marketplaces*, CMS.GOV, <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/state-marketplaces.html> (last visited Mar. 1, 2015) [<http://perma.cc/88JH-WSUB>].

⁷ Letter from Gary Cohen, *supra* note 6, at 1 (quoting BLUEPRINT FOR APPROVAL, *supra* note 4, at 6) (internal quotation mark omitted).

⁸ See generally Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. (Papers & Proc.) 175 (2003). See also RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (2008).

⁹ 34 C.F.R. § 76.104(a)(1) (2014). This deferential practice is used, unless otherwise specified by the Department of Education or by statute, for the acceptance and reacceptance of a range of federal education grants. See 34 C.F.R. §§ 76.1(a), 76.100 (describing the scope of § 76.104’s requirements).

its original application, invite comments on that application from the state's governor, then finally send it to the federal agency.¹⁰ It mandates a chain of communication and consultation between the state's Medicaid agency and the state's governor that state law and practice may or may not support.

The Clean Water Act's¹¹ section-404 permit program is another. The program allows the Environmental Protection Agency (EPA) to transfer federal permitting authority over certain water areas to the states. The program's consent procedure requires not only a letter from the state's governor expressing the state's interest in the 404 program but also a statement from the state's attorney general "contain[ing] a legal analysis"¹² of the effect of state eminent domain law on the successful implementation of the program, which "cite[s] specific statutes and administrative regulations."¹³ The federally dictated consent procedure not only directs the state's attorney general to perform an action in his official state-authorized capacity that he might not otherwise perform, but it also specifies the precise form that action must take.

As these examples suggest, consent procedures do more than operate as processes for registering state consent; many also shape how states internally discuss, deliberate, and decide whether to join federal programs. Whether by accident or by design, these procedures affect the *formation* as much as the *expression* of state consent.

This is the first sustained treatment of "consent procedures." Although issues related to them have been litigated in a handful of state cases,¹⁴ and academics have noted elements of this consent dynamic,¹⁵

¹⁰ 42 C.F.R. § 430.12 (2014) ("Submittal of State plans and plan amendments. (a) Format. A State plan for Medicaid consists of preprinted material that covers the basic requirements, and individualized content that reflects the characteristics of the particular State's program. (b) Governor's review — (1) Basic rules. Except as provided in paragraph (b)(2) of this section — (i) The Medicaid agency must submit the State plan and State plan amendments to the State Governor or his designee for review and comment before submitting them to the CMS regional office." (original formatting omitted)).

¹¹ 33 U.S.C. §§ 1251–1387 (2012).

¹² 40 C.F.R. § 233.12(c) (2014).

¹³ *Id.* § 233.12(a).

¹⁴ See, e.g., *infra* pp. 1605–06. Although the Supreme Court has never had occasion to review consent procedures, some members of the Court have indicated their interest in just the kind of issues that consent procedures raise. See, e.g., *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1644 (2011) (Kennedy, J., concurring) ("The Court should be most cautious before deciding cases that might later lead to a general principle that the National Government can condition receipt of funds on the State's agreement to make far-reaching changes with respect to its governmental structure . . .").

¹⁵ In his provocative piece on the many ways the federal government "dissects" the states, Professor Rick Hills has considered but rejected the idea that local governments can consent to spending grants on behalf of the state. He concludes instead that local governments should be able to make bilateral agreements with the federal government without binding other state insti-

consent procedures have not been identified by the courts or academy as a distinctive feature of federal-state interactions. Yet the federal government's ability to set consent procedures is a consequential aspect of twenty-first-century federalism, and it is becoming more so with each legislative session. As federal-state collaboration increasingly becomes the regulatory model of choice for policy initiatives big and small, these procedures will play an outsized role in mediating the power and influence of state and federal political actors. They let the federal government intervene in state politics and decisionmaking in novel and unexpected ways. They allow the federal government to enhance its bargaining power when dealing with the states in situations that are commonly considered by courts and scholars to be negotiations between equal actors. And they present new opportunities to test the rules established by the Supreme Court that mediate the relationship between the states and the federal government.

Identifying which consent procedures are consistent with American federalism and which are not requires "rules of engagement" that dictate how the states and federal government are obliged to treat one another when they join together their respective power, resources, and democratic legitimacy to achieve a common goal.¹⁶ What type and degree of autonomy, self-determination, respect, and deference are the states entitled to when the states and federal government are negotiating, defining, and agreeing to the terms of their collective ventures?

tutions. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1238–39 (1999). And in an early — pre-*New York* and pre-*Printz* — article, Professor D. Bruce La Pierre describes the efforts of some state courts to navigate "conditions of national grants that affect the allocation of political power among the state government, its political subdivisions, and private groups." D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 849 (1982). La Pierre's analysis, however, bundles together conditions that impact which state official gets to accept a federal grant and conditions that impact which official controls the "actions required for compliance" with such a grant. *Id.* at 850. For a similar analysis, see Comment, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power*, 128 U. PA. L. REV. 402, 405–11 (1979) [hereinafter Comment, *Federal Interference*]. Here, I disaggregate these distinct conditions into those affecting the consent process and those affecting the implementation process in order to interrogate the unique issues that arise in the consent phase in particular. Finally, D. Cody Huffaker has noticed that the federal government used what I call a "transfer" consent action, see *infra* section I.B, pp. 1575–79, to facilitate state acceptance of federal economic stimulus funds. See generally Comment, *A New Type of Commandeering: The Bypass Clause of the American Recovery and Reinvestment Act of 2009 (Stimulus Package)*, 42 ARIZ. ST. L.J. 1055 (2010).

¹⁶ Professor Robert Schapiro originated this phrase in the federalism context. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005) ("Because cooperative federalism accepts the general notion of a federal-state partnership, but does not provide for rules of engagement, the theory provides no resources for monitoring federal-state relations.").

These questions are not unfamiliar in the world of bargaining. Contract law has spawned rules of engagement for nearly every facet of contract formation.¹⁷ But analogous rules have not been recreated in the intergovernmental sphere. Federalism doctrine and scholarship have precious few principles for theorizing and managing how the states and federal government can arrive at a democratically and constitutionally legitimate “meeting of the minds.”

Our federalism’s unique history has made this so. American federalism is still coming to terms with the magnificent growth in federal-state collaborations over the last forty years — a trend that has only accelerated in the twenty-first century, which has borne forms and magnitudes of intergovernmental partnership never before seen.¹⁸ While much ink has been spilled deliberating how to distribute jurisdiction between the states and federal government in the traditional “dual sovereignty” model, that model becomes more detached from our on-the-ground legal reality with each passing year.¹⁹ Scholars have dissected how power is distributed in some of the major cooperative statutes that turn the “dual sovereignty” system on its head,²⁰ but theorizing the “stunningly complex and varied ways that ‘federalism’ manifests from the inside of federal statutes”²¹ remains an emerging project.²²

¹⁷ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) (rules for making offers); *id.* § 33 (rules for managing uncertainty); *id.* § 39 (rules for counteroffering); *id.* §§ 50–70 (rules for accepting an offer); *id.* § 71 (rules requiring consideration to form valid contract); *id.* § 205 (rules for duties of good faith and fair dealing); *id.* § 208 (rules for unconscionable terms); *id.* §§ 224–230 (rules regarding conditions).

¹⁸ See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

¹⁹ See ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 146 (2011) (noting the growing need to address “[i]nterjurisdictional regulatory problems — ranging from the environment to telecommunications to national security —” that “simultaneously implicate areas of such national and local obligation or expertise that their resolution depends on authority at both levels of government”).

²⁰ For a particularly incisive example, which focuses on the ACA, see Abbe R. Gluck, Essay, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011). See also Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006) (on the Clean Air Act); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) (on the Telecommunications Act).

²¹ Gluck, *supra* note 20, at 539.

²² Despite leading efforts to theorize cooperative federalism, see, e.g., Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344 (1983); Weiser, *supra* note 20; Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, PUBLIUS, Spring 2001, at 15, many fundamental questions about what states are and do in the context of federal statutes remain unanswered. Professor Erin Ryan has illuminated many of the fascinating nooks and crevices of this “negotiated” federalism. See, e.g., Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) (analyzing negotiated federalism and the appropriate scope of judicial review); Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules,*

Specifically, the rights and entitlements of the states when they act as partners, administrators, implementers, and collaborators alongside the federal government — rather than as largely isolated miniature governments — remain ill-defined in the Court and academy.²³ This is true among both the old-guard sovereigntists and a new group of scholars who support federalism models that leave sovereignty by the wayside. Yet both schools would be strengthened by more robust answers to these questions.

Scholars and jurists who oppose integration and advocate for a return to the traditional “dual sovereignty” model have focused much of their effort on resisting policies that limit or displace state jurisdiction.²⁴ Questions about how to protect state sovereignty when the states act *within* federal programs — where state participation comes by the “grace of Congress,”²⁵ but the states are nonetheless entitled to be treated as “independent and autonomous political entities”²⁶ — have gone under-addressed.²⁷ The anti-commandeering and anti-coercion rules set an important foundation, but as Part II will demonstrate, our twenty-first-century cooperative federalism has created far more opportunities for the federal government to interfere with state independence than the conventional reading of these rules can encompass. Consent procedures are just one example.

And even among a new group of federalism scholars who extol the benefits of our increasingly integrated system by imagining American federalism as a “distinctive species of nationalism,”²⁸ rules of engage-

and Inalienability Rules in Tenth Amendment Infrastructure, 81 U. COLO. L. REV. 1 (2010) (analyzing rules of exchange for constitutional entitlements during intergovernmental bargaining). But much work remains. For an excellent overview of fifteen unanswered doctrinal questions raised by these arrangements, see Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2022–43 (2014).

²³ This rule is also proven by its exceptions, like Ryan’s excellent overview of the different contexts in which the federal government and states negotiate today. See RYAN, *supra* note 19. Although the descriptive account of federal-state negotiation that is the core of the book is immensely rich and provocative, Ryan’s normative prescription for how these unique forms of intergovernmental bargaining should be regulated is more general, focusing broadly on vindicating a conventional set of federalism values — “checks and balances, accountability and transparency, local autonomy and innovation, and the problem-solving synergy available between local and national regulatory capacity,” *id.* at 340 — rather than on finding new values in this distinctive federalism.

²⁴ See, e.g., Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312 (1997) (“[T]he Court has articulated its intention to establish areas of state control that are to remain immune from federal regulation . . .”).

²⁵ This is Professor Abbe Gluck’s elegant phrase. See Gluck, *supra* note 20, at 542.

²⁶ *Printz v. United States*, 521 U.S. 898, 928 (1997).

²⁷ Previous analysis has largely focused on the Court’s coercion and commandeering cases, see *infra* Part II, pp. 1582–602, but these cases capture only a narrow set of potential ways in which the federal government can intrude on state independence in intergovernmental collaborations.

²⁸ Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2093 (2014).

ment have been the neglected stepchild. The “new nationalists” have revived interest in the value of state contributions to traditionally federal domains. They argue that the states provide “the democratic churn necessary for an ossified national system to move forward”²⁹ by acting, resisting, speaking, and maneuvering within federal programs, even if these acts do not sound in the traditional language of tax-raising, law-making, peace-keeping sovereignty. Indeed, one goal of the new nationalist project is to argue that the decline of these traditional trappings of sovereignty should not be lamented. As participants in national projects, states enable “racial minorities and dissenters to rule,”³⁰ serve as “staging grounds” for national debates,³¹ spur the “develop[ment of] national consensus,”³² “safeguard the separation of powers,”³³ negotiate “interjurisdictional gray area[s],”³⁴ and administer a far-reaching array of federal programs.³⁵ Integration, in other words, is a federalism friend — not a federalism foe.

But although the new nationalists have provided a rich descriptive account of the many ways the states make our national politics more vibrant, they have yet to tell us how much integration is too much integration, or on what terms it should proceed. Professor Heather Gerken — who was a new nationalist before that title existed — has suggested that “identifying ‘rules of engagement’” may be “the most pronounced weakness of th[e] [new nationalist] school.”³⁶ For even if you accept the central premise of the school — that the states are valuable because they make our *national* democracy more vibrant, more legitimate, and more effective, not because of some illusory store of sovereignty — the federal government can’t have *carte blanche* to dictate how they operate, the choices they make, and the terms of their

²⁹ Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2010).

³⁰ *Id.* at 9.

³¹ Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1922 (2014) [hereinafter Bulman-Pozen, *Afterlife of American Federalism*]; see also Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

³² Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014).

³³ Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 472 (2012).

³⁴ RYAN, *supra* note 19, at 145–50; Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007) (exploring the challenges and possibilities of jurisdictional overlap).

³⁵ See Bulman-Pozen & Gerken, *supra* note 22; Gluck, *supra* note 20.

³⁶ Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1916 (2014). One recent exception is Professor Alison LaCroix’s excavation of the federal government’s reliance on state consent to federal regulation in antebellum America. See Alison LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015).

participation in national programs. Such control would turn state-federal collaboration into state-federal assimilation, and state obsolescence would necessarily follow. Certain attributes of state governance must be protected in order for the states to continue serving the nationalist functions that the new nationalists embrace.³⁷ There must be rules of engagement that protect state-federal collaborations against total assimilation.

This Article begins to identify and define those rules. It examines a new and consequential site of federal-state interaction: the consent process. For dual sovereigntists and new nationalists, judges and academics alike, the rules that tell governing bodies how they are obliged to treat one another when they negotiate and collaborate are both vital and sustaining.

* * *

The high-level goals of this Article are twofold. The first is to describe how states express consent today by reviewing on a statutory and programmatic level the federal rules that dictate the consent process. In what follows, I describe the ubiquitous presence of these consent procedures in federal programs big and small, as well as their common forms and structures and their many customizable features and applications. The second goal is to situate consent procedures in the Court's federalism jurisprudence and in contemporary federalism scholarship. Two relevant doctrines are immediately apparent: the anti-coercion rule, which prohibits the federal government from coercing the states during federal-state negotiations, and the anti-commandeering rule, which prohibits the federal government from directing state institutions to make policy choices or implement federal programs. I argue that while neither doctrine directly addresses the distinctive issues raised by federally dictated consent procedures, their intersection reveals a variety of ways in which intrusive consent procedures could raise constitutional concerns. I then look beyond doctrine to the main values and goods that scholars and courts believe federalism advances and argue that consent procedures have the potential to interfere with each of them.

³⁷ Gerken, for instance, has argued that one of the chief values of federalism is its provision of spaces in which dissenters and minorities can "embed their views into a governance decision." Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1979 (2014). By decentralizing power to a multiplicity of governmental bodies, federalism gives minorities the chance to actually govern. But the states can't meaningfully represent constituencies that go unrepresented in Congress if Congress controls how the states act or operate. Nor can the states "furnish . . . democratic legitimacy" to national projects, as Professor Jessica Bulman-Pozen contends they do, Bulman-Pozen, *Afterlife of American Federalism*, *supra* note 31, at 1933, if their democratic processes are not their own.

The Article proceeds in four parts. Part I sketches the range of consent procedures the federal government uses to enroll states in cooperative programs. These processes are rarely discussed during the give and take of federal lawmaking and are often hidden in a morass of statutory and regulatory language. By consolidating them in one place, I identify three elements of consent that the federal government often controls: (1) *consent agents*, (2) *consent actions*, and (3) *baseline assumptions*. Part II undertakes a doctrinal analysis of consent procedures and concludes that when consent procedures interfere with a state's standard governmental processes, they sit at a forbidden intersection between the Court's anti-coercion and anti-commandeering rules. Part III elaborates the potential for consent procedures to interfere with the goods or values our system of federalism produces. And Part IV considers how different stakeholders — Congress, the Executive, the courts, and the states — can and should think about consent procedures going forward.

I. OVERVIEW OF CONSENT PROCEDURES

The means that the federal government uses to ascertain state consent to cooperative programs are as variegated and textured as the programs themselves. Indeed, I use the language of process — calling them consent *procedures* — because they fuse and layer different elements of consent together. They specify the *agent* who must express the consent and the *actions* she must take. They also specify a *baseline assumption* about the state's starting point vis-à-vis the program. Most consent procedures begin with the baseline assumption that states have not consented to the program until they perform the consent procedure; but a few assume that the states have tacitly consented until they use the designated process to opt out of the program. Some consent procedures, in other words, use a “consent *when*” model and others use a “consent *until*” model.

Every act of consent will have an agent, an action, and a baseline assumption. Some consent procedures specify all three elements, while others specify only one or two, implicitly deferring determinations about the other elements of the consent act to the state. For instance, a consent procedure that specifies the actions that a “state” must take in order to consent, but not the agent who must perform those actions, allows the state to select its own agent. In this Part, I step through each of these elements in turn, providing examples of the different variations the federal government incorporates into consent procedures.³⁸

³⁸ My objective is not to provide a comprehensive empirical survey of all existing consent procedures or to make claims about the frequency with which Congress uses particular consent procedures. This preliminary effort aims only to identify the phenomenon and provide examples that

A. Consent Agents

The agent-based elements of consent procedures dictate the state actor or institution that must be the state's representative for the purpose of committing to the federal program.

1. *Chief Executive Officers.* — The federal government often designates the state's governor or "chief executive officer" as this actor.³⁹ As noted above, for instance, guidance implementing the ACA requires that the state's application to establish a state-based insurance exchange be "signed by the State's Governor."⁴⁰ But there are several variations on this theme. A governor may express her state's intention to participate in the program by taking a specified action (discussed in greater detail below in section I.B) instead of sending a communication. In the 1990 amendments to the Surface Mining Control and Reclamation Act of 1977,⁴¹ for instance, Congress permitted the governor of a state to express her intent to expand the scope of her state's reclamation projects by certifying that previous projects had been successfully completed.⁴²

2. *Agencies and Administrative Officials.* — Agencies can also be designated consenters. But it is typical for the federal government to require the governor to first name the appropriate agency to manage the program. The Occupational Safety and Health Act⁴³ is a standard example. The Act makes grants available to fund experimental projects related to occupational safety. The consent procedure first asks

illustrate the different forms that consent procedures can and do take. These examples are drawn from a general survey of large cooperative programs and their many subprograms and initiatives. While I have not attempted to canvass every single cooperative program — indeed no authoritative list of cooperative programs exists — I have particularly endeavored to include in my analyses programs that are of interest to a wide array of scholars, ranging from Medicaid and No Child Left Behind to the Clean Water Act, Temporary Assistance for Needy Families, and various block grants. A spreadsheet of the consent procedures researched for this Article is on file with the author.

