Dynamic Incorporation of Federal Law

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This Article provides a comprehensive analysis of state constitutional limits on legislative incorporation of dynamic federal law, as occurs when a state legislature incorporates future federal tax, environmental, or health regulations. Many state judicial decisions draw on the nondelegation doctrine to endorse an ex ante prohibition on state legislative incorporation of dynamic federal law. However, the analysis in this Article shows how bedrock principles related to separation of powers under state constitutions, such as protecting transparency, reinforcing accountability, and protecting against arbitrariness in lawmaking, are not consistent with this approach. Instead, this Article evaluates two practices that can make dynamic incorporation of federal law more compatible with state separation of powers: (a) accountable intermediaries, such as administrative agencies, as a way of preserving political accountability with incorporation of dynamic federal sources of law; and (b) ex post judicial review, as a mechanism to provide standards and safeguards to protect against arbitrariness in lawmaking. The analysis highlights serious flaws with judicial interpretations of state constitutions that impose an ex ante barrier to the adoption of dynamic federal law. It also advances "hard look federalism" as a novel approach to judicial review by state appellate courts that can allow states to both protect their own separation of powers concerns and improve the operation of federalism, particular by enhancing state participation in adoption, interpretation, and implementation of federal standards.

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I. INTRODUCTION

In drafting statutes state legislatures frequently adopt by reference the laws of other sovereigns. The practice of incorporation by reference has frequently been questioned under state constitutions, especially in instances where the incorporated law is dynamic or subject to future changes by another legal body.[1] This Article examines state constitutional limits on legislative incorporation of dynamic federal law, as occurs when a state legislature incorporates future federal tax, environmental, or health laws.

While many state judicial decisions express constitutional concern about state legislatures incorporating dynamic federal law, I show how these concerns are not consistent with bedrock principles related to separation of powers under state constitutions. Rather, I argue that (a) accountable intermediaries, such as administrative agencies, can help to ensure political accountability with incorporation of dynamic federal sources of law and (b) *ex post* judicial review also provides standards and safeguards that can protect

[1] *See* Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261, 270–76 (1941). *See generally* Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); Griswold v. Atl. Dock Co., 21 Barb. 225 (N.Y. Gen. Term 1855); State v. Charlesworth, 951 P.2d 153 (Or. Ct. App. 1997).

core separation of powers values. My analysis shows the flaws with judicial interpretations of state constitutions that impose an *ex ante* barrier to the adoption of dynamic federal law. It also advances a novel approach to judicial review by state appellate courts as a way for states to both protect their own separation of powers concerns and to improve state participation in the adoption and implementation of federal standards.

In Part II, I describe a number of established state laws that incorporate or authorize adoption of dynamic federal law, and discuss their benefits.[2] Incorporation by reference is a longstanding and commonplace practice in the drafting of legislation[3] and agency regulations.[4] The source of reference may be private bodies.[5] State legislatures sometimes also borrow parallel sources of law, such as the law of another state, as may occur in the uniform lawmaking process.[6] But states also frequently incorporate by reference existing federal standards—a source of law that is (at least theoretically) more hierarchical in

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[2] This Article focuses on the state incorporation of federal legislative standards under state constitutions, not on state incorporation of federal constitutional doctrine. Some state courts or constitutions also may follow the U.S. Supreme Court on particular constitutional issues, ensuring that similar state and federal constitutional provisions are interpreted in lockstep. *See, e.g.*, Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653, 654–55 (1987) (discussing a 1983 amendment to Florida's constitution that mandates that the state's prohibitions on unconstitutional searches and seizures conform with the U.S. Supreme Court's interpretation of the Fourth Amendment); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502–20 (2005) (describing the judicial approach of lockstep interpretation between state constitutions and the U.S. Constitution).

[3] *See generally* John Mark Keyes, *Incorporation by Reference in Legislation*, 25 STATUTE L. REV. 180 (2004) (describing the drafting technique, incorporation by reference, and setting forth the advantages and disadvantages in the manner in which it is used).

[4] At the federal level, 5 U.S.C. § 552(a)(1) (2012) specifically authorizes incorporation by reference of materials that the Director of the Office of the Federal Register (OFR) finds to be "reasonably available to the class of persons affected thereby." *See, e.g.*, Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 133 (2013); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 498 (2013) (discussing incorporation of private standards into administrative regulations); *see also Incorporation by Reference*, ADMIN. CONF. U.S., https://www.acus.gov/research-projects/incorporation-reference [https://perma.cc/H7QS-QH4R] (proposing "ways to ensure that materials subject to incorporation by reference are reasonably available to the regulated community and other interested parties, to update regulations that incorporate by reference, and to navigate procedural requirements and drafting difficulties when incorporating by reference").

[5] *See, e.g.*, Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Use of Private Standards*, 112 MICH. L. REV. 737, 737 (2014).

[6] *See, e.g.*, Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 132 (1996).

nature, under the Supremacy Clause of the U.S. Constitution.[7] Even when they are not compelled by the Supremacy Clause, state lawmakers frequently incorporate by reference federal standards, in effect, "delegating up"[8] the content of future standard setting to the federal government. This form of "dynamic incorporation" of federal law is commonplace in state legislation as well as in state administrative agency rulemaking.[9] It produces many benefits for state lawmaking, including promoting uniformity, efficiency, flexibility, and reinforcing coordination between state and federal regulation.

Part III describes how separation of powers under state constitutions often presents an *ex ante* barrier to state incorporation of dynamic federal law.[10] In most states, the nondelegation doctrine remains alive and well as a more substantial restrictive of the legislature's power to delegate to agencies than the U.S. Constitution's limits on Congress's delegations to federal agencies. There are, of course, many differences among the states, but states can be roughly grouped into those that emphasize a need for procedural safeguards and those that emphasize some need for substantive constraints on legislative delegations.[11] Several state courts have rejected almost any "delegation" that relies on future federal administrative agency determinations.[12] The effect of these decisions serves to freeze state incorporation of federal standards in place at the time of the initial legislative delegation, requiring new legislative action at the state level to update state statutes as federal law or regulations change. I frame this kind of constitutional approach as a "resistance norm"

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[7] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . , shall be the supreme Law of the Land.").

[8] *See* Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1267–68 (2013) (describing federal-state tax base conformity as a type of upward delegation problem).

[9] I borrow the term "dynamic incorporation" from Michael Dorf's terrific assessment of the broader phenomenon associated with a legislature adopting dynamic law from an external sovereign. *See* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 103–04 (2008) (focusing on the democratic challenge presented by national incorporation of supranational sources of law).

[10] The notion of separation of powers that I discuss in this Article is consistent with the American tradition of checks and balances in the design of constitutions. This tradition of shared powers, in contrast to complete separation of the branches of government, has a long legacy under state constitutions. As Gordon Wood has observed, even the earliest state constitutions did not separate the power of each of the branches, but allowed legislatures to appoint governors, executive officers, and judges. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 155–56 (1969).

[11] For broader discussion of the nondelegation doctrine in state courts making a similar grouping of approaches, see Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191–1201 (1999).

[12] For discussion, see my typology of criminal, regulatory, and cooperative federalism cases rejecting dynamic federal law on separation of powers grounds, *infra* Part III.

against state legislatures importing dynamic sources of federal law,[13] and discuss what might motivate state courts to adopt this kind of *ex ante* barrier to legislative adoption of dynamic sources of federal law.

Part IV gauges *ex ante* constitutional barriers to state incorporation of dynamic sources of federal law against some bedrock principles that state constitutions reinforce for the exercise of legislative power: enhancing transparency, ensuring political accountability, and protecting against arbitrary lawmaking. I show that any concerns with transparency and accountability in use of dynamic federal law appear overstated and are better addressed by other constitutional protections or by institutional design—in particular the establishment of an accountable intermediary with direct accountability to the legislature, such as a state agency, to approve future changes to federal law. Arbitrariness is a potential concern any time there is a risk of future legal change, but I argue that the nondelegation doctrine is not necessary to protect this value because of the availability of *ex post* judicial review.

The role of *ex post* judicial review as a constitutional safeguard to delegations is hardly a new insight, but the implications for state judicial review in this context are novel. In adopting dynamic federal law, a state legislature is also implicitly adopting any limits on future legal change under federal law, including statutes and administrative law. In other words, future decisions regarding the legal effects of federal law are constrained by an identifiable and fixed source of law (albeit external to the state) that state courts can apply in *ex post* judicial review, under the arbitrary and capricious standard. Even where this standard of review may be not available in a particular state, legislative adoption of dynamic federal law that depends on future federal agency decisions may implicitly authorize state courts to adopt federal arbitrary and capricious review standards—what I call "hard look federalism."[14] Such an approach presents a significant opportunity for states to enhance their federalism role in the adoption, interpretation, and implementation of federal law.

Part V concludes using state constitutions to erect *ex ante* barriers to the use of dynamic federal law does violence to both federalism principles and state constitutions. Both federalism and state constitutions should favor use of the political process over constitutional prohibitions on the exercise of a political branch's authority to enact laws, such as the nondelegation doctrine as an *ex ante* constraint on incorporation of dynamic federal law. With appropriate attention to institutional design and the availability of *ex post* judicial review—especially bootstrapping state arbitrary and capricious review

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[13] While this Article focuses on incorporation of dynamic federal law, the same analysis can extend to other dynamic external sources of law, including delegations to other states or to private standard setting bodies. Some of the analytical questions posed below, in Part IV, would also seem to have traction in addressing these types of delegations. *See infra* Part IV.

[14] *See infra* Part IV.C.

on federal law—the state political process can provide a more effective check and balance on incorporation of dynamic sources of federal law.

II. HOW DYNAMIC INCORPORATIONS OF FEDERAL LAW ARE COMMONPLACE AND UNDERTHEORIZED

The relationship between state and federal law is often complex. As a common illustration of how federal and state systems are not acoustically separate in nature, in many situations where Congress has authorized states, often through a state attorney general, to enforce federal statutes or regulatory standards, as where Congress has authorized state attorney generals to sue in federal court for enforcement of the Federal Trade Act or Americans with Disabilities Act.[15] It is important, however, "to separate the question of state *enforcement* from that of state *regulatory authority*."[16] This Article focuses on regulation, or the substantive content of law, not its enforcement. Of course, in many, if not most, areas where states regulate activities, Congress has broad authority to preempt states under the Commerce Clause.[17] Even where Congress or a federal regulatory agency has not preempted states by binding them to substantive federal law, states continue to possess their own authority to regulate, even in areas where some existing federal regulation also exists.[18]

This Article focuses on the extent to which a state's constitution allows a legislative body to base the content of its laws on the law of the federal government. This Part describes how state legislatures frequently rely on incorporation of dynamic federal law in their lawmaking task, discusses its benefits, and highlights how the constitutional problem that this presents under state separation of powers is undertheorized.

A. *Common Examples of State Incorporations of Dynamic Federal Law*

As Sir Courtenay Ilbert has observed, "[n]o statute is completely intelligible as an isolated enactment."[19] Every statute "involves references,

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[15] *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 702 (2011) (noting how with state enforcement of federal law state enforcers can be empowered to act "even in areas where state law is preempted or where state regulators have chosen not to act").

[16] *Id.* at 715. As Lemos notes: "Typically, the two go hand in hand: A government creates laws and then enforces them. But state enforcement of federal law breaks that link by authorizing state actors to enforce the law of a different sovereign." *Id.*

[17] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[18] As Scott Dodson explains, in these areas "state actors have authority to craft regimes and render interpretations different from—even contrary to—federal law." But still, in significant measure, "they instead follow federal law." Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 706 (2016).

[19] COURTENAY ILBERT, LEGISLATIVE METHODS AND FORMS 254 (1901).

express or implied, to the rules of the common law, and to the provisions of other statutes bearing on the same subject."[20] In drafting legislation, it is common for state legislatures to incorporate by reference a range of different laws.[21]

This Article focuses on state legislative reference to federal sources of law, in the form of incorporation by reference or delegation. Such legislation references future federal law or regulation as the basis for substantive law. To illustrate the constitutional question presented by state incorporation of dynamic sources of federal law, consider some of the following common examples:

- Many states have adopted provisions of federal law classifying drugs as "controlled substances" based on federal law, drawing on the scientific expertise of federal regulators and promoting uniformity through convergence in the definition of federal and state crimes.[22]
- State revenue agencies are commonly instructed by a state legislature to adopt/rely upon Internal Revenue Service definitions or interpretations related to the definition of "income" as well as the definition of various tax credits or deductions.[23]
- Many state consumer protection agencies operate under "mini-FTC Acts" that incorporate Federal Trade Commission definitions of "unfair," "deceptive," or "misleading" trade practices.[24]
- State health and environmental agencies implementing cooperative federal programs are sometimes told to meet federal standards in order to qualify for federal funding, or are instructed by state legislatures to apply federal quantitative thresholds, standards, and definitions involving technical terms.[25]
- The vast majority of state banking regulators draw on Federal Reserve Board regulations in deciding when state bank regulation is triggered.[26]

These examples share (a) a state legislative delegation, and (b) some constraint on the scope of this delegation based on existing or future federal law. In other words, these are not *mere* delegations, as often occur in state legislating, but are delegations of a special sort. They delegate authority to

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[20] *Id.*

[21] *See, e.g.*, Arie Poldervaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705, 705 (1953); Read, *supra* note 1, at 263.

