

Agonistic Federalism

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It has been called the “oldest question” of American constitutional law: How does the national government deal with and treat its sovereign subnational states? Judges and scholars have tried to capture this dynamic via theories of “dual federalism,” “process federalism,” “cooperative federalism,” or “federalism by integration.” But all these models suddenly seem to have been superseded, and perhaps even rendered obsolete, by an unexpected, recent step-change in the intensity of federal-state conflicts. In the place of longstanding federalism models, this Article demonstrates that an underappreciated form of intergovernmental relations has emerged, or at least re-emerged. We call this model “agonistic federalism.” The Article’s central aim is to introduce and theorize this form of intergovernmental relation by offering a parsimonious definition, a tally of its historical precursors (as well as a recognition of its rupture from more recent forms), a careful accounting of its current and future vectors, and a cartography of its underlying political economy and potential futures.

We define “agonistic federalism” as a zero-sum, no-holds-barred style of contestation between the national government and states that is characterized by mutual, partisan-driven antagonism and intolerance. It is “zero-sum” in the sense that political coalitions use national and state power not just to advance policy preferences, but to lock up decisional authority, or power as such. It is “no-holds-barred” insofar as it is characterized by escalating assertions of formal sovereign power in disregard of judicial precedent, political convention, and doctrinal constraints. So defined, contemporary agonistic federalism can be traced in the efforts of the national government to eliminate state and local governments’ power to adopt policies disdained by the dominant national coalition, even in areas of traditional state competence. As this hardball style of intergovernmental politics radiates from the center today, it is likely to catalyze increasingly assertive countervailing efforts at self-defense by states. These too press against extant legal boundaries.

Understood as a two-sided dynamic, agonistic federalism transforms the incentives, tactics, and ambitions animating federal-state relations. While resonating with certain antebellum-era struggles over tariff policy, fugitive

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slaves, and control of the territories, contemporary agonistic federalism has many novel features. It also generates unprecedented strains upon the American body politic. Mapping the resulting uncertainties, we conclude with a catalog of the unsettled and difficult doctrinal questions thrown up by new tactics of agonistic federalism. The Article also maps the practical, political stakes of this new form of intergovernmental conflict. In so doing, we aim to clarify the stakes of that old question—what actually now makes up “our federalism.”

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We are not going away. We are staying here to liberate the city from the socialists and the burdensome leadership that this governor and that this mayor have placed on this country and what they have tried to insert into the city.

—Secretary of Homeland Security Kristi Noem to
Senator Alex Padilla (CA)¹

Introduction

Federalism has been called the “oldest question” of American constitutional law.² Since the Founding, the relationship between the national government and the several states has been shaped by its constitutional and statutory frames, even as it courses through grooves of partisan contestation at election time, via votes on Congress’s floor, and in conversations between federal and state bureaucrats. In the middle of the nineteenth century, federal-state acrimony famously reached a breaking point, leading to the Civil War. But such intense and overt hostility had long seemed a thing of the past. The first six months of the second Trump presidency, however, saw a sudden—for many, wholly unexpected—acceleration in both tactics and rhetoric from the federal government. This jolt left dominant scholarly models of federal-state relations struggling to keep up, for its destabilizing effect has been greater than the mere sum of its parts.

Here are some snapshots of the new way of doing federalism:

- The state of Maine permits two transgender children to compete in a sporting event; in response, the Department of Agriculture abruptly shuts federal funding for programs that keep low-income children in the state supplied with adequate nutrition.³ In practical effect, the federal government threatens to withhold food from impoverished children unless the state changes its position on an ideologically charged culture-war question. On the President’s

1. Steve Benen, *Democratic Sen. Alex Padilla Forcibly Removed After Trying to Question DHS Secretary Noem*, MSNBC NEWS (June 12, 2025), <https://www.msnbc.com/rachel-maddow-show/maddowblog/alex-padilla-kristi-noem-press-conference-rcna212692> [<https://perma.cc/SA4Q-UYWU>].

2. See *New York v. United States*, 505 U.S. 144, 149 (1992) (characterizing federalism as “perhaps our oldest question of constitutional law”). An excellent recent book on a related set of doctrinal questions uses the same phraseology. See generally RICHARD PRIMUS, *THE OLDEST CONSTITUTIONAL QUESTION: ENUMERATION AND FEDERAL POWER* (2025).

3. Erin Rhoda, Callie Ferguson, Jennifer Smith Richards & Jodi S. Cohen, *Two Transgender Girls, Six Federal Agencies. How Trump Is Trying to Pressure Maine into Obedience*, ME. PUB. (Mar. 12, 2025), <https://www.mainepublic.org/politics/2025-03-12/two-transgender-girls-six-federal-agencies-how-trump-is-trying-to-pressure-maine-into-obedience> [<https://perma.cc/U5H9-9GN9>]; Anmarie Hilton, *Maine AG Sues Trump Administration for USDA Funding Freeze that Hit School Meals*, ME. MORNING STAR (Apr. 7, 2025), <https://mainemorningstar.com/briefs/maine-ag-sues-trump-administration-for-usda-funding-freeze-that-hit-school-meals/> [<https://perma.cc/66DY-YF3V>].

behalf, the federal government further demands an apology from Maine's governor before restoring funding.⁴

- The comptroller of New York City is violently seized, roughly handled, and then briefly arrested while trying to escort a non-citizen to a hearing at a Manhattan courthouse.⁵ He is just one of a series of local officials, many of whom were engaged in their official duties, who have been arrested by federal law enforcement.⁶ The Justice Department also warns it will file criminal charges against local and state officials who take actions on immigration at odds with federal preferences.⁷ The Attorney General of New York, who previously pursued a civil case against the incumbent President, is indicted, seemingly at the urging of that President.⁸
- President Trump signs proclamations first mobilizing 2,000 National Guard troops and then 700 Marines to deploy across Los Angeles in the context of protests about immigration policy.⁹ Both the mayor of Los Angeles and the Governor of California strongly condemn the move.¹⁰ Deployments follow in Portland, Chicago, and Minneapolis. In the course of the Minnesota deployment, two U.S. citizens participating in observation of immigration operations—Renee Good and Alex Pretti—are shot numerous times and killed by federal immigration agents during encounters in which there are substantial doubts about whether either one posed any threat to those agents, and where the use of deadly force is plausibly thought by many to be unjustified.¹¹ In both the Good case

4. *Maine v. U.S. Dep't of Agric.*, 778 F. Supp. 3d 200, 210 (D. Me. 2025) (citation omitted).

5. Luis Ferré-Sadurní, *Brad Lander Is Arrested by ICE Agents at Immigration Courthouse*, N.Y. TIMES (June 17, 2025), <https://www.nytimes.com/2025/06/17/nyregion/brad-lander-immigration-ice.html> [<https://perma.cc/JPN7-HCKU>].

6. *Id.*; see also *infra* text accompanying notes 175–81.

7. See Memorandum from Emil Bove, Acting Deputy Att'y Gen., U.S. Dep't of Just., to all U.S. Dep't of Just. employees (Jan. 21, 2025) [hereinafter Bove Memorandum], <https://www.politico.com/f/?id=00000194-94d6-dd75-adfc-9dd744dc0000> [<https://perma.cc/4WGW-YB86>] (threatening that the government “shall investigate incidents involving [‘failing to comply with lawful immigration-related commands’] for potential prosecution”).

8. See Hurubie Meko, *What to Know About the Federal Indictment Against Letitia James*, N.Y. TIMES (Oct. 10, 2025), <https://www.nytimes.com/2025/10/10/nyregion/james-indictment-what-to-know.html> [<https://perma.cc/7WH9-7ZVT>] (reporting that New York Attorney General Letitia James faces a criminal charge after winning a case against Trump, reflecting Trump's retaliation pattern).

9. John Yoon, *Marines to Join National Guard Troops Protecting ICE Agents in Los Angeles*, N.Y. TIMES (June 11, 2025), <https://www.nytimes.com/2025/06/11/us/marines-los-angeles-immigration-protests.html> [<https://perma.cc/SE4R-26FZ>].

10. *Id.*

11. See Bora Erdan, Devon Lum, Helmuth Rosales, Elena Shao, Haley Willis & Ashley Wu, *Timeline: A Moment-by-Moment Look at the Shooting of Alex Pretti*, N.Y. TIMES (Jan. 24, 2026),

and the Pretti case, federal officials move quickly to label publicly the deceased as a “domestic terrorist,” seemingly without evidence to that effect or making any effort at inquiry into the circumstances of their death.¹² Indeed, in both cases, federal agencies subsequently block state and local investigations into potential criminal violations at issue in federal agents’ use of deadly force, while seemingly undertaking no investigation of their own.¹³ To the contrary, an FBI official who attempts an investigation into the Good killing is pushed out.¹⁴ For all practical purposes, the federal government has killed two citizens for engaging in First Amendment-protected activities, and prevented any official investigation—let alone any process of criminal accountability.

- The national government has long provided certain “public goods,” which the states are poorly situated to supply because of scale effects or what’s called “Tiebout competition”¹⁵ between the states. One of these is weather forecasting. But thanks to cuts in the National Weather Service (NWS) and the National Oceanic and Atmospheric Administration (NOAA), the National Weather Service has to move to a “degraded” service from its 122 offices nationwide.¹⁶ NOAA loses thousands of positions, some fifteen percent of its staff.¹⁷ As a result, when tornadoes strike Kentucky in May 2025, NWS offices lack staff to keep up round-the-clock coverage.¹⁸ A similar (and similarly grim) story follows flooding

<https://www.nytimes.com/interactive/2026/01/24/us/minneapolis-shooting-alex-pretti-timeline.html> [https://perma.cc/U6SZ-M6DN].

12. See Jonah E. Bromwich, *White House Use of ‘Domestic Terrorist’ Doesn’t Match Legal Reality*, N.Y. TIMES (Jan. 28, 2026), <https://www.nytimes.com/2026/01/28/us/trump-minnesota-protesters-domestic-terrorists.html> [https://perma.cc/QDQ7-DE8H].

13. See Ernesto Londoño, *Once Again, Federal Officials Exclude Minnesota from Investigation of a Fatal Shooting*, N.Y. TIMES (Jan. 25, 2026), <https://www.nytimes.com/2026/01/25/us/federal-exclude-minnesota-shooting-investigations.html> [https://perma.cc/EBU4-HVUT].

14. See Alan Feuer & Glenn Thrush, *F.B.I. Agent Who Tried to Investigate ICE Officer in Shooting Resigns*, N.Y. TIMES (Jan. 23, 2026), <https://www.nytimes.com/2026/01/23/us/politics/fbi-agent-ice-shooting-renee-good.html> [https://perma.cc/NZ9M-ZR4A].

15. See John D. Donahue, *Tiebout? Or Not Tiebout? The Market Metaphor and America’s Devolution Debate*, J. ECON. PERSPS., Fall 1997, at 73, 74–75 (explaining theory of intergovernmental competition first outlined by Tiebout).

16. Lisa Friedman, *Weather Service Prepares for ‘Degraded Operations’ amid Trump Cuts*, N.Y. TIMES (Apr. 16, 2025), <https://www.nytimes.com/2025/04/16/climate/national-weather-service-forecast-doge-trump.html> [https://perma.cc/QK3J-9KMB].

17. Rachel Frazin, *NOAA Set to Fire 1,029 More Employees*, THE HILL (Mar. 10, 2025), <https://thehill.com/policy/energy-environment/5186175-noaa-staffing-cuts/> [https://perma.cc/V63V-PUGS].

18. Christopher Salas, *Tornadoes Expose Staffing Crisis at National Weather Service*, KCCI DES MOINES (May 20, 2025), <https://www.kcci.com/article/tornadoes-expose-staffing-crisis-at-national-weather-service/64817880> [https://perma.cc/5XBM-65L8].

along the Guadalupe River in Texas in July 2025.¹⁹ Increasing rates of forecasting errors not only raises the expected damage incurred to physical structures, but imply a growing toll of future weather-related deaths in coming years.

Each one of these national actions could mark a sudden change in the quality of federal-state relations. Together, they constitute what can fairly be described as a paradigm shift in “our federalism.”

This Article develops a model of “agonistic federalism” to frame and analyze these dramatic pivots in federal-state relations. By introducing this new model of federalism, this Article aims to contribute to scholarship and public understanding along several distinct margins. First, there is analytic value, we posit, in offering a clear and parsimonious definition of this new form; a careful accounting of its present and future vectors; and at least a tentative cartography of its potential futures. Second, while this model has historical precedents in antebellum struggles over tariff policy, fugitive slaves, and the territories, we stress how contemporary agonistic federalism is something new as a matter of recent American politics. Finally, our ambition is to sift out and clarify the gamut of legal questions freshly emerging in the trenches of agonistic federalism—with particular attention to questions raised for states facing unprecedented measures deployed by the national government.

To preview the first of these contributions, it is helpful to set forth at the threshold a bare definition of our key term, and to relate it to earlier literatures. We define agonistic federalism as a *zero-sum, no-holds-barred style of contestation between the national government and states characterized by mutual, partisan antagonism and intolerance*. It is a “model” in the sense that it captures a cluster of behavioral regularities and relations between certain institutions that are reasonably (but not perfectly) stable over time. The mode of intergovernmental conflict captured in this model is “zero-sum” insofar as political coalitions are seeking not just to advance their policy preferences but to do so by fighting over decisional authority—they seek not only policy wins, but the power to decide *simpliciter*. Agonistic federalism is “no-holds-barred” because it involves an escalating sequence of aggressive exercises of formal powers, often in disregard of precedent, convention, and doctrinal constraints. At the same time, we stress that agonistic federalism is a matter of “contestation” and not of “conflict.” Once swords are drawn, blood is shed at scale, or sovereignty

19. *Experts Question if Weather Service Was Operating at Its Best Ahead of Texas Floods amid Trump's Cuts*, TIME (July 7, 2025), <https://time.com/7300310/texas-floods-national-weather-service-warnings-debate-staffing-cuts> [<https://perma.cc/KY6V-TEU3>].

divided, we have passed beyond the realm of “federalism” into something else.²⁰

We demonstrate that intergovernmental relations in the second Trump Administration have shifted dramatically in an agonistic direction, leaving behind the dominant models of federalism that legal scholars have developed since the 1950s. This is because the federal government in the second Trump Administration has generally adopted an agonistic mode of governance. While states did not immediately respond in kind, it may well be a question of time before the pressure to match tit-for-tat cannot be resisted. The leading models of federalism—called “dual federalism,” “process federalism” or the negotiated “federalism of integration”—no longer fit the facts. To the extent they were offered not merely as description, but also as normative ideals, they presently seem remote and unlikely ambitions. We offer agonistic federalism as a more tractable and useful description of present dynamics. To be sure, agonistic federalism as we describe it does not offer a normatively attractive or empirically stable model of federal-state relations: It would, indeed, be troubling to suggest as much after the Good and Pretti killings. As in the antebellum period of the nineteenth century, tensions between the federal and state governments may well prove a prelude to more radical change. Our task here is not predicting how the complex and plural forces shaping American constitutional politics will net out over time. Rather, it is offering a parsimonious model of what, at minimum, is a transitional state with profound implications for sovereigns and for individuals alike. For only by understanding our current phase, however evanescent, can we start to plot or theorize a future form of federalism.

To that end, we argue that since the beginning of 2025, three new vectors of intergovernmental action have come to dominate federal-state relations: (1) the weaponization of states’ entanglement in cooperative federalism programs, and their consequent reliance upon—or at least cooperation with—certain forms of federal support; (2) the withdrawal of federal provision of public goods upon which the states have reasonably relied in ways that immediately impose material costs upon states’ residents; and (3) the transformation of policy disputes into matters of criminal law enforcement, or the use of individually targeted punitive measures for policy ends. These three tools run along strongly partisan-coded, ideological

20. On the costs of internal violent conflict, see DAVID ARMITAGE, *CIVIL WARS: A HISTORY OF IDEAS* 6 (2017) (mentioning that “[w]ars within states tend to last longer . . . [and are] more prone to recur”); BARBARA F. WALTER, *HOW CIVIL WARS START AND HOW TO STOP THEM* 33–35, 37–38, 44–45 (2022) (explaining how ethnic cleansing has become symptomatic of recent civil wars). We recognize here that agonistic federalism as we describe it has already led to several tragic deaths, including those of Renee Good and Alex Pretti. By stipulating this bound to our definition, we in no way wish to deny the seriousness of their killings: To the contrary, the fact that agonistic federalism can entail needless death underscores its profoundly problematic normative status.

grooves. They are, more specifically, products of an executive-centered vision of national power closely linked to the second Trump Administration.²¹ That is, they reflect a set of changes in the separation of powers—although implicit in our argument here is the claim that this shift cannot be reduced to a transformation of horizontal, interbranch relations. While there are (contested, and often a century-plus-old) precedents for each of these kinds of federal action,²² the intensity and combined effect of these tactics add up to a novel constitutional formation at least so far as twentieth- and twenty-first-century constitutional law goes. Further, we show that these tactics have begun to generate responses in the states, for example with litigation or in the public square, which in turn have begotten further escalation from the federal government—suggesting that we might already be moving into a vicious circle of accelerating intergovernmental conflict.

We coin the phrase agonistic federalism by drawing loosely upon political theorist Chantal Mouffe’s notion of “agonistic” democracy. On her theory of “agonism,” democratic theory should abjure “[t]oo much emphasis on consensus, together with aversion towards confrontations.”²³ Instead, she stresses the need to strive for “conflictual consensus,” while avoiding a collapse into a violent politics of enmity.²⁴ Like Mouffe, we use the term “agonistic” to capture a form of politics that is not centrally characterized by negotiation, deliberation, or compromise, but rather one driven by aggression, the determination to establish the power to decide at all costs, and a willingness to absolutely subordinate other sovereigns’ and individuals’ interests in so doing.²⁵ Unlike Mouffe, however, we do not

21. On the origins of this vision, see Coral Davenport, *The Man Behind Trump’s Push for an All-Powerful Presidency*, N.Y. TIMES (Oct. 3, 2025), <https://www.nytimes.com/2025/09/29/us/politics/russell-vought-trump-budget.html> [<https://perma.cc/XV3H-NBWQ>].

22. See, e.g., *infra* text accompanying note 186.

23. CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 5–7 (2013).

24. *Id.* at 8; CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 13 (2000) (contending that agonism “involves a relation not between enemies but between ‘adversaries,’ . . . that is, persons who are friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way”). Mouffe’s notion draws explicitly on Carl Schmitt’s idea of the political as being organized in the first instance around the friend/enemy distinction. *Id.* at 13, 49–50; see also CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (George Schwab trans., 2007) (1932) (“The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”). Schmitt’s thought presents many challenges—not the least its connection to the violent antisemitic politics he espoused as a member of the National Socialist party after 1933. See Jennifer Szalai, *The Nazi Jurist Who Haunts Our Broken Politics*, N.Y. TIMES (July 15, 2024), <https://www.nytimes.com/2024/07/13/books/review/carl-schmitt-jd-vance.html> [<https://perma.cc/N56B-R4FY>]. In keeping some distance from Mouffe’s more radical use of the term “agonistic,” we also seek to keep its embrace of a Schmittian version of politics at bay.

25. See Chantal Mouffe, *Democratic Politics and Conflict: An Agonistic Approach*, in *POLITICAL POWER RECONSIDERED: STATE POWER AND CIVIC ACTIVISM BETWEEN LEGITIMACY AND VIOLENCE* 17, 18–19 (Maximilian Lakitsch ed., 2014) [hereinafter Mouffe, *Democratic Politics*] (criticizing liberal theory for its failure to account for “the antagonistic dimension” of

assign a positive normative valence to the term “agonistic.” Nor do we share her implicit assumption that airing and contesting our divisions necessarily leads to greater political stability,²⁶ and we do not assume that the transgressive airing of differences is a necessary element of politics or an intrinsic good. To the contrary, the evidence suggests that contemporary agonistic federalism creates powerful incentives to abandon previous “rules of the road” for intergovernmental relations by eviscerating conventions and legal precedent. It has a centrifugal effect on the republic. In this regard, it is akin to a concept used in the separation-of-powers context running under the label of “constitutional hardball.”²⁷ That concept, however, has generally been used to characterize interbranch and not intergovernmental relations.²⁸ We aim in this Article to primarily describe a distinct set of institutional and legal dynamics with an even more potentially destabilizing character, and (pace Mouffe) underscore the meaningful risk that agonistic federalism spins out of control, precipitating violent forms of political contestation.

In this way, agonistic federalism offers a lens for parsing and understanding contestatory intergovernmental dynamics that fall short of violent rupture—that is, it helps us grasp our world with a parsimonious model, even if it does not offer an attractive normative template for how governments should behave. One of the virtues of an agonistic-federalism lens, indeed, is its capacity to serve as a way of analyzing whether and how “conflictual consensus” slides into something worse. A worry about national unity today is hardly hypothetical. A 2021 poll, for example, found that some 52% of Trump voters and 41% of Biden voters at least somewhat favored

politics, and rejecting “aggregative” or “deliberative” modes of politics); Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RES. 745, 751 (1999) (rejecting Habermas’s account of deliberative democracy on “ontological” grounds); see also Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 53–54 (2022) (noting that what “separates agonism from conventional democratic theories is an ethos that highlights the ontological impossibility of reconciling many forms of political conflict on neutral, consensus-based grounds and its commitment to celebrate and practice political conflict as a means to prevent the antagonism that will result from attempting to settle the fundamental disagreements we have”).

26. Our aim here is not to gloss Mouffe’s extensive and complex set of ideas. Nevertheless, there are traces in her work of resistance to the very possibility of democratic stability. For example, she insists that “[e]very order is the temporary and precarious articulation of contingent practices.” Mouffe, *Democratic Politics*, *supra* note 25, at 17. At the same time, there is a strand of argument that echoes the motions of a Hegelian dialectic, whereby a conflict between two opposing forces produces a new synthesis between those forces. See *id.* at 20 (“[T]he struggle between opposing hegemonic ideas . . . can never be reconciled rationally, [for] one of them need[s] to be defeated.”).

27. The phrase was coined in Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004). See also Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 916–17 (2018) (highlighting the Republican-controlled Senate’s ten-month blockade of President Obama’s Supreme Court nominee, Merrick Garland, in 2016–2017 as an example of recent constitutional hardball by conservatives).

28. This is the focus of the sources cited in note 27.

“states seceding from the union to form their own separate country.”²⁹ Today, a majority of Californians feel the same way.³⁰ One of our most senior and respected constitutional law scholars recently published a book toying gently with the perceived inevitability of national division.³¹ Secession is commonly thought to originate in a desire for economic or political autonomy.³² The magnitude of secession risk, however, depends on the “specific shape of grievance-amelioration policies.”³³ An important question framed by the study of agonistic federalism, therefore, is whether Mouffe’s intuition that a more conflictive and less deliberative or negotiated form of politics mitigates the risk of secession—or whether it increases the likelihood of national fragmentation. Our study of agonistic federalism clarifies the underlying dynamics at issue in that question.

Our notion of agonistic federalism is anticipated by a number of earlier studies of late-twentieth-century federalism in the political science literature. In an important 2007 study, for example, Paul Posner argued that the late 1990s and early 2000s had been characterized by a species of “coercive federalism” that included “federal policy actions with centralizing effects on our system.”³⁴ Picking up and modifying Posner’s vocabulary, Greg Goelzhauser and David Konisky have defined “[p]unitive federalism” in terms of “the federal government’s use of threats and punishments to

29. NEW INITIATIVE EXPLORES DEEP, PERSISTENT DIVIDES BETWEEN BIDEN AND TRUMP VOTERS, UNIV. VA. CTR. FOR POL.: SABATO’S CRYSTAL BALL (Sep. 30, 2021), <https://centerforpolitics.org/crystalball/new-initiative-explores-deep-persistent-divides-between-biden-and-trump-voters/> [<https://perma.cc/H2BD-95CD>]. Talk of secession also seeps into elite political discourse. See, e.g., Nikki McCann Ramirez, *Marjorie Taylor Greene Says States Should ‘Consider Seceding from the Union’*, ROLLING STONE (Sep. 11, 2023), <https://www.rollingstone.com/politics/politics-news/marjorie-taylor-greene-states-consider-seceding-from-the-union-1234822567/> [<https://perma.cc/32AY-VLTQ>].

30. *Poll: As Trump Is Inaugurated, Californians Seek Independence*, INDEP. CAL. INST. (Jan. 19, 2025), <https://ic.institute/2025/01/19/poll-as-trump-is-inaugurated-californians-seek-independence/> [<https://perma.cc/TVM2-YJ23>].

31. ERWIN CHERMERINSKY, NO DEMOCRACY LASTS FOREVER: HOW THE CONSTITUTION THREATENS THE UNITED STATES 172, 180 (2024) (asking “whether it makes sense for the country to remain the *United States*,” and suggesting it might be best to “keep the United States and the federal government especially for the military and for foreign policy, but in other areas radically devolve power to the states”).

32. Lawrence M. Anderson, *The Institutional Basis of Secessionist Politics: Federalism and Secession in the United States*, PUBLIUS: J. FEDERALISM, Spring 2004, at 1, 3.

33. *Id.* at 1–2.

34. Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 PUBLIUS: J. FEDERALISM 390, 390–91 (2007). It is striking that the term “coercive” federalism was one used to refer to unfunded mandates. See, e.g., Michael C. Tolley & Bruce A. Wallin, *Coercive Federalism and the Search for Constitutional Limits*, PUBLIUS: J. FEDERALISM, Fall 1995, at 73, 73–75 (proposing constitutional limits on unfunded mandates); John Kincaid, *From Cooperative to Coercive Federalism*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1990, at 139, 148–49 (charting the emergence in “coercive federalism” in the 1970s and 1980s in terms of cost-shifting). Obviously, suing states, threatening state and local officials with criminal penalties, and withholding disaster aid are, by any measure, more intrusive measures.

suppress state and local actions that run contrary to its policy preferences.”³⁵ Both studies offer evidence of important historical precursors to our account of agonistic federalism. We enrich and extend their accounts here, however, by specifying the legal instruments characterizing such interstate conflict; by attending to its horizontal federalism dimension; and by mapping out its potential unfolding dynamics through political time. These accounts, however, also underscore the fact that we are not modeling an entirely new dynamic in American federalism. Rather, intergovernmental relations in the United States have always been characterized by an ebb and flow of antagonistic tensions. Most times, these have been modulated and controlled. It is rare for them to swell from a bass note to the dominant melody of federal-state interactions.³⁶ “Rare,” however, does not mean “never.”

Our account of agonistic federalism is also in conversation with studies of the rise of authoritarian modes of governance in the United States and beyond.³⁷ In large measure, this literature focuses on dynamics unfolding at the level of the nation-state.³⁸ What we capture here is that authoritarianism analysis transposed to the context of federalism studies. To date, scholars have focused on the distinct question of whether states might act as springboards for national-level movements away from democratic rule. For example, Jacob Grumbach has influentially argued that states can operate as incubators of anti-democratic tactics,³⁹ while Miriam Seifter has identified the tendency of gerrymandered and unrepresentative state legislatures to distort democratic outcomes.⁴⁰ In other work, Seifter and Jessica Bulman-Pozen have identified a textual “state constitutional commitment to

35. Greg Goelzhauser & David M. Konisky, *The State of American Federalism 2019–2020: Polarized and Punitive Intergovernmental Relations*, 50 PUBLIUS: J. FEDERALISM 311, 312 (2020).

