

## STATUTORY FEDERALISM AND CRIMINAL LAW

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*Federal law regularly incorporates state law as its own. And it often does so dynamically so that future changes to state laws affect how federal law will apply. For example, federal law protects against deprivations of property, but states largely get to define what “property” is. So when a state changes its property law, it automatically influences the effect of federal law. This interdependence mediates the tension that would otherwise arise when regulations from different governments overlap.*

*This Article is the first to identify how rare meaningful use of dynamic incorporation is in criminal law and also how this scarcity affects that law. With some notable exceptions, Congress ordinarily acts alone in criminal law. But using dynamic incorporation more often would redress two problems: the political inertia that makes reforming criminal laws exceptionally difficult and the limited accountability officials face for their enforcement decisions.*

*Marijuana laws provide a compelling example. Federal law flatly prohibits all marijuana use. But forty-six states now have laws that conflict with federal law, and ninety-three percent of Americans believe that medicinal marijuana should be lawful. The only legislation Congress has managed to pass in response to this conflict makes heavy use of dynamic incorporation. This example and others suggest that dynamic incorporation reduces congressional inertia in criminal law. What’s more, dynamic incorporation creates additional flexibility that prevents these kinds of conflicts from arising in the first place.*

*Dynamic incorporation also furthers separation-of-powers values. Local and federal enforcement officials have created a relationship that makes local officials a critical part of federal enforcement. This relationship is efficient, but it also enables local officials to evade state law constraints. Local officials can use this ability to, for example,*

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worsen sentencing disparity. Dynamic incorporation rebalances power by giving state legislatures the opportunity to exercise greater oversight of enforcement discretion, enhancing enforcement accountability.

Federalism scholars have overlooked the most potent consequences of dynamic incorporation. Traditional federalism focused on identifying and defining the separate spheres of federal or state influence. And national federalism has focused on how states empower the federal government or shape policy by helping administer federal policies or programs. But this scholarship has missed the important consequences that occur when Congress enables states not only to administer federal programs or policies, but partly to define the existence and scope of those programs or policies—consequences that have particular potency in criminal law.

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## INTRODUCTION

In the aftermath of an enormous expansion in federal reach, a system of dual federal and state regulation now governs most major issues. But in many areas, Congress has not preempted state law. It instead has engaged in a form of federalism—statutory federalism—that enables state law to influence how and when federal law applies. The tax code and the Social Security Act, for example, provide federal benefits for married persons, but state law primarily determines who is married.<sup>1</sup> Federal law protects against deprivations of property, but states largely define what “property” is.<sup>2</sup> Even bankruptcy law, which constitutionally must be “uniform,”<sup>3</sup> has enormous regional variance because state law determines whether a debt exists.<sup>4</sup>

In these and other areas, federal law depends on application of state law and thus “incorporates” state law. And this incorporation often is “dynamic”: federal law automatically changes as the incorporated state laws are amended. The Constitution, for example, protects against depriving persons of forms of property that are modern, not only those forms that existed when the relevant constitutional provisions were ratified.

<sup>1</sup> E.g., 42 U.S.C. § 416(b), (f), (h) (2012) (defining “wife,” “husband,” and “married” by referencing state law as construed by state courts).

<sup>2</sup> Akhil Reed Amar, Foreword: Lord Camden Meets Federalism—Using State Constitutions to Counter Federal Abuses, 27 Rutgers L.J. 845, 854–55 (1996) (“Property is often—though admittedly not always—a *state* law concept, and one that changes over time. Thus, the compensation clause will indeed vary from state to state and year to year as the state-law tinged concept of property itself varies.”); see also *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944–45 (2017) (narrowly ruling that some undefined limits constrain the ability of states to redefine property).

<sup>3</sup> U.S. Const. art. I, § 8.

<sup>4</sup> Michael C. Dorf, Dynamic Incorporation of Foreign Law, 157 U. Pa. L. Rev. 103, 144 (2008).

Dynamic incorporation eases the tension that would otherwise arise when different governments issue regulations that overlap. Its critical importance becomes apparent from those instances where it is not used. Marijuana law provides a striking example. State and federal marijuana laws are in stark conflict precisely because Congress has not created interdependence between those laws. As states have passed competing laws, those laws—unlike statutes using dynamic incorporation—have had no effect on when or how federal law applies.

The scholarship has overlooked the importance of dynamic incorporation, both in federalism and in criminal law. Federalism scholarship has not yet understood the relationship created when Congress enables state legislatures to determine how and when federal law will apply. Indeed, as Professor Abbe Gluck points out, the incentives for dynamic incorporation have remained “almost entirely unrecognized.”<sup>5</sup> Criminal law scholarship is similar. One scholar has discussed some drawbacks to federal reliance on state law.<sup>6</sup> But criminal law scholarship has not yet recognized that meaningful use of dynamic incorporation is rare in federal criminal law—at least, it is rare in those statutes that are routinely enforced.<sup>7</sup>

This Article fills these gaps. It explains how dynamic incorporation expands upon the framework of “national federalism” often discussed by Professors Heather Gerken and Abbe Gluck—that is, statutory instead of constitutional federalism. It explains the consequential importance of dynamic incorporation and the incentives for using it. And then, focusing on criminal law, this Article establishes that Congress’s decision to enact criminal laws that overlap substantially with state law but not to create substantive interdependence between those regimes generates two serious problems. Greater use of dynamic incorporation would reform criminal law in two ways.

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<sup>5</sup> Abbe R. Gluck, *Our [National] Federalism*, 123 *Yale L.J.* 1996, 2008 & n.45 (2014) [hereinafter *Gluck, Our [National] Federalism*].

<sup>6</sup> Wayne A. Logan, *Creating a “Hydra in Government”*: Federal Recourse to State Law in Crime Fighting, 86 *B.U. L. Rev.* 65, 74, 84–101 (2006).

<sup>7</sup> Some exceptions exist. Federal law considers state law for sentencing, but interdependence between the state and federal statutes that create substantive criminal liability rarely occurs for the statutes that are enforced. The one notable exception to this rule is the statute that bars people who have committed state felonies from possessing firearms. 18 U.S.C. § 922(g) (2018). But as this Article shows, even that exception employs only a weak, ineffective form of dynamic incorporation.

First, it would reduce the unique inertia that impedes reforming criminal law. In criminal law, political incentives ordinarily favor a one-way ratchet toward more criminal laws, making it more difficult than normal to reform or update older legislation.<sup>8</sup> Dynamic incorporation curbs this inertia by giving each of the fifty states an opportunity to update federal law. What's more, bills that use dynamic incorporation generally face less political opposition because their allowance for greater regional variability means they are less likely to inconvenience key stakeholders. This fact means that these bills are more likely to become enacted. Both these measures give Congress greater flexibility. And applied to criminal law, these measures help ease the inertia that makes reforming criminal laws exceptionally difficult.

Again, the conflict over marijuana laws illustrates this concept well. Federal law prohibits all uses of marijuana, but the vast majority of Americans support at least medicinal use, so most states have passed laws that permit what federal law unequivocally prohibits. This author, like most major medical associations, remains skeptical of medicinal use because marijuana has not undergone the kind of scientific studies required for other medicinal products.<sup>9</sup> But regardless of the scientific debate, the conflict between state and federal law harms the rule of law and creates many collateral consequences.

Dynamic incorporation could have—and still can—mediate this conflict. The most robust form of dynamic incorporation is a federal statute that lets states create safe harbors against federal liability: if a person complies with state law, then they are not subject to federal enforcement. A federal law with this kind of provision would allow states to drag federal marijuana law slowly into conformity with public opinion, state by state. In fact, Congress has passed only one legislative response

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<sup>8</sup> See notes *infra* 125–133 and accompanying text.

<sup>9</sup> See, e.g., Smart Approaches to Marijuana, <https://learnaboutsam.org/the-issues/public-health-organizations-positions-on-medical-marijuana/> [<https://perma.cc/VD97-3YR2>] (compiling the positions of national medical associations, such as the American Medical Association); Alex Smith, *As Missouri Voters Weigh Legalizing Medical Marijuana, Doctors Urge a Look at Its Health Risks*, Nat'l Pub. Radio (Nov. 1, 2018), <http://www.kbia.org/post/missouri-voters-weigh-legalizing-medical-marijuana-doctors-urge-look-its-health-risks> [<https://perma.cc/CZ3S-ZE2X>] (explaining that many medical associations oppose modern medical marijuana initiatives because of a lack of evidence that marijuana operates in the way activists promise).

to this conflict, and it did so by enacting this kind of provision—albeit using a budget rider that is both temporary and narrow.<sup>10</sup>

Second, dynamic incorporation can strengthen separation of powers by providing state legislatures with greater opportunities to exercise oversight for enforcement discretion. Few realize that *local* police heavily influence *federal* prosecutions and thus can evade state law. Local police often are the information gatekeepers both for local and federal prosecutors. So local police often can avoid more defendant-friendly state sentencing laws, substantive laws, or procedures simply by shifting defendants to federal court. This forum shopping might be beneficial in some contexts. But the problem is that it is exercised with little or no external accountability.

Dynamic incorporation provides new opportunities to reinforce separation of powers by checking that discretion. By creating an interdependence between federal and state legislatures, dynamic incorporation opens the opportunity for fifty more legislatures to oversee how federal law is enforced. Because those legislatures shape federal law, they can narrow the circumstances in which local officials are able to evade the constraints of state law. More generally, the joint partnership between federal prosecutors and local police enhances the power of executive officials compared to legislatures, but dynamic incorporation restores some of that power to legislatures.

This Article proceeds in four parts. Part I explains why dynamic incorporation is one of the most potent tools of modern federalism. This Part describes the concept of dynamic incorporation and classifies those kinds of statutes into four categories. This Part then explains the scholarship on “national federalism,” which studies how the modern Congress entrusts states to implement federal programs, and explains that federalism scholars have not yet appreciated that dynamic incorporation is a potent tool Congress can use to enable state legislatures to help Congress obtain national ends. This Part then explains what the limited scholarship on dynamic incorporation in criminal law misses.

Part II reveals how dynamic incorporation can mitigate the problem of inertia in criminal law. Using the conflicting state and federal laws on marijuana as an illustration, this Part explains how dynamic incorporation can remove the political barriers unique to criminal law that make it

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<sup>10</sup> Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538, 132 Stat. 348, 444–45; *United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016).

harder to reform or update anachronistic criminal statutes. And it explains why dynamic incorporation prevents conflicts like the conflict over marijuana law from occurring in the first place.

Part III then explains that dynamic incorporation reinforces separation of powers by providing greater accountability over enforcement discretion. This Part first exposes the relatively invisible contributor to unchecked enforcement discretion. When Congress greatly expanded the scope of federal criminal law, it did not proportionately increase the federal police force. Local enforcement officials fill that gap, serving as information gatekeepers for federal prosecutors. That new role enhances the power of both local and federal enforcement officials—at the expense of other officials. Dynamic incorporation checks this discretion because it multiplies the number of institutions that can oversee the power of executive officials and rebalances the power to shift some influence away from enforcement officials to legislatures.

Part IV responds to objections. It explains why problems applying the Armed Career Criminal Act do not weigh against dynamic incorporation. Although that statute uses dynamic incorporation, the provisions that lead to extensive litigation are precisely those provisions that do *not* use dynamic incorporation. More dynamic incorporation in fact would resolve the difficulties with that statute. This Part also explains that the relative scarcity of dynamic incorporation in federal criminal law is not due to any determination by Congress that dynamic incorporation would not serve its purposes. Finally, this Part explains that dynamic incorporation does not amount to unlawful delegation, and that possible concerns about decreasing uniformity do not counsel against using dynamic incorporation.

## I. DYNAMIC INCORPORATION OF STATE LAW

Through dynamic incorporation, Congress can enable state legislatures to influence how federal law applies. Properly understood, it is an aspect of modern federalism, and the possibilities for its use have only expanded as Congress has asserted greater jurisdiction over major policy questions.

### *A. What Is Dynamic Incorporation?*

When drafting bills, legislatures rarely start from scratch. They instead incorporate and build upon existing laws. For example, legislatures often

incorporate the definition of a term from a different statute.<sup>11</sup> Legislatures also commonly incorporate statutes passed by other legislatures. That practice is efficient: it allows a legislature to rely on the experience, research, and writing of other legislatures as well as the proven merit of the adopted legislation.<sup>12</sup> Consider the dozens of state laws that adopt the common law of England.<sup>13</sup> Using incorporation, those laws achieve in just a few words the same effect as if they had recited, verbatim, long treatises. For these reasons, incorporation of federal law by the states is especially prolific in more complex or technical fields like tax law.<sup>14</sup> Incorporation is so efficient, in fact, that many states have adopted constitutional amendments to ensure they can use incorporation.<sup>15</sup>

“Dynamic” incorporation propels ordinary incorporation one step further. Statutes using static incorporation have the same effect as if every word of the adopted law were written into the new law: later amendments made to the source statute do not affect the incorporating statute.<sup>16</sup> But dynamic incorporation adopts laws not only as they exist at the time of adoption, but also as they change. For example, the Assimilative Crimes Act makes it a federal offense to violate state criminal law on military

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<sup>11</sup> E.g., 18 U.S.C. § 922(a)(4) (2018) (drawing the definition of “machinegun” from a separate tax statute); 18 U.S.C. § 20 (2018) (defining the term “financial institution” by referencing seven different statutes).

<sup>12</sup> Arie Poldervaart, *Legislation by Reference—A Statutory Jungle*, 38 *Iowa L. Rev.* 705, 706 (1953).

<sup>13</sup> E.g., Mo. Rev. Stat. § 1.010 (2015) (“The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state . . .”).

A similar federal example occurred with the passage of the District of Columbia Organic Act of 1801. That act incorporated the criminal laws of Maryland and Virginia in the newly formed District of Columbia, with the criminal laws of the respective states applying in the respective regions ceded by those states. *An Act Concerning the District of Columbia*, 2 Stat. 103, 103–05 (1801).

<sup>14</sup> Dorf, *supra* note 4, at 136.

<sup>15</sup> F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 *La. L. Rev.* 1201, 1266–67, 1280 (2008).

<sup>16</sup> As the Supreme Court explained in the nineteenth century, “such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. . . . No other rule would furnish any certainty as to what was the law; and would be adopting prospectively, all changes that might be made in the law.” *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 625 (1838); see also Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 *Minn. L. Rev.* 261, 269–71 (1941) (describing this rule as the “primary doctrine” unless the legislature evinces an intent to adopt legislation prospectively).



bases, but it does not adopt only those state laws that existed when the Assimilative Crimes Act was enacted; it instead applies to state law “in force at the time” of the defendant’s conduct.<sup>17</sup>

The most critical distinction between these two forms, and the one federalism scholarship has so far missed, is that dynamic incorporation can give local officials tremendous influence over how and when federal law will apply—indeed, even whether federal law will apply at all. The Assimilative Crimes Act, for example, creates a joint legislative project between the federal and state governments. The federal government provides that violations of state law are violations of federal law when committed on federal enclaves, and the state legislatures get to define the substance of those laws.

This critical distinction makes it important that legislatures make it clear which form of incorporation they are choosing. The simplest way they express this intent is expressly.<sup>18</sup> Another common way is by incorporating a law using a general, umbrella description instead of identifying a specific statute by name or number.<sup>19</sup> Thus when the Constitution incorporates state law to determine the “[t]he Times, Places and Manner of holding Elections,”<sup>20</sup> it incorporates not only state laws in place in 1789, but also laws passed hundreds of years later in states that did not then exist.

Federal law extensively uses statutory incorporation. As Herbert Wechsler reported in the mid-twentieth century, federal law, despite “all the centralizing growth throughout the years,” is “a largely interstitial product, rarely occupying any field completely, building normally upon legal relationships established by the states.”<sup>21</sup> Just as “a state legislature acts against the background of the common law,” so too “Congress

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<sup>17</sup> 18 U.S.C. § 13 (2018).

<sup>18</sup> Cf. *Munoz v. Porto Rico Ry. Light & Power Co.*, 83 F.2d 262, 266 (1st Cir. 1936) (stating that dynamic incorporation occurs when the legislature conveys that intent by “express terms or clear intention”). Some states have adopted statutes that instruct courts to construe all incorporation prospectively by default unless the legislature makes plain a contrary intent. *Boyd*, supra note 15, at 1248.

<sup>19</sup> Read, supra note 16, at 271–72 (stating the general rule that a statute adopts laws prospectively when it refers “not to any particular statute or part of a statute, but to *the law generally* which governs a specified subject”).

<sup>20</sup> U.S. Const. art. I, § 4.

<sup>21</sup> 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, 545 (1954).

acts . . . against the background of the total *corpus juris* of the states.”<sup>22</sup> Those assertions, true in the 1950s, still ring true today. “[F]ederal statutes and federal common law routinely (and in a wide range of subject areas) incorporate state law.”<sup>23</sup> Even in areas where federal law is “nominally uniform[,] . . . such as the federal law of bankruptcy,” federal law still “builds on state law.”<sup>24</sup>

Not only does federal law routinely incorporate state law; it tends to do so dynamically. As Professor Michael Dorf has explained, the federal government “cannot operate effectively without dynamically incorporating state law.”<sup>25</sup> Using static incorporation would create an “administrative nightmare” of having to track updates from fifty states and re-pass federal legislation to incorporate new updates. Indeed, dynamic incorporation is so critical to federal law that courts sometimes graft onto federal law an incorporation of state law when Congress fails to do so.<sup>26</sup>

Yet despite Congress’s “pervasive[.]” use of dynamic incorporation,<sup>27</sup> meaningful use of dynamic incorporation is curiously rare in federal criminal law. Dynamic incorporation is used extensively in sentencing. As Professor Wayne Logan points out, the federal sentencing guidelines calculate recommended sentences—which judges must consider<sup>28</sup>—based on the number and severity of convictions a person has incurred under state law.<sup>29</sup> And the Controlled Substances Act, Armed Career Criminal Act, and pertinent immigration laws sometimes provide sentencing enhancements where persons have previous convictions for state offenses.<sup>30</sup> But all these instances of incorporation employ only the

<sup>22</sup> *Id.* (alteration in original) (quoting Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 435 (1953)).

<sup>23</sup> Radha A. Pathak, *Incorporated State Law*, 61 *Case W. Res. L. Rev.* 823, 826 (2011).

<sup>24</sup> Dorf, *supra* note 4, at 144.

<sup>25</sup> *Id.* at 146.

<sup>26</sup> Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489, 529 (1954).

<sup>27</sup> Dorf, *supra* note 4, at 146; accord Hart, *supra* note 26, at 529.

<sup>28</sup> *United States v. Booker*, 543 U.S. 220, 245 (2005).

<sup>29</sup> Logan, *supra* note 6, at 76–78.

<sup>30</sup> E.g., 8 U.S.C. § 1326(b) (2018) (providing a sentencing enhancement for offenders previously convicted of “three or more misdemeanors involving drugs, crimes against the person, or both, or a felony . . . [or] an aggravated felony”); 18 U.S.C. § 924(e) (2018) (providing a sentencing enhancement for offenders previously convicted of three or more qualifying crimes, including certain drug offenses under state law); 21 U.S.C. § 841(b)(1)(A) (2018) (providing a sentencing enhancement for anyone convicted “after a prior conviction for a felony drug offense has become final”).

weakest form of dynamic incorporation. This weak form gives state legislatures partial responsibility over whether a defendant receives a sentencing enhancement, but because many other factors similarly can enhance a sentence, the influence is relatively small and gives states no real incentive to tailor their laws with the expectation that state law will affect federal law.<sup>31</sup>

More meaningful incorporation would give state legislatures power to influence the scope of criminal liability, not just punishment. Some examples exist, but usually not in statutes commonly enforced. The archetypal statute for dynamic incorporation in criminal law is the Assimilative Crimes Act. It enables state legislatures to influence substantive liability under federal law, but it has fallen into relative disuse because it applies only where federal law is otherwise silent<sup>32</sup> and the rapid expansion of federal criminal law means federal law rarely is silent.<sup>33</sup> That statute now is used only in about three percent of prosecutions and mostly to prosecute traffic offenses.<sup>34</sup> The commonly prosecuted drug, firearm, and immigration statutes account for more than seventy-three percent of federal criminal prosecutions,<sup>35</sup> but they include no meaningful use of dynamic incorporation.