[22] *See infra* Part III.A.

[23] *See* Mason, *supra* note 8, at 1275–76; *see also infra* Part IV.

[24] Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 164–65 (2011) (observing how many states incorporate FTC standards, but also go even further in prohibiting conduct).

[25] *See infra* Part III.A.3.

[26] John J. Schroeder, Note, *"Duel" Banking System? State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions*, 36 IND. L. REV. 197, 200–01 (2003).

regulate based on the actions of a sovereign other than the state that is legislating. Moreover, the sovereign actions that determine the content of regulation, and presumably might constrain, future law are national in nature. These kinds of delegations thus raise distinct issues related to constitutional federalism: They are *state* in terms of the political choice surrounding their initial enactments, but they also draw on *federal* sources of law for their content and constraints.

B. *Benefits of Dynamic Incorporations of Federal Law*

State legislative delegations that incorporate the laws of the federal government produce benefits for both state and federal lawmaking in specific areas of regulation.[27] They can help to promote greater uniformity, as may be particularly valued in areas such as tax or banking regulation.[28] Uniformity may occur at the level of parallel (or *horizontal*) jurisdictions, to the extent that multiple state legislatures settle the same approach, through explicit or implicit coordination. Such an approach is common to the uniform lawmaking process,[29] as well as to state legislature consideration of model statutes.[30] But beyond this, a state legislature incorporating the laws of the federal government can produce *vertical* coordination benefits between the federal and state levels of government and, where widespread (as this appears to be in the contexts of tax and banking regulation), this can also facilitate greater horizontal coordination. This kind of coordination is valuable to any regulatory area that favors national consistency and seeks to avoid inconsistencies and conflicts between jurisdictions.

In addition, horizontal coordination (between states) helps to reduce compliance costs for firms that operate on a national level, as may be especially important for nationwide companies that are subject to tax or business regulation across multiple jurisdictions. These coordination benefits are hardly limited to tax and business regulation, and may extend to other area of regulation where private businesses need to comply across multiple jurisdictions, including in health, labor and environmental regulatory arenas.[31] Especially in the context of what Abbe Gluck has coined "intrastatutory federalism"[32]—state implementation of regulation *within* federal statutes, as

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[27] A general discussion of the explanations for the phenomenon is also presented by Dodson, *supra* note 18, at 706.

[28] *See id.* at 732–36; *see also* John W. Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, 5 GEO. WASH. L. REV. 198, 211 (1936–1937).

[29] *See* Ribstein & Kobayashi, *supra* note 6, at 132.

[30] *Id.*

[31] *See infra* Part III.A.

[32] Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 534 (2011).

often occurs with cooperative federalism programs that can potentially preempt state law—the benefits of incorporation of dynamic federal law may be of greatest significance, but by no means are these benefits limited to the cooperative federalism context. It also bears noting that increasingly nongovernmental organizations that monitor both state and federal regulation operate nationally, so convergence of standards can facilitate better regulatory monitoring by third parties, as well as private compliance.[33]

Notably, incorporation by reference of sources of federal law can also allow states to draw on the expertise of federal agencies in situations where that same expertise is not available at the state or local level.[34] After all, most state agencies have small staffs, and lack the stability, funding or level of professionalism necessary to ensure consistent, thorough, and state-of-the-art evaluation of scientific and technical issues. The role of such expertise is especially important in the context of drug, health, or safety regulation, where an evaluation of the scientific connection between risk and harm depends on complex data analysis and modeling. Due to resource limitations and small agency size, in comparison to federal agencies state regulators are likely to have limited expertise and experience in other regulatory arenas too, such as banking, securities, and antitrust regulation.[35]

There is also a more general efficiency to relying on the incorporation of federal law, insofar as this avoids needlessly duplication of decision-making processes. Relying on the expertise and judgment of a federal agency keeps individual states from having to reproduce the research, political processes, and opportunities for input that have already occurred at the federal level of government. If the federal government has already sought nationwide input, gathered information from a broad range of stakeholders, and evaluated this input in adopting standards, it is not clear what is gained by requiring a state to engage the same process all over again, on a smaller scale. In fact, it may well be the case that a state legislature prefers the national political process as the sources of input in addressing difficult regulatory questions; in contrast to a state decision-making process, a national process may dilute the influence of powerful state or local interest groups and allow the content of regulation to draw from a broader range of geographic and substantive influences.

C. *Significance for State Constitutional Law*

Through constitutional bans on amending legislation by reference, some state constitutions expressly prohibit a legislature from incorporating federal standards without reproducing the complete text of the existing federal law—in effect limiting any ability to use "dynamic" sources of federal law without

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[33] *See infra* Part III.B.

[34] *See* Gluck, *supra* note 32, at 602.

[35] *See* Brabner-Smith, *supra* note 28, at 203–04; *cf.* Gluck, *supra* note 32, at 566.

reenactment by a state legislature each time the law changes.[36] Any referential legislation can create a form of what F. Scott Boyd has called "looking glass law."[37] As metaphor from Lewis Carroll's sequel to *Alice in Wonderland* suggests, the concern with a widespread practice of allowing state legislatures to incorporate by reference sources of law from outside of their jurisdictional borders is that this may result in a regime of legal rules where nothing is quite like it seems.[38] To be sure, legislation by reference could obscure the content of law and lead to confusion, if for example citizens are led to confuse one jurisdiction's laws with another's.

The use of federal law is least controversial—and seems to be of little constitutional concern—when a state legislature incorporates past federal legal enactments, especially fixing in past federal law. A predominant account of state constitutions views state constitutions as independent sources of positive law.[39] On such an account, protecting a particular state's sovereignty in lawmaking could be considered essential to avoiding the transfer and obfuscation of sovereignty through acts of delegation. Even on this rigid positive account, it is not clear, though that enacting state laws that incorporate or draw on existing federal law is a problem: the political choice regarding the content of law is still made by a state legislature, and as long as it is aware of

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[36] For discussion of some of these prohibitions, see Brabner-Smith, *supra* note 28, at 199–202. Although many state constitutions still contain these kinds of bans, as I discuss in Part IV, courts do not always interpret them as imposing a rigid *ex ante* prohibition on the legislature's ability to adopt dynamic federal law. The touchstone analysis typically focuses on whether the legislation is considered complete on its own terms—and state courts routinely allow common law and other legal sources to inform this analysis.

[37] *See generally* F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201, 1203 (2008) (discussing how "[a] reference statute may seem to the uninitiated to be only a simple reflection of the referenced material, but like the world in Alice's looking glass, on close examination it often proves to be quite a bit more complicated").

[38] *Id.* at 1203. *See generally* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS (Penguin Classics 1998) (1865, 1872) (wherein Alice ponders what the world is like on the other side of a mirror's reflection and then discovers a fantastic alternative world when she steps through the mirror).

[39] The view of independent state constitutionalism is often associated with Justice William Brennan's call to arms that state constitutions can serve as an antidote to federal courts' willingness to defer to governmental actions affecting individual rights. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 8–11 (2009) (arguing that each state court has an obligation to interpret its own constitutional rights provisions on its own terms). Most advocates of independent state constitutionalism focus primarily on the independence of state courts from the federal judiciary in interpreting constitutional rights. However, in linking this view to positivism, I only intend to highlight how this view of state constitutionalism also envisions a state constitution as an independent expression of sovereignty. I thus see independent state constitutionalism as consistent with, and perhaps even reinforcing, the notion that each state constitution contains it own self-contained positivist rule of recognition regarding the laws of that particular state.

the content of federal law and identifies and communicates that content to the public it is not clear why this would be problematic, for even the most rigid positivist account of independent state constitutionalism.[40]

When a state legislature incorporates dynamic federal law as well as existing federal standards, a delegation is more likely to present confusion, to both enacting bodies and to the public. As Ernst Freund wrote in 1932, this method of allowing continual updating of legislation based on reference in order to conform with an external source of law is not a new phenomenon.[41] Nor are the concerns with it, as Freund himself warned: "judicial decisions holding that the reference is to the statute in its form at the time of incorporation" makes the use of dynamic sources of federal law "not absolutely reliable."[42] Unfortunately, not even the most staunch advocates of independent state constitutionalism have made an effort to unravel what it is that makes this kind of incorporation by reference suspect. At a general level, it seems that any concerns can be sorted into transparency problems, accountability deficiencies, and the fears associated with arbitrariness in future decision-making. I highlight these concerns here and return to them in greater depth below.[43]

The incorporation of foreign sources of law can present transparency problems, to the extent that a constitutional decision maker is not aware of the content of a foreign law he or she is asked to vote for. Of course this assumes that state legislators are aware of the content of state laws when they vote on them—an assumption that one might call into question.[44] Another kind of transparency problem is that the public may not be aware of the exact content of the laws a legislature has actually adopted, and thus may lack the notice necessary to comply with legal enactments.[45]

In addition to lawmaker and public awareness problems, incorporation by reference of dynamic federal law may present accountability deficiencies into the state political process. For example, if the content of a source of law is unknown, or depends on some future decision, it is not clear who should bear

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[40] *See, e.g.*, WILLIAMS, *supra* note 39, at 8–11.

[41] *See, e.g.*, ERNST FREUND, LEGISLATIVE REGULATION: A STUDY OF THE WAYS AND MEANS OF WRITTEN LAW § 16, at 46 (1932).

[42] *Id.*

[43] *See infra* Part IV.

[44] It has been noted that members of Congress are unlikely to have read legislation on which they vote, since the incentives are for them to prioritize politics over substance. *See generally, e.g.*, ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T (2013). A similar type of legislator ignorance may plague state legislatures, especially to the extent that many state legislators only serve part-time in these positions. *See, e.g.*, PEVERILL SQUIRE & GARY MONCRIEF, STATE LEGISLATURES TODAY: POLITICS UNDER THE DOMES 73–75 (2d ed. 2015).

[45] *See generally* KAISER, *supra* note 44 (telling the story of the complex and consequential piece of legislation, the Dodd–Frank Wall Street Reform and Consumer Protection Act, that regulated Wall Street and created a Consumer Financial Protection Agency as an example of the manner in which Congress enacts laws).

responsibility for the policy choice behind adopting it. Where the foreign source of law is dynamic and may change in the future, concerns with accountability thus also seem to be greater—or at least more difficult to monitor and correct through the channels of ordinary state politics.

The incorporation of dynamic federal law may also produce special concerns insofar as it enables a state legislature to cede some control over the content of law to the federal government. With the loss of control, a state also may perceive some loss of the ability to protect its citizens against arbitrary lawmaking or arbitrary expansions of federal power. The idea that state constitutions have a role in protecting a state's citizens from the loss of liberty represented by the expansion of federal lawmaking power is not a view that is limited to those who see state constitutions as independent sources of positive law, but includes more sophisticated accounts that embed state constitutions within a federal system of government.[46]

Although these reasons are rarely stated by courts, as I discuss below in Part III, many state courts have imposed an *ex ante* constitutional constraint on a state legislature incorporating federal law—especially dynamic federal law—under the nondelegation doctrine.[47] While the questions presented by the use of dynamic federal law in state legislation are difficult ones, I maintain that the basic separation of powers analysis they present is not fantastical or intractable.[48] To the extent that state legislation makes the incorporation of federal law automatic, the delegation to the federal government allows a federal government actor to have an immediate legal effect in a state jurisdiction, absent additional state legislative action to revoke the federal standards.[49] But any decision to apply or enforce future federal law is not automatic, but is contingent on the decision of an arm of state government. For example, often a legislature will instruct a state agency to apply federal standards, or may authorize the agency to draw on federal law as it sees fit, making the use of future federal law contingent on the future actions of a state regulator. It may well be that the use of federal sovereignty in state law adds a "looking glass" of sorts that obscures the legislative process, as F. Scott Boyd has suggested.[50] Yet, just as Alice's mirror could help her to see things that are not visible without its help,[51] allowing a legislature to draw on dynamic federal sources of law also provides state law makers an efficient and effective lawmaking tool. Of even greater significance to state constitutional law, evaluating the constitutionality of the dynamic incorporation of federal law by

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[46] *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 18–20 (2005) (arguing for the interpretation of state constitutions as a form of resistance against the expansion of federal power).

[47] *See infra* Part III.

[48] *See infra* Part IV.

[49] *See infra* Part III.A.1.

[50] *See* Boyd, *supra* note 37, at 1203.

[51] *See generally* CARROLL, *supra* note 38.

states can help us to better understand the inner meaning of separation of powers under state constitutions.

III. NONDELEGATION AS AN *EX ANTE* CONSTRAINT

There is little doubt that, if a state legislature were to abdicate its entire lawmaking function in a regulatory area to another sovereign, this likely would be constitutionally problematic[52]—at the extreme this could violate the Guaranty Clause of the U.S. Constitution.[53] Yet it is commonplace for state legislatures to borrow from other jurisdictions, especially as they consider and adopt uniform laws or model statutes.[54] As Thomas Cooley[55] and others[56] have recognized that, unlike the U.S. Constitution, which is based on enumerated legislative power, state constitutions are premised on legislative sovereignty. Drawing on dynamic federal law would thus appear to be at the core of a state legislature's plenary powers to adopt laws as it sees fit.