³⁹ See, for example, Medicare's beneficiary assistance program, where "[t]he Chief Executive Officer of the State is responsible for . . . [s]ubmittal of the application to CMS [Centers for Medicare & Medicaid Services] for approval," 42 C.F.R. § 403.312 (2014); grants for state and community programs for children, youth, and families, which provide that "[t]he chief executive officer of a State, in order to be eligible for grants . . . for any fiscal year, shall prepare and submit to the Commissioner a State plan for a 3-year period," 42 U.S.C. § 12335(a) (2012); and technology grants to state courts, for which "the chief executive officer of a State or unit of local government shall submit to the Director an application at such time and in such form as the Director may require," *id.* § 3796aa-2.

⁴⁰ BLUEPRINT FOR APPROVAL, *supra* note 4, at 6. The Centers for Medicare & Medicaid Services did acknowledge that in some states the governor might not have the authority to enter into such an arrangement, and the agency declared its willingness to work with the appropriate state authorities. *Id.* at 6 n.5. But, to date, it has not done so.

⁴¹ 30 U.S.C.A. §§ 1201–1328 (West 2014).

⁴² Pub. L. No. 101-508, § 6010, 104 Stat. 1388, 1388-296 (1990) (codified as amended at 30 U.S.C.A. § 1240a(a)–(b)).

⁴³ 29 U.S.C. §§ 651–678 (2012).

the governor to “designate the appropriate State agency for receipt of any grant,”⁴⁴ then requires the designated agency to submit an application requesting funds on behalf of the state.⁴⁵

In some cases, the federal government limits the agencies or administrative officials the governor may designate to those with appropriate state-law jurisdiction. Department of Commerce regulations related to the distribution of fishery assistance funds, for instance, limit eligible agencies to those “authorized under [state] laws to regulate commercial fisheries.”⁴⁶

And in some instances — particularly when there is an obvious state counterpart agency for a federal program — Congress bypasses the governor designation process altogether and commits the consent rights to the agency in the first instance. This is common in education programs. Several grants connected to the No Child Left Behind Act of 2001⁴⁷ make the “State educational agency” the state’s consent agent.⁴⁸

3. *Joint Agents.* — Finally, some agent-based consent elements require two actors to express the state’s interest in concert. The Federal-Aid Highway Act of 1973⁴⁹ allowed the states to receive federal highway funds to build alternatives to highway transportation. The Act required “the joint request of a State Governor and the local governments concerned” before the Secretary would approve such a use.⁵⁰ As should be clear, agent-based consent elements can reflect judgments

⁴⁴ *Id.* § 672(c).

⁴⁵ *Id.* § 672(d) (“Any State agency designated by the Governor of the State desiring a grant under this section shall submit an application therefor to the Secretary.”); *see also* Housing and Community Development Act of 1974, 42 U.S.C. § 5423(c) (2012) (“Any State agency designated by the Governor of a State desiring a grant under this section shall submit an application therefor to the Secretary. The Secretary shall review and either accept or reject such application.”); Juvenile Accountability Incentive Block Grants, 28 C.F.R. § 31.501(b) (2014) (“Each State Chief Executive Officer must designate a state agency to apply for, receive, and administer JAIBG funds.”).

⁴⁶ 50 C.F.R. § 253.52(a)(1) (2014).

⁴⁷ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of the U.S. Code).

⁴⁸ *E.g.*, 20 U.S.C. § 6763(a) (2012) (state and local technology grants) (“To be eligible to receive a grant under this subpart, a State educational agency shall submit to the Secretary, at such time and in such manner as the Secretary may specify, an application containing a new or updated statewide long-range strategic educational technology plan (which shall address the educational technology needs of local educational agencies) and such other information as the Secretary may reasonably require.”); *id.* § 7221b(a) (public charter school grants) (“Each State educational agency desiring a grant from the Secretary under this subpart shall submit to the Secretary an application at such time, in such manner, and containing or accompanied by such information as the Secretary may require.”); 42 U.S.C. § 11432(b) (grants for the education of homeless youths) (“No State may receive a grant under this section unless the State educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.”).

⁴⁹ Pub. L. No. 93-87, 87 Stat. 250 (codified as amended in scattered sections of 23 U.S.C.).

⁵⁰ *See id.* § 137(b), 87 Stat. at 269 (amended 1976).

about which actor or set of actors *ought* to be the state's representative in a given area.⁵¹

B. Consent Actions

As part of its consent procedures, the federal government may also require the “state” or a specified state official to take a set of actions in order to express its consent. Some consent procedures are purely action-based, specifying only that the “state” generally must perform a set of actions, but not dictating who within the state must complete them.⁵²

Action-based consent elements can also be used in conjunction with agent-based elements. This kind of procedure designates a state official, then requires that official to perform certain actions in order to register his consent.

The required actions contemplated by federal procedures can range from the simple to the complex. The simplest action-based consent element is the state's submission of an application.⁵³ More complex procedures require the state to take federally specified political or administrative actions as part of the consent act. There are several common procedural requirements.

1. *Legislative Enactments.* — Some consent procedures require the state to enact a law in order to indicate its consent. Unemployment insurance — the federal-state collaboration operative across the country — requires consent to be expressed through the state legislature unless otherwise noted in particular provisions. The original law — the Wagner-Peyser Act of 1933⁵⁴ — specified that “[i]n order to obtain the benefits of appropriations [under the law], a State shall, through its

⁵¹ Though negotiations between the federal government and Native American tribes are outside the scope of this Article, a glance at federal-tribal consent procedures illustrates this point. Federal regulations implementing the latest iteration of the Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of the U.S. Code), for instance, allow a tribe's “*elected* leadership” to request participation in a new pilot program. Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, 78 Fed. Reg. 35,961, 35,966 (June 14, 2013) (emphasis added). While the legislative record does not disclose the rationale for the requirement that the tribe's leadership be “elected” — or make clear how or whether the requirement will be enforced — a plain reading of the provision seems to endorse a particular kind of tribal structure and decisionmaking process.

⁵² The EPA's default grant process, used unless superseded by statute, *see* 40 C.F.R. § 31.5 (2014), does just that. It requires applications to be submitted by the “State,” but does not specify a particular actor. *See id.* § 31.11. Indeed, it expressly defines “State” in a way that makes it possible for any of a state's horizontal subdivisions to act on its behalf. *Id.* § 31.3 (defining “State” as “any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments”).

⁵³ *See, e.g., supra* notes 3–7 and accompanying text.

⁵⁴ Pub. L. No. 73-30, 48 Stat. 113 (codified as amended at 29 U.S.C.A. §§ 49 to 49-2 (West 2014)).

legislature, accept the provisions of this Act.”⁵⁵ Amendments to the law in 1998, which are still in effect today, retained this requirement, but changed the phrase “through its legislature” to “pursuant to State statute.”⁵⁶

2. *Official Acts.* — As I previewed earlier, some consent procedures require state officials to perform federally specified *official* acts in their state-level capacity prior to consenting to the federal program. I have already mentioned the Clean Water Act’s section-404 permitting program, which requires the state’s attorney general to prepare a “legal analysis” of certain legal implications of the program.⁵⁷

3. *Designation.* — Many consent procedures require a state or specific state official to designate an individual or agency that will be the ongoing contact for the program. The Individuals with Disabilities Education Act⁵⁸ requires an application that must include, among other things, the “designation of the lead agency in the State that will be responsible for the administration of funds.”⁵⁹ Similarly, states requesting federal grants for the management of hazardous material must initially submit an application and letter from the state’s governor “designating the State agency that is authorized to apply for a grant.”⁶⁰ Thereafter, that agency may request funds directly in a primarily agent-based consent model. The Oil Spill Liability Trust Fund similarly makes funds available only if the “Governor of a State . . . advise[s] the [National Pollution Funds Center] in writing of the specific individual who is designated to make [such] requests.”⁶¹

4. *Consultation.* — Some consent procedures, in effect, require state officials to consult with one another prior to expressing the state’s consent. As mentioned above, Medicaid’s consent procedure first requires the state’s designated Medicaid agency to prepare an applica-

⁵⁵ *Id.* § 4, 48 Stat. at 114.

⁵⁶ Workforce Investment Act of 1998, Pub. L. No. 105-220, § 303, 112 Stat. 936, 1081 (codified at 29 U.S.C. § 49c (2012)).

⁵⁷ See 40 C.F.R. § 233.12(c).

⁵⁸ 20 U.S.C. §§ 1400-1482 (2012).

⁵⁹ *Id.* § 1437(a)(1); see also *id.* 1437(a) (“A State desiring to receive a grant under section 1433 of this title shall submit an application to the Secretary at such time and in such manner as the Secretary may reasonably require. The application shall contain — (1) a designation of the lead agency . . .”). Similar examples abound throughout the U.S. Code and its implementing regulations. *E.g.*, 45 C.F.R. § 1386.20(a) (2014) (“The designating official must designate the State official or public or private agency to be accountable for proper use of funds and conduct of the Protection and Advocacy agency.”); *id.* § 1386.19 (“*Designating Official* means the Governor or other State official, who is empowered by the Governor or State legislature to designate the State official or public or private agency to be accountable for the proper use of funds by and conduct of the State Protection and Advocacy agency.”).

⁶⁰ 49 C.F.R. § 110.30(a)(2) (2014).

⁶¹ 33 C.F.R. § 133.25(a) (2014).

tion and any subsequent application amendments.⁶² It then requires that agency to submit that application or proposed amendment to the state's governor (or the governor's "designee") for comments before finally sending the application to the federal government.⁶³ This procedure is interesting not just because it forges a process of political communication between state officials within the state, but also because it asks the governor to send his comments to the federal government alongside the application so that the federal government can take them into consideration when it evaluates the application. Other federal laws include similar action-based consent elements, requiring state agencies to consult first with state governors before requesting a federal grant.⁶⁴ Reaching even more broadly, while the consent procedure for grants under the Safe and Drug-Free Schools and Communities Act⁶⁵ does not specify a consent agent, it does require "an assurance that the application was developed in consultation and coordination with appropriate State officials," including:

the chief executive officer, the chief State school officer, the head of the State alcohol and drug abuse agency, the heads of the State health and mental health agencies, the head of the State criminal justice planning agency, the head of the State child welfare agency, the head of the State board of education, or their designees, and representatives of parents, students, and community-based organizations.⁶⁶

5. *Certification.* — The federal government often requires states to certify that they are able to fulfill their obligations under the program before they can consent. The federal government's primary cash welfare program, Temporary Assistance for Needy Families⁶⁷ (TANF), requires the "chief executive officer of the State" to make half a dozen certifications in the state's application for federal funds,⁶⁸ ranging from "which State agency or agencies will administer and supervise

⁶² 42 C.F.R. § 430.12(a) (2014). Such amendments are not rare; indeed, a state's plan must provide for amendment whenever the federal government changes the terms of the federal program or adds new elective options to Medicaid's programmatic menu. *See id.* § 430.12(c).

⁶³ *See id.* § 430.12(b)(1)(i).

⁶⁴ *See, e.g.*, 45 C.F.R. § 204.1 ("A State plan under title I, IV-A, IV-B, X, XIV, XVI(AABD) of the Social Security Act, section 101 of the Rehabilitation Act of 1973, or title I of the Mental Retardation Facilities and Community Mental Health Centers Construction Act, must be submitted to the State Governor for his review and comments, and the State plan must provide that the Governor will be given opportunity to review State plan amendments and long-range program planning projections or other periodic reports thereon. This requirement does not apply to periodic statistical or budget and other fiscal reports. Under this requirement, the Office of the Governor will be afforded a specified period in which to review the material. Any comments made will be transmitted to the Family Support Administration with the documents.")

⁶⁵ 20 U.S.C. §§ 7101–7165 (2012).

⁶⁶ *Id.* § 7113(a).

⁶⁷ 42 U.S.C. §§ 601–619 (2012).

⁶⁸ *Id.* § 602(a).

the program⁶⁹ to its commitment to preventing fraud in the use of federal funds.⁷⁰

6. *Disclosure and Publicity.* — Some consent procedures require the states to comply with certain transparency requirements in the preparation of their applications or letters of intent. For instance, the Early Intervention Program for Infants and Toddlers with Disabilities⁷¹ requires the states to publish their applications “in a manner that will ensure circulation throughout the State for at least a 60-day period, with an opportunity for public comment on the application for at least 30 days during that period,” prior to submitting them.⁷² Other consent procedures have similar requirements.⁷³

7. *Transfers.* — Finally, to manage cases in which the designated consent actor does not agree to the federal program, some statutes create alternative consent procedures that are triggered when that actor declines or simply fails to move forward. The American Recovery and Reinvestment Act of 2009⁷⁴ specified that “[i]f funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State.”⁷⁵

Likewise, a core provision of the Clean Water Act required states to collaborate with the federal government on “areawide waste treatment

⁶⁹ *Id.* § 602(a)(4).

⁷⁰ *Id.* § 602(a)(6) (requiring a state plan to include “[a] certification by the chief executive officer of the State that the State has established and is enforcing standards and procedures to ensure against program fraud and abuse, including standards and procedures concerning nepotism, conflicts of interest among individuals responsible for the administration and supervision of the State program, kickbacks, and the use of political patronage”); see also Help America Vote Act of 2002, 52 U.S.C.A. § 21003(a) (West 2014).

⁷¹ 20 U.S.C. §§ 1431–1444.

⁷² 34 C.F.R. § 303.208(a) (2014).

⁷³ For example, the Department of Education uses a consent procedure for most grants it awards, which specifies that: “A State shall make the following documents available for public inspection: (a) All State plans and related official materials[,] (b) All approved subgrant applications[, and] (c) All documents that the Secretary transmits to the State regarding a program.” *Id.* § 76.106. Similarly, TANF requires states to ensure that “local governments and private sector organizations — (A) have been consulted regarding the plan and design of welfare services in the State so that services are provided in a manner appropriate to local populations; and (B) have had at least 45 days to submit comments on the plan and the design of such services.” 42 U.S.C. § 602(a)(4); see also Grants to States for Planning and Development of Dependent Care Programs and for Other Purposes, *id.* § 9875(c)(1) (“The chief executive officer of a State shall . . . prepare and furnish the Secretary . . . with a description of the intended use of the payments the State will receive The description shall be made public within the State in such manner as to facilitate comment from any person (including any Federal or other public agency) during development of the description and after its transmittal.”).

⁷⁴ Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of the U.S. Code).

⁷⁵ *Id.* § 1607, 123 Stat. at 304.

management plans.”⁷⁶ At the center of the program was the designation of areas with “substantial water quality control problems.”⁷⁷ The consent procedure gave the governor the first bite at that apple. If the governor did “not act . . . within the time required,” the program allowed the “chief elected officials of local governments” in the state to step forward and make their own designations.⁷⁸

C. *Baseline Assumptions*

Most cooperative programs adopt the initial premise that the state is not part of the program until it affirmatively consents. But a few programs invert this premise and automatically enroll the states, while allowing them to opt out through a prescribed procedure. These programs infer the state’s consent to participate by its failure to opt out. For ease, I call consent procedures that assume states have consented until they opt out “tacit consent procedures.”

President Clinton’s welfare overhaul — the Personal Responsibility and Work Opportunity Reconciliation Act of 1996⁷⁹ (PRWORA) — contains a lively example of tacit consent. In addition to many other welfare reforms, the statute enacted a comprehensive ban on the provision of federal public benefits to undocumented immigrants, a ban that resulted in their removal from the rolls of nearly every federal benefit program.⁸⁰ The law sought the same result in the states.⁸¹ PRWORA included a mirror provision that barred undocumented immigrants from accessing any purely state or local public benefit that was funded from a state treasury or administered through a state agency.⁸² It overrode hundreds of state laws, including nearly every statute and regulation that made a state “grant, contract, loan, professional license, . . . commercial license[,]. . . retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit” available to undocumented immigrants.⁸³ This unprecedented interference with

⁷⁶ See 33 U.S.C. § 1288 (2012).

⁷⁷ *Id.* § 1288(a)(1).

⁷⁸ *Id.* § 1288(a)(4). The plans referred to in § 1288 are colloquially called “208 plans” after their section in the original 1972 enactment. Although funding for 208 plans is no longer available, states and localities continue to use them as frameworks for water-quality regulation.

⁷⁹ Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code).

⁸⁰ See 8 U.S.C. § 1611 (2012). The enumerated exceptions to the ban cover such situations as emergency medical and food aid, *see id.* § 1611(b)(1)(A)–(D), and various benefits for “aliens lawfully present . . . as determined by the Attorney General,” *see id.* § 1611(b)(2)–(4) — and include some grandfather provisions, *see id.* §§ 1611(b)(1)(E), 1611(b)(5).

⁸¹ *Id.* § 1621(a)–(c). The exceptions in this section largely follow those in the federal ban. *See id.* § 1621(b).

⁸² *See id.* § 1621(c)(1).

⁸³ *Id.* § 1621(c)(1)(A)–(B).

state spending and lawmaking prerogatives would seem to exceed Congress's constitutional powers.⁸⁴ So the Act squared itself with Article I's limitations on congressional power by allowing states to "opt out" of the ban through a formal legislative act.⁸⁵ This unusual opt-out provision seems to have transformed an unconstitutional federal directive into a constitutional cooperative program. Congress automatically enrolled states in a joint policy program, but cast their continued involvement as "voluntary" because they were able to override the default at any time. A state's inaction, in other words, constituted tacit consent to its continued participation in the program.

A similar consent procedure operates as the foundation of the Clean Air Act's⁸⁶ (CAA) State Implementation Plan (SIP) process. When the EPA promulgates new ambient air quality standards pursuant to the CAA, states are given a period of time in which to create a SIP articulating their approach to meeting those standards.⁸⁷ If that period elapses without action, states are understood to have waived the statutory right to meet the standards on their own and to have consented to the federal government's management of the state's air quality.⁸⁸

The National Housing Act⁸⁹ (NHA), too, uses a similar device. That Act subjects states to federal mortgage rate regulations, but permits them to opt out of federal rates by enacting a "provision of law"

⁸⁴ In express terms, § 1621 tells the states how they can and cannot spend their tax revenue and how their agencies can and cannot exercise their administrative authority. *See id.* (barring benefits "provided by an agency of a State or local government or by appropriated funds of a State or local government," *id.* § 1621(c)(1)(A)). Doing so by dictate raises serious Tenth Amendment concerns. *See New York v. United States*, 505 U.S. 144, 161 (1992) (noting that a program in an early commandeering challenge was constitutional in part because it did not "compel[]" states to, among other things, "expend any state funds" (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981))); *see also FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (observing that the power of a "state legislative (or . . . administrative) body — which makes decisions and sets policy for the State as a whole — to consider and promulgate regulations of its choosing must be central to a State's role in the federal system").

⁸⁵ 8 U.S.C. § 1621(d).

⁸⁶ 42 U.S.C. §§ 7401–7671q (2012).

⁸⁷ *See id.* § 7410(a)(1) ("Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State.").

⁸⁸ *See id.* § 7410(c)(1) ("The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator — (A) finds that a state has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or (B) disapproves a State implementation plan submission in whole or in part . . .").