The one exception is the law barring persons from possessing firearms if they have previously been convicted of a federal or state misdemeanor crime of domestic violence or any federal or state felony.<sup>36</sup> But that law similarly provides states with little influence over federal law. Because it can be triggered in many different ways other than violating the laws of the state in which a defendant is a resident, its existence does little to encourage states to adopt legislation that they would not otherwise adopt.<sup>37</sup>

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<sup>31</sup> See *infra* text accompanying note 57.

<sup>32</sup> 18 U.S.C. § 13(a) (2018).

<sup>33</sup> Estimates state that Congress passed as many as half of all federal criminal laws after 1970. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 *Emory L.J.* 1, 3 (2012). So the Assimilative Crimes Act, reenacted most recently in 1948, has become only less influential in recent decades.

<sup>34</sup> See *id.* at 120.

<sup>35</sup> U.S. Sentencing Comm'n, 2017 Sourcebook of Federal Sentencing Statistics S-13 fig.A (2018).

<sup>36</sup> 18 U.S.C. § 922(g) (2018).

<sup>37</sup> See *infra* text accompanying note 57.

*B. Four Categories of Dynamic Incorporation*

Congressional incorporation of state law falls into four categories. The first and generally most influential is the “opt-out” statute. These statutes allow state legislatures to create a safe harbor against application of federal law: if a person complies with state law, then the pertinent federal law does not apply. The Gun Free School Zones Act provides a good example. That act prohibits possessing a firearm in a school zone, but it creates a safe harbor for certain people licensed by a state to carry within a school zone.<sup>38</sup> The Indian Liquor Law also provides a good example. Since 1832, Congress has prohibited the sale or use of alcohol on Indian reservations.<sup>39</sup> When this statute grew unpopular because of concerns over discrimination, Congress, instead of repealing it, enacted a new provision that makes the core prohibition inapplicable when a person acts “in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country.”<sup>40</sup> The level of influence these laws give states depends on what conditions Congress attaches. For example, the Indian Liquor Law gives states and tribes authority to define exactly when the federal prohibition applies. But Congress could have restricted state and tribal authority by providing, for example, that the federal prohibition would continue to apply—despite state and tribal law—to alcohol sold near schools. Despite the availability of conditions, this category generally affords state legislatures significant influence.

These statutes are distinct from statutes that prohibit the federal government from bringing a prosecution in certain circumstances, such as if a person already has been tried under state law.<sup>41</sup> True opt-out statutes rely on the decisions of legislators, not enforcement officials. The latter statutes have similar effects and likewise are an important aspect of the federalism relationship between state and federal actors, but those statutes bar only prosecution, not liability, so they leave open the door for private enforcement under statutes like the Racketeer Influenced and Corrupt Organizations Act (“RICO”).

<sup>38</sup> 18 U.S.C. § 922(q)(2) (2012).

<sup>39</sup> *Rice v. Rehner*, 463 U.S. 713, 726 (1983); see also 18 U.S.C. § 1154 (2018) (prohibiting the distribution of alcohol in “Indian country,” with limited exceptions).

<sup>40</sup> Act of Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586 (current version at 18 U.S.C. § 1161 (2018)).

<sup>41</sup> 18 U.S.C. §§ 37(c), 2280(c), 2281(c), 2293(a) (2018) (exempting conduct from federal prosecution if it occurred during a labor dispute and is prohibited by state law as a felony).

Second is the flipside of the opt-out statute: the “opt-in” statute. Congress often passes these kinds of laws when it is concerned that state actors cannot enforce certain laws effectively.<sup>42</sup> The effect of this kind of statute is to provide federal penalties for violations of state law. For example, one historic statute made it a federal crime to violate state criminal law while conspiring to violate civil rights or unlawfully hindering voting.<sup>43</sup> The Assimilative Crimes Act, still in force today, provides another good example. That statute converts state crimes into federal crimes if federal law otherwise is silent and the conduct occurs on a federal enclave (such as a military post).<sup>44</sup> The federal gambling statute similarly prohibits any gambling business that (among other things) “is a violation of the law of a State or political subdivision in which it is conducted.”<sup>45</sup> The Constitution itself also includes this form of dynamic incorporation. The Twenty-First Amendment prohibits transportation or delivery of alcohol “into any State . . . in violation of the laws thereof.”<sup>46</sup>

Other examples in federal law, both criminal and civil, include the provision barring transportation of fireworks into any state knowing that those fireworks will be distributed, used, or possessed in a manner that violates state law;<sup>47</sup> the Federal Tort Claims Act;<sup>48</sup> the Civil Rights Act

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<sup>42</sup> See, e.g., Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in *2 Criminal Justice 2000: Boundary Changes in Criminal Justice Organizations* 81, 85–86 (Charles Friel ed., 2000) [hereinafter Richman, *Changing Boundaries*] (arguing that Congress adopted a federal kidnapping statute to respond to the concern that state officers were being “stopped at [the] State line because of red tape [or] professional jealousy”).

<sup>43</sup> An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union § 7, ch. 114, 16 Stat. 140, 141 (1870) (“[I]f in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender . . . shall be punished for the same with such punishment as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offence may be committed.”).

<sup>44</sup> 18 U.S.C. § 13(a) (2018). Congress has passed similar legislation for some national parks. Act of June 2, 1920, ch. 218, § 4, 41 Stat. 731. This statute, which concerned California national parks, was expressly dynamic, applying to “the laws of the State of California in force at the time of the commission of the offense.” *Id.*

<sup>45</sup> 18 U.S.C. § 1955(b)(1)(i) (2018).

<sup>46</sup> U.S. Const. amend. XXI, § 2.

<sup>47</sup> 18 U.S.C. § 836 (2018); see 18 U.S.C. § 842(c), (e) (2018) (applying a similar prohibition for “explosive materials”).

<sup>48</sup> 28 U.S.C. § 1346(b)(1) (2012) (granting district courts jurisdiction to hear claims against the federal government “where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred”).

of 1866;<sup>49</sup> the Major Crimes Act;<sup>50</sup> the Bankruptcy Code;<sup>51</sup> the provision abolishing debtors' prisons in states that have abolished those institutions;<sup>52</sup> the provision making violation of local quarantine laws a federal offense;<sup>53</sup> and many others.<sup>54</sup>

Under each of these laws, violating state law is a necessary element for a federal conviction. Persons cannot be charged federally unless state legislatures first pass enabling legislation to “opt in” to application of federal law. These statutes entrust state legislatures with significant influence over if, when, and how federal law will apply. But again, the influence varies depending on what other elements the federal statute includes. The Assimilative Crimes Act, for example, carries far less influence now than when it was passed. State law under that Act applies only if federal law is silent,<sup>55</sup> but since passing that Act, Congress has passed thousands of federal criminal statutes, limiting the Act mostly to traffic offenses.<sup>56</sup>

The third and weakest category is the “triggering” statute. With opt-in statutes, violating state law is *necessary* to violate federal law. With triggering statutes, violating a specific state’s law is only sufficient—one of many different ways to violate federal law. These laws typically apply if a person violates the law of any state *or* the federal government. For example, one element necessary to commit “international terrorism” is

<sup>49</sup> 42 U.S.C. § 1988(a) (2012) (incorporating state civil rights law where federal laws “are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses”).

<sup>50</sup> 18 U.S.C. § 1153(b) (2018) (incorporating state law in a manner similar to the Assimilative Crimes Act for conduct within Indian country).

<sup>51</sup> *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007) (stating that the Bankruptcy Code “requires bankruptcy courts to consult state law in determining the validity of most claims”).

<sup>52</sup> 28 U.S.C. § 2007(a) (2012).

<sup>53</sup> Act of April 29, 1878, ch. 66, § 1, 20 Stat. 37.

<sup>54</sup> Congress has passed laws “in aid of state purposes and powers” to prohibit transporting oil in violation of state law, transporting liquor into dry states, transporting goods into states that prohibit manufacturing with convict labor, and transporting vehicles stolen under state law. *Griswold v. President of the United States*, 82 F.2d 922, 923 (5th Cir. 1936) (citing cases).

States have also used these kind of opt-in statutes to incorporate federal law. During World War II, many localities passed laws that merely created local penalties for violating federal regulations—that is, they made violation of federal regulations a local crime. Samuel Mermin, “Cooperative Federalism” Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I, 57 *Yale L.J.* 1, 2 (1947).

<sup>55</sup> 18 U.S.C. § 13 (2018).

<sup>56</sup> See Klein & Grobey, *supra* note 33, at 120. Some estimate that half of all federal criminal laws were passed between 1970 and 2012. *Id.* at 3.

engaging in conduct that is “a violation of the criminal laws of the United States or of any State.”<sup>57</sup> Many sentencing enhancements, such as in the Controlled Substances Act, use this kind of incorporation.<sup>58</sup>

Other examples of triggering statutes include a Reconstruction-era statute that made it a federal offense for state election officials to fail to abide by their duties under state or federal law;<sup>59</sup> a consequential sentencing enhancement in the Armed Career Criminal Act that requires courts to impose a fifteen-year mandatory minimum for offenders previously convicted of three or more qualifying crimes and includes in the list of qualifying crimes both state and federal offenses,<sup>60</sup> the RICO Act,<sup>61</sup> the federal Kidnapping Act, which prohibits dealing with ransom money obtained from a felony “kidnapping punishable under State law” or “in connection with a violation of [federal law, 18 U.S.C. § 1201]”;<sup>62</sup> the Lacey Act, which prohibits transporting, receiving, and so on, any fish or wildlife “taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or . . . in violation of any law or regulation of any State”;<sup>63</sup> and a provision that prohibits interception of communications for the purpose of “committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.”<sup>64</sup>

These laws are the weakest form of dynamic incorporation because they give states less exclusive influence over federal law and less incentive to vary their legislation. Consider the statute that bars felons from possessing firearms. That statute applies to all felonies from any state or the federal government.<sup>65</sup> Wayne Logan rightly points out that

<sup>57</sup> 18 U.S.C. § 2331(1)(A) (2018).

<sup>58</sup> 21 U.S.C. § 841(b)(1)(A) (2018) (providing a sentencing enhancement for anyone convicted “after a prior conviction for a felony drug offense has become final”).

<sup>59</sup> The Act penalized “neglect[ing] or refus[ing] to perform any duty in regard to such [congressional] election required of him by any law of the United States, or of any State.” An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, ch. 114, § 22, 16 Stat. 140, 146 (1870); see also *Ex parte Siebold*, 100 U.S. 371, 381, 387 (1879) (upholding a conviction under this statute where the defendants violated current state law).

<sup>60</sup> 18 U.S.C. § 924(e) (2018); see also 18 U.S.C. § 1037(b)(1) (2018) (providing a sentencing enhancement if a person commits email fraud to advance a felony under state or federal law).

<sup>61</sup> *Id.* § 1961(1), (5) (prohibiting any “pattern of racketeering” and defining “racketeering” to include state and federal crimes).

<sup>62</sup> *Id.* § 1202(a)–(b).

<sup>63</sup> 16 U.S.C. § 3372(a)(1)–(2)(A) (2018).

<sup>64</sup> 18 U.S.C. § 2511(2)(d) (2018).

<sup>65</sup> *Id.* § 922(g)(1).

this statute means that treating an act as a felony in one state but not another creates interstate disparity for how this law applies.<sup>66</sup> But this interdependence is minor. Countless statutes in each state serve as predicates for the federal law. Each individual law has little effect on federal law, even within a single state, and no state would have much incentive to change its laws to take advantage of the slight interdependence.

The fourth category, which provides perhaps the widest range of influence to state legislatures—from almost none to extremely broad—is the “scope” statute. This category can overlap with the others. It allows states to define how broadly or narrowly a federal provision will apply. Often this statute works by allowing state legislatures to define key terms. The Constitution uses this kind of incorporation by protecting against deprivations of “property” but giving states large leeway to define “property.”<sup>67</sup> The Equal Access Act, a civil law, provides another good example. It states that certain schools that “provide[] secondary education” must give all student clubs equal access to school resources, but it provides that “secondary education” is defined “as determined by State law.”<sup>68</sup> The Act thus applies to middle schools in Florida—even though “secondary education” might more commonly denote high schools—because middle schools in Florida provide courses that Florida law defines as “secondary education.”<sup>69</sup> Many other statutes similarly give states authority to define critical terms that affect how broadly a federal law will apply.<sup>70</sup> Scope statutes need not be limited to those laws that enable state legislatures to define terms. Some federal sentencing statutes depend on the maximum sentence length available under state law.<sup>71</sup> If a federal sentencing statute required courts to issue sentences

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<sup>66</sup> See Logan, *supra* note 6, at 74.

<sup>67</sup> See Amar, *supra* note 2, at 854–55.

<sup>68</sup> 20 U.S.C. § 4072(1) (2018).

<sup>69</sup> *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cty.*, 842 F.3d 1324, 1331, 1333 (11th Cir. 2016).

<sup>70</sup> E.g., 5 U.S.C. § 7901(e) (2018) (scope of practice of physicians and surgeons); *id.* § 8101(2) (defining physicians and dentists as those who operate as physicians and dentists under state law); 20 U.S.C. § 7912(a) (2018) (“violent criminal offense”); 29 U.S.C. § 3164(a)(1) (2012) (“school”); 42 U.S.C. § 1103(f)(3)(D) (2012) (“dependents”); *Phillips v. Comm’r of Internal Revenue*, 283 U.S. 589, 602 (1931) (upholding federal laws that allow state laws to define substantive law about tax liability).

<sup>71</sup> 18 U.S.C. § 924(e)(1), (2)(A)(ii) (2018) (providing a sentencing enhancement when a person has three or more qualifying previous convictions, which includes convictions for drug offenses where state law authorizes imprisonment of ten years or more).



1.25 or 1.5 times as severe as the median sentence available under state law, state legislatures would lack influence over critical definitions, but they would still influence the application of federal law.

### *C. Dynamic Incorporation and Federalism*

Dynamic incorporation is the tool that federalism scholars so far have missed. From traditional federalism scholarship to a recently developed field of scholarship called “national federalism,”<sup>72</sup> dynamic incorporation has yet to be evaluated comprehensively as a segment of federalism scholarship. But because dynamic incorporation entails projects that both the federal and state governments help implement, this drafting tool is an aspect of “national federalism” and creates new insights for that field.

National federalism flips the script on the traditional focus of federalism. Traditional federalism theory focused on line-drawing exercises designed to identify and define which sovereign could regulate an issue. The Framers understood the need for the federal government to have nationwide jurisdiction, but they worried about concentrated power, so they gave the federal government “few and defined” powers compared to the “numerous and indefinite” powers possessed by states.<sup>73</sup> For a long time, federalism scholarship focused on discerning and defining the lines separating what the federal government could do from what powers were reserved to the states.<sup>74</sup>

“National federalism” scholarship argues that this line-drawing exercise is outdated.<sup>75</sup> Congress’s legislative agenda on major issues was modest or nonexistent in early American history, but America now resides

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<sup>72</sup> See generally Gluck, *Our [National] Federalism*, supra note 5 (describing the modern allocation of state and federal power as a feature of federal statutory design).

<sup>73</sup> The Federalist No. 45 (James Madison); see also The Federalist No. 28 (Alexander Hamilton) (“[T]he State governments will in all possible contingencies afford complete security against invasions of the public liberty by the national authority.”).

<sup>74</sup> E.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *Yale L.J.* 1889, 1889 (2014) [hereinafter Gerken, *Federalism as the New Nationalism*]; Heather K. Gerken, *Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 11–13 (2010) [hereinafter Gerken, *Federalism All the Way Down*].

<sup>75</sup> E.g., Gerken, *Federalism All the Way Down*, supra note 74, at 11–13; Heather K. Gerken, *Federalism 3.0*, 105 *Calif. L. Rev.* 1695, 1698–1700 (2017) [hereinafter Gerken, *Federalism 3.0*].

in an “age of statutes”<sup>76</sup> where “dominance of statutory law”<sup>77</sup>—especially federal—is the rule. Congress’s statutory reach now is so large that “states and the federal government in fact exercise extensive concurrent authority.”<sup>78</sup> “Overlap and interdependence are the rule, not the exception.”<sup>79</sup> And because of the Supremacy Clause, this concurrent jurisdiction favors federal law.

This concurrent authority, these scholars contend, renders outdated the federalism models of competition and separation.<sup>80</sup> Federalism instead should focus on how the federal and state governments jointly exercise their concurrent authority. And because Congress can preempt the states, studying these joint projects means studying how “Congress utilizes the states to implement federal statutes.”<sup>81</sup> Congressional supremacy and overlapping jurisdiction mean that states exercise most of their influence not by creating their own programs, but by implementing federal programs “from within the [federal] statute, not from outside.”<sup>82</sup> This overlapping jurisdiction creates a “principal-agent relationship” that makes states, in a sense, “servant[s]” of Congress.<sup>83</sup>

This view of federalism creates two important corollaries. First, because of federal preemption, the primary way states exercise influence

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<sup>76</sup> See generally Guido Calabresi, *A Common Law for the Age of Statutes* (1982) (describing the shift from an American legal system dominated by common law to one dominated by statutory law).

<sup>77</sup> Joshua M. Divine, *Statutory Anachronism as a Constitutional Doctrine*, 12 U. St. Thomas L.J. 146, 147 (2015).

<sup>78</sup> Robert A. Shapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 Emory L.J. 115, 120 (2007).

<sup>79</sup> Gerken, *Federalism 3.0*, supra note 75, at 1700.

<sup>80</sup> Gerken, *Federalism as the New Nationalism*, supra note 74, at 1912 (declaring that Madison’s mantra that “ambition [should be] made to counteract ambition” is “deeply unsatisfying” for modern governance).

<sup>81</sup> Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 Yale L.J. 534, 540 (2011) [hereinafter Gluck, *Intrastatutory Federalism*]; see also Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 St. Louis U. L.J. 1045, 1046 (2015) [hereinafter Gluck, *Nationalism as the New Federalism*] (stating that the “central question” for national federalism is “how to conceptualize the role of the states within this federal-law-dominated legal landscape”).

<sup>82</sup> Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 Stan. L. Rev. 1689, 1702 (2018).

<sup>83</sup> Gerken, *Federalism 3.0*, supra note 75, at 1703–04.

is by participating in joint federal-state programs.<sup>84</sup> “[T]he federal government has put itself in the position of managing partner of an enterprise, rather than that of a separate sovereignty.”<sup>85</sup> States that choose not to help administer federal programs risk falling out of this policymaking “enterprise” and into irrelevancy. For example, states have “virtually no influence over” Medicare (the federal healthcare program for the elderly and disabled), so Medicare policy remains largely uniform.<sup>86</sup> But states have “an enormous influence on shaping Medicaid,”<sup>87</sup> (the federal healthcare program for low-income individuals), which causes substantial regional variability in what benefits are provided<sup>88</sup> and who is eligible to receive those benefits.<sup>89</sup>

The second corollary is that decentralization can advance the aims of the federal government. Decentralization has carried a negative connotation in some circles because some states abused it to deprive millions of Americans of their rights.<sup>90</sup> But national federalism scholars stress that decentralization need not be about “states’ rights.”<sup>91</sup> When Congress uses decentralization to incorporate states into facilitating administration of *federal* programs, decentralization can “dramatically expand the leverage points” for obtaining national goals.<sup>92</sup> Decentralization promotes federal goals in several ways.

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<sup>84</sup> Gluck, *Our [National] Federalism*, supra note 5, at 1997 (stating that the “primary vehicle through which states have influence on major questions of policy” is participating as agents of the federal government); see also Gluck, *Nationalism as the New Federalism*, supra note 81, at 1049 (arguing that state influence “mostly comes and goes at Congress’s pleasure”).

<sup>85</sup> Michael W. McConnell, *The Politics of Returning Power to the States*, 6 *Harv. J.L. & Pub. Pol’y* 103, 105 (1982). McConnell has not written anything self-described as “national federalism,” but his observation reinforces those made by scholars who do identify their scholarship as falling within “national federalism.”

<sup>86</sup> Gluck, *Nationalism as the New Federalism*, supra note 81, at 1047.

<sup>87</sup> *Id.* at 1047–48.

