ARTICLE

ABDICATION AND FEDERALISM

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States abdicate many of their federal responsibilities to local governments. They do not monitor local compliance with those laws, they disclaim responsibility for the actions of their local governments, and they deny state officials the legal capacity to bring local governments into compliance. When sued for noncompliance with these federal laws, states attempt to evade responsibility by arguing that local governments—and not the state—are responsible. These arguments create serious and unexplored barriers to enforcing federal law. They present thorny issues of federalism and liability, and courts struggle with them. Because neither courts resolving these conflicts nor advocates litigating them are aware that abdication occurs regularly across a number of policy areas, courts have failed to develop a consistent methodology for addressing it. This Article argues that courts should reject these state arguments in most cases and outlines the contours of a "nonabdication doctrine" that would be less solicitous and accommodating of existing state laws and more attentive to the language of federal laws.

This Article uncovers these state arguments and marks them as a pattern across a surprisingly diverse set of states and federal policies: indigent defense, election law, public assistance, conditions of incarceration, and others. It uses state filings—including archived documents—as well as interviews with numerous advocates and state officials, to explore the concept of state abdication. It posits that abdication is a consequence of superimposing federal responsibilities onto the diverse legal and political relationships between states and their

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local governments. It suggests that abdication provides a new lens through which to reassess previous thinking on localism, federalism, and decentralization. Because abdication permits states to shelter noncompliance with federal law at the local level and mutes productive local dissent, it reveals a cost to decentralizing federal policy that federalism scholarship overlooks.

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INTRODUCTION

Much federal law regulates the conduct of states.[1] States, in turn, delegate many of their federal responsibilities to local governments.[2] This Article argues that states do more than delegate those responsibilities; they *abdicate* them. They do not monitor local compliance with those laws, they disclaim responsibility for the actions of their local governments, and they relinquish the legal capacity to bring their local governments into compliance. When states are sued for noncompliance with these federal laws, they attempt to evade responsibility by arguing that local governments—and not the state—are responsible. These arguments create serious, widespread, and unexplored barriers to enforcing federal law, and this federal–state–local dynamic exists across a surprisingly diverse set of states and policy areas: indigent defense, election law, public assistance, conditions of incarceration, and others.

Abdication provides a new lens through which to reassess previous thinking on localism, federalism, and decentralization. Abdication permits states—intentionally or unintentionally—to shelter noncompliance with federal law at the local level, which can mute productive local dissent. It allows states to use the veneer of federalism, and state-protective federalism doctrines, to obscure their failure to comply with federal law. It thus reveals a cost to decentralizing federal policy that federalism scholarship overlooks.

Consider a recent example. The Sixth Amendment requires states to provide lawyers for defendants who cannot afford to hire their own.[3] Idaho has abdicated that responsibility to its local governments: State law makes Idaho's counties responsible for providing counsel to indigent defendants.[4] In 2015, a class of indigent defendants sued Idaho for failing to discharge its Sixth Amendment responsibilities.[5] Idaho officials made

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1. See, e.g., Abbe R. Gluck, Our [National] Federalism, 123 Yale L.J. 1996, 1997, 2008–17 (2014) [hereinafter Gluck, [National] Federalism] (noting "the reach of federal statutes into areas of historic state control continues to expand" and discussing federal health care laws, social security laws, labor laws, telecommunications laws, and others).

2. See Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 Colum. L. Rev. 1, 1 (1990) [hereinafter Briffault, Our Localism I] ("State legislatures, often criticized for excessive interference in local matters, have frequently conferred significant political, economic and regulatory authority on many localities."); Richard Briffault, "What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303, 1318 (1994) [hereinafter Briffault, "What About the 'Ism'?"] ("In most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision.").

3. See Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

4. See Idaho Code § 19-859 (2017) (stating "[t]he board of county commissioners of each county shall provide for the representation of indigent persons and other individuals who are entitled to be represented by an attorney at public expense" and providing four options for compliance).

5. Class Action Complaint for Injunctive and Declaratory Relief, Tucker v. State, No. CV-OC-2015-10240 (Idaho Dist. Ct. June 17, 2015), http://www.aclu.org/sites/default/files/

what I call an "abdication argument": They disclaimed responsibility for the actions of their local governments and argued that they were powerless to correct the problem because the sovereign decision to delegate indigent defense responsibilities was legislative, not executive.[6] The Idaho state court agreed and dismissed the complaint. It held that although the state was "ultimately responsible" for complying with the Sixth Amendment,[7] and although the plaintiffs made "troubling allegations" about the state's indigent defense system,[8] the governor and other state officials could not be held accountable because they lacked authority to remedy the violation.[9]

This Article uses state briefing—including archived materials—and interviews with numerous advocates and state officials to explore the causes and consequences of abdication. The Idaho case illustrates two kinds of structural barriers to compliance with federal law created by abdication. First, prelitigation—or "front-end"—barriers: Based on court filings, Idaho officials did not believe they were responsible for local noncompliance with the Sixth Amendment. That belief is likely to lead to noncompliance with federal law. Second, litigation—or "back-end"—barriers: The court dismissed the lawsuit. Even if the court's decision is ultimately reversed on appeal, in line with other suits of its kind,[10] it creates a delay in enforcing federal rights caused by uncertain doctrine in this area of law.

This federal–state–local dynamic is widespread among states and federal policy areas. Federal election laws, for example, impose voter registration, absentee balloting, and other election responsibilities onto states that states in turn delegate to their local governments.[11] Federal public-assistance programs, like food stamps and cash assistance, impose

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field_document/acluidahopubdefensecomplaintfilestamp-sm.pdf (on file with the *Columbia Law Review*).

6. Memorandum in Support of Motion to Dismiss at 5, *Tucker*, No. CV-OC-2015-10240 (on file with the *Columbia Law Review*); see also id. at 10 ("Of course the Governor and Commission members have *political* or *governmental interests* in improving Idaho's indigent defense system, but they have no *legal authority* to address the system as requested in the Complaint."). States, of course, do not embrace the term "abdication." But this Article uses it to describe state arguments that draw on state law to avoid responsibility for federal law and instead blame local governments for noncompliance.

7. *Tucker*, slip op. at 5 (on file with the *Columbia Law Review*).

8. Id. at 31.

9. See id. at 22–23 (holding while the governor and Public Defense Commission have "moral, political, and public power to pressure the legislature or the counties to act," neither "have the ability to require it"). The court further held that the separation of powers doctrine rendered the case nonjusticiable. See id. at 31.

10. State courts in Michigan and New York have recently rejected arguments like Idaho's. See infra section I.A.3.

11. See Justin Weinstein-Tull, Election Law Federalism, 114 Mich. L. Rev. 747, 755–64 (2016) [hereinafter Weinstein-Tull, Election Law Federalism] (describing a set of federal election laws that impose election-administration responsibilities onto states, which in turn delegate those responsibilities to local governments).

requirements onto states that states delegate to their local governments.[12] The Americans with Disabilities Act and the Eighth Amendment impose requirements on state prisons that states have delegated to local governments by sending state prisoners to county jails.[13] Consistent across these policy areas, states use their decentralized structures to attempt to avoid liability under federal law.[14]

Abdication cases present thorny issues of federalism and liability, and courts struggle with them. Because courts tend to reject state abdication arguments, this Article uses the term "nonabdication doctrine" to describe that set of cases.[15] But because neither courts resolving these conflicts nor advocates litigating them are aware that abdication occurs regularly across different policy areas, and they rarely cite to the full set of abdication cases,[16] the nonabdication doctrine is inconsistent and ill-defined. It is more the promise of a doctrine than a stable set of principles.

Though abdication is a common feature of our federal system, it has little presence in the academic literature. Abdication implicates both federalism and localism. But with a few notable exceptions,[17] these areas

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12. See, e.g., Henrietta D. v. Bloomberg, 331 F.3d 261, 265–66 (2d Cir. 2003) (describing how New York has delegated day-to-day administration of federal public-assistance programs like food stamps, cash benefits, and Medicaid to its fifty-eight local county districts).

13. See, e.g., Armstrong v. Schwarzenegger (*Armstrong I*), 622 F.3d 1058, 1062 (9th Cir. 2010) (describing how California sends state prisoners to county jails and then disclaims responsibility for the conditions of those jails).

14. See infra Part I. The case studies differ in important ways as well. For example, the federal law at issue in the public-assistance and election-law contexts is statutory, the federal law at issue in the indigent-defense context is constitutional, and the federal law at issue in the incarceration context is a mix. See section I.C.

15. See infra section I.A.

16. See infra note 185 and accompanying text.

17. See Lynn A. Baker & Daniel B. Rodriguez, Constitutional Home Rule and Judicial Scrutiny, 86 Denv. U. L. Rev. 1337, 1372–73 (2009) (suggesting that the state–local relationships—and state court interpretations of those relationships—can inform Tenth Amendment federalism claims); David J. Barron, A Localist Critique of the New Federalism, 51 Duke L.J. 377, 377–78 (2001) [hereinafter Barron, A Localist Critique] (noting the commitment to local control contained in recent federalism decisions but warning that those decisions may have the unintended consequence of diminishing state and local authority); Briffault, "What About the 'Ism,'" supra note 2, at 1307–17 (examining federalism's relationship to localism and local control); Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 Yale L.J. 1256, 1271–74 (2009) (describing how disagreement between the federal, state, and local governments can result in productive dialogue and disagreement); Nestor M. Davidson, Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty, 93 Va. L. Rev. 959, 1000–22 (2007) (arguing that localism serves many of the same aims as federalism and exploring the ways in which local governments and the federal government partner to achieve federal ends, despite potential state disagreement); Roderick M. Hills, Jr., Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control, 97 Mich. L. Rev. 1201, 1243 (1999) [hereinafter Hills, Dissecting the State] (arguing courts should presume state law does not prevent state and local officials from administering federal law unless the state legislature clearly prohibits it); Weinstein-Tull, Election Law Federalism,

of scholarship have remained largely distinct. That separation is unfortunate, as each topic adds richness to the other.

Federalism scholars, for example, have recently explored the roles of states in administering federal law generally.[18] They have argued that disagreement between federal, state, and local governments can create policy "churn," which creates productive national consensus around difficult political issues.[19] That churn, however, relies upon citizen engagement and open disagreement between governments. State abdication, by contrast, permits states to obscure disagreement with federal law by incubating noncompliance at the local level. Abdication therefore reveals a cost to decentralizing federal law that these federalism scholars do not account for.

Local government scholars, on the other hand, have long studied "home rule," or the distribution of power between states and local governments. They examine how states distribute substantive responsibilities—like zoning, taxation, and education—between state and local officials.[20] Abdication adds a different perspective: If states can put compliance with federal law at risk by abdicating federal responsibilities to local governments, local government scholars should focus not only on the state–local distribution of substantive power but also on the state's role in overseeing and supervising its local governments. If federalism scholars are right that states are playing an expanding role administering federal law, local governments will in turn administer more federal law than ever before. And yet scholarship on the administrative relationships between states and their local governments is scarce.[21]

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supra note 11, at 751–52, 778–80 (observing that states delegate many of their election responsibilities to local governments, creating noncompliance with some federal election laws).

18. Contributors to a recent symposium in the *Yale Law Journal* set out this perspective. See generally Heather K. Gerken, Federalism as the New Nationalism: An Overview, 123 Yale L.J. 1889 (2014).

19. Heather K. Gerken, The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 67 (2010) [hereinafter Gerken, Federalism All the Way Down]. For example, Heather Gerken believes that Arizona's recent immigration law "galvanized national debate" on the topic. See id. at 68.

20. See, e.g., David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255, 2288–300 (2003) [hereinafter Barron, Reclaiming Home Rule]; Briffault, Our Localism I, supra note 2, at 15; Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1860–75 (1994); Gerald E. Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059, 1120–28 (1980) (weighing the benefits and drawbacks of decentralizing power from states to cities).

21. The most recent comprehensive study on state supervision over local governments is a 1981 report that attempted to empirically measure local governmental autonomy by state. See Advisory Comm'n on Intergovernmental Relations, Measuring Local Government Discretionary Authority (1981), http://www.library.unt.edu/gpo/acir/Reports/information/M-131.pdf [http://perma.cc/6LV7-R8RY] (empirically measuring the independence of local governments in every state along several dimensions); see also Council of State Gov'ts, State-Local Relations: Report of the Committee on State-Local Relations 11–

This Article has descriptive and normative aims. Descriptively, it explores how and why states abdicate their federal responsibilities to local governments and how that transfer of power affects federal law. It uses litigation against states as a means of identifying state abdication in four policy areas and speculates as to the existence of abdication elsewhere (Part I). Cataloging state abdication arguments marks the problem of abdication as widespread and provides a set of cases that form a foundation for a more coherent nonabdication doctrine.[22]

Compiling these case studies also illustrates the dangers of state abdication (section II.A). Abdication causes compliance concerns by creating a Catch-22 for the federal government and advocates who hope to enforce federal law. The front-end and back-end barriers that abdication creates are state-level roadblocks to enforcing that law. As a consequence, abdication pushes enforcement efforts down to the local level. But local noncompliance can be difficult to find and fix,[23] and some federal policy areas require statewide remedies unavailable at the local level.[24] Abdication also causes representational harm by weakening the relationship between the public and its governing representatives. This representational harm takes two forms: diminished accountability of government officials and quieted public dissent.

This Article also seeks to explain why and how delegation becomes abdication (section II.B). It argues that abdication is a consequence of superimposing federal responsibilities onto the complicated legal and political preexisting relationships between states and their local governments. When highly decentralized states delegate their federal responsi-

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55 (1946); U.S. Advisory Comm'n on Intergovernmental Relations, State Laws Governing Local Government Structure and Administration 1 (1993), http://www.library.unt.edu/gpo/acir/Reports/information/M-186.pdf [http://perma.cc/47JD-LJMT] (surveying state laws and constitutional provisions affecting municipal and county governments).

22. As a practical matter, collecting these cases will serve as a resource for advocates and courts facing state-delegation arguments. Presumably because of the murkiness of the doctrine, states continue to make these arguments regularly. California, for example, was recently sued for failing to provide adequate indigent defense services in Fresno. In a demurrer filed in late 2015, California argued that it was not responsible for what it deemed to be Fresno's failure. See Memorandum of Points and Authorities in Support of Demurrer of Defendants State of California and Governor Edmund G. Brown at 5–8, Phillips v. California, No. 15CECG02201 (Cal. Super. Ct. Sept. 14, 2015). Perhaps because of inconsistent doctrine, advocates and courts do not regularly respond to these arguments holistically by referencing other areas of law in which courts have acted.

23. See Hills, Dissecting the State, supra note 17, at 1218 ("[T]he federal government has an insufficient number of elected policy generalists to monitor effectively 39,000 local governments."). The voting rights domain offers a helpful example of this principle. Congress enacted section five of the Voting Rights Act of 1965 in part because enforcing the right to vote against the thousands of state and local jurisdictions proved impossible. See Shelby County v. Holder, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting) (comparing fighting vote discrimination to "battling the Hydra[—][w]henever one form of voting discrimination was identified and prohibited, others sprang up in its place").

24. See infra note 223 and accompanying text.

bilities onto highly autonomous local governments, officials in those states are likely to believe they lack the authority to supervise their local governments and, when necessary, bring them into compliance.[25] States across the political spectrum—including states where we might expect resistance to federal law and states normally sympathetic to federal law—regularly abdicate their federal responsibilities to local governments and attempt to avoid liability in court.

Normatively, this Article proposes a consistent way for courts to address state abdication arguments (Part III). It argues that a coherent nonabdication doctrine would be less solicitous and accommodating of existing state delegation laws and more attentive to the language of the federal laws. It suggests that courts take seriously the doctrine holding that, for the purposes of federal law, local governments are arms of the state—a doctrine that most courts considering abdications cases ignore. It also suggests that courts and Congress should clarify that state officials are empowered to comply with federal law, even when internal state structure complicates compliance, and require states to actively monitor local government noncompliance.

This Article further argues that abdication and the federal–state–local dynamic it reflects cast doubt on some contemporary federalism scholarship and doctrine. Local constitutionalism, for example, promotes federal court deference to local conduct that vindicates positive constitutional protections but makes assumptions about federal supremacy and the expressive values of local dissent that abdication calls into question. Cooperative federalism laws, similarly, seek to harness states to administer federal programs and tailor them to specific local needs. These laws invite states to exercise their sovereignty by enacting legislation and creating administrative agencies.[26] Federalism doctrines—like the anticommandeering principle—protect state sovereignty but, in so doing, also protect state prerogatives to abdicate. This Article argues that the cost to compliance with federal law due to abdication is not the familiar costs created by errant local governments or intransigent states—those are well studied in the literature. Rather, it is due to the combination of state-protective federalism doctrines and the legal and political nebulousness of the state–local relationship.

The Article concludes by speculating about what motivates states to abdicate their responsibilities to local governments. It offers several possible motivations, including intransigence and resistance to federal law,

25. See infra notes 197–204 and accompanying text.

26. See Gluck, [National] Federalism, supra note 1, at 2007 ("[A]s part of Congress's efforts to give the states substantive lawmaking roles in national schemes, Congress has asked the states to enact . . . state laws, create new state institutions, and pass new state administrative regulations—in other words, to exercise their sovereign powers in service of the national statutory project.").

thoughtfulness and a sincere interest in decentralization, or a lack of funds sufficient to comply with federal law.

I. ABDICATION IN PRACTICE

Geographically and politically diverse states have made abdication arguments across a variety of federal policy areas. This Part presents four case studies and a collection of other examples. In each study, the state delegated a federal responsibility down to its local governments. Those local governments failed to discharge their responsibilities, and the state was sued. In each study, state officials attempted to avoid responsibility by arguing that delegating the obligation exempted them from liability.

The four case studies demonstrate the absence of any coherent doctrine governing abdication. Neither the courts nor the advocates in these cases regularly cite to abdication cases in other policy areas,[27] which may contribute to this incoherence. As described in this Part, courts tend to reject state abdication arguments. But as the Idaho example above demonstrates, states sometimes prevail. Even courts that do reject abdication arguments do so in inconsistent ways.

But first, some definitional work. I understand abdication arguments to consist of some combination of three positions, often asserted in tandem, intended to avoid liability for local noncompliance: (1) the state is not responsible for local noncompliance,[28] (2) the state is unaware of local noncompliance because it does not monitor or supervise local action,[29] and (3) the state is powerless to correct local noncompliance.[30] All three positions need not be present to constitute an abdication argument.[31] These three positions appear throughout the abdication cases

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27. See infra section II.B.

28. See, e.g., Appellees' Brief at 28–42, United States v. Missouri, 535 F.3d 844 (8th Cir. 2008) (No. 07-2322), 2007 WL 6603869 (arguing that local election administrators are not state actors, so Missouri cannot be responsible for their noncompliance with the National Voter Registration Act).

29. See, e.g., Armstrong v. Brown (*Armstrong II*), 732 F.3d 955, 961 (9th Cir. 2013) (noting that California's "'ongoing failure to train, supervise, and monitor' their employees . . . ha[s] played a significant role in causing the undoubted discrimination against Armstrong class members in county jails" (emphasis omitted) (quoting Armstrong v. Brown, 857 F. Supp. 2d 919, 937 (N.D. Cal. 2012))).

30. See, e.g., State Defendants' Response to the United States' Motion for Summary Judgment, Declaratory Judgment, and Permanent Injunctive Relief at 5–6, United States v. Alabama, 857 F. Supp. 2d 1236 (M.D. Ala. 2012) (No. 2:12-cv-00179-MHT-WC) (describing Alabama's decentralized system of elections and the state's lack of power over local elections officials).

31. These arguments can be related, but they are distinct. For example, a state may argue that it is not responsible for local compliance because it is unaware of local noncompliance or because it *is aware* of local noncompliance but the local government had failed to come into compliance. See Reynolds v. Giuliani, 506 F.3d 183, 192–93 (2d Cir. 2007) (holding that the state attempted to supervise and monitor the local government's

described in this Part and arise as common themes in conversations with both state officials and advocates of federal law.

Additionally, I understand abdication to be a particular kind of delegation. This Article treats delegation as any transfer of responsibility from one body to another. Abdication is an extreme form of delegation, an effort at a clean break.

The presence of state abdication is not itself evidence of noncompliance with federal law, or even intent to violate federal law. States may abdicate a given federal responsibility, which can then be fully discharged by local governments. But abdication creates barriers to compliance with federal law that are distinct from problems created by more moderate delegation. Delegation creates policy decentralization, a phenomenon carefully studied by scholars and the judiciary.[32] Abdication, on the other hand, is a kind of delegation that carries serious downsides and has not been previously explored. The remainder of this Part illustrates abdication, inside and outside of litigation.

A. *Four Case Studies*

These case studies examine how four states have abdicated different federal responsibilities. Each study presents a brief description of the responsibility, the state's delegation of that responsibility to local governments, the state's argument to evade liability when sued for local noncompliance with the federal law, and the court's reasoning.

1. *Public Assistance in New York.* — Most federal public-assistance programs involve some state administration.[33] Many states delegate those administrative responsibilities to their local governments. In particular, local governments frequently administer the Food Stamp Act, Medicaid, and programs derived from the Americans with Disabilities Act (ADA) and the Rehabilitation Act.[34]

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administration of public-assistance programs, creating a high bar for holding the state ultimately responsible for the local noncompliance).

32. See, e.g., Barron, A Localist Critique, supra note 17, at 382 (describing the values of policy decentralization, including "more participatory and responsive government; more diversity of policy experimentation; more flexibility in responding to changing circumstances; and more diffusion of governmental power, which in turn checks tyranny").

33. See King v. Smith, 392 U.S. 309, 316 (1968) (describing federal cash assistance as "a scheme of cooperative federalism . . . financed largely by the Federal Government, on a matching fund basis, and . . . administered by the States"); see also Stephen D. Sugarman, Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs, 14 Yale L. & Pol'y Rev., 1996, at 123, 124 (noting most federal public-assistance programs tend to follow the cooperative federalism Spending Clause model in which states accept federal money in exchange for agreeing to administer programs that further a federal priority).