⁸⁹ 12 U.S.C. §§ 1701–1750g (2012).

explicitly regulating rates at the state level.⁹⁰ Like the PRWORA default discussed above, rate regulations in place before the NHA needed to be reenacted in order for the state to opt out of the federal rate regulation.⁹¹

* * *

This typology is intended to demonstrate the range of ways the federal government can manage the expression of state consent. It should also begin to reveal how consent procedures operate to influence, intervene in, and even reshape state political processes. Below, I describe in detail how these procedures may trespass on the constitutional strictures established to protect the states as well as the goods and values traditionally associated with American federalism. But it should be immediately apparent that consent procedures can intrude upon state political processes, whether designed to do so or not.

As I show below, agent-based elements at their most invasive may designate as the state's consent agent an officer or entity that lacks the state-level legal authority or political support necessary to serve as the state's decisionmaker for the program or policy on offer.⁹² States faced with such a provision must choose between acquiescing in the official's service as the state's consent agent, developing a workaround to have the federally designated agent guided by the state's preferred actor, or declining the offer outright.⁹³ Each of these paths could have a meaningful impact on how state political processes function.

Action-based consent elements can be even more intrusive. Procedures that combine action- and agent-based elements not only tell a state official that he must be the state's spokesperson, but also tell him *how* to perform his duties — instructing him, for instance, to provide official commentary on a proposal, write an opinion with certain specifications, or consult with certain officials. Other action-based procedures require the states to subject the consent decision to processes that may not be required by, or even permitted under, state law.

⁹⁰ See *id.* § 1709-1a(b).

⁹¹ See *id.*; see also *Moving Ahead for Progress in the 21st Century Act*, 23 U.S.C. § 213(g) (2012) (“A State may opt out of the recreational trails program under subsection (f) if the Governor of the State notifies the Secretary not later than 30 days prior to apportionments being made for any fiscal year.”); *Border Smog Reduction Act of 1998*, 42 U.S.C. § 7511b(h)(3) (“State election. The prohibition set forth in paragraph (1) shall not apply in any State that elects to be exempt from the prohibition. Such an election shall take effect upon the President’s receipt of written notice from the Governor of the State notifying the President of such election.”).

⁹² For an overview of the vast differences in gubernatorial power across states, see COUNCIL OF STATE GOV'TS, *BOOK OF THE STATES 2013*, at 159–60 tbl.4.4 (2013) [hereinafter *BOOK OF THE STATES*], http://knowledgecenter.csg.org/kc/system/files/4.4_2013.pdf [http://perma.cc/3QN9-VCS6].

⁹³ See *infra* notes 174–77 and accompanying text.

Finally, by requiring the states to take affirmative steps to express their *non*consent to cooperative initiatives, tacit consent procedures necessarily mold state political processes to federal specifications. In order for a state to remain in the position it was in prior to the enactment of the purportedly collaborative program — to simply maintain the status quo — it has to perform a political act required by the federal government, a command that may be difficult, if not impossible, to heed.

This is not to suggest that *all* consent procedures intrude upon the states in unjustifiable ways. Some consent procedures provide the states with the latitude to decide how to consent. One way to do this is to avoid federal pronouncements about who should speak for the state, and simply require “the State” to consent — thereby making valid an expression of consent from any authorized state official. If the governor has the power to act for the state in the performance of the consent act, she can. If a different official has the necessary power, the task falls to that official instead. Importantly, under such a regime, the federal government will receive consent from different state actors in different states. Unlike other consent procedures, these simple action-based processes allow each state to act through a different consent process. Likewise, action-based consent elements that require states to designate an agency or official to manage the program going forward seem necessary, even if they do subtly instruct the designator to act.

My goal in this Article is not to enumerate and analyze the constitutional and theoretical advantages and disadvantages of each type of consent procedure. That detailed project must await future work. My aim is to interrogate whether the federal government has the basic power to create consent procedures that influence state governments in the ways that many already do today. Do our constitutional federalism doctrines and widely accepted federalism values embrace or forbid the intrusions effectuated by consent procedures?

II. CONSENT PROCEDURES AND THE COURT

A. Overview

Because consent procedures influence how the states make consequential governing decisions, they seem intuitively discordant with the constitutional mandate that the federal government engage the states as “independent and autonomous political entities.”⁹⁴ Two maxims form the core of the Court’s existing rules of engagement for facilitat-

⁹⁴ *Printz v. United States*, 521 U.S. 898, 928 (1997).

ing federal-state interactions.⁹⁵ The first rule, which applies to the *implementation* of federal programs, holds that the federal government cannot “commandeer” the states into implementing a federal initiative. Commandeering occurs when the federal government instructs or requires the states to regulate. The second rule, which applies to *negotiations*⁹⁶ over cooperative programs, holds that the states may not be coerced into working with the federal government. When Congress offers states a choice to accept or reject federal funding or joint programming, the Court requires that state assent be “voluntar[il]y”⁹⁷ given and an expression of the state’s own “will.”⁹⁸ When negotiating with the federal government, the states must always have the option “not merely in theory but in fact”⁹⁹ to reject the federal government’s offer.¹⁰⁰

⁹⁵ There is arguably a third “maxim” that should be part of our consent procedures analysis: the constitutional requirement mandating that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. CONST. art. IV, § 4, cl. 1. Professor Deborah Merritt has vividly shown that the clause, through both its text and its historical meaning, “forbids the federal government from interfering with state governments in a way that would destroy their republican character.” Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 25 (1988). While that understanding would prove a rich “rule of engagement” to help guide our analysis of consent procedures, I don’t focus on the Guarantee Clause here because the Court has repeatedly declined to incorporate the clause into its store of court-enforceable federalism doctrines. See, e.g., *Baker v. Carr*, 369 U.S. 186, 223 (1962) (“[T]he Guaranty Clause is not a repository of judicially manageable standards . . .”); see also *New York v. United States*, 505 U.S. 144, 184 (1992) (“[T]he Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the ‘political question’ doctrine.”). I would not rule out, however, the possibility that the Guarantee Clause influenced (even without express acknowledgment) the Court’s anti-commandeering rule, which I interpret to prohibit the federal government from severing precisely the republican relationship between state officials and their constituents that the Guarantee Clause, on Merritt’s reading, protects.

⁹⁶ I use the word “negotiation” here in a rudimentary way. Though some scholars have documented the rich and multifaceted ways that the states and federal government negotiate their roles and obligations in joint policy programs, see, e.g., RYAN, *supra* note 19, I use the term more basically to describe the steps that occur between when Congress enacts cooperative legislation and when a state voluntarily opts to join in.

⁹⁷ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 11 (1981).

⁹⁸ See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937) (noting that a state’s assent must be based on a “true expression of her will,” *id.* at 590). By using these terms, I don’t mean to signal that the Court’s vocabulary of human decisionmaking adds conceptual insight or clarity to conversations about the behavior of representative institutions. I offer at most a cautious embrace of these terms — one that uses the language the Court has long employed, but endeavors to drain it of its anthropomorphic allusions and reconceptualize the terms in a purely institutional context.

⁹⁹ *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2604 (2012) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987)) (internal quotation mark omitted).

¹⁰⁰ As I read the doctrine, these two rules apply to all federal efforts to engage states in collaborative ventures, whether it would have been within Congress’s constitutional power to regulate directly (without state involvement) or not.

Even without careful doctrinal analysis, many consent procedures seem to violate these rules of engagement. How can a state act according to its own “will” if that “will” is subject to the command of another? How can we call the decision of a state voluntary when that state didn’t control the decisionmaking procedures that produced it?

Strong as these intuitions are, their source is difficult to locate in a conventional reading of either the commandeering or coercion cases. The commandeering cases focus on federal directives requiring the states to help implement federal programs; they have never been extended to situations in which the states are negotiating the terms of their participation in cooperative programs. The coercion cases, by contrast, do speak to what the states are owed when they are negotiating the terms of cooperative programs, but to date they have only invalidated federal offers for imposing harms distinct from those present in the commandeering cases. Consent procedures, in other words, sit at an untheorized intersection between the two sets of doctrines. In this Part, I examine what each set of cases has to offer the other and our consent procedure inquiry more generally.

B. *The Commandeering Cases*

Congress cannot require “States to govern according to Congress’ instructions.”¹⁰¹ This is the principle at the heart of the Court’s seminal commandeering cases, *New York v. United States* and *Printz v. United States*. Yet that principle describes almost exactly what consent procedures do — they instruct the states to make consequential policy choices that have legal, financial, and political implications using the federal government’s preferred process or agent.

New York addressed the constitutionality of the Low-Level Radioactive Waste Policy Act,¹⁰² which used a complex web of incentives to encourage states to safely dispose of their own radioactive waste.¹⁰³ The Act was a response to a daunting shortage of waste disposal sites that left the producers of low-level waste without avenues for the waste’s safe removal. The Act required states to remedy this shortage either by creating internal disposal sites or by forming interstate compacts to use disposal sites in neighboring states.¹⁰⁴ To encourage states that were hesitant to act, it offered financial inducements and threatened legal penalties.¹⁰⁵ The most draconian provision commanded

¹⁰¹ *New York v. United States*, 505 U.S. 144, 162 (1992) (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

¹⁰² 42 U.S.C. §§ 2021b–2021j (2012).

¹⁰³ RYAN, *supra* note 19, at 217–25, offers a rich and nuanced history of this important program and the events that led up to the Court’s decision in *New York*.

¹⁰⁴ See 42 U.S.C. § 2021c(a)(1).

¹⁰⁵ See generally *id.* § 2021e (outlining these incentives).

states to “take title” and legal possession of any waste generated within the state’s borders, whether by the government or private parties, unless and until the state enacted regulations providing for an in-state or regional disposal site.

In *New York*, the Court found the “take title” provision to be an unconstitutional act of federal commandeering because it required states to choose between two federally prescribed alternatives. Both purported options, the Court said, “compel[led]”¹⁰⁶ the states to legislate according to the federal government’s “instructions.”¹⁰⁷ When states are commandeered in this manner, the Court reasoned, they cease to operate as “distinct sovereignties” because they act in obedience to another government rather than to their own constituents.¹⁰⁸

Several years later, in *Printz*, the Court extended the *New York* principle to the commandeering of state officials, in addition to legislative processes. The Brady Handgun Violence Prevention Act¹⁰⁹ required state officials to run “instant” background checks on most in-store handgun purchases.¹¹⁰ While the Act ultimately envisioned the federal government conducting these checks, it instructed each state’s chief law enforcement officer (CLEO) to perform the checking function while the federal government got its own process up and running. The Court struck down this command to state CLEOs on the grounds that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program.”¹¹¹

New York and *Printz* together reveal three distinct ways in which the federal government might “instruct[]” the states to “govern.”¹¹² There are: (1) instructions to set in motion a state regulatory process that may otherwise have remained motionless; (2) instructions to enact regulations that conform to federally dictated specifications; and (3) instructions to specific state officials to perform specific official tasks.

The federal government has used consent procedures to instruct the states in each of these ways. Consent procedures require the states to hold public hearings and circulate applications and proposals.¹¹³ They require state officials to prepare official documents and analyses,¹¹⁴ to

¹⁰⁶ *New York*, 505 U.S. at 162 (quoting *FERC v. Mississippi*, 456 U.S. 742, 765 (1982)).

¹⁰⁷ *Id.* (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

¹⁰⁸ *Id.* at 155 (quoting THE FEDERALIST NO. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (internal quotation mark omitted).

¹⁰⁹ Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921–922, 925(a) (2012)), *invalidated in part* by *Printz v. United States*, 521 U.S. 898 (1997).

¹¹⁰ *See id.* § 103, 107 Stat. at 1541.

¹¹¹ *Printz*, 521 U.S. at 935.

¹¹² *New York*, 505 U.S. at 162 (citing *Coyle*, 221 U.S. at 565).

¹¹³ *See, e.g.*, 34 C.F.R. § 303.208 (2014); *supra* note 72 and accompanying text.

¹¹⁴ *See, e.g.*, 40 C.F.R. § 233.12(c) (2014); *supra* notes 12–13 and accompanying text.

make certifications,¹¹⁵ and to engage in processes of intragovernmental consultation.¹¹⁶ And they require federally chosen state officials — most often governors — to designate others as “authorities” in a particular area.¹¹⁷

Although there are clear parallels between consent procedures and the type of instructions given in the commandeering cases, the contexts surrounding the instructions differ in meaningful ways, making the application of the cases to consent procedures a complicated task. This is because consent procedures, to the extent that they commandeer the states, do so as a *condition* on receiving a federal grant, not as a direct command. In *New York*, the federal government instructed states to either enact a regulatory scheme or take title to their state’s low-level waste. A third option — the option of declining both options — was not available to them. Similarly, in *Printz*, the CLEO mandate was just that — a requirement, not a request. Consent procedures, on the other hand, can be avoided, at least in theory, if the state opts not to participate in the federal program.¹¹⁸ Some might say that because consent procedures do not bind states unless (and until) they voluntarily decide to accept the federal government’s offer, consent procedures are not “commandeering” in the technical sense.

But this simple lawyer’s rejoinder — the distinction between a command and a condition — does not tell the whole story, for several reasons. The first is the simplest: in *New York*, Justice O’Connor rejected the idea that state officials are allowed to consent to their state being commandeered. New York state officials had testified in favor of the Low-Level Radioactive Waste Policy Act in Congress, and one of the state’s senators had endorsed the Act on the Senate floor.¹¹⁹ “Where Congress exceeds its authority relative to the States,” Justice O’Connor wrote, “the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”¹²⁰

Second, and more importantly, the proposition that any state that follows a federally mandated consent procedure does so *voluntarily* seems to beg the question. Take the ACA’s health-exchange consent procedure discussed in Part I. The consent procedure vests the decision to establish a health care exchange with the state’s governor.¹²¹ Imagine that a state’s governor wants to build an exchange, but the

¹¹⁵ See, e.g., 42 U.S.C. § 602(a) (2012); *supra* notes 68–70 and accompanying text.

¹¹⁶ See, e.g., 42 C.F.R. § 430.12 (2014); *supra* note 10 and accompanying text.

¹¹⁷ See, e.g., 45 C.F.R. § 1386.20(a) (2014); *supra* note 59 and accompanying text.

¹¹⁸ Of course, when the states are faced with *tacit* consent procedures, see *supra* notes 79–91 and accompanying text, failure to exercise the consent procedures means the state stays *in* the federal program, rather than *out* of it.

¹¹⁹ *New York v. United States*, 505 U.S. 144, 182 (1992).

¹²⁰ *Id.*

¹²¹ See *supra* note 4 and accompanying text.

state's legislature or insurance commissioner opposes it. Should a court conclude that the state voluntarily chose to accept the federal government's offer simply because the governor followed the appropriate consent procedure? Assume further that the legislature and insurance commissioner not only oppose the exchange but also contest the governor's authority, under state law, to decide whether to create an exchange. Is the state's choice voluntary then? How should a court determine whether the state — as distinct from any individual official — voluntarily chose to submit itself to the consent procedure in the first instance?

The problem, in other words, is that the consent procedure is meant to establish that the state is acting voluntarily. What we lack is an account of the predicate conditions that make a state's decision to follow a consent procedure itself a voluntary act.¹²² To interrogate this domino effect, we need a better understanding of the nature of state consent. For that, I turn to the Court's coercion cases.

C. *The Coercion Cases*

The coercion cases pick up the Court's thinking on the degree to which the federal government may influence state decisionmaking. These cases imagine the states not just as independent governments, but as parties to a contract — of sorts¹²³ — and they draw on both common law contracting concepts intended to protect the autonomy of offerees and offerors and on structural constitutional principles that tell us what treatment is owed distinctly to states-qua-negotiators rather than states-qua-sovereigns.

The cases have focused on regulating the kinds of programmatic offers or deals the federal government can extend to the states. They begin with the premise that the states must “voluntarily” opt in to cooperative programs.¹²⁴ The Court's efforts to safeguard the voluntariness of state decisions have focused on prohibiting “coercion” — and particularly the coercion that obtains when the federal government at-

¹²² “[I]t is well-settled that Congress has the power to change a state government's structure by spending federal revenue only if the state government actually accepts the revenue and thereby ‘knowingly and voluntarily accepts the terms of the contract.’” Hills, *supra* note 15, at 1236 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

¹²³ Gluck, for instance, has argued the Court “has used as its overarching theoretical framework for these questions the idea that states and the federal government are in a ‘contractual’ relationship,” but she also contends that it has “inconsistently deployed that framework and not deeply considered its implications for broader questions about the relationship.” Gluck, *supra* note 22, at 2011.

¹²⁴ *NFIB*, 132 S. Ct. 2566, 2660 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“[J]ust as a contract is voidable if coerced, ‘[t]he legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the State *voluntarily* and knowingly accepts the terms of the contract.’” (second alteration and omission in original) (quoting *Pennhurst*, 451 U.S. at 17)).

taches unfair or unconstitutional conditions to an offer. That, of course, was the Court's rationale when it invalidated the ACA's Medicaid expansion in *National Federation of Independent Business v. Sebelius*¹²⁵ (*NFIB*) for making the costs of declining the expansion funding too high to infer that acceptance was freely given.¹²⁶

NFIB has roots in the seasoned case *South Dakota v. Dole*.¹²⁷ In *Dole*, the Court declined to find a condition on a highway grant that required states to maintain a drinking age of twenty-one to be unconstitutionally coercive,¹²⁸ but it nonetheless described several ways that the federal government could theoretically coerce the states. First, a spending grant may be coercive if its conditions are too "unrelated to the federal interest" that motivated the spending grant.¹²⁹ (Put differently, there must be a "nexus" between the condition and the purpose of the original grant.) Second, a federal grant may be coercive if it includes an "inducement" that "pass[es] the point at which 'pressure turns into compulsion.'"¹³⁰ Third, a grant may be coercive if its conditions require the state to violate "other constitutional provisions."¹³¹ Finally, a grant can be coercive if Congress fails to make the grant's conditions "unambiguous[]"¹³² so that the states can make "their choice knowingly, cognizant of the consequences of their participation."¹³³

But while the Court has recycled its rhetoric of voluntariness for the last eighty years,¹³⁴ it has never fully elaborated how each of these mechanisms of coercion operates to render state action involuntary.¹³⁵ Nor has the Court disclosed whether the *Dole* list exhaustively defines the full universe of coercion. Most importantly, for our purposes, the coercion cases do not disclose whether the kind of interference in state government effectuated by consent procedures could render the result-

¹²⁵ 132 S. Ct. 2566.

¹²⁶ See *id.* at 2603–05.

¹²⁷ 483 U.S. 203 (1987).

¹²⁸ *Id.* at 212.

¹²⁹ *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)) (internal quotation mark omitted).