<sup>88</sup> *Mandatory & Optional Medicaid Benefits*, Medicaid.Gov, <https://www.medicaid.gov/-/medicaid/benefits/list-of-benefits/index.html> [<https://perma.cc/4KRL-YTS5>] (identifying optional and mandatory benefits).

<sup>89</sup> For example, North Dakota extends eligibility to persons who earn less than 175% of the federal poverty line, but New York covers persons up to 405% of the federal poverty line. *Where Are States Today? Medicaid and CHIP Eligibility Levels for Children, Pregnant Women, and Adults*, The Henry J. Kaiser Family Found. (Mar. 31, 2019), <https://www.kff.org/medicaid/fact-sheet/where-are-states-today-medicaid-and-chip> [<https://perma.cc/LY-5M-CB8F>].

<sup>90</sup> See, e.g., Gerken, *Federalism 3.0*, supra note 75, at 1708.

<sup>91</sup> *Id.* at 1708, 1711.

<sup>92</sup> *Id.* at 1711.

First, incorporating state officials often is necessary for administrative reasons. The federal government generally cannot administer programs on its own.<sup>93</sup> Even when it can, tapping state infrastructures ordinarily is more efficient because it decreases startup costs and because local agents usually have better knowledge of local facts.<sup>94</sup>

Second, incorporating state officials can eliminate political barriers to achieving federal aims.<sup>95</sup> Because most federal politicians are elected by state constituents, they are more likely to support a federal program if it will deliver federal dollars or if state employees will administer it instead of the federal political appointee of a rival party.<sup>96</sup>

Decentralization also acclimates people to new changes, which can diminish political opposition. For example, the Obama administration's rollout goal for the Affordable Care Act was to “get the ACA entrenched and fix it later”<sup>97</sup>—that is, encourage as many states to adopt it as possible so people would grow used to greater federal intervention. To encourage compliance, the Obama administration “negotiate[d] special deals” with states about enforcement.<sup>98</sup> The goal was to ease states into the apparatus of the Affordable Care Act to allow the public to grow more comfortable with the regulatory scheme before making enforcement national.<sup>99</sup>

Similarly, decentralization allows states to nourish and promote policies that cannot yet be obtained federally. As Heather Gerken explains, nearly every national movement begins locally.<sup>100</sup> People are

<sup>93</sup> *Id.* at 1701 (“[T]he federal government consistently found it easier to enlist the states’ existing administrative apparatuses in the federal project than to build its own from scratch.”); see also Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 *Yale L. & Pol’y Rev.* 87, 88 (2016) (observing that the federal government sometimes “lacks the resources, or the political buy-in, to enforce a large regulatory program on its own”); Andreas Auer, *The Constitutional Scheme of Federalism*, 12 *J. Eur. Pub. Pol’y* 419, 422–23 (2005) (“[W]ithout the constituent units, the federal unit cannot exist. . . . Both have to work together, through a set of specific procedures, in order to accomplish their respective goals.”).

<sup>94</sup> Gerken, *Federalism as the New Nationalism*, *supra* note 74, at 1903.

<sup>95</sup> Gerken, *Federalism 3.0*, *supra* note 75, at 1702 (“[T]he federal government’s success almost always depends as much on politics as decrees.”); Gluck, *Nationalism as the New Federalism*, *supra* note 81, at 1047 (“[P]olitical considerations also incentivize Congress to include state actors in federal schemes. . . .”).

<sup>96</sup> See Gluck, *Intrastatutory Federalism*, *supra* note 81, at 573.

<sup>97</sup> Gluck & Huberfeld, *supra* note 82, at 1733–34.

<sup>98</sup> *Id.*

<sup>99</sup> See Gluck, *Intrastatutory Federalism*, *supra* note 81, at 573.

<sup>100</sup> Gerken, *Federalism 3.0*, *supra* note 75, at 1696 (“National movements, be they red or blue, begin at the local and state level and move their way up.”); *id.* at 1713 (“[V]irtually every national movement began as a local one.”).

more willing to accept a policy when their neighbors already have. Acceptance of same-sex marriage, for example, grew in response to state actors advancing that policy locally—even when they did so by violating state law.<sup>101</sup> Allowing application of federal law to vary between states changes political and social norms, making it easier for federal actors to nationalize a policy.<sup>102</sup>

Although dynamic incorporation has remained “almost entirely unrecognized” in national federalism scholarship,<sup>103</sup> these corollaries apply just as much to this tool. Indeed, even though the term “national federalism” post-dates Wayne Logan’s work—the only article that considers federal reliance on state criminal law in depth—he makes a similar observation using different vocabulary.<sup>104</sup> Just as decentralization allows state administrative officials leeway to shape federal law locally in ways that could spark a later national movement,<sup>105</sup> dynamic incorporation enables state legislatures to shape policy locally and help that policy become acceptable nationally. Michael Dorf makes a similar point: because dynamic incorporation gives local officials this influence, he argues that dynamic incorporation “enhance[s] democracy.”<sup>106</sup> Indeed, legislatures often model bills on those enacted by other states. As Gerken explains, one “benefit that derives from integration” of different governments is that once one state adopts a new policy, “it is typically widely [and rapidly] mimicked . . . by states with similar [political] leanings.”<sup>107</sup>

Dynamic incorporation also facilitates national goals by ameliorating administrative burdens on Congress. Congress could deal with the tough, arduous task of discovering whether a federal program should be tailored to locality differences—and risk being wrong—but that is a burden

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<sup>101</sup> *Id.* at 1711–12.

<sup>102</sup> See, e.g., Gluck, *Intrastatutory Federalism*, *supra* note 81, at 573; Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 *Yale L.J.* 2094, 2108–09 (2014) (noting that “the federal government historically has relied on state and local actors as agents in the development of federal policy” and explaining that the Obama administration granted waivers to some states from complying with certain laws to pursue this strategy).

<sup>103</sup> Gluck, *Our [National] Federalism*, *supra* note 5, at 2008 & n.45.

<sup>104</sup> Logan, *supra* note 6, at 106 (acknowledging that “federal use of state criminal laws and outcomes has eluded systematic analysis”).

<sup>105</sup> Gerken, *Federalism 3.0*, *supra* note 75, at 1696, 1713.

<sup>106</sup> Dorf, *supra* note 4, at 117 n.32, 139.

<sup>107</sup> Gerken, *Federalism 3.0*, *supra* note 75, at 1720.

Congress “is wholly unequipped to bear.”<sup>108</sup> Dynamic incorporation invites state legislatures to share this burden,<sup>109</sup> because it “permits [Congress] to make the one-time decision to depend on [state] law, and then to be done with the matter.”<sup>110</sup>

Dynamic incorporation thus is a tool of modern federalism—albeit one that is undertheorized. It is not a “states’ rights” model because state participation comes only with the consent and at the direction of Congress. Yet, as this Article shows by applying dynamic incorporation to criminal law, it is a highly consequential tool of modern federalism.

#### *D. The Limited Scholarship on this Issue*

Dynamic incorporation has received little attention, and almost none when further narrowed to dynamic incorporation in criminal law. The exception is Logan’s article. That article discusses federal reliance on state law, and it assesses some upsides and downsides of that reliance.

As for upsides, Logan points out that federal reliance on state law expresses confidence in the states, is convenient and efficient, facilitates prosecutions that rely on more complete information, and mitigates the tendency for Congress to centralize criminal law.<sup>111</sup>

For downsides, Logan argues that federal reliance on state law creates both interstate and intrastate disparity: interstate because dynamic incorporation bakes into federal law variations in state law, and intrastate because defendants prosecuted at the federal level do not receive the same procedural rights afforded to defendants prosecuted by a state.<sup>112</sup> Logan also argues that federal reliance removes Congress from the picture, reducing the “laboratories of democracy” by one; abdicates congressional authority to the states (thus removing the benefit of national representation); and increases the scope of federal criminal law.<sup>113</sup>

But Logan’s article does not discuss a critical aspect of federal reliance on criminal law: state law sometimes affects federal sentencing, but federal law rarely relies on state law to define the *substantive* reach of criminal law. This insight suggests that the problem with federal reliance

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<sup>108</sup> Hart, *supra* note 26, at 534.

<sup>109</sup> Dorf, *supra* note 4, at 143–44.

<sup>110</sup> *Id.* at 133; accord Gluck, *Our [National] Federalism*, *supra* note 5, at 2008 (stating that dynamic incorporation allows Congress to “draw on state expertise”).

<sup>111</sup> Logan, *supra* note 6, at 83, 104.

<sup>112</sup> *Id.* at 73–75.

<sup>113</sup> *Id.* at 84–90, 96–101.

on state law may be that reliance occurs not too much, but too little. Criminal law suffers from the vices of federal reliance without receiving all the benefits.

The next Parts identify two ways that increased use of dynamic incorporation can benefit federal criminal law and lessen some of the downsides to federal reliance that Logan identified.

## II. REDUCING INERTIA

Dynamic incorporation mitigates political inertia. In general, congressional inertia makes passing legislation cumbersome. But inertia creates even more unique problems for criminal law. Passing criminal laws often is easier—so long as those laws increase severity. But reforming older criminal laws or making criminal laws less stringent is exceptionally difficult. Dynamic incorporation eases inertia by removing obstacles both to updating current law to avoid conflicts and to passing new laws. And this effect, specifically applied to criminal law, eases the unique inertia that hinders changing criminal law.

In short, the institutional design of Congress coupled with ordinary political incentives make it exceptionally difficult for Congress to reform criminal laws. Decentralization has historically been associated with a “states’ rights” approach, but it need not be. Decentralization can help *Congress* better obtain its policy objectives.

### *A. The General and Specific Problems of Inertia*

Even in times not defined by high political partisanship, the federal system includes a strong bias against new legislation. Inertia has stability benefits, but it also impedes efforts to keep statutes up to date.<sup>114</sup> One notable academic and later federal judge argued that passing new statutes is so difficult that judges should abrogate by judicial fiat those they find anachronistic.<sup>115</sup> He wrote that argument in 1982, when political polarization was relatively quaint by today’s standards.

This inertia occurs because of the legislative structure created by the Constitution combined with 200 years of congressional precedent. By one scholar’s account, proposed legislation must pass through nine

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<sup>114</sup> Divine, *supra* note 77, at 146–47 & n.6.

<sup>115</sup> See generally Calabresi, *supra* note 76, at 164–66 (arguing that judges should be able to employ common-law techniques to abrogate anachronistic statutes or encourage their reconsideration by legislatures).

“vetogates” before becoming law.<sup>116</sup> Each gate presents an opportunity for politicians—often a single politician—to defeat a bill. Assuming a bill originates in the House, it must first advance through two committees: a substantive House Committee and the procedural House Rules Committee, the latter of which the Speaker typically controls.<sup>117</sup> Committee chairs kill ninety percent of bills, often simply by ignoring them.<sup>118</sup> If a bill passes both hurdles, it must then obtain a successful floor vote—after representatives typically receive an opportunity to amend the bill, including by introducing poison-pill amendments.<sup>119</sup> The bill must then advance through a similar process in the Senate where the majority leader often can kill the legislation by ignoring it. A bill in the Senate also is subject to the additional hurdle of the filibuster, which requires most legislation to obtain the support of at least sixty senators.<sup>120</sup> A bill that makes it this far might not have progressed unchanged. A bicameral committee must then edit the resolutions adopted by both houses until they are identical, after which both chambers must agree to the new, identical, edited version.<sup>121</sup> Finally, the President can upend all this work with a veto that Congress can overrule only by a two-thirds vote in both chambers.<sup>122</sup> On top of these hurdles, this process must occur within a two-year window; anything not completed at the end of a two-year congressional cycle must start over.

These vetogates ensure that only a small fraction of bills become law. The 112th Congress passed only two percent of bills introduced.<sup>123</sup> This number is smaller than normal, but not significantly so. The 111th Congress—the first two years of the Obama administration—enjoyed a majority of sixty votes in the Senate for some time, substantially reducing the potency of the filibuster, yet it passed only three percent of introduced bills.<sup>124</sup>

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<sup>116</sup> William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 *Notre Dame L. Rev.* 1441, 1444–46 (2008).

<sup>117</sup> *Id.* at 1444–45.

<sup>118</sup> *Id.* at 1444.

<sup>119</sup> *Id.* at 1445.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1446.

<sup>122</sup> *Id.*

<sup>123</sup> Statistics and Historical Comparison, GovTrack, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/MQ8E-X8SL>].

<sup>124</sup> *Id.*



This inertia may have been less problematic before Congress exercised its legislative power to displace much of the states' traditionally exclusive authority. But now that Congress has done so, the inertia hinders the ability to update or correct existing laws that have grown outdated.

Even worse, the problems with inertia are uniquely difficult in criminal law. As Professor Rachel Barkow put it, "from Congress's perspective, the politics are always in favor of more criminal law" because "both parties share the same incentive to appear as tough as possible."<sup>125</sup> This incentive extends to the executive branch. President Franklin D. Roosevelt expanded federal criminal law because he believed it was a good way to acclimate the public to a broader role for the federal government, which he needed to do to pass New Deal legislation.<sup>126</sup> Since then, both parties have accelerated the growth of federal law because they have viewed targeting salient crimes in salient ways to be politically profitable.<sup>127</sup> Now, after decades of federal involvement in criminal law, "the public overwhelmingly views crime—especially violent street crime—as a top-priority problem and wants the national government engaged in efforts to stop it."<sup>128</sup>

Meanwhile, few constraints impede Congress from exercising this political proclivity. Part of the reason is that Congress's activity is usually inconsequential. Because most criminal statutes rarely, if ever, are enforced, Congress passes legislation mostly "for symbolic and politically profitable purposes."<sup>129</sup> Understanding that most federal criminal law is symbolic, few politicians are likely to oppose a bill just because it is amended to include a criminal provision. Even when the executive does enforce a statute, "the blame falls squarely on it, not the legislature," if enforcement proves unpopular.<sup>130</sup> Congress thus "reaps only benefits from [its] decision and does not pay a price."<sup>131</sup> What's more, the vetogates model makes passing this kind of legislation *easier*

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<sup>125</sup> Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 Mich. L. Rev. 519, 539 (2011).

<sup>126</sup> See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *Crime & Just.* 377, 387 (2006) [hereinafter Richman, *Violent Crime Federalism*].

<sup>127</sup> *Id.* at 395–96.

<sup>128</sup> Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 *Cornell J.L. & Pub. Pol'y* 247, 249 (1997).

<sup>129</sup> Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 772 (1999).

<sup>130</sup> Barkow, *supra* note 125, at 539.

<sup>131</sup> *Id.* at 540.

by encouraging omnibus legislation that bundles together separate projects that individually would not gain majority support.<sup>132</sup> But these omnibus efforts, when exercised in criminal law, tend simply to add new crimes or make existing crimes harsher, not reevaluate existing statutes.<sup>133</sup>

All these effects place Congress on the horns of a dilemma. In the few instances where Congress needs to pass new criminal legislation that is not symbolic, it faces all the hurdles of legislative inertia. And where good policy dictates scaling back federal criminal law or updating anachronistic laws, Congress must fight not only legislative inertia, but also political obstacles unique to criminal law. It is no wonder that, for seventy years, the federal prohibition against distributing alcohol to American Indians has been “viewed as discriminatory,”<sup>134</sup> yet federal law continues to prohibit distribution and has since 1832.<sup>135</sup>

To be sure, some lawmakers from both parties recently appear to have determined that incarceration rates in America are too high. In President Obama’s words, “unlike so many issues that divide Washington, D.C., criminal justice is an area in which there is increasing bipartisan agreement.”<sup>136</sup> In 2018, Congress passed, and the President signed, the First Step Act, which creates more opportunities for pre-release custody, such as home confinement, and lowers some mandatory minimums.<sup>137</sup> But an unusual, rare, bipartisan coalition in favor of reforming what that coalition views as outmoded criminal laws is the exception that proves the rule. And the First Step Act, although narrowing the gap between federal and state law, still leaves federal law far stricter and does nothing to address the enormous expansion of federal criminal laws.

These problems might be less severe if one could rely entirely on enforcement officials not to enforce anachronistic or unpopular statutes. But as recent experiences with marijuana legislation show, reliance on enforcement discretion is insufficient for individuals who think a criminal provision should not exist. Not only do conflicts between state and federal marijuana laws create problems for the rule of law, but even though marijuana laws have long been low priority for federal enforcement, the

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<sup>132</sup> See Eskridge, *supra* note 116, at 1452.

<sup>133</sup> *Id.* at 1453.

<sup>134</sup> *Rice v. Rehner*, 463 U.S. 713, 726 (1983).

<sup>135</sup> *Id.* at 722.

<sup>136</sup> Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 *Harv. L. Rev.* 811, 822 (2017).

<sup>137</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

federal government in fact has enforced marijuana laws many times against medicinal producers.<sup>138</sup> Indeed, the recent U.S. Attorney for the District of Colorado—one of the first states to legalize marijuana recreationally under state law—warned in 2018 that the failure of legalized marijuana to live up to its promise meant that federal enforcement might increase.<sup>139</sup>

What's more, enforcement priorities often diverge from public opinion. Marijuana polls favorably both recreationally, at 63%,<sup>140</sup> and medicinally, at 93%.<sup>141</sup> But nothing suggests that enforcement officials will “reflect the views of the larger electorate in a community.”<sup>142</sup> The confirmation of former Attorney General Jeff Sessions, a strong opponent of marijuana, “highlighted the general uncertainty associated with the marijuana legalization movement, and the ease and speed with which a change in executive branch policy can unsettle the system.”<sup>143</sup> And even when federal officials choose not to enforce federal law, private officials can under statutes like RICO. The U.S. Court of Appeals for the Tenth Circuit recently allowed private plaintiffs to bring RICO claims against marijuana sellers and producers in Colorado because marijuana distribution is illegal under federal law.<sup>144</sup>

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<sup>138</sup> *United States v. McIntosh*, 833 F.3d 1163, 1168–69 (9th Cir. 2016) (reviewing enforcement actions in ten cases brought in states that have relaxed marijuana restrictions); see also *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (upholding federal prohibition of marijuana, even over homegrown marijuana for medicinal use).

<sup>139</sup> Bob Troyer, *It's High Time We Took a Breath from Marijuana Commercialization*, *Denver Post* (Sept. 28, 2018), <https://www.denverpost.com/2018/09/28/colorado-marijuana-commercialization> [<https://perma.cc/XQ9R-CX26>] (warning that people “may start seeing U.S. attorneys shift toward criminally charging licensed marijuana businesses and their investors” because the “results” of the “grand experiment in commercialized marijuana” have been lackluster).

<sup>140</sup> Quinnipiac Univ. Poll, *U.S. Voters Believe Comey More than Trump*, Quinnipiac University National Poll Finds; *Support for Marijuana Hits New High 2* (Apr. 26, 2018), [https://poll.qu.edu/images/polling/us/04262018\\_ufcq23.pdf](https://poll.qu.edu/images/polling/us/04262018_ufcq23.pdf) [<https://perma.cc/V8XS-8H-8P>].

<sup>141</sup> *Id.*

<sup>142</sup> Barkow, *supra* note 125, at 577; accord *id.* at 577–78 (“[There is no] assurance that [police and local prosecutors] are selecting the right cases for this differential sentencing treatment or that allowing cases to be handpicked for harsher treatment comports with notions of due process or federalism.”); Richman, *Violent Crime Federalism*, *supra* note 126, at 401 (arguing that enforcement actions tend to “nicely serve[] the interests of almost all of the *governmental* actors involved” (emphasis added)).

<sup>143</sup> Todd Garvey & Brian T. Yeh, Cong. Research Serv., *Attorney General’s Memorandum on Federal Marijuana Enforcement: Possible Impacts 3* (2018).

<sup>144</sup> *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 876–77 (10th Cir. 2017).

The failure to update federal law also creates important collateral effects unrelated to enforcement. For example, financial institutions hesitate to offer services to marijuana industries because marijuana businesses flagrantly violate federal law and federal regulations prohibit financial institutions from aiding violations of federal law.<sup>145</sup> Marijuana institutions thus typically run on a cash-only basis, which encourages tax cheating and makes theft and burglary easier and more catastrophic.<sup>146</sup>

### *B. The Dynamic Incorporation Solution*

Dynamic incorporation redresses the problem of inertia in two ways. It reduces the likelihood of state-federal conflict and thus the need for Congress to act in the first place, and it removes some of the inertia that hinders Congress's ability to pass substantive legislation.