For many state courts, however, a special set of constitutional concerns arise when a state legislature is not borrowing another state's law, but incorporating the law of the federal government. Judicial decisions in many regulatory areas across multiple state jurisdictions suggest that, under the constitutions of many states, state legislative incorporation of a dynamic

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[52] For example, consider what would happen if the state of Tennessee passed a statute that said that the state "herby adopts all laws adopted by the state of Colorado." Although Justice Brandeis's notion of state experimentation would envisions a certain amount borrowing of legal standards between states, such an abdication of power by the state legislature would almost certainly violate basic bilateralism, presentment and other legislative enactment provision (such as single subject requirements) in state constitutions. I return to some of these specific requirements below, in discussing how state constitutions typically protect transparency in the legislative process. *See infra* Part IV.A.

[53] *Cf.* Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 59–67 (1998) (discussing how the Guaranty Clause may be justiciable in state court, even if it is not justiciable in federal court, in extreme situations, as where a governor cancels elections and declares himself a monarch).

[54] *See supra* notes 19–26, 29–30 and accompanying text.

[55] *See generally, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION (1868). Thomas Cooley's work is considered perhaps the leading treatise of its time.

[56] *See, e.g.*, Daniel B. Rodriguez, *State Constitutionalism and the Scope of Judicial Review*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW 61, 78 (James A. Gardner & Jim Rossi eds., 2011) (noting that legislative power in states is broad and is subject to checks other than judicial review); Robert F. Williams, Comment, *On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 QUINNIPIAC L. REV. 57, 60 (1995) (observing that state legislative power is "plenary," though also highlighting the significance of implied legal limits on its scope).

federal law can violate the "nondelegation" doctrine.[57] Under the U.S. Constitution, the U.S. Supreme Court has not used the nondelegation doctrine to strike down a statute since the New Deal,[58] though lower courts have done so in recent years.[59]

State constitutions, however, have their own distinct principles of separation of powers and state supreme courts are much more welcoming to constitutional challenges under the nondelegation doctrine, especially where legislation lacks standards or constraints on future legal change.[60] Some state courts have held state statutes that rely or draw on federal sources of law unconstitutional.[61] Even state courts that do not hold these kinds of statutes categorically invalid have construed them narrowly, in order to avoid reaching a decision that they are unconstitutional.[62] In effect, these judicial decisions do not authorize state law to be consistent with federal standards absent additional legislative action on the part of the state legislature. For many state courts, the application of the nondelegation doctrine to legislation adopting federal standards is at least as strict as in other settings, such as the delegation to state agencies or to private standards board; for some it is even more so.[63] This approach is not a recent trend, but appears to be a longstanding and accepted practice in interpreting state constitutions, particularly in judicial decisions that strike down or limit delegations to state agencies that would authorize or require a state to adopt federal standards related to health, safety and the environment.

After discussing some categories of examples, I frame this constitutional skepticism against delegation to a federal sovereign as a distinct set of cases in state separation of powers jurisprudence, distinct from application of the nondelegation doctrine in other contexts. I also briefly discuss what might motivate this kind of *ex ante* constraint legislative incorporation of dynamic federal law under state constitutions.

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[57] This doctrine derives from the Constitution's vesting of all legislative powers with Congress. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

[58] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935) (striking down Congress's delegation to the President to adopt industry-specific codes of fair competition).

[59] *See* Ass'n of Am. R.Rs. v. Dep't of Transp., 721 F.3d 666, 667 (D.C. Cir. 2013), *vacated*, 135 S. Ct. 1225, 1234 (2015).

[60] *See, e.g.*, Rossi, *supra* note 11, 1190–1201.

[61] *Id.* at 1193–97.

[62] *Id.* at 1191–93, 1198–1201.

[63] *Id.* at 1190–1201.

A. *Constitutional Challenges to Dynamic Incorporations of Federal Law*

The prohibition era appears to be the origin of use of the nondelegation doctrine by state courts as a constraint on state uses of federal law. New Deal era cases extended the idea, allowing state courts to provide a nondelegation antidote to the broad delegations to agencies upheld by the U.S. Supreme Court under the U.S. Constitution. Modern cases extend the constitutional skepticism about these kinds of delegations to a broad range of regulatory fields, including cooperative federalism programs. I summarize each of these sets of cases, in turn, discussing their implications for state criminal statutes, regulatory statutes, and statutes related to cooperative federalism programs.

1. *Nondelegation Concerns with Dynamic Federal Definitions of Crimes*

Following the ratification of the Eighteenth Amendment, federal law allowed states to take different approaches to implementing prohibition. Many state laws, incorporating by reference the National Prohibition Act (known as the "Volstead Act"), were challenged under state constitutions. In many of these state supreme court cases, state constitutional structural provisions, including separation of powers doctrines such as nondelegation, limited the authority of state lawmakers to use federal law to define future crimes relating to prohibition.

For example, the state of Massachusetts passed a statute "to carry into effect" the Eighteenth Amendment of the U.S. Constitution.[64] Among other things, this statute incorporated by reference laws made by Congress and federal regulations, allowing the substantive law of the state to automatically change in the future to conform to new laws adopted by Congress or new regulations adopted by federal agencies.[65] Emphasizing how this could allow the definition of crimes to change, the state supreme court reasoned that such a law is an unconstitutional delegation to the extent that it allows laws to change in the future without new legislative adoption by the Massachusetts legislature.[66] Maine too found unconstitutional amendments to its state liquor law that defined as an intoxicating beverage "any beverage containing a percentage of alcohol, which by federal enactment, or by decisions of the [S]upreme [C]ourt of the United States, now or hereafter declared, renders a beverage intoxicating."[67] Although the California Supreme Court reasoned that nothing in the California constitution prohibits the state legislature from

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[64] *In re* Op. of the Justices, 133 N.E. 453, 453–54 (Mass. 1921) (quoting H.B. 1612, 141st Gen. Ct. (Mass. 1920)).

[65] *Id.* at 454.

[66] *Id.*

[67] State v. Intoxicating Liquors, 117 A. 588, 589 (Me. 1922) (quoting 1919 Me. Laws 309–10).

adopting standards based on federal law the court also "conceded" that statutes incorporating federal standards that could change into the future were constitutional suspect under separation of powers principles.[68]

In addition to raising nondelegation concerns, some state supreme courts relied on other constitutional provisions to invalidate prohibition era legislation that defined crimes based on federal law. New Mexico adopted law that was identical to the California law.[69] In rejecting this statute, the New Mexico Supreme Court did not hold this to be an unconstitutional delegation.[70] Instead the Court characterized the state legislature's adoption of the Volstead Act as a "flagrant case of blind legislation" in violation of the New Mexico constitution's ban on amending legislation by reference to its title, rather than by terms included in the statute.[71] By contrast, the Pennsylvania Supreme Court held that an almost identical state statute was not an unconstitutional delegation or a violation of the state's constitutional prohibition on amendatory references.[72]

In modern cases involving the use of federal statutes to define crimes, many state supreme and appellate courts take a similar approach, holding unconstitutional the use of federal law to define future crimes without new enactment by the state legislature. A Florida statute specifically described certain drugs that were prohibited but also restricted "any other drug to which the drug abuse laws of the United States apply."[73] At the time of the statute's adoption in 1967, the hallucinogenic drug STP was not registered by the federal government. In 1968 STP appeared in the Federal Register as a controlled substance.[74] In reviewing the conviction of defendant accused of delivering STP under the Florida statute, the state supreme court held it an unconstitutional delegation for the state court to apply amendments to the federal regulations that occurred after the enactment of the Florida law.[75] This approach was common to a number of constitutional challenges to drug convictions in other jurisdictions too.[76]

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[68] *Ex parte* Burke, 212 P. 193, 194 (Cal. 1923).

[69] State v. Armstrong, 243 P. 333, 353–54 (N.M. 1924) (containing a detailed description of state constitution bans on amending legislation by reference). Article IV, Section 18 of New Mexico's Constitution states, "No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full." N.M. CONST. art. IV, § 18.

[70] *Armstrong*, 243 P. at 353.

[71] *Id.* at 353–54.

[72] Commonwealth v. Alderman, 119 A. 551, 553 (Pa. 1923).

[73] Freimuth v. State, 272 So. 2d 473, 474 (Fla. 1972) (quoting FLA. STAT. ANN. § 404.01(3)).

[74] *Id.*

[75] *Id.* at 476.

[76] *See, e.g.*, People v. Harper. 562 P.2d 1112, 1113 (Colo. 1977); Cilento v. State, 377 So. 2d 663, 665 (Fla. 1979); Johnston v. State, 181 S.E.2d 42, 64 (Ga. 1971); State v. Rodriguez, 379 So. 2d 1084, 1087 (La. 1980); State v. Workman, 183 N.W.2d 911, 913 (Neb. 1971); State v. Julson, 202 N.W.2d 145, 151 (N.D. 1972); State v. Emery, 45 N.E.

This basic principle has been extended to criminal settings beyond drug enforcement context too, primarily to construe narrowly any definition of crimes by a state legislature based on dynamic federal law. For example Florida's statutes state: "In any prosecution charging careless or reckless operation of aircraft in violation of this section, the court, in determining whether the operation was careless or reckless, shall consider the standards for safe operation of aircraft as prescribed by federal statutes or regulations governing aeronautics."[77] An appellate court hearing a constitutional challenge to a prosecution under this statute reasoned that "any attempt to adopt or incorporate standards that will arise in the future is unconstitutional as an improper delegation of legislative power."[78] As a result, the court held that it would only be constitutional for a prosecutor to incorporate into the definition of a crime FAA blood alcohol regulations that existed as of 1983, the year the statute was enacted.[79]

2. *Nondelegation Limits on State Agency Incorporation of Dynamic Federal Regulations*

The New Deal era and its following years brought on a significant growth in agencies at the state as well as the federal level of government.[80] As Barry Cushman observes, during the New Deal era "courts occasionally found that state and federal programs transgressed federalism or nondelegation."[81] Keith Whittington's study of state constitutional law during the New Deal eras similarly emphasizes that state courts "regularly heard constitutional challenges to how legislators delegated power to other government officials."[82] Although Whittington's data is limited to only four states, his analysis shows that challenges to structural aspects of state government were

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319, 320 (Ohio 1896); State v. Welch, 363 A.2d 1356, 1359 (R.I. 1976); State v. Johnson, 173 N.W.2d 894, 895 (S.D. 1970); State v. Green, 793 P.2d 912, 917 (Utah Ct. App. 1990); State v. Dougall, 570 P.2d 135, 138 (Wash. 1977); State v. Grinstead, 206 S.E.2d 912, 920 (W. Va. 1974).

[77] FLA. STAT. ANN. § 860.13(2) (West 2014).

[78] Cloyd v. State, 943 So. 2d 149, 163 (Fla. Dist. Ct. App. 2006).

[79] *Id.* at 164.

[80] *See, e.g.*, David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1079–82 (2011) (describing the growth of state agencies beginning in the 1940s as a mechanism for more effectively adjudicating civil rights claims than relying on court-centered, private enforcement).

[81] Barry Cushman, *Lost Fidelities*, 41 WM. & MARY. L. REV. 95, 116–17 (1999) (footnote omitted).

[82] Keith E. Whittington, *State Constitutional Law in the New Deal Period*, 67 RUTGERS U. L. REV. 1141, 1166 (2015).

considerably more likely to lead to invalidation of statutes than individual or economics rights challenges.[83]

Just as the nondelegation doctrine was the center of attention in federal constitutional litigation surrounding New Deal era programs adopted by Congress, state courts heard nondelegation challenges to new agency regulatory programs adopted by state legislatures. State legislatures making these delegations to agencies routinely borrowed federal statutes and regulations in providing instructions to agency regulators; for example, many state programs adopted during the New Deal era were designed and adopted to assist in implementation and enforcement in federal regulation or to fill gaps given limitations in its jurisdictional reach.

Some of the earliest constitutional challenges to these programs drew state courts into the same battles being fought before the U.S. Supreme Court over the constitutionality of federal New Deal programs. For example, New York's Court of Appeals invalidated a state statute that made federal regulation promulgated to implement the National Industrial Recovery Act enforceable against the intrastate coal trade.[84] A New Jersey court held it unconstitutional for the state legislature to adopt the National Industrial Recovery Act, reasoning that it is "vicious legislation" and that the New Jersey legislature has a constitutional obligation to declare the law.[85] The Nebraska Supreme Court declared unconstitutional a state unemployment and old age pensions law because the collection of a tax levied by the statute was made contingent on a future act of Congress.[86]

In the spirit of these decisions, the use of the nondelegation doctrine to invalidate state use of federal law has had a particularly significant impact on state labor legislation. A New Deal era Pennsylvania statute providing that a

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[83] Still, he finds that, on the whole, state courts are no less hostile to the expansion of regulatory power than are federal courts, noting in particular that state court courts held that legislatures "could authorize railroad commissions to determine whether and where to require the construction of overhead crossings, authorize alcohol control boards to develop rules governing the transportation of alcoholic beverages on state roads, and empower courts to review proposed rules developed by conservation boards." *Id.* (footnotes omitted) (citing cases primarily from Virginia and New Mexico). Whittington's data is limited to only four states, and does not appear to focus on or make any effort to distinguish delegations based on federal law, let alone dynamic sources of law. *See id.* at 1141.