¹³⁰ *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹³¹ *Id.* at 208.

¹³² *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

¹³³ *Id.* (quoting *Pennhurst*, 451 U.S. at 17) (internal quotation mark omitted); see also *NFIB*, 132 S. Ct. 2566, 2659 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (reiterating these modes of coercion).

¹³⁴ This idea received early mention in 1937 in *Steward Machine Co. v. Davis*, 301 U.S. 548, one of the first challenges to a federal law on the grounds that it inappropriately coerced the states.

¹³⁵ See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 864 (1998) ("[O]verblown statements about the 'coerciveness' of federal grant conditions require a more careful analysis of what is meant by 'coercion.'").

ing state action involuntary, or otherwise violate the rules that must govern negotiations between the federal government and the states.¹³⁶

We're left then with commandeering cases, which seem to capture just the kind of harm consent procedures can impose, and coercion cases that don't address these harms expressly, but do tell us that the federal government may not harm the states in ways that are "coercive." Therefore, we have to look deeper — to the ways that commandeering can intrude upon state decisionmaking and to what kinds of intrusions constitute coercion — in order to really interrogate consent procedures.

D. A Forbidden Intersection?

Many will think my effort to look for something beneath the surface of these cases a fool's errand. Scholars have long critiqued them as strange bedfellows¹³⁷ that are thin on substance, if not internally incoherent.¹³⁸ Federalism scholars largely see skeletons in the comman-

¹³⁶ Readers steeped in private law may wonder why I analyze consent procedures using the coercion and commandeering cases rather than the basic principles of contract law. The principle that the offeror is the master of her offer (including the mode of her offer's acceptance) seems particularly relevant here. See RESTATEMENT (SECOND) OF CONTRACTS § 30 (1981). But that rule operates against a set of backgrounding limitations. The offeror may not extract acceptance through threats or duress. *Id.* § 175. Nor may she use "undue influence" to induce her offeree to make decisions "in a manner inconsistent with his welfare." *Id.* § 177. Nor may she use fraud or "material misrepresentation" to induce acceptance. *Id.* § 164. The coercion and commandeering cases (as I interpret them below) particularize these kinds of concerns to the intergovernmental sphere. Unlike individuals or corporations, democratic governments must act with popular legitimacy, constitutional sanction, and (many would say) just purpose. For these reasons, they deserve their own rules of engagement. That is not to say, of course, that private law has no relevance to this inquiry, just that this inquiry is not identical to its private law counterpart.

¹³⁷ Several scholars have noted that the principles that appear to be animating the anti-commandeering rule would require much more stringent anti-coercion doctrines than the Court has been willing to embrace. See, e.g., Hills, *supra* note 135, at 828 ("[E]rosion of political accountability is endemic to all forms of cooperative federalism; whenever the federal government induces states to act, whether with block grants or categorical grants, there is a considerable risk that voters will be confused about which level of government imposed the regulatory burdens of the program."); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2202 (1998) ("Conditional spending regulatory requirements, though nominally involving a state's choice to accept federal funds, can result in a very confusing picture of responsibility for voters. Why, then, would commandeering be different?"); Edward A. Zelinsky, *Accountability and Mandates: Redefining the Problem of Federal Spending Conditions*, 4 CORNELL J.L. & PUB. POL'Y 482, 482 (1995). Recently, Professor Andrew Coan has identified an alternative to the accountability rationale to justify the commandeering and coercion cases, the "constituency-relations" rationale, but after uncovering this new rationale, he concludes that even it is not "sufficient to justify the anti-commandeering and anti-coercion principles." Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 5 (2015).

¹³⁸ See Bulman-Pozen & Gerken, *supra* note 22, at 1296 ("Nationalists, needless to say, oppose the anticommendeering principle . . ."); Jackson, *supra* note 137, at 2182 ("*Printz v. United States* appears to offer a relatively clear line that Congress may not transgress — requiring (rather than inducing) state officials to be the enforcement agents of federal laws. This line, although offering

deering and coercion closets. But I see mementos — dust-covered hints of a deeper logic animating these cases and our constitution’s principles of federalism. In the rest of this Part, I excavate from beneath the anti-commandeering and anti-coercion doctrines a cogent set of “principles” of engagement that, though not yet crystallized into rules capable of confronting the many intricacies of contemporary federalism, do motivate the Court’s supervision of state-federal interactions. I then use these principles to critically evaluate consent procedures.

As I previewed in my Introduction, sovereigntists and nationalists largely agree — whether they are happy about it or not — that our federalism is trending away from separation and independence and toward overlap and engagement.¹³⁹ For the Court, however, engagement does not, and cannot, mean complete integration.¹⁴⁰ The anti-commandeering and anti-coercion rules prove this point by imagining a form of policy collaboration that also preserves the “[s]tates as independent and autonomous political entities.”¹⁴¹

But how much independence, and what kind of autonomy, does the Court believe the Constitution guarantees to the states? Here I argue that, read together, the coercion and commandeering cases suggest that the Court is actually interested in protecting the states from two different harms that intrude upon their independence: *substantive* harms and *procedural* harms. The status of the states as “independent and autonomous political entities” can be infringed when Congress imposes either kind of harm. The procedural form of harm — the kind of harm imposed, in general, by consent procedures — has received relatively little attention. But, as I will show below, it nonetheless remains an important part of the Court’s federalism jurisprudence.

1. *Procedural and Substantive Harms.* — According to *Dole*, spending grants are coercive when their conditions are “unrelated to the federal interest,”¹⁴² when they employ inducements that are in fact and form “compuls[ory],”¹⁴³ when they ask the state to violate “other

some benefits of clarity, is not well grounded in history and does not necessarily inhere in the pragmatics of a workable federalism.” (footnote omitted); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1634 (2006) (arguing that the anti-commandeering rule can operate to undermine rather than advance federalism values).

¹³⁹ See *supra* notes 18–37 and accompanying text.

¹⁴⁰ See *supra* note 37 and accompanying text.

¹⁴¹ *Printz v. United States*, 521 U.S. 898, 928 (1997). Indeed, it is often attractive for the federal government to collaborate with the states precisely because they remain independent and distinctive political bodies, which can inject innovation, political energy, and independent financial resources into joint initiatives. See Gluck, *supra* note 20, at 566–71.

¹⁴² *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)) (internal quotation mark omitted).

¹⁴³ *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)) (internal quotation mark omitted).

constitutional provisions,”¹⁴⁴ and when their terms and conditions are not “unambiguously” presented.¹⁴⁵ What’s notable for our purposes is that the first three avenues of coercion in *Dole* contemplate a different mechanism of impermissible influence than the fourth. The first three — the nexus between the condition and the program, the size of the financial inducement, and the independent constitutional bar — focus on the *terms* of the deal the federal government offers to the states. However, the fourth — the requirement that the terms be presented unambiguously — focuses on the *process* of negotiation between the federal government and the states.

The first three — and the thrust of the coercion jurisprudence to date — advance the idea that unfair terms can be coercive because they create what contract law calls “coercive offers” or “unconscionable bargains.” These are “offers” that operate like threats because they restrict the offeree’s set of options so substantially that the offeree is left with a choice between unappealing alternatives.¹⁴⁶ The offeree loses money, time, or resources no matter the option chosen. These offers are concerning because they impose what I call *substantive* harm on the states. This harm captures the objective loss of value to an offeree forced to consent to a bad bargain. In *NFIB*, the Court held the government’s recent Medicaid expansion to be one such offer.¹⁴⁷

The “unambiguous” requirement, on the other hand, focuses on the interaction between the parties during their negotiations, not the substantive sources of value in the deal. The requirement echoes a classic common law rule that requires sellers who are advertising goods or services to make the terms of the offer “reasonably definite.”¹⁴⁸ This rule applies no matter what goods or services are being offered. *Dole*’s “unambiguous” requirement similarly does not police the underlying substantive terms; instead, it sets up a procedural rule that requires the offeror (the federal government) to make clear to the offeree (the states) what the terms of the deal are. This is important because without clear terms, the state cannot fully and robustly conduct the processes of political deliberation that are necessary to yield a legitimate

¹⁴⁴ *Id.* at 208.

¹⁴⁵ *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); see also *supra* notes 129–33 and accompanying text.

¹⁴⁶ See *Steward Machine*, 301 U.S. at 590.

¹⁴⁷ See *NFIB*, 132 S. Ct. 2566, 2602–04 (2012); see also Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013) (offering a thorough account of *NFIB*’s Spending Clause holding).

¹⁴⁸ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981) (“Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.”); see also *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689, 691 (Minn. 1957).

governmental decision about whether to accept the deal — it can't, in other words, form a "will" of its own.

Indeed, we could imagine Congress offering the states a grant that involves a close nexus between the condition and the program, and provides a reasonably sized financial inducement, but still operates coercively because Congress — in its negotiations with the states about the terms of the grant — did not make the terms "unambiguous." We could imagine this form of coercion coming into play in a number of situations. Congress could mislead by using vague language on the face of a statute, or an agency could place ambiguous terms or representations in the documents that it uses to offer grants, amendments, and waivers to the states. Either way, the ambiguity in terms would cast doubt on the authenticity of the state's consent to the grant or program in front of it. (Contrast this with "substantive" coercion, where the terms of the agreement are clear, but courts doubt the authenticity of the state's consent because the consequences of rejecting the deal were too grave). The unambiguous rule in *Dole*, therefore, demonstrates that a state's "will" can be abridged not only by a coercive federal offer, but also by a coercive negotiation process.

While *Dole*'s relatively neglected unambiguity rule has been undertheorized by the Court and underutilized by litigants,¹⁴⁹ it contains the seed of an important insight. This is the intuition that a manipulative process — like a manipulative deal — may so interfere with state decisionmaking that it could render the resulting decision involuntary. This intuition echoes an idea that has long animated the pages of law reviews and philosophy journals: that *both* substance and procedure can bias decisionmaking.

Richard Thaler and Cass Sunstein have perhaps most famously argued that the government need not change the substantive terms of an offer in order to dramatically shape decisions.¹⁵⁰ It can instead change the process that the offeree uses to make her decision: the information the offeree receives, how the decision is framed, and — importantly — how the offeree registers his or her consent. Take Thaler and

¹⁴⁹ One recent exception is litigation (ongoing as this Article goes to press) over whether the ACA makes tax subsidies available to all individuals who buy insurance through an exchange — whether federal or state — or only to those who purchase insurance through a state-run exchange. See *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 135 S. Ct. 475 (2014). In an amicus brief before the Supreme Court, twenty-three states argue that they made their decisions to establish an exchange or not with the understanding that the Act would provide subsidies to their citizens either way. See Brief of the Commonwealth of Virginia et al. as Amici Curiae in Support of Affirmance at 3, *King v. Burwell*, No. 14-114 (U.S. Jan. 28, 2015). Therefore, they argue, interpreting the statute to deny subsidies to users of the federal exchange would violate the unambiguity rule. *Id.* at 15.

¹⁵⁰ See generally Thaler & Sunstein, *Libertarian Paternalism*, *supra* note 8 (outlining this theory).

Sunstein's classic example. Threatening to fire a worker if she declines to enroll in a company retirement plan induces her participation by limiting her substantive option set to two unappealing alternatives. By contrast, automatically enrolling her in the retirement plan, but giving her the ability to opt out, induces her participation by using a selection procedure biased toward enrollment.¹⁵¹ In both situations, the worker's choice might be improperly influenced, but for different reasons. In the first situation, we might be concerned that the worker doesn't have the options necessary to make her choice a meaningful expression of her will. In the second situation, we are concerned that the decisionmaking process does not allow the worker to properly reflect on and formulate a will that she feels she has truly authored. These situations illustrate different intuitions about what it means to act involuntarily and the harms to the decisionmaker that make us characterize her decision that way. In my terms, the first type of coercion results from substantive harm, while the second results from procedural harm.

But while the coercion cases have only ever hinted at a concern for procedural harm, such a concern is deeply embedded in the anti-commandeering rule. Indeed, the commandeering cases have long acknowledged that the kind of governing instructions that constitute commandeering can both impose substantive costs on the states and interfere with state procedures.

It is clear that the commandeering cases contemplate substantive harm. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,¹⁵² an important predecessor to *New York* and *Printz*, the Court held that a federal program did not commandeer the states in part because it did not require the states to "expend any state funds" that the state did not wish to expend.¹⁵³ The statute under review in that case did not impose a *substantive* financial harm on the states, and was therefore constitutional. More prominently, in *Printz*, the majority and dissent debated the level of substantive harm the federal government may impose on the states when it asks them to implement policy programs. Justice Scalia, writing for the majority, held that "forcing state governments to absorb the financial burden of implementing a federal regulatory program"¹⁵⁴ was too great an imposition, while Justice Stevens, writing in dissent, argued that because the background check scheme "merely involve[d] the imposition of modest duties on individ-

¹⁵¹ *Id.* at 176–77.

¹⁵² 452 U.S. 264 (1981).

¹⁵³ *Id.* at 288.

¹⁵⁴ *Printz v. United States*, 521 U.S. 898, 930 (1997).

ual officers,” the substantive harms were too small for the Court to police.¹⁵⁵

But these cases also recognize the potential for commandeering to impose *procedural* harms — primarily by interfering with state decisionmaking processes and the legitimacy they confer. Justice Souter’s dissent in *Printz* provides an instructive illustration of the difference between procedural and substantive harms. Justice Souter reaffirmed the Court’s ruling in *New York* that the federal government may not use commandeering in a way that imposes *procedural* harms, as it does when it “require[s] a state legislature to enact a regulatory scheme.”¹⁵⁶ Doing so, he explained, abrogates “the essence of legislative power,” which must include “discretion not subject to command.”¹⁵⁷ But, he said, because the program at issue in *Printz* only required states to provide low-level nondiscretionary services, it did not impose this kind of discretion-displacing procedural harm. Rather, the only harm it imposed was a *substantive* one — the costs to the state of requiring their officials to perform federal tasks. And this harm, he believed, could be avoided by requiring the federal government to pay “fair value” for state personnel.¹⁵⁸ Because these were substantive harms, they could be easily remedied with compensation.

Of course, members of the Court disagree about how to avoid substantive and procedural harm, and about when avoidance is required, but for our purposes, it is enough to note that these harms are analytically distinct, and that procedural harms — not merely substantive ones — are important to the Court.

The Court, therefore, has at least gestured at an important insight about the different ways in which the federal government can interfere with state autonomy and independence. It can, on the one hand, force the states to decide between two unattractive choices; or it can, on the other, manipulate how the states make their decision between the choices on offer. *Dole*, *Printz*, and other cases make clear that the federal government at times negotiates in a way that makes it difficult for the states to be fully “cognizant of the consequences of their participation.”¹⁵⁹

¹⁵⁵ *Id.* at 961 (Stevens, J., dissenting).

¹⁵⁶ *Id.* at 975 (Souter, J., dissenting).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 975–76 (“I do not read any of The Federalist material as requiring the conclusion that Congress could require administrative support without an obligation to pay fair value for it. The quotation from No. 36, for example, describes the United States as paying. If, therefore, my views were prevailing in these cases, I would remand for development and consideration of petitioners’ points, that they have no budget provision for work required under the Act and are liable for unauthorized expenditures.”).

¹⁵⁹ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (internal quotation mark omitted).

But the Court has expressed only the beginning of this important insight; it has yet to carry it through its federalism jurisprudence generally and its coercion jurisprudence in particular. Indeed, the Court's present doctrine suffers from two significant gaps. First, the Court has not fully articulated why procedural harms matter, nor outlined the full scope of procedural harms that improperly intrude on state interests. Second, the Court has not clarified whether the type of procedural harms imposed by the federal government during the process of *implementing* current programs (the domain of the commandeering cases) should also concern us if they arise during the process of *negotiating* future programs (the domain of the coercion cases). Is the largely dormant "unambiguity" rule the only procedural issue that should be regulated during federal-state negotiations? Or are there other forms of interference with state decisionmaking processes that ought to raise the same concerns?

This two-by-two matrix illustrates the present state of the jurisprudence:

		Point of Federal-State Interaction	
		Negotiation Process	Implementation Process
Type of Harm	Substantive	(1) Coercion jurisprudence	(2) Commandeering jurisprudence (state resources)
	Procedural	(3) <i>Consent procedures</i>	(4) Commandeering jurisprudence (state political discretion)

As the matrix makes clear, the Court's "coercion" cases address substantive harms caused by the federal government during the *negotiation* process (Box 1), its "commandeering" cases address both substantive and procedural harms imposed during the *implementation* process (Boxes 2 & 4), but existing doctrine has never invalidated a federal act that imposes procedural harms during the *negotiation* process (Box 3). And yet Box 3 is precisely where "consent procedures" live. This empty space should concern us because, using consent procedures, the federal government can both impose the procedural harms the commandeering cases proscribe and impact the core aspects of state autonomy protected by the coercion cases.

Why has Box 3 escaped our attention and that of so many federal courts? For one thing, a decisionmaker may suffer procedural harm even when its preferred substantive outcome is secured. If the federal

government designates *me* as Colorado's consent agent for a new spending program, I may well choose the same option that Colorado's legislature would have selected. But that doesn't mean my decision is representative or legitimate. My selection harms the state as a procedural matter even though the substantive outcome is acceptable, or even desirable. This possibility makes procedural harm less salient than substantive harm and may discourage states from seeking remediation.¹⁶⁰

Some states may be further discouraged from remedying these procedural harms if the federally designated decisionmaker and the state-authorized decisionmaker belong to the same political party or share political objectives. Vermont's Democratically controlled legislature may not want to pick a political fight with its Democratic governor just because the governor accepted a federal grant that it was the legislature's prerogative to accept or reject — especially if the legislature would have made the same choice as the governor. Coordinate branches, in other words, may have political incentives to acquiesce in procedural wrongs facilitated by consent procedures. Who is harmed when this happens? The citizens of Vermont, whose choice to subject certain decisions to legislative review — perhaps to ensure a degree of contestation and transparency by forcing their representatives to take on-the-record positions on important issues — is frustrated.

This provides a further clue into the lack of litigation over consent procedures. If citizens are the primary victim of procedural harm — injured when the political structures they have chosen are circumvented — they should be the most likely actors to challenge consent issues in federal court. Yet they are also the group that faces the greatest barriers to getting into court in the first place. They have to find a cause of action, demonstrate standing, and potentially pierce the veil of state sovereign immunity.¹⁶¹

Moreover, in federal statutes, consent procedures are often concealed in seemingly nonsubstantive statutory provisions that rarely trigger the kind of public debate that other statutory federalism provi-

¹⁶⁰ For instance, there was a clear incentive for Florida, Maine, North Dakota, or any of the other twenty-six state petitioners in *NFIB* to seek a remedy for the substantive harm of being “coerced” into expanding Medicaid against their will. But if the governor of Florida opted the state out of creating a health exchange, the parties who were unrepresented in that decision, but agree with it, would have less incentive to bring suit.