#### *1. Reducing the Need for Congress to Enact Legislation*

Dynamic incorporation spreads the legislative burden among a greater number of legislative bodies. When Congress fails to use dynamic incorporation, it alone remains responsible for ensuring that legislation remains up to date. But relying only on Congress for this function is problematic because "Congress itself acts rarely and with growing difficulty and partisanship."<sup>147</sup> Dynamic incorporation invites the legislatures of all fifty states to influence application of federal law, multiplying the opportunities for updating federal law.<sup>148</sup> Congress can still update laws itself. But each of the fifty legislatures receive power to update (at least partly) application of federal law in those states. Of course, state legislatures, like Congress, also are subject to inertia, including short sessions, but providing state legislatures with opportunities to update federal law creates more opportunity on net to update laws than would occur without dynamic incorporation.

Enabling state legislatures to influence application of federal law in their states is so transformational that some scholars have suggested that the failure to do so can itself be a constitutional injury. Heather Gerken

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<sup>145</sup> Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 *Case W. Res. L. Rev.* 597, 600 (2015).

<sup>146</sup> *Id.* at 600–01.

<sup>147</sup> Gluck, *Our [National] Federalism*, *supra* note 5, at 2010.

<sup>148</sup> See Hart, *supra* note 26, at 540 ("Common sense and the instinct for freedom alike can be counted upon to tell the American people never to put all their eggs of hope from governmental problem-solving in one governmental basket.").

made this argument about the Defense of Marriage Act. That Act created a federal definition of marriage independent of what state law provided.<sup>149</sup> In declaring that law unconstitutional, “Justice Kennedy,” Gerken writes, “enabled proponents of marriage equality to take full advantage of the regulatory integration between the states and the federal government.”<sup>150</sup> “After *Windsor*,” she continues, “when the states moved on marriage quality [sic], they got to do what the states do elsewhere in the marriage arena and tug the federal government along with them.”<sup>151</sup>

To state it differently, Gerken’s argument about *Windsor* essentially is that the Defense of Marriage Act created too much political inertia. Marriage is primarily a matter of state law. The Defense of Marriage Act introduced a federal element that took influence away from the states because it failed to include a provision allowing states to update federal law.

Marijuana laws illustrate well how dynamic incorporation redresses inertia. Again, federal law is out of sync with public opinion on this issue. When Congress banned all uses of marijuana in 1970,<sup>152</sup> just 12% of Americans believed that marijuana should be legal.<sup>153</sup> Now, medicinal use of marijuana polls favorably at 93%.<sup>154</sup> Divergence of law from public opinion is not always problematic. Lay opinion sometimes should diverge from the opinion of representatives because representatives in a constitutional republic are supposed to study issues in greater depth than laypersons have the time or resources to do. Yet the wide and growing gulf between federal law and public opinion on this issue strongly suggests that inertia is at fault.

Unlike Congress, states have responded substantively to this shift in opinion. In the past two decades, thirty-three states have adopted laws allowing for medicinal use of marijuana in some form, and many others have adopted laws allowing for use of parts of cannabis plants that those

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<sup>149</sup> 1 U.S.C. § 7 (2018), declared unconstitutional by *United States v. Windsor*, 570 U.S. 744, 775 (2013).

<sup>150</sup> Gerken, *Federalism 3.0*, *supra* note 75, at 1717.

<sup>151</sup> *Id.*

<sup>152</sup> Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1248–49 (codified as amended at 21 U.S.C. § 812 (2018)).

<sup>153</sup> Illegal Drugs, Gallup, <https://news.gallup.com/poll/1657/illegal-drugs.aspx> [<https://perma.cc/9H2A-DCN4>].

<sup>154</sup> Quinnipiac Univ. Poll, U.S. Voters Believe Comey More than Trump, Quinnipiac University National Poll Finds; Support for Marijuana Hits New High 2 (Apr. 26, 2018), [https://poll.qu.edu/images/polling/us/us04262018\\_ufcq23.pdf](https://poll.qu.edu/images/polling/us/us04262018_ufcq23.pdf) [<https://perma.cc/7K6Y-ZR-ED>].

states believe are non-psychotropic.<sup>155</sup> Apart from specialized trial programs, only four states continue to prohibit all uses of medicinal marijuana.<sup>156</sup> Eleven states plus the District of Columbia have gone even further and adopted laws allowing for recreational use of marijuana.<sup>157</sup> But many of these laws are preempted by the Controlled Substances Act because they promote and facilitate violations of federal law<sup>158</sup> and thus “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>159</sup>

Relying on non-enforcement to mediate this conflict does not suffice for all the reasons already stated,<sup>160</sup> but had the Controlled Substances Act used dynamic incorporation from the outset, the dozens of laws passed by the states would have updated federal law and prevented these tensions from arising.

Tellingly, the only successful legislative response in Congress to the shift in state law makes heavy use of dynamic incorporation. Since December 2014, Congress has repeatedly passed budgetary riders that, with some exceptions, prohibit the Department of Justice from using funds to prosecute persons who comply with state medical marijuana laws.<sup>161</sup> This statute has a similar effect to an opt-out statute. It does not transform conduct that complies with state law into federally lawful conduct—meaning that private enforcement remains an issue under RICO—but it does allow states to create a safe harbor to federal prosecution.

Senators Cory Gardner (R-Colo.) and Elizabeth Warren (D-Mass.) have introduced a similar bill that would go even further. Not only would

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<sup>155</sup> State Medical Marijuana Laws, Nat’l Conference of State Legislatures (July 2, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/7-YYY-KZHY>].

<sup>156</sup> *Id.*

<sup>157</sup> Marijuana Overview, Nat’l Conference of State Legislatures (July 26, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/T6JG-VDMZ>].

<sup>158</sup> Many states have set up licensure and taxing schemes that grant the imprimatur of the state to violations of federal law. E.g., Colo. Rev. Stat. § 44-12-309 (2019) (providing that “[a] retail marijuana establishment may not operate until it is licensed by the state licensing authority”); Colo. Rev. Stat. § 39-28.8-302 (2019) (imposing a tax remitted to the state for the sale of marijuana).

<sup>159</sup> *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>160</sup> See *supra* notes 138–146 and accompanying text.

<sup>161</sup> See Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538, 132 Stat. 348, 444–45; *United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016).

the bill be permanent (and thus not as short-lived as a budgetary rider), but it would also allow states to create a safe harbor from liability, not just enforcement. The “STATES Act”<sup>162</sup> would render the federal prohibition against marijuana inapplicable whenever a person complies with state law—subject to some limits.<sup>163</sup>

Had the Controlled Substances Act employed a provision like this, state legislatures could have updated application of federal law to better converge with public opinion. As public opinion on marijuana shifted, the state legislatures could have updated the law without Congress having to lift a finger. Federal prohibition would apply in the states where legalization is least popular, not in the states where legalization carries substantial support. Enabling state legislatures would have multiplied the opportunities to update the Controlled Substances Act fifty-fold. And that update would not have been piecemeal. A single state can create a domino effect because states with similar political leanings often readily and rapidly adopt legislation once one state has done so.<sup>164</sup> Relaxing marijuana restrictions is now so popular that only four states completely prohibit use by the public.<sup>165</sup>

The ability of dynamic incorporation to reduce the need for Congress to revisit statutes extends beyond “opt-out” incorporation. The Assimilative Crimes Act, an “opt-in” statute, provides a ready example. Between 1866 and 1948, the Assimilative Crimes Act used only static incorporation—that is, it adopted state law only as it existed at the time the Act was passed.<sup>166</sup> Congress had to reenact the statute eight times during this period to try to keep it relatively up to date.<sup>167</sup> The U.S. Supreme Court recognized that the continuing need to reenact that law meant that the Act quickly became outdated, contrary to congressional purpose, and that dynamic incorporation would better achieve Congress’s intended effect.<sup>168</sup> As with opt-out statutes, opt-in statutes enable the

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<sup>162</sup> Strengthening the Tenth Amendment Through Entrusting States Act (“STATES Act”), S. 3032, 115th Cong. (2d Sess. 2018).

<sup>163</sup> *Id.* § 2.

<sup>164</sup> Gerken, *Federalism 3.0*, *supra* note 75, at 1720.

<sup>165</sup> State Medical Marijuana Laws, Nat’l Conference of State Legislatures (July 2, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/3FYS-AN8H>].

<sup>166</sup> *United States v. Sharpnack*, 355 U.S. 286, 291 (1958).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 293–94. To the extent that statutes using dynamic incorporation themselves are hard to repeal, one need not be concerned with Congress finding it difficult to repeal these kinds of statutes if, for example, a state guts its own laws to ensure that federal law has little

states to update the law so that Congress does not have to. It allows states to use their better local knowledge to update criminal laws while the federal government lends its resources to prosecuting those crimes by incorporating those laws federally.

These facts show why federal reliance on state law need not, as Logan worries, remove Congress as a laboratory of democracy, decreasing the number of labs by one.<sup>169</sup> Any loss of Congress as a laboratory of democracy is more than offset by the role dynamic incorporation plays in facilitating the creation of new laboratories. Without dynamic incorporation, federal law often freezes regulation in place either by preempting local laws or diminishing their practical effects. Dynamic incorporation, by creating a more integrated regulatory environment, increases the incentive for state and local officials to shape policy because it gives local policymakers more influence. And because dynamic incorporation decreases congressional inertia,<sup>170</sup> it also helps enable Congress to experiment, making Congress more of a laboratory participant than Congress would be absent dynamic incorporation.

Even if dynamic incorporation did reduce the laboratories of democracy, that point would not matter for criminal law. Where federal criminal law overlaps with the states, it is not its own laboratory; it merely supplements state efforts. Federal enforcement is far too small to “make even a sizeable dent in the criminal activity that falls within its statutory jurisdiction.”<sup>171</sup> Except in a few areas aimed at protecting the federal government itself, federal criminal enforcement merely supports what the states already do; it cannot adequately pursue federal interests that are unique.

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effect. It usually is comparatively easier for Congress to eliminate a statute that includes dynamic incorporation and pass a harsher law. See *supra* notes 129–133 and accompanying text.

<sup>169</sup> Logan, *supra* note 6, at 84–85.

<sup>170</sup> See *infra* Subsection II.B.2.

<sup>171</sup> Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583, 612 (2005); see also John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 *Hastings L.J.* 1095, 1099 (1995) (“[N]o matter how widely Congress casts the net of federal crimes, most criminal activity will continue to be handled by state and local authorities.”).



## *2. Reducing the Barriers Against Enacting Legislation*

The second way dynamic incorporation can redress issues of inertia is by removing barriers to passing new legislation. Statutes using dynamic incorporation carry many advantages that make them easier to pass than ordinary legislation.

Statutes that use dynamic incorporation are likely to engender less political opposition because they enable politicians to tailor federal policy to their respective states. Previous federal laws that used tools of national federalism to enable states to influence federal law gained support for precisely this reason. “Southern congressmen pushed early implementation of federal welfare programs through the states to preserve the political economy of the region.”<sup>172</sup>

Consider a senator who either supports a federal prohibition on marijuana or who hails from a state where federal enforcement of marijuana is popular. That politician likely will oppose efforts to decriminalize marijuana nationwide. But that politician will more likely support a statute allowing states to craft safe harbors against application of federal law because that statute would allow the politician’s state to retain the benefits federal enforcement can provide.

Alabama has adopted a similar position. In an amicus brief, Alabama boasted that it has “earned something of a reputation for its zeal in prosecuting and punishing [marijuana] drug crimes” and that “[i]t is not a reputation of which Alabama is embarrassed or ashamed,” yet it favored a policy that would allow other states to become exempt from federal marijuana regulations.<sup>173</sup> That marijuana policy, although bad from Alabama’s perspective, would still allow Alabama to keep the benefit of federal enforcement.

To be sure, a statute that uses dynamic incorporation might, in addition to decreasing opposition, also decrease enthusiasm. A politician who wants marijuana decriminalized nationwide will be less enthusiastic about a bill like the STATES Act and may choose to invest political energy elsewhere. Similarly, if a politician has already obtained favored policy in his or her home state, that politician may worry less about what happens in his or her neighbor states.

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<sup>172</sup> Gluck, *Intrastatutory Federalism*, *supra* note 81, at 573.

<sup>173</sup> Brief of the States of Alabama, Louisiana, and Mississippi as Amici Curiae in Support of Respondents at 1, 3, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03–1454).

But the politics in criminal law generally favor increased criminalization, not the reverse.<sup>174</sup> And the decrease in opposition should outweigh the decrease in enthusiasm. Politicians already are accustomed to voting for bills they do not fully support because the structural design of Congress fosters more compromise than the parliamentary system.<sup>175</sup> Behavioral science also reveals that, other things being equal, avoiding loss is a much stronger motivator than obtaining gain. In some experiments, individuals weighed losses twice as heavily as gains.<sup>176</sup> Some scholarship suggests that loss aversion causes people to prefer policy change at the state or local level,<sup>177</sup> increasing the incentive for politicians to support statutes that use dynamic incorporation. This loss-aversion principle that describes individual behavior might not always translate into institutional behavior, but legislatures are highly individualistic and fairly decentralized institutions. The loss-aversion principle thus should apply with some force to Congress, making legislators more concerned with avoiding legislation that they think is bad for their respective states than obtaining new legislation that they think is good.

In any event, dynamic incorporation statutes do not simply lessen opposition; they also provide affirmative incentives. One advantage is that dynamic incorporation, in a sense, provides federal resources to prosecute violations of state law. Entirely repealing the federal prohibition on marijuana would mean that persons who exceed what state laws allow could be prosecuted only under state law. Opt-out statutes, in contrast, create a safe harbor only for conduct that complies with state law. Any conduct that exceeds state law triggers application of federal law. Thus, for opt-out statutes, enforcement of federal law is substantively no different from federal enforcement of state law (although sentences may differ).

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<sup>174</sup> Barkow, *supra* note 125, at 539.

<sup>175</sup> Eskridge, *supra* note 116, at 1449–50.

<sup>176</sup> Erica Goode, *A Conversation with Daniel Kahneman; On Profit, Loss and the Mysteries of the Mind*, N.Y. Times (Nov. 5, 2002), <https://www.nytimes.com/2002/11/05/health/a-conversation-with-daniel-kahneman-on-profit-loss-and-the-mysteries-of-the-mind.html> [https://perma.cc/CZ3C-YQ8C] (reporting that, when faced with a wager where an unfavorable coin toss would cost a person \$10, most people are unwilling to accept the wager unless a favorable coin toss will net at least twice that amount).

<sup>177</sup> Richard A. Posner, *Toward an Economic Theory of Federal Jurisdiction*, 6 Harv. J.L. & Pub. Pol’y 41, 44 (1982).

The same is true for opt-in and triggering statutes. For example, the Reconstruction-era Congress passed laws that made it a federal offense for state election officials to “neglect or refuse” to perform their election duties under state law<sup>178</sup> or to violate any state criminal law in conspiring to violate civil rights.<sup>179</sup> These laws did no more than declare it to be a federal offense to violate certain state laws, which created the opportunity to use federal resources to prosecute violations of state law.

For those federal politicians who worry about preserving the ability of federal officials to enforce federal law, dynamic incorporation also should be attractive because it can mitigate the risks that unhappy states will block federal enforcement. As explained in greater detail below in Section III.D, federal enforcers rely on local enforcement officials to provide them information needed to bring prosecutions. But those local enforcement officials are more likely to withhold that information—and may be compelled to do so by state law—if state actors disagree with federal policy.<sup>180</sup> Sanctuary cities, for example, choose not to cooperate with federal enforcers, making it much harder for federal enforcers to obtain the information they need, even on issues unrelated to the policy disagreement underlying the decision to become a sanctuary city. Dynamic incorporation—such as through opt-out statutes—can reduce this risk because, under those statutes, federal law is triggered only when a person violates state law, reducing the incentive for local officials to withhold information from federal officials. Those laws also reduce these risks by providing local politicians a stake in the success of federal programs. As national federalism scholarship explains, giving local politicians influence over federal law gives those politicians an incentive to ensure that the federal program is robust, effective, and successful.<sup>181</sup>

Dynamic incorporation statutes also obtain all these benefits without disrupting other incentives that motivate politicians in criminal law. Congress passes far more criminal statutes than can be enforced. Often, its motive is to pass a statute that gives the facial appearance of being

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<sup>178</sup> An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, ch. 114, § 22, 16 Stat. 140, 145–46 (1870).

<sup>179</sup> *Id.* § 7, 16 Stat. at 141.

<sup>180</sup> Cf. Rodríguez, *supra* note 102, at 2106 (noting that, by decriminalizing marijuana at the state level, certain states “deprive the federal government of the state and local enforcement resources on which it historically has relied”).

<sup>181</sup> See Gluck, *Intrastatutory Federalism*, *supra* note 81, at 569 (arguing that local officials who are partly responsible for the success or failure of a federal program have an added incentive to make the program work, which further entrenches the program).

tough on crime—even when the politicians know that the statute may never be enforced.<sup>182</sup> This incentive creates ample room for criticism, but the important thing for dynamic incorporation is that the tool does not disturb this incentive, so it does not increase barriers to passing legislation. Laws using dynamic incorporation can appear symbolically tough on their faces while still allowing states authority to influence application of the law.

Dynamic incorporation also reduces inertia by making it easier for some bills to receive floor time in Congress. Removing conditions that deter politicians from voting for a bill does little good if the bill never gets a vote. The easiest and most common way for a bill to die is for legislatures not to schedule a bill for a committee hearing or floor vote.<sup>183</sup> But dynamic incorporation makes it more likely that certain bills will receive floor consideration. “Decentralization,” Gerken has stated, “helps social movements shift the burden of inertia and force the majority to engage.”<sup>184</sup> When localities can shape federal law, they sometimes bring so much attention to issues that politicians cannot avoid taking notice.<sup>185</sup> Inertia remains, but these circumstances make the prospect of obtaining floor time more likely for salient issues on which state legislatures have been active.

Two examples of enacted legislation bolster the conclusion that statutes using dynamic incorporation often overcome inertia where other statutes cannot. The first is Congress’s only legislative response to the tension created by state laws over marijuana. Congress’s budgetary rider, readopted several times since December 2014, prohibits the Department of Justice from using funds to prosecute persons who comply with state medical marijuana laws.<sup>186</sup> Congress has been unable or unwilling to adopt any legislative fix to the conflict between state and federal law on this issue other than this instance of opt-out dynamic incorporation.

Congress also used opt-out dynamic incorporation to amend the Indian liquor law. For nearly two hundred years, federal law has prohibited distributing alcohol to Native Americans.<sup>187</sup> At least since the 1950s, this

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<sup>182</sup> Barkow, *supra* note 125, at 539.

<sup>183</sup> Eskridge, *supra* note 116, at 1444.

<sup>184</sup> Gerken, *Federalism 3.0*, *supra* note 75, at 1713.

<sup>185</sup> See *id.* at 1712.

<sup>186</sup> See Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538, 132 Stat. 348, 444–45 (2018); *United States v. McIntosh*, 833 F.3d 1163, 1169 (9th Cir. 2016).

<sup>187</sup> *Rice v. Rehner*, 463 U.S. 713, 726 (1983); accord 18 U.S.C. § 1154 (2018).

law has been “viewed as discriminatory,”<sup>188</sup> yet it, or a similar variation, has remained on the books since 1832.<sup>189</sup> Congress has been politically unable or unwilling to eliminate this provision and has instead passed an opt-out statute, allowing states and local tribes to adopt safe-harbor laws, compliance with which turns off application of federal law.<sup>190</sup>

In both circumstances, Congress could have repealed earlier prohibitions. But it chose instead to retain the provision and enable states to create safe harbors that render the federal prohibition inapplicable. Again, this choice keeps the option of federal enforcement in the government’s pocket when a person violates state law. At least in those circumstances, dynamic incorporation overcame inertia where other statutes did not.