34. See, e.g., Heather Hahn et al., HHS, A Descriptive Study of County- Versus State-Administered Temporary Assistance for Needy Families Programs, at v (2015) [hereinafter Descriptive Study of TANF Programs], http://www.acf.hhs.gov/sites/default/files/opre/county_tanf_final_report_submitted_to_acf_b508.pdf [http://perma.cc/DUT7-P44Q] (noting

New York is among the states that delegate their federal public-assistance-administration responsibilities to local officials.[35] As described by New York's highest court, social services are state programs "administered through the 58 local social services districts under the general supervision of the State Department of Social Services and the State Commissioner of Social Services."[36] County social-services commissioners administer public-assistance funds, whether federal, state, or local in origin.[37]

In the 2000s, the Second Circuit considered two cases filed by public-assistance recipients and prospective recipients against both the state of New York and New York City.[38] In each case, the state of New York argued that its delegation to local government absolved the state of responsibility for local noncompliance with the federal programs.[39]

The courts ruled for the state in one case and against the state in the other. In the first, *Henrietta D. v. Bloomberg*, the court held that the state retained ultimate responsibility for local noncompliance with the laws, despite its abdication argument.[40] Specifically, the court considered whether the state was responsible for New York City's failure to accommodate HIV-positive applicants for the Food Stamp and Medicaid programs.[41] It held that it was: that although the Rehabilitation Act does not on its face require states to supervise their local governments, "Congress's intent [is] best . . . effectuated by imposing supervisory liability on the state."[42]

The court grounded its analysis in the responsibilities created by Spending Clause legislation. Spending Clause legislation, it reasoned,

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about half of states delegate their administrative responsibilities under the federal cash assistance program to local governments); see also Karen M. Tani, Welfare and Rights Before the Movement: Rights as a Language of the State, 122 Yale L.J. 314, 333–46 (2012) (describing the historical origins of decentralized public-assistance programs in the context of social security).

35. See Descriptive Study of TANF Programs, supra note 34, at 2.

36. See Beaudoin v. Toia, 380 N.E.2d 246, 247 (N.Y. 1978) (citing N.Y. Const. art. XVII, § 1; N.Y. Soc. Serv. Law § 17 (LexisNexis 1978) (amended 2016); id. § 20 (amended 2017); id. § 34 (amended 1994)).

37. Id. (noting county commissioners are local outposts of the state apparatus).

38. See Reynolds v. Giuliani, 506 F.3d 183 (2d Cir. 2007); Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003).

39. See *Reynolds*, 506 F.3d at 189 ("[S]tate defendants maintain that whatever injury plaintiffs have suffered as a result of a violation of their rights under these Acts is a subject for redress from the City of New York."); *Henrietta D.*, 331 F.3d at 284 ("The state defendant argues that neither the ADA nor the Rehabilitation Act require her to supervise the conduct of subsidiary governmental entities who are more directly delivering social services.").

40. *Henrietta D.*, 331 F.3d at 265 (holding that the state defendant was not shielded by sovereign immunity and had an obligation to supervise the effective delivery of benefits).

41. Id. at 284–87 (discussing whether the ADA and the Rehabilitation Act required the state defendant "to supervise the conduct of subsidiary governmental entities who are more directly delivering social services").

42. Id. at 285, 287.

was akin to a contract between a state and the federal government.[43] To receive the federal money attached to the Food Stamp and Medicaid Acts, New York agreed to administer the programs.[44] It could not then avoid its responsibilities under that agreement by giving them away to local governments.[45] The court cited case law finding states ultimately responsible for complying with other pieces of Spending Clause legislation, including public assistance, even when states had delegated those responsibilities downward.[46]

The court also examined New York state law in its decision and noted that "the nature of the relationship between the state defendant and the city defendants [was] a key issue" in the case.[47] The court constructed a hierarchy of authority for public-assistance administration using state statutes and case law.[48] It held that despite New York's delegation, state law assigned ultimate responsibility for noncompliance to the state.[49]

Just a few years later, however, a different Second Circuit panel reached a contradictory opinion. In *Giuliani v. Reynolds*, the court again considered claims against New York for failing to adequately supervise New York City's administration of the Food Stamp Act and Medicaid.[50] The *Reynolds* plaintiffs claimed that public-assistance offices in New York City deterred potential applicants from applying for the programs.[51] Unlike in *Henrietta D.*, the *Reynolds* plaintiffs did not preserve claims under the federal public-assistance laws or disability laws themselves.[52] Instead, they brought suit under section 1983, with a more general claim

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43. Id. at 285.

44. Id. at 286.

45. Id.

46. Id. at 286–87.

47. Id. at 266 (noting that the state–local relationship was important because "both the city defendants and the state defendant play a role in the administration of New York's social services system").

48. Id. (noting that the state oversees local administration "through administration of a 'fair hearing' system whereby applicants for, and recipients of, state-provided public benefits may challenge local district decisions before an impartial administrative law judge, and may ultimately seek judicial review" (quoting N.Y. Soc. Serv. Law § 22 (LexisNexis 1978) (amended 2016))); id. at 287 (noting that in the context of attorneys' fees, "the [Aid to Families with Dependent Children] administrative scheme creates an interconnected and inextricable chain of authority, with ultimate power reposed in the [State Department of Social Services ('DSS')]" (second alteration in original) (internal quotation marks omitted) (quoting Thomasel v. Perales, 585 N.E.2d 359, 363 (N.Y. 1991))).

49. Id. ("We therefore conclude that Congress's intent would best be effectuated by imposing supervisory liability on the state defendant.").

50. 506 F.3d 183, 186–87 (2d Cir. 2007).

51. Id.

52. They brought those statutory claims in the district court but abandoned them on appeal. Id. at 190.

that New York failed to supervise New York City's administration of the federal programs.[53]

Again, New York argued that it was not responsible for failing to supervise local administration of public-assistance programs.[54] This time, the court agreed: It declined to find New York responsible for the city's noncompliance.[55] The court relied on the strict vicarious liability standards set out in *Monell v. Department of Social Services of the City of New York*,[56] in which the Supreme Court held that governments were responsible only for unlawful acts "implemented or . . . executed pursuant to a governmental policy or custom."[57] The *Reynolds* court held that because the state had issued directives and monitored compliance with the federal law in response to the plaintiffs' complaints, it was not liable under section 1983.[58] The court passed no judgment on whether New York was liable under the public-assistance laws themselves, since the plaintiffs abandoned that argument on appeal.[59]

Other states have similarly attempted to avoid responsibility for noncompliance with federal public-assistance laws by deploying abdication arguments. In *Robertson v. Jackson*, for example, plaintiffs eligible for food stamps sued a Virginia state official for statewide noncompliance with various requirements of the Food Stamp Act.[60] The state official argued that Virginia's decentralized system of public-assistance administration excused him from responsibility for local violations of the federal laws.[61] The Fourth Circuit held that the Food Stamp Act makes state agencies ultimately responsible for compliance, regardless of a state's decision to delegate: "A state that chooses to operate its program through local, semi-autonomous social service agencies cannot thereby diminish the obligation to which the state, as a state, has committed itself, namely, compliance with federal requirements governing the provision of the

53. Id. at 189–90.

54. Reply Brief for the State Appellants at 31, *Reynolds*, 506 F.3d 183 (Nos. 06-0283cv(L), 06-0284cv(CON)), 2006 WL 5126168 (arguing that neither the Food Stamp Act nor Medicaid created supervisory obligations on states that could be enforced under section 1983).

55. *Reynolds*, 506 F.3d at 186.

56. 436 U.S. 658 (1978).

57. *Reynolds*, 506 F.3d at 190 (citing *Monell*, 436 U.S. at 691). The court also held that the stricter *Monell* standard applied whether the relief sought was monetary or injunctive. Id. at 191 ("We join several of our sister circuits in adopting the view that *Monell*'s bar on *respondeat superior* liability under § 1983 applies regardless of the category of relief sought.").

58. Id. at 195–97.

59. Id. at 190.

60. 972 F.2d 529, 529–32 (4th Cir. 1992).

61. Id. at 530.

food stamp benefits . . . ."[62] The Ninth Circuit has held similarly in response to arguments made by California.[63]

2. *Incarceration in California.* — California houses many prisoners—convicted of state crimes and incarcerated pursuant to state authority—in county jails rather than state prisons. This state–local delegation happens in multiple ways. County jails house state parolees if their parole is revoked or during the interim period between a parole hold and a parole revocation hearing.[64] County jails also house state prisoners enrolled in in-custody drug treatment.[65] California creates these delegations through its authority under the state penal code and through contracts between the state and the counties.[66] These delegations affect thousands of prisoners.[67]

In addition, a recent California law—termed "realignment"—transferred authority over many thousands of people who would normally be housed in state prisons to county jails. Realignment is California's effort at downsizing its prison population in response to a U.S. Supreme Court opinion ordering it to do so.[68] It has resulted in a dramatically increased number of state prisoners in county jails.[69]

Beginning in the 1990s, a group of state prisoners housed in county jails sued the state, claiming that jail conditions failed to comply with the ADA, the Rehabilitation Act, and the Eighth Amendment to the U.S. Constitution.[70] The parties litigated the case over many years; the

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62. Id. at 534.

63. In *Woods v. United States*, the Ninth Circuit considered whether California could be held responsible for the actions of San Francisco in administering the Food Stamp Act. 724 F.2d 1444, 1447–48 (9th Cir. 1984). It held that San Francisco was merely an "agent" of California in administering the program and that "California had the power to permit local governmental units to administer the program, but it could not delegate its ultimate responsibility to comply with the requirements of the Act." Id.; see also California v. Block, 663 F.2d 855, 861 (9th Cir. 1981) (holding that the U.S. Department of Agriculture could collect money from California based on the misadministration of the Food Stamp Act by two California counties).

64. See *Armstrong I*, 622 F.3d 1058, 1063–64 (9th Cir. 2010) (describing the conditions under which a state may house prisoners in county jails).

65. Id.

66. Id. (citing Cal. Penal Code § 4016.5 (West 2007)).

67. Id. ("[T]he San Mateo County Jail houses an average of 480 parolees a day, and Alameda and Sacramento County jails each house an average of 1000 parolees a day.").

68. See Joan Petersilia, California Prison Downsizing and Its Impact on Local Criminal Justice Systems, 8 Harv. L. & Pol'y Rev. 327, 327 (2014) (citing Brown v. Plata, 563 U.S. 493 (2011)).

69. See *Armstrong I*, 622 F.3d at 1064 (noting that 14,000 state prisoners were to be housed in county jails because of a court order in a case preceding realignment); Petersilia, supra note 68, at 332–34 (detailing the number of state prisoners handled by county jails after realignment).

70. *Armstrong I*, 622 F.3d at 1063–64.

plaintiffs ultimately prevailed and received several remedial orders forcing the state to comply.[71]

One remedy imposed by the district court required the state to establish a computerized program that tracked disabled prisoners to ensure that the state accommodated their disabilities as required by federal law.[72] The state argued that it was not responsible for ensuring that prisoners housed by counties received accommodations, even those who would be housed in state prisons but for the state's delegation.[73] The state also argued that the remedial orders violated the anticommandeering principles set forth in *Printz v. United States* because they required state employees to administer a federal program.[74]

The court rejected these arguments and held that California officials could not "shirk their obligations to plaintiffs under federal law by housing them in facilities operated by the third-party counties."[75] It held that the ADA did not run afoul of anticommandeering principles because the state, by choice, contracted out its prison services to local governments.[76] The court did not treat counties as a part of the state, or an "arm of the state." Instead, it treated the counties as third parties that happened to contract with the state to provide a service housing prisoners. The court made it clear that the state was not responsible for making sure county governments complied with the ADA for their own—that is, county—prisoners.[77]

Just three years later, California reiterated its arguments before the Ninth Circuit. In the time period between the two cases, California enacted realignment which, as described above, transferred authority over tens of thousands of state prisoners to county jails. As part of realignment, "certain [state] parolees awaiting a revocation hearing or serving a revocation term" were to "'be under the sole legal custody and

71. See id.

72. Id. at 1063.

73. Id. at 1062. The state couched its claim in an attack against a federal regulation preventing a state from avoiding its responsibilities under the ADA by contracting away its prison responsibilities. See 28 C.F.R. § 35.130(b)(1) (2016) (stating "[a] public entity, in providing any aid, benefit, or service, may not, *directly or through contractual, licensing, or other arrangements*, on the basis of disability," deny accommodation to an individual (emphasis added)).

74. *Armstrong I*, 622 F.3d at 1068–69 (citing Printz v. United States, 521 U.S. 898, 919–21 (1997)).

75. Id. at 1074.

76. Id. at 1069 ("The State's only obligation under the order is with regard to its own prisoners and parolees, and it is triggered in this case purely by the State's choice to house incarcerated persons in the county jails.").

77. Id. ("The State could avoid all obligations to ensure that anyone in the county jails receives the accommodations required by the ADA by choosing not to house class members in those jails.").

jurisdiction of local county facilities' while housed in county jails."[78] In litigation, California argued that realignment divested it of authority over that class of parolees, so it could not be responsible for ensuring that they received disability accommodations.[79]

Again, the Ninth Circuit disagreed. It held that realignment did "not relieve defendants of all responsibility for the discrimination suffered by *Armstrong* class members housed in county jails, past and present, or of their obligation to assist in preventing further violations."[80] It emphasized the state's own role in housing the prisoners, even though the plaintiffs were not specifically housed in state prison.[81] The court linked the state's liability with its failures both to "train, supervise, and monitor" the county jails and to effectively communicate with county jails about the needs of the prisoners.[82]

The Ninth Circuit again resisted the idea that the state was responsible for the conditions of county jails because counties are a part of the state. The court compared county jails to adoptive parents: A state may be liable to a child in the foster-care system even after the child is adopted, "if the state 'affirmatively create[s] a danger that the adopted child would not have otherwise faced,' and the state was aware of the danger it created."[83] Similarly here, "the state cannot house persons for whom it is responsible in jails where the state reasonably expects indignities and violations of federal law will continue to occur, turn care over to county custodians, and then disown all responsibility for their welfare."[84] For the court, the county had no special relationship with the state; it was merely the delegatee.

This issue is bound to arise again in California. The Ninth Circuit cases specifically dealt with disability accommodation in California prisons and jails, but scholars have noted that realignment has caused many of the overcrowding problems that previously plagued state prisons to flow downstream. Prison scholars and advocates have described the "deterioration" of county jail conditions, including inadequate medical

78. *Armstrong II*, 732 F.3d 955, 958 (9th Cir. 2013) (quoting Cal. Penal Code § 3056 (West 2012)), cert. denied, 134 S. Ct. 2725 (2014) (mem.).

79. Id. at 959.

80. Id. at 960.

81. Id. at 960–61. This holding affirmed the plaintiffs' argument that the state was not responsible for the actions of its counties; rather, it was responsible for its own failure to supervise. See Brief in Opposition at 17–18, Brown v. Armstrong, 134 S. Ct. 2725 (2014) (No. 13-1056), 2014 WL 1783194 ("In fact, the Ninth Circuit recognized the State's right to divide authority, but found based on the precise circumstances here that the State *retained* authority over—and thus obligations to—class members the State puts in county jails.").

82. *Armstrong II*, 732 F.3d at 961 (internal quotation marks omitted) (quoting Armstrong v. Brown, 857 F. Supp. 2d 919, 937 (N.D. Cal. 2012)).

83. Id. (quoting Tamas v. Dep't of Soc. & Health Servs., 630 F.3d 833, 843–44 (9th Cir. 2010)).

84. Id. at 961–62.

care and increased prison violence.[85] Joan Petersilia has described these conditions as "startlingly familiar" to and "closely mirroring" prison-condition problems at the state level.[86] She has predicted that "a surge of county-level Eighth Amendment suits is likely to emerge."[87] And since the Ninth Circuit has now held that realignment does not divest the state of responsibility for the conditions of the jails housing those prisoners,[88] questions about state liability are bound to be a part of future litigation.

3. *Indigent Criminal Defense in Michigan.* — Indigent criminal defense is another policy area that implicates federal, state, and local levels of governments. The Sixth Amendment, as interpreted by the Supreme Court in *Gideon v. Wainwright*, requires states to provide defense counsel to criminal defendants who cannot afford to hire their own.[89] Many states, in turn, abdicate that responsibility to their local governments. A recent report of the American Bar Association found that nineteen states require their local governments to either fully fund or provide most of the funding for indigent criminal defense.[90] Fewer than half of the states fully fund their indigent defense programs.[91] Even states that fully or partly fund their indigent defense programs delegate significant administrative responsibilities to their local governments.[92]

Michigan was an example of a state with a highly decentralized system of indigent criminal defense.[93] As of 2007, Michigan law required county court chief judges to appoint defense lawyers to criminal defendants who could not afford one themselves.[94] Michigan counties were

85. See Petersilia, supra note 68, at 348–49 (describing interviews with public defenders); see also Margo Schlanger, *Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics, 48 Harv. C.R.-C.L. L. Rev. 165, 210–15 (2013) (noting the "hydra threat" that eliminating some constitutional violations at the state level through litigation in California may lead to constitutional problems throughout California's many county jails).

86. Petersilia, supra note 68, at 349–50.

87. Id. at 350.

88. See *Armstrong II*, 732 F.3d at 961–62.

89. See Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

90. Holly R. Stevens et al., Ctr. for Justice, Law & Soc'y at George Mason Univ., State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008, at 5 (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf [http://perma.cc/9JXX-5MQQ].

91. Id.

92. Id.

93. This changed in 2012 with the passage of state legislation adopting a statewide commission approach to indigent defense. See Margaret A. Costello, Fulfilling the Unfulfilled Promise of *Gideon*: Litigation as a Viable Strategic Tool, 99 Iowa L. Rev. 1951, 1974–75 (2014).

94. Mich. Comp. Laws Ann. § 775.16 (West 2006) (amended 2013).

responsible for fully funding their own criminal defense programs,[95] directly from the county treasury.[96]

In 2007, a putative class of criminal defendants sued the State of Michigan and the Michigan governor in Michigan state court[97] and alleged that Michigan's highly decentralized indigent-defense scheme violated their right to counsel.[98] The plaintiffs alleged that "[a]lthough the constitutional obligation to provide indigent persons with effective assistance of competent counsel rests with the State, Defendants have repeatedly abdicated that responsibility."[99] Specifically, the plaintiffs brought section 1983 claims pursuant to the Sixth and Fourteenth Amendments and similar state constitutional claims.[100]

Michigan moved for summary disposition on several grounds, among them that the plaintiffs' request for relief required the state to make changes that were legislative in nature—relief neither the courts nor the executive were empowered to make.[101] The state also argued that the plaintiffs would be better served suing the local governments responsible for providing defense counsel, rather than the state itself.[102]

Reflecting the complexity of abdication arguments, the Michigan courts struggled with the case. The trial and appellate courts found for the plaintiffs,[103] but the Michigan Supreme Court seemingly could not make a decision. In the span of eight months, it reversed itself twice. It first ruled in favor of the plaintiffs and summarily affirmed the appellate

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95. Nat'l Legal Aid & Def. Ass'n, Evaluation of Trial-Level Indigent Defense Systems in Michigan 5 (2008), http://provinginnocence.org/attachments/article/546/NLADA%20Race%20to%20the%20Bottom%20Report.pdf [http://perma.cc/7M9H-GGL7].

96. Mich. Comp. Laws Ann. § 775.16.

97. Criminal defendants bring these cases in state, rather than federal court, to avoid thorny questions about abstention. Federal courts are reluctant to step into indigent-defense issues when those issues are raised by criminal defendants with ongoing or just-completed state prosecutions. See Luckey v. Miller, 976 F.2d 673, 678–79 (11th Cir. 1992). Indigent-defense scholars and advocates have pressed reform measures that would permit federal courts to hear these kinds of cases. See, e.g., Cara H. Drinan, Am. Constitution Soc'y for Law and Policy, A Legislative Approach to Indigent Defense Reform 12 (2010), http://www.acslaw.org/files/ACS%20Issue%20Brief%20-%20Drinan%20Indigent%20Def%20Reform_0.pdf [http://perma.cc/34N5-CCTK] (proposing legislation that "expressly allows federal courts to provide a prospective remedy by declaring *Younger* abstention inapplicable in these types of suits").

98. Complaint ¶ 1, Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009), http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=22107&libID=22077 (on file with the *Columbia Law Review*).

99. Id. ¶ 85.

100. Id. ¶¶ 154–181.

101. Brief on Appeal - Appellants State of Michigan and Governor Jennifer Granholm at 11, *Duncan*, 774 N.W.2d 89 (Nos. 139345, 139346, 139347), 2010 WL 1215034.

102. Id.

103. See Duncan v. Michigan, 832 N.W.2d 761, 765 (Mich. Ct. App. 2013) (describing the procedural history of the case).

court's denial of summary disposition.[104] Soon after, it reversed itself on a motion for reconsideration and granted the state's motion for summary disposition on the grounds stated in the dissent of the appellate court decision:[105] that the case was not justiciable because it asked state officials to change Michigan's decentralized system of indigent defense, which was a legislative, and not an executive, decision.[106] Just four months later, the court reversed itself again on another motion for reconsideration and found for the plaintiffs on the ground that the reconsideration had been improper.[107] Since then, the case has gone back down to the trial court and up again to the Michigan Supreme Court, which finally dismissed the appeal in 2013.[108] That dismissal allowed trial to begin, over six years after the case was filed. Just months later, Michigan legislatively reformed its system of indigent defense, creating enforceable minimum standards and earmarking additional funding for local governments to provide counsel.[109]

New York made similar arguments when criminal defendants alleged that New York's indigent defense scheme was unconstitutional. New York moved to dismiss the charges as nonjusticiable because (1) New York's decision to delegate indigent defense to local governments was a legislative decision not remediable by courts and (2) local governments were indispensable parties that must be joined for litigation to proceed.[110] The parties litigated these issues all the way up to New York's highest court, which ruled against the state and held that the legislative decision to decentralize the provision of indigent defense did not insulate the state from the Sixth Amendment.[111]

State abdication arguments in the indigent-defense context are live in contemporary litigation, and the doctrine is fluid. Although Michigan

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104. Duncan v. State, 780 N.W.2d 843, 844 (Mich. 2010) (denying defendants' motion for summary disposition because the case was "at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it [wa]s premature to make a decision on the substantive issues").

105. Duncan v. Michigan, 784 N.W.2d 51, 51 (Mich. 2010).

106. *Duncan*, 774 N.W.2d at 168–70 (Whitbeck, J., dissenting).

107. Duncan v. Michigan, 866 N.W.2d 407, 407 (Mich. 2010). The political balance of the Michigan Supreme Court also shifted during this timeframe. See Costello, supra note 93, at 1971 n.154.

108. See Duncan v. State, 832 N.W.2d 752 (Mich. 2013) (mem.).

109. See Costello, supra note 93, at 1974–75.

110. See Brief for Respondents at 31–36, Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07), 2009 WL 6409872; Memorandum of Law in Support of Defendant's Motion to Dismiss at 16–17, 27–28, Hurrell-Harring v. State, No. 8866-07 (N.Y. Sup. Ct. Apr. 4, 2008).