36. See *infra* section II(B)(2).

37. See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 1, 7–10 (2018) (discussing how an authoritarian leader may rise to power in the U.S.); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 3, 38–39 (2018) (discussing the consequences of varying speeds of democratic decline); see also Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 11 (2020) (introducing the “authoritarian playbook” as a means of studying democratic decline).

38. There are a few comparative studies of federalism and authoritarianism, which we discuss *infra* in Part IV. For an overview of the field, see generally Carlos Gervasoni, *Subnational Dimensions of Autocratization*, in THE ROUTLEDGE HANDBOOK OF AUTOCRATIZATION 222 (Aurel Croissant & Luca Tomini eds., 2024).

39. See JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 151–54 (2022) (introducing the theory of the states as leaders of democratic backsliding); see also Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967, 967 (2023) (establishing the State Democracy Index to better analyze state-level democratic backsliding).

40. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1764–67 (2021).

democracy.”⁴¹ As we show in what follows, agonistic federalism builds on some of the political dynamics identified in these important works, but it is characterized by a different set of tactics, and creates distinct stakes. Indeed, our aim here is to show that agonistic federalism is a unique phenomenon that deserves its own analysis alongside the study of authoritarianism in a way that brings nuance to the comforting nostrum that “[f]ederalism and democracy are . . . mutually reinforcing values.”⁴² We also aim to show how authoritarianism is not reducible to the interbranch dynamics associated with “executive hyperactivity,”⁴³ but that there are also vertical elements of that process.

Just as we do not make the implausible claim that federal-state relations have never been characterized by high tensions, so our aim in what follows is not to advance the implausible assertion that each and every element of present intergovernmental relations can be ranked as “agonistic.” The historians Sara Mayeux and Karen Tani, for example, have underscored the divergent pathways taken by education, criminal justice, and welfare federalism.⁴⁴ We aim here to isolate and characterize one important thread of federal-state relations, not to describe the totality of those relations. Our approach, tracking the leading federalism theories of earlier generations,⁴⁵ is aimed at capturing a *central tendency* of current intergovernmental relations.

Our analysis proceeds in four steps. First, we locate agonistic federalism in the historical sequencing of American federalism theories. Part II introduces the idea of agonistic federalism in contradistinction to those earlier accounts. As we define it here, agonistic federalism finds certain precursors in American history, particularly in the antebellum period. We then identify its contemporary form and specify the particular legal tools and doctrines through which it has been asserted, principally by the federal government but also by allied states. Reflecting the historical moment in

41. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 869–79 (2021) (enumerating various state constitutional commitments to democracy); see also Miriam Seifter, *Saving Democracy, State by State?*, 110 CALIF. L. REV. 2069, 2082–83 (2022) (arguing that “states can act as counterweights to the minoritarian forces taking hold at the national level”). But see Aziz Z. Huq, *Our Federalism and Our National Democracy: Complements or Foes?*, 2023 WIS. L. REV. 1793, 1794–96 (suggesting the possibility of more ambivalent, bilateral effects).

42. Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 824–25 (2004).

43. See Aziz Huq, *Executive Hyperactivity*, LONDON REV. BOOKS, Mar. 2025, <https://www.lrb.co.uk/the-paper/v47/n04/aziz-huq/short-cuts> [<https://perma.cc/2B4D-G8FY>] (discussing the expansive presidential power exercised by the second Trump Administration).

44. Sara Mayeux & Karen Tani, *Federalism Anew*, 56 AM. J. LEGAL HIST. 128, 132–38 (2016). For an extension of this argument into the healthcare domain, see Nicole Huberfeld, *High Stakes, Bad Odds: Health Laws and the Revived Federalism Revolution*, 57 U.C. DAVIS L. REV. 977, 983–88 (2023).

45. See *infra* subpart II(B).

which we write, we turn in Part III to a necessarily speculative inquiry: What is the imaginable range of instruments that might be brought to bear by states experiencing the brunt of an agonistic national government? Here, we identify a range of possibilities, and at the same time pay particularly close attention to moments at which the legal doctrines of constitutional federalism are relevantly opaque or uncertain. Finally, in Part IV, we shift the analytic lens to consider the political economy out of which agonistic federalism arises and the pathways along which it might evolve. Drawing on comparative constitutional work, we chart the possibilities of both future authoritarian consolidation and fissiparous fragmentation. The endgames of agonistic federalism, in short, are sobering to contemplate, underscoring why it's so important now to grasp the consequences of opting into, or veering away from, that new model of intergovernmental relations.

I. The Cycles of Federalism Theory

The literature on federalism can have a frustratingly fugitive quality. It is often not entirely clear what an author means when they invoke the term “federalism”: Are they speaking of the judicial doctrine elaborated by the Supreme Court?⁴⁶ Or how agents of the national and state governments interact when generating and enforcing regulations?⁴⁷ Or is federalism a matter of “normative” political theory, exploring “what even *might* make it justifiable” to split the atom of sovereignty?⁴⁸ When a theory is offered, is it a (necessarily abstracted) description or an endorsement of a desirable state of affairs?

A parsimonious definition of federalism involves a government system characterized by a “layer of institutions between a state’s center and its localities” with its own “leaders and representative bodies,” when those

46. See, e.g., Note, *Federalism Rebalancing and the Roberts Court: A Departure from Historical Patterns*, 138 HARV. L. REV. 1385, 1393 (2025) (“Since the beginning of the Roberts Court, the Court has issued mostly state-strengthening decisions.”); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 431 (2002) (describing “the Rehnquist Court’s federalism revival” in terms of three strands of cases); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEXAS L. REV. 1, 7 (2004) (identifying “sovereignty” and “autonomy” visions of federalism).

47. See Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism’s Administrative Law*, 132 YALE L.J. 1320, 1330 (2023) [hereinafter Fahey, *Coordinated Rulemaking*] (showing the importance of “rules promulgated by both [federal and state] governments acting in coordination” in many regulatory efforts); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1263, 1271–72 (2009) (enumerating “ways in which states playing the role of federal servant can also resist federal mandates, the ways in which integration—and not just autonomy—can empower states to challenge federal authority”).

48. Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459, 464 (2007).

“leaders and bodies share decision-making power with the center.”⁴⁹ A necessary premise of federalism is the existence of separate governments exercising some measure of distinct governmental power, but such power might be organized in different ways. Most importantly, it might be more or less overlapping. At one extreme is the idea of “separate spheres” of state and national jurisdiction.⁵⁰ At the other is the possibility that subnational jurisdictions exercise power as a gift from, and so entirely at the discretion of, a national body. The relations between these two layers of government, moreover, might be arranged and managed through different vectors—*ex ante* constitutional law, revisable and defeasible statutory arrangements, and either separate or interlinked party-based systems of political contestation. Federalism, that is, might be constitutional, legal, or political in form. Theorists of American federalism, as we shall see momentarily, have disagreed as to how these various forms overlap.

Federalism is also not an end in itself. Rather, it must be justified by reference to its normative effects. As such, it has been long associated with a litany of public-facing benefits. These can broadly be characterized as liberal, democratic, and welfarist in character. In a well-known 1991 passage, the Supreme Court identified “the principal benefit of the federalist system is a check on abuses of government”⁵¹—a liberal policy end. It also asserted that federalism has democratic benefits—making “government . . . more sensitive” by increasing “opportunity for citizen involvement”—and positive economic effects—such as “innovation and experimentation” and interstate competition “for a mobile citizenry.”⁵² Scholarship on federalism generally reiterates these goals.⁵³

49. Nancy Bermeo, *The Import of Institutions*, J. DEMOCRACY, Apr. 2002, at 96, 98. William Riker offers a more demanding definition, which requires that (1) two levels of government rule the same jurisdiction; (2) each has at least one area of autonomous action; and (3) such autonomy is guaranteed in some way. WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 11 (1964); see also DANIEL J. ELAZAR, EXPLORING FEDERALISM 12 (1987) (defining federalism as “self-rule plus shared rule” (emphasis omitted)).

50. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2196–97 (1998).

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

52. *Id.* (citing Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491–511 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS’ DESIGN (1987)), and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988)).

53. On federalism’s anti-tyranny effects, see, for example, Levy, *supra* note 48, at 469, where the author argues that “[o]ne of federalism’s potential virtues in a democratic system is the capacity of the provinces to be oppositional” and Daniel Weinstock, *Towards a Normative Theory of Federalism*, 53 INT’L SOC. SCI. J. 75, 76 (2001). On federalism’s economic effects, see, for example, Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1, 3 (1995), for an argument that federalism “limit[s] the degree to which each of these country’s political systems could encroach upon its markets.” On democracy, see Steven G. Calabresi, “*A Government of Limited and Enumerated*

Linking mechanism design to normative aspiration is federalism theory. In constitutional law, the task of a theory is “to fit or explain what [it] characterize[s] as the most fundamental features of the constitutional order” in either descriptive or normative terms.⁵⁴ Broadly speaking, we identify three main scholarly positions that in turn have had a dominant measure of influence.⁵⁵ These theories do not correspond to changes in Supreme Court doctrine,⁵⁶ but instead reflect ebbs and flows in scholarly thought. Each purports to be a description of federal-state relations premised on observation, but each also has a normative quality. That is, implicit in these theories (although not in our model of agonistic federalism) is some process of reflective equilibrium shuttling back and forth between description and evaluation, albeit without a clear statement of how mere observation can be transformed into an “ought,” let alone a legal “must.”

First, a theory of federal and state actors as “separate sovereigns” possessed of distinct, largely non-overlapping spheres of jurisdiction and authority seemed to dominate until the middle of the twentieth century.⁵⁷ The terminus of this theory is conventionally marked by Edward Corwin’s declaration that such “dual federalism” had expired,⁵⁸ although the Supreme Court (and some scholars) continued to speak of “dual sovereignty” for decades afterward.⁵⁹ Post mortems trace dual federalism’s demise to the New Deal emergence of a federal regulatory state that brooked few federalism-

Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 770 (1995), for an argument that “people are happier . . . when their governmental structure provides some outlets for their minority viewpoints but does so in a way that blurs over and deemphasizes the fault lines as much as possible.”

54. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 540 (1999).

55. The same inquiry into federalism’s effects within the political science or political theory literature would generate different responses. *Cf.* Levy, *supra* note 48, at 463 (“The dominant tendency in contemporary normative theory has been to ignore federalism altogether.”).

56. For example, this chronology of federalism theory does not account for the “‘new federalism’ that emerged from the Supreme Court in the late twentieth century.” Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839, 853 (2024).

57. This is a simplification of far more complex historical debates. *Cf.* Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 401 (2015) (characterizing federalism debates in “the Founding period or the early nineteenth century” as turning not on questions of sovereignty, but “state consent; distinctions among Congress’s powers to appropriate funds for internal improvements, to execute the improvements itself, and to transfer the public lands to the states . . . and the role of the federal government as proprietor of the public lands”).

58. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 2 (1950) (noting that the nation “has shifted base in the direction of a consolidated national power”).

59. *Printz v. United States*, 521 U.S. 898, 918 (1997); *see also* *Heath v. Alabama*, 474 U.S. 82, 88–89 (1985) (noting, in the context of the Double Jeopardy Clause, that “the Court has uniformly held that the States are separate sovereigns with respect to the Federal Government”).

related outer bounds,⁶⁰ and that had largely been embraced by Americans in the crucible of World War II.⁶¹ Judicial efforts to reestablish a zone of state autonomy amounted to only “sporadic, inconsistent, and unappealing” interventions.⁶² And the widespread recognition of policy challenges that cut across the national and the local—think of healthcare, immigration, or environmental policy—means that efforts to carve out that line are unlikely to prevail.⁶³ The brute fact of an expanding twentieth-century federal regulatory state, in other words, broke the theoretical grip of separate spheres.

Second, the decline of separate spheres theories opened a space for an influential slate of “process federalism” theories celebrating “political and institutional safeguards [that] preserve balance in the federal structure,” in particular in terms of how federal law is created.⁶⁴ Herbert Wechsler pointed to the states’ “crucial role in the selection and the composition of the national authority”—through the choice of Senators, districting, and the Electoral College—as investing federal politicians with reasons not to encroach “on the domain of the states.”⁶⁵ Notwithstanding a fleeting influence upon the Justices,⁶⁶ Wechsler’s theory soon foundered against increasing evidence that his structural safeguards “at best protected geographically concentrated

60. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 938 (1998) (referring to “statements that the federal and state governments operate in separate, independent, and mutually exclusive spheres” as “palpably untrue”); LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 3, 597 (2002) (observing that by the end of the twentieth century, federalism posed no real constraint on the federal government).

61. See JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* 9–10 (2011) (documenting how “ordinary Americans came to terms with massive structures of national power” by the end of the World War II era).

62. H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 669 (1993).

63. See Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 512, 653 (2007) (“Demanding attention from both a national and local actor, interjurisdictional problems do blur that boundary, pitting concerns about tyranny and needs for pragmatism against one another.”).

64. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1364, 1386 (2001).

65. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546, 558 (1954) (citing THE FEDERALIST No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961)). Miriam Seifter developed a variation on this argument by pointing to the “myriad associations of state officials that lobby federal agencies and consult on pending federal rules and policies, advancing the ‘state’ view.” Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 955–56 (2014). But this must be weighed against the “variety of procedures and tools [federal] agencies use to influence state legislation,” including behind-the-scenes drafting. Adam S. Zimmerman, *Ghostwriting Federalism*, 133 YALE L.J. 1802, 1810 (2024).

66. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (reasoning that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself”).

interests, not the autonomy of state institutions. In other words, Wechsler's process federalism failed to protect federalism."⁶⁷

A later iteration of process federalism, developed by Larry Kramer, identified the national political parties as vectors by which states' interests would be transmitted.⁶⁸ The problem with Kramer's theory, again, proved to be its divergence from the actual operation of political institutions. Across different arenas of political behavior, "nationalization is so apparent as to be [increasingly] indisputable."⁶⁹ Today's main political parties in particular are "national in scope, largely coherent ideologically, and do little to represent state-specific interests in Washington."⁷⁰ Elections for federal, state, and even local offices are also "increasingly tied to presidential election outcomes."⁷¹ Again, federalism theory foundered against the unremitting refusal of American political life to conform to modeling assumptions.

Third, in the last decade or two, a new wave of federalism scholarship exploded across the law reviews. This scholarship started from a quite different threshold observation from Wechsler's and Kramer's: Starting as far back as the first decades of the twentieth century, the federal government and the states worked together to deliver a growing set of goods, ranging from infrastructure building, to food and drug regulation, to child and maternal welfare.⁷² Within these "major statutory schemes," states operate as "component parts of the national administrative apparatus."⁷³ Given de facto federal dependence on states' roles as front-line agents, Jessica Bulman-Pozen and Heather Gerken argued that "states use regulatory power

67. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1925 (2014).

68. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 276 (2000) (positing "a new kind of federalism" where the decentralization of national political parties "linked the fortunes of federal officeholders to state politicians and parties").

69. DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 2 (2018).

70. David Schleicher, *Federalism and State Democracy*, 95 TEXAS L. REV. 763, 771 (2017).

71. Daniel J. Moskowitz, *Local News, Information, and the Nationalization of U.S. Elections*, 115 AM. POL. SCI. REV. 114, 114 (2021); accord Richard Burke, *Nationalization and Its Consequences for State Legislatures*, 102 SOC. SCI. Q. 269, 270–73 (2021). For more specific findings on gubernatorial elections, see Joel Sievert & Seth C. McKee, *Nationalization in U.S. Senate and Gubernatorial Elections*, 47 AM. POL. RES. 1055, 1073–74 (2019). On state legislative races, see Steven Rogers, *National Forces in State Legislative Elections*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 207, 222 (2016), finding that "[i]nstead of being local affairs, state legislative elections are dominated by national politics."

72. For a comprehensive account, see generally KIMBERLEY S. JOHNSON, GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877–1929 (2007).

73. Bulman-Pozen, *supra* note 67, at 1932; see also Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 537 (2011) (positing that "every branch of state government is squarely in the midst of creating, implementing, and interpreting federal statutory law"); accord Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1893–94 (2014).

conferred by the federal government to tweak, challenge, and even dissent from federal law.”⁷⁴ Through the coordinated process of rulemaking, Bridget Fahey has explained, “cooperative federalism’s administrative law structures the paths states have to express their policy preferences—and their pushback.”⁷⁵ And through operating as independent regulatory units, Bulman-Pozen argued, states “facilitate competition between the Democratic and Republican parties” by serving as staging posts and zones of retreat and rebuilding while a party is on the outs nationally.⁷⁶ As Bridget Fahey succinctly puts it, this is “federalism . . . by integration.”⁷⁷

Like dual federalism and process federalism, “federalism by integration” rests on certain empirical claims about the circumstances in which federal and state officials interact. As Cristina Rodríguez puts it, this theory needs there to be “discretionary spaces of federalism” in which “policy conversations and bureaucratic negotiations” can unfold without the federal government “taking preemptive action.”⁷⁸ The resulting intergovernmental interactions, moreover, are not “locked in zero-sum competition nor bound by fixed rules of engagement.”⁷⁹ The absence of federal hegemony is crucial to these accounts. In its absence, an abiding assumption of the theory is that “power also resides with states when they play the role of federal servants.”⁸⁰ The focus upon cooperative federalism programs and coordinated rulemaking in this conception of federalism follows from this need for spaces in which the national government does not exercise hegemonic control and where state officials can act upon policy preferences.

Dual federalism and then process federalism ran aground because they rested on models that did not match empirical realities. Even if normatively attractive (as their advocates imply), they hence failed the threshold test of plausibility. Will the same fate befall federalism by integration? In the following pages, we will offer a set of specific examples, nested in a more general political economy of federal-state relations, to suggest that this third theory of constitutional federalism is hitting up against some uncomfortable

74. Bulman-Pozen & Gerken, *supra* note 47, at 1259.

75. Fahey, *Coordinated Rulemaking*, *supra* note 47, at 1388.

76. Bulman-Pozen, *supra* note 67, at 1932, 1950–51; *see also* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–81 (2014) [hereinafter Bulman-Pozen, *Partisan Federalism*] (arguing that the “federal system generates a check on the federal government and fosters divided citizen loyalties” because “it provides durable and robust scaffolding for partisan conflict”).

77. Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2412 (2020) [hereinafter Fahey, *Federalism by Contract*].

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

79. *Id.* at 2098.

80. Bulman-Pozen & Gerken, *supra* note 47, at 1265.

realities—ones that should make us reach for another model of constitutional federalism, even if we value the normative goods that federalism by integration advocates hoped to muster.

II. The Past and Present of Agonistic Federalism

This Part identifies a new descriptive model of federalism, which we call agonistic federalism. As the Introduction intimated, this theory is motivated by the dramatic shifts in national policy undertaken by the second Trump Administration. It would be a mistake, however, to think recent national policy entirely *sui generis*. Indeed, we follow our presentation of contemporary agonistic federalism by charting several examples of historical precursors of the phenomenon. We then turn to a three-part taxonomy of its main contemporary vectors, concentrating on initiatives begun after January 2025. Finally, we offer a more general political economy of what has unfurled since that date. That is, we step back from some of the distinctive dynamics of the Trump presidency and offer an analysis of more general reach.

A. *Defining Agonistic Federalism*

We define agonistic federalism as a zero-sum, no-holds-barred contestation between the national government and states characterized by mutual, partisan antagonism and intolerance. This definition is intended to capture certain essential elements of intergovernmental relations, without packing in an underlying political economy. It is tractable but not excessively precise: That is, its identification is not a matter of measurement but judgment. We also underscore that it is a descriptive model: We do not offer it as a trigger for reflective equilibrium let alone endorsement. In subpart IV(A), instead, we explore how agonistic federalism arises from a distinctive collusion of partisan dynamics and institutional conditions and suggest ways in which its effects may well be undesirable.

Our definition of agonistic federalism underscores a series of sharp discontinuities from earlier theorizations of federalism. First, it does not require separate spheres of federal and state authority in the manner of dual federalism. To the contrary, the implication of “no-holds-barred” tactics is precisely that participants in agonistic federalism do not recognize the force of either doctrinal chains or “constitutional conventions,” i.e., “practice[s] not memorialized in a formal rule but regularly engaged in out of a sense of obligation” keyed to “valuable goals of institutional organization and the public good.”⁸¹ It is a contest not just over policy, but over power.

81. Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 483 (2018).

Second, the formal and informal mechanisms for conveying local interests into national parties envisaged by Wechsler and Kramer are absent from this account. They are replaced, in the first instance, by the specter of top-down direction from the national government, and in particular, a hypertrophic executive branch. And, in response to such no-holds-barred federal action, they generate from states' acquiescence or increasingly aggressive resistance that transcend the conventional legal and political channels of Wechsler and Kramer.

Finally, while agonistic federalism shares with federalism by integration the possibility of policy making by federal-state conflict, the nature and scope of those conflicts differ dramatically. Agonistic federalism lacks what Cristina Rodríguez calls "discretionary spaces," in which "policy conversations" or "bureaucratic negotiations" can unfold without the federal government "taking preemptive action."⁸² To the contrary, it is characterized precisely by the kind of "zero-sum competition" unconstrained by rules or settled expectations that she decries.⁸³ We also think it important to observe that agonistic federalism is not simply the logical, or inevitable, extension of the "uncooperative" aspects of federalism by integration. Rather than continuity, agonistic federalism is a rupture of integrated federalism instigated by the federal government.

That said, we think that it is likely that agonistic federalism operates within a potentially hazardous outer bound: Even as it is characterized by potentially accelerating cycles of intergovernmental conflict, it has come to be understood that there is a "basic" norm "in the federalism sphere [of] a categorical bar on nullification and secession."⁸⁴ That is, agonistic federalism is a way of characterizing conflict *within* the bounds of the nation-state—not conflict that *fractures* the nation-state. Yet, *ex ante* uncertainty as to when agonistic measures imperil federal-state bonds means that there is always some uncertainty about where this outer limit lies. To the extent that agonistic federalism drives all concerned to view intergovernmental relations as irretrievably broken, we think that it induces a movement toward fragmentation and even conflict that is likely undesirable. Unlike Mouffe, therefore, we think that the adjective "agonistic" in this context may carry a negative connotation.

82. Rodríguez, *supra* note 78, at 2097.

83. *Id.* at 2098.

84. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 87 (2014).

B. Historical Precursors of Contemporary Agonistic Federalism

American intergovernmental relations have “generally [been] cooperative in nature.”⁸⁵ But there have been exceptions. No-holds-barred conflict between the federal government and states that slices through legal, doctrinal rules and conventional expectations is not a new phenomenon. During the ratification debates, Anti-Federalists challenged the proposed constitution’s supporters over the dire prospect of “a consolidation of all the states.”⁸⁶ The terms of intergovernmental relations would remain hotly contested after ratification. While federalism-related anxieties were quickly channeled into questions of institutional design, and in particular questions of federal court jurisdiction and power, at several moments in American history those same debates have erupted into uncivil, no-holds-barred, zero-sum conflicts that we would rank as “agonistic.” We offer a non-exhaustive list of four examples of such conflict—three from the antebellum period (when we think agonistic federalism was far more common) and one from the cusp of the twenty-first century. We exclude the Civil War of the 1860s, however, because our definition of agonistic federalism requires a distinction between contestation on the one hand and violent conflict on the other. These historical precursors anticipate both the certain features of contemporary agonistic federalism and hint at the political-economic conjunction necessary to its catalysis. Note, too, that we exclude examples of violent social upheaval and even more violent government repression that do not pit the federal government against the states—ours is a model of federalism, not a model of state power.

1. Antebellum Intergovernmental Agonism.—Agonistic federalism can first be glimpsed in the Virginia and Kentucky Resolutions penned by James Madison and Thomas Jefferson in late 1798.⁸⁷ The Resolutions arose out of

85. Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, PUBLIUS: J. FEDERALISM, Spring 2001, at 15, 16; accord Daniel J. Elazar, *Federal-State Collaboration in the Nineteenth-Century United States*, 79 POL. SCI. Q. 248, 249 (1964) (“[F]ederalism in the United States, in practice if not in theory, has traditionally been cooperative.”).

86. *Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 23–24 (Jonathan Elliot ed., 2d ed., Washington, D.C., 1836) (statement of Joseph Taylor) (“This is a consolidation of all the states. Had it said, *We, the States*, there would have been a federal intention in it. But, sir, it is clear that a consolidation is intended.”). In response, Federalists such as James Iredell contended that the new Constitution would “preserve completely the sovereignty of the states.” *Id.* at 132–33 (statement of James Iredell). At the end of these debates, “few skeptics were pacified by these assurances.” Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783, 1802–04 (2021) (collecting evidence of discomfort about the nature of federal power and summarizing how that debate ended).

87. See Thomas Jefferson, *The Kentucky Resolutions of 1798*, in 30 THE PAPERS OF THOMAS JEFFERSON 529, 536, 550 (Barbara B. Oberg ed., 2003) (1798) (emphasizing the importance of separating powers between the federal government and the states); James Madison, *Resolutions of*

partisan conflict over the Federalist Adams Administration's enactment and use of the Sedition and Alien Acts against their political foes.⁸⁸ In response to the (correctly) perceived unwillingness of the Federalist bench to check such partisan prosecutions, the Kentucky Resolution proposed that "each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."⁸⁹ As revised by Jefferson, the Virginia Resolution declared the Alien and Sedition Acts "null, void, and of no effect," and invited the state's General Assembly to consider nullification, although the language was omitted from the enacted resolution.⁹⁰ The Resolutions, as well as the federal statutes to which they responded, count as a form of agonistic federalism because they proposed a zero-sum contestation over what law binds, and advanced their ambitions through a tool—the state's nullification of federal acts within its borders—that breached extant contours of intergovernmental relations.

Three decades later, in the midst of the 1832–1833 nullification crisis, John C. Calhoun and other South Carolinian leaders asserted a state legislature's power to "nullify" federal laws it deemed unconstitutional, a decision that could be overridden only by a vote of three-fourths of the other state legislatures.⁹¹ Echoing the Virginia and Kentucky Resolutions,⁹² Calhoun's proposal responded to federal legislative action—1828 and 1830 protective tariffs designed to shield nascent American industries from European competition—that was construed as a partisan assault on the interests of certain states.⁹³ Further, Calhoun's proposal was a piece of constitutional innovation: He began with the idea of a "minority veto as a check on the majority" and then "interpreted the Constitution to fit that idea,

1798, in 6 THE WRITINGS OF JAMES MADISON 326, 326 (Gaillard Hunt ed., 1910) (1798) (elaborating on the necessity of such a division of powers).

88. Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801); Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (expired 1801); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24). The Sedition Act in particular "was vigorously, but selectively, enforced by the Federalist Party against its political opposition." William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 124 (1984).