¹⁶¹ See Alex Hemmer, Note, *Civil Servant Suits*, 124 *YALE L.J.* 758, 768–72 (2014) (describing contemporary barriers to “citizen suits”). These barriers to getting into court similarly afflict another group — civil servants — that could otherwise be well positioned to challenge consent procedures. See *id.* at 795–99.

sions attract.¹⁶² And at the state level, it is easy to imagine officials employing consent procedures with little oversight or disclosure.

Therefore, the absence of litigation and commentary on procedural harms in the negotiating phase should not suggest that these harms are insignificant. Box 3 tells us — or *should* tell us — the extent to which the federal government may dictate, interfere with, and influence internal state decisionmaking procedures during negotiations over cooperative ventures. It tells us what level of decisionmaking autonomy our Constitution confers on states when they are considering whether to cede their resources and their political power to the federal government. It tells us, fundamentally, what it means for states to act “voluntarily.”

2. *Theorizing the Box 3 Intersection.* — While federal actions are not normally challenged on both coercion and commandeering grounds, this section argues that the potential harms imposed by consent procedures are best illuminated by thinking about them where those doctrinal lines intersect — in Box 3. This intersection reveals a harmonious thread between the two doctrines that tells us what it means for states, as democratically legitimate governmental bodies, to act voluntarily. I argue that current doctrine supports the view that decisionmaking autonomy is a necessary precondition to the formulation of a voluntary state “will.” My argument, of course, is not that the Court offers a full and rigorous defense of this view of voluntariness. Scholars have convincingly shown that the Court has neglected to fully theorize the commandeering cases, the coercion cases, and their intersection.¹⁶³ My goal instead is to show that this view of voluntariness logically follows from current doctrine and that scholars who think voluntariness is a useful requirement should consider rethinking their rejection of these cases — at least as they apply to consent procedures.

Voluntariness carries a different meaning and takes a different form for different types of decisionmakers. We can’t know what it means for an organization to make voluntary decisions unless we know how it is internally organized and what it is designed to do. This is because, as the Court emphasized seventy-five years ago in *Steward Machine Co. v. Davis*,¹⁶⁴ a decisionmaker acts voluntarily only when it expresses its “will” without undue influence or interfer-

¹⁶² There have been numerous scholarly efforts to outline the federalism features of major statutes, but none mention consent procedures. See, e.g., Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009) (various environmental statutes); Gluck, *supra* note 20 (Affordable Care Act); Weiser, *supra* note 20 (Telecommunications Act).

¹⁶³ See, e.g., Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL’Y 71 (2014); Jackson, *supra* note 137; Siegel, *supra* note 138, at 1634.

¹⁶⁴ 301 U.S. 548 (1937).

ence¹⁶⁵ — and what counts as the decisionmaker’s “will” necessarily varies by decisionmaker. An individual’s will is the product of her volition. A corporation’s will is the product of decisions made through its organizational bylaws and authorized agents. And, as I argue below, a representative government’s will is the product of citizen views transmuted through normatively legitimate structures and processes.¹⁶⁶

To build the case that American states act voluntarily only when they operate as representative political bodies according to their own representative processes and procedures, I draw out the particular harms of commandeering. The first is the commonly cited motivation for the anti-commandeering rule: the frustration of state accountability structures. The second is both deeper and broader: the restructuring of state *representative* processes.

The accountability concern is most clearly articulated in *New York*. Drawing on the *Federalist Papers*, Justice O’Connor began with the premise that “the residents of the State [must] retain the ultimate decision” power when the federal government seeks to “encourage[] a State to conform to federal policy choices.”¹⁶⁷ This “intergovernmental allocation of authority”¹⁶⁸ is essential because it “secures to citizens the liberties that derive from the diffusion of sovereign power.”¹⁶⁹ In order for state residents to retain decision power, governmental policies must be traceable to the institution that enacted them. But when the federal government “conscript[s] state governments as its agents,” citizens do not know whether to hold the agent (the conscripted state) or the principal (the federal government) accountable for the policy.¹⁷⁰

However, the Court also appears concerned with a procedural harm deeper than interference with the state’s accountability structures: interference with the ability of state governments to *represent* the interests of their constituencies. *Printz* enumerated “accountability” and “representation” as distinct values when it noted that the “Constitution . . . contemplates that a State’s government will repre-

¹⁶⁵ *Id.* at 590.

¹⁶⁶ Of course, these differences do not mean that the philosophy of individual volition and the law of corporate agency are irrelevant to an analysis of what it means for governments to act voluntarily. There are many parallels to be drawn. But those parallels have their limits. For instance, the doctrine of “authority” is the bedrock principle governing how corporations act through their agents, but one project of this Article is to show the ways in which governments are different. Although state officials may need something like “authority” to act, they also need democratic legitimacy and constitutional sanction. The question of who can speak for a state thus encompasses, but is broader than, similar questions in the corporate context.

¹⁶⁷ *New York v. United States*, 505 U.S. 144, 168 (1992).

¹⁶⁸ *Id.* at 183.

¹⁶⁹ *Id.* at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)) (internal quotation mark omitted).

¹⁷⁰ *Id.* at 178.

sent *and* remain accountable to its own citizens.”¹⁷¹ While accountability can certainly promote good representation, the two are not synonymous.

Accountability is an *ex post* virtue: it describes the way that citizens sanction or replace government personnel who aren’t adequately representing their interests. Representation, by contrast, describes the act of governing itself. In order to represent constituencies, a government needs not only elected officials, but structures, rules, and procedures that tell those officials how to act in ways that are faithful to the people. Before an official can act in a representative capacity, she must hold her office and access the powers it encompasses.¹⁷² Moreover, once instituted, the official must, at a decisional level, act according to her constituents’ instructions, within the parameters they have drawn for her office, and according to the procedures they have chosen. Representation, therefore, is more complex than accountability. It can be achieved only when state officials are both properly elected *and* properly acting. It is therefore possible to have functional accountability, and yet a deficit of representation.¹⁷³

The fact that both the federal and state governments are structured with a balance of powers between coordinate branches illustrates the distinction between accountability and representation. While the governor, state legislature, and elected cabinet officials may all be independently “accountable” to the people *ex post*, they properly represent the people only when they act in ways that the people have directed and sanctioned *ex ante* — that is, through the processes of intragovernmental give and take that a system of balanced powers requires. The people sanction their representatives in this way by establishing constitutional structures and processes that guide their collective actions.¹⁷⁴ This is why, as *Printz* noted, the anti-commandeering rule protects a state government’s “own set of mutual rights and obligations to the people who sustain it and are governed by it.”¹⁷⁵

¹⁷¹ *Printz v. United States*, 521 U.S. 898, 920 (1997) (emphasis added).

¹⁷² See, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1436 (1987) (“As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers. Within the sphere of these delegated powers, government agents could legitimately compel obedience in the name of their sovereign principal, but those agents lacked authority to go beyond the scope of their agency.”).

¹⁷³ Imagine, for instance, a line of corrupt congressmen, one replacing the other. Citizens could vote each bad actor out of office at the earliest opportunity (thereby holding them robustly accountable for their misdeeds), yet still never be adequately represented.

¹⁷⁴ As James Madison emphasizes in *The Federalist No. 51*, “[i]n 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.” THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003).

¹⁷⁵ *Printz*, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)) (internal quotation mark omitted). I want to avoid claiming too

Federal efforts to reshape these representative processes might be concerning because they constitute incursions into the “sovereign” powers of states. But they become particularly troubling when we have to imagine the decisions that these processes produce as “voluntary” choices. Because the states are constitutionally constituted representative governments, they act as *states* only when they act according to their own democratically sanctioned representative processes.

Commandeering, however, asks officials to act without the sanction of their constituents, it asks them to bypass carefully designed procedures, and it asks them to ignore the state’s internal political checks and balances. Indeed, the statutes the Court addressed in *New York* and *Printz* did not attempt to hire the private persons who filled state offices into new federal roles; they placed the state official qua state official on the federal government’s “organizational chart.”¹⁷⁶ In his opinion in *Printz*, Justice Scalia emphasized that “[w]hile the Brady Act is directed to ‘individuals,’ it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State.”¹⁷⁷

Indeed, commandeering state institutions is an appealing federal policy option not just for efficiency, competency, or expertise reasons; it is attractive, too, for legal and political ones. Commandeering allows the federal government to get state officials — who possess the authority and legitimacy conferred on them by that status — to contribute to the federal project.¹⁷⁸ Commandeering, seen in this light, does not federalize state resources; it federalizes state *authority* and *legitimacy*. It seeks to give the federal government access to the power and decision rights granted to state officials by the state electorate.¹⁷⁹

much in this Article. There are libraries full of books debating the nuances of representative government; while the federalism literature would certainly benefit from more of these nuances, that is not the project of this Article. In this piece, I do not intend to defend a specific view of representation; I mean only to distinguish the concept of representation from the concept of accountability by enumerating the basic features of any democratic representative regime.

¹⁷⁶ *New York v. United States*, 505 U.S. 144, 188 (1992).

¹⁷⁷ *Printz*, 521 U.S. at 930.

¹⁷⁸ *Cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (noting that “power, once granted, does not disappear like a magic gift when it is wrongfully used” and emphasizing that an individual holding a government position has “a far greater capacity for harm than an individual . . . exercising no authority other than his own”).

¹⁷⁹ Seeing commandeering in this way also helps address one of the most common criticisms of the anti-commandeering rule — that commandeering is preferable to preemption. For a comprehensive discussion of this argument, see Siegel, *supra* note 138. If a regulatory arena is preempted, a government structure and process deemed legitimate (the federal government) shapes the policies in that area. If the federal government instead commandeers the states in the way I have described here, it subjects policies in the relevant area to an amalgamated process that involves both federal and state officials, processes, and actions that are not governed by a preapproved decisionmaking process. If we take the democratic value of structure seriously, this necessarily renders resulting decisions illegitimate.

Take the Brady Act at issue in *Printz*. The Act instituted a broad set of federal requirements for the distribution of handguns and required the states' "chief law enforcement officers" (CLEOs) to use state, local, and national databases to review handgun sales for evidence that they were "in violation of the law."¹⁸⁰ Congress instructed CLEOs to conduct these reviews because they were presumed to have access to the relevant databases and, although not required to do so by the federal government, had the state authority (or even obligation) to take action if a sale was revealed to be illegal. But the CLEOs presumably also possessed the state-level *legitimacy* to conduct investigations of this nature. Congress, in other words, wanted the officials to retain the power given them by the state constitution, laws, and political processes, but *also* wanted to guide how they used that power. This is the paradox of commandeering: a commandeered official is either acting *ultra vires* in her position as a state official or is not acting as a "state" official at all.¹⁸¹

This disjunction between the antecedent source of the official's authority and the source of a particular mandate (for instance, the mandate to conduct handgun background checks) creates *ex ante* ambiguity about whom the official is representing, and, in turn, the *ex post* accountability concerns that Justice O'Connor describes in *New York*. When the federal government impedes state processes of authorization — by interfering with their constitutional structures, political norms, or lines of authority — the resulting actions cannot claim the mantle of state authority. As *New York* emphasizes, the states cannot

¹⁸⁰ *Printz*, 521 U.S. at 903 (quoting 18 U.S.C. § 922(s)(2) (2012)); *see also* 18 U.S.C. § 922(s)(2) (requiring CLEOs to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General").

¹⁸¹ Even so, there may be sound defenses of some commandeering practices. The Court has long defended federal requirements that state judges apply federal law. But this obligation is justified in spite of the role of state judges as democratic representatives and because of their paramount role as judicial officers. The Supremacy Clause expressly recognizes the potential for state courts to be confronted with questions of federal law and directs judges in their capacity as judges to follow that law. *See Testa v. Katt*, 330 U.S. 386, 391 (1947) ("[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" (quoting U.S. CONST. art. VI)). Judges are therefore uniquely obliged by their position as judicial officers to apply all laws applicable in their jurisdiction regardless of the source of their office. *Id.* at 392–94. State legislative officials are not similarly obliged, when acting as lawmakers for the state, to follow federal instructions. *See New York*, 505 U.S. at 179. The judicial counterpoint, therefore, suggests that the justifiability of intervening in the execution of state democratic processes depends on the source of the state official's authority. Where judges are concerned, we are less worried about interfering with their role as state democratic representatives because we recognize that the obligation of a judge to apply the law before him, regardless of its source, is paramount.

be considered “mere political subdivisions of the United States,” nor will the Constitution permit us to imagine them as “regional offices” or “administrative agencies of the Federal Government.”¹⁸² The “positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart.”¹⁸³ Whatever you think of the legitimacy or rationale for this type of commandeering, as a descriptive matter, it is clear that the actions of commandeered state officials cannot be attributed to the state.

Against this backdrop, we can see why consent procedures might render state action involuntary. When the federal government tells the states what it means to decide by picking the state official that has decision power or by imposing procedural requirements on that decision, it reconfigures the state structures that exist to ensure that the state government represents its citizenry. The paradox returns here again: Congress wants to claim that it has obtained the voluntary participation of the state, but also wants to choose who within the state gets to decide whether and how to participate. In either case, as I describe below, the state official cannot be seen to be representing citizen views transmuted through normatively legitimate structures and processes.

III. CONSENT PROCEDURES AND FEDERALISM VALUES

In this Part, I extend my analysis of consent procedures beyond doctrine to how they relate to the broader goods that the Supreme Court and scholars have located in our federalist system. These goods are often described as the “ends of federalism” or “federalism values.” My goal is not to endorse all of them — indeed some may not be goods at all and others may be mutually inconsistent — but rather to show what scholars, judges, and policymakers who believe in federalism for each of these reasons stand to gain by thinking about the presence and operation of consent procedures. Although the protection of “sovereignty” and “autonomy” are commonly cited federalism values, these terms are hard to define and rigorously dissect in a limited space. I therefore approach these concepts by digging one step deeper and thinking about two of their obvious constitutive parts: constitutional autonomy and political autonomy. I then discuss the intersections between consent procedures and three other goods produced by federalism: representation; the checking function; and energy, contestation, and voice.

¹⁸² *New York*, 505 U.S. at 188.

¹⁸³ *Id.*

A. Constitutional Autonomy

Consent procedures have the potential to dictate both who speaks for the state and how. Both the “who” and the “how” requirements could present serious state-level constitutional concerns. When the federal government requires the “governor” or “chief executive of the state” to consent to a federal program or express the state’s desire to accept federal funds, the governor is made the state’s spokesperson and legal representative. In this capacity, she both expresses the state’s desire to participate in the federal program and commits the state to the legal obligations attached to participation.

In some cases the governor undoubtedly possesses authority under the state constitution to decide the issues presented in the federal offer. But in other cases, federal speaker designations can function as extra-constitutional grants of *additional* power to the designated state party.¹⁸⁴ For example, one section of the Asbestos Hazard Emergency Response Act of 1986¹⁸⁵ authorizes state governors to take “emergency action” to “respond to the [presence of] airborne asbestos or friable asbestos-containing material” in schools, when the “local educational agency is not taking sufficient action.”¹⁸⁶ The governor may then seek reimbursement for such actions from the Environmental Protection Agency.¹⁸⁷ In states that vest authority for school oversight in an education agency rather than the governor, or in those that preclude the governor from making directives to local schools without intervening steps by the legislature — for instance, amending a home rule statute — any action by the governor under the Act would reallocate authority away from the legislature, agency, or local school district and to the governor.¹⁸⁸

The potential harms that federal consent procedures can impose on state constitutional structures are illuminated by three types of responsive actions states have taken to counteract federal interference. After outlining these state-level responses to federal consent procedures, I

¹⁸⁴ For a comparison of gubernatorial powers across states, see BOOK OF THE STATES, *supra* note 92, at 159–60 tbl.4.4.

¹⁸⁵ Pub. L. No. 99-519, 100 Stat. 2970 (codified in scattered sections of 15 and 20 U.S.C.).

¹⁸⁶ 15 U.S.C. § 2648(a)(1) (2012).

¹⁸⁷ *Id.* § 2648(a)(4).

¹⁸⁸ Professor Weiser has developed an insightful “reverse-*Erie* doctrine” for determining when courts should find that state law precludes state agencies from implementing federal law, which could have valuable applications for determining consent questions. He advocates a doctrine that “recognizes that federal law cannot provide a state agency with a jurisdictional capability that is fundamentally contrary to its charter even when that extra capability is necessary to implement federal law,” but that allows “state agency implementation of federal law where state law does not specifically authorize the agency to take the exact measure at issue, but where the action is within the competence of the state agency.” Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 674 (2001).

shall argue that these mechanisms provide insufficient protection against consent procedures that interfere with the allocation of state constitutional powers.

First, federally designated state speakers have attempted to delicately reallocate authority back to the rightful state-level actor. This type of state-level maneuver came into sharp relief last year when Sergio Garcia applied for a law license in California. Garcia is an undocumented immigrant and is prohibited from receiving state assistance, including a law license, under PRWORA's bar on the provision of state benefits, grants, and licenses to undocumented immigrants. While the law does permit states to opt out of the ban through an "enactment of a State law,"¹⁸⁹ California had not exercised this opt-out option at the time that Garcia applied for his law license. When Garcia's application came to the California Supreme Court for its (largely ceremonial) approval, the court expressed doubt about its ability to legally issue the license and asked the United States Department of Justice (DOJ) to file an amicus brief describing how PRWORA applied to Garcia's situation. In its brief, DOJ argued that PRWORA's opt-out provision required "the *state legislature* . . . to affirmatively determine that undocumented aliens should be entitled to receive law licenses."¹⁹⁰ The State Bar of California, however, argued that "[t]he primary authority of the State to regulate in this area is vested with [California's Supreme] Court, which, in the exercise of its sovereign power, may . . . provide for licensure of Mr. Garcia and those similarly situated."¹⁹¹ A clear impasse. The federal government insisted that the consent procedure required an "enactment of State law" executed by the state *legislature*, while the State Bar of California believed that the state granted power over attorney licensure to the California Supreme Court. The federal opt-out mechanism, therefore, either granted new exclusive powers to the state legislature to regulate attorney licensure, or could not be exercised in California because the power to act in the way envisioned by the federal law was committed to the California courts.

This awkward situation reached an awkward denouement when the California legislature enacted an amendment to an existing law that already seemed to recognize the California Supreme Court's power to admit undocumented people to the bar. That pre-amendment law acknowledged the court's expansive power to welcome any applicant who had "fulfilled the requirements for admission to practice law"

¹⁸⁹ 8 U.S.C. § 1621(d) (2012); *see also supra* notes 82–85 and accompanying text.