111. Hurrell-Harring v. State, 15 N.E.2d 217, 227 (N.Y. 2010) ("It is . . . possible that a remedy . . . would necessitate the appropriation of funds and perhaps . . . some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right.").

and New York courts ultimately dismissed state abdication arguments, an Idaho court recently ruled in favor of Idaho on similar arguments. In a motion to dismiss, Idaho and state officials argued that Idaho's decentralized system of indigent defense absolved the state of responsibility because "[n]o statute gives the Governor or the Public Defense Commission supervisory authority over persons who provide indigent public defender services or the County officers who are required by statute to provide for such services."[112]

The court accepted the state's abdication argument. It found that the case presented "troubling allegations regarding problems with the public defender system" and expressed "sympath[y] with Plaintiffs' plight."[113] It held that "[u]nquestionably, the State is ultimately responsible for ensuring constitutionally-sound public defense."[114] But it also held that (1) the plaintiffs lacked standing to bring suit because the alleged harm was not caused by the defendants[115] and (2) the "separation of powers doctrine" prevented the court from "shap[ing] the institutions of government in such fashion as to comply with the laws and the Constitution."[116] The court held that it could not "legislate specific standards" or "provide funding to enact those standards."[117]

Suing states for violations of the Sixth Amendment right to counsel for indigent defendants is gaining steam as a litigation tactic, and state abdication arguments will continue to be relevant in the coming years.[118]

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112. Memorandum in Support of Motion to Dismiss at 5, Tucker v. State, CV-OC-2015-10240 (Idaho Dist. Ct. Jan. 20, 2016) (on file with the *Columbia Law Review*); see also id. at 10 ("Of course, the Governor and Commission members have *political* or *governmental interests* in improving Idaho's indigent defense system, but they have no *legal authority* to address the system as requested in the Complaint.").

113. *Tucker*, slip op. at 31 (on file with the *Columbia Law Review*).

114. Id. at 5.

115. Id. at 22–23 (noting the legislature and the county commissioners are "the principal bodies with the power to affect the policy . . . and systemic changes Plaintiffs seek" and neither state officials nor the governor "has the power and authority to act alone to redress Plaintiffs' grievances"). The court went on to note: "Certainly, both [the legislature and the county commissioners] have moral, political, and public power to pressure the legislature of the counties to act, but neither have the ability to require it." Id.

116. Id. at 31.

117. Id.

118. In addition to the litigation in Idaho, indigent criminal defendants sued California recently for violating the Sixth Amendment right to counsel. See Complaint, Phillips v. State, No. 15CECG02201 (Cal. Super. Ct. Apr. 11, 2016), http://www.aclu.org/sites/default/files/field_document/file_stamped_phillips_v_state_of_california_complaint.pdf [http://perma.cc/SQY5-55U4]. California initially filed a demurrer on abdication grounds, see generally Memorandum of Points and Authorities in Support of Demurrer of Defendants State of California and Governor Edmund G. Brown Jr. at 5–8, *Phillips*, No. 15CECG02201 (on file with the *Columbia Law Review*) (arguing that California law delegating the provision of indigent defense to local governments absolves California of any possible wrongdoing), which the trial court denied, see *Phillips*, slip op. at 2–4 (on file with the *Columbia Law Review*) ("[I]f the State created an indigent defense system that is systematically flawed and underfunded, *Stanley* indicates that the State remains responsible,

4. *Election Law in Alabama.* — States play an important role in administering federal election laws.[119] In particular, the National Voter Registration Act of 1993 (NVRA) requires states to offer voter-registration opportunities in a variety of state offices,[120] the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) requires states to transmit ballots to military and overseas voters at least forty-five days before a federal election,[121] and the Help America Vote Act (HAVA) requires states to update their voting machine technology.[122] Each statute imposes responsibilities directly onto states, even though many states delegate significant election responsibilities to their local governments.[123]

As in the other case studies described above, states attempt to evade federal election laws by arguing, in litigation, that their decentralized elections systems excuse them from responsibility.[124] I highlight Alabama as an example here, but it is not alone in making these arguments.[125]

Alabama employs a decentralized elections scheme. In the context of absentee voting, for example, Alabama designates county circuit clerks to be "absentee election manager[s]" who administer the absentee ballot process.[126] The absentee election manager accepts absentee ballot applications and transmits those ballots.[127]

The United States has sued Alabama repeatedly for failing to comply with the federal election statutes described above.[128] In 2012, the United States sued Alabama for failing to comply with UOCAVA.[129] Alabama argued that it was not the proper defendant because under state law, local officials—and not state officials—were responsible for transmitting

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even if it delegated this responsibility to political subdivisions." (citing Stanley v. Darlington Cty. Sch. Dist., 84 F.3d 707, 713 (4th Cir. 1996))).

119. This section draws from a previous piece exclusively about election law. Weinstein-Tull, Election Law Federalism, supra note 11 (arguing that state–local relationships in election law can frustrate federal election law).

120. 52 U.S.C. §§ 20501–20511 (Supp. 2015).

121. 52 U.S.C. §§ 20301–20311.

122. 52 U.S.C. §§ 20901–21145.

123. See Justin Weinstein-Tull, A Localist Critique of *Shelby County v. Holder*, 11 Stan. J. C.R. & C.L. 291, 296–98 (2015) [hereinafter Weinstein-Tull, Localist Critique of *Shelby County*] (describing the many ways states delegate their election-administration responsibilities to local governments).

124. See supra sections I.A.1–.3.

125. See generally Weinstein-Tull, Election Law Federalism, supra note 11, at 764–71 (describing election law abdication arguments in litigation by Illinois, Ohio, Missouri, New York, Alabama, California, Vermont, and Texas).

126. See Ala. Code § 17-11-2 (2007). If the circuit clerk declines the responsibility, the county may appoint an alternate. Id.

127. See id. §§ 17-11-4 to -5.

128. The Department of Justice sued Alabama in 2006, 2008, and 2012 for violating UOCAVA and in 2006 for violating HAVA. See Voting Section Litigation, U.S. Dep't of Justice, http://www.justice.gov/crt/voting-section-litigation [http://perma.cc/752L-H9M7] (last visited Mar. 10, 2017).

129. United States v. Alabama, 857 F. Supp. 2d 1236 (M.D. Ala. 2012).

absentee ballots.[130] The state argued that Congress did not intend "to cast aside general principles of legal liability or to intrude upon the State's sovereign prerogative to organize its internal affairs, i.e., which officials have which duties and to whom they report, as it sees fit."[131] Later in the litigation, Alabama described its difficulties enforcing UOCAVA given the independence of local election officials:

> Most local election officials are cooperative and diligent. In some cases, though, local officials will not cooperate with the Secretary of State. For example, the [Absentee Election Manager] of Jefferson County, Alabama, when it was clear that the county would miss the deadline, refused to allow state officials to assist in ballot transmission in 2010, even though state officials drove from Montgomery to Birmingham twice to offer their help . . . . If a local official refuses to cooperate or provide information to the Secretary of State, the Secretary has no authority to compel the action of a local official. The situation is often resolved through persuasion, but the fact remains that the Secretary cannot be in 67 counties at once, and cannot compel a local official to mail a ballot by a particular date.[132]

Alabama noted that the secretary of state "cannot fire an elected Probate Judge, or an Absentee Election Manager," who is elected by county voters and replaced or disciplined by county boards.[133] "So while the Defendants can inform and train local election officials—and always want to look for ways to improve in doing so—the Defendants cannot perform the duties of local election officials."[134]

The court disagreed with Alabama and noted the "explicit" statutory language that "[e]ach state" shall transmit ballots to military and overseas voters to comply with UOCAVA.[135] But Alabama's description of conflicts with local election officials demonstrates the kind of constraints that state election laws can place on compliance with federal election laws.

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130. See id. at 1238 (describing Alabama's argument that "it is not its responsibility to ensure compliance with UOCAVA, especially where local county officials transmit ballots and administer an election").

131. State Defendants' Third Response to the Court's Opinion and Order (Doc. 8) and Motion to Dissolve Injunction at 3 n.1, *Alabama*, 857 F. Supp. 2d 1238 (No. 2:12-cv-00179-MHT-WC); see also id. ("Accordingly, while it is undisputed that UOCAVA ballots requested in advance of January 28, 2012 were not transmitted by that same date, it does not necessarily follow that the correct defendants are before this Court such that any relief can issue.").

132. State Defendants' Response to the United States' Motion for Summary Judgment, Declaratory Judgment, and Permanent Injunctive Relief at 5–6, *Alabama*, 857 F. Supp. 2d 1236 (No. 2:12-cv-00179-MHT-WC) (citations omitted).

133. Id. at 6.

134. Id.

135. *Alabama*, 857 F. Supp. 2d at 1238 ("Alabama's contention that it is not its responsibility to ensure compliance with UOCAVA, especially where local county officials transmit ballots and administer an election, is meritless.").

State abdication arguments like these are common in election litigation. They have been made by state officials in Missouri, Ohio, New York, California, Vermont, Texas, Louisiana, and Mississippi, as recently as 2015.[136] In most cases, courts reject these arguments and find that liability rests on the state, despite delegation to local governments.[137]

But not all of the election cases are so clear. In *United States v. Missouri*, the United States sued Missouri for noncompliance with section 8 of the NVRA, which regulates voter-list management.[138] Missouri argued that it was not responsible for noncompliance because the state legislature delegated election-administration responsibilities to local governments and neither state law nor the NVRA gave state officials the authority to enforce the NVRA against local governments.[139] The court mostly disagreed and found that local noncompliance bore on whether Missouri failed to oversee compliance with the NVRA.[140] The court held, however, that Missouri could not be required to *enforce* the NVRA against its local election officials.[141] The court declined to shift the burden of enforcing compliance onto Missouri "without clear direction from Congress."[142]

B. *Other Examples*

These four case studies demonstrate examples of delegation and abdication across federal law. Other examples exist, both inside and outside of litigation.

Take language accommodation in education. Education responsibilities tend to be decentralized from states to local school districts, but federal laws hold states responsible for different parts of the educational system.[143] Plaintiffs have successfully challenged state abdication of federal education responsibilities to local school districts. In *Idaho Migrant Council v. Board of Education*, for instance, a nonprofit organization sued Idaho's state education agencies for failing to supervise local school districts' compliance with obligations imposed by the Equal Educational Opportunities Act, Title VI of the Civil Rights Act of 1964, and the Fourteenth Amendment to ensure that students with limited English language proficiency be given instruction that addressed their language needs.[144]

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136. See Weinstein-Tull, Election Law Federalism, supra note 11, at 764–71.

137. See id.

138. 535 F.3d 844, 846 (8th Cir. 2008).

139. See United States v. Missouri, No. 05-4391-CV-C-NKL, 2006 WL 1446356, at *6–7 (W.D. Mo. May 23, 2006), rev'd, 535 F.3d 844 (8th Cir. 2008).

140. *Missouri*, 535 F.3d at 850.

141. Id. at 851.

142. Id. at 851 n.3.

143. See, e.g., infra note 147 (describing obligations of the Equal Educational Opportunities Act, Title IV of the Civil Rights Act of 1964, and the Fourteenth Amendment).

144. 647 F.2d 69, 70 (9th Cir. 1981).

The state agencies made abdication arguments. They argued that Idaho law made local school districts responsible for administering schools, making the state agencies the wrong defendants.[145] Furthermore, the agencies argued that the relief the plaintiffs were requesting exceeded the agencies' authority.[146]

Relying on both state and federal law, the Ninth Circuit rejected these arguments. It cited Idaho law, which imposed supervisory authority on the state agencies.[147] It also held that the federal laws at issue—the Equal Employment Opportunity Act and Title VI of the Civil Rights Act of 1964—specifically placed responsibilities on the state, rather than the local governments.[148] The court concluded that "the State Agency is empowered under state law and required under federal law to ensure that needs of students with limited English language proficiency are addressed."[149]

Courts have also heard abdication arguments in the context of desegregation. When a South Carolina school district sought to hold the state partially liable for desegregation remedies, the state argued that its delegation of authority to the local school districts satisfied its own responsibility to desegregate.[150] The Fourth Circuit held that South Carolina was not responsible for the desegregation plan costs, but only because the plaintiffs had sued just the school district. Had they chosen to sue the state as well, the state could not avoid its responsibility through delegation.[151]

California officials have also made abdication arguments in the context of desegregation. They moved to be removed from a segregation case and argued "that even if they engaged in *de jure* segregation in the past, they are now without power to remedy any segregation still existing in the Los Angeles schools, because the responsibility for school desegregation in California rests with the local school boards."[152] The Ninth Circuit admitted that "[t]he issue is a difficult one" but ruled for the plaintiffs because "California law does allocate a role to each of the state

145. Brief for Defendants-Appellees at 5–14, *Idaho Migrant Council*, 647 F.2d 69 (No. 79-4660) (on file with the *Columbia Law Review*).

146. Id. at 12–13 ("The [plaintiff] is asking this Court to order conduct which plainly exceeds the State Board of Education's statutory responsibility.").

147. *Idaho Migrant Council*, 647 F.2d at 71.

148. Id.

149. Id.

150. Brief for Appellants at 24, Stanley v. Darlington Cty. Sch. Dist., 84 F.3d 707 (4th Cir. 1996) (No. 95-1827(L)), 1995 WL 17847225 (arguing "when the District has the power and means to eliminate any remaining consequences of segregation, the State may permit the District to do so, and the State may not be required to pay for the further desegregation or to discharge any, arguendo, obligation to do so directly itself").

151. See *Stanley*, 84 F.3d at 713 ("Even if a state gives its local school districts the power and means to remedy segregation, it can still be sued by the students in those districts for its failure to take steps to dismantle a dual educational system that it created.").

152. L.A. Branch NAACP v. L.A. Unified Sch. Dist., 714 F.2d 946, 949 (9th Cir. 1983).

defendants in achieving and maintaining desegregated schools."[153] Michigan has made similar arguments, which the Sixth Circuit rejected because the state controlled its local governments.[154]

Abdication exists outside litigation as well. States can exist in a state of abdication even before they make abdication arguments in litigation. We would expect the same compliance and representational concerns, described below,[155] to attach to prelitigation abdication.

Consider the case of marriage licenses. Three months after the Supreme Court mandated marriage equality in *Obergefell v. Hodges*,[156] a clerk in a small Kentucky county refused to issue marriage licenses to gay applicants.[157] The clerk, having been elected by the people of her county and sheltered by state law that provided few means of removing her, stood her ground.[158] The governor of Kentucky claimed that only an act of the state legislature could remove the clerk, and the governor was unwilling to call a special session at taxpayer expense.[159] Although Kentucky did not make these arguments in court, this is another example of a state strategically using abdication for political purposes, resulting in noncompliance with federal law.

Local justice systems may also be sites of abdication. States authorize local governments to create and fund local justice systems, including local courts, prosecutors, and police. Many of these institutions enforce and apply state law.[160] But they are also governed by numerous federal constitutional guarantees that attach to states, like the Sixth Amendment right to counsel and the Fourteenth Amendment right to due process. Meanwhile, state oversight of local courts is varied. States designate dif-

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153. Id.

154. United States v. Sch. Dist. of Ferndale, 577 F.2d 1339, 1346–48 (6th Cir. 1978) (holding that Michigan could be held jointly liable for segregated schools with the local school districts because of "the substantial control exerted by Michigan state officials over local school operations" and because the state "had consistently provided funding and other assistance to the local district").

155. See infra section II.A.

156. 135 S. Ct. 2584 (2015).

157. Alan Blinder & Richard Pérez-Peña, Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court, N.Y. Times (Sept. 1, 2015), http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html (on file with the *Columbia Law Review*).

158. Chris Geidner, Few Options to Remove Kentucky Clerk from Office, Buzzfeed (Sept. 2, 2015, 5:44 PM), http://www.buzzfeed.com/chrisgeidner/it-would-be-very-difficult-to-remove-kentucky-clerk-from-off [http://perma.cc/C6LB-ERSA].

159. Press Release, State of Ky., Gov. Beshear's Statement on County Clerks, Marriage Licenses in Kentucky (Sept. 1, 2015), http://migration.kentucky.gov/newsroom/governor/20150901statementonmarriagelicenses.htm [http://perma.cc/ZD2A-JDV7] ("The legislature has placed the authority to issue marriage licenses squarely on county clerks by statute, and I have no legal authority to relieve her of her statutory duty by executive order or to remove her from office.").

160. See, e.g., Ron Malega & Thomas H. Cohen, Bureau of Justice Statistics, U.S. Dep't of Justice, State Court Organization, 2011, at 3 tbl.1, 8 tbl.8 (Nov. 2013), http://www.bjs.gov/content/pub/pdf/sco11.pdf [http://perma.cc/GL97-MVLF].

ferent kinds of state bodies with different powers—including chief justices and judicial councils—as administrative authorities.[161] The extent to which states deserve responsibility for the actions of their local justice systems is an open question that awaits future research into those state–local relationships, but state and federal laws suggest they might.

Finally, education may be another site of abdication outside of litigation. In Louisiana, a state law permitted teachers to use outside materials to critique theories of evolution.[162] One commentator has described how that law allowed state legislators to ignore evidence that local school districts are teaching creationism.[163]

C. Making Sense of the Existing Case Law

Each of the case studies above presents a similar dynamic, but important differences between the cases exist as well. This section describes those differences and then synthesizes the doctrine, noting the inconsistent ways courts deploy it.

The broadest difference between the studies is the kind of federal law at issue (statutory or constitutional) and whether the federal law targets states explicitly. The election laws are motivated by both constitutional and statutory laws that explicitly target states. The Elections Clause makes states responsible for determining "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."[164] It also

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161. See Nat'l Ctr. for State Courts, Governance of the Judicial Branch, http://data.ncsc.org/QvAjaxZfc/QvsViewClient.aspx?public=only&size=long&host=QVS%40qlikviewisa&name=Temp/fd3b4debc5b24e2b94be593acecd3988.html [http://perma.cc/63LJ-G9DE] (last visited Jan. 30, 2017) (listing the top authority of each state's judicial branch and the sources of its authority); Nat'l Ctr. for State Courts, Judicial Councils and Conferences, Authority, and Year Established, http://data.ncsc.org/QvAjaxZfc/QvsViewClient.aspx?public=only&size=long&host=QVS%40qlikviewisa&name=Temp/a047997597e940738cad7d337468d2ae.html [http://perma.cc/7MQA-RECG] (last visited Jan. 30, 2017) (providing the names and sources of authority for judicial councils in every state).

162. Louisiana Science Education Act, La. Stat. Ann. § 17:285.1(C) (repealed 2010) (permitting teachers to "use supplemental textbooks and other instructional materials to help students understand, analyze, critique, and review scientific theories in an objective manner, as permitted by the city, parish, or other local public school board . . .").

163. See Zack Kopplin, The Bible v. the Constitution: Politicians, School Boards, Principals, and Teachers Are Pushing Creationism on Kids, Slate (June 2, 2015, 1:46 PM), http://www.slate.com/articles/health_and_science/science/2015/06/louisiana_science_education_school_boards_principals_and_teachers_endorse.html [http://perma.cc/R6TB-T7RS]; Zack Kopplin, Creationism Whistleblower: 'Academic Freedom' Is Sneak Attack on Evolution, Daily Beast (Dec. 28, 2015, 12:05 AM), http://www.thedailybeast.com/articles/2015/12/28/creationism-whistleblower-academic-freedom-is-sneak-attack-on-evolution.html/ [http://perma.cc/4K4Y-NXFU]; Zack Kopplin, Dismissing Darwin: Records Show Teachers and School Board Members Conspiring to Teach Creationism in Public School Science Class, Slate (Apr. 21, 2015, 12:39 PM), http://www.slate.com/articles/health_and_science/science/2015/04/creationism_in_louisiana_public_school_science_classes_school_boards_and.html [http://perma.cc/943C-QMQN].

164. U.S. Const. art. 1, § 4, cl. 1.

gives Congress the authority to "make or alter" those laws,[165] which Congress has exercised in the form of the election laws discussed above.[166] These laws explicitly require states to take action to satisfy federal election priorities—for example, to transmit absentee ballots a certain amount of time prior to an election.[167]

Public-assistance laws like the Food Stamp Act and the Medicaid Act are statutory.[168] In these laws, the federal government offers money to states to administer the programs.[169] The Spending Clause empowers Congress to enact these laws, but unlike in the elections context, states are not already required to administer public-assistance programs as a matter of constitutional law.

The indigent-defense context, by contrast, reflects a purely constitutional requirement on states. The federal requirement there—that states must provide counsel to criminal defendants who cannot afford to hire their own—comes from the Sixth Amendment, as interpreted by the Supreme Court in *Gideon*.[170]

The case of incarceration is a hybrid constitutional–statutory context, with the most tenuous connection to state liability of the studies above. The plaintiffs in the *Armstrong* case brought both federal statutory (ADA) and constitutional (Eighth Amendment) claims.[171] Neither the ADA nor the Eighth Amendment, however, explicitly imposes liability on states.

A second difference between the policy areas is how each federal responsibility is funded by state and federal governments. The federal government partly funds public-assistance administration.[172] Some limited federal money is available to states to comply with federal election laws, but that money rarely covers the full cost of compliance with the full

165. Id.

166. See Weinstein-Tull, Election Law Federalism, supra note 11, at 776–78 (noting Congress enacted the election laws described in this Article pursuant to its Elections Clause authority); see also supra notes 119–121 and accompanying text (discussing the NVRA, UOCAVA, and HAVA).

167. See 52 U.S.C. § 20302(a)(8) (Supp. 2015).

168. See Reynolds v. Giuliani, 506 F.3d 183, 186 (2d Cir. 2007) (describing statutory litigation pursuant to food-stamp, Medicaid, and cash-assistance statutes).

169. See Sugarman, supra note 33, at 124; see also Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663, 669 (2001) [hereinafter Weiser, Constitutional Architecture] (noting New Deal federal programs "called for state implementation of federal programs mostly to distribute federal benefits—such as unemployment insurance and Aid to Families with Dependent Children . . . [and] [s]uch programs insisted on . . . uniformity . . . but also left important discretion with state agencies to implement the programs within federal requirements").

170. See Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

171. See *Armstrong I*, 622 F.3d 1058, 1063–64 (9th Cir. 2010).

172. See supra note 34.

set of federal election laws.[173] The federal government provides no funding for state indigent-defense efforts, and no federal agency provides oversight or rulemaking guidance.[174] Neither the Eighth Amendment nor the ADA provides funding for states to ensure their prisons and jails comply with constitutional and statutory standards.[175]

A final difference between the cases is the legal mechanisms that bring them into court. When federal statutes exist, plaintiffs can bring suit pursuant to statutory causes of action. The federal election laws, for example, provide causes of action against states for noncompliance.[176] When the federal law at issue is court-created, plaintiffs bring claims pursuant to section 1983.[177] But as the Second Circuit noted in *Reynolds v. Giuliani*, section 1983 may impose a different or stricter standard for finding state liability.[178] Plaintiffs in the incarceration cases have pushed back against the idea that the section 1983 standard is relevant in these cases, arguing that the conduct at issue is the state's failure to supervise and comply with the law, not the local governments' failures to properly

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173. Because of the broad powers the Elections Clause confers, the federal government may require states to administer federal programs—here, voter registration and absentee ballots—without the promise of linked federal money. See Ass'n of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 836–77 (6th Cir. 1997) (noting that unlike the Spending Clause, the Elections Clause "specifically grants Congress the authority to force states to alter their regulations regarding federal elections . . . . and does not condition its grant of authority on federal reimbursement"). The Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (Supp. 2015), provides some federal funding, but that funding is "quite limited." States and local governments bear the financial burden of funding elections. See Alec C. Ewald, The Way We Vote: The Local Dimension of American Suffrage 3–4 (2009).