89. Jefferson, *supra* note 87, at 550.

90. Robert S. Claiborne, Jr., Comment, *Why Virginia's Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification*, 46 U. RICH. L. REV. 917, 931, 931 n.100 (2012) (citing Letter from Thomas Jefferson to Wilson Cary Nicholas (Nov. 29, 1798), in THE PAPERS OF THOMAS JEFFERSON, *supra* note 87, at 590).

91. John C. Calhoun, *Address: On the Relation Which the States and General Government Bear to Each Other*, in 6 THE WORKS OF JOHN C. CALHOUN 59, 73–74 (Richard K. Crallé ed., 1864); see also DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 400, 404–05 (2007) (describing the South Carolina Nullification Convention and President Jackson's response).

92. Paul Finkelman, *Turning Losers into Winners: What Can We Learn, If Anything, from the Antifederalists?*, 79 TEXAS L. REV. 849, 891–92 (2001) (reviewing Saul Cornell, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828 (1999)). Finkelman suggests that the 1800s "nullificationists went into hibernation for almost thirty years, emerging two political generations later as secessionists." *Id.* at 892.

93. Anderson, *supra* note 32, at 12–13.

not the other way around.”⁹⁴ Like the authors of the 1798 Resolutions, he broke peremptorily from conventional understandings of how intergovernmental relations should be conducted.

Sectional conflict in the 1850s over slavery precipitated another round of agonistic federalism. On the one hand, a South Carolina convention in 1852 voted to affirm the state’s right to secede, anticipating and setting the stage for the Union’s fracture at the end of the decade.⁹⁵ In northern states, the 1850 Fugitive Slave Act triggered “scores of meetings . . . to condemn and declare open defiance of the law,” declaring support for runaway slaves and enacting resolutions “condemning the law as inhumane and unconstitutional.”⁹⁶ A series of “massive demonstrations against fugitive slave renditions” showed that “many Northerners morally opposed the return of fugitive slaves and some even rejected the legal duty despite its explicit mention in the Constitution.”⁹⁷ Black communities formed “vigilance committee[s]” to fend off new federally licensed “slave”-hunters.⁹⁸ In Wisconsin, the seizure of a former slave called Joshua Glover catalyzed a riot and jailbreak.⁹⁹ State-court judges in Wisconsin and Ohio invalidated the federal statute knowing that the U.S. Supreme Court “would probably uphold it.”¹⁰⁰ Wisconsin Chief Justice Edward Whiton noted that citizens of his state “naturally and properly look to their own state tribunals for relief from all kinds of illegal restraint and imprisonment,” and that those courts are “clothed with power sufficient for their protection.”¹⁰¹ Again, perceptions of the national government’s legal overreach induced public officials, as well as private citizens, to resort to new, convention-breaking tactics. The ensuing “no-holds-barred” conflict was a form of agonistic federalism.

94. JAMES H. READ, MAJORITY RULE VERSUS CONSENSUS: THE POLITICAL THOUGHT OF JOHN C. CALHOUN 16 (2009).

95. Anderson, *supra* note 32, at 13, 13 n.56.

96. R.J.M. BLACKETT, THE CAPTIVE’S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY 14–15 (2018).

97. Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 L. & HIST. REV. 797, 815 (2011).

98. BLACKETT, *supra* note 96, at 15; *see also* ANDREW DELBANCO, THE WAR BEFORE THE WAR: FUGITIVE SLAVES AND THE STRUGGLE FOR AMERICA’S SOUL FROM THE REVOLUTION TO THE CIVIL WAR 5 (2018) (describing how “free black people in the North—including those who had never been enslaved—found their lives infused with the terror of being seized and deported on the pretext that they had once belonged to someone in the South”).

99. For careful accounts of the jailbreak, see A.J. Beitzinger, *Federal Law: Enforcement and the Booth Cases*, 41 MARQ. L. REV. 7, 10–11 (1957) and Jeffrey Schmitt, *Rethinking Ableman v. Booth and States’ Rights in Wisconsin*, 93 VA. L. REV. 1315, 1323–25 (2007).

100. Schmitt, *supra* note 97, at 818.

101. H. ROBERT BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR 119–20 (2006) (quoting *In re Booth*, 3 Wis. 1, 54 (1854), *rev’d sub nom. Ableman v. Booth*, 62 U.S. 506, 526 (1859)).

By the 1850s, in short, there were both powerful arguments and violent actions that can be characterized as agonistic federalism at work. As Peter Radan has demonstrated recently, there were also a wide range of serious arguments for the legality, and even the necessity, of secession bubbling up from these conflicts in the 1850s.¹⁰² One does not need to go as far as Radan does when he claims these pro-secessionist arguments were supported by “logic and reason”¹⁰³ to see that agonistic federalism both infused debate and channeled action, up to and including secession, at least through to the Civil War.¹⁰⁴

Agonistic federalism, in short, was something of a norm rather than an exception in the antebellum period. This suggests an intriguing possibility, which we lay out here without fully exploring: Perhaps the initial relationship between the states and the federal government was, as the Virginia and Kentucky Resolutions intimated, one of hostility and tension. Perhaps this tense relationship, moreover, was consistent with the Constitution’s design—part of the internal contradictions that kept the new federal leviathan in its lane. If that’s at least in part right, and if agonistic federalism abated in the late nineteenth century, then that change can be understood as an implicit change in what the late Fred Schauer called the unspoken “presuppositions” of the Constitution.¹⁰⁵ If that is correct, then it may be the absence of agonistic federalism that initially posed questions for the dynamics of the intergovernmental relations.

2. *Twenty-first Century Intergovernmental Agonism.*—These antebellum examples isolate state reactions to federal initiatives (namely, criminal prosecutions, tariffs, and slave renditions) as forms of agonistic federalism. But there is no reason why state, as opposed to national, action needs to be taken as central to that category. In the late twentieth century, political scientists identified forms of federal action that repudiated negotiated intergovernmental settlements, and instead broke through legal and conventional bounds in the apparent belief that conflicts between levels of government could be settled only in a zero-sum fashion. Some of these putative moments of deepening conflict qualify as instances of agonistic federalism; others, however, do not. And at the same time, in other policy domains, the federal government and the states

102. PETER RADAN, CREATING A MORE PERFECT SLAVEHOLDERS’ UNION: SLAVERY, THE CONSTITUTION, AND SECESSION IN ANTEBELLUM AMERICA 153 (2023) (setting forth competing nationalist and compact theories of the Union).

103. *Id.* at xxi.

104. For an argument that such debate continued after the war, see CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 5 (2017).

105. Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 147–48 (Sanford Levinson ed., 1995).

diverged on matters of policy without resort to extraordinary weapons or zero-sum conflict.

Writing in 2007, political scientist Paul Posner defined the presidency of George W. Bush as one of “[s]ignificant nationalization” using instruments of “coercive federalism.”¹⁰⁶ He pointed, for example, to the “accelerated” pace of “federal preemptions of state and local tax law”; “sweeping” new standards of natural emergency response plans; and a slate of congressional “mandates” on issues ranging from land use to firearms to nuclear safety.¹⁰⁷ We think that Posner’s sample of federal initiatives may have diverged from a norm of intergovernmental cooperation,¹⁰⁸ but they are not properly ranked as agonistic as we use the term. There is no evidence that either level of government viewed themselves as engaged in a zero-sum situation. Nor is there the kind of no-holds-barred conflict characterized by novel, precedent-busting innovations of the kind that characterized the antebellum period. Indeed, it is striking to note how *mild* the “coercive” measures Posner decries are in relation to those observed today.¹⁰⁹ As such, we think these episodes can also fit (with a few nudges and knocks) into the federalism by integration framework.

A better modern precursor of agonistic federalism, perhaps unsurprisingly, can be located in the first Trump Administration. In a number of policy domains, the Administration responded to policy differences with states not solely through targeted, lawful measures. Rather, policy or partisan divergence triggered no-holds-barred deployment of both relevant and unrelated federal regulatory and fiscal authorities. One well-publicized front of such conflict concerned the threat to withdraw federal money from “sanctuary” or “[a]narchist” jurisdictions in “structurally extraordinary” ways.¹¹⁰ Courts struck down many of the first Trump Administration’s no-holds-barred actions targeting states and localities.¹¹¹

Perhaps more illuminating were events involving the state of California’s fuel emissions policies. In 2019, the state of California reached an agreement with four automakers on fuel economy standards higher than those issued by the EPA and National Highway Traffic Safety

106. Posner, *supra* note 34, at 392.

107. *Id.* at 396–99.

108. See Zimmerman, *supra* note 85, at 16 (explaining that federal intergovernmental cooperation is characterized by the federal government acting as a facilitator that doles out assistance to state and local governments, an inhibitor that preempts state action, and an initiator that establishes minimum national standards).

109. Posner, *supra* note 34, at 399. One point of similarity with cases of agonistic federalism is the presence of “highly partisan” motives in the enactment of federal mandates. *Id.* at 404.

110. Eloise Pasachoff, *Executive Branch Control of Federal Grants: Policy, Pork, and Punishment*, 83 OHIO ST. L.J. 1113, 1138–39 (2022).

111. *Id.* at 1141.

Administration (NHTSA).¹¹² By way of response, the federal government took “several measures seemingly motivated by retribution,” in what Greg Goelzhauser and David Konisky called “[p]unitive federalism.”¹¹³ These included withdrawing the waiver of federal preemption for the state’s emissions standards; opening an antitrust investigation into the state’s dealings with car companies; threatening to cut off federal highway funding; and seeking penalties against the state for Clean Water Act violations.¹¹⁴ Governor Gavin Newsom complained that these actions amounted to a “political vendetta” against California’s divergent policy preferences.¹¹⁵ Indeed, this is an apt way to describe the White House’s apparent resort to not just a targeted response from EPA and NHTSA, but also an array of unrelated fiscal and regulatory powers, to batter California into submission. Such no-holds-barred efforts to elicit compliance through all available means, in derogation of conventional (and perhaps legal) constraints on regulatory discretion qualify this as an instance of agonistic federalism.

The Administration’s interactions with states in response to the March 2020 pandemic provide a further example. Despite the high levels of excess mortality Americans experienced in 2020,¹¹⁶ the White House supplied aid “based in part on political allegiance.”¹¹⁷ So Republican-led Florida received “everything it requested from the federal stockpile while Democratic-led states like Michigan” went wanting.¹¹⁸ At one point, the President threatened to condition life- and health-sustaining aid to states on their compliance with his “hard-line immigration demands.”¹¹⁹ The White House also “forced states to bid against one another and against the national government for critical [medical] supplies,” while publicly eliciting violent responses to Democratic states’ lockdowns.¹²⁰ Politicization of disaster aid—in effect demanding that

112. Anna M. Phillips & Tony Barboza, *California Reaches Climate Deal with Automakers, Spurning Trump*, L.A. TIMES (July 25, 2019), <https://latimes.com/politics/story/2019-07-25/california-reaches-climate-deal-with-automakers-spurning-trump> [https://perma.cc/2YUR-CLTK].

113. Goelzhauser & Konisky, *supra* note 35, at 312–13 (defining punitive federalism as “the federal government’s use of threats and punishments to suppress state and local actions that run contrary to its policy preferences”).

114. *Id.* at 313–14.

115. *Id.* at 314–15.

116. Scott L. Greer, Kenneth A. Dubin, Michelle Falkenbach, Holly Jarman & Benjamin D. Trump, *Alignment and Authority: Federalism, Social Policy, and COVID-19 Response*, 127 HEALTH POL. 12, 15 (2023).

117. Goelzhauser & Konisky, *supra* note 35, at 315.

118. *Id.* at 315–16.

119. Sonam Sheth, *Trump Says He Might Give Federal Coronavirus Aid to States if They Comply with His Political Demands*, BUS. INSIDER (May 5, 2020), <https://www.businessinsider.com/trump-tweets-federal-coronavirus-aid-may-depend-on-sanctuary-cities-2020-5> [https://perma.cc/52MF-4DC3].

120. Mark J. Rozell & Clyde Wilcox, *Federalism in a Time of Plague: How Federal Systems Cope with Pandemic*, 50 AM. REV. PUB. ADMIN. 519, 520 (2020) (noting that “President Donald J.

governors pick between their constituents' lives and their political autonomy—as well as federal solicitations of violent defiance of state government are intimations of a no-holds-barred approach to intergovernmental relations. And anticipating another feature of his second Administration's agonistic policies, President Trump also drew down the provision of federal health-related public goods by, for example, eliminating the National Security Council's pandemic preparedness office, letting "slip" opportunities to stock up on ventilators, and deflecting counsel respecting the seriousness of the virus.¹²¹

Still, we think it would be a mistake to make too much of these examples: Such moments of stark tension, boiling over into overt hostility, between levels of government stand in striking counterpoint to the background norm of "cooperative, coordinated, and concentrated intergovernmental relations" initiated by the national expansion in the early twentieth century.¹²² Nor were these moments of agonistic federalism reiterated across the first Trump Administration. In other domains, the federal government and the states diverged on matters of policy without resort to extraordinary weapons or zero-sum conflict. Rather, they followed the standard script of intergovernmental disagreements—frequently involving battles in the public square, and occasionally (though increasingly) involving litigation and then resolution by the courts. In 2018, for example, Secretary of Agriculture Sonny Perdue imposed a work requirement on recipients of Supplemental Nutrition Assistance Program (SNAP) benefits.¹²³ Nineteen states and the District of Columbia promptly filed suit and secured a nationwide preliminary injunction.¹²⁴ In effect, a federal executive initiative in this instance was stymied by an "alliance of state government, federal courts, and public interest lawyers."¹²⁵ Similarly, state involvement in the administration of the Affordable Care Act slowed the Trump Administration's efforts to dismantle that program,¹²⁶ while in the high-profile conflicts over cities' "sanctuary" policies, the Trump

Trump has encouraged demonstrators to 'liberate' states where Democratic governors have imposed lockdowns"); see also David M. Konisky & Paul Nolette, *The State of American Federalism, 2020–2021: Deepening Partisanship amid Tumultuous Times*, 51 *PUBLIUS: J. FEDERALISM* 327, 327, 336 (2021) (describing "rancor[ous]" interactions between the states and the federal government).

121. Rozell & Wilcox, *supra* note 120, at 522.

122. Cynthia J. Bowling, Jonathan M. Fisk & John C. Morris, *Seeking Patterns in Chaos: Transactional Federalism in the Trump Administration's Response to the COVID-19 Pandemic*, 50 *AM. REV. PUB. ADMIN.* 512, 513 (2020) (internal quotation marks and citation omitted).

123. Press Release, USDA, USDA to Restore Original Intent of SNAP: A Second Chance, Not a Way of Life (Dec. 20, 2018), <https://www.fns.usda.gov/news-item/usda-restore-original-intent-snap-second-chance-not-way-life> [<https://perma.cc/NGA9-6MXR>] (quoting Secretary Perdue).

124. *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 6–7 (D.D.C. 2020).

125. Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 *NW. U. L. REV.* 361, 427 (2020).

126. David L. Noll, *Administrative Sabotage*, 120 *MICH. L. REV.* 753, 822 (2022).

Administration tried (and failed) to condition federal monies for law enforcement—an aggressive, but hardly no-holds-barred approach to disagreement.¹²⁷ We are not aware of any instance in which states lost in the courts and chose to escalate rather than to acquiesce.

To say that agonism between federal and state governments is unprecedented, in sum, would be misleading.¹²⁸ There have been moments of no-holds-barred conflict. Most receded back into more typical federal relations. In the antebellum period, agonistic federalism was a prelude to, and perhaps a lubricant of, the sectional conflict that would lead to the Civil War. Our definition of agonistic federalism stops short of civil war, but this state of affairs may be causally related to violent civil conflict.

C. *The New Agonistic Federalism: A Typology of Its Vectors*

The second Trump Administration has been marked by sharp departure from the cooperative norm of intergovernmental relations. Across multiple policy domains, the Administration has imposed extraordinary, at times extra-legal, pressure on states in a no-holds-barred effort to extinguish policy divergence and to punish partisan opponents—i.e., to claim not just a specific policy win, but a more general power to fix policy. The White House’s approach to states thus helps itself to coercive elements of the first Trump Administration, but then extends and elaborates them into a more general posture.

The new agonistic federalism has three main vectors: (1) the weaponization of states’ entanglement in cooperative federalism programs, and their ensuing reliance upon certain forms of federal support, or at least cooperation; (2) the withdrawal of federal provision of public goods upon

127. Press Release, U.S. Dep’t of Just., Backgrounder on Grant Requirements (2017), <https://www.justice.gov/opa/press-release/file/984346/download> [https://perma.cc/LC8V-6YVS] (outlining new conditions for recipients of Edward Byrne Memorial Justice Assistance Grants); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 861–62 (N.D. Ill. 2018) (same). These policies were struck down in federal court litigation. See Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEXAS L. REV. 1247, 1266 (2019) (summarizing litigation outcomes).

128. Were there forms of agonistic federalism during the Biden Administration? While the Administration pressed the boundaries of its regulatory authority in certain cases, we are hard-pressed to think of reasonable analogy to the interactions charted above between California and the first Trump Administration. See *supra* text accompanying notes 108–115. A striking development of this period was, to the contrary, the exceptional openness of the federal courts to state challenges to federal policies even in the absence of what would ordinarily have counted as Article III standing. See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) (holding that a state nonprofit government corporation participating in the student loan market had Article III standing to challenge a federal loan forgiveness plan). But see *United States v. Texas*, 143 S. Ct. 1964, 1970 (2023) (denying states authority to challenge federal “arrest or prosecution policies”). For discussion of the tension between these cases, see William Baude & Samuel L. Bray, Comment, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 183–87 (2023).

which the states have reasonably relied in ways that impose material costs upon states' residents; and (3) the transformation of policy disputes into matters of criminal law enforcement, or the use of individually targeted punitive tools for policy ends. The first two of these tactics take paradoxical advantage of "cooperative, coordinated, and concentrated intergovernmental relations" initiated by the national expansion in the early twentieth century.¹²⁹ The third harkens back to the very first decomposition of national partisan competition into state repression during the Adams Administration of the 1790s. In their aggregate, they make up a phase shift in the intensity of federal action. Separately and as a whole, they are reasonable to rank as a no-holds-barred approach that exhibits zero tolerance for policy, and perhaps also partisan, divergence.

To date, these agonistic tools have not elicited parallel lawless measures from the states at their receiving end. At least at the time of this writing, therefore, agonistic federalism is a partial, asymmetrical dynamic. Yet this configuration is likely to be unstable, and states may take up agonistic tools if the federal government continues to use tools of the sort described here.

1. *Weaponizing Federal-State Cooperation.*—Theorists of "federalism as integration" have celebrated the "power states enjoy as national government's agents . . . in driving national policy and debates."¹³⁰ Such power exists because states and the federal government are jointly entangled in many of the largest regulatory programs in the country, from "health insurance to pollution control to transportation, public education, social welfare, disaster relief, policing, [and] immigration enforcement."¹³¹ Federalism as integration theorists did not, though, center in their accounts the flow of funds from the national government to the several states. In 2023, for example, the federal government collected some \$4.67 trillion in taxes, sending back some \$4.56 trillion to states and residents, mainly via social-service programs.¹³² Withholding of these funds is "infrequen[t]."¹³³ The fiscal element of cooperative federalism was to prove a neuralgic point—a lever that allowed the White House to flip what had been a model of cooperative and negotiated

129. Bowling, Fisk & Morris, *supra* note 122, at 513.

130. Gerken, *supra* note 73, at 1893.

131. Fahey, *Coordinated Rulemaking*, *supra* note 47, at 1323.

132. *Which States Contribute the Most and Least to Federal Revenue?*, USAFACTS (Apr. 22, 2025), <https://usafacts.org/articles/which-states-contribute-the-most-and-least-to-federal-revenue/> [<https://perma.cc/9GLN-EKS3>]; Michael Greve, *The State of Competitive Federalism*, AM. INST. FOR ECON. RSCH. (Nov. 21, 2024), <https://aier.org/article/the-state-of-competitive-federalism/> [<https://perma.cc/75XS-Z4MT>] ("Federal transfer payments to state and local governments . . . [i]n 2023 . . . equaled . . . roughly 18 percent of all federal outlays.").

133. Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 253 (2014) (noting "the relative infrequency of funding cut-offs").

intergovernmental relations into a weapon to achieve policy ends that many states' governments adamantly opposed.

In a series of executive orders and other administrative actions beginning on Inauguration Day, President Trump, or departments acting on his direction, either threatened or actually withheld federal funds intended to be transferred either directly to states or to state entities such as hospitals or museums. These executive actions had certain common features. In many instances, they terminated ongoing flows of federal money peremptorily and without notice or delay. Certain of these funding flows had been appropriated under a federal statute. In some cases, the threat to withhold federal monies was linked to an unrelated policy demand. We will return in Part III to some of the legal arguments and moves that states can deploy in response to the weaponization of cooperative federalism. Our narrower focus here, however, is simply sketching the basic contours of the new agonistic federalism at work.

On Inauguration Day, for example, an executive order threatened to withhold all “[f]ederal funds” from any immigration “sanctuary” jurisdiction.¹³⁴ Shortly after the order was promulgated, and before it could be enforced by any federal department, a coalition of cities and states obtained preliminary injunctive relief against the order on the ground that “the Executive Branch may not refuse to disperse federal grants already allocated by Congress to sanctuary jurisdictions without authorization by Congress.”¹³⁵ Litigation losses, though, seem to have scant effect on the White House’s strategic calculus—a fact perhaps reflecting what might be characterized as disinterest or disdain for judicial orders.¹³⁶

So, notwithstanding the earlier loss in the sanctuary litigation, in April 2025 the Administration threatened to end all K–12 funding for public schools in Maine because of the state’s policy on transgender athletes.¹³⁷ At the same time, the Department of Agriculture “pause[d]” its grants to the state on the same ground.¹³⁸ The Department of Education also threatened

134. Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025).

135. *City & Cnty. of San Francisco v. Trump*, 783 F. Supp. 3d 1148, 1190 (N.D. Cal. 2025); *accord PFLAG, Inc. v. Trump*, 766 F. Supp. 3d 535, 546, 561 (D. Md. 2025) (underscoring the same principle).

136. This is in contrast to the first Trump Administration, when “the Administration accepted the judicial determination that its efforts had no statutory support and agreed to comply.” Pasachoff, *supra* note 110, at 1144.

137. Kevin Miller, *Trump Administration Moves to Cut Off K-12 Funding to Maine amid ‘Impasse’ over Transgender Athletes*, ME. PUB. (Apr. 14, 2025), <https://www.mainepublic.org/politics/2025-04-11/maine-and-trump-administration-at-an-impasse-after-state-rejects-latest-demands> [<https://perma.cc/7QSV-H6HQ>].

138. Press Release, USDA, *USDA Freezes Funding, Promises Further Action if Maine Continues Violating Federal Law* (Apr. 2, 2025), <https://www.usda.gov/about-usda/news/press-releases/2025/04/02/usda-freezes-funding-promises-further-action-if-maine-continues-violating-federal-law> [<https://perma.cc/Y4HC-ZWQU>].

wholesale withholding of funds to schools that have “DEI programs.”¹³⁹ Then, in May 2025, the President threatened California with the loss of all federal funding—this time for allowing transgender children to compete in sporting events.¹⁴⁰ In September, it was the turn of Chicago schools to lose their funding because of their “Black Student Success Plan.”¹⁴¹ Other states have been threatened because they have laws concerning climate change.¹⁴² Again, the central characteristic of these threats is the absence of a nexus between the activity of the state being challenged (which, to be clear, is not plainly unlawful) and the sweeping scope of the threatened funding loss.

Other executive orders issued in early 2025 have simply terminated ideologically disfavored federal funding streams, despite the existence of a statutory appropriation. In March 2025, for instance, an executive order purported to eliminate most arts- and humanities-related spending by seven different federal agencies, including much funding that flowed to state-managed institutions and initiatives.¹⁴³ Again, a coalition of states filed suit and obtained preliminary injunctive relief against the measure on the ground that it was arbitrary and capricious.¹⁴⁴ In October 2025, during a government

139. Jonaki Mehta, *Education Dept. Warns Schools: Eliminate DEI Programs or Lose Funding*, NPR (Apr. 3, 2025), <https://www.npr.org/2025/04/03/nx-s1-5350978/trump-administration-warnsschools-about-dei-programs> [<https://perma.cc/4RYC-HFSZ>]; accord Press Release, U.S. Dep’t of Educ., U.S. Department of Education Directs Schools to End Racial Preferences (Feb. 15, 2025), <https://www.ed.gov/about/news/press-release/us-departmentof-education-directs-schools-end-racial-preferences> [<https://perma.cc/C7AX-XMB8>] (same).

140. Zolan Kanno-Youngs & Laurel Rosenhall, *Trump Threatens California over Transgender Athletes’ Participation in Sports*, N.Y. TIMES (May 27, 2025), <https://www.nytimes.com/2025/05/27/us/politics/transgender-athletes-trump-california.html> [<https://perma.cc/W5UQ-DQH3>] (reporting threat to remove “large scale” funding from California “maybe permanently”). Chicago and L.A. received similar threats. See Craig Wall, *Trump’s Threat to Withhold Chicago’s Federal Funding Amounts to ‘Terrorism,’ Mayor Johnson Says*, ABC7 CHI. (Apr. 15, 2025), <https://abc7chicago.com/post/donald-trumps-threat-withhold-federal-funding-sanctuary-city-policy-is-terrorism-chicago-mayor-brandon-johnson-says/16180417/> [<https://perma.cc/7FKC-T7Y7>] (noting Trump’s threat to withhold all federal funds over Chicago’s sanctuary city policy); see also Lisa Mascaro & Chris Megerian, *Trump Says He May Withhold Federal Aid for Los Angeles if California Doesn’t Change Water Policies*, ASSOC. PRESS (Jan. 23, 2025), <https://apnews.com/article/donald-trump-republicans-taxes-eea4754a0f580d451aa0588f0639d52c> [<https://perma.cc/E9BK-ZSDM>] (stating that Trump threatened to withhold federal disaster aid until California changed its approach on water management).

141. Mary Norkol, *Trump Administration Pulls Millions in Funding from Chicago Public Schools*, CHI. SUN-TIMES (Sep. 24, 2025), <https://chicago.suntimes.com/education/2025/09/24/future-of-cps-magnet-school-program-unclear-as-funding-threatened-by-trump-administration> [<https://perma.cc/WSG3-PH5M>].

142. Rachel Frazin, *Governors Push Back as Trump Directs the Justice Department to Go After State Climate Laws*, THE HILL (Apr. 9, 2025), <https://thehill.com/policy/energy-environment/5240623-democrat-governors-push-trump-climate-order/> [<https://perma.cc/7ZX7-66CZ>].

143. See Exec. Order No. 14238, 90 Fed. Reg. 13043 (Mar. 14, 2025) (directing seven governmental entities to eliminate “to the maximum extent” possible their “non-statutory components and functions”).