### *3. The Insufficiency of Administrative Delegation*

These positive effects of dynamic incorporation cannot simply be obtained by delegating matters to administrative agencies. Even setting aside the schools of thought that question whether administrative delegation is lawful or wise, administrative delegation does not achieve the same ends as dynamic incorporation. For example, although administrative delegation increases by one the number of bodies that can update federal law, it forgoes the opportunity to multiply the number of updating bodies by fifty. True, dynamic incorporation allows states to affect federal law directly only in their own jurisdictions. But action by one state routinely induces changes in other states,<sup>191</sup> meaning that dynamic incorporation creates fifty different potential beginnings for nationwide reform while administrative delegation creates only one. The Attorney General has the power to move marijuana, for example, into a different schedule, allowing the drug to be used for medicinal purposes.<sup>192</sup> But the Attorney General has never done so even though a majority of states have and even though parties have repeatedly petitioned the federal government to do so.<sup>193</sup>

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<sup>188</sup> *Rice*, 463 U.S. at 726 (quoting U.S. Dep’t of the Interior, Federal Indian Law 382 (1958)).

<sup>189</sup> *Id.* at 722.

<sup>190</sup> 18 U.S.C. § 1161 (2018).

<sup>191</sup> Gerken, *Federalism* 3.0, *supra* note 75, at 1713.

<sup>192</sup> 21 U.S.C. § 811 (2018).

<sup>193</sup> Karen O’Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 *J. Health Care L. & Pol’y* 39, 40–42 (2013).

Federal regulation also does not allow for useful variation. A law like the STATES Act would allow states to tailor their regulations, meaning that federal law would apply in different circumstances depending on the variations in state regulations. To the extent states can adopt regulations that tailor federal criminal law to the needs of each community, updating by federal regulation loses this benefit.

### III. SUPPORTING SEPARATION OF POWERS

Dynamic incorporation can reform criminal law in a second way. Enforcement officials often are a target of criticism because their enforcement decisions cause many disparities and inequities, yet those officials remain mostly immune from judicial oversight. And by passing far more laws than the executive branch can enforce, Congress has aggravated that discretion.

Even worse, Congress has taken another, low-visibility action that often is overlooked in scholarship but has diminished enforcement oversight. As Congress significantly expanded the scope of federal criminal law, it never gave the executive branch enough resources to investigate those new crimes. Federal and local officials instead crafted a codependent relationship where local officials serve as gatekeepers of much of the information federal officials need to bring prosecutions. This arrangement enhances the power of both local and federal officials—meaning that Congress aggravated not only the problem of federal enforcement discretion, but also of local discretion.

Dynamic incorporation can redress this issue by evening the score. Providing state legislatures with a greater role in implementing federal criminal law empowers state legislatures to influence federal law in ways that check enforcement discretion of both local and federal officials. Dynamic incorporation thus reinforces separation of powers by restoring the role of the legislature as a check on the executive.

#### *A. Criminal Law and Concurrent Jurisdiction*

Scholars writing in the field of national federalism argue that Congress has seized concurrent (or exclusive) jurisdiction over most important issues and that states and their officials can exercise appreciable influence only by helping administer federal programs.<sup>194</sup> That same story rings true

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<sup>194</sup> See *supra* notes 84–89 and accompanying text.

in criminal law. Initially modest in scope, federal criminal law now overlaps almost entirely with state criminal law.

### *1. The Humble Beginnings of Federal Criminal Law*

In the eighteenth century, federal and state criminal law shared almost no overlap. The Constitution barely mentions the power to pass criminal legislation. Apart from the provision giving Congress plenary police power over federal territories and enclaves,<sup>195</sup> the only power over federal criminal law that the Constitution expressly contemplates is the power to “define and punish” piracy and offenses against the law of nations and to prescribe “Punishment” for counterfeiting and treason.<sup>196</sup>

In the light of this modest authority, early federal criminal statutes were unassuming. The Crimes Act of 1790 stuck mostly to the limited authority expressly recognized by the Constitution. It prescribed the punishment for treason, created an offense for misprision of treason (failure to report pending treason), defined five offenses related to piracy and the high seas, prescribed a sentence for counterfeiting, defined two offenses against the law of nations, and created six offenses for conduct occurring in federal districts and enclaves.<sup>197</sup>

But Congress also recognized that it had some implicit powers to protect its own legislative creations through criminal laws. The Crimes Act of 1790 used the Necessary and Proper Clause to create six offenses designed to protect the newly created federal courts or their ability to enforce their authority.<sup>198</sup>

Still, use of that implicit power remained humble. Except when crafting legislation for federal districts and enclaves, over which Congress had plenary power, Congress restrained criminal law to targeting activity that harmed the “federal government itself, its property, or its programs.”<sup>199</sup> It left to the states the responsibility of protecting individuals.<sup>200</sup> Because of this humble reach, “there was virtually no overlap between federal and state offenses.”<sup>201</sup>

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<sup>195</sup> U.S. Const. art. I, § 8, cl. 17; id. art. IV, § 3, cl. 2.

<sup>196</sup> Id. art. I, § 8, cl. 10; id. art. III, § 3, cl. 2.

<sup>197</sup> Crimes Act of 1790, ch. 9, 1 Stat. 112.

<sup>198</sup> Id.

<sup>199</sup> Richman, *Violent Crime Federalism*, supra note 126, at 383.

<sup>200</sup> See Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 *Ariz. St. L.J.* 825, 831–32 (2000).

<sup>201</sup> Id. at 830.

*2. Congress Rapidly Expands Federal Criminal Law*

Federal criminal law remained in this state until after the Civil War when the Reconstruction amendments and postbellum ideas altered the traditional view of the relationship between the federal and state governments.<sup>202</sup> For the first time, Congress passed criminal laws that applied in the states and that were designed to protect individuals instead of the federal government. It passed a variety of acts prohibiting using the mail to send obscenities,<sup>203</sup> to send certain lottery-related documents,<sup>204</sup> or to defraud.<sup>205</sup> Congress also enacted crucial laws designed to protect black Americans from deprivation of their civil rights.<sup>206</sup>

This conceptual shift sparked what would eventually become an enormous expansion of federal criminal law. Expansion began slowly. Under the Supreme Court's existing doctrine about the Commerce Clause, Congress lacked authority to control many things, such as drugs, directly. So Congress instead passed taxation laws that required people to create elaborate documentary evidence that states could then use to bring prosecutions.<sup>207</sup> As one court put it, these laws often had penalties “so disproportionate to the gravamen of the offense as to be further convincing that Congress was more concerned with the moral ends to be subserved than with the revenue to be derived.”<sup>208</sup>

The Supreme Court then loosened its interpretation of the Commerce Clause, and the pace of criminal law expansion exploded. The new doctrine allows Congress to regulate nearly anything that has crossed state lines (even if decades earlier)<sup>209</sup> or even purely intrastate activity that

<sup>202</sup> *Id.* at 831.

<sup>203</sup> Act of Mar. 3, 1865, ch. 89, § 16, 13 Stat. 504, 507.

<sup>204</sup> An Act to Further Amend the Postal Laws, ch. 246, § 13, 15 Stat. 194, 196 (1868).

<sup>205</sup> Act of June 8, 1872, ch. 335, §§ 149, 301, 17 Stat. 283, 302, 323 (codified as amended at 18 U.S.C. § 1341 (2018)).

<sup>206</sup> An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, ch. 31, § 2, 14 Stat. 27 (1866).

<sup>207</sup> See, e.g., *Leary v. United States*, 395 U.S. 6, 16, 27 (1969) (finding it “inescapable that the [Marihuana Tax Act] was aimed at bringing to light transgressions of the [state] marihuana laws”).

<sup>208</sup> *United States v. Doremus*, 246 F. 958, 964 (W.D. Tex. 1918) (citation omitted), rev'd, 249 U.S. 86 (1919). One person was sentenced to fifteen years for depriving the federal government of only a few dollars in tax revenue. *United States v. Daugherty*, 269 U.S. 360, 363 (1926).

<sup>209</sup> *Scarborough v. United States*, 431 U.S. 563, 575 (1977). For example, the federal carjacking statute does not require any meaningful interstate nexus such as crossing state lines or attacking a driver in interstate travel. The vehicle only has to have “been transported, shipped, or received in interstate or foreign commerce”—even if decades earlier. 18 U.S.C.



could have a “substantial effect” on interstate activity.<sup>210</sup> Congress need only assert a substantial effect that satisfies rational basis review.<sup>211</sup>

Congress used this broad power to erase nearly every substantive distinction between federal and state criminal law. The first criminal statute included fewer than twenty crimes. Today, as many as 4,500 to 6,000 criminal provisions pervade the U.S. Code, not to mention the 300,000 or more regulations that can trigger criminal sanctions.<sup>212</sup> Today, federal jurisdiction overlaps almost completely with state criminal jurisdiction.<sup>213</sup>

No statute better exemplifies this concurrent jurisdiction than the Controlled Substances Act. Federal enforcers “could theoretically leave all drug trafficking enforcement to the states” without sacrificing federal interests.<sup>214</sup> Yet this Act is responsible for nearly one-third of federal prosecutions even though the Act does little more than target activity traditionally regulated by state law.<sup>215</sup>

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§ 2119 (2018); *United States v. Jones*, 854 F.3d 737, 739 (5th Cir. 2017), cert. denied, 138 S. Ct. 242 (2017) (enforcing the statute even though the interstate transportation occurred five years before the crime). This standard is so loose that it applies to nearly every single vehicle.

This rule takes all the bite out of the Supreme Court’s decision in *United States v. Lopez*, 514 U.S. 549 (1995), where the Court held that a federal law banning possession of handguns in schools was unconstitutional for lack of a substantial effect on interstate commerce. After that decision, Congress simply passed the same statute again and included another element: the gun had to have crossed state lines at least once, which is true of nearly all firearms. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 922(q)(2) (2018)). Courts have held that the addition of the jurisdictional element cured the problem that caused the statute in *Lopez* to be unconstitutional. E.g., *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999).

<sup>210</sup> E.g., *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Perez v. United States*, 402 U.S. 146, 154 (1971) (allowing the government to prosecute a loanshark who engaged only in intrastate transactions).

<sup>211</sup> *Gonzales*, 545 U.S. at 22.

<sup>212</sup> Klein & Grobey, *supra* note 33, at 3 n.6; Mark Holden, *Criminal Justice Reform Is Ripe for Bipartisan Achievement*, *The Hill* (Jan. 3, 2017), <https://thehill.com/blogs/congress-blog/judicial/312492-criminal-justice-reform-is-ripe-for-bipartisan-achievement> [<https://perma.cc/3UWM-BLQK>].

<sup>213</sup> Richman, *Changing Boundaries*, *supra* note 42, at 90.

<sup>214</sup> Klein & Grobey, *supra* note 33, at 24; accord Fed. Judicial Ctr., *Report of the Federal Courts Study Committee* 37 (1990), <https://www.fjc.gov/sites/default/files/2012/Rep-FCSC.pdf> [<https://perma.cc/U94Y-ZWUE>] (reporting that federal courts have become “overwhelmed with [drug] cases that could be prosecuted in the state courts” and advocating for local “primacy in drug control”).

<sup>215</sup> U.S. Sentencing Comm’n, *2017 Sourcebook of Federal Sentencing Statistics* S-13 fig.A (2018).

*B. Local Officials: Gatekeepers of Federal Enforcement*

This enormous change in the scope of federal criminal law has had collateral consequences that greatly affect interactions between federal and state officials.

*1. Local Influence over Federal Enforcement*

Even as Congress drastically expanded the substantive scope of federal criminal law, it never gave the federal government the resources to fully use that power—perhaps because of widespread fear of having a national police force.<sup>216</sup> As with the substantive scope of its jurisdiction, the federal government began with only modest investigative resources. It first had at its disposal only the Postal Inspection Service, the Revenue Cutter Service, and the U.S. Marshal Service.<sup>217</sup> The Department of Justice did not even exist until 1870.<sup>218</sup> U.S. Attorneys were in charge of federal prosecutions, but they lacked officials dedicated to investigating crimes. Instead, federal prosecutors often had to borrow Treasury Department agents for investigations.<sup>219</sup>

Federal investigative resources have since expanded. In addition to the Department of Justice, a centralized Attorney General, the Federal Bureau of Investigation, and the Drug Enforcement Administration, none of which existed until relatively recently in American history, the federal government now has 120,000 “law enforcement officers,” defined as those “authorized to make arrests and carry firearms.”<sup>220</sup>

But the federal police force still remains comparatively tiny even though federal criminal law has both the geographic and substantive scope of all the states combined. Congress has displayed a “penchant for giving federal agencies more enforcement obligations than enforcement resources.”<sup>221</sup> State and local law enforcement officers outnumber federal law enforcement officers more than six-to-one.<sup>222</sup> Even this number

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<sup>216</sup> See William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, 15 *Crime & Just.* 231, 280–81 (1992).

<sup>217</sup> *Id.* at 241.

<sup>218</sup> An Act to Establish the Department of Justice, ch. 150, § 1, 16 Stat. 162 (1870).

<sup>219</sup> Richman, *Violent Crime Federalism*, *supra* note 126, at 384.

<sup>220</sup> Brian A. Reaves, Bureau of Justice Statistics, NCJ 238250, *Federal Law Enforcement Officers*, 2008, at 1 (2012), <https://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<https://perma.cc/3AT7-ACLE>].

<sup>221</sup> Geller & Morris, *supra* note 216, at 269.

<sup>222</sup> Brian A. Reaves, Bureau of Justice Statistics, NCJ 233982, *Census of State and Local Law Enforcement Agencies*, 2008, at 1 (2011), <https://www.bjs.gov/content/pub/>

understates the situation. About 40% of the 120,000 federal “law enforcement officers” perform customs inspections, detention duties, security, or court operations,<sup>223</sup> leaving only about 72,000 police officers for more traditional investigation and policing. Indeed, drug crimes make up about one-third of federal prosecutions, yet just 3.6% of the federal police force works for the Drug Enforcement Administration, fewer than the number who work for the Secret Service.<sup>224</sup> Put simply, the expansion of federal investigation resources did not keep pace with the dramatic substantive expansion of federal criminal law.

The most notable absence in this area is any investigation force dedicated to obtaining local information. Federal officials tend to focus on obtaining specialized information because it is local officials who bear primary responsibility for law enforcement. Federal officials thus have an informational advantage over local officials in some areas, such as the dynamic and changing ways offenders commit money-laundering schemes and computer-based crimes.<sup>225</sup> But the federal government lacks anything remotely comparable to the size and breadth of local beat officers. This fact gives local officials a “virtual monopoly over local knowledge.”<sup>226</sup> Not only are local officers often physically on the streets, but the more common information systems, like Emergency 911, route information to local officers, not federal officials.<sup>227</sup> Local officials also are more likely to have cultivated relationships with criminal informants.<sup>228</sup>

So federal enforcers rely substantially on the willingness and ability of local officials to gather and share information critical to bringing federal prosecutions. What’s more, federal agents rely on local agents to make arrests; local officials make a clear majority of arrests of persons prosecuted in federal court for drug crimes.<sup>229</sup> Federal and local officials

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pdf/cslla08.pdf [https://perma.cc/R2XQ-QTWJ] (reporting that states have 251 officers per 100,000 residents); Reaves, *supra* note 220, at 1 (reporting that the federal government has 40 officers per 100,000 residents).

<sup>223</sup> Reaves, *supra* note 220, at 1 fig. 1.

<sup>224</sup> *Id.* at 2 tbl.1.

<sup>225</sup> Geller & Morris, *supra* note 216, at 253.

<sup>226</sup> Richman, *Violent Crime Federalism*, *supra* note 126, at 379.

<sup>227</sup> *Id.* at 405.

<sup>228</sup> Geller & Morris, *supra* note 216, at 250.

<sup>229</sup> See Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 *Am. L. & Econ. Rev.* 259, 262 (2000); Bureau of Justice Statistics, *Drug and Crime Facts: Drug Law Violations and Enforcement 1*, <https://www.-bjs.gov/content/dcf/enforce.cfm> [https://perma.cc/57F4-HAYL].

have created and maintained a “negotiated boundary”<sup>230</sup> where local agents often conduct initial investigations and arrests before turning case files over to the federal government for prosecution. The federal government rewards the willingness of local officials to help administer federal law by providing free training and other resources. In some programs, the federal government even pays part of local officials’ salaries.<sup>231</sup>

A 1990s program highlights this relationship. Sentences for crimes involving firearms are far harsher under federal law, but the federal government lacks much local information about when and where firearms are used or located. So federal officials entered into an agreement with local officials in Richmond, Virginia, asking to be notified every time a local official “finds a gun during the officer’s duties.”<sup>232</sup> In exchange, federal officials shifted prosecution resources to that city, which had an extremely high murder rate, so that more offenders would face prosecution than if local enforcement officials alone brought prosecutions.<sup>233</sup>

## *2. Enhancing Enforcement Power*

The reliance the federal government places on local officials to obtain information enhances the power both of federal and local enforcement officials. For federal officials, the enhancement is obvious: their relationship with local officials gives them information they could not otherwise acquire given their limited resources.

This reliance also enhances the power of local officials because their gatekeeping role enables them to exercise substantial influence over when, where, and if federal criminal law will apply. As sanctuary cities can do in the immigration context, local officials can impede federal enforcement by declining to share information. They also can enable federal enforcement by sharing information. And they can funnel federal enforcement by strategically choosing to convey certain information or pursue certain paths of investigation. Local officials may choose not to exercise this power, and lots of ink could be spent discussing whether

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<sup>230</sup> Richman, *Changing Boundaries*, supra note 42, at 93.

<sup>231</sup> Richman, *Violent Crime Federalism*, supra note 126, at 397; see also Geller & Morris, supra note 216, at 288 (describing “tuition-free” training programs federal agents provide for local agents).

<sup>232</sup> Richman, *Violent Crime Federalism*, supra note 126, at 397.

<sup>233</sup> *Id.* at 397–98.

officials should or should not exercise this power, but evaluating the state of criminal law requires understanding precisely the power local officials have. This power gives local officials the ability to evade state law and obtain enhanced leverage over defendants.

*a. Circumventing State Law*

The gatekeeping role local officials play enables them to circumvent constraints imposed by state law. Nowhere is this clearer than with sentencing law. The stark differences between state and federal incarceration periods, plus the gatekeeping role local officials play, give local officials tremendous power to create significant sentencing disparities among similarly situated offenders. (Again, some officials may not use this power, but they nonetheless possess it.)

Because of Congress's decision to drastically expand the scope of federal criminal law jurisdiction, nearly all conduct that would violate state criminal law also can be prosecuted federally.<sup>234</sup> Yet almost across the board, Congress has authorized—and even mandated—far harsher sentences than have state legislatures. Some federal sentences are ten or twenty times as harsh as state sentences.<sup>235</sup> In one case, the U.S. Sentencing Guidelines required a sentence of 188 to 235 months for distributing controlled substances while state sentencing guidelines prescribed a sentence of just 18 to 20 months.<sup>236</sup> In another, a drug offender faced a four-year sentence in state court but life without parole in federal court.<sup>237</sup>

Not only are sentences higher, but federal offenders typically serve larger proportions of their sentences. Federal offenders who display “exemplary compliance” with disciplinary directives can receive credit for 419 days for every 365 served.<sup>238</sup> So a federal offender with a good disciplinary record can obtain release after serving about 87% of his sentence. But sentence proportions are very different in the states. In Missouri, certain felony offenders need only serve 15% of their sentences

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<sup>234</sup> Richman, *Changing Boundaries*, supra note 42, at 90–91.

<sup>235</sup> Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 *Hastings L.J.* 979, 998 (1995).

<sup>236</sup> *United States v. Williams*, 746 F. Supp. 1076, 1078–79 (D. Utah 1990), *aff'd & remanded on other grounds*, 963 F.2d 1337 (10th Cir. 1992).

<sup>237</sup> Beale, supra note 235, at 1000–01.