174. The Department of Justice's Access to Justice program does attempt to encourage nonfederal governments to comply with the Sixth Amendment by generating policy and best-practice reports, offering training and some grants, and filing statements of interest in ongoing right-to-counsel litigation. See U.S. Dep't of Justice, Accomplishments, Access to Justice, http://www.justice.gov/atj/accomplishments [http://perma.cc/XV92-FD3S] (last visited Jan. 22, 2017). The Idaho decision notes that some might call *Gideon* and state requirements that local governments offer indigent defense "an unfunded mandate." Tucker v. State, No. CV-OC-2015-20140, slip op. at 3 (Idaho Dist. Ct. Jan. 20, 2016).

175. Ross Sandler and David Schoenbrod tell the fascinating story of how local governments, with the help of the federal Advisory Commission on Intergovernmental Relations, unsuccessfully attempted to push back against the costly and federally unfunded ADA requirement that local governments create curb ramps. See Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 39–43 (2003).

176. See Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20307(a); National Voter Registration Act, 52 U.S.C. § 20510(a); Help America Vote Act, 52 U.S.C. § 21111.

177. See, e.g., Complaint ¶ 12, Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009) (Nos. 278652, 278858, 278860), http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=22107&libID=22077 [http://perma.cc/Q2TJ-K9SS].

178. See 506 F.3d 183, 190 (2d Cir. 2007). The indigent-defense cases have not mentioned section 1983's elevated standard.

administer the federal program.[179] In any case, courts have not spoken on this issue in a consistent way.

On the whole, abdication cases have not congealed into a consistent doctrine. Although many abdication cases ultimately find that states cannot avoid federal responsibilities by sending them to local governments, these cases reach their conclusions in different ways. Some adopt a supervisory theory of liability and hold that abdication frustrates the state's obligation to supervise its local governments.[180] Others rely on an equitable sense that states should not be able to "shirk" their federal responsibilities by giving them away to a third party.[181] Still others find state liability on efficiency grounds.[182] Some cases are solicitous of state law and find state responsibility based on state law relationships.[183] Others hardly mention state law.[184] The opinions rarely cite to one another, and advocates only rarely cite to other areas of the law when facing abdication arguments.[185]

In addition, some courts accept abdication arguments. In the public-assistance context, the Second Circuit allowed New York to escape liability even though its local governments had violated provisions of the Food Stamp and Medicaid Acts.[186] It did so because it held that section 1983 imposed liability only if New York failed to supervise its local governments and if that failure was the primary cause of the noncompliance.[187] Because New York had, to some extent, responded to the noncompliance

179. See Brief in Opposition at 19–20, Brown v. Armstrong, 134 S. Ct. 2725 (2014) (mem.) (No. 13-1056), 2014 WL 1783194.

180. See Henrietta D. v. Bloomberg, 331 F.3d 261, 284–87 (2d Cir. 2003).

181. See *Armstrong I*, 622 F.3d 1058, 1072 (9th Cir. 2010).

182. See Harkless v. Brunner, 545 F.3d 445, 452 (6th Cir. 2008) ("[I]f every state passed legislation delegating NVRA responsibilities to local authorities, the fifty states would be completely insulated from any enforcement burdens, even if NVRA violations occurred throughout the state.").

183. See Robertson v. Jackson, 972 F.2d 529, 532 (4th Cir. 1992) (noting Virginia's state law establishing state control over local officials processing food-stamp applications); Idaho Migrant Council v. Bd. of Educ., 647 F.2d 69, 71 (9th Cir. 1981) (describing the Idaho state laws that empower the state to supervise local school districts).

184. See United States v. Alabama, 857 F. Supp. 2d 1236, 1238 (M.D. Ala. 2012) (finding Alabama responsible for the conduct of its local governments based on federal law, not Alabama's own state law, and finding "Alabama's contention that it is not its responsibility to ensure compliance with UOCAVA, especially where local county officials transmit ballots and administer an election" to be "meritless").

185. There are a few, limited exceptions. See, e.g., Appellee's Brief at 36, United States v. Missouri, 535 F.3d 844 (8th Cir. 2008) (No. 07-2322), 2007 WL 6603869 (citing to abdication cases in other policy areas); Plaintiffs' Opposition to Defendants State of California and Governor Edmund G. Brown Jr.'s Demurrer at 6–7, Phillips v. State, No. 15CECG02201, 2016 WL 1573199 (Cal. Super. Ct. Apr. 11, 2015), 2015 WL 10711176 (same).

186. See Reynolds v. Giuliani, 506 F.3d 183, 191 (2d Cir. 2007).

187. Id. at 191–93.

of its local governments, it was not liable.[188] The court also rejected the separate argument that the Food Stamp and Medicaid Acts created a nondelegable duty on states to administer the programs so as to ensure compliance by all of their local agencies.[189]

In the elections context, the Eighth Circuit held that while local noncompliance with a federal election law bore on whether the state failed to oversee compliance with the law, the state could not be required to enforce the law against its local election officials.[190] The court noted that neither the federal nor state law provided a cause of action for the state to enforce the law against its local governments.[191] And it rejected the United States's "policy" argument that the state was better positioned to enforce the law against its local governments than the federal government.[192]

And in the indigent-defense context, an Idaho court held that Idaho's delegation of its Sixth Amendment responsibilities to local governments absolved the Idaho governor and other state officials from responsibility for compliance with those laws.[193]

In sum, the doctrine courts use to resolve abdication arguments, to the extent it exists at all, is more a collection of vague arguments than a stable set of principles.

II. UNDERSTANDING ABDICATION

Abdication arises from absence: absence of state supervision and perceived absence of state responsibility and control. This Part describes the consequences and causes of that absence. It argues that abdication creates structural barriers to compliance with federal law both before and during litigation. Before litigation, abdication arguments reflect a belief on the part of state officers that they either are not responsible for ensuring local compliance with the federal law or are not empowered by the state to do so (front-end barriers). Postcomplaint, abdication creates litigation costs that delay and block lawsuits seeking to enforce federal law (back-end barriers). In addition, abdication creates representational harm by weakening the relationship between the public and its governing representatives. This Part then explores the factors—both state–local and federal—that tend to create states of abdication. It argues that abdication is a consequence of superimposing federal responsibilities onto the complicated preexisting legal and political relationships between states and their local governments.

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188. See id. at 195–97.

189. Id. at 193–95.

190. *Missouri*, 535 F.3d at 851.

191. Id.

192. Id. at 851 n.3.

193. See Tucker v. State, No. CV-OC-2015-20140, slip op. at 29 (Idaho Dist. Ct. Jan. 20, 2016) (on file with the *Columbia Law Review*).

A. *Consequences*

Abdication complicates the chain of responsibility for federal law by obscuring the identity of the actor responsible for compliance. As described above, many federal laws place responsibility for compliance onto states. When states abdicate those responsibilities to local officials, they believe they also shift responsibility for compliance with those laws downward.[194] Abdication thus creates ambiguity—practical and legal—about the governmental body ultimately responsible for compliance.

That ambiguity has two important consequences. First, it makes enforcing abdicated federal law difficult. Because states believe they are not responsible for compliance with laws they have abdicated, those laws are likely to remain out of compliance at the statewide level. But policing noncompliance at the local level carries its own difficulties; it is impractical at best and impossible at worst.

Second, the disconnect between abdicated federal laws and the actors responsible for complying with them causes representational harms. Decentralizing administration of federal laws down to the local level diminishes governmental accountability. Further, abdication can silence political dissent. Those who suffer from noncompliance with abdicated federal laws—those who do not receive adequate legal representation, who face difficult prison conditions, and who are disenfranchised, to use the examples from Part I—are less able to communicate their unhappiness with noncompliance *because* of the noncompliance.

1. *Compliance Costs.* — Abdication creates a number of conditions likely to lead to noncompliance with federal law. It creates front-end and back-end barriers to state-level enforcement of federal law and as a consequence pushes noncompliance down to the local level, where it is difficult to find and fix. Put simply, abdication creates state-level roadblocks to enforcing federal law. But local-level enforcement is often infeasible, creating a Catch-22 for the federal government and advocates who hope to enforce federal law.

Perhaps because of this Catch-22, widespread noncompliance exists with the federal laws at issue in at least three of the four case studies above. In the context of incarceration in California, one contemporary commentator has noted that realignment—California's attempt to decrease its state prison population by giving county jails jurisdiction over many lesser offenders—has resulted in worsening conditions in those county jails.[195]

In the context of indigent defense, commentators have noted that nationally, states have failed to fulfill the promise set out by the Sixth

194. See infra section II.A.1.

195. Petersilia, supra note 68, at 348–51 (noting the decrease in space for prisoner beds, the increase in violent fights, and the increasing problems with providing adequate medical care at the local level since realignment).

Amendment.[196] Former Attorney General Eric Holder has stated that "America's indigent defense systems exist in a state of crisis."[197]

Widespread noncompliance also exists with respect to federal election laws. The recent Presidential Commission on Election Administration, as well as other recent surveys, described widespread noncompliance with election laws like NVRA and UOCAVA.[198]

In states that have abdicated federal responsibilities, state officials do not believe they are responsible for ensuring local compliance. These beliefs constitute front-end barriers to statewide compliance with federal law. State filings illustrate these beliefs.

State officials point to the decentralized structure of their states to attempt to evade responsibility for noncompliance. Idaho state school officials, for example, when sued for noncompliance with the Equal Educational Opportunities Act, Civil Rights Act of 1964, and the Fourteenth Amendment for failing to provide instruction in different languages, spent many pages of their brief explaining Idaho's decentralized system of school administration in service of their argument that local school districts, and not the state, were the bodies responsible for noncompliance.[199] These arguments are widespread in the state briefs filed in the abdication cases described in Part I.[200]

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196. See Cara H. Drinan, The Third Generation of Indigent Defense Litigation, 33 N.Y.U. Rev. L. & Soc. Change 427, 429 (2009) ("[D]espite voluminous documentation of the indigent defense crisis, the crisis persists."); David Carroll, Commentary, *Gideon*'s Despair: Four Things the Next Attorney General Needs to Know About America's Indigent Defense Crisis, Marshall Project (Jan. 2, 2015), http://www.themarshallproject.org/2015/01/02/four-things-the-next-attorney-general-needs-to-know-about-america-s-indigent-defense-crisis#.zrqcEDRZz [http://perma.cc/6BBT-NKU5] ("Fifty years after the U.S. Supreme Court first determined in Gideon v. Wainwright that states are responsible for providing public lawyers to poor defendants, the U.S. Department of Justice has found that right-to-counsel services in America 'exist in a state of crisis.'").

197. Eric Holder, U.S. Attorney Gen., Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [http://perma.cc/5TX7-WQXL].

198. See Presidential Comm'n on Election Admin., The American Voting Experience 15–18 (2014), http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/466754/doc/slspublic/Amer%20Voting%20Exper-final%20draft%2001-04-14-1.pdf [http://perma.cc/6GBD-Q7CW] ("[T]he election statute most often ignored, according to testimony the Commission received, is the National Voter Registration Act (NVRA or 'Motor Voter')."); see also Weinstein-Tull, Election Law Federalism, supra note 11, at 759–61 (describing widespread noncompliance with the NVRA, UOCAVA, and HAVA).

199. Brief of Defendant-Appellees at 6–14, Idaho Migrant Council v. Bd. of Educ., 647 F.2d 69 (9th Cir. 1981) (No. 79-4660) (arguing that the plaintiffs' analysis "completely disregards the legal structure of Idaho's public education system" and spending eight pages explaining how Idaho's decentralized education system rebutted the plaintiff's argument that the state agencies and the local school districts had a principal–agent relationship).

200. See, e.g., Brief for State Defendant-Appellant at 4–11, Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003) (Nos. 02-7022, 02-7074), 2002 WL 32442869 (explaining, in

According to their court filings, state officials believe not only that they are not responsible for the actions of their local governments but also that they are powerless to comply with the statutes even if they wanted to. New York state officials, when challenged for noncompliance with federal law among local public assistance agencies, emphasized not only the decentralized structure of New York's public-assistance programs but also the limited enforcement mechanisms that state law provided to state officials for overseeing and supervising their local governments.[201] Alabama made a similar argument when it was sued for violating UOCAVA because its local governments failed to transmit ballots to military and overseas voters on time.[202] California officials did the same when they were sued because conditions in California county jails violated the ADA and the Eighth Amendment.[203] Virginia officials did the same when sued for local-level violations of the Food Stamp Act.[204]

Claims by state officials that they are powerless to bring their local governments in line with federal law should of course be taken with a healthy dose of skepticism. Those arguments are self-serving and often (but not always[205]) ignored by courts.

On the other hand, coordinating compliance with positive federal obligations on states is a complex legal and political process that can require funding, legislative change, and sometimes cooperation from diverse state agencies and even the public.[206] Ross Sandler and David Schoenbrod, in their book on consent decrees against states and local governments, argue that while state officials are often defendants in lawsuits seeking to mandate compliance with federal laws, the federal duty

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detail, the decentralized nature of "New York State's Public Assistance Scheme"); Brief for Appellant at 8–15, Robertson v. Jackson, 972 F.2d 529 (4th Cir. 1992) (No. 91-2580) (explaining why, under Virginia law, local departments of social services were not agents of the state commissioner).

201. See Brief for State Defendant-Appellant at 8–9, *Henrietta D.*, 331 F.3d 261 (Nos. 02-7022, 02-7074), 2002 WL 32442869 (describing the "limited enforcement mechanism[s]" of the state agency).

202. State Defendants' Response to the United States' Motion for Summary Judgment, Declaratory Judgment, and Permanent Injunctive Relief at 5–6, United States v. Alabama, 857 F. Supp. 2d 1236 (M.D. Ala. 2012) (No. 2:12-cv-00179-MHT-WC) (describing Alabama's decentralized system of elections and the state's lack of power over local elections officials).

203. Defendant-Appellant's Opening Brief at 3–5, Armstrong v. Brown, 732 F.3d 955 (9th Cir. 2013) (Nos. 12–16018, 12–17198) (arguing state law gave the counties "sole custody and jurisdiction" of state parolees placed in county jails for parole violations).

204. Brief for Appellant at 15, *Robertson*, 972 F.2d 529 (No. 91-2580).

205. See United States v. Missouri, 535 F.3d 844, 850–51 (8th Cir. 2008) (noting that neither federal nor Missouri law empowered Missouri state officials to bring their local governments into compliance with the NVRA, and thus while local government noncompliance could be held against the state, the state could not be required to enforce the NVRA against its local government).

206. See Sandler & Schoenbrod, supra note 175, at 107–08.

holder is broader than just those officials: "The duty is in essence on society . . . but society is a slippery fellow for a judge to grab."[207]

And indeed, actions that some officials take once sued suggest their beliefs about state law are genuine. When Idaho Governor Butch Otter was sued for statewide violations of the Sixth Amendment, for example, he asked his state legislature for additional funds to remedy the noncompliance.[208] Presumably, Governor Otter believed that he was either politically or legally constrained from complying with the federal law himself.[209] Other state officials who make abdication arguments are politicians who might otherwise support the policies being advocated by the lawsuits. That disconnect—between the beliefs of state officials and their statements in litigation—suggests genuine feelings of constraint by intrastate allocations of power.

But whether these state powerlessness arguments have legal merit is, in some sense, beside the point. Taken as a whole, the arguments demonstrate at the very least that state officials do not believe they are responsible for ensuring local compliance with the federal laws states push downward. That belief is likely to lead to noncompliance with federal law.

Abdication also creates postcomplaint, back-end barriers to state compliance with the federal law. As demonstrated above, no consistent nonabdication doctrine exists. Courts have admitted that abdication arguments present thorny legal issues,[210] resulting in delayed litigation while the issues proceed up through the appeals system.[211]

These barriers to statewide compliance with federal law push enforcement of those laws down to the local level, which presents its own challenges. Roderick Hills has argued that enforcing federal law at the local level is an impossible task for practical and institutional reasons.[212] First,

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207. Id. at 108.

208. KBOI News Staff, Gov. Butch Otter Seeking Nearly 8 Percent Increase in Education Budget, KBOI2 (Jan. 11, 2016), http://kboi2.com/news/local/gov-butch-otter-the-state-of-idaho-is-healthy-and-strong [http://perma.cc/N94N-JJKH] ("Please join me in a commitment to ensuring that all Idaho citizens in every one of our 44 counties can avail themselves of this fundamental constitutional right. My budget recommends $5 million to implement the changes that you approve.").

209. Idaho ultimately enacted a law that funded local indigent-defense programs and created greater state oversight over those programs. See David Carroll, Idaho Empowers State Commission with New Authorities and New Funding, Sixth Amend. Ctr. (Mar. 23, 2016), http://sixthamendment.org/idaho-empowers-state-commission-with-new-authorities-and-new-funding/ [http://perma.cc/ND8M-2KZB].

210. See, e.g., L.A. Branch NAACP v. L.A. Unified Sch. Dist., 714 F.2d 946, 949 (9th Cir. 1983) ("The issue is a difficult one . . . .").

211. See, e.g., Duncan v. Michigan, 832 N.W.2d 761, 765–66 (Mich. Ct. App. 2013) (describing the procedural history of the case in which resolution of an abdication argument caused trial on the merits to be delayed by six years).

212. See Hills, Dissecting the State, supra note 17, at 1218–23. Hills is writing about the disadvantages of federal laws that specifically attempt to empower local government at

the federal government is not staffed to monitor the 40,000 local governments that administer federal law.[213] States create new local governments frequently; the federal government would be hard pressed to keep up.[214] Hills also notes that the relatively unrepresentative nature of the federal government, as well as its partisan polarization, prevents the federal government from effectively policing local governments. As of 1998, federal representatives reported to an average of 600,000 constituents, and few individual representatives are motivated to correct the often small-scale noncompliance and intrastate inequality created by local noncompliance with federal law.[215] In addition, political polarization at the federal level "prevents any consensus about enforcement from developing in the national legislature," leaving local governments "free to pursue their own agendas."[216]

Election law illustrates the difficulties of finding noncompliance at the local level. Section 5 of the Voting Rights Act was originally enacted to address the practical problem of enforcing federal voting rights laws against the thousands of local governments capable of vote discrimination.[217] Dale Ho, a prominent voting-rights advocate, has noted that "much of the practical value of section 5 was its effect in stopping dilutive practices, particularly at the local level, where the major political parties and advocacy groups rarely commit the resources necessary to litigate."[218]

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the expense of state autonomy. His analysis is relevant here, however, because his argument is that states are better suited to supervising local governments than the federal government, which is simply not equipped to monitor the vast landscape of local governments. Id.

213. Id. at 1220. Hills suggests that the federal government would need to monitor not only compliance but also the structure of state–local relationships that might prevent or cause noncompliance. Id. ("[I]t is inconceivable that Congress could give sufficient attention to such minutiae of state-local relations, given that different states have radically different laws and political cultures that affect state-local relations." (footnotes omitted)).

214. Id. at 1219 (noting the "promiscuous creation of local governments" by states).

215. Id. at 1220. That number had risen to 700,000 constituents per representative by 2010. U.S. Census Bureau, Apportionment Data, http://www.census.gov/2010census/data/apportionment-data.php [http://perma.cc/68PP-U8D2] (last visited Mar. 18, 2017).

216. Hills, Dissecting the State, supra note 17, at 1221 (citing sources on political polarization and gridlock at the national level).

217. See supra note 23.

218. Dale E. Ho, Voting Rights Litigation After *Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims, 17 N.Y.U. J. Legis. & Pub. Pol'y 675, 705 n.21 (2014). Ho and other voting-rights advocates have argued that the "battle for the ballot box" will be "fought in cities and small towns, at the level of county seats, school boards and city councils." Sarah Childress, After *Shelby*, Voting-Law Changes Come One Town at a Time, PBS: Frontline (Aug. 8, 2013), http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/after-shelby-voting-law-changes-come-one-town-at-a-time/ [http://perma.cc/U3AR-B5YE] (describing voting changes at the local level that could threaten voting rights); Michael Wines, Critics See Efforts by Counties and Towns to Purge Minority Voters from Rolls, N.Y. Times (July 31, 2016), http://www.nytimes.com/2016/08/01/us/critics-see-efforts-to-purge-minorities-from-voter-rolls-in-new-elections-rules.html (on file with the *Columbia Law Review*) (noting that after *Shelby County*, "blatant efforts to keep minorities from voting have

Absent serious scrutiny, local election problems can "pass under the radar, leaving some groups vulnerable in the absence of a firm regulatory regime."[219]

The Department of Justice made a similar argument in the context of a different voting statute, the NVRA, which requires states to regularly update their lists of registered voters.[220] In a case against Missouri, the government argued that the statute should not be read to require direct enforcement by the United States against local governments.[221] The United States noted that "[t]he 44 states that are presently subject to the NVRA contain a total of 2,851 counties and have more than 5,500 local election jurisdictions responsible for voter registration."[222] "Forcing the United States to proceed locality-by-locality," the government argued, "would severely strain the federal government's resources and inevitably leave many NVRA violations unremedied."[223]

While fighting noncompliance at the local level may be impractical in some contexts (like voting), it is impossible in others. In the case of indigent defense, in which local noncompliance often arises because of inadequate funding, effective reform comes only from statewide remedy.[224] Suing one local government, without the state, is ineffective when the local government has no money to remedy its violation.[225]

2. *Representational Costs.* — Abdication has deeper, less obvious consequences as well. Abdication weakens the relationship between the public and its governing representatives; it causes representational harm by diminishing the accountability of government officials and quieting public dissent.[226]

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been supplanted by a blizzard of more subtle changes" and efforts to suppress voting at the local level "have often gone unnoticed and unchallenged").

219. See Samuel Issacharoff, Beyond the Discrimination Model on Voting, 127 Harv. L. Rev. 95, 123 (2013) (discussing local government compliance with federal voting laws in the context of a proposed disclosure regime).

220. See 52 U.S.C. § 20507 (Supp. 2015).

221. See Brief for the United States as Appellant at 36, United States v. Missouri, 535 F.3d 844 (8th Cir. 2008) (No. 07-2322), 2007 WL 6603868.

222. Id.

223. Id.

224. See Drinan, supra note 196, at 429–30 (noting many problems with indigent defense derive from funding issues, which are often a problem of state legislatures); Lisa R. Pruitt & Beth A. Colgan, Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense, 52 Ariz. L. Rev. 219, 221–23 (2010) (demonstrating the tenuousness of indigent-defense programs when funded at the local level).