144. Rhode Island v. Trump, 781 F. Supp. 3d 25, 34 & n.1 (D.R.I. 2025) (pending appeal).

shutdown, the Administration froze or canceled some \$27.2 billion in funds earmarked for blue states (as opposed to \$739 million for red states).¹⁴⁵

The question of statutory authority for such actions has arisen in other suits challenging executive action concerning non-funding policies related to elections. Hence, in a different suit challenging an elections-related executive order, the District of Columbia District Court held that the president lacked authority to direct the addition of a citizenship documentation requirement to federal voting forms on a similar theory about the limits of statutory authority.¹⁴⁶ One of the features of the litigation triggered by these actions is the relative clarity of the underlying question of authority: In neither the arts funding case nor the citizenship question case was there significant uncertainty as to the *absence* of authority. Neither was an instance of a government pressing the margins of its statutorily defined mandate, but rather a government disregarding the outer envelope of that legislative mandate altogether.

States have also been swept up in a more general effort to eliminate federal support for universities conducting scientific and biomedical research. Late on one Friday in February, for example, the National Institutes of Health (NIH) issued a Supplemental Guidance document suddenly “slashing and capping previously negotiated indirect cost rates on all existing and future grant awards for biomedical research.”¹⁴⁷ The measure directly affected both public and private universities with large scientific research programs. Suit was initially brought by a group of twenty-two Democratic state attorneys general, who sought targeted relief for their institutions rather than for all institutions.¹⁴⁸ When preliminary relief was granted, it excluded states that did not join the lawsuit such as Alabama (which stood to lose about \$500 million), Georgia, or Missouri (each of which had about \$1 billion of federal funds on the line).¹⁴⁹

Again, these examples are not the first time that federal funding has been used as leverage over states. But their volume and scope, their disinterest for statutory requirements and settled conventions, and their partisan targeting suggest that something new is afoot—especially since the

145. Tony Romm & Lazaro Gamio, *Trump Targets Democratic Districts by Halting Billions During Shutdown*, N.Y. TIMES (Oct. 14, 2025), <https://www.nytimes.com/interactive/2025/10/14/us/trump-grants-democrat-districts-government-shutdown.html> [<https://perma.cc/E2ZG-6JGP>].

146. *League of United Latin Am. Citizens v. Exec. Off. of the President*, 808 F. Supp. 3d 29, 72, 80 (D.D.C. 2025).

147. *Massachusetts v. Nat’l Insts. of Health*, 770 F. Supp. 3d 277, 287 (D. Mass. 2025), *aff’d*, 164 F.4th 1 (1st Cir. 2026).

148. *Id.* at 287–88, 290.

149. Sheryl Gay Stolberg & Christina Jewett, *Judge Temporarily Blocks Trump Cuts to Medical Research Funding*, N.Y. TIMES (Feb. 10, 2025), <https://www.nytimes.com/2025/02/10/us/politics/nih-trump-lawsuit-medical-research.html> [<https://perma.cc/PMA2-5HHF>].

examples we have offered here are hardly exhaustive of the Administration's efforts.

2. *Withdrawing Federal Public Goods.*—A standard claim in the theoretical literature on federalism is that a key function of a national government is to supply “public goods” that would be underproduced if left to competing subnational authorities.¹⁵⁰ Public goods are products or services that are non-excludable and non-rivalrous in character, although both qualities are matters of degree, not kind.¹⁵¹ Examples of government services with a modicum of these qualities include the provision of information about risks (e.g., public health and meteorological data) and insurance against unexpected or stochastic risks.¹⁵² Very simply, these goods are more effectively applied at scale; subnational provision, in contrast, would yield duplication, waste, and subpar-quality goods.

Despite the sense that the federal provision of public goods is a one-way ratchet, at times in this country's history the federal government has stepped back. For example, President Reagan fired striking air traffic controllers in 1981, signaling a broader retreat from the post-war regulatory status quo and the bargain between capital and labor that had underwritten it.¹⁵³ Nevertheless, since January 2025, the federal government has pulled back on public goods in ways that impose large costs on states, without notice to those states, and in at least one instance in the teeth of an unfolding human disaster. In some instances, the withdrawal of federal public goods has likely been in violation of statutory law, and perhaps also constitutional doctrine. Yet, under the no-holds-barred approach to intergovernmental relations taken by the second Trump Administration, this has not proved a friction to date.¹⁵⁴

150. See WALLACE E. OATES, *FISCAL FEDERALISM* 31–35 (William J. Baumol ed., 1972) (offering the theory that the optimal division of functions among levels of government requires the “central government [to] assume primary responsibility for . . . providing efficient outputs of those public goods that significantly affect the welfare of individuals”).

151. Jonathan Anomaly, *Public Goods and Government Action*, 14 *POL., PHIL. & ECON.* 109, 109–10 (2015).

152. National security is often identified as a national public good, but at least in an era of small-scale action with national security consequences (i.e., terrorism), it is not clear that such security can be produced exclusively by a central authority. See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 *COLUM. L. REV.* 1595, 1641 (2014) (exploring the value state enforcement can provide in enforcing federal programs).

153. On the importance of the firings as a historical moment, see JOSEPH A. MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* 10–11 (2011).

154. The main text includes illustrative examples, see *infra* notes 155–65 and accompanying text, but is not exhaustive—in part because the list of federal public goods defunded is a moving target. In June 2025, for example, the White House proposed eliminating the Chemical Safety Board, responsible for investigating dangerous chemical accidents. Ellie Borst, *Trump Revives Efforts to Kill Chemical Safety Board*, *E&E NEWS* (June 2, 2025), <https://www.eenews.net/articles/trump-revives-efforts-to-kill-chemical-safety-board/> [<https://perma.cc/EQL9-QRXA>].

We recognize that it is hardly clear that the withdrawal of a funding stream counts as an “agonistic” act, and are sensitive to the fact that this category of government action therefore falls at the edge of what might be called agonistic federalism. But we think it would elevate form over political and material substance to ignore these cases in offering an account of contemporary agonistic federalism. State dependency on federal public good provision is so extensive, and so deeply entrenched, that it beggars belief to say that the national government can, willy-nilly, withdraw those goods—imposing along the way large material harms on the states—without severely disrupting the operation of another sovereign government. Hence, we include them in the agonistic federalism category.

Consider, for example, the cuts to the National Weather Service (NWS) and the National Oceanic and Atmospheric Administration (NOAA) executed in April and March 2025, respectively. These cuts led to 500 departures from NOAA (with 300 more anticipated later in the same year), leading to a “degraded” service and a “significant[] scal[ing] back [of] work of the 122 weather offices nationwide.”¹⁵⁵ The result is a broad degradation of both short- and medium-term forecasting capacity.¹⁵⁶ Declining forecast quality creates geographically localized pockets of intense vulnerability. For example, after the Director of the Federal Emergency Management Agency expressed surprise that the Gulf Coast had a hurricane season (perhaps in jest?), experts in disaster preparedness warned of the resulting risks from the loss of forecasting acuity and preparedness.¹⁵⁷ When tornadoes struck Kentucky in May 2025, local NWS offices lacked the staff to maintain round-the-clock coverage.¹⁵⁸ As forecasts become less accurate, the risk that evacuation orders will target the wrong places rises.¹⁵⁹

At the same time that it withdrew the informational public good of weather forecasting, the second Trump Administration also narrowed its provision of insurance for weather-related natural disasters. In the first months of that Administration, FEMA “denied federal assistance for tornadoes in Arkansas, flooding in West Virginia and a windstorm in Washington state. It also has refused North Carolina’s request for extended

155. Friedman, *supra* note 16.

156. *Id.*

157. Saul Elbein, *With Hurricane Season Underway, Gulf Coast Worries FEMA, Weather Service Aren’t Ready*, THE HILL (June 6, 2025), <https://thehill.com/policy/equilibrium-sustainability/533582-fema-nws-weather-service-noaa-dhs-hurricane-season-trump-cuts/> [<https://perma.cc/F6Y7-ZVEB>].

158. Salas, *supra* note 18.

159. Andrea Thompson, *How Trump’s National Weather Service Cuts Could Cost Lives*, SCI. AM. (May 13, 2025), <https://www.scientificamerican.com/article/how-trumps-national-weather-service-cuts-could-cost-lives/> [<https://perma.cc/F4UY-BYBV>].

relief funding in the aftermath of Hurricane Helene.”¹⁶⁰ Arkansas’s denial was later reversed,¹⁶¹ but funding nevertheless arrived late—perhaps inflicting costs on wellbeing and health. The Administration also canceled two grant programs—the Building Resilient Infrastructure and Communities grants and the Hazard Mitigation and Grant Program—funding local initiatives to mitigate damage from “flooding, tornadoes and other weather-related events.”¹⁶² While the FEMA denials were equal-opportunity, sometimes disaster relief has been tied to unrelated but ideologically charged policy demands. For instance, in January 2025, the President suggested that California would only receive federal aid for the wildfires sweeping the Los Angeles area if it enacted new voter identification laws.¹⁶³ Arguably, any denial of funding for wildfire relief would have been unlawful given that Trump’s predecessor had already signed an emergency declaration, triggering the disbursement of appropriated funds.¹⁶⁴

Another policy domain characterized by a rapid withdrawal of federal public good provision is public health. The second Trump Administration has been characterized by a powerful contempt for science funding, for example, dramatically scaling back the availability of National Science Foundation and National Institutes of Health monies.¹⁶⁵ Credible, evidence-backed federal interventions with respect to vaccine safety and scheduling have also been cast into doubt as key advisory panels are increasingly dominated by anti-vaccine activists.¹⁶⁶ This general federal retreat from

160. Alex Brown, *Trump Denies Disaster Aid, Tells States to Do More*, ARK. ADVOC. (Apr. 25, 2025), <https://arkansasadvocate.com/2025/04/25/trump-denies-disaster-aid-tells-states-to-do-more/> [<https://perma.cc/4XGP-6C79>].

161. Antoinette Grajeda, *Arkansas’ Request for Federal Disaster Assistance Approved After Initial Denial*, ARK. ADVOC. (May 14, 2025), <https://arkansasadvocate.com/briefs/arkansas-request-for-federal-disaster-assistance-approved-after-initial-denial/> [<https://perma.cc/RGW9-4L9Q>].

162. Thomas Frank, *FEMA Halts Grant Program that Spent Billions on Disaster Protection*, E&E NEWS (Apr. 4, 2025), <https://www.eenews.net/articles/fema-halts-grant-program-that-spent-billions-on-disaster-protection/> [<https://perma.cc/MMX6-Y8C5>]; Thomas Frank, *Trump Quietly Halts Money for Preventing Disaster Damage*, E&E NEWS (May 1, 2025), <https://www.eenews.net/articles/trump-quietly-halts-money-for-preventing-disaster-damage/> [<https://perma.cc/NRH7-XC6N>].

163. *Trump’s Two Asks from California: Voter ID Laws and Water Flow*, REUTERS (Jan. 24, 2025), <https://www.reuters.com/world/us/trumps-two-asks-california-voter-id-laws-water-flow-2025-01-24/> [<https://perma.cc/ZVS9-5E6W>].

164. Meryl Justin Chertoff, *Trump’s Threats to Withhold Disaster Relief Undermine Federalism Principles*, STATE CT. REP. (Mar. 11, 2025), <https://statecourtreport.org/our-work/analysis-opinion/trumps-threats-withhold-disaster-relief-undermine-federalism-principles> [<https://perma.cc/5CY6-2NQU>].

165. Kathryn M. Olesko, Introduction, in *The Crisis in American Science*, 63 HIST. SCI. 126, 127, 129–30, 132 (2025) (summarizing funding cuts across scientific agencies).

166. See Amy Schoenfeld Walker & Lazaro Gamio, *Who Makes Decisions About Vaccine Policy Now?*, N.Y. TIMES (Sep. 15, 2025), <https://www.nytimes.com/interactive/2025/09/16/>

science education and funding undermines a national public good to the extent that such research and its fruits are closely tied to possibilities for future economic growth.¹⁶⁷ But the prospect of an impoverished nation that lags geostrategically is not a federalism problem as such. More relevant on that front is, for example, the “extensive” pruning of the Centers for Disease Control and Prevention (CDC), which lost some eighteen percent of its staff within the first months of 2025.¹⁶⁸ At the same time, federal support withdrew from state and local health services responsible for “invisible but critical work such as inspecting restaurants, monitoring wastewater for new and harmful germs, [and] responding to outbreaks before they get too big.”¹⁶⁹ These withdrawals of federal regulatory actions in effect impose potentially large externalities on the states responsible for the health and safety of their residents.

In public discourse, the eliminated elements of the federal bureaucracy are often labeled pejoratively as a “deep state”¹⁷⁰ or a pathological form of “managerialism.”¹⁷¹ Such terminology, though, jars when set against the elimination of federal informational goods and disaster insurance—goods that likely save the lives of thousands of Americans. Such terminology also understates the discontinuity with federal relations before 2025. When the absence of such public goods at the national level de facto imposes large costs on states (particularly when set against a historically informed baseline expectation of the goods’ provision), when the nature of the public good means that states cannot substitute for the federal absence, and especially when such withdrawals are at odds with federal statutes, it seems plausible to view the national government as engaging in a form of asymmetrical assault on the states through a no-holds-barred renegeing on what had seemed an enduring and enabling intergovernmental bargain.

health/vaccines-rfk-jr-cdc-fda.html [https://perma.cc/R8X7-8XN6] (cataloguing anti-vaccine statements from newly installed health officials).

167. H. Holden Thorp, *America Is Ceding the Lead in Creating the Future*, 388 SCI. 1005, 1005 (2025) (arguing that the drawdown in science funding “will eventually reduce the market successes and global leadership that the United States has boasted since World War II”).

168. Apoorva Mandavilli & Roni Caryn Rabin, *C.D.C. Cuts Threaten to Set Back the Nation’s Health, Critics Say*, N.Y. TIMES (Apr. 2, 2025), <https://www.nytimes.com/2025/04/02/health/cdc-layoffs-kennedy.html> [https://perma.cc/U7KB-K2MR].

169. Laura Ungar & Michelle R. Smith, *Trump Administration’s Deep Cuts to Public Health Leave System Reeling*, PBS NEWS (May 31, 2025), <https://www.pbs.org/newshour/health/trump-administrations-deep-cuts-to-public-health-leave-system-reeling> [https://perma.cc/ML5V-2U3B].

170. For a careful and fair-minded analysis of that rhetoric, see generally Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018).

171. See Nathan Levine, Opinion, *This Idea Explains a Lot About What Has Happened in Trump 2.0*, N.Y. TIMES (June 6, 2025), <https://www.nytimes.com/2025/06/06/opinion/trump-musk-managers-bureaucrats.html> [https://perma.cc/MA8Q-NAF8] (exploring the current anti-managerial ideology opposed to bureaucratic expansion).

3. *Criminalizing Policy Disagreement (and Other Accelerations)*.— Policy differences between state and federal officials commonly play out in court.¹⁷² One state attorney general famously summarized his job as “I go into the office, I sue the federal government and I go home.”¹⁷³ Under the second Trump Administration, however, the forms of litigated contestation between governments have changed along both affirmative and negative dimensions.

In the first wing of this strategy, the federal government has transformed political disagreements into criminal charges filed against officials in their personal capacity, upping the ante of potential disobedience. A logical (and terror-inducing) extension of the strategy is the deployment of federal troops, as occurred in June 2025 in Los Angeles. In the second wing of the strategy, the federal government has drawn back from the policing of public corruption, sometimes in ways that evinced a starkly partisan character. In more than one instance, it has declined to investigate seemingly credible evidence of corruption among senior officials.¹⁷⁴ In net, these two shifts portend a reallocation of federal criminal enforcement resources to buttress the Administration’s partisan or ideological goals on the one hand, and to degrade the capacity of local and state governments on the other.

On the affirmative side, the Justice Department announced in January 2025 its intention to use criminal charges against local and state officials who take divergent positions with respect to immigration policy.¹⁷⁵ For example, it identified the “harboring” of undocumented persons, the refusal to disclose immigration-status information, and criminal conspiracy as potential charges.¹⁷⁶ Early on, the Department singled out the sheriff of Tompkins County, New York, Derek Osborne, for potential charges based on his refusal to continue to detain an undocumented Mexican citizen upon federal

172. See Heather K. Gerken, *The Taft Lecture: Living Under Someone Else’s Law*, 84 U. CIN. L. REV. 377, 377 (2016) (“When the national government passes a law and state officials think the feds have overstepped their bounds, everyone knows the script. We all know it’s a federalism problem, we all know the doctrinal tools the states will deploy . . .”).

173. Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1893 (2018) (quoting then-Texas Attorney General Greg Abbott).

174. See, e.g., Devlin Barrett, Glenn Thrush, Alan Feuer, Maggie Haberman & Hamed Aleaziz, *Trump Justice Dept. Closed Investigation into Tom Homan for Accepting Bag of Cash*, N.Y. TIMES (Sep. 22, 2025), <https://www.nytimes.com/2025/09/20/us/politics/tom-homan-fbi-trump.html> [<https://perma.cc/3K9M-8NSW>] (outlining the Trump Administration’s efforts to shut down the Homan case).

175. Bove Memorandum, *supra* note 7; see also Russell Payne, *DOJ Is Trying to “Scare” Local Democrats into Carrying Out Trump’s Mass Deportations*, SALON (Jan. 23, 2025), <https://www.salon.com/2025/01/23/doj-is-trying-to-scare-local-democrats-into-carrying-out-mass-deportations/> [<https://perma.cc/QKR4-SMSV>]; Maria Sacchetti & Jeremy Roebuck, *DOJ Threatens to Prosecute Local Officials over Immigration Enforcement*, WASH. POST (Jan. 22, 2025), <https://www.washingtonpost.com/national-security/2025/01/22/justice-immigration-memosanctuary-cities/> [<https://perma.cc/9USA-AHRT>].

176. Bove Memorandum, *supra* note 7.

demand.¹⁷⁷ In May 2025, federal agents arrested, and a federal grand jury indicted, Wisconsin state judge Hannah Dugan for obstruction of justice.¹⁷⁸ In “rushing to obtain a criminal complaint and publicly arresting a sitting state-court judge with no apparent criminal history,” the Justice Department at minimum broke with standing prosecutorial policy.¹⁷⁹ Judge Dugan’s arrest, to be sure, is not without precedent. During the first Trump Administration, an analogous prosecution was brought against Judge Shelley Joseph, a Massachusetts state-court judge, based on obstruction-of-justice-related offenses.¹⁸⁰ In addition to these immigration-law-related prosecutions, a U.S. Attorney who had formerly served as Trump’s personal lawyer obtained an indictment of the sitting New York Attorney General, Letitia James, on grounds generally viewed as unusual and evidentiarily thin.¹⁸¹

Once the switch to coercion has been made, criminal prosecution need not be the only tool on the table. On the night of Saturday, June 7, President Trump issued an order deploying National Guard troops to Los Angeles “to temporarily protect ICE and other United States Government personnel who are performing Federal functions,” a move that was followed by threats to deploy in several other cities.¹⁸² Tellingly, the initial memo characterizes the protests—i.e., what would ordinarily be understood to be a core case of First Amendment speech—as “a form of rebellion against the authority of the Government of the United States.”¹⁸³ On social media, the President further employed inflammatory rhetoric, claiming that the city was “invaded and

177. Christopher Maag & Eileen Sullivan, *U.S. Says Sheriff Could Face Prosecution for Releasing Immigrant*, N.Y. TIMES (Jan. 30, 2025), <https://www.nytimes.com/2025/01/30/nyregion/ny-sheriff-ithaca-immigration.html> [<https://perma.cc/BY32-VHPS>].

178. Mitch Smith, *Wisconsin Judge Accused of Obstructing Immigration Agents Seeks Dismissal of Case*, N.Y. TIMES (May 15, 2025), <https://www.nytimes.com/2025/05/14/us/judge-hannah-dugan-ice-wisconsin.html> [<https://perma.cc/BD5N-5JAZ>].

179. James Pearce, *The Judge Dugan Case Is More Complicated than It Seems*, LAWFARE (Apr. 29, 2025), <https://www.lawfaremedia.org/article/the-judge-dugan-case-is-more-complicated-than-it-seems> [<https://perma.cc/7B5B-25B6>].

180. Recent Indictment, *Tenth Amendment—Anticommandeering—Department of Justice Brings Obstruction of Justice Charges Against Massachusetts State Court Judge—Indictment*, *United States v. Joseph, No. 19-cr-10141 (D. Mass. Apr. 25, 2019)*, 133 HARV. L. REV. 1129, 1129 (2020).

181. Erica Orden, *Why Trump May Have Given Letitia James Ammo in Court*, POLITICO (Oct. 15, 2025), <https://www.politico.com/news/magazine/2025/10/15/letitia-james-indictment-defense-interview-00607888> [<https://perma.cc/4EMW-9D9Y>]; Jacob Knutson, *In Latest Political Prosecution, Trump’s DOJ Indicts New York AG Letitia James*, DEMOCRACY DOCKET (Oct. 9, 2025), <https://www.democracymagazine.com/news-alerts/letitia-james-indicted-trump-justice-department-pressure/> [<https://perma.cc/VPJ2-3785>].

182. Memorandum from President Donald J. Trump to the Sec’y of Def., Att’y Gen., and Sec’y of Homeland Sec. (June 7, 2025), <https://www.whitehouse.gov/presidential-actions/2025/06/department-of-defense-security-for-the-protection-of-department-of-homeland-security-functions/> [<https://perma.cc/C6M3-C57K>].

183. *Id.*

occupied” by “violent, insurrectionist mobs,” and directed his lieutenants to take any actions necessary to “liberate Los Angeles from the Migrant Invasion.”¹⁸⁴ The deployment to Los Angeles was followed by litigation, as well as the threat to deploy troops to other cities, including Chicago, Portland, and Baltimore, as well as intensive and complex litigation over the statutory authority available for such deployments.¹⁸⁵ Once again, the action is not quite unprecedented: President Johnson had taken a similar action in the late 1960s with respect to desegregation-related protests.¹⁸⁶

Obviously, the deployment of federal troops on American soil outside the context of an actual war raises profound questions of statutory and constitutional authority—and in skating over those complexities we do not mean to minimize their importance or difficulty.¹⁸⁷ Nor are the legal and political questions limited to instances of military deployment. In Chicago, a wave of ICE enforcement actions has raised troubling questions about when violent force can lawfully be used against not just those targeted by immigration agents, but also bystanders.¹⁸⁸ In Minneapolis, as we have noted, the deployment led to at least two tragic shooting deaths.¹⁸⁹ Rather, our point here is narrower, and focuses on the logic of agonistic federalism at work in those incidents. The use of federal troops in Los Angeles came over the sharp protests of the Governor and other California leaders.¹⁹⁰ Indeed, it is

184. Tyler Pager, *Trump Jumps at the Chance for a Confrontation in California over Immigration*, N.Y. TIMES (June 8, 2025), <https://www.nytimes.com/2025/06/08/us/politics/trump-california-immigration.html> [<https://perma.cc/MD6B-Y7BL>].

185. Efforts to deploy the Guard generated legal challenges with divergent outcomes that are unfolding still at the time of this writing. *Compare* Oregon v. Trump, 809 F. Supp. 3d 1193, 1202–03 (D. Or. 2025), *appeal dismissed*, No. 25-6268, 2026 WL 443722 (9th Cir. Feb. 17, 2026) (permanently enjoining deployment to Portland), *with* Trump v. Illinois, 146 S. Ct. 432, 433–34 (2025) (holding that “to call the Guard into active federal service . . . the President must be ‘unable’ *with the regular military* ‘to execute the laws of the United States’” and therefore denying the Government’s application for a stay of the district court’s temporary restraining order barring deployment of the Guard in Illinois). A central question, moving forward, will be whether the Administration will find a way to satisfy the seemingly very onerous requirement imposed by the Court via statutory construction on guard deployments. If not, the *Illinois* case will be an instance in which a statutory construction decision had significant constitutional ramifications.

186. Pager, *supra* note 184.

187. For an excellent first take on these questions, see Chris Mirasola, *The National Guard in Los Angeles*, LAWFARE (June 8, 2025), <https://www.lawfaremedia.org/article/the-national-guard-in-los-angeles> [<https://perma.cc/MT68-UHSV>]; *see also* Aziz Huq, *Will the Supreme Court Stand Up to Trump if He Sends Troops to Chicago?*, POLITICO (Sep. 4, 2025), <https://www.politico.com/news/magazine/2025/09/04/trump-national-guard-chicago-democracy-00541248> [<https://perma.cc/MS6V-L8HN>] (discussing litigation in the Ninth Circuit Court of Appeals).

188. Julie Bosman, *Immigration Crackdown Spreads Through Chicago, Including Wealthy Neighborhoods*, N.Y. TIMES (Oct. 24, 2025), <https://www.nytimes.com/2025/10/24/us/trump-immigration-crackdown-chicago-lakeview.html> [<https://perma.cc/CV5J-Q23N>].

189. *See supra* note 11 and accompanying text.

190. Nigel Duara, Jeanne Kuang & Sergio Olmos, *Gavin Newsom Asks Trump to Withdraw Troops from Los Angeles as Protests Intensify*, CALMATTERS (June 8, 2025), <https://calmatters.org/justice/2025/06/national-guard-los-angeles/> [<https://perma.cc/C3GW-5NWJ>].

plausibly glossed in context as a presidential effort to leverage control of the military not just to address a policy problem, but also to score points against what he called “feckless” ideological foes at the state and local level.¹⁹¹ Such no-holds-barred conflict, seemingly with scant space for compromise or negotiation, offers a particularly crisp example of agonistic federalism at work.

Second, at the same time as it has instrumentalized federal criminal justice to undermine the policy autonomy of states, and used it to enforce an ideological line on culture-war and immigration issues, the Justice Department has “decimat[ed]” its public corruption unit, reducing it from “more than two dozen personnel last fall to a skeleton crew of four to six prosecutors now.”¹⁹² This disarming of the federal instruments for maintaining governmental integrity occurred in the context of increasing “skepticism” from the Supreme Court about public corruption prosecutions in general.¹⁹³ Just as in the context of federal public good provision discussed above, the national government is using its past collaborations with state authorities as a means of pressure.

Perhaps more agonistic than the general retreat from white-collar prosecutions has been the selective and ideological use of prosecutorial discretion. Consider the decision in February 2025 to drop the charges against New York City Mayor Eric Adams in relation to alleged public corruption and campaign finance violations.¹⁹⁴ The decision revealed considerable tension between political appointees, who drove the decision to drop charges, and career prosecutors in the Southern District of New York.¹⁹⁵ Several of the latter resigned rather than execute an order that to them seemed

191. Priscilla Alvarez & Betsy Klein, *Inside the Trump Administration's Decision to Deploy the National Guard to California*, CNN (June 8, 2025), <https://www.cnn.com/2025/06/08/politics/trump-national-guard-decision> [<https://perma.cc/YX4H-PUAR>]; see also Pager, *supra* note 184 (quoting Governor Newsom as interpreting events in this light).

192. Adam Goldman, Glenn Thrush & Devlin Barrett, *F.B.I. Dismantles Elite Public Corruption Squad*, N.Y. TIMES (May 15, 2025), <https://www.nytimes.com/2025/05/15/us/politics/fbi-public-corruption-squad-trump.html> [<https://perma.cc/77EE-YGER>].