¹⁹⁰ *See* Application and Proposed Brief for Amicus Curiae the United States of America at 14, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (No. S202512) (emphasis added).

¹⁹¹ Answer of the Committee of Bar Examiners of the State Bar of California to Amicus Brief of the United States of America at 2, *Garcia*, 315 P.3d 117 (No. S202512).

to the bar.¹⁹² The new provision purported to authorize the court to admit a subclass of applicants that seemed already to be covered by the prior provision — that is, applicants who were “not lawfully present in the United States” and had “fulfilled the requirements for admission to practice law.”¹⁹³ The legislature, in essence, had to conform state law to the federal consent procedure *for federal purposes*, while at the same time affirming the court’s preexisting prerogatives under state law. Whether this type of intricate maneuvering presents a durable solution to invasive federal consent procedures remains to be seen, but, as I will discuss below, it at the very least seems to impose significant, and arguably inappropriate, costs on state governments.

Second, states have challenged the validity of federal consent procedures (and the authority of their own officials to consent for the state) in state court. In *Florida House of Representatives v. Crist*,¹⁹⁴ Florida’s majority-Republican legislature brought a state claim questioning the power of Florida’s Republican Governor to act pursuant to the requirements of the Indian Gaming Regulatory Act¹⁹⁵ (IGRA).¹⁹⁶ The Act created a complex scheme through which the states and Indian tribes could negotiate “compacts” governing gaming on Indian-owned land within the states’ respective territorial boundaries.¹⁹⁷ After long and drawn-out litigation in the federal courts challenging other aspects of the law and after extensive negotiations with the Seminole Tribe of Florida, Governor Charlie Crist entered into a compact with the tribe.¹⁹⁸ Shortly thereafter, however, the compact was challenged in the Florida Supreme Court by then-Speaker of the Florida House of Representatives, Marco Rubio, who “disput[ed] the Governor’s authority to bind the State to the compact,” calling it a violation of state separation of powers principles, notwithstanding IGRA’s authorization.¹⁹⁹ In this case, state-level judicial review was successful at mitigating federally imposed procedural harms — the Florida court agreed that IGRA could not alter the allocation of authority estab-

¹⁹² CAL. BUS. & PROF. CODE § 6064 (Deering 2007).

¹⁹³ See Act of Oct. 5, 2014, 2013 Cal. Stat. 573 (codified at CAL. BUS. & PROF. CODE § 6064(b) (Deering Supp. 2015)).

¹⁹⁴ 999 So. 2d 601 (Fla. 2008).

¹⁹⁵ Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166–1168 (2012) and 25 U.S.C. §§ 2701–2721 (2012)).

¹⁹⁶ See *Crist*, 999 So. 2d at 603.

¹⁹⁷ 25 U.S.C. § 2710(d).

¹⁹⁸ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that the Eleventh Amendment does not allow Congress to authorize suits by tribes against States to enforce this legislation); see also *Crist*, 999 So. 2d. at 605.

¹⁹⁹ *Crist*, 999 So. 2d at 603; cf. *State ex rel. Clark v. Johnson*, 904 P.2d 11, 15 (N.M. 1995) (making a similar claim).

lished by the state constitution²⁰⁰ — but this mitigation effort came at a cost.

Finally, states have erected statutory safeguards to prevent certain unauthorized state officials from acting pursuant to federal consent procedures. In 2012, as states began accepting federal funds to develop health care exchanges under the Affordable Care Act, Missouri enacted a referendum providing that:

No state-based health benefit exchange may be established, created, or operated within this state . . . unless the authority to create or operate such an exchange is enacted into law through: (1) A bill as prescribed by Article III of the Missouri Constitution; (2) An initiative petition as prescribed by Article III, Section 50 of the Missouri Constitution; or (3) A referendum as prescribed by Article III, Section 52(a) of the Missouri Constitution.²⁰¹

This act was not unprecedented. Several decades ago, as the portion of Pennsylvania's general budget provided by the federal government ballooned, the state General Assembly passed a law to counteract the growing influence of the Governor in the allocation and management of these increasingly important federal resources.²⁰² The law required "that all federal funds be deposited in the General Fund without designation as a restricted or separate account, and that they be available for appropriation by the General Assembly," and prohibited the State Treasurer "from paying out any such federal funds unless pursuant to a specific appropriation by the General Assembly."²⁰³ In essence, the law stripped the Governor of the power to accept federal funds and appropriate them consistent with the federal government's conditions, requiring instead that all funds, whether earmarked for cooperative programs or not, be appropriated by the legislature. The Act was intended to counteract the Governor's accretion of power in his role as the state's consent-agent for many federal programs. The Governor sued for injunctive and declaratory relief, claiming that the law violated the Pennsylvania constitution, but the Pennsylvania Supreme Court upheld the state workaround.²⁰⁴ As the lower court explained, the legislative intervention prevented the Governor from "seeking and administering Federal aid programs free of any checks or balances and with little political accountability for such actions."²⁰⁵

While state-level political, judicial, and legislative review might moderate the impact of federally imposed procedural harms, they do

²⁰⁰ *Crist*, 999 So. 2d at 615–16.

²⁰¹ MO. ANN. STAT. § 376.1186(1) (West 2013).

²⁰² See *Shapp v. Sloan*, 391 A.2d 595, 600 (Pa. 1978). For a full excavation of the events and issues leading up to *Shapp*, see Comment, *Federal Interference*, *supra* note 15, at 405–08.

²⁰³ *Shapp*, 391 A.2d at 601; see also Act of June 29, 1976, No. 117, 1976 Pa. Laws 469.

²⁰⁴ *Shapp*, 391 A.2d at 599, 608.

²⁰⁵ *Shapp v. Sloan*, 367 A.2d 791, 797 (Pa. Commw. Ct. 1976), *aff'd*, 391 A.2d 595.

not mitigate the more fundamental concerns. First, even if state-level review can police some acts of overreach by state officials, Congress still controls the default allocation of power, which requires both time and resources to modify. In the scenarios discussed above, the federal government commissioned essentially *ultra vires* actions by state officials and placed the burden of correcting them on other states. If not coercive, these actions seem at least manipulative. Imagine a powerful corporate supplier bypassing the corporate hierarchy to negotiate with an employee who lacks the internal power to sign company contracts. These *ultra vires* agreements would presumably be executed until the company's internal oversight mechanisms noticed something amiss. In order to be made whole, the company must pursue expensive litigation against either the internal party who erroneously agreed to the contract or the external supplier. Imposing the corrective responsibility on the company, rather than the supplier, interferes with the company's ability to operate as a cohesive unit and subjects it to unnecessary costs. Perhaps more importantly, the company will almost certainly not do business with the supplier again, for trust and mutual respect are important components of any bargaining relationship. But states cannot cut their business ties with the federal government in the same way, and so have fewer options for avoiding these harms and costs.

Second, when consent procedures are attached to valuable federal grants, states may feel compelled to acquiesce in extraconstitutional uses of power to ensure that funds are secured. Given the choice between letting the governor act in a way not endorsed by the state constitution and forgoing essential federal resources because there exists no other way to consent to the funding source, it is not hard to imagine a state choosing the funds. But should our federalism permit the federal government to offer such a Hobson's choice? If we believe that federal systems are designed to respect the governing structures and legislative processes of different layers of government, the underenforcement and degradation of state constitutional norms should be just as concerning as the underenforcement and degradation of federal constitutional norms.

Finally, because state-level judicial review is an *ex post* remedy, it is unlikely to adequately police all of the harms consent procedures can impose. First, while litigation may be able to remedy affirmative *ultra vires* actions taken pursuant to federal consent procedures by nullifying the official's action, litigation may be less effective at policing acts of *omission* by the designated consenter. If the governor's consent is required and the governor wants to decline the grant, a different state actor cannot accept in his stead, even if that actor possesses the appropriate state-level authorization. For such an action would not comply with the federal consent procedure. The state would have to take more radical steps — perhaps even mandamus-ing the federally

designated decisionmaker to act under the direction of the state-authorized decisionmaker.

This is important because acts of omission can be just as inconsistent with the will of the state electorate as acts of commission. If the state's standard political process would have resulted in acceptance of a federal grant, and the designated actor (acting beyond his delegated authority) refuses it, the state representative institution has failed to actualize the will of the people it was commissioned to follow. For any state constitution that allows the state legislature to override a gubernatorial veto or otherwise restrain executive action, a consent procedure that places the decision rights in the hands of the governor alone blocks the exercise of this important constitutional prerogative.²⁰⁶

These acts of omission may be particularly hard to remedy for programs with low political salience. If a state official acting according to a federal consent procedure, but ignoring a state-level constitutional procedure, *rejects* federal funds, it may be difficult to trace the omitted action, quantify its harms, and remedy them *ex post*. Perhaps these harms can be identified with significant transparency mechanisms, but requiring the state to be the remedial actor allows the federal government to shunt to the states the burden of conforming federal-state collaborations to basic standards of intergovernmental respect when the federal government could have done so in the first instance.

Ex post state-level judicial review, moreover, cannot remedy many of the harms that *action*-based consent elements impose. Many actions cannot be undone later — an application submitted to stakeholders for comments cannot be withdrawn once those comments have been considered and incorporated, nor can the resources expended in such an effort be recovered. Moreover, even if a state court can undo consent actions, nullifying these critical steps could imperil the state's participation in the program. For consent actions, in other words, there is no way to circumvent actions that offend state laws and still join the federal program, as is sometimes an option with agent-based elements (where a state could simply require the federally designated agent to act according to a different official's instructions).

B. *Political Autonomy*

Even where consent procedures leave a state's constitutional structure intact, federally prescribed consent procedures can interfere with state political norms — norms that govern how different representatives and institutions of government collaborate toward shared policy goals, how political contestation sparks innovation and induces com-

²⁰⁶ Over forty states permit the legislature to override the governor's veto. See BOOK OF THE STATES, *supra* note 92, at 159–60 tbl.4.4.

promise, and how laws and policies are added to political agendas and earn time in legislative forums. In *FERC v. Mississippi*,²⁰⁷ the Court characterized “the authority to make . . . fundamental . . . decisions”²⁰⁸ as “perhaps the quintessential attribute of sovereignty.”²⁰⁹ For the Court, “having the power to make decisions and to set policy is what gives the State its sovereign nature.”²¹⁰ Consent procedures can interfere with the states’ ability to “set policy” and make “fundamental decisions” in two important ways.

First, consent procedures can be tailored to elevate the voices of certain state officials over others. Consent procedures that locate the decision in a legislative forum will capture the kind of state-level views that can be filtered up through lawmakers. The legislative process could secure the advantages of committee meetings, floor debates, constituent outreach, and diverse amendments. But it also carries the harms of logrolling, political stalling, and, in one-party states, majoritarian conformity. Consent procedures that locate the decision in state governors, by contrast, could be more responsive to the entire state and reflect a greater amalgamation of interests. But they may also bypass legislative mechanisms that force publicity, acknowledgment of dissent, and compromise. Finally, consent procedures that locate the decision with an administrative official may draw on expertise, on-the-ground information, and input from a web of officials spanning state and local government, but may also be less attentive to constituent views. Each of these avenues represents the “state” in a different way by giving voice to different interests, institutions, and constituencies.

Moreover, federally prescribed consent procedures may reinforce or calcify outdated allocations of political authority. Above, I describe harms that can occur when federal consent procedures vest state actors with power those actors are not constitutionally authorized to possess. There is a more subtle version of this harm that obtains when the designated state official indisputably possesses jurisdiction over the cooperative venture’s subject matter, but the program would so transform the meaning or importance of that subject matter in the state’s political ecosystem that the very existence of the federal offer renders the original jurisdictional grant outdated. The actor’s jurisdiction could, in other words, be based on an assumed set of institutional resources and power, which a federal offer could dramatically alter.

Absent a consent procedure, in at least some cases, states would recognize these potential distortionary effects and preemptively vest

²⁰⁷ 456 U.S. 742 (1982).

²⁰⁸ *Id.* at 761 (omissions in original) (quoting *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851 (1976)) (internal quotation marks omitted).

²⁰⁹ *Id.*

²¹⁰ *Id.*

the decision to accept or reject the program with a different actor. We know that because high-magnitude decisions rarely come about without high-intensity political activity — deliberation and debate, bargaining and negotiation — not only over the metes and bounds of the decision, but over the structure of political authority that will carry it to fruition. When the federal government multiplies the resources available for a policy area or initiative — from air quality and nuclear waste removal to public health care and early childhood education — it is easy to see the state’s elected and bureaucratic representatives reviewing the governance structures for the policy area at issue. Whether this conversation leads to a reallocation of political power away from an actor or agency not scaled to confront its evolving possibilities or to a reaffirmation of the existing arrangement, the process of political review is important for the ongoing legitimacy of the program.

Finally, consent procedures could circumvent state political processes altogether. Tacit consent procedures, like the default/override mechanism in PRWORA, are the most potent cause of this harm.²¹¹ As I note above, PRWORA bans states from providing undocumented immigrants with state-funded “public benefits.”²¹² But it also allows states to make immigrants who are ineligible under these provisions “eligible for any State or local public benefit . . . through the enactment of a State law.”²¹³ In the meantime, they are assumed to be tacitly consenting to the program.

Some might think it easy for the states to override such a default, and therefore conclude that PRWORA’s idea of tacit consent is perfectly reasonable. Professor Hanna Pitkin, however, points out the central puzzle of consent through inaction: it is “extremely difficult to formulate a notion of tacit consent strong enough to create the required obligation, yet not so strong as to destroy the very substance and meaning of consent.”²¹⁴ This idea has been articulated in other areas of the law as well.²¹⁵ If what we care about is that a state decision is, as the

²¹¹ See 8 U.S.C. § 1621 (2012); see also *supra* notes 79–85 and accompanying text.

²¹² 8 U.S.C. § 1621(a)–(c).

²¹³ *Id.* § 1621(d).

²¹⁴ Hanna Pitkin, *Obligation and Consent — I*, 59 AM. POL. SCI. REV. 990, 994 (1965).

²¹⁵ In contract law, for instance, the concept of quantum meruit applies to situations where would-be contract terms are performed, but the contracting parties never had an opportunity to formalize the terms in consensual words or writing. The theory gives weight to tacit consent without devaluing express consent by requiring both that the party seeking recovery performed work and that the work benefited the other party. Tacit consent is rescued here, as in Locke’s theory, by actions that demonstrate mutual agreement. See *Del. City, Salem & Phila. Steamboat Navigation Co. v. Reybold*, 142 U.S. 636, 641 (1892) (defining a quantum meruit claim as involving “work done and labor performed by the plaintiff which enured to the benefit of the defendant” without an express agreement to that end). When contracting parties have failed to agree to a single term, rather than the entire contract, scholars have similarly suggested that courts insert a “default” term that “the parties would have selected.” FRANK H. EASTERBROOK & DANIEL R.

Court said in *Steward Machine*, an “expression of her will,”²¹⁶ with which the state can be “satisfied” or be “disappointed,”²¹⁷ we have to understand a state’s acts of omission to be both tangible and expressive in order to make tacit consent as meaningful as affirmative consent. However, in light of the political dynamics of state governments, there are good reasons not to understand acts of omission to be politically expressive.

To begin with, states are discontinuous decisionmakers — they have structured periods of action and inaction. Most states limit the time that their legislatures are in session, many to four months per year or less.²¹⁸ Being a delegate to a state legislature is a full-time commitment in only ten states.²¹⁹ Most states require representatives to be on the job — including time spent in legislative sessions, committee hearings, and performing constituent services — for fifty to seventy percent of the time equivalent of a full-time job.²²⁰ Tacit consent, however, takes what states do in these periods of inaction to be expressive. It infers intentionality even when the processes through which citizens express their views are dormant.

What’s more, there are numerous reasons that states might delay affirmative enactments, even when they enjoy the support of a plurality of constituents, or even a plurality of state officials. Indeed, defaults are attractive precisely because of the “strong tendency to go along with the status quo or default option” even when another option is more appealing.²²¹ Richard Thaler and Cass Sunstein have shown that people’s tendencies are shaped by certain psychological features of human decisionmaking that can induce them to make choices that diverge from their objective evaluation of the offer.

While states do not have psyches subject to these biases, they do have behavioral patterns, and the political economy literature suggests that they suffer an analogous status quo bias, which might shape

FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 22 (1991). The default, in other words, is appropriate because the parties’ failure to contract around it is evidence of their consent to a predictable option of the court’s choosing. As an illustration of this idea, in *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989), Professor Lea Brilmayer argues that in the conflict of law context, “[s]tate reliance on consent inferred from someone merely remaining in the state is particularly unrealistic.” *Id.* at 5.

²¹⁶ *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

²¹⁷ *Id.* at 589.

²¹⁸ See *Legislative Session Length*, NAT’L CONFERENCE OF STATE LEGISLATURES (last visited Mar. 1, 2015), <http://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx> [<http://perma.cc/P4WD-L835>].

²¹⁹ *Full- and Part-Time Legislatures*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/legislatures/full-and-part-time-legislatures.aspx> (June 1, 2014) [<http://perma.cc/33AP-KEK2>].

²²⁰ *Id.*

²²¹ THALER & SUNSTEIN, *NUDGE*, *supra* note 8, at 8.

which political preferences are expressed and which are not.²²² Empirical studies have shown that legislatures are quite reluctant to override existing laws. One study found that each incremental year that a policy remains in effect decreases the likelihood that it will be repealed.²²³ And recent empirical work suggests that Congress “rarely [legislatively] overrides judicial statutory decisions” even when it is clear that the Court misunderstood Congress’s intent.²²⁴ Scholars have offered several explanations for the legislative status quo bias, including legislative rules and procedures that make it difficult to place policy repeals on the legislative agenda,²²⁵ divided government, political polarization, and bicameralism;²²⁶ the desire of politicians to “safeguard their policies against attempts to undo the original agreement”;²²⁷ and the influence of outsiders on legislative agendas.²²⁸

Of course, not all state governments confront each of these law-making barriers, but we can hypothesize that at least some of these forces lower the likelihood that states will override the federal default even when the state’s constituents would prefer something different. What’s important is that congressionally imposed defaults and the federally prescribed procedures for altering them can shape the political process states use to either acquiesce in the congressional default or alter it.²²⁹ If we care, therefore, about state political processes — messiness and all — we cannot infer a will where none is expressly produced by that political process.

The Court has expressed a similar notion in its sovereign immunity jurisprudence. Congress often asks states to waive their sovereign immunity to enable better and more robust enforcement of cooperative

²²² Among political scientists, this status quo bias may also be called path dependence, a negative feedback mechanism, or structure-induced equilibrium.

²²³ Jordan Michael Ragusa, *The Lifecycle of Public Policy: An Event History Analysis of Repeals to Landmark Legislative Enactments, 1951–2006*, 38 AM. POL. RES. 1015, 1018 (2010).