<sup>238</sup> 18 U.S.C. § 3624(b)(1) (2018).

before becoming eligible for parole.<sup>239</sup> Even for repeat offenders, Missouri sometimes requires only that offenders serve 40% of their sentences.<sup>240</sup>

Because incarceration periods are much longer under federal law, the choice whether to prosecute a defendant in state court or federal court—for the same conduct—is more consequential to the defendant than any other decision. As one scholar has noted, the disparity in how much time persons spend incarcerated if convicted federally instead of under state law creates “a kind of cruel lottery.”<sup>241</sup>

Exploiting this disparity, officials routinely shift defendants to federal court simply to obtain higher sentences,<sup>242</sup> and they openly admit doing so.<sup>243</sup> When he was Attorney General, Jeff Sessions asked local officials to “steer more gun-crime cases to federal court, where offenders face an average of six years in prison, compared with the lighter punishments that can result from state convictions.”<sup>244</sup> Shifting defendants for these reasons is official Department of Justice policy. Since at least 1988, the DOJ manual has directed officials to weigh “[t]he probable sentence or other consequences if the person is convicted in the other jurisdiction.”<sup>245</sup> The manual states that sentencing disparity is one of the most important factors for prosecutors to consider. It stresses that “[t]he *ultimate measure* of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted.”<sup>246</sup> As one scholar put it, this “language appears virtually to

<sup>239</sup> Mo. Code Regs. Ann. tit. 14, § 80-2.010(1)(A) (2019).

<sup>240</sup> Mo. Rev. Stat. § 558.019.2(1) (2019).

<sup>241</sup> Beale, *supra* note 235, at 997.

<sup>242</sup> “[O]ne of the chief motivators for federal involvement is a different view of what sentence is appropriate.” Barkow, *supra* note 125, at 574.

<sup>243</sup> E.g., *United States v. Oakes*, 11 F.3d 897, 898 (9th Cir. 1993) (“The government admits that Oakes was prosecuted in federal court primarily because federal law provides for stiffer penalties and more rigorous forfeiture of defendants’ property.”); *United States v. Mills*, 925 F.2d 455, 457 (D.C. Cir. 1991), *aff’d in part & rev’d in part on other grounds on reh’g*, 964 F.2d 1186, 1188 n.3 (D.C. Cir. 1992) (reporting that, during the first Bush administration, “officials adopted a new policy to bring more D.C. drug cases in federal court in order to take advantage of the stricter penalties available under the federal sentencing guidelines”).

<sup>244</sup> Mark Obbie, *Why Jeff Sessions’ Recycled Crime-Fighting Strategy Is Doomed to Fail*, Politico (Sept. 7, 2017), <https://www.politico.com/magazine/story/2017/09/07/jeff-sessions-gun-crime-st-louis-215578> [<https://perma.cc/NG7Q-3M5T>].

<sup>245</sup> U.S. Dep’t of Justice, *Justice Manual*, § 9-27.240 (2018) [hereinafter *Justice Manual*]; U.S. Dep’t of Justice, *1 U.S. Attorneys’ Manual* § 9-27.240 (1988).

<sup>246</sup> *Justice Manual*, *supra* note 245, § 9-27.240 (emphasis added).

instruct federal prosecutors to go after particular defendants on the basis that a harsher sentence can be obtained under federal law.”<sup>247</sup>

Local officials have the power to create sentencing disparity between similarly situated offenders by choosing to convey information about some defendants to federal officials. Federal officials have a much higher rate of convictions and guilty pleas<sup>248</sup> in part because they can choose to “charge only rock-solid cases.”<sup>249</sup> Local officials cannot force federal officials to take cases, but they can increase the likelihood that federal officials will take a case by making an arrest, pouring more investigation resources into a case, and conveying all that information to federal officials. This ability greatly enhances the enforcement discretion of local officials—discretion that receives little oversight under current procedures.

Consider the case of Mark Palmer and Jack Roberts, two joint partners of a marijuana-growing venture. Despite their equal involvement in the unlawful scheme, their sentences could not have been more different. Local officials chose to charge Roberts locally under state law. He received a fine of just \$1,000, reduced to \$176 because of financial insecurity.<sup>250</sup> Palmer was far less fortunate. In a move the Ninth Circuit declared “troubling” but legal, local officials sent his case file to federal officials. Palmer received a mandatory minimum sentence of ten years.<sup>251</sup> Local officials were the gatekeepers for Palmer’s conviction. The DEA learned about Palmer only because local enforcement officials informed the agency of their investigation into Palmer.<sup>252</sup> Their decision to shift information about Palmer’s case created stark disparity between Palmer’s and Roberts’s sentences.

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<sup>247</sup> Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 *Harv. C.R.-C.L. L. Rev.* 499, 513 n.57 (1996).

<sup>248</sup> See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 *S. Cal. L. Rev.* 643, 676–77 (1997).

<sup>249</sup> Klein & Grobey, *supra* note 33, at 10.

<sup>250</sup> *United States v. Palmer*, 3 F.3d 300, 305 n.3 (9th Cir. 1993); see also *United States v. Willis*, 139 F.3d 811, 812 (11th Cir. 1998) (reporting that “brothers of roughly equal culpability for the same offense conduct” received drastically different sentences after one was convicted in state court and the other was convicted in federal court); *United States v. Docampo*, 573 F.3d 1091, 1103–04 (11th Cir. 2009) (Barkett, J., concurring in part and dissenting in part) (reporting that two codefendants pleaded guilty in state court to a conspiracy and received only probation, but the named defendant was convicted in federal court and sentenced to 210 months).

<sup>251</sup> *Palmer*, 3 F.3d at 305 n.3.

<sup>252</sup> *Id.* at 302.

The ability of local officials to circumvent constraints imposed by state law extends much further than evading state sentencing constraints. Defendants in state court often possess greater procedural and substantive rights than defendants in federal courts because most (although not all) procedural protections under federal law are constitutional and apply both to states and the federal government. So to the extent states have different procedural requirements, those provisions tend to give defendants greater protection. For example, the Fourth Amendment does not recognize a right against the government searching trash left at the curb,<sup>253</sup> but materially identical provisions in some state constitutions do.<sup>254</sup>

The gatekeeping role local officials play allows them to evade these protections. A New Jersey investigator, for example, can search a person's trash in violation of the New Jersey Constitution without having to worry that a judge will suppress the evidence so long as prosecution occurs in federal court.<sup>255</sup> Likewise, under federal law, obtaining bail or pretrial discovery is harder,<sup>256</sup> asset forfeiture is harsher,<sup>257</sup> and statutes of limitations are longer,<sup>258</sup> so local officials can evade defendant-friendly state policies in all these areas by shunting cases to federal prosecutors. In the light of the greater protections generally afforded under state law, it should not be surprising that the rate of conviction is far higher in federal courts.<sup>259</sup>

Evading state constraints is easier than ever before. The status of local police as gatekeepers of federal information gives them new bargaining power over prosecutors. Police “used to be wholly dependant [sic]” on local prosecutors.<sup>260</sup> But federal dependence on local police has given

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<sup>253</sup> *California v. Greenwood*, 486 U.S. 35 (1988).

<sup>254</sup> E.g., *State v. Tanaka*, 701 P.2d 1274 (Haw. 1985); *State v. Hemepele*, 576 A.2d 793 (N.J. 1990) (interpreting a state provision that is identical except for some minor word choices and punctuation); *State v. Morris*, 680 A.2d 90 (Vt. 1996); *State v. Boland*, 800 P.2d 1112 (Wash. 1990); see also Clymer, *supra* note 248, at 671–73 (listing differences between state and federal approaches to suppression of evidence).

<sup>255</sup> Of course, the individual may be liable in tort for violating the defendant's state constitutional rights, but his actions would pose no bar to federal prosecution.

<sup>256</sup> Clymer, *supra* note 248, at 669–73.

<sup>257</sup> *Geller & Morris*, *supra* note 216, at 259.

<sup>258</sup> *Id.* at 257.

<sup>259</sup> See Clymer, *supra* note 248, at 676–77; Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 *L. & Soc. Inquiry* 239, 257–58 (2005) (“[Defendants] are much more likely to get convicted in the federal system.”).

<sup>260</sup> Richman, *Violent Crime Federalism*, *supra* note 126, at 405.



those police “bargaining leverage over local prosecutors.”<sup>261</sup> As one police captain reported, “it’s like buying a car: we’re going to the place [federal or state] we feel we can get the best deal.”<sup>262</sup> Police in New York City have used their informational monopoly to skirt local prosecutors in favor of federal prosecutors because they disagreed with the decision by local prosecutors to put first-time firearm offenders through diversion programs instead of into prison.<sup>263</sup>

*b. Increased Leverage over Defendants*

The gatekeeping role local officials play also gives both police and prosecutors much more leverage over defendants. This power enables them to use threats of federal prosecution as leverage in plea negotiations. Although local prosecutors do not have as much gatekeeping influence as police because they are second in line as gatekeepers, they too possess power to convey cases to federal prosecutors. One study found that prosecutors who threaten defendants with possible federal prosecution extract plea agreements where defendants face sentences “higher than the standard state plea for similar crimes.”<sup>264</sup>

The gatekeeping function also enables police in some locations to make arrests even when they lack probable cause to believe a defendant committed a crime under state law. Although courts are split on the issue, some courts allow state officials to arrest individuals for violating federal

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.* (quoting Charles D. Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 *Rich. L. Rev.* 905, 930 (1998)).

<sup>263</sup> J. David Goodman & Al Baker, *Prison Diversion Programs in New York Face New Scrutiny After Police Officer’s Killing*, *N.Y. Times* (Dec. 15, 2015), <https://www.nytimes.com/2015/12/16/nyregion/prison-diversion-programs-in-new-york-face-new-scrutiny-after-police-officers-killing.html> [<https://perma.cc/88YG-KCAM>].

<sup>264</sup> Miller & Eisenstein, *supra* note 259, at 255; *id.* at 256 (reporting that defendants threatened with federal prosecution “face substantially more state prison time in a plea agreement than other defendants who are not facing federal charges”); accord Richman, *Violent Crime Federalism*, *supra* note 126, at 405 (“The large difference between federal and state sentences meant that defendants would quickly plead out in state court to avoid (maybe) having their case taken federally.”).

Pleading guilty to state crimes does not preclude the federal government from bringing a later prosecution under the current doctrine about the Double Jeopardy Clause. See, e.g., *United States v. Lanza*, 260 U.S. 377 (1922). But the Department of Justice Manual establishes a (rebuttable) presumption against retrying an individual who has already been charged under state law. *Justice Manual*, *supra* note 245, § 9-2.031.

law even when the underlying conduct is legal under state law.<sup>265</sup> This gatekeeping role thus gives local law enforcement greater arrest powers than they otherwise would have.

### 3. *Exacerbating Disparity*

No doubt, this greater leverage and ability to evade constraints under state law might make enforcement more efficient and enable officials to shift more blameworthy, dangerous defendants to federal court.<sup>266</sup> And it may be within a local official's legitimate scope of duty to take advantage of the relationship between federal and state laws that allows for this enhancement.

But this enhancement is also cause for concern. Despite the well-documented sentencing disparity created by judges,<sup>267</sup> the biggest contributor to disparity, including racial disparity, usually is enforcement discretion because charging decisions dramatically affect sentences.<sup>268</sup> There is also little reason to believe that enforcement decisions reflect local interests.<sup>269</sup> Decisions to shift, or threats to shift, cases to federal court “nicely serve[] the interests of almost all of the governmental actors involved,”<sup>270</sup> “[b]ut it is not necessarily the case that local officials making these assessments reflect the views of the larger electorate in a community.”<sup>271</sup> For example, policing decisions in suburban conservative communities in blue states might not reflect state priorities; the same is true for policing decisions in liberal urban areas within red states. And because shifting cases to federal courts causes “citizens of the forty-nine other states [to] subsidize local law enforcement activities,”<sup>272</sup> local officials are likely to overuse the federal system simply because those officials do not fully internalize the costs.

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<sup>265</sup> Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 *Harv. L. Rev.* 471, 474–75 (2018).

<sup>266</sup> See Klein & Grobey, *supra* note 33, at 9.

<sup>267</sup> Joshua M. Divine, *Booker Disparity and Data-Driven Sentencing*, 69 *Hastings L.J.* 771, 785–92 (2018).

<sup>268</sup> *Id.* at 809–11.

<sup>269</sup> See Richman, *Changing Boundaries*, *supra* note 42, at 97.

<sup>270</sup> Richman, *Violent Crime Federalism*, *supra* note 126, at 401; accord Barkow, *supra* note 125, at 577–78 (“[There is no] assurance that [police and local prosecutors] are selecting the right cases for this differential sentencing treatment or that allowing cases to be handpicked for harsher treatment comports with notions of due process or federalism.”).

<sup>271</sup> Barkow, *supra* note 125, at 577.

<sup>272</sup> *United States v. Jones*, 36 F. Supp. 2d 304, 314 (E.D. Va. 1999).

The prospect of shifting more culpable offenders to federal courts is also not without downside. Although officials sometimes shift offenders to federal courts because of culpability, they also can do so for administrative conveniences like saving cash-strapped localities money or placing a defendant in a system where he will be most valuable as a potential witness against other defendants.<sup>273</sup> And in any event, it is far from clear why “State officials [should] be free to nullify State legislators’ decision[s] to establish supraconstitutional barriers to conviction.”<sup>274</sup>

#### 4. *Limited Accountability*

This enhancement of enforcement power creates problems not only because it increases the opportunities for misuse of enforcement discretion, but also because it increases those opportunities where oversight already is thin.

The judiciary is nearly powerless to review enforcement discretion. Courts have repeatedly declared, for example, that the decision to prosecute a defendant in federal court instead of state court is not actionable.<sup>275</sup>

That is true even when prosecutors *admit* that they shifted the defendant to federal court to obtain a higher sentence.<sup>276</sup> Plaintiffs can successfully challenge enforcement discretion only by proving that officials acted because of the defendant’s race or other similarly protected characteristics.<sup>277</sup> As one court put it, local police and prosecutors have substantial discretion, yet “there exists no means [for the judiciary] to ensure that this substantial discretion is constitutionally exercised.”<sup>278</sup>

<sup>273</sup> Klein & Grobey, *supra* note 33, at 9.

<sup>274</sup> Richman, *Changing Boundaries*, *supra* note 42, at 97.

<sup>275</sup> Hollon, *supra* note 247, at 501 (explaining that discretion is “virtually unreviewable”).

<sup>276</sup> E.g., *United States v. Batchelder*, 442 U.S. 114, 124–25 (1979) (holding that prosecution decisions do not violate the Constitution simply because “[t]he prosecutor may be influenced by the penalties available upon conviction”); *United States v. Jacobs*, 4 F.3d 603, 604–05 (8th Cir. 1993) (*per curiam*) (rejecting a challenge based on federal-state sentencing disparity because “[c]hoice of forum lies within the realm of prosecutorial discretion”); *United States v. Mills*, 925 F.2d 455, 461 (D.C. Cir. 1991), *aff’d in part & rev’d in part* on other grounds *reh’g*, 964 F.2d 1186, 1188 n.3 (D.C. Cir. 1992) (“[T]he prosecutor may select one alternative charge over another precisely *because* the selected offense carries a more severe sentence.”); Hollon, *supra* note 247, at 501; see also Barkow, *supra* note 125, at 574–76 (listing examples of agents shifting prosecutions to federal courts for sentencing purposes).

<sup>277</sup> *United States v. Williams*, 963 F.2d 1337, 1342 (10th Cir. 1992).

<sup>278</sup> *United States v. Jones*, 36 F. Supp. 2d 304, 312 (E.D. Va. 1999).

What remains is political accountability, but that too does not suffice. Even where law enforcement authorities (such as sheriffs) or prosecutors are elected, they are unlikely to bear political accountability for how they exercise their gatekeeping role because that role is of “low-visibility.”<sup>279</sup> Indeed, the methods by which officials sort cases between federal and state prosecutors is “well hidden to most criminal practitioners,”<sup>280</sup> who are much more likely to have better information about these issues.

To the extent a need already existed for greater oversight of enforcement discretion, that need has only increased because the gatekeeping role has greatly expanded the power of local officials, enabling them to evade constraints imposed by state law and giving them greater leverage over defendants. This enhanced power makes external oversight even more necessary.

Yet, if anything, the gatekeeping role of local officials has reduced external oversight. Congress exercises some oversight of federal enforcers through appropriations, oversight hearings, and managing the structure of federal bureaucracies.<sup>281</sup> But Congress’s power to exercise oversight of local enforcers is far less. Congress might be able to strip away grants from local agencies, but it cannot do much else. The gatekeeping relationship thus lets federal officials receive information or resources through a source not managed or overseen much by Congress.

The power local prosecutors hold as gatekeepers also has diminished what Blackstone called the “grand bulwark” of accountability: the jury.<sup>282</sup> The jury, by design, is the “check or control” against “dangerous and destructive” use of the prosecutorial power.<sup>283</sup> Indeed, the Rehnquist Court’s revitalization of the jury role has substantially affected plea-bargaining by shifting some power back to juries who, under modern sentencing doctrine, must find all facts necessary to make a defendant

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<sup>279</sup> See Richman, *Changing Boundaries*, *supra* note 42, at 97.

<sup>280</sup> Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, 21 *Crim. Just.* 16, 17 (2006).

<sup>281</sup> Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 810 (1999) [hereinafter Richman, *Federal Criminal Law*].

<sup>282</sup> See 4 William Blackstone, *Commentaries* \*349; accord *Oregon v. Ice*, 555 U.S. 160, 168 (2009) (describing the jury as having a “historic role as a bulwark between the State and the accused at the trial for an alleged offense”).

<sup>283</sup> *Duncan v. Louisiana*, 391 U.S. 145, 151–52 (1968) (quoting 4 Blackstone, *supra* note 282, at \*349–50); accord Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 *U. Pa. L. Rev.* 33, 34 (2003).

eligible for enhanced sentences.<sup>284</sup> This accountability check is traditionally considered strongest when the jury pool draws from the accused's peers.<sup>285</sup> Local juries might convict less often when they live in communities that have experienced overincarceration or police abuse.<sup>286</sup> But shifting cases to federal courts allows local prosecutors to diminish this check because federal courts draw from larger, less representative jury pools. For example, in the late 1990s, the jury pool for Richmond, Virginia, was 75% black, but the jury pool for the division of the Eastern District of Virginia that contained Richmond was just 10% black.<sup>287</sup> When a jury is not representative of the community, it no longer reflects "the values and insights of the communities in which such policing is taking place."<sup>288</sup>

This problem is inherent in federal criminal law to the extent federal juries come from a broader jury pool, but the problem is made worse because the gatekeeping function enables local officials to venue shop. Local officials can shunt cases to federal courts if they expect they will draw a more favorable jury. The gatekeeping function thus decreases the already limited accountability of local police and local prosecutors, even as it enhances the power of both.

### *C. Reinforcing Separation of Powers Through Dynamic Incorporation*

Although other scholars have long recognized this gatekeeping function, nobody has yet viewed this relationship through the lens of modern federalism scholarship, so one opportunity for reinforcing separation of powers has remained unrecognized. Two straightforward solutions for checking enforcement discretion are apparent, but both remain unlikely. The first is creating a much larger federal police force, which would reduce the influence local enforcement officials have on federal prosecution, but the country has long been uneasy with the prospect of a full-scale national police force.<sup>289</sup> The second is scaling back

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<sup>284</sup> Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 *Geo. Wash. L. Rev.* 1043, 1045, 1051–52, 1060–61 (2006).

<sup>285</sup> *Duncan*, 391 U.S. at 156.

<sup>286</sup> See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677, 678, 715–22 (1995).

<sup>287</sup> *United States v. Jones*, 36 F. Supp. 2d 304, 307–08 (E.D. Va. 1999).

<sup>288</sup> See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *Geo. L.J.* 1153, 1184 (1998).

<sup>289</sup> Geller & Morris, *supra* note 216, at 280–81.

criminal law so that federal enforcement officials possess only the historical jurisdiction they used to possess. But that is the least likely of all scenarios.

Dynamic incorporation presents a third option. National federalism scholarship reveals that cooperation between federal and state officials enhances the power of both. Gerken stresses that states possess much more influence when “they are inside the [federal] system, not outside of it.”<sup>290</sup> The cooperative relationship enhances the power of enforcement officials compared to those left “outside” the system, so the relationship between enforcement officials alters the balance of power both within the federal government and within the states. This cooperation enhances the power of enforcement officials compared to other policymakers. Federal officials access information and resources that Congress cannot oversee. And local officials evade constraints under state law by jointly bringing cases in federal court.

The solution is to create a cooperative relationship between federal and state legislatures, putting both “inside the system” where they can better compete with the enforcement officials who are inside the system. Dynamic incorporation does that. Creating a joint relationship between the state and federal legislatures enhances the power of both. State legislatures play a more active role than they otherwise could, and Congress gains the benefit of reduced inertia. Indeed, because of the interconnected relationship between local and federal enforcement officials, enhancing the influence of state legislatures allows them to check both local and federal enforcement officials.