193. Daniel C. Richman, *Navigating Between “Politics as Usual” and Sacks of Cash*, 133 YALE L.J.F. 564, 565 (2023); see also Zephyr Teachout, *Demoralizing Elite Fraud*, 133 YALE L.J.F. 620, 620–22 (2024) (explaining the Supreme Court’s unwillingness to adopt a moral framework when deciding antifraud and anticorruption cases).

194. Lola Fadulu & Alyce McFadden, *A Timeline of Eric Adams’s Indictment, and What Came Next*, N.Y. TIMES (Apr. 2, 2025), <https://www.nytimes.com/article/eric-adams-indictment-timeline.html> [<https://perma.cc/K2Q6-PJ4K>].

195. William K. Rashbaum, Dana Rubinstein, Glenn Thrush, Michael Rothfeld & Jonah E. Bromwich, *Push to Drop Adams Charges Reveals a Justice Dept. Under Trump’s Sway*, N.Y. TIMES (Feb. 14, 2025), <https://www.nytimes.com/2025/02/10/nyregion/eric-adams-charges-doj-trump.html> [<https://perma.cc/HLZ6-JMX4>]; Michael S. Schmidt, William K. Rashbaum, Maggie Haberman & Jonah E. Bromwich, *How the Justice Dept. Helped Sink Its Own Case Against Eric Adams*, N.Y. TIMES (Feb. 14, 2025), <https://www.nytimes.com/2025/02/13/nyregion/adams-lawyers-justice-department-dismissal.html> [<https://perma.cc/RQ89-KWXZ>].

(very plausibly) unethical.¹⁹⁶ While a federal judge approved the dismissal of the prosecution, he did so with manifest reservations.¹⁹⁷ After the dismissal, the Adams Administration reversed course on “sanctuary” policies that limited municipal officials’ cooperation on immigration, while the mayor allegedly offered his personal thanks to the President directly.¹⁹⁸

It seems likely that withdrawal of the Adams prosecution signaled to other state and local actors that they could engage in corrupt behavior that otherwise would violate federal law if they agreed to advance the ideological agenda of the national government. It is worth setting this withdrawal of criminal justice’s shadow against the context of the more aggressive use of criminal prosecutions for ideological ends. The net result of these divergent approaches is that state and local officials can likely expect—to put the matter in its starkest form—immunity from federal criminal prosecution if they comply with the ideological mandates of the Administration but violate the criminal law. They must also reflect on the prospect of prosecution if they buck those mandates in ways that would ordinarily have not generated criminal charges, but that can be characterized as criminal under the capacious terms of federal criminal law. Rather than constituting separate centers of policymaking, state and local governments would have a strong incentive to operate as vassals of the White House.

The federal retreat from anti-corruption enforcement also coheres with our earlier discussion of the selective withdrawal of public goods provision. This policy choice marks a significant and perhaps irremediable loss of a national public good—i.e., the mitigation of corruption, defined as “the sale by government officials of government property for personal gain.”¹⁹⁹ States

196. Benjamin Weiser & Jonah E. Bromwich, *An Ambitious Prosecutor Quits Rather Than Do Trump’s Bidding*, N.Y. TIMES (Feb. 14, 2025), <https://www.nytimes.com/2025/02/12/nyregion/adams-prosecutor-danielle-sassoon-profile.html> [<https://perma.cc/KZ6F-CEUC>].

197. William K. Rashbaum, Benjamin Weiser, Jonah E. Bromwich & Dana Rubinstein, *Judge Ends Eric Adams Case, but Sharply Criticizes Trump’s Justice Dept.*, N.Y. TIMES (Apr. 2, 2025), <https://www.nytimes.com/2025/04/02/nyregion/eric-adams-case-dismissed.html> [<https://perma.cc/L3FA-7MGS>].

198. On the policy changes attendant on the dropping of charges, see Luis Ferré-Sadurní, *After Meeting with Trump’s Border Czar, Adams Opens Rikers to ICE Agents*, N.Y. TIMES (Mar. 5, 2025), <https://www.nytimes.com/2025/02/13/nyregion/adams-ice-rikers-homan.html> [<https://perma.cc/JP6Q-C4CF>]; Hurubie Meko, *Adams Administration Will Give ICE Space to Operate on Rikers Island*, N.Y. TIMES (Apr. 9, 2025), <https://www.nytimes.com/2025/04/09/nyregion/adams-ice-rikers-island.html> [<https://perma.cc/FY32-GWM2>]. On the personal interaction with the president, see Emma G. Fitzsimmons & Jonah E. Bromwich, *Trump Says Mayor Adams Visited the White House to ‘Thank Me’*, N.Y. TIMES (May 9, 2025), <https://www.nytimes.com/2025/05/09/nyregion/eric-adams-trump-meeting.html> [<https://perma.cc/FKF9-YP7N>].

199. Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q. J. ECON. 599, 599 (1993); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 374 (2009) (arguing that the “Framers believed that an individual is corrupt if he uses his public office primarily to serve his own ends”); Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 AM. J. POL.

are unlikely to punish their own,²⁰⁰ and since states cannot typically engage in cross-border prosecutions (say, with Wisconsin prosecutors investigating corruption in Chicago), there is no effective substitute for federal action. The end result, therefore, is not just an ideological distortion of state and local policies due to the gravitational tug of unbridled federal prosecutorial power. It is also likely to be an absolute loss of capacity in local and state government.

D. Agonistic Federalism and the Theorization of Intergovernmental Relations

We have charted here three distinct vectors of agonistic federalism: weaponizing federal-state cooperation; withdrawing federal public goods; and criminalizing policy disagreement. These measures are not wholly unprecedented—to the contrary, we have stressed the existence of antebellum antecedents in particular—but in their intensity and their concurrency in time, they have an aggregate effect that runs beyond any individual action. For instance, it surely matters that states are simultaneously losing national public goods and being placed under new fiscal strain by efforts to leverage existing funding flows if for no other reason that both tactics impose pressure on states' budgets simultaneously. The combined effect of multiple vectors of fiscal pressure is likely to be more significant as a consequence. Similarly, state and local officials worrying about both the federal refusal to prosecute their corrupt peers, and also the prospect of themselves being targeted by the Justice Department, are likely to be chilled. The aggregate effect of agonistic federal tactics is likely more than the sum of their effect standing alone: It is to oust states' power to set policy in general, and not just on specific points of disagreement.

To be sure, we have painted a one-sided picture in this Part by drawing out new modes of national action. While surely the current Administration would argue that the targeted states moved first—say, by passing laws protecting transgender rights—the purpose of these state decisions was not to challenge federal authority. Even states and localities that adopted sanctuary measures or slow-walked cooperation with federal officials were still acting within the tradition of uncooperative federalism and within the tradition of state police powers, well short of the agonistic federalism we describe here. And we will turn in Part III to other tools available to respond to this acceleration of intergovernmental conflict. Nevertheless, even with

SCI. 328, 332 (2004) (defining “political corruption [as] the inappropriate use of common power and authority for purposes of individual or group gain at common expense”).

200. Lauren M. Ouziel, *What Are Federal Corruption Prosecutions For?*, 133 YALE L.J. F. 593, 605–06 (2024); accord Norman Abrams, *The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role*, 42 LOY. U. CHI. L.J. 207, 230–33 (2011).

only one side of the ledger detailed, we think that it is clear how inadequate previous theories of federalism are to capture these dynamics. Agonistic federalism instead might be understood as flowing from the exploitation of plural fault-lines in the federal-state relationship. Previous theories of federalism have relied on “solutions” to their fault lines that no longer hold fast—and the emergence of agonistic federalism can be understood very simply as a realization of the internal contradictions and an unraveling of the implicit patches holding earlier federalism theories together. In other words, even if agonistic federalism works as a matter of mere description now, it may in the medium-term prove an unsustainable equilibrium—giving way to something else entirely.

The transformative and volatile nature of agonistic federalism, though, is a function of its deviation from earlier models of intergovernmental relations. To begin with, recall that dual federalism requires that “the nation and the states . . . control autonomous and distinct domains of social life.”²⁰¹ Courts, however, lacked effective doctrinal tools for maintaining a sharp distinction,²⁰² and the efflorescence of interjurisdictional challenges made reassertion of a hard jurisdictional boundary unappealing.²⁰³ Agonistic federalism takes advantage of the resulting pervasive intermingling of responsibilities. The absence of a hard separation between national and state power means that it is often possible to point to a prima facie valid reason for—say—arresting a state-court judge,²⁰⁴ or ending the funding for school meals upon which impoverished children rely.²⁰⁵ The blurring of jurisdictional boundaries thus lowers the frictional cost of using one of agonistic federalism’s tools, and hence makes it a more appealing, easier to grasp approach.

Second, the process federalism of Wechsler and Kramer envisaged a synchronization of interests bubbling up from the structural and party-political linkages between different levels of government.²⁰⁶ Both theories also assumed that the flow of influence would run from the more local to the more national, such that national action reflected and embodied state-level

201. Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 DUKE L.J. 1513, 1518 (2002).

202. See Powell, *supra* note 62, at 669–70 (describing how the Court’s use of textual construction as a doctrine effectively collapsed the federal-state distinction and resulted in inconsistent, policy-driven decisions after *Hammer v. Dagenhart*).

203. Ryan, *supra* note 63, at 537–38.

204. Pearce, *supra* note 179.

205. Miller, *supra* note 137; Harris Van Pate, *Correcting Misconceptions Surrounding Maine’s ‘Win’ Against the USDA*, ME. POL’Y INST. (May 6, 2025), <https://mainepolicy.org/correcting-misconceptions-surrounding-maines-win-against-the-usda/> [<https://perma.cc/WKL3-HQVK>].

206. See *supra* text accompanying notes 60–68.

preferences.²⁰⁷ The emergence of agonistic federalism turns these logics of process federalism on their heads: Across the examples we have collected here, federal action is characterized by intensive, even no-holds-barred, forms of partisan and ideological action. Whatever linkages between the national and the local that might have existed as a consequence of the constitutional design (per Wechsler) or the operation of the American party system (as Kramer postulated) no longer restrain federal action. This analysis puts agonistic federalism closer to the “separation of parties” framing of American governance, except that it adds to that general conception a set of aggressive partisan tools that are not the necessary outgrowth of national parties.

Finally, federalism by integration²⁰⁸ celebrated the absence of “fixed rules of engagement.”²⁰⁹ It imagined “discretionary spaces of federalism” in which “policy conversations and bureaucratic negotiations” could unfold without the federal government “taking preemptive action.”²¹⁰ It assumed that the federal government and the states had a joint interest in “creating, implementing, and interpreting federal statutory law.”²¹¹ And it anticipated the possibility that states would “tweak, challenge, and even dissent from federal law.”²¹² Agonistic federalism works with the same basic materials: A discretionary policy space in which the federal government and the states work together; a relative paucity of hard legislative constraints; and a pattern of negotiation, cooperation, and to a certain extent, codependency in the production of a policy good. But it inverts their valence by using the fact of interdependence—and in particular, the flow of federal funds from the center to the various states—as a lever to assert control not just over one policy domain, but far more generally. Rather than negotiation, the agonistic federal government issues demands. These demands purport to place states into untenable positions, whereby they are asked either to abandon their democratic capacity to pursue their own policy commitments or to allow considerable, immediate harms to befall to vulnerable groups. In this way, a state is asked to choose between forgoing its democratic commitments and allowing harm to come to an innocent subset of its population—a type of “moral blackmail” that the federal government (we believe) has no business

207. See Wechsler, *supra* note 65, at 547 (“To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.”); Kramer, *supra* note 68, at 279 (describing a system of “mutual dependency among party and elected officials at different levels . . . that explains the success of American federalism . . . [in] protect[ing] state institutions”).

208. Fahey, *Federalism by Contract*, *supra* note 77, at 2412.

209. Rodríguez, *supra* note 78, at 2098.

210. *Id.* at 2097.

211. Gluck, *supra* note 73, at 537.

212. Bulman-Pozen & Gerken, *supra* note 47, at 1259.

using in the first instance.²¹³ This account also resonates with theories of authoritarianism more generally. Agonistic federalism does involve the application of authoritarian tactics, typically targeting individuals and civil society, to the states.²¹⁴ But we think mere invocations of “authoritarianism” fail to specify the stark change in federal-state relations.

In sum, there are profound differences between the earlier models of dual federalism, process federalism, and federalism by integration, and the details of agonistic federalism that are depicted here. Our aim in this Part has been to identify that model as an emergent possibility, and to illustrate how it has played out in the opening months of the second Trump Administration. While we have flagged certain continuities with policies pursued by the first Trump Administration—particularly salient in respect to so-called “sanctuary” jurisdictions—we think that the sheer volume and intensity of these measures marks a phase shift in intergovernmental relations. So far as “our federalism” goes, the net result is something distinctive and different from the twentieth- and twenty-first-century models that came before it. Whether agonistic federalism proves stable, or whether it is transient, remains to be seen.

III. The Hidden Arsenals of American States

Agonistic federalism is not a one-way street by which the federal government acts and states are passive in response. To the contrary, states can and do wield constitutional entitlements, sovereign prerogatives, and ordinary policy instruments against precedent-breaking national action.

This Part deepens and complexifies the account of agonistic federalism developed in Part II by mapping a range of constitutional, legislative, and policy responses that states might pursue in the present conjuncture. We offer, to be clear, no claim that the states can or will pursue all the measures set forth here, nor do we blanketly endorse the tactics detailed below. Rather, our goal is analytic insofar as it aims to detail the terrain over which agonistic federalism is likely to play out in the future. Even if states determine that some of the measures described below are either unavailable or unwise (or

213. The federal government threatens to impose costs on groups such as schoolchildren or crime victims that are not politically disfavored as a means to leverage the moral or political commitments of state officials against those very officials. There is at least a resonance here with accounts in the political theory literature of “moral blackmail,” by which “one agent, A, threatens to do some evil thing unless a second agent, B, does some less evil thing.” Terrance C. McConnell, *Moral Blackmail*, 91 *ETHICS* 544, 544–45 (1981). The decision structure created by those choices to which states are put is also relevant because it casts light on the probable motives of the federal government. Hence, Mitchell Berman’s account of blackmail suggests that the background context of the threat is evidence that the threatened action, while it might be permissible if standing on its own, demonstrates the existence of a “bad motivation.” Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 *U. CHI. L. REV.* 795, 849 (1998).

214. *E.g.*, GINSBURG & HUQ, *supra* note 37, at 115.

even both), the mere possibility of their deployment is likely to alter the strategic environment of intergovernmental relations. Our aim is simply to show that which is possible, not to prescribe particular courses of action.

As a threshold matter, we think that it is clear that at least some states have powerful incentives to respond to perceived federal overreach. Styles of intergovernmental competition that breach settled understandings tend to create “negative spillovers, paradigmatically in the form of escalating cycles of recrimination.”²¹⁵ There is no reason to think that agonistic federalism will be any different. Indeed, as the antebellum history we have already canvassed shows, there is historical precedent for destabilizing cycles of conflict. Further, states have powerful incentives to embrace agonistic tactics when they are not aligned with the party in power within the Beltway. As Jessica Bulman-Pozen has extensively mapped in an important contribution, in many lower intensity conflicts that have emerged historically, “[s]tates controlled by one party challenge the federal government when it is controlled by the other party.”²¹⁶ The logic of partisan contestation in state elections, if nothing else, makes some response likely. The early part of the century has already witnessed increasing numbers of state laws asserting power to nullify federal law in Calhoun’s spirit.²¹⁷ And we think that it is very likely that such responses accelerate.

Our analysis is organized as follows. We begin by evaluating states’ efforts in federal court litigation. We treat this separately because it is a tactic that cuts across all three kinds of agonistic federalism described in Part II. In the following three subparts, we focus more closely on each of the three modes of federally driven agonistic federalism—i.e., withdrawing federal public goods, weaponizing federal-state cooperation, and criminalizing policy disagreement. Our survey here is by no means comprehensive, as the imagination of state officials may produce ever more obscure responses. Still, within each of these subparts, we track the possible escalation from the relatively modest to the ambitious to perhaps hazardous—noting, where possible, the existence of standing legal impediments to state agonistic federalism.²¹⁸

215. See Pozen, *supra* note 84, at 50 (discussing the normalization of the self-help doctrine, which breaches settled understandings of intergovernmental competition, and the implications of such normalization).

216. Bulman-Pozen, *Partisan Federalism*, *supra* note 76, at 1082.

217. Adam Olson, Timothy Callaghan & Andrew Karch, *Return of the “Rightful Remedy”*: *Partisan Federalism, Resource Availability, and Nullification Legislation in the American States*, 48 *PUBLIUS: J. FEDERALISM* 495, 495–97 (2018).

218. For the purpose of this analysis, we take those legal guardrails, which largely arise from federal statutory or constitutional law, as fixed. As Part II demonstrated, though, the national government does not take the law as fixed—and does not necessarily comply with federal court orders, see *infra* text accompanying note 136, and so it may well be that states in time mimic the federal disregard of national law.

A. *The First Wave of Litigation in Agonistic Federalism*

Agonistic federalism involves innovative intergovernmental attacks. As such, its very novelty invites litigation. So it is no surprise that states can seek to prevent the federal government from withdrawing support or weaponizing aid by filing lawsuits challenging federal actions in federal courts. In contrast to dual federalism, process federalism, or federalism by integration, therefore, litigation is likely to be a central vector of agonistic federalism's contestation. Litigation offers an obvious, high-salience means for states to respond to the emergence of agonistic federalism in the national government's hands. As such, federal court litigation in and of itself can serve as a "safeguard of American federalism."²¹⁹

To begin with, states were among the entities that quickly sued the Trump Administration for its withdrawal of funding or the weaponization of aid on a host of issues. Take the withdrawal of federal funds first. Twenty-two states, the District of Columbia, and the Governor of Kentucky challenged the Office of Management and Budget (OMB) January 27, 2025, Memorandum M-25-13 (OMB Directive), and its associated funding freezes.²²⁰ In an extensive opinion, the District Court of Rhode Island granted a preliminary injunction, finding the plaintiffs' claim that the OMB's action was "without regard to relevant authorizing statutes and regulations, violates the Administrative Procedure Act (APA) because such actions violate the law, are *ultra vires*, and arbitrary and capricious" likely to succeed on the merits.²²¹ Other suits filed by private parties have successfully enjoined not just the OMB freeze,²²² but also federal efforts to eliminate the national public good of health information. For instance, the private not-for-profit Doctors for America first obtained a temporary restraining order and then a summary judgment against the wholesale removal of health and medical information from a range of governmental websites as arbitrary and capricious.²²³ At the same time, a coalition of environmental groups also secured a preliminary injunction against a freeze of funds authorized under

219. Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023, 1025 (2017).

220. *New York v. Trump*, 133 F.4th 51, 56 (1st Cir. 2025).

221. *New York v. Trump*, 769 F. Supp. 3d 119, 135, 141–42 (D.R.I. 2025), *aff'd in part and vacated in part*, No. 25-1236, 2026 WL 734941, at *16–17, *19 (1st Cir. Mar. 16, 2026) (affirming the preliminary injunction's prohibition of "reissuing, adopting, implementing, giving effect to, or reinstating under a different name the OMB Directive," but vacating the injunction "to the extent that it requires the Agency Defendants to make disbursements to the States on awarded grants and executed contracts" (internal quotation marks omitted)).

222. *See Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, 775 F. Supp. 3d 100, 125–27, 130 (D.D.C. 2025) (enjoining the OMB memo as arbitrary and capricious, and also *ultra vires*).

223. *Drs. for Am. v. Off. of Pers. Mgmt.*, 793 F. Supp. 3d 112, 127, 149–50 (D.D.C. 2025) ("[T]he Court must vacate both directives and the actions taken pursuant to them . . . i.e., the substantial modification or removal of webpages and datasets on which the plaintiffs rely.").

the Infrastructure Investment and Jobs Act and the Inflation Reduction Act as both “arbitrary and capricious” and as the exercise of “broad powers . . . nowhere to be found in federal law.”²²⁴

Similarly, there has been a raft of challenges to the weaponization of federal aid. A coalition of states has successfully challenged the withholding of federal funds from so-called “sanctuary” jurisdictions on Tenth Amendment anti-commandeering grounds.²²⁵ And the state of Maine similarly secured a temporary restraining order against the elimination of Department of Agriculture funding for basic child nutrition programs as a punishment for the state’s policies on trans athletes.²²⁶

A number of regularities emerge from a review of this initial wave of challenges and judicial opinions. First, the challenges themselves are brought on a range of legal theories, some of which are available to both state and private plaintiffs, and some of which only states can invoke. The Administrative Procedure Act’s prohibition on arbitrary and capricious agency action²²⁷ and the idea that federal action can be enjoined if it was “in excess of statutory jurisdiction, authority, or limitations”²²⁸ are equal-opportunity legal theories.²²⁹ On the other hand, only states can invoke the Tenth Amendment’s anti-commandeering doctrine against withdrawals of funds that aim to coerce state executive or legislative actors into specific actions,²³⁰ or against the imposition of novel, non-germane conditions on federal funding streams.²³¹ States hence can avail themselves of both generally available interests and also federalism-specific constitutional entitlements.

Second, federal courts have long been solicitous of state standing, and in these challenges to federal public good withdrawals, federal courts have routinely sided with the states. It is, of course, always possible that the Supreme Court changes state standing doctrine, or cuts back on Tenth Amendment entitlements, but initially there has been no dearth of judicial

224. *Woonasquatucket River Watershed Council v. U.S. Dep’t of Agric.*, 778 F. Supp. 3d 440, 451–52, 479 (D.R.I. 2025).

225. *City & Cnty. of San Francisco v. Trump*, 783 F. Supp. 3d 1148, 1194–96, 1203–04 (N.D. Cal. 2025).

226. *Maine v. U.S. Dep’t of Agric.*, 778 F. Supp. 3d 200, 204–06 (D. Me. 2025).

227. 5 U.S.C. § 706(2)(A).

228. 5 U.S.C. § 706(2)(C).

229. *See, e.g., Woonasquatucket River Watershed Council*, 778 F. Supp. 3d at 470–73 (evaluating APA claims made by private plaintiff).

230. *See, e.g., San Francisco v. Trump*, 783 F. Supp. 3d at 1184 (explaining the anti-commandeering doctrine).

231. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“[I]f Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (alterations in original)).

willingness to recognize and protect federalism concerns—at least in the lower federal courts.²³²

Third, it is striking (albeit predictable) to note that the coalitions of suing states include blue but not red states. Also striking and less predictable: In some cases the states have sought relief only for themselves, and in other cases they have sought an across-the-board remedy for *all* affected state and private actors. On the one hand, a coalition of Democratic states challenged an OMB directive that barred the disbursement of federal funds under grants and contracts related to policy programs opposed by the White House.²³³ The states requested, and a judge issued, a preliminary injunction barring enforcement of the directive only as to those states.²³⁴ On the other hand, in challenges to the National Institutes of Health’s cap on “indirect” support, two district courts have consciously reflected upon and granted nationwide injunctions extending beyond the plaintiff institutions—both state and private—that filed suit.²³⁵ Putting aside the legal permissibility of nationwide injunctions in cases brought by states (an issue left open in *Trump v. CASA, Inc.*²³⁶), these cases raise a strategic choice. In many of the cases concerning withdrawals of federal public goods, both red and blue states have experienced the loss of national support (e.g., of the public good of reliable weather prediction).²³⁷

By suing and securing the resumption of such goods for all, however, blue states undermine their own strategic position in two different ways. First, states allied with the national government are in effect free-riding on

232. Looking ahead, we foresee a world where states might support private litigation where state standing is unavailable. States routinely support litigation, typically through legal aid programs for low-resource residents. See Alan W. Houseman, *The Future of Civil Legal Aid: Initial Thoughts*, 13 U. PA. J.L. & SOC. CHANGE 265, 266–67, 274–75, 279 (2009) (discussing state-funded legal aid programs that support low-income individuals). But we are aware of no legal impediment to states providing legal services to other individuals in service of state policy goals even when they are suing the federal government. For example, states could provide litigation support to individuals harmed if the Advisory Committee on Immunization Practices (a body recently reconstituted by the Secretary of Health and Human Services) declines to advance a recommendation for a critical vaccine, or to employees of agencies dismantled by the Department for Government Efficiency (DOGE). *Advisory Committee on Immunization Practices (ACIP): General Committee-Related Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 12, 2025), <https://www.cdc.gov/acip/about/index.html> [<https://perma.cc/8RBS-YEVB>].

233. *New York v. Trump*, 769 F. Supp. 3d 119, 130 (D.R.I. 2025), *aff’d in part and vacated in part*, No. 25-1236, 2026 WL 734941 (1st Cir. Mar. 16, 2026).

234. See *id.* at 146 (issuing a preliminary injunction that applied only to those states who were party to the suit).

235. See *Massachusetts v. Nat’l Insts. of Health*, 770 F. Supp. 3d 277, 316, 328–30 (D. Mass. 2025) (reasoning that issuing a nationwide injunction is necessary to protect institutions across the country from operating in uncertainty that could result in the same types of irreparable harm as those party to the suit), *aff’d*, 164 F.4th 1 (1st Cir. 2026); *Ass’n of Am. Univs. v. Dep’t of Energy*, 789 F. Supp. 3d 118, 130, 152 (D. Mass. 2025) (same).

236. 145 S. Ct. 2540, 2557–58 (2025).

237. See *supra* text accompanying notes 16–19.

blue states' litigation investments and success. Second, those states are able to reap the political benefits of maintaining intra-partisan solidarity while also being relieved of the constituency pressure that would arise from the losses of federal funding. In effect, they can have their (political) cake while eating their (fiscal) cake. Given the inexorably partisan dynamics of agonistic federalism, it seems counterproductive for states adversarial to the national government to subsidize the latter's subnational allies.

B. *The Weaponization of Federalism*

The first category of agonistic federalism mapped in Part II involved the weaponization of cooperative federal relations, and their accompanying funding streams, by the national government. As described above, the Trump Administration has threatened or actually withheld federal funding from states, state entities, and local governments, often related to hot-button issues such as immigration sanctuary policies and transgender athletics.²³⁸

The weaponization strategy, however, is two-sided. States, just like the federal government, have assets and entitlements that they can leverage to the disadvantage of the federal government. As we explained in subpart III(A), states have already invoked anti-commandeering claims under the Tenth Amendment against efforts to weaponize federal aid.²³⁹ We first identify other legal entitlements that states could bring to bear against weaponization. We then consider non-litigation strategies for weaponization available to the states.

1. Litigating Agonistic Weaponization.—Expanding upon the litigation efforts described above, there are three constitutional interests that states could bring to bear in new challenges to the agonistic weaponization of national entitlements.

First, while the Administration has sought to coerce state action through the weaponization of funding, it is perhaps surprising to observe that few of the adjudicated cases have turned on the anti-coercion principle in the Tenth Amendment. In *National Federation of Independent Business v. Sebelius*,²⁴⁰ the Court struck down the Affordable Care Act's sanctions for states that refused to expand Medicaid because it imposed what the Court characterized as new policies on new, as well as existing funding, such that it was "a shift in kind, not merely degree" of federal control.²⁴¹ In *Sebelius*, federal

238. See, e.g., *supra* text accompanying notes 134, 140.

239. See, e.g., *City & Cnty. of San Francisco v. Trump*, 783 F. Supp. 3d 1148, 1184 (N.D. Cal. 2025) (citing *Printz v. United States*, 521 U.S. 898 (1997)).