²²⁴ Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 912 (2013).

²²⁵ John J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821, 822 (1999).

²²⁶ SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 81–83, 86–88 (2003).

²²⁷ Ragusa, *supra* note 223, at 1022.

²²⁸ *Id.* at 1032.

²²⁹ Here, again, there is a valuable analogy to contract law. In *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012), Professor Ian Ayres argues that “[a]ltering rules [can] artificially impede opt-out,” *id.* at 2045, serve normative values like transparency and redistribution, *id.* at 2062–63, and favor some classes of would-be default overrides while disfavoring others, *id.* at 2088 n.155. While demonstrating that these tactics could be employed by the federal government against the states is beyond the scope of this Article, developing the analogies between the behavioral psychology of individuals and the political economic tendencies of state institutions could be a fruitful avenue for further research.

programs. But like the choice to join a cooperative program in the first instance, these waivers must be “altogether voluntary.”²³⁰ So unless a state “voluntarily invokes”²³¹ federal jurisdiction — waiving its immunity by suing in federal court — it must make “a ‘clear declaration’ that it intends to submit” to federal jurisdiction as a defendant in order to properly waive its immunity.²³² In *College Savings Bank v. Florida Prepaid*,²³³ the Court addressed whether a state could make a “clear declaration” of its intent to waive immunity through its *actions* rather than its *words*. Alleging that Florida used false advertising in contravention of federal regulations, the bank argued that Florida “impliedly” or “constructively” waived its sovereign immunity by participating in a federally regulated activity. The Court disagreed, holding that state consent cannot be inferred through implied action, but must be directly expressed.²³⁴ There is simply too much noise in “constructive” waivers.

C. Representation

In my discussion of the anti-coercion and anti-commandeering rules in Part II, I argue that the Court’s description of “accountability” — often touted as a key federalism good — in fact reveals a deeper concern for the representative nature of states. Although the Court has only gestured at this important idea in its federalism doctrines, here I take up the broader consequences of consent procedures for the representativeness of state governments. The states, like the federal government, have complex representative structures, which include vertical accountability mechanisms (elections), horizontal accountability mechanisms (intragovernmental balancing of powers), and legal accountability mechanisms (required information disclosures and notice-and-comment requirements). By designating an actor or process through which states must register their consent to federal programs, the federal government minimizes the force of these mechanisms.

Some might not find this so worrying. It’s possible to think that if any elected official can be held accountable by the state’s electorate for making the wrong call on a federal offer, the state government is meaningfully subjected to accountability and the state’s democratic legitimacy is safeguarded. But this idea requires an overly simplistic understanding of representation. The notion that a government is properly representative whenever its decisions are subjected to elec-

²³⁰ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)).

²³¹ *Id.*

²³² *Id.* at 676 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)).

²³³ 527 U.S. 666.

²³⁴ *Id.* at 680.

toral accountability is contradicted by the Court's extensive jurisprudence on the balance of powers in the federal government.

In its cases on campaign finance, the legislative veto, the Appointments Clause, presidential powers, and judicial review, the Court articulates a view of representation that relies collectively on elections, the balance of powers, and legal requirements rather than any single mechanism alone. In *INS v. Chadha*,²³⁵ the Court explained that bicameralism and presentment are important structural accountability mechanisms without which Congress, though elected, would be unresponsive to its constituents.²³⁶ In *Edmond v. United States*,²³⁷ the Court emphasized that the "joint participation of the President and the Senate" in appointments was "designed to ensure public accountability."²³⁸ And in *Buckley v. Valeo*,²³⁹ the Court affirmed that each elected official contributed differently to the overall representativeness of the government — Congress by enacting bills, the President by signing or vetoing them, and the Senate by confirming appointees.²⁴⁰

These vertical and horizontal mechanisms of accountability are not unique to the federal government. The Court has recognized that the states use similarly complex government structures to actualize citizen interests. In *Alden v. Maine*,²⁴¹ Justice Kennedy powerfully summarized this idea: "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State"²⁴²

²³⁵ 462 U.S. 919 (1983).

²³⁶ *Id.* at 948 ("[The veto] establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design." (omission in original) (quoting THE FEDERALIST NO. 73, at 458 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888)) (internal quotation marks omitted)); *see also id.* ("The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide" (quoting *Myers v. United States*, 272 U.S. 52, 123 (1926)) (internal quotation marks omitted)).

²³⁷ 520 U.S. 651 (1997).

²³⁸ *Id.* at 660.

²³⁹ 424 U.S. 1 (1976) (per curiam).

²⁴⁰ *Id.* at 121 ("The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny.")

²⁴¹ 527 U.S. 706 (1999).

²⁴² *Id.* at 751.

Specifically, these complex structures serve two representative values. At a basic level, they serve the representative value of responsiveness: they tie the government to its constituents. But different mechanisms can connect the government to the people in different ways that emphasize different principles and tradeoffs. Accordingly, our selection of government structure is *itself* a political choice that represents a popular judgment about how the government should operate and what values its operation should vindicate. And each state has made a different such choice.²⁴³ Different structures recognize that political processes can be tuned to produce different results. Government structures that require various representatives to participate in the legislative process create more contestation, but perhaps fewer laws. Structures that vest substantial control in a fast-acting legislature may enact policies more rapidly, but could also hasten the rate at which those policies are overturned by future representatives. Thus, these structures are both a means to representative ends and a representative end in themselves — democratic choices that deserve independent respect and reverence.

Understood this way, when the federal government interferes with the configuration of state decisionmaking, it is undermining representation in both its means and its ends capacities. To believe that the accountability of a single decisionmaker — whether a legislature, a governor, or an agency — is sufficient to make the corresponding decision truly representative would be to ignore the architecture of accountability created in each state’s constitution.

D. *Checking Function*

Federalism’s checking function is perhaps its most widely embraced value. In *Gregory v. Ashcroft*,²⁴⁴ the Court characterized the checking function as “[p]erhaps the principal benefit of the federalist system.”²⁴⁵ As conventionally understood, the claim is that the diffusion of power to the states protects the people’s liberty by guarding against the federal government’s overreach.²⁴⁶ There are three ways our federalism serves this checking function. First, it safeguards certain state-level policy areas and governing decisions from the federal

²⁴³ For an overview of the vast differences in governmental structure across states, see ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES, at xxvi–xxxi (2d ed. 2006); BOOK OF THE STATES, *supra* note 92.

²⁴⁴ 501 U.S. 452 (1991).

²⁴⁵ *Id.* at 458.

²⁴⁶ See *NFIB*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.’ Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.” (quoting *New York v. United States*, 505 U.S. 144, 162 (1992))).

government's reach.²⁴⁷ Second, when the federal government wants to extend its regulations into areas traditionally occupied by the states, it requires the federal government to woo the states into joining up voluntarily.²⁴⁸ Finally, it structures the federal political process in a way that allows state representatives to block acts of federal overreach at their source — in the chambers of the House and Senate. Intrusive consent procedures could throw a wrench in each of these embodiments of the checking function.

First, consent procedures can be used to expand federal power in several ways. They can be used to nudge the states into joining programs they might otherwise avoid. But they also expand the federal government's power by allowing it to shape not only what policies the states pursue, but also how they structure their politics.

Second, although consent procedures could be used to ensure that states have a meaningful choice about whether to accept federal funds or join cooperative programs, as Part II demonstrates, state consent pursuant to a federally dictated consent procedure stretches the concept of voluntariness. Concretely, the more flexibility the federal government has to opportunistically use consent procedures to maximize the likelihood of state participation or of state acquiescence to the federal government's preferred terms,²⁴⁹ the thinner the barrier "consent" poses to federal power concentration.

Finally, the checking function is actualized when political choices that impact the balance of federal-state power are subjected to the federal political process, in which the states are represented. For so-called "process" federalists, this means guaranteeing that "important governmental decisions actually . . . [are] made through channels in which the states are represented," like Congress, rather than federal agencies, which are not directly accountable to state constituencies.²⁵⁰ And it means giving "defenders of the states on Capitol Hill . . . adequate warning when pending legislation may affect the interests or authority of state governments," so that they can mobilize to protect the diffusion of power to the states.²⁵¹ But because consent procedures are

²⁴⁷ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

²⁴⁸ See *Printz v. United States*, 521 U.S. 898, 922 (1997) ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service — and at no cost to itself — the police officers of the 50 States.").

²⁴⁹ In other work, I have analyzed the recent implementation of the exchange provisions of the Affordable Care Act as a case study of precisely this type of state disaggregation by a federal agency. See generally Bridget A. Fahey, *Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act* (Oct. 1, 2014) (unpublished manuscript) (on file with author).

²⁵⁰ Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358–59 (2001).

²⁵¹ *Id.* at 1359.

often formulated in agencies rather than in Congress, consequential federalism decisions are made without the direct input — and checking effect — of the states' representatives in Congress. For example, even though the Affordable Care Act was one of the most publicized federal-state cooperative ventures ever, to my knowledge there was no public discussion of its consent procedures as it moved through Congress.

E. Energy, Contestation, and Voice

It has become increasingly common for federalism scholars to challenge the historical value placed on state sovereignty and autonomy, and instead reinterpret the states as sources of voice, contestation, and dynamism in our otherwise easily flummoxed national political system. An early group of scholars began making these arguments decades ago²⁵² and a new wave of theorists has further infused them with vibrancy by branding their federalism a “new nationalism.”²⁵³ The goods of this federalism as nationalism are not autonomy and sovereignty, but energy, contestation, and voice. By giving voice to underheard communities and by forging new ways for citizens to participate in our complex project of governance, these scholars argue that the states make our *national* politics livelier and more vibrant.

This nationalist federalism is facilitated by integration between state and federal political goals and regulatory projects, which allows the states to use their roles in the implementation of federal initiatives to advocate for and actualize dissenting and otherwise unrepresented views. This school takes on thinkers who cast states as sovereign political units, on the one hand, and those who describe them as devoted partners, on the other. They contend that thinking about states as sovereigns with spheres of exclusive regulatory jurisdiction protected from federal intervention risks undermining actual power by freezing

²⁵² See, e.g., Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY 363, 367 (James E. Fleming & Jacob T. Levy eds., 2014).

²⁵³ See *supra* notes 28-37 and accompanying text; see also Bulman-Pozen & Gerken, *supra* note 22, at 1258 (arguing that “the state’s status as servant, insider, and ally might enable it to be a sometime dissenter, rival, and challenger”); Gluck, *supra* note 20; Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 610 (2008) (“Different actors within state governments may speak with different voices when they address different constituencies. And, particularly when it comes to unauthorized immigration, the officials who run governmental subentities, in cooperation with private partners, may take positions in tension with federal objectives.”); *id.* at 617 (“Local participation in matters thought to be of national significance can have generative effects, helping to resolve issues incrementally in the absence of national consensus, and therefore protecting the varied interests of parties who have yet to see their way to national consensus.”).

them out of federal programs in areas ripe for collaboration.²⁵⁴ At the same time, imagining states as fully “cooperative” actors who agree to be loyal devotees to national goals is inconsistent with political reality. Empirically, states do not blindly follow — they mold and shape federal programs from the inside.²⁵⁵ Professors Gerken and Bulman-Pozen have advocated that we instead strive to engage the states as participants in national programs, while at the same time making space for each state to be a “sometime dissenter, rival, and challenger.”²⁵⁶ Professor Abbe Gluck has outlined the ways in which innovative federal statutes have created new opportunities for the states and federal government to collaborate.²⁵⁷ And Professor Cristina Rodríguez identifies rich regulatory overlap even in areas like immigration that have been traditionally reserved for the federal government alone.²⁵⁸

But, as I argued earlier, the federalism goods of this “new nationalism” cannot be achieved by complete integration; they require a kind of integration that also preserves multiplicity. For the new nationalists, *some* amount of music is too much music — the notes blend together, the melody is lost, and the audience is left in a fog of dissonance. But well-formulated consent procedures can help create just the integrated multiplicity that I suspect the new nationalists are after.

Bulman-Pozen and Gerken have critiqued the Court’s anti-commandeering rule and its voluntariness requirement for closing rather than opening pathways for state influence. Commandeering, they say, makes states attractive associates, while the anti-commandeering principle encourages the federal government to go it alone in policy implementation. And programs that let states voluntarily opt in or out, they argue, suffer their own deficiencies: these schemes “allow states to opt out without raising any objection to the merits of [the] federal policy.”²⁵⁹ States may have greater choice where the federal government must secure their voluntary participation, but they have fewer occasions to exercise their voice. This concern echoes

²⁵⁴ Professor Neil Siegel argues that the anti-commandeering rule increases the likelihood of outright preemption, resulting in net loss, rather than gain, in state regulatory power. *See* Siegel, *supra* note 138, at 1634 (“[A]nticommandeering doctrine undermines federalism values when the (clearly constitutional) alternative of preemption is reasonably available and the commandeering ban thus places states in danger of losing regulatory control in a greater number of future instances.”).

²⁵⁵ *See generally* Bulman-Pozen & Gerken, *supra* note 22 (citing state resistance to federal policy through their formulations of state-based components of welfare, environmental, and national security policies).

²⁵⁶ *Id.* at 1258.

²⁵⁷ Gluck, *supra* note 20.

²⁵⁸ Rodríguez, *supra* note 253, at 610 (noting the need for the federal government to “tolerate tension between federal objectives and state and local interests”).

²⁵⁹ Bulman-Pozen & Gerken, *supra* note 22, at 1297.

the worry I describe above that the moment of consent for most federal programs is veiled and obscured — a low-salience exercise hidden in a mire of regulatory language.

But the solution is not to jettison consent and voluntariness completely. It's to make the processes of consent more robust and politically rich. Consent procedures that designate high-volume agents, like governors, or highly specialized agents, like agency officials, are probably less likely to spur the kind of state-level political debate that would either "raise . . . objection[s] to the merits of [the] federal policy" or rigorously justify the state's embrace of the program.²⁶⁰ Integration that allows the federal government to so smooth the processes of state consent that this political energy is lost should be concerning to the new nationalists and the values they advance. Judicial rules that guarantee that the federal government cannot use consent procedures to bypass vibrant state political processes could be one example of new nationalist "rules of engagement."

IV. CONSENT PROCEDURES GOING FORWARD

A. For Congress: Designing Consent Procedures

One of my central descriptive claims in this Article is that Congress does not engage the states as neutral counterparties in federal-state negotiations. Through consent procedures, Congress takes a position on how states should conduct the internal processes that yield decisions about whether to apply state money, administrators, capital, and political legitimacy to federally defined goals. That is not to say that we should stop using consent procedures entirely. Some form of consent procedure may always be pragmatically necessary, lest federal agencies find themselves with a heavy load of conflicts to mediate between would-be state consenters. The forward-looking question for Congress is how to use (and, depending on one's federalism posture, how to harness) this important feature of cooperative programs.

I suggest above that some consent procedures may be sufficiently intrusive to merit judicial intervention under existing doctrine. Scholars have long debated when courts should and should not police apparent violations of the constitutional balance between state and federal powers. I take no position on that broader question in this Article. My goal is to think about how existing constitutional doctrine could — and perhaps will — be applied to consent procedures going forward. But I also want to argue that consent procedures at present represent a failure of the federal political process ripe for a *political* so-

²⁶⁰ *Id.*

lution. Indeed, a political solution to the consent-procedure problem may have much to recommend it. Setting aside the usual arguments contesting the judicial enforceability of federalism norms,²⁶¹ the evolving nature of federal-state interaction in this century will inevitably destabilize the normative assumptions that have long guided our federalism, and the political branches will play an important role in re-fashioning federalism's normative character for a new time.

Though consent procedures can substantially impact the form and function of cooperative programs, as far as I can tell, state delegates to the House and Senate pay them little attention. On the one hand, the variation and low salience of consent procedures could be the product of the failure among state representatives in Congress to appreciate the important role these procedures play in shaping state consent. On the other, Congress could be opportunistically formulating these procedures to advance federal policies by ensuring that agencies can collaborate with willing actors and bypass loci of resistance within the states. Either way, more public information about how consent procedures function and how they impact state choices is needed.

In the near term, interested advocates could develop oversight devices for tracking consent procedures as statutes are being written and ensuring that they receive the publicity they deserve. And interested members of Congress could take steps to guard against worrying consent procedures by omitting them from the statutes they support. Congress could also take steps to exert greater oversight over administrative agencies that create consent procedures either by specifying such procedures in the statutory text (rather than delegating the power to do so to the relevant agency), or by instituting more restrictive guidelines on agency development of consent procedures. Congress could even go one step further and amend the Administrative Procedure Act to prohibit agencies from seeking or accepting certain forms of consent from the states.

B. For the Executive: Managing Consent Procedures

Even without congressional action, there are several steps that the President and executive agencies could take to address some of the issues raised in this Article. The President could insert safeguards into Executive Order 13,132²⁶² — the “federalism” executive order — which was designed to ensure that agencies consider the federalism

²⁶¹ For arguments that political solutions are the best-fit solutions to federalism problems, see Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552 (1977); and 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 (1954).

²⁶² Exec. Order No. 13,132, 64 *Fed. Reg.* 43,255 (Aug. 10, 1999).

implications of their choices. Originally issued by President Bill Clinton in 1999, but still in effect today, the order requires agencies to take a series of steps whenever they pass regulations that implicate state interests, including “grant[ing] States the maximum administrative discretion possible”²⁶³ and “ensur[ing] meaningful and timely input by State and local officials.”²⁶⁴ Regulations of the consent process seem ripe for inclusion in future iterations of the order.

Using broad grants of authority, some agencies have already established general guidelines to govern state consent to those agencies’ cooperative programs. The Department of Education, for instance, has a set of regulations specifying “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.”²⁶⁵ These regulations hardly required a particular grant of power from Congress but were instead passed pursuant to the Secretary of Education’s generic authority to “prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.”²⁶⁶

These Department of Education regulations delicately thread the needle between respecting the internal operations of state governments and creating a manageable process for states to accept and renew the voluminous number of state education grants the federal government issues each year. The regulations require any state plan submitted for the purposes of a federal education grant to include several certifications ensuring that the appropriate party has the power to consent to the grant and take the actions necessary to fulfill its conditions.

Any plan submitted by a consenting state must certify that it has been “submitted by the State agency that is eligible to submit the plan,” “[t]hat the State agency has authority under State law to perform the functions of the State under the program,” “[t]hat the State legally may carry out each provision of the plan,” “[t]hat all provisions of the plan are consistent with State law,” “[t]hat a State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the plan,” “[t]hat the State officer who submits the plan, specified by title in the certification, has authority to submit the plan,” “[t]hat the agency that submits the plan has adopted or otherwise formally approved the plan,” and “[t]hat the plan is the basis for State operation and administration of the program.”²⁶⁷ These certifications encourage the

²⁶³ *Id.* § 3(c), 64 Fed. Reg. at 43,256.