The federalism scholarship so far has missed the huge potential for dynamic incorporation to enable legislative accountability. The scholarship has recognized that state legislatures, by increasing the number of relevant institutional actors, can foster separation of powers. As Professor Jessica Bulman-Pozen has recognized, “cooperative federalism may restore legislative control over policymaking—in the form of state legislation.”<sup>291</sup> This means that “state legislatures may be a good stand-in for Congress, perhaps better than the real thing.”<sup>292</sup> But the scholarship has missed the grand extent to which this is true. Congress has undermined its own oversight capacity. It now displays an inability

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<sup>290</sup> Gerken, *Federalism All the Way Down*, *supra* note 74, at 38.

<sup>291</sup> Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *Colum. L. Rev.* 459, 505 (2012).

<sup>292</sup> *Id.*

(or at least lack of interest) in overseeing enforcement discretion.<sup>293</sup> But through dynamic incorporation, Congress can delegate its checking function to state legislatures. State legislatures, subject to less inertia and politically more distant from the federal system, can check enforcement discretion where Congress has not. And critically, dynamic incorporation does more than just provide another branch of separation; it instead helps one branch (state legislatures) boost another branch (Congress). Through dynamic incorporation, the state legislatures can help Congress overcome its inertia, and thus exercise appropriate oversight.

In this way, dynamic incorporation addresses another of Logan's concerns. Logan argues that federal reliance on state law aggrandizes federal power by providing more efficient ways to expand federal criminal law: Congress just has to pass an incorporating statute and let the states do the work.<sup>294</sup> But discussing federal aggrandizement is imprecise. What matters is which part of the federal government gains influence. After decades of Congress delegating to the executive branch, dynamic incorporation can shift influence back to legislatures. This shift disrupts the usual one-way ratchet in Congress toward harsher and more criminal laws, as established above,<sup>295</sup> and also allows states to ease federal criminal law because the states are more responsive to budgetary constraints. Dynamic incorporation also enhances Congress's—and the states'—ability to check enforcement discretion.

Consider opt-out statutes. Those statutes enable state legislatures to create safe harbors. If local individuals comply with state law, then federal law does not apply. The primary reason for local officials to shift cases to federal courts is to take advantage of a gap between state and federal law. Opt-out laws reinforce separation of powers by decreasing or eliminating this gap. For example, even though enforcement of marijuana laws has been a low priority for the federal government for years, the federal government still brings prosecutions in places where marijuana is legal

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<sup>293</sup> See, e.g., William J. Stuntz, *The Collapse of American Criminal Justice* 68 (2011) (arguing that Congress, rather than checking the executive, empowers the executive to fulfill a legislative desire to prosecute cases more cheaply). But see Richman, *Federal Criminal Law*, supra note 281, at 759 (arguing that Congress exercises control not by legislative specificity, but by managing the structure of federal bureaucracies).

<sup>294</sup> Logan, supra note 6, at 96–101.

<sup>295</sup> See supra Section II.A.

under state law.<sup>296</sup> Opt-out statutes eliminate that possibility by removing legal liability in those instances.

Opt-out statutes would also place greater checks on the arresting authority of local officials. Officials in some states can make arrests when they have probable cause to believe a federal crime has occurred even when no state crime has occurred.<sup>297</sup> Opt-out statutes erase this possibility by making certain federal prohibitions inapplicable.

Opt-out statutes also enable state legislatures to place greater control on the ability of enforcement officials to engage in what critics sometimes call pretextual prosecutions. When officials suspect a person of having committed a more serious crime but lack enough evidence to prosecute those crimes, they sometimes resort to less serious drug charges, which are relatively easy to prove.<sup>298</sup> Enacting opt-out statutes grants state legislatures authority to determine whether and when these prosecutions serve the public interest because it gives the states the ability to turn off application of federal law.

Congress also could use opt-out statutes to enable state legislatures to ensure that defendants do not lose many of their procedural rights simply because they are charged in federal court. Logan argues that federal reliance on state criminal law creates intrastate disparity because state procedural protections do not carry over into federal court.<sup>299</sup> But Congress could pass opt-out statutes that, for example, consider for purposes of federal prosecution whether the state statute of limitations has run or whether local police violated state search-and-seizure provisions. Congress has done similar things in other statutes. For some federal crimes, federal officials cannot bring a prosecution if a state court already has issued a judgment in an enforcement arising from the same conduct<sup>300</sup> or if state law penalizes conduct as a felony.<sup>301</sup>

Opt-in statutes create a similar effect. Much of the power created by the gatekeeping relationship exists because of the sentencing gap between state and federal law. But for many federal crimes, such as the carjacking

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<sup>296</sup> See, e.g., *United States v. McIntosh*, 833 F.3d 1163, 1168–69 (9th Cir. 2016) (reviewing enforcement actions in ten cases brought in states that have relaxed marijuana restrictions).

<sup>297</sup> See Kerr, *supra* note 265, at 474–75.

<sup>298</sup> See Richman & Stuntz, *supra* note 171, at 608; *id.* at 584–86 (criticizing this “common” phenomenon for the information- and deterrence-distorting effect pretextual prosecution has).

<sup>299</sup> Logan, *supra* note 6, at 74–75.

<sup>300</sup> E.g., 18 U.S.C. §§ 659–660 (2018) (prohibiting federal prosecution where state courts have already issued a judgment of conviction or acquittal on the merits).

<sup>301</sup> 18 U.S.C. §§ 37(c), 2280(c), 2281(c), 2293 (2018).



statute, Congress's only interest is in assisting localities; it has no independent federal interest.<sup>302</sup> In those circumstances, “conformity to local law”<sup>303</sup> appears to be the most justifiable philosophy. Opt-in statutes advance that philosophy by tying sentences to state law, which eliminates most incentives to shift cases to federal court and reserves federal prosecution for instances where localities face resource shortages or corruption.

Scope statutes have the same promise. Several statutes have provided that convictions under federal law should carry penalties tied to those under state law.<sup>304</sup> By tying federal sentences to state law—even with a multiplier such as 1.25 or 1.5—federal law would decrease both the ability to create sentencing disparity and what some might perceive as excessive leverage over defendants. Perhaps because many defendants overestimate their chances of success at trial, prospective sentencing differences give prosecutors leverage only when the differences are “substantial[,]” not moderate.<sup>305</sup>

Of course, with any dynamic incorporation statute, Congress controls the levers. It can create or withhold opportunities for state legislatures to the extent it has legitimate reasons to diverge from conformity to state law. The STATES Act bill, for example, limits the kinds of safe harbors states can create: compliance with state marijuana law ordinarily renders federal law inapplicable, but not if a suspect distributes to a person under

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<sup>302</sup> Richman, *Changing Boundaries*, supra note 42, at 86–89.

<sup>303</sup> *United States v. Sharpnack*, 355 U.S. 286, 290 (1958).

<sup>304</sup> An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, ch. 114, § 7, 16 Stat. 140, 141 (1870) (“[I]f in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same with such punishments as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offence may be committed.”).

The Assimilative Crimes Act is similar. It provides that federal offenders must be “subject to a like punishment” as state offenders. 18 U.S.C. § 13 (2018). Because this statute reflects a congressional policy of “conformity to local law,” *Sharpnack*, 355 U.S. at 290, some courts interpreted the Act to require a similar sentence to what state courts would have imposed, so those courts disregarded the federal sentencing guidelines. E.g., *United States v. White*, 741 F. Supp. 1200, 1204 (E.D.N.C. 1990). But several courts have held that only the maximum and minimum statutory limits apply and that courts should consult the far harsher federal sentencing guidelines within those ranges. *United States v. Pierce*, 75 F.3d 173, 176 (4th Cir. 1996); *United States v. Garcia*, 893 F.2d 250, 254 (10th Cir. 1989).

<sup>305</sup> Miller & Eisenstein, supra note 259, at 255–57; Richman, *Violent Crime Federalism*, supra note 126, at 405 (“The large difference between federal and state sentences meant that defendants would quickly plead out in state court to avoid (maybe) having their case taken federally.”).

21 or at a truck stop.<sup>306</sup> Congress's control over these levers prevents dynamic incorporation from devolving into the sort of "states' rights" model that many advocates of robust federal power want to avoid.

For this reason, another argument against federal reliance on state law need not caution against use of dynamic incorporation. Logan argues that dynamic incorporation abdicates federal responsibility in deference to the states.<sup>307</sup> But dynamic incorporation occurs only at the will and subject to the direction of Congress. Congress can and does impose restraints on state authority. The Assimilative Crimes Act, for example, provides federal penalties for violations of state law, but only on federal enclaves and only if state law does not conflict with federal law.<sup>308</sup> Logan argues that dynamic incorporation undermines the "nationally representative character of federal law,"<sup>309</sup> but it is not clear that a nationally representative body cannot conclude that the problem of crime is primarily local, not national, and that criminal laws should thus conform to local laws and the facts and needs underlying those laws. Congress expresses this intent often.<sup>310</sup>

In each of these situations, dynamic incorporation would grant state legislatures greater ability to check the discretion of enforcement officers. By passing laws that shape application of federal law, the state legislatures would gain the ability to check what influence local enforcement officials exert on application of federal law. To be sure, state legislatures might choose not to exercise this power, but the availability of that power would at least give them an option to do so—an option they currently lack. And this option would greatly supplement any other options currently available. Legislatures might find it difficult to exercise oversight by requiring local officials to provide reports for auditing not only because an audit might be incredibly time intensive, but also because the gatekeeping role local officials play is relatively invisible<sup>311</sup>—the

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<sup>306</sup> STATES Act, S. 3032, 115th Cong. (2d Sess. 2018).

<sup>307</sup> Logan, *supra* note 6, at 85–90.

<sup>308</sup> 18 U.S.C. § 13 (2018).

<sup>309</sup> Logan, *supra* note 6, at 87.

<sup>310</sup> *United States v. Sharpnack*, 355 U.S. 286, 290 (1958); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (providing financial resources to state and local governments because "Congress finds further that crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively").

<sup>311</sup> See Richman, *Changing Boundaries*, *supra* note 42, at 97.

reasons for prosecutorial decisions may not always appear in documentary form.

For all these reasons, even if the two alternatives to dynamic incorporation were realistic—repealing many laws or creating a more robust national police force—those alternatives would forego at least some of the benefits dynamic incorporation can provide. Dynamic incorporation provides an opportunity to assist cash-strapped localities with enforcement that will protect public safety, and because dynamic incorporation provides the legislatures with an opportunity for input, it gains many of the benefits of joint partnerships between federal and local enforcement officials while removing some of the downsides. Dynamic incorporation also is far more cost effective than creating a robust national police force, which would create many investigative redundancies between federal and local officials.

#### IV. OBJECTIONS

This Article has already addressed many of the objections raised by Logan.<sup>312</sup> This Part provides a more detailed response to some of his remaining arguments and other possible objections.

##### *A. Complexity*

Using dynamic incorporation would not appreciably increase the complexity of federal law by requiring federal judges to interpret state law. Simply put, federal judges do the same thing all the time in criminal law because they routinely must interpret state laws to determine sentencing effects or whether local police had probable cause to search or seize.<sup>313</sup>

True, legal adjudication that requires interpreting federal statutes together with state statutes sometimes creates difficulties. A prime example is the Armed Career Criminal Act (“ACCA”), one of the few frequently invoked criminal laws that does use dynamic incorporation.<sup>314</sup> But the parts of that statute that cause confusion are precisely those provisions that *do not* use dynamic incorporation. The statute requires

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<sup>312</sup> See *supra* notes 111–113, 169, 294, 307, 309.

<sup>313</sup> Wayne A. Logan, *Erie* and Federal Criminal Courts, 63 Vand. L. Rev. 1243, 1244–47 (2010).

<sup>314</sup> See *Ovalles v. United States*, 905 F.3d 1231, 1256 (11th Cir. 2018) (W. Pryor, J., concurring).

enhanced penalties if an offender has three previous convictions for various offenses, including state convictions for crimes such as “burglary.”<sup>315</sup> Adjudication under this statute is difficult because the Supreme Court has interpreted “burglary” not to mean whatever the state defines as burglary, but instead to mean the *federal* definition of “generic” burglary.<sup>316</sup> That inquiry involves complicated questions about whether a state definition of a crime like “burglary” matches the federal “generic” definition or is instead “broader.”<sup>317</sup>

Using more dynamic incorporation in the ACCA would significantly decrease this complexity. Currently, determining whether the ACCA applies for a conviction under state law for burglary requires discerning the federal meaning of “burglary” and then determining whether circumstances exist where a person might violate the state law without committing the federal definition of burglary.<sup>318</sup> But if the ACCA instead used dynamic incorporation and applied a sentencing enhancement for convictions where a person commits “burglary as determined by state law,” determining whether the ACCA applies would be far simpler.

The requirement that courts interpret state law under dynamic incorporation also does not excessively increase complexity because interpreting state law has been a core function of the federal courts since their inception. “Diversity jurisdiction,” which usually requires construction of state law, “is one of the longest standing traditional bases of federal court jurisdiction.”<sup>319</sup> Indeed, during early American history, those cases “comprised the largest segment of the docket of the Supreme Court.”<sup>320</sup> Some scholars and judges have suggested abolishing diversity jurisdiction, but not because interpreting state law makes cases complex. They tend to argue instead that diversity cases clog the dockets of federal courts with cases state courts could adjudicate just as well.<sup>321</sup> That

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<sup>315</sup> 18 U.S.C. § 924(e) (2018).

<sup>316</sup> *Taylor v. United States*, 495 U.S. 575, 598 (1990) (“We believe that Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States.”).

<sup>317</sup> See, e.g., *United States v. Stitt*, 139 S. Ct. 399, 405 (2018).

<sup>318</sup> *Id.*

<sup>319</sup> Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. Va. L. Rev. 171, 227 (1995).

<sup>320</sup> *Id.*

<sup>321</sup> Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 Wash. U. L.Q. 119, 120 n.5 (2003).

criticism does not apply to prosecutions of federal criminal law, which under current law must occur in federal courts.<sup>322</sup>

What is more, the idea of federal courts existing to interpret federal law, not state law, is a new idea. General federal question jurisdiction, which some today view as the “most important” function of federal courts,<sup>323</sup> did not even exist for a hundred years after the Founding. The Judiciary Act of 1789 gave district courts minimal jurisdiction over federal questions.<sup>324</sup> It was not until 1875 that Congress granted courts general federal question jurisdiction,<sup>325</sup> and even that jurisdiction was subject to an amount-in-controversy requirement until 1980.<sup>326</sup> So “the vast majority of federal question cases throughout history have been decided not by federal courts but by state courts, subject only to appellate review by the Supreme Court.”<sup>327</sup> The federal court system “gave almost its entire attention to the settlement of the simplest types of commercial and property disputes,” often by interpreting state law.<sup>328</sup>

Federal courts have long interpreted state law without much difficulty. It is in fact part of what they were designed to do. Nothing suggests dynamic incorporation, which occurs all the time outside the criminal context, would needlessly complicate adjudication inside criminal law. Indeed, state law most often will be clear or will have been construed previously by the same district court or by state courts.

The biggest risk is not complexity, but that some judges—because of a temptation to pursue federal interests—might arrive at different conclusions than state courts would.<sup>329</sup> No doubt, the possibility of federal

<sup>322</sup> 18 U.S.C. § 3231 (2018).

<sup>323</sup> Michelle Reed, “Arising Under” Jurisdiction in the Federalism Renaissance: *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 2002 BYU L. Rev. 717, 727 (2002) (“[T]he courts’ exercise of federal question jurisdiction remains one of their most important functions.”); Erwin Chemerinsky, *Federal Jurisdiction* § 5.2.1, at 265 (4th ed. 2003).

<sup>324</sup> Jurisdiction extended to “seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States” and over “all causes where an alien sues for a tort only in violation of . . . a treaty of the United States.” An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789).

<sup>325</sup> An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts, ch. 137, § 1, 18 Stat. 470 (1875).

<sup>326</sup> Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369.

<sup>327</sup> Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *Geo. Wash. L. Rev.* 91, 104 (2003).

<sup>328</sup> John P. Frank, *Historical Bases of the Federal Judicial System*, 13 *L. & Contemp. Probs.* 3, 18 (1948).

<sup>329</sup> Pathak, *supra* note 23, at 863–64.

courts interpreting state law raises the prospect of divergent interpretations, but any disparity that arises from those contexts cannot be as bad as the divergence that currently exists between federal and state law. What's more, any requirement that federal courts adopt state-court interpretations as binding, as courts must do in diversity cases, would eliminate this problem.<sup>330</sup>

### *B. Uniformity*

One of Logan's principal arguments is that federal reliance on state law disturbs uniformity by baking into federal law variations in state law.<sup>331</sup> But far from being a downside, regional disparity is an asset. As Logan acknowledges, "national" uniformity—the principle that defendants in Texas should be treated just like those in Vermont—is not the sole way of viewing uniformity.<sup>332</sup> Another principle insists on "local uniformity"—that defendants in Vermont—or better yet, a specific town or district in Vermont—should be treated only like defendants in the same narrow geography, not like anybody else. It is the latter policy that gives Congress and the states the flexibility to achieve the promises of dynamic incorporation. As national federalism scholarship recognizes, national politicians "have plenty of reasons to prefer the 'disuniform implementation of national law.'"<sup>333</sup> Regional variance of interpretation often will "better accord with a divided Congress' intentions and with differing regional preferences."<sup>334</sup> The availability of regional variance is in fact one reason why statutes that use dynamic incorporation are more likely to overcome inertia; regional variability creates more opportunities for a greater number of federal politicians to support new legislation.<sup>335</sup>

As the Supreme Court has held, "conformity to local law," which necessarily entails national variability, is a legitimate congressional aim,<sup>336</sup> so national variability is just as legitimate a congressional objective as national uniformity. In fact, Congress's decision to refrain

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<sup>330</sup> Dorf, *supra* note 4, at 126 ("[T]rue dynamic incorporation will typically incorporate not only the future text of the statutes of the incorporated jurisdiction, but also the future authoritative interpretations thereof").

<sup>331</sup> Logan, *supra* note 6, at 84.

<sup>332</sup> *Id.* at 102.

<sup>333</sup> Gerken, *Federalism as the New Nationalism*, *supra* note 74, at 1904 (quoting Gluck, *Our [National] Federalism*, *supra* note 5, at 2020).

<sup>334</sup> Amanda Frost, *Overvaluing Uniformity*, 94 *Va. L. Rev.* 1567, 1570 (2008).

<sup>335</sup> See *supra* Subsection II.B.2.

<sup>336</sup> *United States v. Sharpnack*, 355 U.S. 286, 290 (1958).

from providing federal courts with general federal question jurisdiction for a century “indicate[s] that the standardization of federal law was low on a list of original federal courts values.”<sup>337</sup>

The very existence of concurrent jurisdiction in criminal law similarly suggests that national uniformity is not the goal. In other fields—healthcare, for instance—Congress preempts state law but allows states to exercise local expertise administratively. But in federal criminal law, Congress creates an interdependence without preempting state law. This structure weighs even more in favor of preserving a robust role for states, which can occur only under a regime of regional, not national, uniformity.

Striving too much toward national uniformity also ignores that the ideal is virtually impossible to achieve. Uniformity is nothing more than an abstract principle because of “the sheer volume of governmental business.”<sup>338</sup> Local facts nearly always differ, so trying to achieve “federal uniformity comes at the unacceptably high cost of almost random unpredictability.”<sup>339</sup>

Allowing for variability tracks the reasons Congress expanded the scope of federal criminal law in the first place. “[L]egislators began to think of Federal criminal jurisdiction not as protecting certain discrete areas of particular Federal concern but as supplementing local enforcement efforts—supporting local exertions, and compensating for local inadequacies or corruption.”<sup>340</sup> Thus, the Supreme Court has recognized that when Congress uses dynamic incorporation for criminal law, its intent often is not to make law uniform, but “to reinforce state

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<sup>337</sup> Frost, *supra* note 334, at 1572.

<sup>338</sup> Hart, *supra* note 26, at 540.

<sup>339</sup> Dorf, *supra* note 4, at 144.