[84] Darweger v. Staats, 196 N.E. 61, 72 (N.Y. 1935).

[85] Wilentz v. Sears, Roebuck & Co., 172 A. 903, 903 (N.J. 1934). As the court reasoned:

> [T]he adoption of the laws of another state or of the nation as a part of our act was improper; it cannot be introduced into our legislation by reference. We may adopt the spirit, but we can't make the law by injecting into our statutes a reference to the United States Code or Minnesota law and calling it our law. The Legislature must establish its own standards; it may follow those created by the Federal Government, but it cannot draft them; it must enact them.

Id. at 904.

[86] Smithberger v. Banning, 262 N.W. 492, 500 (Neb. 1935).

state agency "shall conform" labor schedules to standards to be established in the future by federal authorities was declared unconstitutional by the state Supreme Court.[87] Highlighting the lack of any limiting principle in the delegation as well as no procedural opportunity for a hearing before adopting a federal standard, the court declared, "A more sweeping abdication of power and duty it would be difficult to imagine."[88] Such decisions are hardly confined to the New Deal era. In more recent decades, the Oklahoma Supreme Court declared unconstitutional on nondelegation grounds a statute establishing a prevailing hourly wage for Oklahoma based on a federal Department of Labor prevailing wage, without leaving any discretion to reject federal standards to the state agency implementing the statute.[89] In addition, an Oregon appellate court has held that agency incorporation by reference of a federal prevailing wage standard is limited to the federal regulation at the time the standard was adopted.[90]

Beyond state labor statutes, other state regulatory programs that incorporate or rely on federal standards have also been invalidated under separation of powers principles, often on the grounds that state statutes referring to federal legislation are limited to only static sources of federal law, as it existed only at the time of the statute's adoption. A Michigan civil rights case held that state legislation or regulations adopting by reference future federal statutes and regulations is not constitutional.[91] This accords with the general approach Michigan courts seem to recognize in interpreting state statutes that refer to federal law: "[W]hen a Michigan statute adopts by reference a federal law that is subsequently amended, but the Michigan statute remains unchanged . . . the Legislature is presumed to have intended to freeze the federal law as it was at the time of the original state statute."[92] Consequently, the Michigan Worker's Disability Compensation Act, which delegated implementation authority to the Director of the Michigan Bureau of Worker's Disability Compensation, could not be interpreted to incorporate future amendments to the federal Internal Revenue Code.[93]

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[87] Holgate Bros. v. Bashore, 200 A. 672, 678 (Pa. 1938).

[88] *Id.*

[89] City of Okla. City v. State *ex rel.* Okla. Dep't of Labor, 918 P.2d 26, 28 (Okla. 1995).

[90] Coats-Sellers v. State *ex rel.* Dep't of Transp., 85 P.3d 881, 885 (Or. Ct. App. 2004).

[91] Mich. Prot. & Advocacy Serv., Inc. v. Caruso, 581 F. Supp. 2d 847, 852–53 (W.D. Mich. 2008).

[92] Radecki v. Dir. of Bureau of Worker's Disability Comp., 526 N.W.2d 611, 614 (Mich. Ct. App. 1994).

[93] *Id.*

3. *Cooperative Federalism Programs and Constraints on Dynamic Incorporation of Federal Law*

Many modern programs involving infrastructure funding or health, safety, and environmental regulation are designed to implement cooperative federalism, defined broadly as states coordinating their substantive law and enforcement policies with overlapping federal standards, goals, and programs. Some such programs are tied to "carrots," such as federal funding—common in the transportation and education areas.[94] Elsewhere, however, federal programs rely on the possibility of preemption by federal regulators as the ultimate enforcement "stick"—a common approach under environmental statutes such as the Clean Air Act.[95] In most regulatory areas with such programs, state legislatures have adopted laws to assist the state in enforcing or implementing federal standards, often by assigning the primary coordinating role to an executive branch agency.

The Medicaid Act adopted the framework for a cooperative federalism program, where the federal government provides contingent funding to states to provide medical assistance to persons who lack the income to pay for medical care.[96] Under Medicaid, for many years Nebraska had provided medical services to "caretaker relatives" who were not eligible for federal Aid to Dependent Children benefits.[97] Although federal law once required these "caretaker relative" benefits, later amendments to federal law made them optional.[98] The Nebraska agency overseeing Medicaid initiated an administrative process to eliminate these benefits, leading the Nebraska Supreme Court to consider a constitutional challenge to the state agency's elimination of the benefits in *Clemens v. Harvey*.[99] As the Nebraska Supreme Court observed, the state statute had incorporated federal Medicaid legislation at the time the benefits were mandatory.[100] Thus, according to the court it would be unconstitutional for a state agency to later conform benefits to new federal regulations without new state legislation.[101] An ironic effect of this

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[94] *See generally* 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 (1998) (discussing cooperative federalism programs).

[95] *See generally* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1 (2000) (discussing the Environmental Protection Agency's deterrence-based enforcement and compliance scheme).

[96] 42 U.S.C. §§ 1396–1396s (2012).

[97] *See* Jeffery R. Kirkpatrick, Note, *Restraining Agency Action: Administrative Discretion and Adoption of Statutes by Reference in* Clemens v. Harvey, *247 Neb. 77, 525 N.W.2d 185 (1994)*, 75 NEB. L. REV. 621, 623–26 (1996).

[98] *Id.* at 634–35 (noting how Nebraska law is more restrictive in limiting agency discretion than is federal law).

[99] Clemens v. Harvey, 525 N.W.2d 185, 187 (Neb. 1994).

[100] *Id.* at 188.

[101] *Id.* at 189.

decision was to require Nebraska to fund Medicaid benefits that were no longer funded by the federal government, even without explicit legislative authorization of their funding. Put another way, the delegation was considered unconstitutional, yet was not unconstitutional for the Nebraska Supreme Court to require the funding of benefits.

Perhaps out of recognition that this presents its own potential separation of powers concerns, the Nebraska Supreme Court has refused to extend the approach of *Clemens* to other programs that would require the expenditure of state funds. For example, the court refused to invalidate a legislative delegation to an agency to set income eligibility for child care subsidies based on 120% of the federal poverty level, noting that without an income eligibility limit subsidies would be expanded to the extent that "the entire program would collapse."[102] Perhaps, *Clemens* can be distinguished to the extent that it invoked the nondelegation doctrine to preserve the status quo of program funding—effectively requiring the state to provide benefits absent legislative authorizing to the contrary. Without eligibility standards, by contrast, the state would effectively be forced to expand its program beyond precedent. Perhaps it is thus more common that the absence of legislative authorization based on federal standards under the nondelegation doctrine works to restrict (not expand) programs or the availability of government benefits. Other courts, for example, have observed that a lack of a state statute explicitly authorizing compliance with specific federal standards could potentially result in a loss of funding.[103] This problem seems particularly salient for any state programs that authorize the spending of federal money, with some states even suggesting that federal funding of state programs requires recurring legislative approval.[104]

Other cooperative federalism programs are not tied to funding, or carrots, but instead rely more significantly on the stick of federal enforcement. Such programs exist under the Clean Air Act and Clean Water Act, each of which provide for federal standards and enforcement where states fail to action that

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[102] Johnsen v. State, 697 N.W.2d 237, 240 (Neb. 2005).

[103] *See, e.g.*, West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281, 293 (4th Cir. 2002).

[104] While a discussion of state implementation of federal grants under state budgeting laws is beyond the scope of this Article, others have highlighted how federal preemption might work to address some of the problems presented by state legislatures that, due to inaction in authorizing expenditure, refuse to spend federal grants. *See, e.g.*, George D. Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U. L. REV. 279, 281 (1979) (suggesting that, at core, state grant-in aid expenditure are a federal law, not subject to state constitutional limits where the federal government has assigned a designate in the state executive branch to spend these resources); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1201 (1999) (evaluating when federal law can delegate federal powers to specific state or local institutions, even against the will of a state legislature).

meets minimum expectations under federal law.[105] Another example is the national program for regulating hazardous waste under the Resource Conservation and Recovery Act (RCRA), adopted in 1976.[106] This program authorizes each state to develop its own program consistent with the minimum federal standards, but also gives states the flexibility to adopt more rigorous waste disposal standards.

The Texas Solid Waste Disposal Act, enacted in 1989 to implement RCRA, criminalizes transportation and storage of "hazardous waste," defined as "solid waste identified or listed as a hazardous waste" by the federal Environmental Protection Agency under RCRA.[107] In *Ex parte Elliot*, a Texas appellate court hearing a constitutional challenge to this statute construed this statute to allow incorporation by reference of the EPA standard at the time of the statute's enactment, but not afterwards.[108] The court reasoned that allowing the definition of hazardous waste to "change from time to time at the will of the EPA . . . [would] place in doubt the constitutionality" of the statute.[109]

The approach of Texas to this issue stands in contrast to the approach taken by Louisiana courts in reviewing similar state legislation that incorporates federal standards under RCRA. According to Louisiana's Supreme Court, a state statute defining hazardous waste based on federal RCRA standards is not an unconstitutional delegation because the Louisiana legislature retains its authority to modify hazardous waste laws in lieu of RCRA's program.[110] Although the Louisiana Supreme Court acknowledged that RCRA would dictate the minimum requirements in the state, the state legislature retains the power to adopt "more stringent" requirements.[111] In Louisiana, delegation to an agency allowed the legislature to continue to exercise oversight and monitoring of the agency's discretion, even though that discretion included the authority to incorporate minimum federal standards under RCRA.

B. *Nondelegation as a Resistance Norm*

The constitutional practice of using the nondelegation doctrine to reject a state legislature's choice to incorporate dynamic federal law might be defended to the extent that it allows state separation of powers to serve as a "resistance norm" of sorts to the use of vertical sources of sovereignty in state

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[105] *See* Markell, *supra* note 95, at 10, 30; *see also* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 156–62 (2011).

[106] 42 U.S.C. §§ 6901–6992k (2012).

[107] TEX. HEALTH & SAFETY CODE ANN. § 361.003(12) (West 2010).

[108] *Ex parte* Elliott, 973 S.W.2d 737, 742–43 (Tex. App. 1998).

[109] *Id.* at 741.

[110] State v. All Pro Paint & Body Shop, Inc., 639 So. 2d 707, 720 (La. 1994).

[111] *Id.* at 717–18 n.16.

lawmaking.[112] James Gardner has argued that state courts ought to serve as "agents of federalism"[113] in interpreting their constitutions, and nondelegation approaches to rejecting dynamic federal law might similarly be understood to protect against unwanted intrusion of federal sovereignty into the legislative lawmaking process.[114] Whatever benefits may be advanced by fixating on state sovereignty, in effect this view invites state courts to use their constitutions to erect an *ex ante* limit to a state legislature drawing on federal sources of law or on cooperative federalism, instead favoring parochial notions of state sovereignty—even where a state legislature has made a different political choice.

Every time the nondelegation doctrine is used to invalidate legislation, it may be said to impose an *ex ante* constraint on lawmaking. This kind of resistance norm, however, appears to be special to delegations involving federal law, going above and beyond ordinary constitutional constraints on legislative delegations in states. Interestingly, state courts seem to routinely reference a lack of standards or loss of control over relying on future federal law. These same states, however, also seem willing to authorize state agencies or local governments to adopt regulations under similarly broad delegations without raising the same constitutional concerns. In this sense, the nondelegation concerns with dynamic incorporation of federal law seem to be driven by a concern about a state losing control over the constraining principles for a delegation to some sovereign outside of a state. Moreover, they seem to reflect a special concern about loss of control to the *federal* government, without a state's legislature approving the specific federal standard at issue.

Interestingly, states have authorized fairly broad delegations to private bodies, such as the American Medical Association, in workers' compensation claims, without holding statutes unconstitutional under the nondelegation doctrine. Consider, for example, a New Mexico workers' compensation statute requiring "use of the most recent edition of the AMA Guide in evaluating impairment."[115] The New Mexico Supreme Court rejected a nondelegation

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[112] I borrow the term "resistance norm" from Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552–53 (2000), wherein the author evaluates judicially created constitutional avoidance canons. Although the idea of resistance norms is commonly discussed today in the context of the U.S. Constitution, the role such norms should play in interpreting state constitutions is largely unexplored.

[113] *See, e.g.*, James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1731–32 (2003).

[114] Although James Gardner does not frame state constitutions as providing "resistance norms," the role of state constitutional rights as providing a form of resistance against the expansion of federal power is discussed in James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1003–04 (2003).