225. See Briffault, Our Localism I, supra note 2, at 23 (noting that education-reform advocates have in the late-twentieth century come to see the state, rather than solely local governments, as a target for litigation in order to secure statewide remedies that minimize interlocal differences).

226. I do not use the term "representational harm" in the specific way the Supreme Court has used it in redistricting cases. See Pamela S. Karlan & Daryl J. Levinson, Why Voting Is Different, 84 Calif. L. Rev. 1201, 1211–16 (1996) (discussing the Court's creation

To borrow a term from administrative law, abdication creates "slack" between the federal law administrators and the people those laws affect. In the administrative context, "slack" describes a situation in which difficulties monitoring the agent in a principal–agent relationship grant the agent some privacy from public view and therefore flexibility in administration.[227] Here, the federal government's decision to impose responsibilities onto states and the states' delegation of federal responsibilities to local government creates slack at both the state–local and federal–state levels. The relative obscurity of local government administration of federal law gives local governments—as agents in the state–local, principal–agent relationship—more flexibility in how they administer federal law. That relative obscurity also permits states—as agents in the federal–state, principal–agent relationship—to evade their own responsibilities by making compliance harder to evaluate and enforce.[228]

Slack permits states to evade accountability for their actions. In *New York v. United States*, the Court struck down a federal statute that forced states to take title to low-level radioactive waste unless the state could dispose of that waste—either itself or through an interstate compact—by a certain date.[229] The Court based its decision in part on the idea that permitting the federal government to "conscript" states into passing laws that further federal interests diminished accountability for policymakers:[230] The people would not know whom to hold responsible for the law.[231]

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of a relatively narrow representational-harm injury in order to avoid "unpalatable" judicial intervention).

227. See Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 68 (1998) ("Given that the citizenry cannot monitor its regulators costlessly—for knowing what regulators do requires considerable investments in time, information, and organization, all of which are stymied by the logic of collective action—regulators enjoy a certain amount of regulatory slack."); Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. Econ. & Org. 167, 179 (1990) ("Slack allows a regulator to function without being perfectly observed by the polity.").

228. The problem of slack in abdication is actually a bit broader than this. The principal, in the ultimate principal–agent relationship of government, is the public. The public delegates lawmaking responsibilities to the government, which attempts to discharge those responsibilities by creating laws. Federal laws create new agents—states—responsible for compliance. State abdication creates yet another agent—local government—that shares compliance responsibilities. These principal–agent relationships each contain some slack. Steven Croley describes these relationships as slack "down the line." Croley, supra note 227, at 24.

229. 505 U.S. 144, 153–54, 186–88 (1992).

230. Id. at 178.

231. Id. at 182–83 (noting that because citizens dislike waste-disposal sites near their homes, and federal and state officials have the authority "to choose where the disposal sites will be, it is likely to be in [their] political interest . . . to avoid being held accountable . . . for the choice of location"). Scholars have questioned the validity of the Court's accountability concern. See Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich.

This concern applies with even more force in the abdication context. In *New York*, the Court worried that federal–state slack diminished political accountability.[232] In the abdication context, that slack exists at all three levels of government: federal, state, and local. A prospective overseas military voter who does not receive a ballot in time to vote—in violation of the UOCAVA—does not know whether his or her disenfranchisement was caused by federal officials (who enacted and enforce the law), state officials (responsible for complying with the law), or local officials (tasked with administering the law).

Abdication—at least the kinds discussed in this Article—can also quiet political dissent. An Elysian perspective helps here. In *Democracy and Distrust*, John Hart Ely argued that courts should act to ensure that voters are able to "clear[] the channels of political change."[233] Here, abdication ossifies, rather than clears, the channels of political change by muting the voices of those worst-served by the legal system. Consider those who suffer from the noncompliance that abdication shelters: prisoners in county jails subject to poor prison conditions; indigent criminal defendants who, because of poor representation, are likely soon to be in prison as well; and people who are not registered to vote or do not receive a ballot in time to cast their vote. These groups are prototypically disenfranchised. They are unlikely to publically dissent, or create dialogue that moves national policy forward, because they are unlikely to have the opportunity to dissent. As a consequence, they are unlikely to hold state or local governments accountable for noncompliance with federal law.[234]

Abdication thus creates a number of worrisome conditions. It causes states to believe they are not responsible for federal laws that impose state responsibilities, making statewide compliance difficult to achieve. It pushes compliance efforts down to the local level, which is often imprac-

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L. Rev. 813, 824–30 (1998) (noting that in the context of federal laws imposing state responsibilities, the Court's accountability concern proves too much—it applies equally well to any cooperative federalism program, not just those that commandeer).

232. *New York*, 505 U.S. at 168–69.

233. John Hart Ely, Democracy and Distrust 105–34 (1980). Although Ely uses that phrase to describe regulating the political process, it has broad application. See, e.g., Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev. 1015, 1064 & n.143 (2004) (noting "public law norms" can operate to disrupt government officials in an Elysian sense).

234. You might worry that this representational-harm analysis is overly dependent on the specific case studies in this Article. That is, that these case studies happen to involve groups that lack political strength (indigent defendants, nonvoters, etc.) and are thus particularly susceptible to silencing. Indeed, we might envision an abdicated federal law that improves the lives of the politically powerful who can organize to prevent local noncompliance. On the other hand, states may be more likely to abdicate federal laws that aid the politically powerless, in part because administering those laws themselves could be politically harmful at the state level.

tical or impossible. And it creates representational harms by diminishing political accountability and muting dissent.

B. *Causes*

A set of legal and political factors independent from the federal laws at issue explains why states make abdication arguments in the first place. That is, why delegating federal responsibilities leads states to believe that they have actually given away those responsibilities—or, put simply, how delegation becomes abdication.

Factors both intrinsic and extrinsic to the state–local relationship transform delegation into abdication. First, delegation of federal responsibilities occurs against a backdrop of preexisting legal and political relationships between states and their local governments. Delegations are superimposed upon those preexisting relationships and as a consequence, state officials believe they have less authority over local governments than a plaintiff or federal court might prefer.

Second, a set of factors outside the state–local relationship operates to cause confusion about who is responsible for these federal laws—states or counties. The federal laws at issue and the doctrine interpreting those laws create ambiguity about the entity ultimately responsible for compliance.

1. *State–Local Factors.* — Preexisting state–local relationships inform local control over federal responsibilities and in part explain why states make abdication arguments when presented with local noncompliance.

State–local relations are generally governed by some degree of "home rule": the idea that local governments should be responsible for purely local affairs while states should be responsible for issues of statewide concern.[235] Individual states grant home rule to local governments either legislatively or constitutionally.[236] Most states provide some form of home rule, though each state has unique variations.[237]

There is a kinship between abdication and home rule. Whereas home rule is a state decision to confer local autonomy on a set of state policy issues, abdication is a state decision to confer local autonomy on specifically federal policy issues. Home rule permeates a state's administration of federal law.

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235. See Baker & Rodriguez, supra note 17, at 1338; see also Dale Krane et al., Home Rule in America: A Fifty-State Handbook 2 (2001) ("[T]he ideal of home rule is defined as the ability of a local government to act and make policy in all areas that have not been designated to be of statewide interest through general law, state constitutional provisions, or initiatives and referenda."). The line between a purely local affair and statewide concerns is something that states, local governments, and the courts have struggled to define. Id. at 1 ("Where the line between an appropriate sphere of local action and the authority of state government is drawn has been a source of continuous conflict in state capitals.").

236. Joseph F. Zimmerman, State-Local Government Interactions 4 (2012).

237. See Krane et al., supra note 235, at 476–77 (attempting to classify the home-rule contours of each state).

Consider the case studies described above. California, for example, has made abdication arguments in the incarceration context,[238] the indigent-defense context,[239] the public-assistance context,[240] and the election law context.[241] Unsurprisingly, local governments in California possess significant autonomy: They "enjoy[ ] considerable home rule. They have organizational flexibility, a wide latitude to spend and regulate, and the ability to experiment with programs and procedures."[242] Although California local governments do not possess as much fiscal autonomy as they once did,[243] the California constitution gives local governments broad political and policymaking authority.[244]

Home-rule laws are a helpful starting place for understanding state–local relationships, but other dynamics explain those relationships as well.[245] A state's political culture of local autonomy can also help explain why states make abdication arguments. As one home-rule scholar has noted, "[E]ven though state courts typically hold the state–local relationship to be unitary and hierarchical, the political reality is that the relationship is more complicated."[246] The particular history and patterns of the state–local relationship also bear upon the efficacy and reach of federal law.

238. See supra section I.A.2 (describing the state's argument that it was not responsible for accommodating prisoners despite federal requirements).

239. See supra note 118 (noting that California filed a demurrer on abdication grounds in response to a suit by indigent criminal defendants).

240. See supra note 63 (discussing a Ninth Circuit case in which the court considered whether California could be held responsible for San Francisco's administration of the Food Stamp Act).

241. See Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1412–13, 1416 (9th Cir. 1995) (affirming the district court's ruling ordering California to comply with the NVRA).

242. Krane et al., supra note 235, at 58.

243. Id. at 63–66.

244. Id. at 61–63, 67.

245. Baker & Rodriguez, supra note 17, at 1342 ("While constitutional home rule on paper points to a delineated realm of local sovereignty, the record of home rule in the state courts in this regard is more mixed.").

246. Krane et al., supra note 235, at 4; see also Baker & Rodriguez, supra note 17, at 1344–64 (describing the complex politics of home rule by examining how state courts resolve state–local conflicts across different regulatory areas).

New York, for example, has made abdication arguments in the public assistance,[247] election law,[248] and indigent defense contexts.[249] Formally, local governments in New York do not possess the same kind of autonomy that local governments in California do. The state takes an active role in regulating local government.[250]

But the specific context in which New York's abdication arguments arose reveals the connection between New York's abdication and its state–local relations. In both public-assistance cases, plaintiffs sought to hold New York State responsible for the noncompliance of New York City,[251] which has had its own long-standing struggle with the State of New York for autonomy.[252] And in fact, New York has previously stated in unrelated litigation (in which abdication was also at issue) that New York City made it difficult for the state to fully comply with federal law. In a suit against New York for violating HAVA, New York State wrote that New York City was "complicating" the state's ability to maintain an accurate voter-registration list, as required by HAVA.[253] So despite New York

247. See supra section I.A.1 (discussing two cases with different outcomes in which New York state argued that delegating to local government absolved the state of responsibility noncompliance).

248. United States v. New York, 700 F. Supp. 2d 186, 203–06 (N.D.N.Y. 2010) (describing arguments by New York state agencies that they should not be liable for violations of the NVRA because local community colleges—and not state officials—administered the offices where the violations occurred); United States v. New York, 255 F. Supp. 2d 73, 78–81 (E.D.N.Y. 2003) (describing a similar state argument in the context of local disability services offices).

249. See supra notes 110–111 and accompanying text (noting New York's abdication arguments in response to a suit by criminal defendants alleging New York's indigent-defense scheme was unconstitutional).

250. Krane et al., supra note 235, at 303, 310 ("The involvement of state government [in local activities] is extensive because the population is relatively liberal and predisposed to having an active state government that shapes local practices.").

251. See supra section I.A.1.

252. See Robert F. Pecorella, The Two New Yorks Revisited: The City and the State, *in* Governing New York State 7, 7–23 (Jeffrey M. Stonecash ed., 4th ed. 2001) (describing the conflicts between the State of New York and New York City over time and across legal and political domains). For more recent and popular evidence of the power struggles between the State of New York and New York City, see the current conflict over New York City's homelessness problem, Tatiana Schlossberg, New York Today: Empire State of Conflict, N.Y. Times (Jan. 5, 2016), http://www.nytimes.com/2016/01/05/nyregion/new-york-today-empire-state-of-conflict.html (on file with the *Columbia Law Review*), and former-mayoral-candidate Anthony Weiner's proposed "City Bill of Rights," which reduced New York State's power over New York City "on a range of issues that have long remained out of the hands of frustrated city lawmakers," Sebastien Malo, Weiner's Declaration of City Independence, N.Y. World (July 3, 2013), http://www.thenewyorkworld.com/2013/07/03/weiner/ [http://perma.cc/D87Q-2JFS].

253. Status Report at 1, United States v. N.Y. State Bd. of Elections, No. CV 06 0263 (GLS) (N.D.N.Y. June 8, 2012) (on file with the *Columbia Law Review*) (stating "New York City was declining to do the required maintenance of its voter list . . . which had created a backlog of voters to be removed from the list" and suggesting the state was somewhat dependent on the city in order to fully comply with the federal law).

State's strength in relation to its local governments, its more contentious relationship with New York City may explain New York State's abdication arguments.

Strong home-rule provisions and other cultural factors may not always fully explain why a state might make an abdication argument, however. Consider Alabama, which made abdication arguments in the election law context.[254] Alabama stated that "[i]f a local official refuses to cooperate or provide information to the Secretary of State, the Secretary has no authority to compel the action of a local official."[255] But the Alabama Constitution has one of the weakest home-rule provisions in the country.[256] Only three Alabama counties possess some form of home rule, and local government powers are specifically enumerated by the Alabama constitution, rather than granted broadly.[257] The state legislature provides "zealous . . . oversight and control" over local governments.[258]

So other, more general state–local dynamics must also exist to help explain abdication arguments. Richard Briffault, who has written extensively about the balance of power between states and local governments, provides a helpful principle. He has shown that once states delegate authority to local governments, they tend not to take it back:

> Although local power is, at its source, a delegation from a state, that delegation is often quite broad and is rarely revoked. In most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision. Indeed, despite their formal status as political subdivisions of the state, most general purpose local governments—counties and municipalities—are primarily accountable to their local electorates. In practice, they function as representatives of local constituencies and not as field offices for state bureaucracies.[259]

In other words, states commonly abdicate state law responsibilities to their local governments. Briffault supports his claim with examples from education and land use, two predominantly state-law issues,[260] but generalizes his claim to state–local relations more broadly.[261] He argues

254. See supra section I.A.4 (highlighting Alabama as an example of a state claiming its decentralized election systems free it of any obligation to follow federal election laws).

255. State Defendants' Response to the United States' Motion for Summary Judgment, Declaratory Judgment, and Permanent Injunctive Relief at 5, United States v. Alabama, 857 F. Supp. 2d 1236 (M.D. Ala. 2012) (No. 2:12-cv-00179) (on file with the *Columbia Law Review*).

256. Krane et al., supra note 235, at 23.

257. Id. at 26.

258. Id. at 31–32.

259. Briffault, "What About the 'Ism'?," supra note 2, at 1318.

260. Briffault, Our Localism I, supra note 2, at 59–72.

261. Id. at 17–18 ("[S]tate legislatures avoid [state–local] conflicts by devolving broad authority to localities and then declining to pass laws displacing the operations or policies of their local governments in critical areas of local decision making.").

that "[l]ocalist ideology," or a belief in local autonomy, "crippl[es] the willingness of states to take a statewide perspective and displace local authority when considerations of equity or efficiency make it appropriate to do so."[262]

This particular state–local dynamic replicates itself in the context of state delegation of federal responsibilities as well. Take compliance with the NVRA, which requires states to provide voter-registration opportunities at certain state offices, including motor-vehicle offices and public-assistance offices.[263] Noncompliance with the NVRA is widespread, in part because states have delegated voter-registration responsibilities, public-assistance administration, and motor-vehicle administration to local governments, which fail to offer voter-registration opportunities at those offices.[264]

A recent study found that in the absence of a clear legal chain of command between state officials and local offices responsible for administering a federal responsibility, state officials have few options for correcting local noncompliance.[265] The study considered whether minimally obtrusive state administrative oversight—like trainings for local officials and emails reminding them to comply with the NVRA—could increase NVRA compliance at the local level.[266] These measures were some of the only actions available to the state officials, given the states' "authority structure, intergovernmental dynamics, and lax federal enforcement surrounding the NVRA."[267] The measures were "modestly" effective, but only for local offices that were already largely compliant with the NVRA.[268] The intervention failed to increase compliance in noncompliant local offices.[269]

The study reached this result despite the fact that the state officials the study's authors worked with "were responsible and dutiful public servants who earnestly wanted to improve compliance with the dictates of the NVRA."[270] And, as the study mentioned, more serious interventions—like alerting the U.S. Department of Justice to the local noncom-

262. Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346, 452 (1990) [hereinafter Briffault, Our Localism II].

263. 52 U.S.C. § 20504 (Supp. 2015) (motor-vehicle offices); id. § 20506(2) (public-assistance offices and disability-services offices).

264. See Weinstein-Tull, Election Law Federalism, supra note 11, at 759–60 (citing reports from the Elections Assistance Commission and the President's Commission on Election Administration that demonstrate widespread noncompliance with the NVRA and arguing that state–local relationships have in part created that noncompliance).

265. Douglas R. Hess et al., Encouraging Local Compliance with Federal Civil Rights Laws: Field Experiments with the National Voter Registration Act, 76 Pub. Admin. Rev. 165, 172 (2015).

266. Id. at 168.

267. Id.

268. Id. at 172.

269. Id.

270. Id.

pliance or instituting more intrusive monitoring and oversight of local governments—were unavailable to the state officials hoping to improve local compliance because of state law and intrastate political culture.[271]

Even when state legislatures do act to empower state officials or otherwise encourage local compliance, or when they threaten to act, they face resistance from local officials who do not want to relinquish their authority. Take Michigan and indigent defense as an example. Once the state was sued for violating the Sixth Amendment and contemplated legislative change that would create state-enforceable standards for the provision of indigent defense, local voices protested that centralizing authority for indigent defense at the state level would create unnecessary bureaucracy and decrease the quality of representation. One Michigan county counsel stated that centralizing indigent defense would create "'bureaucratic bulge and bloat.'"[272] The legislative director of the Michigan Association of Counties worried that the state would strip local governments of their authority over indigent-defense programs but continue to make local governments pay for them.[273] And a county judge opined that divesting local governments of authority would decrease the quality of representation by diminishing the involvement of the actors most familiar with each individual lawsuit.[274] A similar dynamic has occurred in the elections context.[275]

Economic conditions can also affect whether states abdicate. Money informs many of the conflicts between states and their local governments. A

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271. Id. at 166.

272. See Scott Aiken, Rethinking the System: Changes Sought in How Poor Are Represented in Court, Herald-Palladium (Feb. 14, 2010), http://www.heraldpalladium.com/localnews/rethinking-the-system/article_cabf8c0a-05e8-5456-a107-0dc6731478b4.html [http://perma.cc/X9QB-5SQU] (quoting R. McKinley Elliott, Berrien County corporate counsel).

273. See David Egger, Securing Rights for the Poor: Push Continues to Fix Indigent Defense in State, Grand Rapids Press (May 5, 2013) (on file with the *Columbia Law Review*).

274. See Angie Jackson, Locals Skeptical over Push to Overhaul Indigent Defense, Record-Eagle (June 22, 2013), http://www.record-eagle.com/news/local_news/locals-skeptical-over-push-to-overhaul-indigent-defense/article_37a4da76-823d-525f-a371-0147c11eca9b.html (on file with the *Columbia Law Review*) (quoting Thirteenth Circuit Court of Michigan Judge Thomas Power).

Briffault suggests that another reason power tends to remain at the local level, once delegated, is that local governments are understood as the extension of the *family*, in opposition to the state as government. That association reinforces local control over certain state responsibilities that have been delegated downward. See Briffault, Our Localism II, supra note 262, at 385 ("[C]onceptualiz[ing] local government after the model of suburbs as centers of families and homes facilitates the equation of local control with family control, encourages deference to state decisions and makes it more difficult for concerns about interlocal inequality and the external effects of local actions to overcome . . . decentralization.").

275. See Weinstein-Tull, Localist Critique of *Shelby County*, supra note 123 at 300 (describing resistance among local governments when states attempted to comply with HAVA by assuming greater control over some aspects of election administration previously left to local governments).

"law of intergovernmental relations," one scholar notes, is that during times of economic stress, states both shift greater responsibilities to local governments and also provide less financial assistance.[276] States may be less likely to oversee local administration of federal obligations when they are not responsible for funding and therefore more likely to create conditions of abdication during economic downturns.

Finally, it is worth noting that these state–local dynamics do not explain *why* states abdicate. This Article avoids chronicling state rationales for abdication, in part because understanding the motives of states in abdicating federal responsibilities is beyond its scope and because state intention should not affect state liability.[277] Nevertheless, it is interesting to note that states of all political stripes make abdication arguments. Alabama and Louisiana have made abdication arguments, but California and New York have made abdication arguments more regularly and across a wider set of federal policy areas than any other state.[278] California and New York tend to align politically in favor of the federal civil rights laws they abdicate. But they are also large, complex states that demonstrate that state bureaucracy can create unintentional resistance to federal law—certainly in the form of abdication, and perhaps in other ways as well[279]—even in states that might otherwise sympathize with those laws.

2. *External Factors.* — Factors outside the state–local relationship have created ambiguity that also may lead to state abdication arguments. Federal statutes themselves seldom account for the decentralized structure that states employ when administering federal law. And abdication and commandeering case law is sufficiently inconsistent so as to create doctrinal space for states to continue making abdication arguments.

First, federal laws that impose responsibilities onto states rarely address the reality that states delegate those responsibilities to local governments. The election statutes described above, for example, make no mention of local governments even though it is widely understood that states delegate broad election-administration responsibilities. The Sixth Amendment and federal case law on the right to counsel similarly fail to acknowledge the decentralized reality of state indigent-defense programs. In the incarceration context, the Eighth Amendment makes no mention

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276. David R. Berman, Local Government and the States: Autonomy, Politics, and Policy 153 (2003); see also id. at 112 (noting "state-local tensions vary with ups and downs in the general economy"); Steven D. Gold & Bruce A. Wallin, The State Fiscal Predicament Under the New Federalism, *in* The End of Welfare? Consequences of Federal Devolution for the Nation 55, 73 (Max B. Sawicky ed., Routledge 2015) (1999) ("[I]n recent years . . . states have pursued 'de facto federalism' and 'fend-for-yourself federalism' policies that often served to shift burdens to local governments without carefully considering whether this was the correct course." (footnote omitted)).

277. I later speculate as to state intention. See infra section III.C.1.

278. See supra section I.A.

279. See infra section III.C.3 for a discussion of other barriers potentially created by state bureaucracy.

of local government, even though local governments often administer state programs subject to the Eighth Amendment.