<sup>340</sup> Richman, *Changing Boundaries*, *supra* note 42, at 87; accord *id.* at 86 (arguing that Congress adopted a federal kidnapping statute to respond to the concern that state officers were being “stopped at [the] State line because of red tape [or] professional jealousy”); Geller & Morris, *supra* note 216, at 237 (arguing that a principal purpose of federal law enforcement is “to inhibit and punish antisocial conduct with which the states are unwilling or incompetent to deal”).

For example, Congress created an offense for failure to pay child support because “the ability of [the] states to enforce such laws outside their own boundaries is severely limited” by the problem of extradition for minor criminal offenses being “complicated, time-consuming, and costly.” Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893, 942 (2000) (quoting H.R. Rep. No. 102-771, at 6 (1992)).

law.”<sup>341</sup> Congress has often recognized that crime is a local problem.<sup>342</sup> So it has never tried to “make even a sizeable dent in the criminal activity that falls within its statutory jurisdiction.”<sup>343</sup> If crime is local, then interstate variability is not something to stress about avoiding. All this is especially true with crimes that are justified by the Commerce Clause. The uniformity values imbued into that clause concern uniformity of trade regulations to prevent states from constructing a hodgepodge of trade barriers.<sup>344</sup> Most crime, in contrast, is local. And when crime is national, then Congress can set limits on what authority it gives states through dynamic incorporation, ensuring that states cannot undermine legitimate federal interests.

In any event, those who support national uniformity need not automatically oppose regional uniformity. As stated above, there are strong reasons to support a federal criminal law that retains internal diversity. But short-term variability often blooms into long-term uniformity. As national federalism scholars state, every national movement begins locally.<sup>345</sup> Successful local movements often turn into national movements as states adopt the policies of other states.<sup>346</sup> When they do so, they decrease variability.

### *C. Undermining Federal Law*

One additional possible concern is that states might try to undercut federal priorities or otherwise not update laws in a way that Congress might expect. For example, Congress might pass laws, such as civil rights laws, precisely because it determines that the state response has been inadequate. But that is not a reason to avoid dynamic incorporation. True, when states are uncooperative, dynamic incorporation may fail to live up

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<sup>341</sup> *Perrin v. United States*, 444 U.S. 37, 50 (1979).

<sup>342</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (providing financial resources to state and local governments because “Congress finds further that crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively”).

<sup>343</sup> Richman & Stuntz, *supra* note 171, at 612; Jeffries & Gleeson, *supra* note 171, at 1099 (“[N]o matter how widely Congress casts the net of federal crimes, most criminal activity will continue to be handled by state and local authorities.”).

<sup>344</sup> See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 605 (1982) (“[Trade barriers] may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams.” (alteration in original) (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 450 (1945))).

<sup>345</sup> Gerken, *Federalism 3.0*, *supra* note 75, at 1713.

<sup>346</sup> *Id.* at 1720.



to its promises. But so long as Congress takes care not to give states authority to undermine legitimate federal interests, dynamic incorporation carries little downside. In this sense, dynamic incorporation gives localized organizations the freedom to act on their local knowledge even as more centralized authority ensures accountability by establishing broader policy objectives.<sup>347</sup>

Unfulfilled dynamic incorporation is no worse than no dynamic incorporation at all because in both instances, dynamic incorporation has not occurred. But fulfilled dynamic incorporation is substantially better. Congress should not refrain from using dynamic incorporation simply because the effort sometimes might fail to produce gain.

#### *D. Congressional Interest*

The relative rarity of dynamic incorporation in the substantive provisions of criminal law compared to other areas of law raises the question whether that rarity occurs because of a deliberate determination by Congress that dynamic incorporation does not serve federal interests. But other than the bare fact of rarity, no evidence supports this conclusion. The rarity appears instead to be due to the constraints placed on the federal government in other areas of law and the ease of passing criminal laws.

Dynamic incorporation occurs in other areas more frequently because it often is necessary. Federal law usually is interstitial; Congress cannot with reasonable efficiency draft federal law without adopting state law as a foundation.<sup>348</sup> But criminal law is different. Passing new substantive criminal legislation is relatively simple because it requires few considerations of existing law. Congress simply has to locate something it dislikes and then make it a federal offense to engage in that conduct. And in fact, because Congress knows that most statutes are never enforced, Congress can take comfort in the knowledge that these actions mostly will be symbolic.<sup>349</sup> The absence of dynamic incorporation in these statutes reflects nothing other than that Congress did not need dynamic incorporation to pass them. Dynamic incorporation is not necessary for criminal law. But that does not mean it is not still beneficial.

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<sup>347</sup> E.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentation*, 98 *Colum. L. Rev.* 267, 267–68 (1998).

<sup>348</sup> See *supra* notes 21–24 and accompanying text.

<sup>349</sup> Nearly half of all criminal prosecutions use just four statutes. Klein & Grobey, *supra* note 33, at 106, 110.

The relative rarity of dynamic incorporation in those statutes that are most often enforced also does not suggest that Congress has considered and rejected dynamic incorporation. Congress has surprisingly little control over which statutes are enforced. Because it has passed far more statutes than the executive branch ever could enforce, Congress has traded in its supervisory role for massive executive discretion.<sup>350</sup> The Controlled Substances Act, one of the most consequential federal criminal laws, saw little enforcement when it was first passed; it was not until a decade later that the executive branch decided that enforcing that law would take high priority because drug crimes had a high correlation with street violence.<sup>351</sup>

As this Article has explained, Congress should be interested in dynamic incorporation. That it has not used the tool often in criminal law appears to be because passing new legislation without dynamic incorporation is easier than in other areas of the law, not because Congress has consciously rejected the tool.

### *E. Non-Delegation*

Another potential concern is that incorporating prospective changes to laws passed by other legislatures delegates legislative authority to other bodies. Many states prohibit dynamic incorporation precisely because they view dynamic incorporation as delegation.<sup>352</sup> But the Supreme Court has upheld dynamic incorporation against a delegation challenge, and the long history of using dynamic incorporation in federal law further supports the conclusion that this practice is lawful.

The most apposite case is the 1958 decision rejecting a delegation challenge to the Assimilative Crimes Act, the law that adopts state criminal laws on federal enclaves.<sup>353</sup> When Congress first enacted the

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<sup>350</sup> See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 *Va. L. Rev.* 953, 954–55 (2016).

<sup>351</sup> See Richman, *Violent Crime Federalism*, *supra* note 126, at 393–94.

<sup>352</sup> Dorf, *supra* note 4, at 108.

<sup>353</sup> Technically, the Supreme Court's first express upholding of dynamic incorporation against a delegation challenge came nearly three decades earlier. *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 602 (1931). But the Supreme Court offered no reasoning to support its bare conclusion that dynamic incorporation did not amount to unlawful delegation. Each of the Supreme Court's citations in that part of the decision supported its additional holding that dynamic incorporation did not violate the constitutional requirement for geographic uniformity. *Id.* Some of those decisions discussed the variability that state law imposed on federal tax law, but they did not consider the delegation question. *Poe v. Seaborn*, 282 U.S. 101, 117–18 (1930); *Florida v. Mellon*, 273 U.S. 12, 17 (1927).

Assimilative Crimes Act in 1825,<sup>354</sup> the Supreme Court avoided the delegation question by issuing a one-sentence opinion interpreting the statute to adopt state law statically as it existed the moment the Assimilative Crimes Act went into effect.<sup>355</sup> That interpretation, made with no analysis, was dubious because the Assimilative Crimes Act references general state law, not any specific state law, and incorporation by general reference typically is construed to be prospective.<sup>356</sup> Perhaps unwilling to press its luck with a Court that had avoided reaching the delegation question by adopting an odd interpretation, Congress did not try to adopt state law prospectively with the Assimilative Crimes Act for more than a hundred years.<sup>357</sup> This proved difficult. The Act adopted a “fundamental policy of conformity to local law,” but because state law changed, “the Act gradually lost much of its effectiveness.”<sup>358</sup> To pursue its “policy of conformity to local law,” Congress had to reenact the statute repeatedly. It did so eight times between 1866 and 1948—on average once every ten years.<sup>359</sup> And each time it did so, it included express language designating that the Act applied only to state law in effect when the Assimilative Crimes Act was reenacted.<sup>360</sup> But in 1948, Congress tried dynamic incorporation again. That newest iteration of the law, still in place today, provides that the law incorporates all state law “in force at the time of [the defendant’s] act or omission.”<sup>361</sup>

The Supreme Court upheld this Act against a delegation challenge. After determining that the Marshall Court did not decide the delegation issue,<sup>362</sup> the Court reasoned that, because Congress could incorporate state law statically and could update that law repeatedly, nothing in the

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<sup>354</sup> An Act More Effectually to Provide for the Punishment of Certain Crimes Against the United States, ch. 65, § 3, 4 Stat. 115 (1825).

<sup>355</sup> *United States v. Paul*, 31 U.S. (6 Pet.) 141, 142 (1832). The opinion includes a second sentence that is procedural only. *Id.*

<sup>356</sup> *Read*, supra note 16, at 271–72. The Assimilative Crimes Act used general language to incorporate “the laws of the state in which such [federal enclave] is situated.” Act of March 3, 1825, ch. 65, § 3, 4 Stat. 115.

<sup>357</sup> Congress did employ dynamic statutory incorporation in other statutes, just not the Assimilative Crimes Act. For example, an act much like the Assimilative Crimes Act, only for national parks instead of military bases, expressly applied to “the laws of the State of California in force at the time of the commission of the offense.” Act of June 2, 1920, ch. 218, § 4, 41 Stat. 731.

<sup>358</sup> *United States v. Sharpnack*, 355 U.S. 286, 290–91 (1958).

<sup>359</sup> *Id.* at 291.

<sup>360</sup> *Id.* at 291–92.

<sup>361</sup> Act of June 25, 1948, ch. 645, § 13, 62 Stat. 683, 686 (codified at 18 U.S.C. § 13 (2018)).

<sup>362</sup> *Sharpnack*, 355 U.S. at 291.

Constitution barred passing a statute that would update the Assimilative Crimes Act automatically to achieve Congress's goal more effectively.<sup>363</sup> Citing many other laws that dynamically incorporate state law,<sup>364</sup> the Court upheld dynamic incorporation because it, unlike static incorporation, enabled Congress to pursue its goal in its "most complete and accurate form."<sup>365</sup> Congress could use dynamic incorporation so long as Congress did not irrevocably bind itself to future state law.<sup>366</sup>

This holding might be explained away by stating that the federal government's non-delegation doctrine is basically dead, which raises the question of what happens to this doctrine if the Supreme Court ever revives the non-delegation doctrine. Just last term in *Gundy v. United States*, the Court again declined to declare a statute unlawful under the non-delegation doctrine, but four justices expressed interest in greater enforcement of that doctrine, and the fifth and newest justice was recused, raising the possibility that a majority of the Court might be willing to give more force to that doctrine.<sup>367</sup>

But even if the Supreme Court gives more teeth to the non-delegation doctrine, it will not likely cast doubt on dynamic incorporation. For one thing, the non-delegation concern in *Gundy* and many other cases is the concentration of power in one branch—that an executive body can both write and enforce regulations.<sup>368</sup> That concern does not apply to dynamic incorporation where any "delegation" occurs to another legislature and does not include enforcement authority.

What's more, dynamic incorporation finds substantial historical support. The First Congress itself used this tool, and support by early Congresses ordinarily is considered strong evidence of constitutionality.<sup>369</sup> It enacted a statute regulating "pilots"—those who navigate ships through harbors, channels, and ports—by incorporating state law. The Act provided that pilots should "be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or

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<sup>363</sup> Id. at 293–94, 297.

<sup>364</sup> Id. at 294–96.

<sup>365</sup> Id. at 294.

<sup>366</sup> Id. (holding that Congress could use dynamic incorporation because "Congress retains power to exclude a particular state law from the assimilative effect of the Act").

<sup>367</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment); id. at 2131 (Gorsuch, J., dissenting).

<sup>368</sup> Id. at 2131 (Gorsuch, J., dissenting).

<sup>369</sup> E.g., *Marsh v. Chambers*, 463 U.S. 783, 787–88 (1983); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 323, 401–02 (1819).

with such laws as the States may respectively hereafter enact.”<sup>370</sup> It also enacted the Judiciary Act of 1789, which provided that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”<sup>371</sup>

The Court questioned dynamic incorporation at times, but always in dictum. Some lower courts issued strong statements condemning dynamic incorporation after first interpreting the relevant statute statically, making determination of the delegation issue irrelevant.<sup>372</sup> Early on, the Supreme Court also suggested that dynamic incorporation was unlawful, declaring that an Act that “adopts future State laws to regulate the conduct of the officer in the performance of his official duties” would “delegate[] to the State legislatures the power which the constitution has conferred on Congress.”<sup>373</sup> But the Court then undercut the force of this statement and revealed it to be dictum by determining that no delegation issue was present because contract law, which the case involved, allowed—indeed, mandated—using dynamic incorporation.<sup>374</sup>

Those declarations of dictum against dynamic incorporation are equally matched by many cases where courts enforced statutes that use dynamic incorporation. The Supreme Court’s early cases simply avoided the issue.<sup>375</sup> But in a later case, the Supreme Court, without comment,

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<sup>370</sup> An Act for the Establishment and Support of Lighthouses, Beacons, Buoys, and Public Piers, ch. 9, § 4, 1 Stat. 53, 54 (1789).

<sup>371</sup> An Act to Establish the Judicial Courts of the United States, ch. 20, § 34, 1 Stat. 73, 92 (1789). Congress would later enact this provision in substantially similar form under the Rules of Decision Act, now codified at 28 U.S.C. § 1652 (2012).

<sup>372</sup> *Hollister v. United States*, 145 F. 773, 779 (8th Cir. 1906) (“It does not purport to delegate to the state of South Dakota authority at any time in the future to fix, ad libitum, the punishment of federal offenses. This it could not do.”); *United States v. Barnaby*, 51 F. 20, 23 (C.C.D. Mont. 1892) (“A statute [with prospective] effect might be classed as delegating legislative authority, which is not proper.”).

<sup>373</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 48 (1825).

<sup>374</sup> *Id.* The Supreme Court later reiterated this position, declaring that dynamic incorporation was “the only rule that could be adopted by the courts of the United States.” *United States v. Reid*, 53 U.S. (12 How.) 361, 363 (1851), overruled in part on other grounds by *Rosen v. United States*, 245 U.S. 467 (1918); see also *Golden v. Prince*, 10 F. Cas. 542, 543 (C.C.D. Pa. 1814) (arriving at the same conclusion before *Wayman*).

<sup>375</sup> E.g., *United States v. Paul*, 31 U.S. (6 Pet.) 141, 142 (1832) (avoiding the delegation issue by interpreting the Assimilative Crimes Act to include only static incorporation); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 207–08 (1824) (acknowledging that the “pilots” statute passed by the First Congress had “prospective” effect but avoiding the delegation issue by interpreting the statute as nothing more than a declaration “leav[ing] this subject entirely

enforced an act that used dynamic incorporation. The statute provided that U.S. marshals “shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have.”<sup>376</sup> The Supreme Court held that this statute provided a marshal with authority to use deadly force to protect a Supreme Court Justice because then-current California law provided the same power to sheriffs.<sup>377</sup> Other courts did the same. The federal district court in Colorado applied this statute even though Colorado was not even a state until several years after this statute was enacted, meaning that the statute could not apply if dynamic incorporation were invalid.<sup>378</sup>

This readiness to enforce statutes that use dynamic incorporation may occur because the longstanding historical use of those statutes in this country provides powerful evidence that dynamic incorporation is legitimate.<sup>379</sup> Indeed, even though some early lower courts condemned its use, one federal court went so far as to declare that “[t]here is *no doubt* that congress may, by clear enactment, adopt the prospective legislation of the states, and impart to it the effect of an act of the national government.”<sup>380</sup> Modern courts often dismiss delegation challenges to statutes that use dynamic incorporation as “patently frivolous”—even without discussing the Supreme Court’s decision in *United States v. Sharpnack*.<sup>381</sup> If Congress possesses the power to regulate a subject directly, it can do so as well using dynamic incorporation.<sup>382</sup>

#### CONCLUSION

Heightened use of dynamic incorporation may be the next stage in federalism relations between the federal and state governments. Unlike

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to the States” despite the Court’s acknowledgment in the very next sentence that Congress believed the law was necessary).

<sup>376</sup> Rev. Stat. § 788 (1874) (codified as amended at 28 U.S.C. § 564 (2012)).

<sup>377</sup> *In re Neagle*, 135 U.S. 1, 68 (1890); see also *State v. Williams*, 18 So. 486, 487 (Miss. 1895) (considering prospective incorporation and holding that this statute used dynamic incorporation).

<sup>378</sup> *Hyman v. Chales*, 12 F. 855, 855 (C.C.D. Colo. 1882).

<sup>379</sup> Dorf, *supra* note 4, at 139–46.

<sup>380</sup> *Gaines v. Travis*, 9 F. Cas. 1062, 1064 (S.D.N.Y. 1849) (emphasis added).

<sup>381</sup> *United States v. Bryant*, 716 F.2d 1091, 1094 (6th Cir. 1983) (quoting *United States v. Molt*, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979)); see also *United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998) (following *Bryant*).

<sup>382</sup> *Bryant*, 716 F.2d at 1095 (rejecting a delegation argument because “Congress could obviously exercise its plenary power over foreign commerce in such a manner if it so chose” (quoting *Molt*, 599 F.2d at 1219 n.1)).

the federalism focus sometimes found in the nineteenth and twentieth centuries about “states’ rights,” which imposed a wall of separation between federal and state powers, dynamic incorporation arrives at the behest of Congress and operates by creating a joint legislative partnership.

The contours of possibilities for dynamic incorporation are endless, and no single article can do them justice, especially an article that seeks, as this one does, to open the field for discussion. More than likely, the level of dynamic incorporation, and the limits imposed, will and should vary across different situations.

But as this Article has shown, Congress can create many different joint legislative projects in criminal law. Congress can pass federal laws and allow states to “opt in” to application of those laws. Congress can create federal regulations and allow states to create safe harbors that allow states partly to “opt out” of those laws. Congress can make conduct that violates state law a predicate element for violating federal law. And Congress can enable state legislatures to determine the scope of federal statutes by entrusting those legislatures with authority to, among other things, define important terms within the federal statute.

Of these forms of dynamic incorporation, the “opt-out” form is most noteworthy. It gives politicians the best of both worlds. It allows objecting states to influence substantially—indeed, turn off—application of a federal law if actors comply with state law. Yet it affords the promise of federal resources for prosecution if some in-state actors choose not to comply with state law. This form also pursues federal ends by increasing the flexibility of federal law.

The project of this Article has not been to craft a treatise on all the implications created by dynamic statutory incorporation. But this Article has shown that one tool of national federalism—dynamic statutory incorporation—has largely remained unexplored, is a potent tool for modern forms of federalism, and has particularly noteworthy implications for criminal law.

Still, much more needs to be said. This Article raises broader implications for future research. For example, more can be said about the role states can play to help further national separation of powers. The role statutory dynamic incorporation can play lends additional layers to the debate about what it means for a law to be uniform and whether uniformity is desirable in federal law in general and criminal law in particular. Although a more robust use of dynamic incorporation would have courts interpret statutes using dynamic incorporation as in *Erie*

*Railroad Co. v. Tompkins*,<sup>383</sup> where state-court decisions are considered part of state law, courts have split on this issue, with some determining that they can deviate from the interpretations of the highest court of the relevant state.<sup>384</sup> The more compelling argument is that a federal court interpreting a statute that incorporates state law sits like a court in diversity jurisdiction—and thus interpretations of state law are not federal questions<sup>385</sup>—but the debate is not yet settled. And other questions arise about what role dynamic incorporation should play when someone commits a continuing offense that crosses state lines and whether that situation should create choice-of-law issues. The author intends to explore these topics in further research.

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<sup>383</sup> 304 U.S. 64 (1938).

<sup>384</sup> *United States v. Smith*, 965 F. Supp. 756, 761–62 (E.D. Va. 1997) (describing the split and siding with the *Erie*-like approach).

<sup>385</sup> Lumen N. Mulligan, *Jurisdiction by Cross-Reference*, 88 Wash. U. L. Rev. 1177, 1180–81 (2011).