[115] Madrid v. St. Joseph Hosp., 928 P.2d 250, 256 (N.M. 1996).

challenge to this statute, noting that the AMA's standards were "periodically subject to revision, in limited circumstances such as where the standards are issued by a well-recognized, independent authority, and provide guidance on technical and complex matters within the entity's area of expertise."[116] Notably, these same state courts do not tend to afford similar deference to the independence or expertise of federal agencies.

Concerns with a lack of state-centered controls on legal change also appear to motivate these kinds of resistance norms against the use of federal sovereignty. Most notably, these cases seem to place emphasis on prohibiting the use of prospective federal law without explicit authorization by the legislature, as a way of protecting citizens from legal change without some additional process or notice. These may well be valid concerns, as I discuss below, though it is not clear why a constitutional nondelegation doctrine is necessary to address it here when it is not necessary in other areas. In effect, this kind of constitutional restriction can serve to freeze in place federal regulation for state criminal and regulatory standards, and disable cooperative federalism programs. By increasing the costs of dynamic regulation, that can evolve and adapt to new information and regulatory circumstances, this approach to nondelegation thus serves to resist legal change where the primary source of that change is national, not the state as sovereign.

IV. REASSESSING DYNAMIC INCORPORATION OF FEDERAL LAW FOR STATE SEPARATION OF POWERS AND FEDERALISM

As Walter F. Dodd remarked, "A constitution must be judged not by its name, but by the function which it has to perform."[117] On its own terms, state separation of powers serves many functions without a state system of government, including improving transparency, preserving accountability, and protecting against arbitrariness in lawmaking. Gauged against these bedrock values, it is unclear why an *ex ante* prohibition on legislative incorporation of dynamic sources of federal law is necessary. The incorporation of dynamic sources of federal law should survive constitutional challenge whenever the ultimate authority to effect rights and duties with federal law is assigned to an accountable intermediary, such as a court or state agency. Moreover, to the extent that some identifiable legislative constraint allows for monitoring the delegation, whether that constraint comes from state or federal law, even the most rigorous nondelegation standard would seem to be met. I argue that nondelegation constraints here are not necessary but may be harmful to some of the purposes of separation of powers and federalism, to the extent that the incorporation of dynamic federal law provides state legislatures a way to make

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[116] *Id.* (quoting Bd. of Trs. of the Emps.' Ret. Sys. of the City of Baltimore v. Mayor & City Council of Balt., 562 A.2d 720, 731 (Md. 1989)). For similar analysis, see McCabe v. N.D. Workers Comp. Bureau, 567 N.W.2d 201, 204–05 (N.D. 1997); and Tenn. Op. Att'y Gen. No. 08-75, 2008 WL 913288, at *1–4 (2008).

[117] W.F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 215 (1915).

both state agencies and courts more, not less, relevant to the development of federal law.

A. *Transparency: Self-Contained Statutes and Contingent Legislation*

Many state constitutional provisions are aimed at ensuring that the state legislative process is transparent. Transparency serves the important separation of powers function of ensuring that legislators are actually aware of the particular laws that they are asked to vote for.[118] In addition, transparency serves to better inform citizens, which improves their ability to monitor the voting records of legislators.[119] Perhaps of greatest significance, transparency in the legislative process serves to give citizens notice of laws, so that they are not blindsided by legislative prohibitions or requirements of consequence without some communication and opportunity to conform prior to enforcement.[120]

While transparency is an important value to the general principle of separation of powers, state constitutions contain a number of explicit protections designed to enhance legislative transparency—many of which go beyond the requirements of the U.S. Constitution or Congress's legislative process. Consider a ban on legislation or statewide initiatives that do not comply with single subject rule requirements, which appears in more than two dozen state constitutions.[121] At least in theory, such bans serve to advance transparency, but in practice single subject requirements have been a notorious "source of uncertainty and inconsistency" for state legislatures and citizens.[122] As Richard Briffault puts it, "The notion of a subject is inherently incapable of precise definition."[123] While these constitutional bans on legislation containing multiple topics would appear to limit legislative flexibility to enact statutes addressing complex topics, courts interpreting these provisions have often adopted a presumption in favor of constitutionality so long as all of a statute's provisions are "reasonably germane."[124]

Another express state constitutional prohibition designed to enhance transparency is the limit on amending laws through the use of referential

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[118] *See* Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 651–52 (2001).

[119] *See id.* at 667.

[120] *See id.* at 652.

[121] *See generally* Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004).

[122] Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 803 (2006).

[123] Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1177 (1993).

[124] Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 936–57 (1983).

legislation, a ban that appears in the roughly twenty state constitutions.[125] Consider the modern Michigan Constitution, which states: "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length."[126] As Michigan Chief Justice Thomas Cooley (also a leading authority on state constitutions[127]) explained in addressing the same language in a previous state constitution:

> The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation.[128]

Many of the cases that purport to strike down legislation that incorporate dynamic federal law raise these same types of concerns. Some of these cases seem to rely just as much on state constitutional bans on referential legislation as they do on the nondelegation doctrine under general separation of powers principles.[129] It is not clear that constitutional bans on referential statutes, in those states that have them, would necessarily limit the ability of a state to rely on or incorporate future federal law, so long as a statute is considered complete on its own terms.[130] Still, for states that do endorse these kinds of constitutional bans, it simply is not necessary to rely on general separation of

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[125] Typically this takes the form of a constitutional provision to the effect that no act shall be revised or amended by reference to its title only. *See* Brabner-Smith, *supra* note 28, at 199 n.1 (describing such language in constitutions of Arizona, California, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, Missouri, Mississippi, Nevada, Oregon, Texas, Utah, Virginia, Washington, and West Virginia).

[126] MICH. CONST. art. IV, § 25 (1963) (current). This exact language, with slightly different punctuation, also appears in Article IV, Section 25 of the 1850 Michigan Constitution, MICH. CONST. art. IV, § 25 (1850), and Article V, Section 21 of the 1908 Michigan Constitution, MICH. CONST. art. V, § 21 (1908).

[127] *See generally* COOLEY, *supra* note 55.

[128] People *ex rel.* Drake v. Mahaney, 13 Mich. 481, 497 (1865) (discussing Article IV, Section 25 of the 1850 Michigan Constitution).

[129] *See supra* notes 125–128 and accompanying text (discussing examples).

[130] *See* Brabner-Smith, *supra* note 28, at 199 ("If the new act is complete in itself, it will be upheld although it amends another statute by implication."); *see also* People *ex rel.* Cant v. Crossley, 103 N.E. 537, 544 (Ill. 1913) (holding that a referential statute is valid as long as it is a "complete act" and is "intelligible" without having to "read into the new law certain provisions of prior statutes").

powers principles or nondelegation constraints in order to enhance transparency

Moreover, it seems important to assess whether the transparency concerns with relying on opaque sources of law expressed by Cooley in the late nineteenth century[131]—a time when external sources of law may have been law that was difficult to track down—hold true in modern state lawmaking. Such concerns seem significant for sources of law that are not widely disseminated, warranting a particular judicial skepticism in evaluating legislative incorporation of private standards. However, any concern with the incorporation of private standards simply does not extend to the incorporation of federal law. Federal legal pronouncements are widely disseminated and accessible to the public at large through the *Federal Statutes*, the *Code of Federal Regulation*, the *Federal Register* and federal agency websites. Even when the concern with the incorporation of federal law is framed as a concern about regulatory change, in areas where conduct is already regulated by the federal government, it would seem that any entity subject to some federal regulation would already have notice of any changes that occur through the federal lawmaking process. It is not clear why separation of powers principles are necessary to protect the public's notice or reliance interests, especially when statutory publication requirements, administrative procedure, and constitutional due process already provide substantial protections.

In addition, it bears noting that many state statutes incorporating dynamic sources of federal law are examples of what is commonly considered "contingent legislation."[132] Contingent legislation occurs when a legislative body creates a law and provides that all of it takes effect only upon the happening of a given fact or identifiable future contingency, often to be determined by an agency to whom authority has been delegated.[133] The first nondelegation case decided by the U.S. Supreme Court involved a statute providing that a trade restriction was to remain in effect unless the President declared by proclamation that the relevant country (here Great Britain) had ceased to violate the neutral commerce of the U.S.[134] States appear to follow a similar approach, often in situations that draw on federal law. For example, Alabama's Supreme Court rejected a separation of powers challenge to a statute that depends on future federal funding.[135] Kansas's Supreme Court rejected a similar challenge to a statute that depends on the passage of future

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[131] *See supra* note 55.

[132] *See* Samuel Mermin, *"Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements: I*, 57 YALE L.J. 1, 9 (1947).

[133] *See id.*

[134] *See, e.g.*, The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 383 (1813).

[135] Op. of the Justices, 344 So. 2d 1196, 1196–97 (Ala. 1977).

legislation by Congress.[136] The Oklahoma Supreme Court upheld a separation of powers challenge to a statute that was contingent on the outcome of future federal court determinations.[137]

In such contexts any delegation related to a dynamic source of federal law does not automatically affect any rights or duties; rather, it depends on an independent future fact or identifiable event, so there is arguably no separation of powers violation. As Gary Lawson has reasoned, such legislation is commonplace to the extent that every statute contains an effective date, and "there is no evident reason why that effective date cannot be determined by some event other than celestial motions."[138] Thus, conditioning the operative legal effect of legislation on the happening of an identifiable future event is not, in itself, an unconstitutional delegation of power—even when the event is determined by the decision of a legal entity external to the jurisdiction.[139]

For example, consider a state statute that instructs a state banking regulator to apply a particular set of regulations based on whether a bank is a member of the Federal Reserve System or the bank exercises powers authorized under the Federal Reserve Act "and amendments thereto."[140] To the extent that this state's standard is triggered by an identifiable future event, such as a bank's Federal Reserve membership, it would seem to fall in the category of contingent legislation and not raise any separation of powers issue at all. Even the portions of the statute that provide for regulation of banks that exercise the same powers as banks under the Federal Reserve Act[141]—which appears to place the contingency in the hands of federal rather than state regulators—gives clear and transparent criteria that can be observed in the future as a basis for regulation. Following a similar line of reasoning, even some states with explicit bans on referential legislation have interpreted these to allow incorporation of federal standards as triggering or definitional terms

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[136] State v. Dumler, 559 P.2d 798, 804 (Kan. 1977) (holding that a provision in a statute regulating highway speeds that expires on a future date when Congress removes all restrictions on maximum speeds limits is not an adoption of future federal legislation or an unconstitutional delegation).

[137] Gibson Prods. Co. v. Murphy, 100 P.2d 453, 457 (Okla. 1940) (upholding a provision of the Oklahoma Unemployment Compensation Act that suspends the statute if the Federal Social Security Act is declared invalid).

[138] Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 364 (2002).

[139] *See* Diversified Inv. P'ship v. Dep't of Soc. & Health Servs., 775 P.2d 947, 950 (Wash. 1989) (concluding that a state statutory provision that declares itself invalid if it conflicts with a federal Medicaid property reimbursement is not a future incorporation of federal law or an unconstitutional transfer of power); *see also* People v. Parker, 359 N.E.2d 348, 352 (N.Y. 1976) (noting that New York's definition of "felony" applies to crimes to committed in other states, and treating these as a factual determination rather than the adoption of the law of another state).

[140] The example, common to the dual banking approach of many states, is from Brabner-Smith, *supra* note 28, at 204.

[141] *See id.* at 203–04.

in state law, as long as the statute is otherwise considered complete within itself.[142]

B. *Accountability and Dynamic Federal Law*

As John Hart Ely has observed, "[t]hat legislators often find it convenient to escape accountability is precisely the reason *for* a nondelegation doctrine."[143] Relying exclusively on state law in adopting statutes may reinforce one narrow type of political accountability—based on state sovereignty—but legislative incorporation of dynamic federal law advances a different kind of political accountability. In addition, to the extent state incorporation of dynamic federal law relies on accountable intermediaries, states can bolster accountability even further—alleviating most separation of powers concerns in jurisdictions that require only political safeguards to support a legislative delegation.

1. *Intrinsic Accountability Benefits to the Incorporation of Dynamic Federal Law*

One set of accountability concerns focuses on encouraging legislators to adopt more specific statutes. More specificity in statutes helps to ensure that major policy choices are made by elected officials, and that these elected principals have some ongoing basis through statutes for monitoring the agents to whom they have delegated authority. Another set of accountability concerns relates to the comparative political accountability of the legislature vis-à-vis the executive branch. Both concerns seem largely inapplicable to state legislative adoption of dynamic federal law; indeed, there may be reasons to think that this kind of incorporation produces more accountability benefits than relying entirely on state sources of law.

Eric Posner and Adrian Vermeule observe how it is commonly assumed that nondelegation doctrines can enhance accountability through enhancing legislative updates of statutes, since "[u]nder the nondelegation doctrine, Congress will enact narrow statutes in order to avoid reversal by the courts."[144] Recent empirical work by Jed Stiglitz, however, shows that enforcement of nondelegation limits on legislative power can lead to clearer or

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[142] *See, e.g.*, Commonwealth v. Alderman, 119 A. 551, 552–53 (Pa. 1923) (holding constitutional a statute defining "intoxicating liquor" based on federal law similar to the Maine statute, discussed *supra* note 67 and accompanying text, but finding that there was no violation of the state's constitutional prohibition against amendatory references).