Some exceptions exist, especially in the context of public assistance. The Food Stamp Act accounts for states that decentralize their system of public-assistance administration by broadly defining "state agency" under the statute to include "*the local offices thereof*, which ha[ve] the responsibility for the administration of the federally aided public-assistance programs within such State."[280] Medicaid requires states that delegate administrative responsibility to local governments to closely monitor that delegation.[281] Although these provisions do not prevent states from making abdication arguments in the context of these statutes,[282] they do provide federal authority that courts use to reject these arguments.[283]

Second, inconsistent case law has sent a message to states that they may not bear ultimate responsibility for compliance with federal law once they delegate those responsibilities downward. States use language from those cases to attempt to avoid liability when challenged. A recent election law case out of Mississippi provides an example. In *True the Vote v. Hosemann*, private plaintiffs sued state officials pursuant to the NVRA's public-disclosure provision seeking voting records from the 2014 Senate election.[284] Mississippi Secretary of State Delbert Hosemann deployed the doctrinal ambiguity of the *Missouri* case—which held that states could not be required to enforce the NVRA against noncompliant local governments[285]—in his response. He argued that he was "not a proper party to plaintiffs' putative causes of action asserted"[286]—in part because he had no "authority or duty to enforce NVRA's public disclosure provision, or any state laws, against Mississippi's 82 locally elected Circuit Clerks"—

280. 7 U.S.C. § 2012(s) (Supp. 2015) (emphasis added). Furthermore, "in those States where such assistance programs are operated on a decentralized basis, the term [state agency] shall include the counterpart local agencies administering such programs . . . ." Id.

281. See Shakhnes v. Berlin, 689 F.3d 244, 247–48 (2d Cir. 2012) (describing how Medicaid allocates responsibility between federal, state, and local governments). Medicaid regulations permit the state agency responsible for administering Medicaid to delegate eligibility determinations to local government agencies. See 42 C.F.R. §§ 431.10(c)–(d) (2015). However, should the state delegate, it must also create "methods to keep itself . . . informed of the adherence of local agencies to the State plan provisions" and "[t]ake corrective action to ensure their adherence." Id. § 435.903.

282. See, e.g., Robertson v. Jackson, 972 F.2d 529, 530 (4th Cir. 1992) (describing the state commissioner's argument that Virginia's decentralized system of public-assistance administration absolved him from responsibility for violations of the federal laws at the local level).

283. See id. (noting that the language of the Food Stamp Act applied to Virginia's decentralized system of public-assistance administration).

284. 43 F. Supp. 3d 693, 700 (S.D. Miss. 2014).

285. See United States v. Missouri, 535 F.3d 844, 850–51 (8th Cir. 2008).

286. Secretary of State Delbert Hosemann's Answer and Defenses to Plaintiffs' Complaint at 14, *True the Vote*, 43 F. Supp. 3d 693 (No. 3:14-CV-532-NFA) (on file with the *Columbia Law Review*).

and that neither the NVRA nor state law required him to "enforce the [NVRA] against local officials."[287]

The anticommandeering doctrine has also contributed some ambiguity to abdication cases. Although the Supreme Court has never explicitly extended the anticommandeering doctrine to state abdication or delegation to local government, that doctrine has provided ammunition for states to argue that their delegation absolves them of responsibility for federal law.

Briefly, the anticommandeering principle states that the federal government may not "compel the States to implement, by legislation or executive action, federal regulatory programs."[288] In *New York v. United States*, the Court struck down a federal statute that forced states to take title to low-level radioactive waste unless the state was able to dispose of that waste—either itself or through an interstate compact—by a certain date.[289] The Court held that Congress could not compel a state "to enact or administer a federal regulatory program."[290] A few years later in *Printz v. United States*, the Court struck down a part of the Brady Act that required state and local law enforcement officers to conduct background checks on prospective handgun buyers.[291] The Court held "that Congress cannot circumvent that prohibition by conscripting the State's officers directly."[292]

States have argued that the anticommandeering doctrine prohibits the federal government from creating state responsibilities in areas in which states delegate to local governments. In the incarceration context, California has argued that requiring the state to monitor, supervise, and ensure that its local governments complied with the ADA and the Eighth Amendment violated the anticommandeering principle.[293] Multiple states have also cited the anticommandeering doctrine in the elections context.[294]

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287. Brief of Secretary of State Delbert Hosemann in Opposition to Motion for Partial Summary Judgment at 33–34, *True the Vote*, 43 F. Supp. 3d 693 (No. 3:14-CV-532-NFA) (citing *Missouri*, 535 F.3d at 849–51) (on file with the *Columbia Law Review*).

288. Printz v. United States, 521 U.S. 898, 925 (1997).

289. 505 U.S. 144, 153–54 (1992).

290. Id. at 188.

291. *Printz*, 521 U.S. at 902.

292. Id.

293. Defendants-Appellants' Opening Brief at 14–16, *Armstrong I*, 622 F.3d 1058 (9th Cir. 2010) (No. 09-17144), 2009 WL 5538925 (arguing that "ordering Defendants to oversee county jail operations" violated the anticommandeering principle).

294. See ACORN v. Miller, 129 F.3d 833, 835–36 (6th Cir. 1997) ("Citing [the anticommandeering doctrine,] . . . Michigan claims that the Act is unconstitutional because it conscripts state agencies, personnel, and funds to further a federal purpose, thereby impinging upon basic principles of federalism and violating the Tenth Amendment."(citation omitted)); Petition for Writ of Certiorari at 15–16, Wilson v. Voting Rights Coal., 516 U.S. 1093 (1996) (No. 95-673), 1995 WL 17048226 (challenging the constitutionality of the NVRA on the basis that Congress "conscripts state governments as

Courts have largely rejected these arguments,[295] but they nonetheless may reflect a belief on the part of states—created by inconsistent federal law—that abdicating their federal responsibilities protects them from liability despite local noncompliance.[296]

III. ABDICATION AND FEDERALISM

Abdication provides a new perspective on decentralizing federal policy. We decentralize because we believe that allowing states to tailor federal programs to the needs and tastes of their inhabitants improves the effectiveness of those laws.[297] Tailoring to local tastes has long been a value of federalism. Decentralized policy encourages local diversity, innovation, and interjurisdictional competition.[298] A decentralized govern-

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its agents"); see also Amicus Curiae Brief of Pacific Legal Foundation and the States of Arizona, Idaho, New Hampshire, and South Carolina in Support of Petitioners at 17, *Wilson*, 516 U.S. 1093 (No. 95-673), 1995 WL 17048406 ("If the Constitution prohibits Congress from forcing state legislatures to legislate, it follows that Congress cannot step into the shoes of the state Legislature and commandeer state agencies simply to do their bidding.").

295. See *ACORN*, 129 F.3d at 836 (dismissing a state anticommandeering argument and finding that "Article 1 Section 4 explicitly grants Congress the authority" to make or alter laws regarding federal elections); Wilson v. United States, 878 F. Supp. 1324, 1327–28 (N.D. Cal. 1995) ("Article 1, Section 4 specifically states Congress may make or alter state regulations concerning the time, place and manner of federal elections."). But see Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415–16 (9th Cir. 1995) (recognizing that California's sovereignty was a "constitutional concern" and directing the district court "to impose no burdens on the state not authorized by the Act which would impair the State of California's retained power to conduct its state elections as it sees fit").

296. Advocates themselves may create some of the ambiguity about ultimate responsibility for delegated federal responsibilities. Whereas some advocates sue states for violating delegated federal law, some sue local governments, which may send a message to states that they do not bear ultimate responsibility for compliance. Advocates may choose to sue local governments rather than states for perfectly sensible reasons: to avoid immunity defenses or to target the actor most directly responsible for the violation. Fred Smith has argued, however, that local governments may functionally enjoy sovereign immunity themselves (from constitutional suit, at least), suggesting local governments may not always be softer targets than states. See Fred Smith, Local Sovereign Immunity, 116 Colum. L. Rev. 409, 486–87 (2016) ("[C]ourts have cited judicial conceptions of sovereignty to protect local governments and their officials from transgressions of constitutional guarantees.").

297. See Jessica Bulman-Pozen, Executive Federalism Comes to America, 102 Va. L. Rev. 953, 994–1001 (2016) (describing the benefits of state-differentiated national policy that can result from negotiation and cooperation between federal and state executive branches in some cooperative federalism schemes); Gluck, [National] Federalism, supra note 1, at 2020 ("Values like experimentation, variation, and tailoring to local circumstances are also now integral components of nationalist policy making.").

298. Erin Ryan, Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area, 66 Md. L. Rev. 503, 610 (2007).

ment, the theory goes, is "more sensitive to the diverse needs of a heterogenous [sic] society."[299]

While state implementation will vary, a bedrock set of federal policies attempts to provide uniformity, or a floor for a set of rights that we identify as universally important.[300] This Article argues that abdication creates major challenges to that uniformity and reveals a new kind of cost to decentralization. This cost is not borne from noncompliance created by errant local governments or intransigent states. Rather, it is a cost to compliance with federal law created by the legal and political ambiguity of the state–local relationship.

This Part discusses abdication within the framework of federalism. Section III.A uses abdication to contribute to and question some of the doctrinal and scholarly wisdom that sits at the intersection of federalism and localism. Section III.B outlines how courts and others could address abdication in a coherent, productive way. Section III.C poses questions for further study.

A. *Abdication as Critique*

Abdication provides a new lens through which to reassess previous thinking on decentralization and federalism. It demonstrates that we cannot fully understand the balance of power between states and the federal government without also understanding the distribution of power between states and their local governments. This section uses abdication to provide a new perspective on two ideas in the federalism scholarship: local constitutionalism and cooperative federalism.[301]

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299. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); see also Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1493–94 (1987) ("The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—and hence less desirable—approach."). Scholars have recently argued that even when states resist federal laws, they can serve nationalist ends. See Heather K. Gerken, Federalism and Nationalism: Time for A Détente?, 59 St. Louis U. L.J. 997, 1001–04 (2015) (describing how disagreement between the federal, state, and local governments can result in productive dialogue and disagreement).

300. See, e.g., Philip J. Weiser, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1705–06 (2001) (noting that federal courts develop federal common law to implement uniform application of federal law). But see 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, 1057–59 (2015) (noting that Congress now designs federal law to foster disuniformity).

301. In making this critique, I am reminded of Larry Kramer's comment that "[t]alking about federalism feels a bit like joining the proverbial blind men trying to describe an elephant. It's such a big topic, one can't possibly hope to grasp more than a small part of the beast." Larry Kramer, Understanding Federalism, 47 Vand. L. Rev. 1485, 1485 (1994).

1. *Local Constitutionalism.* — Scholars have, in recent years, explored the place of local governments in our federal constitutional system. These scholars have demonstrated that local governments can productively contribute to national discourse and unity, minority rights, and policy consensus.

Abdication demonstrates that these accounts are incomplete, however: They fail to account for the complicated and varied relationships between states and their local governments, the ways in which federal law can get lost in those relationships, and the reluctance of federal courts to step in. Abdication shelters noncompliance with federal law at the local level, allowing states—intentionally or not—to incubate noncompliance without publically disagreeing with the law. This shelter diminishes consensus-building dialogue about that federal law. In so doing, abdication presents a pure downside to local decentralization of federal policy that localism scholars overlook.

David Barron, in his work on local constitutionalism, has promoted federal court deference to local conduct that vindicates positive constitutional protections.[302] Because local governments "are most directly responsible for structuring political struggles over the most contentious of public questions, ... [they] are often uniquely well positioned to give content to the substantive constitutional principles that should inform the consideration of such public questions."[303] As a practical matter, Barron advocates that recognizing the value of local constitutionalism means "affording local communities the freedom to give life to the positive constitutional rights of their residents that judges are often ill-positioned—and unwilling—to secure."[304]

Heather Gerken has also breathed new constitutional life into local governments with her formulation of "federalism-all-the-way-down."[305] To Gerken, state and local governments are spaces where political and racial minorities can rule in the majority, generating "a dynamic form of contestation [and] the democratic churn necessary for an ossified national system to move forward."[306] Gerken and Jessica Bulman-Pozen have coined the term "uncooperative federalism," which describes how disagreement

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302. David J. Barron, The Promise of Cooley's City: Traces of Local Constitutionalism, 147 U. Pa. L. Rev. 487, 491 (1999) [hereinafter Barron, Promise of Cooley's City].

303. Id. at 491.

304. Id. at 548; see also id. at 600 ("Local constitutionalism would not . . . support a constitutional defense of localism qua localism. It would suggest only that local governmental sovereignty, understood as local freedom from state law constraints, merits federal constitutional protection when such recognition would serve some independent substantive constitutional value.").

305. Gerken, Federalism All the Way Down, supra note 19, at 8.

306. Id. at 10; see also Heather K. Gerken, Dissenting by Deciding, 57 Stan. L. Rev. 1745, 1748 (2005) [hereinafter Gerken, Dissenting by Deciding].

among federal, state, and local governments can result in productive dialogue and disagreement.[307]

These theories—that celebrate the value of local constitutionalism and dissent in the context of national policy[308]—have extended federalism scholarship to include both the vast world of local administration of federal law and the ways that federal law actually affects humans at the local level.

But they rest on two premises that abdication casts doubt on. First, those who celebrate local constitutionalism rely on the idea that the federal government and federal courts can correct local noncompliance. So to Barron, "a doctrine of local constitutionalism should not be confused with a defense of a locality's right to engage in either constitutional nullification or unlimited constitutional expansionism."[309] Barron is bullish on state control of local governments: "[T]he fact that cities are securely in the grip of state control helps counterbalance the common assumption that city officials' independent interpretations pose a greater threat than the interpretations of state officials."[310] Gerken similarly notes that "it is perfectly acceptable for the national majority to play the Supremacy Clause card whenever it sees fit."[311]

The current absence of a coherent nonabdication doctrine—and the difficulties abdication poses to courts—is a reminder that as of now, the "Supremacy Clause card" of federal law is more jack than ace. Courts have not settled on a doctrine clarifying that federal law will always overcome internal state structural barriers to compliance with that law. And even when courts do ultimately decide that federal law overcomes those barriers, lawsuits create significant delays and litigation costs.[312]

Abdication therefore raises an additional and pervasive cost to policy decentralization and a critique of a theory of federalism that celebrates

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307. Bulman-Pozen & Gerken, supra note 17, at 1284–95.

308. I do not suggest that Barron and Gerken are engaged in the same project. They are not. They do, however, both possess a robust view of individual and structural rights and see in local government the potential for positive expression of those rights.

309. Barron, Promise of Cooley's City, supra note 302, at 602–03; see also id. at 600 ("Nor would local constitutionalism afford local governments the right to disregard state law commands in the absence of some demonstration that such disregard would be supported by an independent federal constitutional limitation on state power. There is no general federal constitutional principle of localism that circumscribes traditional state power.").

310. David J. Barron, Why (and When) Cities Have a Stake in Enforcing the Constitution, 115 Yale L.J. 2218, 2234–35 (2006) [hereinafter Barron, Why (and When)].

311. Gerken, Federalism All the Way Down, supra note 19, at 51; see id. at 65 (noting a strong national majority can reverse local majorities when it chooses, mitigating costs associated with local majorities that oppress racial minorities "in defiance of a national majority"). Gerken's account of the Supremacy Clause trump card is nuanced, however. She points out that "the Supremacy Clause won't always be a trump card; sometimes it will simply be the [national majority's] opening play." Id. at 71.

312. See supra section I.A (describing four cases in which lawsuits arose from state abdication of federal responsibilities).

local constitutionalism. A familiar cost of taking localism seriously is contending with oppressive or racist local communities. But abdication demonstrates that another cost comes not from those communities that flout federal law but from overcoming structural arrangements that states deploy. When a state abdicates, a local government can more freely flout federal law even when it is not governed by oppressive or racist communities.

Second, a theory of federalism that values decentralization to the local level relies on local governments to be *expressive* in their understanding of federal policy and the Constitution. That is, local constitutionalism and contestation contribute to national deossification and democratic churn only when people know about it. Barron discusses "comfort with the notion that democracy depends upon reasonable disagreement" that can be hashed out among the federal, state, and local levels.[313] San Francisco's experiment with marriage equality in 2004 is a paradigmatic example: San Francisco formulated a localist understanding of the Constitution and communicated that understanding by issuing same-sex marriage licenses.[314] A local constitutionalist might celebrate that kind of local dissent because it affected the national political landscape.[315]

Abdication complicates the idea that local governments can be fora for productive dialogue around constitutional meaning. Local governments administer the Constitution on orders from the state, but they often do that work in obscurity. Few pay attention to how rural counties interpret the Sixth Amendment or how small county jails interpret the Eighth Amendment.

Instead, abdication allows a quiet unconstitutionalism at the local level. By creating slack and weakening relationships between the public and its governing representatives, as described in section II.A.2, abdication allows states to hide unconstitutional conduct from view. In this way, abdication reveals a set of important policy areas in which decentralization is a pure downside: Not only does it foster noncompliance, it does so in a way that allows states and local governments to disagree noiselessly, without contributing to productive national dialogue about those policies.

Scrutinizing local constitutionalism, and local administration of federal law generally, is not inconsistent with a sincere belief in the positive potential of local governments. Local governments are capable of great public good at the constitutional level.[316] But abdication emphasizes the importance of the distinction between expressive and nonexpressive local

313. Barron, A Localist Critique, supra note 17, at 377; see also Barron, Why (and When), supra note 310, at 2220 ("A growing body of scholarship now emphasizes the important and constructive role that cities could play in resolving contemporary constitutional disputes.").

314. See Gerken, Dissenting by Deciding, supra note 306, at 1765.

315. Id.

316. See, e.g., Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 Harv. C.R.-C.L. L. Rev. 1, 18–26 (2012).

action. Whereas we may choose to celebrate and encourage the former, we should carefully scrutinize the latter.

2. *Cooperative Federalism.* — Abdication also provides a critique of the theory and doctrine that support cooperative federalism. Cooperative federalism schemes seek to harness states to administer federal programs and tailor them to specific local needs. The doctrines of cooperative federalism, like the anticommandeering principle, protect state sovereignty and, in so doing, also protect state prerogative to abdicate. Abdication therefore permits states to use the veneer of federalism to obscure their failure to comply with federal law.

It used to be that we understood federalism as a vertical division of powers between the federal government and the states. Courts called the arrangement "dual federalism": The federal government operated within its policy domains, the states within theirs.[317] During the New Deal, Congress enacted a set of federal laws that required state participation. The federal government became involved in areas of traditional state concern, like public assistance.[318] Scholars and courts call this kind of interaction "cooperative federalism."[319] Congress has continued to innovate in the ways that it uses federal–state cooperation to further federal ends.[320]

Scholars have coined a variety of terms to describe the give-and-take between federal and state governments implicated by these laws. Robert Schapiro uses the term "interactive federalism" to describe how the federal government and states work together to achieve a wide variety of policy goals.[321] Others have used the terms "picket fence federalism"[322] and "marble cake federalism."[323] Still others have coined federalism language

317. See Weiser, Constitutional Architecture, supra note 169, at 665.

318. Id. at 669–70.

319. Id.

320. See Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534, 584–94 (2011) (noting the Affordable Care Act contains at least five different kinds of federal–state cooperation).

321. Robert A. Schapiro, From Dualist Federalism to Interactive Federalism, 56 Emory L.J. 1, 8 (2006); see also Robert A. Schapiro, Toward A Theory of Interactive Federalism, 91 Iowa L. Rev. 243, 244 (2005) ("[P]olyphonic federalism rejects the dualist vestiges of dual federalism . . . [and] focuses on facilitating . . . the interaction of state and federal governments.").

322. Roderick M. Hills, Jr., The Eleventh Amendment as Curb on Bureaucratic Power, 53 Stan. L. Rev. 1225, 1227 (2001) ("The idea behind the metaphor is that state and federal agency experts within the same specialty—the 'posts' in the 'fence'—often share more in common with each other than they do with the level of government by which they are employed.").

323. See Morton Grodzins, The American System: A New View of Government in the United States 8 (1966) ("No important activity of government in the United States is the exclusive province of one of the levels, not even what may be regarded as the most national of national functions, such as foreign relations; not even the most local of local functions, such as police protection . . . .").

to describe policy-specific relationships, like immigration federalism,[324] national security federalism,[325] election law federalism,[326] and so on.

Whatever you choose to call it, federal law now "reaches for the states" in a wide range of statutory contexts.[327] States act in their sovereign capacities to administer federal law by "pass[ing] new state laws and regulations, creat[ing] new state institutions, appoint[ing] state officials, disburs[ing] state funds, and hear[ing] cases in state courts."[328]

Abdication demonstrates that even as states use state law to tailor federal law to local needs, they can also erect barriers to frustrate federal law.[329] As the case studies in Part I demonstrate, a state may seek to tailor federal law to even more local needs by abdicating its federal responsibilities to local governments. That abdication then creates state-level barriers to compliance with the federal law being abdicated.

State-protective federalism doctrines like the anticommandeering principle then buttress and protect those state-level barriers. Although not all of the state filings in abdication cases explicitly sound in federalism, some do, and many others do implicitly. State filings refer to the anticommandeering doctrine and a state's power to order its internal structures.[330] Appeals to state laws that exempt state officials from responsibility for local noncompliance—a common state approach in abdication arguments—implicitly invoke the concept of state sovereignty by suggesting that federal law cannot force a state to organize counter to its internal preferences, even if those preferences frustrate federal law.

Abdication similarly highlights the ways in which recent federalism doctrine runs up against bedrock principles of federal supremacy. In a classic Supremacy Clause case, *Testa v. Katt*, the Supreme Court considered whether a Rhode Island court was obligated to entertain a federal claim that conflicted with a state law.[331] The Court held not only that the Rhode Island court must vindicate the federal right but also that no real

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324. Peter H. Schuck, Taking Immigration Federalism Seriously, 2007 U. Chi. Legal F. 57.

325. Matthew C. Waxman, National Security Federalism in the Age of Terror, 64 Stan. L. Rev. 289 (2012).

326. Weinstein-Tull, Election Law Federalism, supra note 11.

327. Gluck, [National] Federalism, supra note 1, at 1999 (noting Congress relies on states "to restrain the breadth of federal law and to bring the states' expertise, variety, traditional authority, and sovereign lawmaking apparatus into federal statutes").

328. Id. at 2000.

329. See supra sections I.A.1–.4.

330. See supra section II.B.2 for examples of state briefing. For case law that sets out this doctrine, see Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004) (holding the Telecom Act could not preempt Missouri law because "liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, [which are] . . . 'created as convenient agencies for exercising . . . governmental powers of the State as may be entrusted to them in its absolute discretion'" (quoting Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607–08 (1991))); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government . . . a State defines itself as a sovereign.").