240. 567 U.S. 519 (2012).

241. *Id.* at 583, 588 (plurality opinion); see also *id.* at 681 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (describing the high bar for establishing such claims, acknowledging that "[w]hether federal spending legislation crosses the line from enticement to coercion is often difficult

Medicaid funds “constitut[ed] over 10 percent of most States’ total revenue.”²⁴²

The Administration has not (yet) threatened such large shares of state budgets,²⁴³ but states might well insist that the size of the federal funding stream is less important than the unwaivable structural principle of state sovereign autonomy that underwrites the decision.²⁴⁴ That is, they might insist that the *Sebelius* anti-coercion doctrine hinges upon states’ reasonable reliance upon a longstanding pattern of intergovernmental relations. Drawing on the insights of process federalism, they might insist that the decision reflects the elemental idea that “a federal government controlled by one set of interests shouldn’t be given an excessive amount of power in federal-state negotiations.”²⁴⁵ It is, in essence, a Burkean, conservative doctrine that raises the cost of non-incremental changes in the status quo absent the concurrence of all concerned. As such, it is particularly aptly suited to states’ predicament in an agonistic federalism context.

Second, many of the second Trump Administration’s immigration policies in particular have involved federal access to state buildings such as courthouses. For example, in June 2025, the Justice Department sued New York State, challenging a state law barring immigration agents from courthouses.²⁴⁶ States and localities, however, have a powerful countervailing weapon in the form of the Takings Clause. As a threshold

to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear”).

242. *Id.* at 542 (majority opinion); see Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outerson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 62 (2013) (“*NFIB*’s coercion analysis suggests that some subset of federal laws may now be unconstitutionally coercive, but the quantitative analysis was heavily fact dependent.”).

243. In 2026, the federal government threatened to withhold some two billion dollars of Medicaid from Minnesota on grounds of alleged fraud. Juliana Kim, *The Threats to Minnesota’s Medicaid Funds Are Unprecedented. Other States Could Be Next*, NPR (Mar. 18, 2026), <https://www.npr.org/2026/03/18/nx-s1-5751216/medicaid-minnesota-fraud-explained> [<https://perma.cc/L7QZ-EUAP>]. We estimate that this is about 6.5 percent of Minnesota’s annual budget. See *2026-2027 Enacted Biennial Budget*, MINNESOTA: MGMT. & BUDGET, <https://mn.gov/mmb/budget/current-budget/current-enacted-budget/> [<https://perma.cc/L7QZ-EUAP>] (revenue tab shows \$31 billion of 2025 and \$32 billion of 2026 expected revenue, implying that \$2 billion would represent ~6.5% of MN’s budget). It seems reasonable to think that there is a *Sebelius* challenge that could be filed on the basis of this threat. Our thanks to Will Bonds for digging out this data.

244. Cf. Ryan C. Williams, *Unconstitutional Conditions and the Constitutional Text*, 172 U. PA. L. REV. 747, 762–63 (2024) (citing *Sebelius*, and arguing that “structural limits on federal power are typically not amenable to waiver or surrender”).

245. Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2236 (2022).

246. Luis Ferré-Sadurní, *Trump Administration Sues New York over Law Barring ICE from Courthouses*, N.Y. TIMES (June 12, 2025), <https://www.nytimes.com/2025/06/12/nyregion/trump-lawsuit-ice-courthouses.html> [<https://perma.cc/43B9-V996>].

matter, the Takings Clause has long been held to protect the real property of subnational units from the federal government's exercise of eminent domain power.²⁴⁷ In 2021, the Court in *Cedar Point Nursery v. Hassid*²⁴⁸ held that a California law that "grant[ed] union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year" was a per se taking.²⁴⁹

States could leverage *Cedar Point* to resist federal access to state and local buildings. Under *Cedar Point*'s ruling that "a physical appropriation is a taking whether it is permanent or temporary,"²⁵⁰ the federal government's "access" demand to state and local buildings—be they schools or courthouses or prisons—is a per se taking under the Fifth Amendment. That would entitle states to just compensation. Further, states may argue that this is one of the "rare circumstances" in which it would be permissible for a court to enjoin federal action under the Takings Clause.²⁵¹ In the agonistic federalism context, it would seem quite unlikely that the federal government would agree to compensate states. The extent of compensation for the compromise of public functions such as education or public safety when the federal government threatens to periodically intrude on state schools and courthouses, moreover, is difficult, perhaps impossible, to calculate. And states could argue that they have a sovereignty interest that private persons lack.²⁵² This would be irretrievably lost if federal agents have power to enter state facilities at a whim, disrupting the provision of state education or criminal justice. A variant on this use of "local control over local property"

247. *United States v. 50 Acres of Land*, 469 U.S. 24, 26, 31 (1984) (protecting a city's property rights under the Takings Clause); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 831 & n.4 (1989) (noting that "[t]he Court had previously held that states and localities were entitled to compensation for intergovernmental takings" in a 1946 case, but had not "addressed the question of why" until *50 Acres of Land*).

248. 141 S. Ct. 2063 (2021).

249. *Id.* at 2072, 2074.

250. *Id.* at 2074.

251. Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1632 & n.14 (2015).

252. Canonical accounts of Takings doctrine locate "popular sovereignty" on the governmental side of the balance. *See, e.g.*, Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1628 (1988) (explaining how popular sovereignty over property and classical conceptions of individually owned property are reconciled through weak judicial property protections). In the agonistic federalism context, it is not at all clear that the aggressor government can claim the mantle of democratic authorization for *ultra vires* action, while the state landowner has their own form of sovereignty to assert.

relates to the zoning power.²⁵³ Portland, for example, has used its land-use powers to impose frictions on federal immigration enforcement.²⁵⁴

Third, many federal decisions seem to target, or retaliate against, state actors in ways that seemingly invite First or Fifth Amendment challenges. For example, the effort to strip Maine of children’s nutrition assistance smacked of disapproval of teachers’ and school administrators’ views and speech about trans rights.²⁵⁵ In effect, the federal government was taking food from hungry children to make those teachers, officials, and even Maine voters bend the knee. States, however, lack First and Fifth Amendment rights under the Constitution. But the same analysis does not apply when the targets are private entities, such as hospitals, and it does not necessarily apply to local governments.

Consider the city of Chicago, which was identified by the federal government as an early target for ICE raids perhaps because of the city’s historical support of sanctuary policies.²⁵⁶ Although there is little case law on point, a few cases suggest that local governments may be able to assert rights under the First and Fifth Amendments.²⁵⁷ There is also a doctrinal and historical logic to allowing cities to sue under these provisions. Cities have long been treated as “municipal corporations,” including at the time of the Founding.²⁵⁸ And corporations, we know, are “persons” under the First and

253. *Papasan v. Allain*, 478 U.S. 265, 287 (1986).

254. Anna Griffin, *To Fight ICE, Portland’s Leaders Turn to What They Know Best: Zoning*, N.Y. TIMES (Oct. 20, 2025), <https://www.nytimes.com/2025/10/20/us/politics/portland-ice.html> [<https://perma.cc/2SFN-SEJZ>].

255. In respect to Maine’s decision to allow two transgender girls to participate in sports events, six federal agencies threatened to withdraw funding. Rhoda et al., *supra* note 3. As the district court noted, the federal government demanded not just compliance with its view of Title IX, but an “apology” from Maine’s government to the President. *Maine v. U.S. Dep’t of Agric.*, 778 F.Supp.3d 200, 210 (D. Me. 2025) (quoting Steff Danielle Thomas, *Trump Presses Maine Governor for ‘Full Throated Apology’ After Transgender Athlete Spat*, THE HILL (Mar. 22, 2025), <https://thehill.com/homenews/lgbtq/5208797-donald-trump-maine-governor-transgender-sports-policy/> [<https://perma.cc/7AYC-2T3Y>]).

256. Devlin Barrett, Julie Bosman & Hamed Aleaziz, *Trump Administration Begins Immigration Arrests in Chicago*, N.Y. TIMES (Jan. 26, 2025), <https://www.nytimes.com/2025/01/26/us/politics/chicago-deportation-emil-bove-trump.html> [<https://perma.cc/2EJG-ZLH2>].

257. *E.g.*, *In re Real Est. Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 762 (3d Cir. 1989) (holding that a school district’s due process rights would be violated if forced to litigate in a forum with which it had no contacts); *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (“A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual. The right to petition administrative agencies is a basic First Amendment right.” (citation omitted)); *see also City of Phila. v. New Jersey*, 437 U.S. 617, 629 (1978) (protecting the city’s rights under the Commerce Clause).

258. *See* Zachary D. Clopton & Nadav Shoked, *The City Suit*, 72 EMORY L.J. 1351, 1366–69 (2023) (discussing a city’s right to sue as inherent because “[e]ven if cities could exist without charters . . . they could not exist without the right to sue”); *see also Cnty. of Suffolk*, 710 F. Supp. at 1390 (“A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.”); *accord* Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 370 (2019) (identifying a category of “city speech,” and arguing that “silencing measures

Fifth Amendments.²⁵⁹ Cities, therefore, might be able to mount First Amendment challenges to federal weaponization that targets them because of their speech. Cities might also challenge such actions under the Fifth Amendment's Due Process Clause for vagueness or lack of notice—as a group of cities led by San Francisco did in the sanctuary cities context.²⁶⁰ In addition, they might mount “class of one” Equal Protection challenges, also under the Fifth Amendment, alleging that they are being singled out with no rational basis.²⁶¹ Taken together, these legal theories represent new frontiers in state responses to the weaponization of federal-state cooperation.

2. *Financial Responses.*—If litigation is unsuccessful in reinstating federal funds, states might respond to the weaponization of federal aid by seeking to replace the lost revenue, perhaps in ways that also strike back against the federal government. This might happen in several ways. First, states working together might enter a mutual aid pact to support each other if the federal government threatens or eliminates funding streams. There are a number of ways in which this could be done. The simplest version of this might be the creation of an interstate market for sovereign debt in which one state could borrow from another at below-market interest rates. Just as banks create liquidity through an interbank money market using instruments such as repos,²⁶² so too can states ease fiscal strains by standing up their own intermural lending facilities.²⁶³

A second possibility is for states to coordinate in the creation of new public debt—in effect by releasing joint debt instruments to the market.

against this speech should amount to violations of the First Amendment”). *But see* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2009–10 (2018) (discussing and rejecting the idea that cities enjoy First Amendment rights).

259. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1656–57 (2011) (noting that corporations benefit from First Amendment free speech protections and Fifth Amendment protections for liberty and against double jeopardy, although they do not have a privilege against self-incrimination).

260. *See City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1234–35, 1235 n.5 (9th Cir. 2018) (affirming the district court's grant of summary judgment based on separation of powers grounds, while noting that the district court also based its ruling on vagueness and the Counties' procedural due process rights).

261. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (per curiam); *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 595, 609 (2008) (confirming that “class of one” Equal Protection suits may lie, but rejecting such claims “in the context of public employment”).

262. For an explanation of interbank markets, see *Repo-Market Ructions Were a Reminder of the Financial Crisis*, THE ECONOMIST (Sep. 26, 2019), <https://www.economist.com/finance-and-economics/2019/09/26/repo-market-ructions-were-a-reminder-of-the-financial-crisis> [<https://perma.cc/UD8H-2VGD>].

263. We recognize, however, that the availability of large stocks of reserves appears to be necessary for the smooth functioning of such markets. Adam Copeland, Darrell Duffie & Yilin (David) Yang, *Reserves Were Not So Ample After All*, 140 Q. J. ECON. 239, 239 (2025). Unlike the Federal Reserve, states cannot simply create assets—which imposes a ceiling on the utility of this strategy.

While there is no American history of joint debt issuance by states,²⁶⁴ there is a fierce debate in Europe as to the permissibility of jointly issued state debt. In the 1970s, for example, the European Community took out a set of what were called “Eurobonds” to help states hit particularly hard by the oil crisis.²⁶⁵ Speaking in 2014 after the sovereign debt crisis, European Central Bank President Mario Draghi remarked that “some form of cross-country risk-sharing is essential to prevent recessions from leaving deep and permanent scars.”²⁶⁶ In the U.S. context, there is nothing in the Constitution that prevents states from entering into ordinary contracts with each other. Indeed, as Bridget Fahey has observed, the practice has in fact become quite common.²⁶⁷ Why should that not extend to debt? One might imagine, for example, states coordinating to create a credit line to seek funding to fill healthcare or social services gaps left by the federal retreat, and identifying specific new taxes to fund those measures. Alternatively, if the federal government threatens to withhold funding from a municipality led by a political foe of the White House,²⁶⁸ this funding could be made available to bridge that gap at the substate level.

States also own a small but potentially meaningful tranche of federal debt. As of March 2025, for example, state and local governments in the aggregate owned some \$1.7 trillion (out of a total of \$38 trillion) of federal debt.²⁶⁹ Like any debtholder, states can always sell this debt. Indeed, nothing prevents several states from coordinating their debt sales. In the context of federal-state escalation, states could threaten to sell and ultimately sell federal debt in response to federal encroachments on state authority. In

264. In March 1863, representatives of the Confederacy obtained an external loan in Paris called the “Erlanger” loan, which in the end provided “more European funds than the total raised in Europe by the much-praised system of cotton exportations.” Judith Fenner Gentry, *A Confederate Success in Europe: The Erlanger Loan*, 36 J. S. HIST. 157, 157, 160–61 (1970).

265. Jörn Axel Kämmerer, *How Can Eurobonds Be Legally Implemented into European Law?*, 12 REV. L. & ECON. 585, 590 (2016).

266. Kaushik Basu, *The Economics and Law of Sovereign Debt and Risk Sharing: Some Lessons from the Eurozone Crisis*, 12 REV. L. & ECON. 495, 497–98 (2016) (citation omitted).

267. Fahey, *Federalism by Contract*, *supra* note 77, at 2351–52. Because federal and state debt compete in different markets, and are not fungible as a practical matter, there is no reason to find a federal bar on their creation. Even if a mutual debt instrument were to be characterized as a compact, we do not think that state debt mutualization is likely to impinge on a federal interest. Any jointly created asset from the states is exceedingly unlikely to displace nationally issued debt in the form of Treasuries, which offer a deep, liquid, and hence safe market of debt instruments. Michael J. Fleming, *The Benchmark U.S. Treasury Market: Recent Performance and Possible Alternatives*, ECON. POL’Y REV., Apr. 2000, at 129, 129–30.

268. *U.S. Treasury’s Bessent Message to NYC on Any Bailout: ‘Drop Dead,’* REUTERS (Sep. 24, 2025), <https://www.reuters.com/world/us/us-treasurys-bessent-message-nyc-any-bailout-drop-dead-2025-09-24/> [<https://perma.cc/HC8X-FSYL>].

269. *The Federal Government Has Borrowed Trillions. Who Owns All That Debt?*, PETER G. PETERSON FOUND. (Oct. 25, 2025), <https://www.pgpf.org/article/the-federal-government-has-borrowed-trillions-but-who-owns-all-that-debt/> [<https://perma.cc/RZ4A-U556>].

November 2025, for example, the city of Chicago declared it would no longer invest its \$10 billion portfolio in federal bonds.²⁷⁰ While the amount of such debt is small, it is reasonable to think that state-level expressions of distrust in federal debt as an asset class would have outsized effects—especially at a moment when expectations of a ballooning federal deficit impose new pressure on the national government’s creditworthiness.²⁷¹ The signal conveyed by a withdrawal of confidence by states in dollar-denominated assets may be greater than the absolute fiscal effect.

Finally, states might respond to federal escalation in ways that mitigate financial harms to the states from federal weaponization, while also imposing financial costs on the federal government in response. The most direct mechanism involves federal taxes. Indeed, in June 2025, Governor Gavin Newsom of California gestured vaguely at the prospect of a federal tax boycott. California is one of eleven states that send more funds to than they receive from the federal government; its surplus as of 2022 was \$83 billion a year.²⁷² In a social media post, Governor Newsom suggested without elaboration that “[m]aybe it’s time to cut that off.”²⁷³ The Governor, importantly, did not explain exactly how the state could or would terminate the flow of funds to the federal government. Nevertheless, Newsom’s comment should be taken seriously as a possible step in the logic of agonistic federalism. As such, the practical and legal mechanisms by which it might be implemented warrant careful scrutiny.

A few options exist, although none as sharply edged as Newsom suggested. States themselves are in possession of funds owed to the federal government because they withhold federal taxes for their many employees.²⁷⁴ Perhaps a sufficiently frustrated state will decline to pay, or to pay immediately, these obligations. Or else it could use them to offset funds that

270. Fran Spielman, *Chicago Treasurer Will No Longer Invest Any of City’s \$10B Portfolio in U.S. Treasury Bonds to Protest Trump*, CHI. SUN-TIMES (Nov. 12, 2025), <https://chicago.suntimes.com/city-hall/2025/11/12/treasurer-melissa-conyears-erwin-boycott-treasury-bonds-protest-trump-council-fight> [https://perma.cc/EQG4-WPE9].

271. See Robin Brooks, *Worrying Signs for the US Dollar*, BROOKINGS INST. (July 3, 2025), <https://www.brookings.edu/articles/worrying-signs-for-the-us-dollar/> [https://perma.cc/4S25-UWV6] (noting that the fall of the U.S. dollar’s value has occurred simultaneously with rising U.S. interest rates).

272. Aimee Picchi, *California Gov. Gavin Newsom Is Floating a Federal Tax Boycott. Here’s What to Know*, CBS NEWS (June 9, 2025), <https://www.cbsnews.com/news/california-gavin-newsom-federal-tax-boycott-trump-what-to-know/> [https://perma.cc/Q92K-KSPF].

273. Tyler Katzenburger, *Newsom Floats Withholding Federal Taxes as Trump Threatens California*, POLITICO (June 6, 2025), <https://www.politico.com/news/2025/06/06/newsom-floats-withholding-federal-taxes-00393386> [https://perma.cc/6M5B-FAEW].

274. *Tax Withholding for Government Workers*, INTERNAL REVENUE SERV. (Oct. 2, 2025), <https://www.irs.gov/government-entities/federal-state-local-governments/tax-withholding-for-government-workers> [https://perma.cc/EJV6-2LWN].

are illegally withheld by the federal government despite having been appropriated by statute.

In theory, states could encourage, or even require, individuals and corporations within the state not to pay federal taxes. State governments could also threaten corporations with dissolution for paying taxes, or could legislate penalties for paying federal taxes. We think that these measures would be met with legal challenges based on federal preemption, and that these challenges would likely be successful. Nor do we think that states could order banks not to transfer funds to the federal government, since states may not regulate or unduly burden national banks,²⁷⁵ which hold the vast majority of assets in the United States.²⁷⁶ It hence seems to us exceedingly unlikely that a state could, as a matter of law, block banks from handing federal taxes over to the national government. Still, as described, states retain many mechanisms to fund their affected operations while also meaningfully reducing federal revenues. And the general fact that the national government does not always act in ways bounded by law should also be kept in mind as a background condition of states' responses.

3. *Regulatory and Enforcement Responses.*—Another class of responses would be to target entities that collaborate with the federal government on the programs that the states resist. So, for example, states might look closely at entities like Palantir that have supported the federal government's crackdown on immigration.²⁷⁷ States routinely regulate firms located in other states for conduct within their borders, and at times they even attempt to regulate extraterritorial conduct.²⁷⁸ The dormant Commerce Clause, among others, limits such extraterritorial regulations without eliminating them—with doctrinal limits that currently create “more puzzlement than illumination.”²⁷⁹ If

275. 12 U.S.C. § 484 (“No national bank shall be subject to any visitatorial powers except as authorized by Federal law.”); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) (“[F]ederal control shields national banking from unduly burdensome and duplicative state regulation.” (citation omitted)).

276. *About Us*, OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.treas.gov/about/index-about.html> [<https://perma.cc/MJE9-KPCB>] (showing that OCC-regulated national banks and similar institutions hold sixty-seven percent of U.S. commercial banking assets); Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 3–4, 50 (1977) (explaining that national banks and savings and loan associations held over fifty percent of total assets as of 1975).

277. Adam Satariano, Paul Mozur, Aaron Krolik & David McCabe, *The Tech Arsenal that Could Power Trump's Immigration Crackdown*, N.Y. TIMES (Jan. 25, 2025), <https://www.nytimes.com/2025/01/25/technology/trump-immigration-deportation-surveillance.html> [<https://perma.cc/88AJ-GDP8>].

278. See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–25 (2023) (describing ways in which abortion-restrictive states may try to undermine the laws of abortion-permissive states).

279. Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEXAS L. REV. 1135, 1142 (2024).

states take this course, they could look to Texas as a path-maker. In 2022, the state comptroller banned state and local governments from doing business with firms that “boycott” fossil fuels.²⁸⁰ By extension, a state might ban its subdivisions from contracting with firms that, say, participate in the detention of undocumented persons without due process of law, or facilitate surveillance of Americans, or the like.

Agonistic federalism thrives on the aggressive exploitation of zones of constitutional ambiguity, so the uncertainties of dormant Commerce Clause doctrine presents states with rich opportunities. In particular, states hostile to the federal government may target for regulation the firms that aid and abet the national government’s ideological projects. This agonistic tactic, it should be noted, would again not break new ground. Florida’s insurance regulator, for example, has aggressively sought patient data from out-of-state healthcare companies, presumably “to get information about reproductive care or transgender care or mental health care.”²⁸¹ The federal government has also used regulatory powers over third parties in agonistic ways. In February 2025, for instance, the Department of Homeland Security directed Citibank to unilaterally debit \$80.5 million dollars from New York City’s accounts, allegedly to recoup money the city had spent on refugee resettlement.²⁸² Were such unilateral (and arguably unlawful) federal mandates to financial institutions to reoccur to the detriment of states and localities, it seems quite likely that the risk of sudden and colossal losses of fiscal reserves would force states into countervailing protective measures.

Certain states that serve as incorporating jurisdictions (such as Delaware and Nevada) will have even more power, including the threat of dissolution for for-profit corporations and the supervisory power of the attorney general over not-for-profit corporations.²⁸³ For example, states housing companies that facilitate the federal government’s agonistic immigration policies might use their regulatory powers to discourage such corporate cooperation, or even

280. Mitchell Ferman, *Texas Bans Local, State Government Entities from Doing Business with Firms that “Boycott” Fossil Fuels*, TEX. TRIB. (Aug. 24, 2022), <https://www.texastribune.org/2022/08/24/texas-boycott-companies-fossil-fuels/> [<https://perma.cc/2AGN-WGKK>].

281. See Reed Abelson & Rebecca Robbins, *Florida Seeks Drug Prescription Data with Names of Patients and Doctors*, N.Y. TIMES (Mar. 5, 2025), <https://www.nytimes.com/2025/03/05/health/florida-prescriptions-patient-privacy-data.html> [<https://perma.cc/7TJF-6Z99>] (explaining how Florida sought data on non-Florida residents, which included those under the federal Medicare program and commercial plans regulated under federal law).

282. Nathan Tankus, *Can Trump Arbitrarily Take Money from Anyone’s Bank Account?*, ROLLING STONE (Mar. 13, 2025), <https://www.rollingstone.com/politics/politics-features/trump-musk-doge-treasury-take-money-bank-account-1235295232/> [<https://perma.cc/EW55-2WTL>].

283. The California Attorney General’s role in respect to OpenAI’s not-for-profit status is an example of how a state can shape the path of a nationally important firm. Wendy Lee, *Coalition Urges California Attorney General to Halt OpenAI’s For-Profit Transition*, L.A. TIMES (Apr. 9, 2025), <https://www.latimes.com/entertainment-arts/business/story/2025-04-09/attorney-general-rob-bonta-open-ai> [<https://perma.cc/6PDP-MXDQ>].

shut down those companies entirely. Even if these companies are not housed within a given state, the fact that they do business in the state might be sufficient to work as a jurisdictional hook under the right conditions for onerous regulation.²⁸⁴

Alternatively, states may try to leverage the existing uneven allocation of essential commercial nodes across the various states. Nation-states already deploy such physically located “choke points” as a way of extending extraterritorial influence over other sovereign states’ behavior.²⁸⁵ It seems possible that subnational actors would ultimately be tempted to leverage choke points as a form of agonistic federalism conflict. Finance and telecommunications offer obvious examples. The states that contain within their borders central nodes of the nation’s financial infrastructure—e.g., the banks that operate as clearing houses between all financial institutions—and telecommunications infrastructure—e.g., the location of choke points for internet traffic—may realize that they have an asymmetrical degree of influence over the balance of the nation (and the central government) because they can lean on these choke points. Another obvious example of potential asymmetrical leverage arises from the location of major stock exchanges and bank holding companies in New York City.

Consider further in this regard the twelve regional Federal Reserve Banks. These are cooperatives whose members are local investor-owned commercial banks, and act as “operational arms of the Fed.”²⁸⁶ The regional reserve banks provide critical and widely diffused political support for the central bank,²⁸⁷ but their members fall within the regulatory jurisdiction of the states, as long as such state regulation does not directly conflict with a federally chartered bank’s operation.²⁸⁸ A state might nonetheless use its ordinary powers of regulation and enforcement to throw enough sand into the gears of these banks’ operations—simply, say, by the punctilious and exhaustive application and enforcement of state banking regulation—that the

284. *Cf.* *Mallory v. Norfolk S. Ry. Co.*, 142 S. Ct. 2028, 2032 (2023) (holding that states can require out-of-state companies to agree to general jurisdiction in state courts as a prerequisite to registering for business in the state).

285. Henry Farrell & Abraham L. Newman, *Choke Points*, HARV. BUS. REV., Jan.–Feb. 2020, <https://hbr.org/2020/01/choke-points> [<https://perma.cc/RBY9-VTBV>]; *see generally* EDWARD FISHMAN, *CHOKEPOINTS: AMERICAN POWER IN THE AGE OF ECONOMIC WARFARE* (2025) (offering a sweeping history of the American use of financial sector choke points).

286. Kathryn Judge & Lev Menand, *Regionalism and the Federal Reserve Banks*, 92 U. CHI. L. REV. 417, 430 (2025).

287. Caitlin Ainsley, *Decentralized Central Banks: Political Ideology and the Federal Reserve System of Regional Banks*, 34 GOVERNANCE 277, 278 (2021).

288. This is a central holding of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819), and was affirmed in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 865–66 (1824). Neither *McCulloch* nor *Osborn*, however, prevent states and localities from enforcing, and enforcing rigorously, all generally applicable regulations.

federal government is meaningfully disadvantaged, or even unable to pursue certain policies.