[143] JOHN HART ELY, DEMOCRACY AND DISTRUST 133 (1980).

[144] Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1726, 1761 (2002) (questioning whether, with grants of authority to agencies, there is any nondelegation problem at all, since the core of the doctrine is concerned with protecting against the transfer of actual legislative powers in the Constitution, such as the power to vote on statutes).

more complete statutes or to more frequent updating of laws.[145] Even if the nondelegation doctrine did have the practical effect of making legislation more specific, it is not clear that dynamic federal law presents a special challenge in this regard—any more so than delegation to state administrative agencies under fairly open-ended grants of authority that, in effect, allow state agencies to adopt dynamic sources of law through the agency rulemaking process.

Aside from more specific statutes, which might enhance the accountability of majoritarian lawmaking, perhaps a broader accountability benefit of the nondelegation doctrine is that, by keeping exercises of legislative power in majoritarian bodies, this can help to reduce powerful interest group influence in lawmaking. Those who attribute this kind of accountability benefit to the nondelegation doctrine may be concerned with how interest groups can manipulate the legislative process and, through delegation, vest lawmaking with an agent that will be more susceptible to capture than a state legislature.[146] The general argument is that the best way to protect this kind of accountability is to make sure that political choices are made only by political principles with electoral accountability in a majoritarian political process.[147] David Schoenbrod, for example, argues that without a strong nondelegation doctrine to ensure that only Congress makes legislative choices, members of Congress will "evade[] responsibility"[148] for the laws they adopt, passing blame to those to whom they have delegated legislative power under sweeping grants of authority.[149]

It is not at all clear, however, that a legislature's delegation necessarily reduces political accountability, especially to the extent that delegation is assigned to an agent with equal or greater democratic accountability than the legislative principle. As Jerry Mashaw has observed, delegation can clarify ultimate responsibility for decisions.[150] In particular, Congress's delegation to the executive branch may produce greater accountability to the national electorate—overcoming some of the decision-making obstacles faced by a

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[145] *See* Jed Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine* 23–24 (Cornell Legal Studies Research Paper No. 15-21, 2015), http://ssrn.com/abstract=2611313 [https://perma.cc/D7BR-5E2G].

[146] *Cf.* Rachel E. Barkow, *Explaining and Curbing Capture*, 18 N.C. BANKING INST. 17, 18–19 (2013) (discussing the well-financed lobbying of regulated industries and the "revolving door" between agencies and the regulated industries as reasons why agencies are susceptible to capture).

[147] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.").

[148] David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732 (1999).

[149] *Id.* at 764. *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

[150] Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–96 (1985).

faction-driven Congress.[151] Many political scientists see formal divisions of power as rendered irrelevant by the rise of political parties, especially at the national level of governance, similarly recognizing that political accountability can take many different forms.[152]

Looking to state legislative incorporation of dynamic federal law, two sets of mechanisms may intrinsically reinforce this kind of political accountability. First is representative democracy in national lawmaking process through federalism. Since the content of future federal law is determined in a representative national political process, a state delegating to future federal choices is, in effect, opting to participate in a national political process in which the state has only representative democratic participation, not lawmaking control. In the context of evaluating supranational lawmaking, some have argued that this alone may be sufficient to ensure accountability.[153] To a degree, representative lawmaking in a national political process may serve as a substitute for having a state legislature decide every issue itself, entirely under state law.

Beyond representation in the process of federalism, another way that incorporation of dynamic federalism intrinsically can enhance accountability is through the nature of the national lawmaking process. A national political process may be preferable to state legislators insofar as, through the participation in national politics or in national regulatory proceedings, interest groups that are able to manipulate or control lawmaking at the state level are not as effective and see their influence diluted, vis-à-vis what would occur through state lawmaking.[154] For example, where a state legislature chooses to incorporate dynamic federal law, as opposed to delegate discretion to a state agency to make a substantive choice independent of federal law, concerns with capture of an agency decision-making process would seem to be at their lowest: the ability of any powerful interest group to capture regulation becomes more difficult the more national the range of interests reflected in the decision-making process.[155] Likewise, in many instances delegation to a

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[151] *See generally* Mashaw, *supra* note 150, at 98; JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

[152] *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM 47–54 (2d ed. 1979); *see also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (noting that the rise of political parties damaged the natural and beneficial opposition between state and federal governments).

[153] *See, e.g.*, Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1501 (2004) (arguing that Congress's delegations to international bodies, such as the WTO and the U.N., are constitutional to the extent that they provide a bulwark against concentration of political power that is consistent with the ambitions of separation of powers).

[154] For an extended argument to this effect, see Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1356–59 (2005).

[155] *Id.* at 1380–81.

federal agency would increase the likelihood that the ultimate substantive decisions in a regulatory area reflect expertise or science, rather than mere political preference.[156] Thus to the extent that the quality of the decision-making process and expertise are central to accountability, state incorporation of dynamic sources of federal law can have distinct accountability advantages over a state legislature drawing entirely on state law.

2. *"Accountable Intermediaries" as Safeguards in Institutional Design*

Beyond these intrinsic mechanisms enhancing accountability, many states incorporating dynamic federal law only allow for this to have a binding legal effect following approval by an accountable intermediary, i.e., a particular agent of state government.[157] In this sense, institutional design can plant procedural safeguards to ensure that any dynamic use of federal law is accountable to the state political process.

Many state courts have recognized the significance of an accountable intermediary to separation of powers analysis. In upholding a delegation for a California agency to only issue licenses consistent with federal law, the California Supreme Court emphasized that this decision was only made following adjudication and a determination that federal law was consistent with and carried out the purposes of the California statute.[158] Notably, for the California Supreme Court, the independent judgment of an accountable intermediary—here an agency subject to procedural safeguards under California law—helped to ensure that the use of federal law was consistent with California's statutes. The court upheld the statute against a constitutional challenge asserting an unconstitutional delegation to the state agency, along with a challenge asserting that this was an unconstitutional delegation to Congress and to the U.S. Secretary of Agriculture.[159]

A similar approach was taken by the Missouri Supreme Court, in upholding a criminal prosecution under a state statute for illegal possession of pentazocine, an opioid drug.[160] In January 1979, the Federal Drug Enforcement Agency (DEA) placed pentazocine on the schedule IV list of controlled substances. One month later, the Missouri Division of Health followed this approach.[161] Missouri's Supreme Court held this constitutional, rejecting a nondelegation challenge to the statute under which state regulators restricted the drug. As the court observed, the statute required a state agency to

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[156] *Cf. id.* (discussing how state legislating is more susceptible to "rent-seeking" by interest groups).

[157] *See e.g.*, Boyd, *supra* note 37, at 1265 (discussing the ability of the state agent, as an accountable intermediary, to issue marketing licenses after determining the "federal regulations carried out the purposes of the state act and conformed to its standards").

[158] Brock v. Superior Court, 71 P.2d 209, 213 (Cal. 1937).

[159] *Id.*

[160] State v. Thompson, 627 S.W.2d 298, 300–03 (Mo. 1982).

[161] *Id.* at 299.

use rulemaking to consider whether or not to restrict the drug, based in part on how the DEA treated it and also applying other state-specified statutory criteria.[162] In this sense, the DEA's treatment of the drug was not determinative in terms of its legal effect on Missouri law, as it did not automatically create a state law or have a legally binding effect. Instead, the primary effect of the DEA's treatment of a drug was to trigger mandatory consideration by the Missouri regulations, who retained some discretion in deciding whether to follow it or not.[163]

As the California and Missouri cases highlight, state legislatures have some opportunities through delegation to an agency to use federal law to create trigger regulatory consideration, define relevant criteria, and create presumptions. Ultimately state agency regulators, or courts enforcing state law, would need some independent basis in state law to make a federal standard binding, thus allowing for continued ability for the legislature to monitor any changes in the law. This might be considered as a form of contingent legislation, but unlike other forms of lawmaking that depend on an event over which a state has no control whatsoever,[164] here the contingency is subject to a decision of an public entity that can be managed by a state's legislature, or an "accountable intermediary."

Michael Dorf has recognized the significance of accountable intermediaries in enhancing accountability in his assessment of dynamic incorporation of foreign law.[165] Political safeguards associated with allowing a state agency approval authority over adopting future changes under federal law, subject to adjudication or rulemaking procedures under state law, may help to ensure better accountability in state lawmaking.[166] Such a process, though involving a functionally irrevocable use of federal law, does not affect legal rights based on federal law without some accountable intermediary first making a decision under a specified decision-making process that contains procedural safeguards, thus leaving both a state legislature and courts some continued opportunity to monitor—and to disapprove—the use of federal law.[167] An established precedent for such an approach appears to exist under

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[162] *Id.* at 302; *see also id.* at 301 n.2 (observing that the federal action was not the determinative factor, but instead that state standards specified in the statute must be applied).

[163] *Id.* at 303.

[164] *See supra* notes 132–42 and accompanying text (discussing contingent legislation).

[165] *See* Dorf, *supra* note 9, at 153–57.

[166] *Id.* at 108 n.13 (in addition to Missouri, Dorf notes cases from Alabama, Arkansas and Minnesota that endorse a similar approach).

[167] Perhaps most significantly, these safeguards will include state administrative procedure. Although presumably any adoption of federal law would be subject to the same procedures that apply to the adoption of other agency regulations, the 2010 Model State Administrative Procedures Act contains a provision that addresses incorporation by reference, noting that a rule "may incorporate by reference all or any part of a code, standard, or rule that has been adopted by an agency of the United States." REVISED MODEL STATE ADMIN. PROCEDURE ACT § 314 (NAT'L CONFERENCE OF COMM'RS ON UNIF.

the banking laws of many states, which routinely delegate to state agencies the power to determine when federal bank powers should extend to state banks.[168]

C. *Nonarbitrariness in Dynamic Federal Law and "Hard Look Federalism"*

Absent the nondelegation doctrine, one concern is that agency decisions would be subject to capture by private interest groups. Perhaps this is one reason courts, at both the federal and state levels of government, have expressed a particular concern with delegations of lawmaking authority to private bodies.[169] More generally, without a nondelegation doctrine, agency decisions may stray from Congress's preferences and, worse yet, be made on some arbitrary basis. As Tom Merrill puts it, "What matters is that someone, somewhere, supplies a standard for the exercise of administrative discretion and that the courts can enforce this standard."[170]

Today it is well recognized that the administrative process coupled with judicial review is designed to address this kind of concern. Kenneth Culp Davis famously celebrated how judicial review provides limiting principle to constrain agency discretion, thus minimizing the arbitrariness of agency decisions.[171] As Lisa Bressman has suggested in her assessment of modern judicial review, fixating entirely on political ideals such as participation and accountability may overlook how the avoidance of arbitrary governmental decision-making also lies at the core of constitutional structure and administrative law.[172] Bressman maintains that courts' attention to agency decision-making procedures, such as the use of notice and comment rulemaking, can help to serve as some safeguard against arbitrary

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STATE LAWS 2010). Some state APA's specifically provide for an abbreviated rulemaking process where federal standards are adopted. *See, e.g.*, FLA. STAT. ANN. § 120.54(6) (West Supp. 2016) (providing for a 14-day comment period for the adoption of federal standards, which can become effect 21 days after proposed—in contrast to a 28 to 90 day period for ordinary notice and comment rules—and requiring a state agency to repeal any federal regulation that is repealed, remanded or revoked, as well as respond to any "substantially amended" federal regulation).

[168] *See* Schroeder, *supra* note 26, at 206 (observing that eighty-three percent of states delegate such powers to state agencies).

[169] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935) (striking down Congress's delegation to the President to adopt industry-specific codes of fair competition); Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 457 (Tex. 1997) (striking state legislative delegation to private board).

[170] Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL'Y 73, 73 (2010).

[171] Kenneth Culp Davis argued, for example, that the constitutional nondelegation doctrine is met as long as an agency decision-making process is subject to safeguards, including judicial review. *See* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 725–30 (1969).

[172] *See generally* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

governmental decisions.[173] However, she also argues that attention to procedure alone will not always be sufficient; instead, courts also need to gauge an agency's decision against some "intelligible principle" or other legal standards to help monitor and protect against arbitrary agency lawmaking.[174] In federal administrative law, the common mechanism for this is arbitrary and capricious review, by which a court assesses whether an agency

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[175]

Aaron Saiger has highlighted how, just as their federal counterparts engage in arbitrary and capricious review of agencies, so too do state courts—and perhaps even more so given the institutional character of state governments.[176] Where the adoption or use of dynamic federal law, or its immediate effect, depends on the future decision of a state administrative agency, review of whether the agency has abused its discretion in making that decision is typically available under state law.[177] To the extent the nondelegation doctrine serves to ensure that there are some legal standards that constrain the discretion of agencies in making these decisions,[178] it is important to evaluate whether any standards—procedural or substantive—serve to cabin agency decision-making. In almost every case involving state incorporation of dynamic federal law by a state agency, some identifiable and relatively fixed source standard can allow state courts to monitor whether

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[173] *Id.* at 541–45.