331. 330 U.S. 386, 387–89 (1947).

conflict existed because the Supremacy Clause ensured that the federal law was, in fact, "the prevailing policy in every state."[332] The federal policy was "as much the policy of [the state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."[333]

Others have noted conflict between cooperative federalism programs and recent federalism doctrine as well. Bridget Fahey has written about the uncomfortable fit between the anticommandeering doctrine and the ways that cooperative federalism programs require states' consent to participate.[334] Nestor Davidson has written about the uncomfortable fit between federal laws that empower local governments and federalism doctrines that promote state law power to order their own internal structures.[335]

State abdication arguments amount to state structural explanations for failing to reconcile state and federal laws. But those explanations clash with historical understandings of state and federal law. The more we learn about state structural barriers to compliance with federal laws that require state involvement, the clearer it becomes that these federalism doctrines either need to be reconceived or cannot possess broadly applicable force. It is the combination of cooperative federalism programs with state-protective federalism doctrines that makes state structural barriers particularly dangerous.[336] If the Supremacy Clause is to mean anything, federal law must be able to deeply disrupt state structures when necessary. This is true when states have consented to administering federal law, as they do when they receive federal dollars authorized by Commerce Clause legislation. But it must also be true when federal law (either statutory or constitutional) requires states to act even without the promise of funding.

B. *A Coherent Approach to Abdication*

Having identified barriers to compliance with federal law that abdication creates, and an incoherent set of opinions grappling with it,[337] this section presents some solutions. Section III.B.1 tackles back-end barriers to compliance with federal law—inconsistent judicial opinions on abdication once a lawsuit has been filed—and describes what a coherent

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332. Id. at 393.

333. Id. at 392 (quoting Mondou v. New York, New Haven & Hartford R.R. , 223 U.S. 1, 57 (1912)).

334. See generally Bridget A. Fahey, Consent Procedures and American Federalism, 128 Harv. L. Rev. 1561 (2015).

335. Davidson, supra note 17, at 961 ("A clash is thus looming between plenary authority over local government as a facet of resurgent state sovereignty and the protection that has been afforded to federal-local cooperation.").

336. The problem of abdication is broader than cooperative federalism programs. As is obvious from Part I, the potential for abdication exists whenever federal law creates legal obligations on states, which consists of a superset of cooperative federalism programs.

337. See supra section I.C.

nonabdication doctrine might look like, as well as how it would fit within existing federal law on state–local relationships. Section III.B.2 tackles front-end barriers to compliance with federal law created by abdication—the state belief that abdication disempowers state officials to comply with federal law before a lawsuit is filed—and suggests ways for legislators and courts to dispel that belief. Broadly, this section suggests that two legal concepts—(1) the idea that local governments are arms of the state and (2) federal supremacy, neither of which courts currently address—provide a coherent and reasonable way to resolve abdication cases. Section III.B.3 describes how we might remedy noncompliance caused by abdication. And Section III.B.4 discusses how the federal government could take a more active role to encourage compliance with federal law in policy areas prone to abdication.

1. *State Liability.* — Richard Ford has observed that "[l]ocal government exists in a netherworld of shifting and indeterminate legal status."[338] It is therefore unsurprising that opinions addressing abdication treat local governments in different ways. Some consider local governments primarily as contractees with the state.[339] Others have found states responsible for local noncompliance because of state laws that made states responsible specifically in the context of the delegated federal law.[340] Still others found state liability not because of any special relationship between states and local governments, but for policy reasons: Allowing a state to elude federal responsibilities by sending them downward would "completely insulate[]" the "fifty states . . . from any enforcement burdens," even in the face of noncompliance with federal law.[341]

But these holdings are peculiar for a different reason: None of them finds states responsible for local noncompliance on the ground that the formal status of local governments—from the perspective of federal law—is that of a *part* of the state itself. The prevailing legal authority on this point, set out by *Hunter v. City of Pittsburgh*, is that local governments are "political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted

338. Ford, supra note 20, at 1864.

339. In the *Armstrong* prison litigation, for example, the Ninth Circuit treated the counties as parties that had contracted with the state to provide a service housing prisoners. *Armstrong I*, 622 F.3d 1058, 1069 (9th Cir. 2010) (holding that California's choice to house incarcerated persons in county jails triggered its obligation to its prisoners and parolees).

Similarly, in the *Henrietta D.* public-assistance litigation, the Second Circuit ultimately held that New York could not evade responsibility for the Food Stamp Act merely because it had contracted those responsibilities away to New York City. Henrietta D. v. Bloomberg, 331 F.3d 261, 284–87 (2d Cir. 2003).

340. See Robertson v. Jackson, 972 F.2d 529, 532 (4th Cir. 1992) (noting Virginia's state law control over its local governments); Idaho Migrant Council v. Bd. of Educ., 647 F.2d 69, 71 (9th Cir. 1981) (describing the Idaho state laws that empower the state to supervise local school districts).

341. See Harkless v. Brunner, 545 F.3d 445, 452 (6th Cir. 2008).

to them."[342] In *Hunter*, the Court considered whether Pennsylvania's decision to consolidate two cities, despite opposition by one of the cities, violated the federal constitutional rights of the unwilling city and its inhabitants.[343] The Court held that "[t]he number, nature and duration of the powers conferred upon [cities] . . . rests in the absolute discretion of the State."[344] The state "may modify or withdraw all such powers . . . conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme . . . ."[345]

In recent years, scholars have debated whether *Hunter* remains good law,[346] whether it describes sound policy,[347] and whether it accurately characterizes the powers and flexibility that local governments wield in practice.[348] Commentators have noted the emergence of an alternate doctrine recognizing that local governments are more than administrative arms of the state:[349] They are, at times, "little republics which can

342. 207 U.S. 161, 178 (1907); see also Briffault, Our Localism I, supra note 2, at 7 ("The formal legal status of a local government in relation to its state is summarized by the three concepts of 'creature,' 'delegate' and 'agent.'").

343. *Hunter*, 207 U.S. at 174–76.

344. Id. at 178.

345. Id. at 178–79.

346. See Morris, supra note 316, at 18–26 (arguing *Hunter* may have been overruled by *Erie v. Tompkins*).

347. See Barron, Promise of Cooley's City, supra note 302, at 496, 595–611 (providing "some general principles concerning when, and to what extent, federal constitutional recognition should be accorded to local governmental institutions").

348. See Ford, supra note 20, at 1864 ("Local government exists in a netherworld of shifting and indeterminate legal status."); id. at 1865 ("*Hunter*'s logic has not driven the constitutional analysis in the Court's desegregation decisions.").

349. A "shadow doctrine." See Richard C. Schragger, Reclaiming the Canvassing Board: *Bush v. Gore* and the Political Currency of Local Government, 50 Buff. L. Rev. 393, 395–96 (2002) ("The result [of local governments' ambiguous status] has been a constitutional 'doctrine' that treats localities as mere creatures of the state with no independent federal constitutional role, and an alternative 'shadow doctrine' that treats localities as sovereign political entities entitled to constitutional protection."); see also Briffault, Our Localism I, supra note 2, at 85–86 (noting that the Court has recognized "the importance of localism in . . . political culture," "[w]ithout according local governments . . . constitutional rights against the states"); Davidson, supra note 17, at 991–94 (describing different doctrinal areas—including Eleventh Amendment immunity, section 1983, antitrust law, and election law—in which the Supreme Court has disaggregated state from local governments); Joan C. Williams, The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law, 1986 Wis. L. Rev. 83, 85 (1986) ("This Article's basic thesis concerning the constitutional vulnerability of cities begins from the fact that cities—unlike the states or federal government—have no set place in the American constitutional structure."). For a detailed account that traces the movement for local autonomy throughout American history, see Barron, Reclaiming Home Rule, supra note 20, at 2277–322. Other local government scholars have persuasively challenged the characterization of local governments as either autonomous or controlled. See, e.g., Ford, supra note 20, at 1886 ("Localities are neither sovereigns nor delegates, neither freely

serve as fora for citizen deliberation and participation in public decisionmaking over a broad range of issues of community concern."[350] In these cases, courts treat local governments as representative bodies that deserve their own autonomy and are accountable for their own actions.[351]

Courts, when deciding abdication cases, embrace an account of local government as autonomous, distinct from their states, and capable of independently contracting to fully inherit the states' federal responsibilities. *Armstrong* and *Henrietta D.* even suggest that the local government contractees might as well be private entities—the obligations arose from the contracts, not from the relationship between the states and their local governments.[352]

And yet the abdication context seems especially poorly suited to privileging the autonomy of local governments. Here, in the context of federal law, we want the opposite: uniformity. This is true partly because abdication seems often to occur in the context of federal civil rights laws, which already aim to constrain state action in favor of federal civil rights minima. It is also true because abdication allows states to hide the noncompliant conduct of their local governments, providing a shield for states to avoid their federal responsibilities.[353]

Treating local governments as something other than "arms of the state," for the purposes of federal law, forces courts to search for independent state liability within the maze of state law.[354] But relying on state law hierarchies of authority to determine state liability is unreliable: State law does not always accurately mark abdication.[355] States have different

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chosen nor wholly imposed; rather they are altogether distinct political agents, and as such require a distinct theory of law and justice.").

350. Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. Chi. L. Rev. 339, 419 (1993) (footnote omitted) (internal quotation marks omitted) (attributing the phrase "little republics" to Thomas Jefferson); see also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 577 (1985) (Powell, J., dissenting) ("It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that 'democratic self-government' is best exemplified.").

351. See, e.g., Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (holding that the value of local control over school district lines outweighed the federal district court's interest in crafting an interdistrict remedy to a constitutional violation); see also Michelle Wilde Anderson, Mapped Out of Local Democracy, 62 Stan. L. Rev. 931, 964–78 (2010) (describing twentieth-century Supreme Court cases that promote local autonomy).

352. See supra note 339 and accompanying text.

353. See supra section II.A.1.

354. See supra notes 333–335 and accompanying text. For a helpful exploration of the question of state liability for local government actions, see generally Note, The State's Vicarious Liability for the Actions of the City, 124 Harv. L. Rev. 1036 (2011). This student note proposes a rule under which "the state [is] vicariously liable only for city actions that the state has mandated that the city perform." Id. at 1054.

355. Krane et al., supra note 235, at 4 ("[E]ven though state courts typically hold the state-local relationship to be unitary and hierarchical, the political reality is that the relationship is more complicated.").

cultures of local autonomy that do not always track the approach set out in the state law.[356]

Furthermore, using state law to determine state liability incentivizes states to statutorily abdicate their federal responsibilities. For example, we might consider adopting a liability standard similar to the local government sovereign immunity jurisprudence. That doctrine considers when a local government may enjoy its state's Eleventh Amendment sovereign immunity from suit. The doctrine probes state law to determine whether the local government acted as part of the state when it committed the action that spawned the suit, or whether it was acting as an independent entity.[357] Importing that standard to the abdication context would be risky, however. If states believe they can avoid their own federal obligations by fully abdicating those obligations to their local governments, they will do so and create the barriers to compliance described in Part II.

Instead, federal courts should pay closer attention to the actual federal law at issue. When the federal law clearly places responsibility for compliance on the state, courts should give states that responsibility. This rule applies whether the federal law requires states to create a new program (as in the case of public assistance) or creates new federal standards for existing state programs (like the federal election laws). Federal public-assistance laws explicitly place compliance responsibilities onto states,[358] as do the federal election laws,[359] *Gideon* and its progeny,[360] and

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356. See Barron, A Localist Critique, supra note 17, at 393 ("Local autonomy—or, at least, something widely perceived to be local autonomy—is alive and well under state law despite an overwhelming state constitutional premise that localism is to be the exception rather than rule."); supra section II.B.1 (discussing extralegal factors that shape state–local relations).

357. See Davidson, supra note 17, at 992 (citing cases). Similarly in the antitrust context, states confer to municipalities their sovereign immunity to Sherman Act claims when municipalities act "pursuant to a clearly expressed state policy" to restrain competition. See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985).

358. See Woods v. United States, 724 F.2d 1444, 1447 (9th Cir. 1984) ("The Food Stamp Act places responsibility for the administration of the food stamp program on the state. It is the state that must request participation of the program . . . [and] agree with the Secretary [of Agriculture] on a plan for the lawful and effective operation of the program." (citation omitted)).

359. See National Voter Registration Act of 1993, 52 U.S.C. §§ 20504, 20506(a)(2), 20507 (Supp. 2015); Uniformed and Overseas Citizens Absentee Voting Act, id. §§ 20302(a), (f); Help America Vote Act, id. § 21081(a)(1)(A).

360. See Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (holding that states must provide counsel for indigent criminal defendants who cannot afford their own counsel); Tucker v. State, No. CV-OC-2015-10240, slip op. at 5 (Idaho Dist. Ct. Jan. 20, 2016) (on file with the *Columbia Law Review*) ("Unquestionably, the State is ultimately responsible for ensuring constitutionally-sound public defense."); Duncan v. State, 774 N.W.2d 89, 104–05 (Mich. Ct. App. 2009) ("[I]t is the state that is ultimately mandated to ensure that indigent defendants are provided their constitutional right to counsel.").

language accommodation in education laws.[361] With clear markers like these, courts may still, but need not, look for other reasons—like contract and state law—to justify state liability.

When the federal law clearly imposes requirements on local governments, and the local obligation comes directly from that federal law, states should not be responsible for local noncompliance. Examples of this include federal grant money that flows directly to local governments and federal laws that specifically target and implicate local governments.[362]

The harder case is when the target of the federal law is unclear. The Eighth Amendment is an example: It does not differentiate between state prisons and local jails.[363] In those cases, a court evaluating a state abdication argument should consider the context in which the local actor was operating. If the local actor responsible for noncompliance was acting as an agent while administering a state program, a court should find state liability. The *Armstrong* case is a clear example: Because California law sent state prisoners to local jails, the local officials were acting to administer the state's criminal justice system.[364]

But consider a local sheriff in a state other than California who arrests a disabled woman for intoxication and incarcerates her overnight (without charging her with a state crime) in a locally funded jail that fails to accommodate her disability. In that case, neither the local official nor the jail operates as part of the state criminal justice system, and the state should not be liable.

This approach may result in state liability for local conduct that state officials feel they have little control over. But making states responsible for a broader swath of federal law hardly seems a major problem. At worst, it will increase the number of bodies responsible for compliance with federal law and permit easier enforcement of that law.

2. *State Structure.* — A coherent nonabdication doctrine clarifying state liability postcomplaint will motivate states to pay closer attention to local noncompliance. But state beliefs about their responsibilities and

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361. 20 U.S.C. § 1703(f) (2012) ("No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."); see Idaho Migrant Council v. Bd. of Educ., 647 F.2d 69, 71 (9th Cir. 1981) (noting these federal laws placed liability directly onto states).

362. For a set of federal laws and programs that implicate local governments directly in policy areas like immigration, national security, housing, community development, telecommunications, and education, see Davidson, supra note 17, at 971–75.

363. See supra section II.B.2.

364. See supra section I.A.2 (describing California's state–local delegation of responsibility over prisoners and the *Armstrong* litigation). And, in fact, now that realignment has transferred jurisdiction over many kinds of state prisoners to local jails, state relief may be available for a wide range of local noncompliance with federal laws previously litigated against only local officials. This theory has yet to be tested in court.

powers under federal and state law create prelitigation, front-end barriers to compliance with federal law as well. To fully address these barriers, federal law must more explicitly empower state officials to comply with federal law, even when state law constrains state officials.

In the case studies in Part I.A, state officials argued that the federal laws at issue could not overcome a state chain of command that disempowered them from remedying noncompliance.[365] Missouri, sued for violations of the NVRA at the local level, stated that it was "unaware of a rule of statutory construction providing that [federal] statutes be construed to insure that agencies have sufficient resources to perform all the actions a statute would authorize."[366] Missouri cited the lack of federal money to enforce the NVRA as evidence that Congress did not intend states to play an enforcement role.[367] In a public-assistance lawsuit against the Commissioner of the Virginia Department of Social Services for local noncompliance, the Commissioner argued that he was not empowered, as a matter of Virginia law, to remedy local noncompliance.[368] Specifically, the Commissioner argued that he lacked state authority to discipline or remove local public-assistance providers or to vary their pay[369] and that "[a]t the state level, clearly the Commissioner alone is not empowered to control and compel compliance with federal program requirements."[370] "Plaintiffs and the Court must take the Commissioner as they find him."[371] The Commissioner argued that "[a] public officer is a creature of legislation and the legislature alone determines the duties and authorities of the post."[372]

Arguments like these resonate with what Hills describes as the "widespread assumption among courts, politicians, and political scientists that the federal government must take nonfederal governmental institutions as it finds them, accepting the limits that state law imposes on such institutions."[373] State law limits state officials in different ways. State officials may not believe they have the authority to force their local

365. See supra section I.A.

366. Appellees' Brief at 40–41, United States v. Missouri, 535 F.3d 844 (8th Cir. 2008) (No. 07-2322), 2007 WL 6603869.

367. Id.

368. Brief for Appellant at 9, Robertson v. Jackson, 972 F.2d 529 (4th Cir. 1992) (No. 91-2580) (on file with the *Columbia Law Review*).

369. Id.

370. Id. at 16.

371. Id.

372. Id.

373. Hills, Dissecting the State, supra note 17, at 1207. Hills cites opinions from various state supreme courts promoting this view, including the Washington Supreme Court, which stated that a federal power "endow[ing] a state-created municipality with powers greater than those given it by its creator, the state legislature" would be "a momentous and novel theory of constitutional government . . . that will eventually relegate a sovereign state to a position of impotence never contemplated by the framers of our constitutions, state and Federal." Id. at 1207–08 (quoting City of Tacoma v. Taxpayers of Tacoma, 307 P.2d 567, 577 (Wash. 1957)).

governments to comply with federal law. Or a state official may want to improve local compliance, perhaps by providing additional funding to local governments, but depend on the legislature to authorize that funding.[374] Structural approaches to abdication must address these constraints.

As a preliminary matter, very little doctrine governs whether federal law can relax constraints imposed by state law. As Abbe Gluck has observed—in the slightly different context of state agencies that lack state law authority to comply with federal law—it is an open question whether Congress can empower state actors with authority they otherwise lack under state law.[375] Erin Ryan has called regulatory fields that implicate both federal and state laws an "interjurisdictional gray area."[376] Despite a lack of doctrine, a handful of scholars have examined this question and analyzed whether and how federal law can open the "black box" of a state and empower state or local officials to comply with federal law or otherwise cooperate with the federal government. No one has yet considered the question in the context of abdication, but this related analysis is helpful nonetheless.

Hills, in his seminal piece on "dissecting the state," considered whether federal law can liberate state and local officials from the constraints of state law.[377] Hills resists the assumption that federal law, generally in the context of federal grants, takes states as they are and instead suggests a rule by which courts presume state and local actors are empowered to spend federal dollars unless the state legislature explicitly prevents it.[378]

Philip Weiser has proposed a different approach, forged from the context of state laws that fail to adequately *enable* state actors to comply with federal laws.[379] He suggests that courts adopt a standard analogous to the reverse-*Erie* doctrine[380] and construe state law to empower state

374. After Idaho was sued for violating the Sixth Amendment right to counsel, the Idaho governor appealed to the Idaho legislature in his State of the State for more money to fund indigent defense programs in Idaho's counties. KBOI News Staff, supra note 208.

375. Gluck, [National] Federalism, supra note 1, at 2037–38; see also Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 260–61 (2011) (holding a state agency may sue state actors in federal court to enforce compliance with federal statutes, but declining to address the extent of Congress's power to "affect the internal operations of a State").

376. Ryan, supra note 298, at 567–84.

377. Hills, Dissecting the State, supra note 17, at 1201.

378. Id. at 1232–52.

379. Weiser himself focuses on the Telecommunications Act. See Weiser, Constitutional Architecture, supra note 169, at 677–81 (explaining why theories of state empowerment based on contract, preemption, and Hills's presumption proposal fail to sufficiently authorize state agencies to comply with the Telecommunications Act).

380. The reverse-*Erie* doctrine holds that "the Supremacy Clause empowers, and indeed requires, state courts to exercise jurisdiction in federal causes of action." Id. at 682. Further, "where state courts lack authority to enforce an important aspect of a federal right—say, providing a jury trial or certain equitable remedies—reverse-*Erie* principles require that the state court rely on federal authority to supplement its ordinary practice."

agencies to comply with federal law (even if the text of that state law does not do so explicitly) unless the state has a "valid excuse" for structuring itself differently.[381] Weiser's more muscular proposal is premised in part on the idea that cooperative federalism laws allow—in the language of Albert O. Hirschman—"exit":[382] States can withdraw from traditional cooperative federalism programs like cash assistance and Medicaid if they are willing to pass up the federal dollars that flow through those programs.[383] Just as reverse-*Erie* provides an exception to the maxim that federal law must take state courts as it finds them,[384] so too do Weiser's and Hills's proposals seek to create an exception to the "widespread assumption" that federal law must take *states* as it finds them.

Davidson offers a still different perspective: How do we treat state laws that interfere with federal–local cooperation? He describes the many ways in which the federal government cooperates directly with local governments, through both direct regulation and federal grant money, in areas of education, telecommunications, immigration, housing, employment, and so on.[385] He notes that federal empowerment of local government "is increasingly at odds with the Court's revival of state sovereignty as the lodestar of its federalism jurisprudence."[386] But Davidson argues that the values the Court channels through its federalism jurisprudence—promoting efficiency, checking governmental tyranny, and reinforcing community and democratic participation—also support federal empowerment of local governments.[387] To further those ends, Davidson supports judicial deference to federal–local cooperation, even in the face of state law disagreement.[388]

Id. at 684; see also Kevin M. Clermont, Reverse-*Erie*, 82 Notre Dame L. Rev. 1, 4 (2006) (describing the reverse-*Erie* doctrine and the choice between state and federal law).

381. Weiser, Constitutional Architecture, supra note 169, at 681–93 (proposing courts and state agencies "should conclude that implementing federal law is compatible with a state agency's charter, provided that the state agency does not have to fundamentally change its form and . . . enactment after passage of the federal scheme could preclude [it] . . . from taking the heretofore unauthorized action").

382. Id. at 704–07.

383. Jim Rossi sees a similar problem—that is, state constitutions that constrain state and local agencies' ability to enforce federal law—but suggests a more state-centered approach. See Jim Rossi, Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards, 46 Wm. & Mary L. Rev. 1343, 1370–83 (2005). Rossi suggests that state law and state courts, rather than federal courts employing the Supremacy Clause, are the better fora for reconciling state constitutional constraints with federal obligations. Id. at 1356–84.

384. As Weiser notes, this maxim is often attributed to Henry Hart. Weiser, Constitutional Architecture, supra note 169, at 683.

385. Davidson, supra note 17, at 965–75.

386. Id. at 1000.

387. Id. at 961–62, 1001 ("[T]he very values on which the Court has relied to limit federal power in the face of state resistance support preserving federal power when engaged through local governments.").

388. Id. at 1032–33.

These scholars present rich accounts of the thorny federal–state–local relationships implicated by federal law. Their proposals provide both a structural nudge against a state of abdication that disempowers state actors from complying with federal law and a backstop that permits states to order their internal subdivisions as they choose. That backstop does allow states to organize their internal governments in a way that perpetuates the front-end, structural barriers to compliance described in Part II, but it also preserves state sovereignty to order its internal affairs. And no matter the internal state structure, no account proposes lifting *liability* from the states.