C. Responding to Withdrawals of Federal Support

As we explained in Part II, a second category of agonistic federalism is at stake when the federal government steps back from the provision of national public goods—e.g., weather forecasting, public health information (such as vaccine identification and recommendations), or regulatory enforcement. In certain instances, the federal government exercises not just a practical monopoly, but also a legal monopoly. For example, the Secretary of Health and Human Services acts through the Food and Drug Administration (FDA) to license biological products for use in interstate commerce, provided they are shown to be “safe, pure, and potent.”²⁸⁹

Where the federal government has a legally protected monopoly power to supply or withhold a public good such as vaccine approval, states have extremely limited leeway to respond to a federal withdrawal from the field. States, for example, cannot produce and license vaccines that the national government declines to authorize because the provision of a nationally unlicensed vaccine is itself unlawful.²⁹⁰ At least absent a willingness to nullify federal law in the spirit of John Calhoun, it seems unlikely that states would be able to fill these gaps. At the same time, states have stepped up coordination over vaccine recommendations in the absence of credible federal information on this issue.²⁹¹

In other contexts, however, federal law shares regulatory authority between the federal government and the states over “inextricably linked” market practices in ways that necessitate coordination.²⁹² In these situations, states might act independently of the federal government to provide the

289. 42 U.S.C. § 262(a)(2)(C)(i)(I). Vaccines, like any other biologic, may not be distributed without such a license. *See* 42 U.S.C. § 262(a)(1), (a)(2)(C) (requiring that manufacturers of the product be individually licensed as capable of making the biological product at a particular site and requiring consent to facility inspection as an express condition of license approval).

290. The basis for this illegality is 21 U.S.C. § 355. *See* 21 U.S.C. § 355(a), (b)(1). The statute states in relevant part:

No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application . . . is effective with respect to such drug Such persons shall submit to the Secretary as part of the application . . . full reports of investigations which have been made to show whether such drug is safe for use and whether such drug is effective in use.

Id. § 355(a), (b)(1).

291. Emily Baumgaertner Nunn, *States Go Their Own (and Contradictory) Ways on Vaccine Policy*, N.Y. TIMES (Sep. 3, 2025), <https://www.nytimes.com/2025/09/03/us/rfk-jr-vaccines-western-health-alliance.html> [<https://perma.cc/LA9Z-YJBM>].

292. *See, e.g., Fed. Energy Regul. Agency v. Elec. Power Supply Ass’n*, 577 U.S. 260, 264–65 (2016) (describing the Federal Power Act, 16 U.S.C. §§ 791–828(c), as a division of authority between the national and state governments).

withdrawn public goods. Hence, New York might create its own “New York Weather Service” to provide more accurate weather information for the state. This might entail employing personnel who have been let go by the national government or using facilities that have been abandoned by NOAA. Certain states have both the demographic heft and a skeletal institutional base to provide these public goods. California, for example, already has a state climatologist in its Department of Water Resources.²⁹³ This sort of capacity could be built out and shared across aligned states’ lines.

For many states, indeed, it would be inefficient to act alone. These states might want to work together to provide public goods across state lines, for example, by creating a Northeast or a Pacific Regional Weather Service. Federal actions, indeed, might have made such efforts feasible at a discount: Recall that the NWS’s reform entailed chopping away a large number of professional jobs. Why can’t states, acting in tandem, scoop up these fired federal employees, many of them experts with valuable scientific human capital, and leverage their skills? States could even go further and link these efforts to whistleblower protections²⁹⁴: States might encourage federal employees to publicly disclose illegal government activities by offering such whistleblowers a safety net, litigation support, and potentially state employment. These options are made more possible by an underappreciated aspect of “federal decentralization”²⁹⁵: The distribution of federal officials across the country, not just in Washington, D.C., means that they can easily ply their services for state governments when their federal employment expires.

Regional or cooperative options echo a longer history in which state coalitions “have been sites of resistance to the federal government” by collectively “giv[ing] force to arguments for states’ rights.”²⁹⁶ One way through which these arrangements could be coordinated and formalized is

293. *California State Climatologist*, CAL. DEP’T OF WATER RES., <https://water.ca.gov/Programs/Flood-Management/Flood-Data/Climatology-and-Meteorology> [<https://perma.cc/UCU9-GPU3>].

294. Paul Achkar, Note, *COVID-19 and Whistleblower Retaliation Claims: Expanding the Illinois Whistle Blower Act to Protect Employees*, ANNALS HEALTH L. ADVANCE DIRECTIVE, Fall 2022, at 101, 102 (explaining how many “[s]tate and federal laws contain provisions that make it unlawful for employers to retaliate against employees ‘who exercise their protected legal rights or oppose unlawful employer actions’” (quoting Durga Bharam & Matthew O’Malley, *Adverse Action? COVID-19-Related Whistleblower and Retaliation Claims*, FOR THE DEF., Mar. 2021, at 43, 44)).

295. See David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727, 729 (2018) (arguing that federal decentralization allows for federal officials in locations outside of Washington to “compete with and constrain one another”).

296. Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 394 (2018) [hereinafter Bulman-Pozen, *Our Regionalism*].

with the use of interstate compacts pursuant to Article I, Section 10.²⁹⁷ Although the text of the Constitution suggests that congressional approval is required for a compact, in practice the Court has long permitted compacts to be fashioned either with implicit congressional approval or no approval at all.²⁹⁸ The Compacts Clause applies only in response to the “classic indicia of a compact”—that is, creation of a joint organization; conditioning a state’s action on the actions of other states; restrictions on a state’s power to change its law unilaterally; and reciprocal constraints among the states.²⁹⁹ Even then, the Court further explained, Congress only must approve when the agreement increases “political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”³⁰⁰ Scholars have recognized that this standard imposes few constraints upon state compacting.³⁰¹

We think that the legal case for compacts would be strengthened where, as here, the federal government has ostentatiously withdrawn from the field or engaged in a form of “government centralization and cultural homogenization” at odds with traditional understandings of American decentralization.³⁰² Even if a compact were to be legally unavailable, states have also entered a range of interstate administrative agreements that do not rise to the level of compacts.³⁰³ To this end, states might structure their joint

297. U.S. CONST. art. I, § 10 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .”). For a proposal along these lines, see Jon D. Michaels, *From Defense to Offense: Blue States Need a New Playbook for Trump*, BOS. GLOBE (Mar. 17, 2025), <https://www.bostonglobe.com/2025/03/17/opinion/trump-blue-states-playbook/> [<https://perma.cc/HH4G-X5RZ>]. For a comprehensive list of compacts, albeit somewhat dated, see JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 54–61 (2002); see also Fahey, *Federalism by Contract*, *supra* note 77, at 2352 (“Today, there are over two hundred interstate compacts in effect . . .”).

298. *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893). Many interstate agreements do not involve the federal government at all. See, e.g., *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 468–69 (1978) (finding that a number of interstate agreements have been upheld without Congressional consent); *Star Sci., Inc. v. Beales*, 278 F.3d 339, 359–60 (4th Cir. 2002) (holding that a Master Settlement Agreement between states and tobacco companies does not require congressional approval); *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991) (finding that congressional approval was not necessary for the Interstate Compact on Placement of Children); *Tichenor v. Mo. State Lottery Comm’n*, 742 S.W.2d 170, 176–77 (Mo. 1988) (en banc) (finding that the multi-state lottery agreement does not require congressional approval).

299. *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).

300. *U.S. Steel Corp.*, 434 U.S. at 471 (quoting *New Hampshire v. Maine*, 426 U.S. 363, 369 (1971) (quoting *Virginia v. Tennessee*, 148 U.S. at 519)).

301. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 287–88 (2003) (noting that “it is difficult to imagine a state agreement on which the Compact Clause would operate as a distinct constitutional requirement and obstacle”).

302. Bulman-Pozen, *Our Regionalism*, *supra* note 296, at 395–97 (describing similar conditions that arose in the 1920s and 1930s).

303. ZIMMERMAN, *supra* note 297, at 212–14 (describing the nature and scope of administrative agreements).

arrangements to avoid the classic indicia of a compact by eliminating any joint organizational or reciprocal obligations, and just engaging in coordinated action.³⁰⁴

Through such interstate collaborations, states might respond to the aggressive leveraging of federal public goods in kind. For example, they might act aggressively as well as defensively by providing public goods in ways that systematically cut the federal government out of certain areas. Imagine states concerned about federal or state governments accessing healthcare data in order to chill the use of contraceptives. Such states might create an interstate organization to facilitate the sharing of medical information among doctors—as the federal government has set up for certain prescription drugs.³⁰⁵ They could condition sister state membership in this coordination, however, on a commitment to refuse requests from federal authorities for access to such data by categorically stipulating that such data is privileged—even as against law enforcement subpoenas—and so not amenable to mandatory release.³⁰⁶

To be sure, the federal government can and does demand data from state and local governments under many federal statutes. But, as Bridget Fahey has carefully demonstrated, the anti-commandeering principle logically extends to commands to compel the production of information from states.³⁰⁷ Especially as the private data economy booms, and the federal government loudly aligns itself with the companies that reap large profits from that information economy, it would be incoherent and perverse to deny that access to data is a central lever of economic and political life protected by the Tenth Amendment.³⁰⁸

Of course, many of the measures just described would necessitate the overcoming of substantial practical challenges. Among the most obvious is that absent federal funding, states are likely to find their purses ill-equipped to the task at hand. So here, states might turn to the financial measures

304. Compacts and agreements alike might build upon the ten-section system created by the federal government in 1969. Bulman-Pozen, *Our Regionalism*, *supra* note 296, at 389 n.46.

305. *Prescription Drug Monitoring Programs (PDMPs)*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 6, 2024), <https://www.cdc.gov/overdose-prevention/hcp/clinical-guidance/prescription-drug-monitoring-programs.html> [<https://perma.cc/KPW4-7VZR>].

306. The idea of using privilege law to shield sensitive health-related data is introduced in Aziz Z. Huq & Rebecca Wexler, *Digital Privacy for Reproductive Choice in the Post-Roe Era*, 98 N.Y.U. L. REV. 555, 635 (2023), which argues that “federal and state legislatures should enact statutory evidentiary privileges that not only protect abortion-relevant data from voluntary disclosure but also make that data immune from law enforcement and judicial compulsory legal process alike.”

307. See Bridget A. Fahey, *Data Federalism*, 135 HARV. L. REV. 1007, 1059–63 (2022) (canvassing several arguments for applying the anti-commandeering doctrine to data).

308. See *id.* at 1062–64 (concluding that “there can be no data sharing exception to the anti-commandeering rule”); Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 154, 158–59 (2012) (explaining why data sharing triggers Tenth Amendment protection even absent any special doctrinal treatment of information).

mentioned above. In addition, when interstate spillovers are large, there will be implementation challenges for the state provision of public goods because of coordination costs or the risk of free-riding. Accordingly, providing public goods themselves will thus be an incomplete response, building pressure in the states with potentially no outlet.

D. Responding to Agonistic Criminal Prosecutions and Investigations

For state and local officials, the highest stakes agonistic federalism tactic involves the federal government's use of its investigative, coercive, and prosecutorial powers against state and local officials.³⁰⁹ Such deployments of extraordinary authority force those officials to choose between their political commitments to their constituents and their own physical security and well-being.³¹⁰ For many, this is likely to feel like an intolerable choice—and hence it is likely to spur potentially more extreme and unaccommodating responses than other vectors of agonistic federalism. At the same time, we have already seen that the federal courts may permit increasingly aggressive federal interventions in the states, as the Ninth Circuit's decisions to temporarily uphold the federalization of the California National Guard for deployments to Los Angeles and Portland suggested. These decisions, to be sure, predated the Supreme Court's decision in *Trump v. Illinois*,³¹¹ which at least allows for the possibility of more aggressive judicial intervention in the future.

To begin with, it is reasonable to expect that states will invert the agonistic use of coercive powers against federal officials engaged in such practices. For example, states might amend their statutory frameworks for governmental torts to allow for so-called converse-1983 actions to be brought against federal officials for violating federal constitutional or statutory rules.³¹² While these actions would likely be removed to federal courts by federal officials who remained in office at the time of suit, some federal

309. See *supra* text accompanying notes 175–180.

310. Cf. Katie Glueck, *Images of Handcuffed Democrats Start to Pile Up in Trump's Crackdown*, N.Y. TIMES (June 18, 2025), <https://www.nytimes.com/2025/06/18/us/politics/democrats-arrested-lander-padilla-trump.html> [<https://perma.cc/3KW2-EFTA>] (discussing the arrests of Democratic politicians at news conferences and in courthouses).

311. *Newsom v. Trump*, 141 F.4th 1032, 1054–56 (9th Cir. 2025) (per curiam); *Oregon v. Trump*, 157 F.4th 1013, 1033 (9th Cir. 2025) (per curiam), 809 F. Supp. 3d 1193, 1202–03 (D. Or. 2025) (permanently enjoining deployment to Portland), *appeal dismissed*, No. 25-6268, 2026 WL 443722 (9th Cir. Feb. 17, 2026); *Trump v. Illinois*, 146 S. Ct. 432, 433–34 (2025).

312. See Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159, 172 (1993) (“The overall architecture of constitutional federalism is . . . designed to encourage states to use state law to vindicate federal constitutional rights against the federal government.”); Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229, 1246–49 (1994) (discussing Supreme Court dictum aligned with the converse-1983 model, defined as the “idea that if either government invades the citizen’s constitutional rights, the citizen can use the other government as the instrument of redress”).

judges have expressed an openness to such suits.³¹³ These suits would then supply states and their residents an opportunity at least to air some of the grievances generated by aggressive federal enforcement actions. Or, imagine states that have experienced arrests of state and local officials responding with an exacting enforcement of local public order laws against federal agents. At a minimum, this might entail arresting and temporarily detaining federal agents out of what might be described as an abundance of caution as to the risk that private persons might be impersonating law enforcement.³¹⁴ Alternatively, it might involve following California's example by imposing a ban on the use of masks during enforcement actions,³¹⁵ and it is possible to imagine arrests unfolding under these laws too. As policing scholars have long recognized, the highly discretionary character of arrests also allows them to be deployed for a wide variety of policy ends³¹⁶—including agonistic federalism. Such localities would further insist on all procedural steps being assiduously followed before those agents would be released. States are also lawfully permitted to disclose and circulate personal information gleaned through an arrest.³¹⁷ In the agonistic federalism context, this would be turned into an instrument of imposing reputational sanctions on federal officers in their home locales. At the same time, one can imagine partisan congressional allies of these states using their prerogatives to block or delay the same programs through holds on nominations and via the exercise of investigative powers.³¹⁸

313. See, e.g., *Buchanan v. Barr*, 71 F.4th 1003, 1014–15 (D.C. Cir. 2023) (Walker, J., concurring) (“Relying on state causes of action to hold federal officers accountable put[s] an important structural check on federal power.”); *id.* at 1012 (“The Framers saw state common-law suits as an important check on federal misconduct.”); cf. *Hernandez v. Mesa*, 140 S. Ct. 735, 751 (2020) (Thomas, J., concurring) (“From the ratification of the Bill of Rights until 1971, the Court did not create ‘implied private action[s] for damages against federal officers alleged to have violated a citizen’s constitutional rights.’ Suits to recover such damages were generally brought under state tort law.” (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)) (internal citation omitted)).

314. Arrests only require a weak showing of probable cause to be valid. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence,” he can make an arrest without violating the Fourth Amendment).

315. Gerardo Zavala, *California Bans Masks Meant to Hide Law Enforcement Officers’ Identities*, NPR (Sep. 20, 2025), <https://www.npr.org/2025/09/20/nx-s1-5548532/newsom-trump-masked-ice-agents> [<https://perma.cc/HBU3-EKUA>].

316. See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 819 (2015) (“Arrests can also give police officers the opportunity to respond to incentives that have little to do with crime control.”).

317. *Paul v. Davis*, 424 U.S. 693, 713 (1976) (rejecting the claim that there is a constitutional right to privacy that prohibits a state from publicizing “a record of an official act such as an arrest”).

318. See, e.g., Alexander Bolton, *Schumer Invokes Senate ‘Blue Slip’ to Block Trump US Attorney Nominees*, THE HILL (Apr. 16, 2025), <https://thehill.com/homenews/senate/5251671-schumer-blue-slip-trump-u-s-attorney-nominees/> [<https://perma.cc/4MY3-SSSS>] (discussing

Further, it is not impossible to contemplate the prospect of state prosecutors bringing criminal charges under state law against federal officials who act outside their legal or constitutional mandates. In the late 1800s and early 1900s, there was a pattern of state criminal prosecutions of federal officers based on the way in which they enforced revenue and prohibition laws.³¹⁹ In 1992, an Idaho prosecutor charged an FBI agent involved in the Ruby Ridge stand-off with involuntary manslaughter because of his shooting of an unarmed civilian, Vicki Weaver.³²⁰ After removal from Idaho court to federal court, the question whether the Supremacy Clause precluded the state prosecution sharply divided the Ninth Circuit Court of Appeals.³²¹ No one disputed, however, that some state prosecutions of federal agents were permissible.

The relevant scope of immunity pursuant to the Supremacy Clause is defined in an 1890 decision of the U.S. Supreme Court entitled *In re Neagle*.³²² The Court held that immunity attaches to “an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do.”³²³ The Supreme Court has not revisited *Neagle*, and scholars disagree sharply about how it should be interpreted today.³²⁴ Yet it is not hard to imagine aggressive state prosecutors pushing the narrowest view of Supremacy Clause immunity. Even if such cases do not prevail in the end, the prospect of an extended criminal investigation and its attendant publicity is a means for imposing costs on a federal official. States that have enacted bans on mask-wearing by law enforcement already appear to be moving in this direction.³²⁵

Chuck Schumer’s use of senatorial privilege to block Trump’s nominations for U.S. Attorney in his state of New York).

319. John S. Strayhorn, Jr., *The Immunity of Federal Officers from State Prosecutions*, 6 N.C. L. REV. 123, 131–32 (1928).

320. Seth P. Waxman, *Federalism, Law Enforcement, and the Supremacy Clause: The Strange Case of Ruby Ridge*, 51 U. KAN. L. REV. 141, 144 (2002).

321. *Idaho v. Horiuchi*, 215 F.3d 986, 992–93, 997, 1005 (9th Cir. 2000) (2–1) (applying the *Neagle* rule to the officer’s actions in the present case to affirm the dismissal of charges), *rev’d en banc*, 253 F.3d 359, 377 (9th Cir. 2001) (6–5) (holding that Horiuchi was “not entitled to dismissal on the ground of Supremacy Clause immunity”), *and vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

322. 135 U.S. 1 (1890).

323. *Id.* at 75.

324. Compare Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2233–42 (2003) (canvassing debate and offering a broad view that gives “Supremacy Clause immunity [essentially] the same scope as qualified immunity”), with Dev P. Ranjan, Note, *Harmonizing Federal Immunities*, 109 VA. L. REV. 427, 459–63 (2023) (criticizing Waxman and Morrison, and offering a narrower view that Supremacy Clause immunity only applies where “adhering to the state’s criminal law . . . [would] actually prevent the federal officer from performing their official duties”).

325. Trần Nguyễn & Martha Bellisle, *California Bans Most Law Enforcement Officers from Wearing Masks During Operations*, ASSOC. PRESS (Sep. 20, 2025), <https://www.nbcnews.com/>

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In this Part, we have aimed to map out—necessarily tentatively—the potential responses of state and local actors to the emergence of agonistic federalism as a national government posture. Tracking the three kinds of aggressive approaches the federal government could take (or has taken), we have offered a taxonomy of steps that more or less aggressive state officials might adopt.

Importantly, we have stopped short of measures that violate federal law or that deny the force of federal court orders. We hence do not follow Dean Chemerinsky in musing about the legality or wisdom of some kind of secession.³²⁶ The conventional view among constitutional lawyers is that the Supreme Court’s statement in *Texas v. White*³²⁷ that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States” places secession outside legal bounds.³²⁸ We accept that view here, even as agonistic federalism’s dynamics place it in doubt. We also take for granted here that states would respect the (far lower stakes) holding in *Ableman v. Booth*³²⁹ that a state court “can proceed no further” in a habeas corpus action upon being told that the prisoner is in federal custody.³³⁰ We assume, that is, that a state court would not reject the centrifugal logic of national unity offered by Chief Justice Roger Taney.

Yet the conflictive logic of agonistic federalism means that these assumptions may well come under greater and greater strain. As the federal executive demonstrates its unwillingness to pay due regard to the “etiquette of federalism,”³³¹ and as doubts mount as to the willingness of the White

politics/immigration/california-bans-law-enforcement-officers-wearing-masks-operations-re-na232666 [https://perma.cc/M4N7-YH7K].

326. See CHEMERINSKY, *supra* note 31, at 174–75 (exploring various reasons as to why secession may be legal).

327. 74 U.S. 700 (1868).

328. *Id.* at 725. For a much narrower reading still of *White*, see Sanford Levinson, *The Twenty-First Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to Be Wrestled With?*, 67 ARK. L. REV. 17, 56–57 (2014) (arguing that *White* “merely rejects the arguments presented by Madison in 1798 about why the Supreme Court should not be the Constitution’s definitive interpreter”).

329. 62 U.S. 506 (1859) (Taney, C.J.).

330. *Id.* at 523. In *Ableman*, the Wisconsin Supreme Court notably declined to certify the record of the case to the U.S. Supreme Court. *Id.* at 512.

331. *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (citing *New York v. United States*, 505 U.S. 144 (1992), a commandeering case, and *Fed. Energy Regul. Comm’n v. Mississippi*, 456 U.S. 742, 781 (O’Connor, J., concurring in judgment in part and dissenting in part), as cases in which “the etiquette of federalism has been violated by a formal command from the National Government directing the state to enact a certain policy . . . or to organize its governmental functions in a certain way” (internal citations omitted)); see also Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 136 (1998) (describing the way in which federalism doctrine creates “rules of etiquette that highlight the importance of state autonomy within Congress”).

House to comply with federal court orders, these assumptions may dissolve. At that point, intergovernmental relations may well be agonistic, but may no longer be properly ranked as a species of *federalism*.

IV. The Origins and Ends of Agonistic Federalism

Our aim in this Part is to locate agonistic federalism in a larger context of political economy, and offer a tentative view about how it will unfold. These two analyses are plainly related: The underlying structural conditions producing intergovernmental conflicts of a distinctively adversarial timbre will channel and direct the unfolding terms of such conflicts. The national government and the states will select among the instruments described in Parts II and III—but they will make these choices in broader political and socioeconomic contexts. Agonistic federalism's endgame depends on how these legal and exogenous factors interact.

A. *The Political Economy of Contemporary Agonistic Federalism*

The particulars of contemporary agonistic federalism identified here are drawn from the second Trump Administration. It would be wrong to draw from this the inference that the dynamics we describe flow solely from the idiosyncratic choices of one specific president (even if the phenomenon at issue here is a side effect of concentrated authority within the executive branch). Agonistic federalism, to the contrary, arises out of a broader set of changes to the political psychology, party structure, and economics of the nation. The second Trump presidency may have provided the spark for dramatic constitutional change—and we do not mean to downplay the importance of individual figures in the acceleration of the blaze—but the kindling was already in place. We hence set forth here the structures of political psychology, political geography, and structural constraint that create fertile ground for this new form of federalism.

1. *Affective Polarization, Nationalization, and Sectionalism in American Politics.*—Agonistic federalism emerges out of changes to the structure of popular political sentiments. These changes to the modal political psychology of American voters both feed and are fed by changes to the structure and orientation of the two main political parties. The net result is an increasingly zero-sum competition between parties that view each other with animosity, if not hatred, in a federal system predictably but asymmetrically divided into red and blue states.

To begin with, Americans have become not just polarized in respect to their political identity, but increasingly emotionally invested in the perceived

moral gap between their partisan identity and that of others.³³² This is not just a matter of warm feelings toward one's co-partisans: Americans have "grown more contemptuous of opposing partisans for decades, and at similar rates" across party lines.³³³ Democratic and Republican voters behave more like fans of competing sports teams—say, the Cubs and Sox—than as rational maximizers of policy preferences.³³⁴ Affective polarization can be observed, strikingly, even if the two parties' positions on issues are not far apart.³³⁵ Rather, partisan identity becomes a "substantial driver of ingroup bias, activism, and anger [at the other party and its members]" without regard to the size of the gap in policy preferences between the two main parties.³³⁶ One of the effects of this identitarian reorientation of partisan political psychologies is that the ambient popular support for democratic norms has declined.³³⁷ That is, to the extent a person has animus toward a partisan outgroup, they will be more willing to violate democratic norms in the pursuit of political goals.

Layered upon this affectively polarized electorate is a new, sharply bifurcated geography of partisan competition. This political geography has

332. On the rise of affective polarization, see Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130–31 (2019); accord Bertrall L. Ross II, *Polarization, Populism, and the Crisis of American Democracy*, 22 ANN. REV. L. & SOC. SCI. 293, 296 (2024).

333. Eli J. Finkel, Christopher A. Bail, Mina Cikara, Peter H. Ditto, Shanto Iyengar, Samara Klar, Lilliana Mason, Mary C. McGrath, Brendan Nyhan, David G. Rand, Linda J. Skitka, Joshua A. Tucker, Jay J. Van Bavel, Cynthia S. Wang & James N. Druckman, *Political Sectarianism in America*, 370 SCI. 533, 533 (2020).

334. Patrick R. Miller & Pamela Johnston Conover, *Red and Blue States of Mind: Partisan Hostility and Voting in the United States*, 68 POL. RES. Q. 225, 225–26 (2015) ("What are the consequences of voters treating political parties like sports teams?").

335. Lilliana Mason, *"I Disrespectfully Agree": The Differential Effects of Partisan Sorting on Social and Issue Polarization*, 59 AM. J. POL. SCI. 128, 139–40 (2015) (finding "an electorate whose members are more biased and angry than their issue positions alone can explain").

336. *Id.* at 130; see also Finkel et al., *supra* note 333, at 533 (describing the emergence of "political sectarianism—the tendency to adopt a moralized identification with one political group and against another"); Lilliana Mason, *Ideologues Without Issues: The Polarizing Consequences of Ideological Identities*, 82 PUB. OP. Q. 866, 866–67 (2018) (finding, based on an analysis of a nationally representative survey, that "it is the 'otherness' of ideological opponents, more than issue-based disagreement, that drives liberal-versus-conservative rancor").

In contrast, Mia Costa argues that most voters "prioritize policy and constituency service" such that officials "who often take part in expressive partisanship may thus be out of line with what their constituents want." Mia Costa, *Ideology, Not Affect: What Americans Want from Political Representation*, 65 AM. J. POL. SCI. 342, 343 (2021). *But see* NEIL A. O'BRIAN, THE ROOTS OF POLARIZATION: FROM THE RACIAL REALIGNMENT TO THE CULTURE WARS 5, 15 (2024) (arguing that "racial realignment . . . constrained the positions parties could take on other, ostensibly nonracial culture war issues").