[174] *Id.* at 532–33 (citing Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472–73 (2001)).

[175] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[176] *See generally* Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555 (2014) (discussing why basing *Chevron* deference on accountability does not neatly project onto the institutional features of state agencies). For discussion of the institutional factors Saiger highlights that make state courts more likely to use exacting arbitrary and capricious review than their federal counterparts, such as the presence of elected judges, see Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 557–59 (2001).

[177] For purposes of the discussion in this Article, I use the terms "abuse of discretion" (a more general, non statutory standard of review) and "arbitrary and capricious review" (a specific standard that applies to review of certain agency decisions under state administrative procedure acts) interchangeably. The core suggestions I make regarding the operation of arbitrariness review could apply under either review standard.

[178] *Cf.* Davis, *supra* note 171, at 713 and accompanying text.

agency decision-making is arbitrary.[179] In fact, this kind of arbitrary and capricious review can afford state courts an opportunity to engage their federal counterparts on the meaning of federal statutes. Such an approach enhances the role of states in interpreting federal statutes in comparison to treating the nondelegation doctrine as an *ex ante* limit on dynamic incorporation of federal law, which relegates states an only passive role on the sidelines in interpreting federal law.

1. *Grounding Judicial Review in State Law*

A few state courts have recognized that the functions of separation of powers would not be advanced by striking as unconstitutional the incorporation of dynamic federal law, at least in instances where a state legislature has provided some specific criteria to constrain how state agencies can use federal law. For example, an Ohio appellate court rejected a constitutional challenge to an Ohio Public Utilities Commission regulation that incorporates a Department of Transportation regulation banning transportation of hazardous waste through tunnels, using this definition as a basis for criminal convictions.[180] By regulation, the Commission adopted "[a]ll United States Department of Transportation regulations concerning . . . interstate transportation of hazardous materials by motor carriers for the purpose of enforcing such regulations against motor carriers operating in Ohio while engaged in interstate commerce."[181] In rejecting a nondelegation challenge to this regulation, the court reasoned that it was constitutional for the legislature to delegate discretion to the commission to fix the standards for safety within a clearly defined range.[182] In other words, as long as the state agency's adoption of federal standards were within the permissible range of delegated authority, no state separation of powers violation is present.[183] Identification of specific constraints on the content of a state's incorporation of federal law—i.e., statutory language that speaks to whether or how it can be used by an agency or a court—can provide reviewing courts some basis for evaluating whether a future change in the law is an abuse of its discretion. Such judicial monitoring will likely serve as the most rigid constraint on future legal change where, as in Ohio, some clear *ex ante* legislative or regulatory constraints on the agency's authority to use federal law, can be identified.

However, even if specific statutory language can be identified to rigidly constrain the operative effect of dynamic federal law, a state legislature's purpose in making a delegation can also be helpful to state courts in evaluating

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[179] *Cf.* Bressman, *supra* note 172, at 532–33 (suggesting that administrative standards "are necessary to improve the rationality, fairness, and predictability . . . of administrative decisionmaking").

[180] State v. Basham, 573 N.E.2d 773, 774 (Ohio Ct. App. 1989).

[181] *Id.* (second alteration in original) (citing OHIO ADMIN. CODE 4901:2-5-02).

[182] *Id.* at 775 (citing Belden v. Union Cent. Life Ins. Co., 55 N.E.2d 629, 635 (1944)).

[183] *Id.*

whether this is an abuse of discretion. Consider California's State Agricultural Adjustment Act, which made the orders and regulations of the Federal Secretary of Agriculture "heretofore or hereafter made" the law of California "when and in so far as within the standards" specified by state law.[184] A state agency was authorized by statute to issue marketing licenses consistent with the federal regulations, but only after making an administrative determination that the federal regulations carried out the purposes of state legislation and conformed to its standards.[185] The California Supreme Court rejected a constitutional challenge to this statute, reasoning that it does not effectuate "automatic incorporation by reference of future federal laws."[186] Instead, the court highlighted, the statute merely "declared policy of making our law correspond with federal regulation under circumstances set forth in our statute."[187]

To the extent that a legislature has made a decision to favor a delegation based on federal law for purposes related to promoting uniformity and efficiency, or for purposes of advancing a cooperative federalism program, attention to legislative purposes can assist courts in identifying substantive constraints on the delegation. It is notable that many of the state cases discussed above which strike delegations that use federal standards do not make any effort at all to identify legislative purpose behind the delegation.[188] Interestingly, however, where courts that do address the legislative purposes (or benefits) behind the incorporation of dynamic federal law, they are much more inclined to uphold state legislative incorporation of dynamic federal law.[189]

This does not mean, however, that dynamic federal law can have a legal effect without any judicial scrutiny. State courts are not always deferential in reviewing agency implementation of statutes.[190] It thus might be expected that in reviewing state agency choices regarding federal programs that state courts will carefully examine agency interpretations, especially to the extent that there is possible constitutional concern. Examination of legislative purpose is

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[184] Brock v. Superior Court, 71 P.2d 209, 212–13 (Cal. 1937) (quoting California Agricultural Adjustment Act of 1935, § 5(1), 1935 Cal. Stat. 1032).

[185] *Id.* at 210–11.

[186] *Id.* at 213.

[187] *Id.* (citing examples of contingent legislation, where some foreign law triggers retaliatory licenses or tax measures under state law).

[188] *See supra* Part III.

[189] *See, e.g.*, People v. Blackorby, 586 N.E.2d 1231, 1237 (Ill. 1992) ("His conduct was exactly the type of conduct the legislature intended to protect its citizens against by its incorporation of the Federal standards into the Illinois Vehicle Code.").

[190] *See* Saiger, *supra* note 176, at 558; *see also* Gluck, *supra* note 32, at 604–05; D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 374 (2009).

commonly accepted in the context of such review at the state level.[191] In reviewing state agency interpretations, what Abbe Gluck calls the "modified textualism" approach (a methodological approach to stare decisis used by Oregon and other state Supreme Courts), commonly looks to context and purposes, as well as statutory text.[192] It might even be expected for this to happen more frequently at the state level, to the extent that elected judges have greater interpretive freedom in interpreting statutes than their federal counterparts.[193]

Consider that many state courts that have been inclined to reject state health, safety, and welfare programs based on dynamic federal law also appear to be more accepting of similar delegations in the business or tax regulation contexts. In business and tax contexts, courts seem more attentive to how legislatures have an interest to promoting uniformity, in order to ensure consistency and predictability regarding the operation of commerce and fiscal policy.[194] Legislative purpose, in other words, appears too significant to many state courts in deciding when some delegations are permissible, perhaps out of deference to principles of legislative sovereignty in state constitutions. To the extent such a principle is applied consistently to different types of statutes, courts should be more likely to uphold delegations based on dynamic federal law where there are clear legislative purposes favoring uniformity, administrative efficiency, and conformity to federal law (as either a floor or a ceiling).

As an example, consider how state courts appear to weigh uniformity interests heavily in considering constitutional challenges to state statutes that incorporate or rely on federal definitions of terms of such as "income" for tax purposes. Some state courts have invalidated statutory provisions that adopt future changes to future tax laws,[195] and still others readopt the provisions of the IRS Code each year to avoid any potential nondelegation problem with relying on federal tax law.[196] However, most state courts appear to have rejected constitutional challenges to these kinds of delegations based on incorporation of dynamic federal tax law. Tennessee's Supreme Court upheld a statute making individual retirement plans taxable if subject to a federal

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[191] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1829–30 (2010).

[192] *Id.*

[193] Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1221, 1238 (2012).

[194] *See, e.g.*, McFaddin v. Jackson, 738 S.W.2d 176, 182 (Tenn. 1987) (quoting Alaska S.S. Co. v. Mullaney, 180 F.2d 805, 816–17 (9th Cir. 1950)).

[195] *E.g.*, Cheney v. St. Louis Sw. Ry. Co., 394 S.W.2d 731, 732 (Ark. 1965) (holding unconstitutional the establishment of tax liability based on a formula subject to prospective federal regulations).

[196] In order to avoid any question of unconstitutionality, Florida adopts the provisions of the Internal Revenue Code each year. FLA. STAT. ANN. § 220.03(3) (West Supp. 2016).

estate tax.[197] Even though this was a general delegation that allowed even future IRS regulations to dictate results in Tennessee, the court reasoned that this is simply an example of contingent legislation—specifying a particular event that affects the state's laws—and also found it significant that the legislature retained the power to withdraw its approval of any future change to federal law.[198] The court also emphasized the need for uniformity and administrative simplicity in conforming federal and state tax enforcement.[199] In reviewing Alaska law that adopts federal tax law "as now in effect or hereafter amended," the U.S. Court of Appeals for the Ninth Circuit also rejected a delegation challenge, recognizing the "convenience to the taxpayer," "simplicity of administration," and other coordination benefits in conforming tax standards.[200] Other states have reached the same conclusion upholding the use of federal tax law against constitutional nondelegation challenges,[201] though some states also have adopted state constitutional amendments that explicitly allow state incorporation of dynamic federal tax law.[202]

Scholars defending cases that have upheld delegations based on dynamic federal tax law have highlighted the benefits of uniformity in tax standards.[203] They also point to the benefits of respecting a legislative desire for conformity.[204] However, it is not clear why a legislative preference for uniformity or administrative simplicity should be given significant weight in the tax context, while such a legislative preference appears to be ignored entirely by state courts when discussing health, safety and environmental

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[197] *McFaddin*, 738 S.W.2d at 177.

[198] *Id.* at 179–80.

[199] *Id.* at 182 (quoting *Alaksa S.S. Co.*, 180 F.2d at 816–17).

[200] *See also Alaksa S.S. Co.*, 180 F.2d at 810, 816 (first quoting Alaska Net Income Tax Act, § 3(B)(1), 1949 Alaska Sess. Laws ch. 115).

[201] *See, e.g.*, Underwood Typewriter Co. v. Chamberlain, 108 A. 154, 160–61 (Conn. 1919) (finding that a statute imposing a tax based on the net income subject to taxation under federal law does not represent an unconstitutional delegation); First Fed. Sav. & Loan Ass'n v. State Tax Comm'n, 363 N.E.2d 474, 483 (Mass. 1977) (finding that a federal determination on deduction allowed to a savings and loan is not an unconstitutional delegation of power); Katzenberg v. Comptroller of the Treasury, 282 A.2d 465, 470 (Md. 1971) (holding that state adoption of a federal definition of "income" is not an unconstitutional delegation, even though the statute appeared to refer to future changes); Commonwealth v. Warner Bros. Theatres, Inc., 27 A.2d 62, 63–64 (Pa. 1942) (holding that statutory adoption of federal definition of "net income" is not an unconstitutional delegation, even though the amount of the deduction in federal law varies over time).

[202] These include Colorado, Kansas, Missouri, Nebraska, New Mexico, New York, North Dakota, and Virginia. *See* COLO. CONST. art. X, § 19; KAN. CONST. art. XI, § 11; Mo. CONST. art. X, § 4(d); NEB. CONST. art. VIII, § 1(B); N.M CONST. art. IV, § 18; N.Y CONST. art. III, § 22; N.D. CONST. art. X, § 3; VA. CONST. art. IV, § 11.

[203] *See generally* Arnold Rochvarg, *State Adoption of Federal Law—Legislative Abdication or Reasoned Policymaking?*, 36 ADMIN. L. REV. 277 (1984).

[204] Jim B. Grant, Jr., Commentary, *Conforming the State Income Tax to Federal Tax Law: Prospective Incorporation of Federal Changes and the Nondelegation Doctrine*, 40 ALA. L. REV. 233, 249–50 (1988).

regulation. These regulatory areas too may sometimes value a parroting of federal standards at the state level, to promote uniformity or administrative efficiency. If there is some identifiable legislative purpose in uniformity or efficiency, this provides state courts *some* basis against which they can evaluate whether an agency is abusing its discretion, even where specific statutory constraints may be lacking.

Courts also seem willing to look to legislative purpose where states are using federal law as a floor in defining and enforcing standards (rather than a ceiling, as occurs with uniform standards). Consider the statutes authorizing regulation of consumer fraud practices known as "mini-FTC Acts."[205] Florida's statute delegates to the state Attorney General the authority to define "unfair methods of competition" and "unfair or deceptive acts or practices" by regulation.[206] The state's mini-FTC Act states that these regulations "must not be inconsistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts" under the provisions of section 5(a)(1) of the Federal Trade Commission Act.[207] In considering a constitutional challenge to an earlier version of this statute, the Florida Supreme Court noted that it is not unconstitutionally vague or a violation of due process, because it gives persons of common intelligence sufficient warning regarding well-settled, albeit evolving, legal terms under federal law.[208] Even though the Florida statute also allowed for the incorporation of federal law "as from time to time amended" the court also held that this was a valid delegation of authority because it is a "law complete in itself," containing "valid limitations to provide rules for the complete operation and enforcement of the law within its expressed general purpose."[209]

Moreover, the Florida Supreme Court reasoned, the state's Attorney General could still take a more restrictive view than the FTC of what business practices are allowed under the statute[210]—using federal law as a floor, not a ceiling for consumer protection. In the context of regulating business marketing and advertising practices, many companies market products nationwide, making some uniformity in regulation across jurisdictions desirable. Still, as Henry Butler and Joshua Wright have observed, many state mini-FTC Acts result in more substantial prohibitions of business conduct than

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[205] *See* Butler & Wright, *supra* note 24, at 164–65, 169–70 and accompanying text (describing how these statutes draw on model statutes, such as the Uniform Deceptive Trade Practices Act and the Model Unfair Trade Practices and Consumer Protection Law).