These accounts provide a helpful starting point, but they need some adapting to fit the context of abdication. First, abdication extends these accounts beyond cooperative federalism schemes. Abdication requires that not only federal statutory law (like federal election laws) but also federal constitutional law (like the Sixth and Eighth Amendments) empower state actors beyond the limits of state law. Second, Weiser's account (and perhaps Hills's account as well) is premised on the idea that states can choose to cease administering those policies. States may withdraw from some federal laws, like the public-assistance laws and other cooperative federalism laws enacted pursuant to Congress's Spending Clause authority, but they may not decline to enforce constitutional standards like the Sixth and Eighth Amendments or the federal election laws.[389] Tailored to abdication, these accounts cannot be premised on "exit."

3. *Remedying Abdication.* — Finding liability for noncompliance in an abdication context is one part of the solution; remedying it is another. The remedy, especially of an institutional suit, "is commonly perceived as the key to the success or failure of the litigation."[390] Earlier, this Article described three components of abdication: (1) state refusal to take responsibility for local administration, (2) state refusal to monitor or supervise local administration, and (3) state belief that it has no authority to course correct local noncompliance.[391]

Remedies for abdication-related noncompliance should account for all of those components. As one voting rights advocate put it,

> A court order or settlement agreement that doesn't mandate state supervision of the local entities that have the real, concrete, frontline responsibility to implement what an agreement requires will not be effective. States must work with local

389. Federal election laws, for example, are enacted pursuant to Congress's Elections Clause authority, which permits Congress to require the states to take account without attaching federal dollars. See Weinstein-Tull, Election Law Federalism, supra note 11, at 762–64.

390. William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 638–39 (1982).

391. Supra text accompanying notes 28–29.

> entities to make sure they are invested in the implementation and receive education about performing necessary responsibilities. With state supervision, those responsibilities become institutionalized as part of the agency infrastructure—just like any other agency responsibility.[392]

In other words, a court order or settlement agreement that does not mandate state supervision of its local governments will likely not result in local compliance. Zimmerman has similarly observed that local governments are more likely to ignore state mandates in states with limited supervisory resources.[393] Courts should therefore clarify, in their orders, not just that states are ultimately responsible for local noncompliance, but also that they must monitor local administration and that they are authorized to bring their local governments into compliance.

An example of a remedy that addressed each factor described above comes from a consent decree the United States reached with the State of Wisconsin in March 2012.[394] Wisconsin, which delegates the responsibility for transmitting absentee ballots to its municipalities, had violated UOCAVA because its municipalities failed to timely transmit some ballots.[395] In order to prevent noncompliance for the then-upcoming 2012 federal elections, the consent decree both explicitly enumerated the powers and duties of various state officials (emphasizing state responsibility)[396] and imposed stringent reporting obligations that required state officials to closely monitor whether its municipalities complied with the federal law (requiring state monitoring).[397] Although the consent decree does not explicitly address whether state law empowers state officials to monitor the municipalities in this way, the decree itself implicitly empowers those state officials (clarifying state authority).[398]

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392. E-mail from Lisa Danetz, Legal Dir., Demos, to Justin Weinstein-Tull, Grey Fellow & Lecturer in Law, Stanford Law Sch. (Mar. 29, 2016) (on file with the *Columbia Law Review*).

393. Zimmerman, supra note 236, at 7 ("If the state has limited supervisory resources, local governments may ignore state mandates in the belief they will not be enforced.").

394. Consent Decree at 2–3, 11–14, United States v. Wisconsin, No. 3:12-cv-00197-wmc (W.D. Wis. Mar. 23, 2012), http://www.justice.gov/sites/default/files/crt/legacy/2012/03/28/wi_uocava_cd12.pdf [http://perma.cc/3CCL-DMUK].

395. Id. at 4–5.

396. Id. at 2–3 (defining the formal roles of the state, the municipal clerks, the Wisconsin Government Accountability Board, and that Board's members).

397. Id. at 11–14 (requiring Wisconsin state officials to periodically survey the state's municipalities to ensure that they are prepared to comply with the federal law, collect compliance data from the municipalities, and transmit that data to the United States).

398. In briefly describing this consent decree, I skirt a vibrant debate on the constitutionality and feasibility of complex institutional remedies imposed against states and state officials. See Sandler & Schoenbrod, supra note 175; Fletcher, supra note 390. In a work in progress entitled *Federal Rights, Coordination Remedies, and the Reproduction of Inequality*, I explore in greater depth the remedial challenges noncompliance with federal law presents in light of horizontally and vertically decentralized states. Justin Weinstein-Tull, Federal Rights,

4. *Federal Abdication.* — This Article has largely focused on *state* abdication, and what a coherent judicial response might look like. But there is a story to tell about *federal* abdication as well. The federal government enacts these laws but relies on states to administer them, fails to fully fund them,[399] and imperfectly enforces compliance.[400] This section briefly suggests ways that the federal government could ensure greater compliance with its own laws, short of administering them itself.

First, Congress could address abdication by encouraging greater federal–local cooperation. Congress could authorize federal employees to work directly with local actors—having been delegated responsibilities by the state—to improve compliance with federal law. Karen Tani, in her rich work on the history of rights language in public-assistance administration, describes the ways that federal actors, up against intransigent or uninterested states, worked directly with local actors to improve local administration of federal social security programs.[401] Federal agents could make greater efforts to work around state abdication along these lines.

Congress could also authorize more federal programs to flow directly through local actors, rather than through states. Davidson has written about ways in which the federal government can cooperate productively and directly with local governments, rather than through states.[402] Although this approach would foster federal–local interaction, it could also introduce more enforcement problems by pushing compliance monitoring down to the local level. This approach would require the federal government to expend more resources overseeing local-government compliance.

Second, Congress could better account for abdication by requiring increased state accountability. That increased accountability should consist of requirements that any state delegating its federal responsibilities to local governments must: (1) ensure state officials have the authority to correct local noncompliance when necessary,[403] (2) actively monitor local

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Coordination Remedies, and the Reproduction of Inequality (unpublished manuscript) (Mar. 21, 2017) (on file with the *Columbia Law Review*).

399. See supra notes 172–175 and accompanying text (examining federal funding of public-assistance, federal election, indigent-defense, and ADA programs).

400. See, e.g., supra note 174 and accompanying text (discussing the federal government's efforts to ensure state compliance with the Sixth Amendment).

401. Tani, supra note 34, at 356–58 (describing the ways in which federal actors used informational campaigns, training, and professional connections to increase the professionalism of local administration of social security programs). Tani also describes a concerted effort on the part of federal actors to use explicit rights language to elevate the importance of professional administration of public-assistance programs at the state and local level. Id. at 358.

402. See generally Davidson, supra note 17, at 971–75.

403. Ensuring sufficient state authority to correct local noncompliance might consist of a federal cause of action that states could use against noncompliant local governments. Courts have in the past noted that the NVRA, for example, does not provide such a cause

compliance and report that information to federal authorities, and (3) acknowledge ultimate responsibility for compliance.[404] In addition, because abdication can make local noncompliance difficult to find, Congress should authorize a federal administrative body—whether enforcement or cooperative in nature (or both)—to work with and monitor states and ensure that abdication does not obscure noncompliance at the local level.

Finally, Congress should take seriously the idea that unfunded mandates on states are likely to be abdicated to local governments. This is true of federal statutes that impose unfunded mandates (like the ADA) and of constitutional unfunded mandates (like the Sixth and Eighth Amendments).[405] Although funding statutory requirements often enters the political debate, funding federal constitutional requirements rarely does.

C. *Beyond Abdication: Three Outstanding Questions*

Permit me now to wade into more speculative waters. Abdication raises a number of important, difficult questions about states and their relationships with both local governments and the federal government, discussed below.

1. *Why Do States Abdicate?* — This Article has avoided characterizing state rationales for abdication. Nevertheless, we should think about what might motivate a state to abdicate its responsibilities to better understand how to encourage states to embrace their federal responsibilities. Here, I suggest four ways of characterizing state motivation to abdicate federal responsibilities to local governments.

a. *The Thoughtful State.* — States may intentionally abdicate their federal responsibilities because they genuinely believe that local governments will best administer those responsibilities and that supervision is unnecessary.

Scholars and courts recognize serious benefits from policy decentralization. Local control over public education, for example, is a part of the country's fabric and, according to the Supreme Court, "essential both to the maintenance of community concern and support for public schools

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of action. See, e.g., United States v. Missouri, 535 F.3d 844, 851 n.3 (8th Cir. 2008). And the Supreme Court has been reluctant to create a cause of action when none is explicitly granted. See Armstrong v. Exceptional Child Ctr., 135 S. Ct. 1378, 1384 (2015) (holding the Supremacy Clause does not grant a cause of action against states for private actors to enforce federal law); see also Weinstein-Tull, Election Law Federalism, supra note 11, at 797 (calling for Congress to permit states to sue their local governments to increase compliance with federal election laws).

404. The Medicaid Act contains some of these requirements. If a state delegates its administrative responsibilities to local governments, it must also create "methods to keep itself . . . informed of the adherence of local agencies to the State plan provisions" and "[t]ake corrective action to ensure their adherence." 42 C.F.R. § 435.903 (2016).

405. See, e.g., supra notes 173–175.

and to the quality of the educational process."[406] Many believe local control over elections is similarly important.[407] The thoughtful state seeks these benefits and genuinely believes that its local governments will comply with the federal laws without supervision.

b. *The Willful State.* — States may intentionally abdicate their federal responsibilities to frustrate federal law and because they believe they can best do so by sending those responsibilities to the local level, where noncompliance is harder to detect.

Consider the case of marriage equality in Kentucky.[408] Prior to the *Obergefell* decision, Kentucky had no reason to believe that its delegation of marriage-license responsibilities to local governments could operate to frustrate federal law. But once the decision came down and local clerks refused to comply, it became clear that that abdication could be a convenient and politically palatable way to allow small, conservative communities to avoid issuing marriage licenses to same-sex couples. Although Kentucky's abdication may not have initially been a way to avoid complying with the Constitution, it became a willful accommodation of religious clerks and communities.

Or states may abdicate willfully not to frustrate federal law, but because it is politically advantageous for them to do so. Jonathan Macey has suggested that, at the federal level, Congress delegates policymaking authority to state regulators "when the political support it obtains from deferring to the states is greater than the political support it obtains from regulating itself."[409] The same can be true of states. Local autonomy is

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406. See Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) (overturning a federal district court's order imposing a multidistrict busing desegregation scheme despite no evidence of a multidistrict segregation problem, in part because "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools").

407. Election jurisdictions differ dramatically in size, and local governments can tailor the elections process to local needs. See David C. Kimball & Brady Baybeck, Are All Jurisdictions Equal? Size Disparity in Election Administration, 12 Election L.J. 130, 130 (2013) (noting the "tremendous disparities in local election administration"). The Presidential Commission on Election Administration refers to this as a "one size does not fit all" problem. See Presidential Comm'n on Election Admin., supra note 198, at 9 ("Given the complexity and variation in local election administration, the argument goes, no set of practices can be considered 'best' for every jurisdiction. . . . There is certainly merit to this position; no one can doubt the limits of nationwide reforms . . . when local institutions, rules, and cultures differ considerably."). Local administration of elections may also prevent voter fraud and improve accountability. Some members of Congress expressed these views during the debates over the Help America Vote Act, which sought to modernize and standardize the voting process. See H.R. Rep. No. 107-329, at 31–32 (2001) (discussing the role local control plays in preserving election integrity).

408. See supra notes 156–159 (describing the case of the Kentucky clerk who refused to issue marriage licenses to same-sex couples).

409. Jonathan R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 Va. L. Rev. 265, 267 (1990).

politically popular.[410] In some circumstances, state legislators and officials may be able to maximize their political support by enacting state policies that abdicate federal responsibilities to local governments.

c. *The Broke State.* — States may abdicate their federal responsibilities because they simply cannot afford to comply with them themselves. The federal laws highlighted in Part I are expensive to administer. Federal election laws like the NVRA require states to fund their own compliance with the laws.[411] In addition, we know that states delegate to local governments as a way to save money. As mentioned above, states tend to delegate more responsibilities to their local governments during times of recession.[412]

State abdication, therefore, may be a result of burdensome and unfunded responsibilities the federal government places on states. Those obligations arise from constitutional guarantees as well as statutory ones. The Sixth Amendment right to counsel, for example, is an unfunded judicial mandate on the states.[413] The Eighth Amendment's freedom from cruel and unusual punishment is similarly an unfunded judicial mandate on state prison conditions.[414]

d. *The Inattentive State.* — Finally, states simply may not care enough to supervise local compliance. States delegate numerous responsibilities to local governments—both federal and state responsibilities—and many take a hands-off approach to those delegations.

Of course, these state characteristics—thoughtfulness, willfulness, poverty, and inattentiveness—are not mutually exclusive. The same state may abdicate in one policy area because it hopes to frustrate federal law but abdicate in another because it cannot afford to comply.

2. *Do States Have a Duty to Supervise?* —Borrowing again from the literature on administrative law, we should consider whether there is a duty for states to supervise their local governments, even in the absence of noncompliance. In a recent article, Gillian Metzger argued that the Take Care Clause of the Constitution and general principles of delegation and accountability create a constitutional duty for federal administrative agencies to supervise administration of their federal law charge.[415] This constitutional duty "impose[s] a constitutional barrier to administrative

410. See, e.g., Richard Briffault, The Role of Local Control in School Finance Reform, 24 Conn. L. Rev. 773, 774 (1992) (describing the long history and popularity of local control over education); Richard Briffault, Smart Growth and American Land Use Law, 21 St. Louis U. Pub. L. Rev. 253, 267–68 (2002) (describing why local control over land use is politically popular).

411. See supra note 173 and accompanying text.

412. See supra note 274 and accompanying text.

413. See supra note 174 and accompanying text.

414. See supra note 175 and accompanying text.

415. Gillian E. Metzger, The Constitutional Duty to Supervise, 124 Yale L.J. 1836, 1874–99 (2015).

arrangements that diffuse governmental power to such a degree that such a minimal level of higher-level oversight is prevented."[416] Metzger envisions the duty to supervise to attach to administrative agencies that delegate to private corporations or administer public institutions, or even to agencies that delegate federal responsibilities to states in the context of cooperative federalism programs.[417]

As noted above, states now play an important role as agents of the federal government.[418] Gluck contends even that the most important powers possessed by states are granted by federal law—or in other words, "federalism by the grace of Congress."[419] Because states take such a significant role administering federal law, and because Congress relies on states for their expertise, Gluck wonders whether federal law should recognize a form of *Chevron* deference for state implementation of federal law.[420]

In some ways, Metzger's constitutional duty to supervise is a necessary counterpart to Gluck's state *Chevron* deference. If states have become important administrators of federal law, so much so that they deserve deference in their administration, then we should take seriously the possibility that states also have a standing constitutional duty to supervise their administration of federal law. That is, if they choose to delegate their federal law responsibilities to local governments, they then have a duty to supervise local administration of those laws. Where *Chevron* for states embraces and encourages a state's ability to tailor federal law to state needs, a state duty to supervise constrains a state's ability to use its internal ordering to frustrate federal law. The two in concert promote the best kinds of state tailoring while preventing the worst.

It might seem far-fetched to suggest that the Constitution would protect federal law from state misadministration.[421] But states, and not the federal government, are best able to distinguish state from local authority. Drawing the line between what states are responsible for and what local governments are responsible for is nearly impossible, which makes abdication particularly difficult to police. Indeed, that blurriness is what

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416. Id. at 1901.

417. Id. at 1913–26.

418. See supra notes 327–328 and accompanying text.

419. Gluck, [National] Federalism, supra note 1, at 2003.

420. See id. at 2024–26 (concluding that the "possibility of [*Chevron*-like] deference for state implementers is not an easy question," but since "[s]tate actors are not accountable to Congress or the President as federal agencies are . . . that alone might be a reason for eschewing *Chevron*-like deference for them").

421. It might seem especially far-fetched to suggest that the Take Care Clause of the Constitution could create a duty for states. But Metzger's second justification, grounded more generally in principles of delegation and accountability, is broader and a better fit. See Metzger, supra note 415, at 1903–04 (noting that while the Take Care Clause duty to supervise would apply only to executive agencies, the delegation and accountability justification could apply more widely, including to the President and potentially Congress).

makes abdication such a powerful tool for escaping federal responsibility. Perhaps, then, a federal constitutional duty on states to supervise their local administration of federal law is the most administrable solution.

Furthermore, we appear to be in a period of flux with respect to individual rights. Kenji Yoshino has documented the contraction of Fourteenth Amendment rights throughout the 1990s and 2000s, and the Court's unease with major expansions of individual and group rights.[422] At the same time, many of our most pressing concerns—especially criminal justice concerns, like police reform, right to counsel, civil forfeiture, and penal debt reform[423]—seem susceptible to structural, institutional reform litigation rather than individual or group-rights-expanding litigation. It is therefore worthwhile to consider how that structural litigation might proceed and how it will run up against internal state ordering that creates conditions like abdication.

3. *What Other Structural Barriers Exist?* — Abdication helps us to be clear eyed about the state structural barriers that frustrate compliance with cooperative federalism laws. Each state is a complex piece of machinery with many internal moving parts. As Gerken has noted, adapting a quote by Kenneth Shepsle, governments are a "they," not an "it."[424] Abdication, which deals with *vertical* coordination within a state, is a particularly vivid example of this maxim.

But federal law also implicates *horizontal* intrastate coordination that can erect barriers to compliance with federal law. Drawing from our case studies, consider the NVRA, which imposes responsibilities on a number of state actors. Each state must designate a "chief State election official" to be "responsible for coordination of State responsibilities" under the NVRA.[425] Many states have designated their Secretaries of State in that

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422. See Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 748 (2011) ("[T]he Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, . . . limited Congress's capacity to protect groups through civil rights legislation[,] [and] . . . repeatedly justified these limitations by adverting to pluralism anxiety. These cases signal the end of equality doctrine as we have known it."); see also id. at 755–76 (documenting "the exhaustion of traditional group-based equal protection" through limitations on heightened scrutiny, disparate impact law, and the Fourteenth Amendment enforcement power).

423. Local governments administer many important programs that shape our criminal justice system. They often administer state trial courts, for example, sometimes with their own funding. See Malega & Cohen, supra note 160, at 8 tbl.8 (reporting that forty-one percent of state court trial-level judge salaries come from a combination of state and local funding sources and only fifty-eight percent of states fully fund trial-level judge salaries).

424. Heather K. Gerken, Keynote Address: What Election Law Has to Say to Constitutional Law, 44 Ind. L. Rev. 7, 9–10 (2010) (describing how election law scholars can enrich constitutional law scholarship by "imagin[ing] institutions as a collection of political actors" (quoting Kenneth A. Shepsle, Congress Is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Int'l Rev. L. & Econ. 239, 239 (1992))).

425. 52 U.S.C. § 20509 (Supp. 2015).

role.[426] This designation gets a state only partway to compliance with the NVRA, however. The NVRA requires public-assistance agencies, state disability-services offices, and DMV offices to register applicants to vote.[427] But secretaries of state do not administer those offices: Public assistance offices and state disability services offices are often administered by cabinet-level directors—the director of the department of health and human services, for example—appointed by the governor. DMVs are typically administered by a different state official. Neither director is subject to the authority of the secretary of state.

Cabinet-level state actors will not always agree. Disagreement may be especially sharp when the federal issue at hand is a partisan one (like elections) and when the state is highly unbundled.[428] Intrastate conflict is likely to arise when state officials have allegiance to different political parties or constituencies. That conflict could result in a state-level stalemate that creates noncompliance with federal law.[429] Federal courts are not likely to indulge these intrastate conflicts. But as discussed above, intrastate conflict can nonetheless create powerful front-end, prelitigation barriers to compliance with federal law.[430] What is a DMV director to do, given an intransigent secretary of state and a governor unwilling to spend political capital on compliance? She cannot sue in federal court, as a state typically does not have standing to sue itself.[431] The lack of case law in this area increases risk of noncompliance with the federal law.[432]

We are only beginning to understand these state structural barriers. This Article is the first to explore vertical coordination problems. A small handful of scholars have written on horizontal coordination problems.[433] Very little empirical or descriptive work explores these structural barriers.

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426. Election Administration at State and Local Levels, Overview, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx [http://perma.cc/C4G7-RDDC] (last updated June 15, 2016) (noting that twenty-four states have designated their secretaries of state as the states' chief elections officials).

427. See 52 U.S.C. § 20504 (discussing motor-vehicle offices and disability-services offices).

428. A state is unbundled when many of its high-level state officials are popularly elected rather than appointed by the governor. See Christopher R. Berry & Jacob E. Gersen, The Unbundled Executive, 75 U. Chi. L. Rev. 1385, 1396 (2008) ("When two similar policies are produced by different executive authorities without coordination, these policies might conflict or at least not work as well in tandem.").

429. Fahey has done interesting work on intrastate conflict in the context of the Affordable Care Act. See Bridget A. Fahey, Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act, 125 Yale L.J. Forum 56, 57 (2015), http://www.yalelawjournal.org/pdf/Fahey_PDF_zhtyvuqa.pdf [http://perma.cc/DDK9-LVFL].

430. See supra section II.A.

431. Cf. Michael Herz, United States v. United States: When Can the Federal Government Sue Itself?, 32 Wm. & Mary L. Rev. 893, 897 (1991).

432. See supra section III.A.2.

433. See supra notes 373–384.

Whereas state sovereignty and home rule have received scholarly attention, the varied administrative relationships within states have not. How do states monitor responsibilities they delegate to their local governments? What are the tools—legal and political, formal and informal—that states use to bring their local governments in line? What other state structural barriers might exist, that we are not yet aware of?

CONCLUSION

This Article has argued that abdication illustrates important, problematic, and overlooked aspects of our system of federalism: Legal and political relationships between states and local governments can operate to limit federal power. States can frustrate federal law functionally, even if unintentionally, by abdicating federal responsibilities to local governments. Abdication forces us to think about the overlap between the actors subject to federal law and those responsible for administering it. In important areas of federal policy, these actors only partly overlap. That mismatch, and the ways in which states and courts deal with it, results in noncompliance with important federal laws.

We cannot understand the logic of federalism and decentralization without also understanding the varied, inconsistent, and deeply unfederal relationships between states and their local governments. And any account of federalism that accounts for these state–local relationships must grapple with new questions: Do states abdicate intentionally to frustrate their obligations under federal law? Who speaks for a fractured state? As federal law requires federal and state governments to partner more and more closely in administering federal law, these questions—both doctrinal and functional—will arise with greater urgency.