337. Matthew H. Graham & Milan W. Svobik, *Democracy in America? Partisanship, Polarization, and the Robustness of Support for Democracy in the United States*, 114 AM. POL. SCI. REV. 392, 404 (2020) (presenting evidence that support for democracy declines under conditions of increasing polarization).

two key features. First, there are clearly identifiable “blue” states and “red” states, with an ever-“shrinking slice of territory where the parties remain evenly matched.”³³⁸ This decline in contested seats reshapes the ideological profiles of the parties. Because the two national parties are less and less beholden to regional factions (who are most often crucial in margin elections), they are increasingly “ideologically homogenous.”³³⁹ In this sense, political dynamics are geographically channelized in ways that reinforce affective polarization. Documenting this trend, Mia Costa finds that legislators from noncompetitive districts are more likely to engage in “negative representation” of their political opponents.³⁴⁰ Affective polarization and the ebbing of electoral competition, that is, interact with each other, making each other stronger in what seems to be a feedback loop. Under these conditions, it is perhaps unsurprising that some Americans may view the prospect of the White House withdrawing, say, school meals for the children of another state with equanimity.³⁴¹

Second, as David Schleicher has argued, voting behavior in local and state elections increasingly turns on national rather than local political issues.³⁴² He and Chris Elmendorf, for example, have presented evidence that voters in municipal elections respond to national-party brands rather than local-party performance.³⁴³ At least since the 1970s, that is, the “vital mediating institutions” of the press, interest groups, and political parties have become “both more nationalized and more tightly linked to partisan networks.”³⁴⁴ In part, the nationalization of politics is a result of changing

338. DAVID A. HOPKINS, *RED FIGHTING BLUE: HOW GEOGRAPHY AND ELECTORAL RULES POLARIZE AMERICAN POLITICS* 3 (2017); accord Julia Azari & Marc J. Hetherington, *Back to the Future? What the Politics of the Late Nineteenth Century Can Tell Us About the 2016 Election*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 92–95 (2016) (mapping a “[s]hared [p]attern” of partisan contestation at the level of states in presidential elections since 2000).

339. HOPKINS, *supra* note 338, at 6.

340. MIA COSTA, *HOW POLITICIANS POLARIZE: POLITICAL REPRESENTATION IN AN AGE OF NEGATIVE PARTISANSHIP* 79–80 (2025).

341. There is no polling on this specific question of which we are aware, but there is no evidence that these actions had any effect on the popularity of the Administration, which implies indifference on the part of supporters.

342. See Schleicher, *supra* note 70, at 771 (noting that parties are increasingly “national in scope, largely coherent ideologically, and do little to represent state-specific interests in Washington”).

343. Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 397–98.

344. PAUL PIERSON & ERIC SCHICKLER, *PARTISAN NATION: THE DANGEROUS NEW LOGIC OF AMERICAN POLITICS IN A NATIONALIZED ERA* 13–15 (2024); Danica Dillion, Curtis Puryear, Longjiao Li, Andre Chiquito & Kurt Gray, *National Politics Ignites More Talk of Morality and Power than Local Politics*, 3 PNAS NEXUS 345, 345 (2024) (“Politics in the United States has shifted sharply towards national issues, and political conversations regularly involve partisans from different regions with different experiences.”). For an analysis that traces nationalization back to the New Deal, see Ignacio Lago, *Making Countries Small: The Nationalization of Districts in the United States*, 12 POL. SCI. RES. & METHODS 416, 418, 424 (2024).

media environments. Voters are increasingly underinformed about local and state issues thanks to the decline of local media such as newspaper and radio stations.³⁴⁵ As a result, both House and Senate elections have “experienced a strong trend toward nationalization over the past several decades.”³⁴⁶ Hence, even as elections are becoming more “local” (in the sense of being driven by the political demography of a particular state), they are also becoming more and more “nationalized” (in the sense of being more focused on national issues).³⁴⁷ The net result might be characterized as a new sectional divide running between red and blue states where politics in each state is a reflection, albeit through a dark glass, of one side’s national political agenda.

At the same time as developments in red and blue states mirror each other in important ways, there are also significant disparities in the incentives and behavior of Democrats and Republicans. The national political map, when viewed through the federalism lens of House, Senate, and Electoral College competition, is not evenly balanced between the two parties. All else being equal, it is easier for Republicans to translate votes into political representation, and hence power, than Democrats, in House and Senate races.³⁴⁸ Democrats tend to be clustered in urban areas, whereas Republican voters are dispersed across rural areas.³⁴⁹ As a result, Democrats are less efficient in translating votes into representation than the Republican electorate in suburbs and rural areas.

The geographic distribution of safe Republican and safe Democrat seats, Steven Levitsky and Daniel Ziblatt have explained, means that the two parties have systematically different incentives in respect to the maintenance or promotion of majority rule. As Levitsky and Ziblatt explain, “[a]t no time during the twenty-first century have Senate Republicans represented a

345. Danny Hayes & Jennifer L. Lawless, *The Decline of Local News and Its Effects: New Evidence from Longitudinal Data*, 80 J. POL. 332, 336 (2018) (finding that “local political news is diminishing in the United States, and that citizen engagement is a casualty”); see also Moskowitz, *supra* note 71, at 114–15 (finding that increased information about local matters attenuates the nationalization of elections).

346. Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of US Elections in the 21st Century*, 41 ELECTORAL STUD. 12, 18–20 (2016) (charting changing degrees of nationalization in both kinds of elections).

347. Sharif Amlani & Carlos Algara, *Partisanship & Nationalization in American Elections: Evidence from Presidential, Senatorial, & Gubernatorial Elections in the U.S. Counties, 1872–2020*, 73 ELECTORAL STUD. 8–10 (2021) (finding increasing polarization at the federal level, with gubernatorial polarization mirroring this federal increase).

348. HOPKINS, *supra* note 338, at 21; see also Dante J. Scala & Kenneth M. Johnson, *Political Polarization Along the Rural-Urban Continuum? The Geography of the Presidential Vote, 2000–2016*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 162, 163 (2017) (finding that rural residence was a statistically and practically significant predictor of a Republican vote).

349. See DAVID F. DAMORE, ROBERT E. LANG & KAREN A. DANIELSEN, *BLUE METROS, RED STATES: THE SHIFTING URBAN-RURAL DIVIDE IN AMERICA’S SWING STATES 3–4* (2021) (providing Nevada and North Carolina as examples of this phenomenon).

majority of the U.S. population.”³⁵⁰ A “rural bias of American institutions enabled the GOP to win the presidency and control the Senate (and eventually the Supreme Court) even as it lost the national popular vote time and time again.”³⁵¹ As a consequence, “Republicans became the beneficiaries of a kind of ‘constitutional protectionism’ . . . that dull[ed] the incentive to compete.”³⁵² This logic of representational bias, as a result of the Constitution’s linkage of institutions, spills over into the presidency and to the federal courts. Hence, it is increasingly common to find “minoritarian judges” (i.e., judges confirmed by Senators who received fewer actual votes than the Senators voting against them), or even “super-minoritarian justices” (i.e., justices nominated by a president who lost the popular vote and confirmed by Senators who received fewer votes than the Senators who opposed them) on the Supreme Court.³⁵³ These dynamics may also help to illuminate the asymmetrical partisan polarization that has led Republican officials to violate or abjure constitutional and political norms more frequently than Democrats.³⁵⁴ This “tyranny of the minority,” to use Levitsky and Ziblatt’s evocative phrase, arises in a political moment at which affective polarization is undermining loyalty to democratic norms, and so undermining incentives to treat members of the opposing party as a “loyal opposition” worthy of respect.³⁵⁵

Finally, partisan sectionalism is emerging against a context of declining capacity on Congress’s part to produce legislation or conduct oversight. Even when Congress and the presidency agree on a policy solution, “intense partisanship and electoral competition of recent years appears to be undermining Congress’s broader problem-solving capacity.”³⁵⁶ Indeed, one of the effects of partisan polarization is to create an incentive for the minority party “to *hinder* the performance of Congress” with the aim of discrediting members of the majority party.³⁵⁷ The absence of action on Congress’s part

350. STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 176 (2023).

351. *Id.* at 193.

352. *Id.*

353. Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 442–43 (2020).

354. Fishkin & Pozen, *supra* note 27, at 938–41 (linking asymmetrical “hardball” to the rise of asymmetrical patterns of polarization). For a different account that underscores divergent policy goals, see William G. Howell & Terry M. Moe, *The Strongman Presidency and the Two Logics of Presidential Power*, 53 PRES. STUD. Q. 145, 159 (2023).

355. Cf. Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1960 (2014) (“We do, in fact, have a form of loyal opposition in this country, one that is distinctively American and arguably more robust than its counterparts elsewhere. It’s called federalism.”).

356. Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 86 (2015).

357. David R. Jones, *Partisan Polarization and Congressional Accountability in House Elections*, 54 AM. J. POL. SCI. 323, 334 (2010).

creates pressure for states to act.³⁵⁸ Paradoxically, however, the national orientation of partisan political debates does not necessarily elicit state-level policy on matters of acute local interest—but rather action on national issues. For instance, both red and blue states or cities have enacted over the past decade a slate of immigration-related measures.³⁵⁹

It is important to observe, though, that not all structural tendencies press in the same direction. As the Republican Party has gained ground among working-class voters, who tend to be less frequent participants in politics, it has benefited (at least in swing elections) from increased turnout.³⁶⁰ Hence, while it was rational for Republicans at one point to press for election rules that raised the cost of voting (e.g., voter identification rules or limits upon absentee voting), it is now rational for them to oppose such restrictions, at least in potential swing jurisdictions. Whether political operatives can make this pivot, though, remains to be seen.

2. *How Evolving Political Structures Engender Agonistic Federalism.*—How does the combination of intensively affective polarization, a new red-blue sectional divide, and the nationalization of state and local politics reshape American federalism writ large? One way to see the effect of such structural changes is to consider their combined impact upon federalism by integration models. That helps clarify why that erstwhile model of intergovernmental relations no longer holds, and further elucidates why the sorts of agonistic measures discussed in Parts II and III would be observed.

Writing about a decade ago, Jessica Bulman-Pozen captured crisply the rise of “partisan federalism.” At the core of her theory was the claim that the “federal system generates a check on the federal government and fosters divided citizen loyalties” because “it provides durable and robust scaffolding for partisan conflict.”³⁶¹ Bulman-Pozen pointed to the way in which “political actors’ use of state and federal governments . . . articulate, stage, and amplify competition between the political parties.”³⁶² For her, the “derivative, contingent attachment to state power” would mean that “only some states

358. Rebecca Bromley-Trujillo & Michael A. Dichio, *The State of American Federalism 2023–2024: Judicialization of Gridlocked Politics*, 54 PUBLIUS: J. FEDERALISM 436, 438 (2024).

359. *Id.* at 440, 454.

360. Nicholas Carnes & Noam Lupu, *The White Working Class and the 2016 Election*, 19 PERSPS. ON POL. 55, 57 (2021) (finding a long-term increase in Republican support among working-class voters); see also *New Census Data Reveal Voter Turnout Disparities in 2022 Midterm Elections*, NAT’L LOW INCOME HOUS. COAL. (May 15, 2023), <https://nlihc.org/resource/new-census-data-reveal-voter-turnout-disparities-2022-midterm-elections> [<https://perma.cc/JW9F-LE9Y>] (finding that eligible voters with lower incomes were less likely to be registered to vote).

361. Bulman-Pozen, *Partisan Federalism*, *supra* note 76, at 1080–81.

362. *Id.* (“States make demands for autonomy, they enact shadow policies rejected by the federal government, they fight federal programs from within—and they do all of this because of partisan commitments.”).

[would] challenge the federal government”—but the result would “facilitate opposition” and policy competition in a productive fashion.³⁶³ Hence, she underscored ways in which states challenge federal policies through litigation, legislation, and regulatory resistance.³⁶⁴ All this, she concludes, conduces to “federalism’s vitality.”³⁶⁵

To be very clear, we think that Bulman-Pozen accurately captured important, even modal, dynamics of intergovernmental relations at the time she wrote. But the empirical ground has shifted since her analysis.³⁶⁶ Some elements of the landscape remain the same today, such as the “ideologically cohesive, polarized parties.”³⁶⁷ The healthful policy competition she perceived as emerging organically from the states, albeit along partisan lines, is no longer the whole picture.

Since Bulman-Pozen wrote, the increasing intensity of affective polarization and the growing nationalization of policy contestation have, in tandem, strained her model of simmering contestation and competition beyond the breaking point. Intergovernmental relations are now characterized by zero-sum conflict in which both the national government and the states seem to be committed to victory at all costs. The intensification of partisan identity and aversion to political outgroups, as well as the declining allegiance to democratic norms as such, means that there is less willingness to tolerate the kind of policy variations that Bulman-Pozen celebrated. In effect, a shift from moderate to intense polarization has overturned the partisan federalism equilibrium. Abrupt, coercive, and even violent efforts to shut down political opponents through the withdrawal of federal public goods, or the weaponizing of federal-state cooperation, flow logically from the new partisan-political landscape. Consistent with the waning of popular commitments to democratic norms, this new political psychology seems to translate into a willingness not just to contest, but also to repress, those who are not co-partisans. That is, if one’s party is akin to one’s sports team, then the goal of politics is to win the game whatever the price.³⁶⁸

Whereas Bulman-Pozen focused on the states as loci of contestation only, today it is both states and also the federal government that are driven by affective partisan polarization. Indeed, the national strategies of agonistic federalism cataloged in Part II can be understood as a second-generation

363. *Id.* at 1092.

364. *Id.* at 1096.

365. *Id.* at 1108.

366. Indeed, Bulman-Pozen rightfully and carefully acknowledged the time-bound quality of her analysis. *Id.* at 1145 (“The account offered here is in critical respects a particular story about federalism at the turn of the twenty-first century.”).

367. *Id.* at 1083.

368. Miller & Conover, *supra* note 334, at 226.

response to the first-generation wave of “partisan federalism” that Bulman-Pozen captured. It is further no surprise that it would be a Republican Administration that pioneers the weaponization of cooperative federalism or the withholding of federal public goods: One of the baseline explanations for the radicalization of the national Republican Party, developed by William Howell and Terry Moe, turned on the greater difficulty it faced in advancing a deregulatory agenda in the post-Reagan era, and the consequent need to resort to increasingly radical tools to make a mark.³⁶⁹ Agonistic federalism’s evolution is consistent with Howell and Moe’s account.

The new geography of sectional, partisan division facilitates this intensification and radicalization of partisan conflict. A tendency to sort among blue and red states has calcified into a politically sectarian form of sectionalism. This geographic bifurcation, in turn, lowers the cost of targeted acts of norm-breaking coercion or extortion: The voting public generally knows that California and Maine are Democratic states—so the use of weaponized federal-fund withdrawals on these states is immediately legible as partisan conflict by other means. The absence of partisan competition in an increasing number of states also means that there are more loci for such attacks.

In sum, agonistic federalism emerges out of a matrix of radical affective polarization, a frozen landscape of increasingly partisan-identified and thus uncompetitive states, and a growing nationalization of policy debate. Under these conditions, it suffices that one party embrace a no-holds-barred, zero-sum approach to overturn the kind of benign partisan federalism Bulman-Pozen embraced. In practice, this means withdrawing federal public goods, weaponizing federal-state cooperation, and criminalizing policy disagreement. And after one side embraces these tools, it is hard to see how the other survives without responding in kind.

B. The Potential Futures of Agonistic Federalism

The strain imposed by agonistic measures on intergovernmental bonds raises questions about the potential future paths of federal-state relations. Agonistic federalism breaks from the historical models of dual federalism, process federalism, and federalism by integration, so it is difficult to extrapolate from history to a prediction of how present dynamics will unfold.

Earlier moments of intergovernmental tension, such as those canvassed in subpart II(B), offer only limited guidance. On the one hand, the Virginia and Kentucky Resolutions did not give rise to extended political conflict for the simple reason that the Federalists lost national elections.³⁷⁰ On the other hand, conflict over nullification, tariffs, and fugitive slaves culminated in

369. Howell & Moe, *supra* note 354, at 158–59.

370. *See supra* text accompanying notes 87–89.

secession and civil war. It would be a mistake, however, to reason forward from the crisis of the 1850s in any mechanical way: The decision to secede in part turned on contingent factors such as the demographics of Southern conventions (which over-represented slave-holding counties) and the excessively optimistic view among slave-holders about Lincoln's intentions.³⁷¹ Such was the uncertainty and contingency of events that, even in the cauldron of the early 1860s, well-informed participants in political debates remained deeply uncertain about the meaning or effects of secession.³⁷² In any event, the nineteenth-century American national state is sufficiently different from the national state wrought by the New Deal, World War II, and the Cold War that it would be reckless to assume the same dynamics would play out then and now.

Rather, we turn to comparative and political science evidence to advance three postulates about the potential pathways of intergovernmental conflict in an agonistic context. First, it remains the case today, as in the mid-nineteenth century, that efforts to centralize power in a nation-state can drive the extent of internal conflict, whether legal or violent, within that nation-state. Second, such conflicts also engender pro-secession sentiments in the general public, creating at least the psychological conditions for overt conflict. And third, the endgame of such conflicts cannot be predicted with certainty. There is, indeed, no necessary incompatibility between, on the one hand, the existence of subnational units with some discretionary political powers and a highly centralized, even authoritarian regime.³⁷³ In developing these points, we mean to underscore the substantial stakes of agonistic federalism. Our aim is to offer analytic frameworks for understanding how such conflicts unfold—but not to make normative recommendations about how they *should* turn out.

To begin with, not only American history but also contemporary experience in other democracies shows that forms of agonistic federalism can be expected in the context of efforts to centralize political power and to eliminate sites of subnational contestation. The richest examples come from the Latin American context. Brazil emerged from military rule as a democracy in 1985 with a “highly decentralized system” in which the governors of subnational states exercised considerable authority over

371. Mario L. Chacón & Jeffrey L. Jensen, *The Political and Economic Geography of Southern Secession*, 80 J. ECON. HIST. 386, 387–89 (2020).

372. See ALISON L. LACROIX, *THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS* 422–23 (2024) (explaining Frederick Douglass's doubt that states could truly secede).

373. Gervasoni, *supra* note 38, at 223 (noting that “different national and subnational regimes can coexist in many combinations”).

education, healthcare, and the regional bureaucracies.³⁷⁴ During the presidency of the populist and authoritarian Jair Bolsonaro (2018–2022), subnational authorities played an important role in preventing the concentration of political power at the national level so as to ensure the preservation of democratic norms.³⁷⁵ While Bolsonaro advanced a “conflictual” view of federalism, the autonomy of subnational units nevertheless preserved “an institutional space for conflict when meaningful cooperation [was] lacking.”³⁷⁶ Similarly, in Venezuela, the decentralized election system and the existence of state-level offices allowed opponents of the autocratic Hugo Chávez to maintain a foothold in politics at least initially.³⁷⁷ Because the Chávez regime controlled both elections and courts, states fell “vulnerable to political pressure and reorganization,” thus stripping state power.³⁷⁸ Venezuela ultimately lost its democratic character under Chávez’s pressure.³⁷⁹ The Brazilian and Venezuelan examples suggest that democratic deconsolidation through the concentration of power in a national executive is commonly associated with forms of intergovernmental conflict akin to agonistic federalism. The kinds of tensions mapped in Parts II and III, therefore, should be understood as common symptoms of a widely experienced phenomenon.

A second observation that can be drawn from historical and comparative evidence: Agonistic conflicts between levels of government create at least psychological pressure toward a fracturing of the national compact, and in the extreme, secession. There are two reasons for positing this effect. First, in addition to the contingent factors identified above, one of the structural factors driving secessionist movements in the 1860s was a belief that “the South had lost its ability to win national elections” because of demographic changes.³⁸⁰ The belief that national government no longer offered a space for political negotiation and compromise, in other words, accentuated the turn to secession as a political goal. Second, empirical studies of the diffusion of pro-secession sentiments among Americans finds that such views are

374. Robert R. Kaufman, R. Daniel Kelemen & Burcu Kolcak, *Federalism and Democratic Backsliding in Comparative Perspective*, 23 PERSPS. ON POL. 15, 22 (2025).

375. *See id.* at 24 (explaining Brazilian governors’ role in preventing state police from falling under Bolsonaro’s control).

376. Juan F. González Bertomeu, *Constitutional Politics of Federalism in Latin America*, in RESEARCH HANDBOOK ON THE POLITICS OF CONSTITUTIONAL LAW 228, 228 (Mark Tushnet & Dimitry Kochenov eds., 2023).

377. Kaufman, Kelemen & Kolcak, *supra* note 374, at 25.

378. *Id.* at 26.

379. Javier Corrales, *Autocratic Legalism in Venezuela*, J. DEMOCRACY, Apr. 2015, at 37, 37–38. *See also* Radek Buben & Karel Kouba, *Democracy and Institutional Change in Times of Crises in Latin America*, 16 J. POL. LATIN AM. 90, 96 (2024) (discussing comparisons between the falls of democratic governance in Venezuela and Ecuador).

380. Anderson, *supra* note 32, at 14.

strongest among “those who see the largest political differences between the states, in terms of the quality of government services, states’ economic prospects, and the desirability of living in a state controlled by the ‘other’ party.”³⁸¹ These sentiments would build upon surprisingly robust lingering identifications with states as such.³⁸² As politicians and public intellectuals raise the prospect of secession with more gravity, these sentiments may harden into the basis for political identity and action. Even if secession is not ultimately feasible, increases in the frequency of political violence cannot be ruled out.³⁸³

Finally, the contrasting examples of Venezuela and Brazil suggest that we should not be too confident in predicting how agonistic federalism plays out. On the one hand, in the Venezuelan case, an authoritarian central regime prevailed, even though delegation to subnational units did not. Indeed, there is cross-national evidence that “federalism can remain alive under authoritarianism.”³⁸⁴ One study, for example, found that “Russian federalism under Putin has been strongest where sub-national democracy was at its *weakest*.”³⁸⁵ The degree of “central manipulation” may increase, as subnational electoral authorities tend to be disbanded, while fiscal autonomy often persists.³⁸⁶ In Brazil, on the other hand, democratic norms held in part thanks to federalism. As Landau and his co-authors observed, federalism can act as a friction on centralization with an authoritarian cast provided that states have the necessary incentives and institutional resources.³⁸⁷ While it is risky to extrapolate from just two cases, these conflicting outcomes at least

381. Nicholas F. Jacobs, *Seeing Red and Blue: Assessing How Americans Understand Geographic Polarization, Secession, and the Value of Federalism*, 54 PUBLIUS: J. FEDERALISM 201, 203 (2024).

382. Emily Pears & Emily Sydnor, *The Correlates and Characteristics of American State Identity*, 52 PUBLIUS: J. FEDERALISM 173, 193 (2022) (finding, based on survey data, that “even in today’s increasingly nationalized political environment, [state-level] attachments still matter in American political behavior”).

383. See *supra* note 326 and accompanying text. On the difficulty of secession as a practical matter, see RYAN D. GRIFFITHS, *THE DISUNITED STATES: THREATS OF SECESSION IN RED AND BLUE AMERICA AND WHY THEY WON’T WORK* 37, 44 (2025).

384. Paolo Dardanelli, John Kincaid, Katharine Adeney, Lorena Moscovich, Juan Cruz Olmeda, Rogerio Schlegel, Rotimi Suberu, Filippo Boni & Santiago Lacroix Eussler, *Authoritarianism, Democracy and De/centralization in Federations: What Connections?*, 33 REG’L & FED. STUD. 577, 578 (2023) (citing research from various countries).

385. Anastassia Obydenkova & Wilfried Swenden, *Autocracy-Sustaining Versus Democratic Federalism: Explaining the Divergent Trajectories of Territorial Politics in Russia and Western Europe*, 1 TERRITORY, POL., GOVERNANCE 86, 88 (2013); see *id.* at 90 (explaining how Russian federalism is a means to manage ethnic diversity).

386. Dardanelli et al., *supra* note 384, at 597 (“Regime change [has] much less impact in the fiscal sphere . . .”).

387. See David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1211 (2020) (writing of courts, law enforcement, and electoral administration as levers that can oppose authoritarian centralization).

rule out the view that effective federalism always prevails, and hence persists, or necessarily must fail in the teeth of aggressive centralization.

In sum, the resort to agonistic federalism courts considerable risk. The risk is not necessarily one of outright partition of the nation. On the one hand, secessionist movements are relatively rare in advanced democracies, and there are no recent cases of successful partition in a mature democracy.³⁸⁸ In a recent monograph, Dean Chemerinsky cited the examples of Czechoslovakia and Norway.³⁸⁹ But these were relatively recently created polities without long traditions of shared government.³⁹⁰ And it is hardly clear that either offers a template for a large and old nation-state such as the United States. On the other hand, national democracies can end—sometimes surprisingly fast.³⁹¹ One way in which that happens involves a slippage into what Barbara Walter calls “anocracy,” or a mix of democracy with some autocratic elements—this is a state in which there are no longer nonviolent channels through which political change can be plausibly sought.³⁹² Out of anocracy, Walter argues, comes violent civil war. Hence, the conditions that might have restrained secessionist movements may well be fragile in an era of democratic backsliding. And if it were the case that a downshift in the quality of democracy responsiveness was associated with a spike in the risk of fragmentation, then the risks of secession may well be weighing more heavily, at least in the United States post-2025.

Conclusion

Agonistic federalism is a game of high, even existential, stakes. We cannot predict with confidence how it will unfold, and more modestly, our aim in this Article is to offer an analytic lens that captures its basic logic, some of the main legal questions that it raises, and the possible forms of its acceleration into crisis. We believe these clarifications are timely, even necessary, if we are to avoid the worst. Still, we want to underscore that we have not offered a firm prediction about how these dynamics will play out.

388. Stéphane Dion, *Why Is Secession Difficult in Well-Established Democracies? Lessons from Quebec*, 26 BRIT. J. POL. SCI. 269, 269–70 (1996). The most important exception, as Dion notes, is Great Britain and Eire in 1922. For an accessible history, see generally CHARLES TOWNSHEND, *THE PARTITION: IRELAND DIVIDED, 1885–1925* (2021). There have been a range of secessionist movements in North America; few have mustered much popular support. See Lawrence M. Anderson, *Exploring the Paradox of Autonomy: Federalism and Secession in North America*, 14 REG'L & FED. STUD. 89, 106, 109 (2004) (analyzing the Quebec secessionist movement as compared to the American South prior to the Civil War).

389. CHEMERINSKY, *supra* note 31, at 176–78.

390. *Id.* at 177–78; Dion, *supra* note 388, at 270.

391. See GINSBURG & HUQ, *supra* note 37, at 39 (noting that the speed of democratic decline varies dramatically).

392. WALTER, *supra* note 20, at 11–12 (2022); *id.* at 84 (arguing that civil wars start when there are “downgraded groups in anocracies dominated by ethnic factions”).

For in truth, we think that it is impossible to offer a definite prognosis about the end-state of agonistic federalism.

But even with that uncertainty in mind, we can say with confidence that the United States has entered a novel era of American federalism. Somewhat akin to the antebellum period—but with the higher stakes associated with the created capacity for state violence on both sides of the field—we are moving into a period in which both the federal government and the states have strong incentives to push the bounds of their authorities against each other, and even to seek to disrupt the pre-existing legal rules of the game in order “to resolve a perceived wrong . . . and thereby to defend a perceived institutional prerogative.”³⁹³ Whether there is a nation standing after the mutual cycles of offense and self-defense have played themselves out remains to be seen.

393. Pozen, *supra* note 84, at 12.