²⁶⁴ *Id.* § 6(a), 64 Fed. Reg. at 43,257.

²⁶⁵ 34 C.F.R. pt. 80 (2014).

²⁶⁶ 20 U.S.C. § 3474 (2012).

²⁶⁷ 34 C.F.R. § 76.104(a)(1)–(8) (2014). The regulations do require that the documents be publicly disclosed, but leave significant discretion regarding how the states do that. *See id.* § 76.106

states to meaningfully discuss and flesh out the powers and authority of the agency that will manage the state's negotiations with the federal Department of Education.

More regulations of this form could help avoid serious federal incursions into state authority like those discussed in Part III, while also allowing administrators to experiment with ways to more thoughtfully balance state interests and regulatory efficiency for high-volume grants. At a minimum, agencies should write consent procedures with purpose and publicize them for all state officials to view — whether those officials are involved in the procedure or not.

C. For the Courts: Interpreting Consent Procedures

In Part II, I discuss some of the ways in which consent procedures could violate the rules of engagement the Court has established for federal-state collaborations. In addition to analyzing the issues that consent procedures could raise, I have also argued that consent procedures highlight negative spaces in the Court's current federalism jurisprudence — federalism questions without ready doctrinal answers. Litigation over consent procedures could provide the Court with an opportunity to begin filling in some of these empty spaces, which I bundle below into four sets of questions.

First, under what circumstances should courts attribute the actions of state officials or institutions during the negotiation process to the “state” more broadly? Is it necessary that the “state” speak with a unified voice or does disaggregation also preserve our constitutional federalism structure? These are deep questions at the intersection of political philosophy, federalism doctrine, and contract theory, and they do not have easy answers. Further complicating them are the variety of other legal contexts in which questions arise about how and when a state can be disaggregated into its component parts.

Three examples come immediately to mind. The Compact Clause allows states to form binding compacts with other states, with congressional approval.²⁶⁸ These compacts raise some of the same questions as federal-state cooperative agreements. The Colorado River Compact of 1922,²⁶⁹ for instance, was initiated by the legislatures of seven states, but negotiated by commissioners appointed by those states' gover-

(“State documents are public information. A State shall make the following documents available for public inspection: (a) All State plans and related official materials. (b) All approved subgrant applications. (c) All documents that the Secretary transmits to the State regarding a program.”).

²⁶⁸ See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .”).

²⁶⁹ E.g., COLO. REV. STAT. § 37-61-101 (2014); UTAH CODE ANN. § 73-12a-2 (LexisNexis 2012); see also Act of Aug. 19, 1921, Pub. L. No. 67-56, 42 Stat. 171 (granting congressional approval for the compact).

nors.²⁷⁰ A quick survey of other interstate compacts suggests that this is a common model.²⁷¹ But could two governors form a compact? Two state agencies? Who decides? Congress could presumably decline to approve a compact it felt was insufficiently representative of the states' constituents, but is its approval power constitutionally proscribed? If so, how?

The Eleventh Amendment similarly has a dog in the disaggregation fight.²⁷² A staple of the Eleventh Amendment's sovereign immunity jurisprudence is the so-called *Ex parte Young* fiction,²⁷³ which allows state officials to be sued in federal court for injunctive relief, even when it's clear that suing the official is tantamount to suing the state.²⁷⁴ The so-called "fiction" is the (perhaps illusory) distinction between the state and the state's officials. The *Young* fiction threads a fine needle on the disaggregation issue by permitting suits consistent with the Eleventh Amendment against state officials, while also seemingly recognizing that such suits are indistinguishable from suits against the state itself. Further thinking about when state officials actually do speak for their respective states and when they do not could make this needle even trickier to thread.

Last but not least, *Hollingsworth v. Perry*²⁷⁵ spurred a lively debate between the majority and the dissent about the conditions under which different state actors and institutions have Article III standing to defend state laws in federal courts. In *Hollingsworth*, the United States District Court for the Northern District of California invalidated a California referendum defining marriage; this decision was affirmed by the Ninth Circuit.²⁷⁶ California's political officials — its governor, attorney general, and others charged with implementing the law — opted not to appeal the decision to the Ninth Circuit or the Supreme Court.²⁷⁷ In their stead, a group of citizens, who were the "official proponents" of the referendum under California election law, sought and won certiorari.²⁷⁸ The Court held that the citizen-proponents lacked Article III standing to defend the law because they

²⁷⁰ See UTAH CODE ANN. § 73-12a-2.

²⁷¹ See, e.g., Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943); Rio Grande Compact, Pub. L. No. 76-96, 53 Stat. 785 (1939).

²⁷² U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

²⁷³ See *Ex parte Young*, 209 U.S. 123 (1908); see also *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1649 (2011) (Roberts, C.J., dissenting) (citing the "*Young* fiction").

²⁷⁴ See *Young*, 209 U.S. at 159-60; see also Henry Paul Monaghan, *The Supreme Court, 1995 Term — Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 126-27 (1996).

²⁷⁵ 133 S. Ct. 2652 (2013).

²⁷⁶ *Id.* at 2660.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

“are plainly not agents of the State” since “the most basic features of an agency relationship,” as defined by the Restatement (Third) of Agency, “are missing here.”²⁷⁹

An interesting group of dissenters — Justice Kennedy writing, joined by Justices Thomas, Alito, and Sotomayor — contended that because California law permits the proponents of a referendum to “appear in court and assert the State’s interest in defending an enacted initiative,” it was not the Court’s place to decide that those citizens were not viable state representatives for the purposes of federal litigation.²⁸⁰ Just as the executive branch uses consent procedures to single out state spokespeople, the Supreme Court in *Hollingsworth* used its own theory of representation, rooted in the private law of agency rather than California’s constitutional structure, to select (and *deselect*) the state’s representatives.

Justice Kennedy saw the error of that way: “Article III does not require California, when deciding who may appear in court to defend an initiative on its behalf, to comply with the Restatement of Agency or with this Court’s view of how a State should make its laws or structure its government.”²⁸¹ If you believe that the states are independent decisionmaking bodies — “Republican Form[s] of Government”²⁸² — there seems little basis for using the Restatement of Agency or any other source beyond the state’s own framework of government to identify who represents the state.

Second, can procedural manipulation be “coercive”? If it can be, how do we tactically define the doctrinal concepts of “coercion” and “voluntariness” to capture the procedural harms that consent procedures can impose? Thaler and Sunstein have argued that “nudges” are less coercive than outright directives, but are they nonetheless too coercive for federal-state interactions that are meant to be “voluntary”? How, moreover, do procedural forms of influence compare to substantive forms of influence? How do we weigh the coercive effect of an “offer” that asks the state to spend money it otherwise would have preferred to save against one that asks it to alter its political process to accommodate the federal government?

Third, are federal cooperative programs contracts, treaties, or some other form of intergovernmental agreement? Gluck has identified this as one of the leading doctrinal questions spurred by the exponential rise of federalism statutes.²⁸³ Consent procedures put particular pres-

²⁷⁹ *Id.* at 2666.

²⁸⁰ *Id.* at 2668 (Kennedy, J., dissenting).

²⁸¹ *Id.*

²⁸² U.S. CONST. art. IV, § 4.

²⁸³ Gluck’s pithy phrasing (and punctuation) is exactly on point when she asks: “Is Spending Clause Legislation ‘Legislation,’ ‘Contract,’ or Both?” Gluck, *supra* note 22, at 2030.

sure on this question because they both reinforce the intuition that federal-state cooperative agreements are like contracts and highlight the limits of contract law for addressing the distinctive features of states as offerees.²⁸⁴ Indeed, the complications of applying strict contract law doctrines to federal-state agreements extend beyond constitutional issues. Courts have departed in other important ways from contract law in run-of-the-mill reviews of governmental contracts with private parties — departures that could reasonably extend to federal-state “contracts” as well.²⁸⁵

Fourth, how should federalism canons of statutory interpretation guide the Court’s reading of cooperative agreements? Just last term, the Court disposed of a case that was widely expected to be a federalism blockbuster — *Bond v. United States*²⁸⁶ — by modestly and uneventfully reading the statute to dodge the case’s meatiest federalism questions.²⁸⁷ The “federalism canons” could be an appealing way for courts to confront issues raised by consent procedures as well. For instance, Congress often delegates authority to prescribe consent procedures to administrative agencies through provisions instructing the states to consent “at such time, in such form” as the Secretary may specify.²⁸⁸ Courts could employ the federalism canon to interpret statutes in a way that limited the “times” and “manners” agencies could “specify” to those “consistent with principles of federalism inherent in our constitutional structure.”²⁸⁹ Courts convinced that the analysis in Part III raises plausible constitutional concerns could interpret Congress’s “time” and “manner” language to preclude consent procedures that single out specific state officials or require states to use processes

²⁸⁴ See *supra* section II.D, pp. 1589–602.

²⁸⁵ For example, federal courts have been disinclined to apply the equitable rule permitting the enforcement of contracts made by agents acting only with “apparent authority.” See RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006). Federal courts have found that “[a]pparent authority . . . generally will not suffice to bind the government.” *Thomas v. INS*, 35 F.3d 1332, 1339 (9th Cir. 1994). Instead, in contracts with the government, “the burden rests with the party asserting the existence of a contract with the United States to determine whether the person with whom it dealt had actual authority to enter into the contract on behalf of the Government.” *Perri v. United States*, 53 Fed. Cl. 381, 394 (2002), *aff’d*, 340 F.3d 1337 (Fed. Cir. 2003). If courts extended this exception to federal-state “contracts,” it would be the burden of the federal government to discern whether the state consent agent possessed actual authority.

²⁸⁶ 134 S. Ct. 2077 (2014).

²⁸⁷ *Id.* at 2093 (declining to adopt “the most sweeping reading” of a chemical-weapons statute, a reading that “would fundamentally upset the Constitution’s balance between national and local power”).

²⁸⁸ See, e.g., 42 U.S.C. § 13892 (2012) (grants to support violent crime control); see also *id.* § 13951-4(b) (Medicare grants for rural hospitals); *id.* § 3797dd (grants to evaluate prison educational quality and methods); *id.* § 14662(a) (grants to facilitate reporting missing persons).

²⁸⁹ *Bond*, 134 S. Ct. at 2088.

not expressly sanctioned by state law.²⁹⁰ This approach could mitigate the need for detailed pronouncements on these constitutional mediations, but would nonetheless require the courts to acknowledge the high-level questions and concerns raised here.

D. For the States: Resisting and Accommodating Consent Procedures

The easiest way for the states to shape consent procedures is through their representatives in Congress. But states have other options as well. To resist the effects of *agent*-based consent elements, states can enact their own rules and regulations requiring any state official who consents to a federal program to first follow a state-crafted decisionmaking process. Consent agents could be required, as a matter of state law, to disclose the existence of the grant and the agent's role in the consent process, to seek comment from relevant stakeholders, and to collaborate with other officials to formulate a counteroffer, if relevant. The state could also enact a more general rule providing that any federally designated consent agent is merely a spokesperson who is not empowered to bind the state as a legal agent; the state actor with actual power must take all relevant legal steps prior to the consent agent's action. Finally, state officials could contest the "consent" offered by its agents — as did Mississippi Governor Phil Bryant and Insurance Commissioner Mike Chaney.²⁹¹

The states' options are more limited with regard to action-intensive consent procedures because these procedures impose an *affirmative* requirement that the state cannot circumvent without falling short on the necessary prerequisites of consent. In these cases, a state's best option may be rejecting the grant as a way to ensure that future Congresses internalize the costs of using intrusive consent procedures. If Congress cares about its programmatic objectives, a state's unwillingness to participate because it objects to the consent process may provide just the nudge Congress needs to take consent more seriously.

²⁹⁰ Hills has advocated an interpretive default rule in a related context to achieve the opposite goal. Hills has described the ways in which the federal government uses conditions on the implementation of federal grants to empower certain state instrumentalities and disempower others, by, for instance, requiring that certain agencies or officials control how federal funds are spent. In this context, he has advocated a default rule permitting this kind of disaggregation on the grounds that it "might produce . . . efficiency by allowing the federal agency to pit the governor and legislature against each other, lending weight to one or the other institution depending on their fidelity in implementing federal policies." Hills, *supra* note 15, at 1259. While this kind of disaggregation-friendly default rule may be available to courts construing the implementation conditions, my analysis in Part II suggests that disaggregation might be more concerning in the consent context, calling for a different — even the inverse — default rule.

²⁹¹ See *supra* notes 5–7 and accompanying text; see also Abby Goodnough, *Mississippi: State Health Exchange Is Disallowed*, N.Y. TIMES, Feb. 8, 2013, <http://www.nytimes.com/2013/02/09/us/mississippi-state-health-exchange-is-disallowed.html> (describing the conflict between Bryant and Chaney).

CONCLUSION

What does “consent” mean in our distinctive intergovernmental policymaking processes? This question deserves special attention because of its capacity to shape — in dramatic and nuanced ways — how the states and federal government work together toward joint policy ends. But it also brings into focus a set of theoretical questions that probe our foundational assumptions about what states *are*, questions that existing theories of federalism are not fully equipped to interrogate.

The desirability of the consent procedures on offer today depends on what we think is distinctive about the states, what we think their purpose is, and what features of their operation must be protected in order for them to continue functioning in these fundamental ways.

The answers to these questions have proven elusive across the schools of federalism. While process theorists want the “states” to be represented in the federal political process, we don’t know what (and who) counts as the state. Is it enough for the state’s congressional delegation to represent the “state,” or should the federal political process provide opportunities for other state officials to participate as well — perhaps, for instance, as givers of consent to the programs fashioned by the states’ representatives in Congress? And while the “new nationalists” want voice and contestation from within federal programs, they assume that the individual state-level agents of this political energy act in democratically legitimate ways, without articulating why and under what conditions this is so. By highlighting what happens when we disaggregate the states into individual officials and processes, consent procedures force us to probe the legitimacy of individual state officials who act outside the states’ “normal” constitutional and political processes.

Most fundamentally, consent procedures add energy to conversations about what states are and why we should care about them. In this Conclusion, I want to outline a high-level conception of the “states” that may help explain why they deserve our embrace.

Consent procedures ask us to consider whether our federal system should view each state as a unified political body that acts with collective volition and “speaks” with a single voice, or as a disaggregated collection of distinct and separately representative officials, organs, and processes that could each conceivably “speak” for the underlying constituency.

The answer to this question depends on the role states ought to play in our system of government. A thin conception of states imagines them as nodes of delegated authority created by the central gov-

ernment to execute policy programs that require decentralized implementation, as Professors Edward Rubin and Malcolm Feeley provocatively posit.²⁹² For Rubin and Feeley, the states have no direct democratic line to the people; they have representative authority only by virtue of the power shared with them by the federal government. Under this conception of the states, what I call “procedural harms” are not harms at all.

A thicker conception of states — and the one I embrace — sees them as uniquely *political* bodies that serve as independent sources of preference actualization for the constituencies they represent. In this view, the states have direct, rather than derived, representative authority. This conception of the states is buttressed by their basic structural features. Like the federal government, every state is *constitutionally* structured — the people were the architects of the state governments, just as they were of the federal government. This is important because it means that every time those structural gears turn — through run-of-the-mill elections, legislative sessions, and intragovernmental bargaining — the people’s choice to configure the government in the way they did is simultaneously honored and actualized.

Each state’s constitution in turn provides a framework within which the state’s constituents can guide political contests and author political actions. They do this by mediating how and when citizens participate in government,²⁹³ distributing different forms and exertions of political power among the state’s constitutionally prescribed representative offices,²⁹⁴ and establishing rules and procedures for state-level decisionmaking.²⁹⁵

²⁹² See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 944 (1994).

²⁹³ For instance, many state constitutions include rules pertaining to who can vote and when elections are held, who is eligible to run for elected office, and other protected modes of citizen participation like petition and instruction.

²⁹⁴ Like rules establishing different branches of government, specifying their respective jurisdictions, and regulating how those branches interact. See MADDEX, *supra* note 243, at xxvi–xxxi, for a description of variations in state governmental structures.

²⁹⁵ For instance, most states have bicameral legislatures like the federal government, see BOOK OF THE STATES, *supra* note 92, at 54 tbl.3.1, http://knowledgecenter.csg.org/kc/system/files/3.1_2013.pdf [<http://perma.cc/2QV9-UBTG>], and rules requiring laws to be enacted by both houses and then presented to the “chief executive officer” for her approval, see *id.* at 97–99 tbl.3.16, http://knowledgecenter.csg.org/kc/system/files/3.16_2013.pdf [<http://perma.cc/24VY-XV54>]. Other decisionmaking rules could arise in the context of state legislative processes. See, e.g., *id.* at 100–01 tbl.3.17, http://knowledgecenter.csg.org/kc/system/files/3.17_2013.pdf [<http://perma.cc/4AZD-FNPS>] (comparing state budgeting processes); *id.* at 97–99 tbl.3.16 (comparing state veto override processes); *id.* at 94–96 tbl.3.15, http://knowledgecenter.csg.org/kc/system/files/3.15_2013.pdf [<http://perma.cc/3WB7-95PB>] (comparing bill introduction processes). A state’s unique decision-making process could also be the product of its allowance for citizen involvement through petitions and referendums. MADDEX, *supra* note 243, at xv (“A majority of the states now provide some type of direct democratic procedures . . .”).

Conceiving of state governments as frameworks for decisionmaking in this politically and structurally thick way helps us appreciate the stakes of consent procedures and the harms of procedural interference. The careful configuration of state political structures and processes gives states what some democratic theorists have called a “unity of agency,” or the ability of diverse groups of people to act as a normatively legitimate collective agent.²⁹⁶

One way that groups achieve this status is by establishing democratic decisionmaking processes that produce results that group members feel are legitimate, even if they do not embody the policy that each member would have independently chosen. This is precisely what state political processes do. But disaggregating the state from *without* in the way that some consent procedures do means unsettling the processes that allow the state to act as a normatively legitimate decisionmaking agent in the first instance.

If we take seriously the importance of the states’ political structure and processes — their infrastructures of representation — consent procedures have the potential to dramatically diminish the representativeness of states. This, of course, is a theoretical claim whose full development is beyond the scope this Article. My more modest goal here is simply to suggest that consent procedures ask us to think about how the states function as collectivities — a capacity in which they operate whether or not they possess sovereign jurisdiction — and what we win and lose when we treat them as unified wholes or disaggregated parts.

²⁹⁶ E.g., Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTL. J. LEGAL PHIL. 185, 185 & n.3 (2000) (citing Christine M. Korsgaard, *Personal Identity and the Unity of Agency: A Kantian Response to Parfit*, 18 PHIL. & PUB. AFF. 101, 119 (1989)).