[206] FLA. STAT. ANN. § 501.204 (West Supp. 2016).

[207] *Id.* § 501.205 (West 2010); *see also* Federal Trade Commission Act § 5(a)(1), 15 U.S.C § 45(a)(1) (2012).

[208] Dep't of Legal Affairs v. Rogers, 329 So. 2d 257, 264 (Fla. 1976) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

[209] *Id.* at 262 n.2, 266 (first quoting FLA. STAT. 501.205; and then quoting State v. Griffin, 239 So. 2d 577, 580 (Fla. 1970)).

[210] *Id.* at 267.

those approved by the FTC.[211] In upholding the delegation under Florida's mini-FTC Act Florida's Supreme Court interpreted the statute's purpose as embracing a floor based on FTC standards, but as not requiring these standards to constitute the ceiling regarding prohibited trade practices.

State courts appear to consistently identify uniformity purposes, or purposes related to cooperative federalism programs in tax and business related statutes. It is thus somewhat puzzling to see many courts refuse to engage the same set of purposes when evaluating the constitutionality of health, safety, and environmental legislation.[212] Even though uniformity interests may not be as significant in these contexts, state legislatures still may have interests in promoting efficiency and coordination. Some of those interests could well connect to a state legislatures policy choice to treat federal standards as a floor, not a ceiling—as Florida's Supreme Court recognized with mini-FTC Acts. To look to these purposes to uphold legislation in some contexts, but to fail to even make an effort in identifying these purposes in others is puzzling, at the very least, and suggests that state courts are not always even handed in the manner in which they approach these kinds of delegation issues. In addition, it is important to recognize how identification of these purposes provide some gauge against which courts can evaluate agency discretion. For example, if a tax regulator is expected to pursue uniformity, this purpose can serve to evaluate a tax regulator's exercise of discretion in making a particular regulatory decision. Likewise, in implementing a cooperative federalism program that incorporates a dynamic source of federal law as a floor, the discretion of a state regulator is not without limit. Instead, based on a fixed source of state law, whether framed in terms of specific statutory language or general legislative purpose, a court has some basis for monitoring future legal change for conformity with intent of the state legislature.

2. *Incorporating External Considerations and Constraints—"Hard Look Federalism"*

Beyond simple incorporation of federal law that may change due to some future act of Congress, as many of the examples above show, many state statutes incorporating federal law frequently adopt future federal agency regulations.[213] When dynamic federal law is agency regulation, it is wrong to consider future federal law as completely up for grabs. Any dynamic federal law is still subject to the constraints and limitations under the specific federal statutes that authorize a federal agency to regulate, as well as requirements in federal administrative law. State courts addressing the incorporation of

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[211] *See* Butler & Wright, *supra* note 24, at 176–77.

[212] One particular example is Texas's hazardous waste statute. *See supra* notes 107–109 and accompanying text.

[213] *See supra* Part III.

dynamic federal law have failed to assess whether these external standards also become a part of the state's incorporation of federal law.[214] To the extent that they do, federal statutes and administrative law can provide state courts relevant considerations to consider in assessing whether future changes in federal law are appropriate.

Relative to state legislatures, whose delegations are often subject to *ex ante* constraints under state constitutions, under the U.S. Constitution Congress's delegations to federal agencies are subject to lax constraints on legal change. Importantly, however, when Congress delegates authority to a federal agency, that agency still must comply with the statute delegating authority and, under federal administrative law, judicial review imposes *ex post* constraints, relevant considerations, and procedures as limits on future legal change by the agency.[215] The extent that this is may be considered a part of the law adopted by a state legislature when it incorporates dynamic federal law has important implications for how state courts engage in appellate review of legal change that is precipitated by federal law.

At its most fundamental level, a decision by any federal agency could be considered ultra vires under the statute that delegates authority to it, or may contravene a statute to the extent that the agency bases its decision on a factor that Congress has prohibited it from considering. Based on the scope of Congress's delegation to an agency or specific statutory provisions that prohibit or foreclose a federal agency from regulating an activity, congressional lawmakers typically limit the ability of a federal agency to expand its regulatory reach.[216] At the very least, whenever a state legislature adopts dynamic federal law it should be understood that it is legislating against the backdrop of any existing statutory limitations on federal agencies under federal law. Put another way, any state legislature adopting dynamic federal law also effectively incorporates any fixed statutory constraints on legal change by a federal agency—even though those constraints come from an external source, i.e., federal statutes, rather than a source of law internal to a particular state.

Apart from agency-specific federal statutes, federal administrative law also provides some important constraints on future legal change by agencies. A decision by any federal agency to change existing federal standards must comply with the procedures articulated in the federal Administrative Procedures Act (APA), such as the requirement to engage in notice and comment rulemaking prior to changing existing agency regulations.[217] It is

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[214] *See, e.g.*, *supra* notes 108–109 and accompanying text.

[215] *See, e.g.*, 5 U.S.C. § 706 (2012) (describing the scope of judicial review); Massachusetts v. EPA, 549 U.S. 497, 533 (2007) ("To the extent that [the Clean Air Act] constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.").

[216] *See, e.g.*, *supra* note 215.

[217] *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT §§ 304, 306 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

well established that federal administrative procedure will limit, to at least some degree, an agency's ability to change its regulations.[218] For example, any regulations adopted by a federal agency following notice and comment rulemaking cannot be changed or revoked at will, but must go through a similar process prior to their modification.[219] Such procedural safeguards for federal agencies, I would submit, also presumably become a part of any state law adopting dynamic federal law.

Consider, for example, the approach of the Wisconsin Supreme Court in considering a state agency's incorporation of EPA technical regulations (including later interpretations) to determine the asbestos content in bulk samples. The court upheld state agency regulation against a nondelegation challenge by basically applying *Chevron*-type deference to EPA's interpretation as endorsed by a Wisconsin agency.[220] A dissenter objected on the grounds that the EPA interpretation had not gone through notice and comment, even though the Wisconsin agency used a notice and comment process.[221] This case highlights how, the federal administrative process can, if recognized as part of dynamic federal law when state legislatures incorporate it, serve to encourage procedures by federal agencies to ensure notice to the public and its opportunity to participate, especially if a federal agency hopes to see its regulations have some effect in state lawmaking. Where a federal agency has used notice and comment rulemaking in adopting new regulations, the rationales for a state deferring to the federal agency seem strong—especially where a state legislature has made a policy judgment to favor a federal agency's approach because this is consistent with a general legislative purpose. However, as the dissenter in Wisconsin warned, one concern may be whether the federal standard at issue had been adopted through notice and comment rulemaking by the federal agency.[222]

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[218] *See, e.g.*, Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468–75 (1992) (outlining the spectrum of agency rulemaking activities).

[219] *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015) (allowing an agency to interpret its statutes without notice and comment rulemaking, but also suggesting that a rule adopted by notice and comment rulemaking cannot be amended through conflicting interpretive rules). For discussion, see generally Matthew P. Downer, Note, *Tentative Interpretations: The Abracadabra of Administrative Rulemaking and the End of* Alaska Hunters, 67 VAND. L. REV. 875 (2014).

[220] State v. Harenda Enters., Inc., 746 N.W.2d 25, 38 (Wis. 2008) (noting that the EPA's interpretation of an ambiguous statutory term is entitled to judicial deference when it does not contravene statutory purpose or is otherwise clearly erroneous).

[221] *Id.* at 45 (Ziegler, J., dissenting).

[222] *Id.* at 45–46. Despite this concern, I am not sure that this would have been problematic to the extent that the Wisconsin agency used notice and comment rulemaking in adopting the federal standard.

Beyond these kinds of procedural protections, federal agencies are also subject to *ex post* arbitrariness review in federal courts.[223] This type of review is available in federal court under the APA regardless of whether the federal agency makes its decision through notice and comment rulemaking or with less public participation, as may occur with agency guidance documents.[224] As Professor Bressman and others have highlighted, arbitrary and capricious review in federal court can serve the function of monitoring a federal agency's compliance with statutory and other legal considerations.[225] Whenever a state legislature adopts dynamic federal law contingent on future federal agency actions, the arbitrariness constraints on these under federal law should be considered a part of the state legislative laws constraining future legal change.

To the extent that federal administrative procedure, including the relevant considerations under arbitrary and capricious review, are incorporated into state law concerning future legal change of federal standards, future changes in federal law are not without limit. For example, even in the instance where a federal agency has made legal changes without notice and comment rulemaking, as in the Wisconsin case above, it is still not clear to me that the concerns of the Wisconsin dissenter are warranted.[226] Even absent federal notice and comment procedures, changes in federal standards adopted outside of rulemaking must comply with federal publication requirements.[227]

More significantly, they also are subject to arbitrary and capricious review in federal court.[228] Applying this review standard, a court could evaluate the relevant considerations that an agency takes into account in making its decision.[229] Even if it used the correct procedures, under the arbitrariness standard a federal agency still may not be able to support its legal change if it violated statutory criteria, failed to consider relevant considerations, or otherwise lacks sufficient reasoning to support its legal change.

My basic proposal is that, at the very minimum, when a state legislature makes a choice to rely on legal change that is dependent on the future choices of a federal agency, the federal statutory and administrative limitations on that agency's decisions become a part of state law, providing a set of principles

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[223] *See* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 352–57 (2011) (arguing for arbitrariness for review of guidance documents and discussing some of the practical barriers to this).

[224] *See, e.g.*, *id.* at 331.

[225] *See generally* Bressman, *supra* note 172 and accompanying text.

[226] *See supra* note 221 and accompanying text.

[227] *See, e.g.*, 5 U.S.C. § 552(a) (2012) (outlining federal agency requirements to make available and publish documents that affect the public).

[228] 5 U.S.C. § 706(1)(A) (providing for judicial review in federal court of federal agency action under the arbitrary and capricious standard).

[229] The seminal federal case on arbitrary and capricious review requires an agency to consider "relevant factors" even if they are not mentioned in a statute. That same case, of course, also makes it clear that it is impermissible for an agency to consider "factors which Congress has not intended it to consider." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

state courts can invoke in reviewing agency decisions. In other words, the state "opts in" to federal law concerning legal change—including both substantive statutes and administrative law. This includes state courts engaging in a form of "hard look federalism"—in *ex post* judicial review of state agency decisions, state courts could treat such limitations and relevant considerations under federal law as a part of the state's law for these purposes. Where regulations change in the future at the state level, due to the incorporation of dynamic federal law, the arbitrary and capricious standard in state court would provide an opportunity to consider challenges to dynamic federal law on state law terms, without a state ceding any control over evaluation of the arbitrariness of lawmaking to the national government.

The source of this kind of hard look federalism may be existing state administrative procedure, as many state APAs routinely provide for arbitrary and capricious review of agency decisions. In many states, appellate courts could readily do this under existing statutory standards of review.[230] It has been recognized, though, that not all states provide for the same form of arbitrariness of agencies review available in federal courts.[231] Regardless of any variations in administrative law across states, however, by adopting dynamic federal law a state legislature has implicitly authorized a state court to review legal change precipitated by a federal agency under the arbitrary and capricious standard—at least for purposes of state agency adoption of future federal legal changes. The state, in other words, has effectively also opted into having its courts apply a federal arbitrary and capricious review standard regarding future changes in federal law.

It is novel to suggest that state courts should look to federal arbitrary and capricious review to identify relevant considerations and constraints on a federal agency's decision. But it is hardly a stretch to recognize external sources of law under established principles of arbitrary and capricious review. To take one example, under federal administrative law, it is common for an agency to bootstrap its reasoning—and for a court to apply the arbitrary and capricious standard—using law and other relevant factors from outside of the

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[230] Many state administrative procedure acts already provide for review under the arbitrary and capricious or abuse of discretion standard. For example, the 2010 Model State Administrative Procedure Act (MSAPA) directs courts to provide relief is "agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." REVISED MODEL STATE ADMIN. PROCEDURE ACT § 508(a)(3)(C) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010). The comments to the MSAPA cite approvingly William Araiza's view that the "[j]udiciary, not [the] legislature, [is the] appropriate body to evolve specific standards for review, because of [the] great variety of agency action and contexts." *See id.* § 508(a)(3)(C) cmt. (citing William D. Araiza, *In Praise of a Skeletal APA:* Norton v. Southern Utah Wilderness Alliance, *Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. REV. 979, 993 (2004)).

[231] *Cf.* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 147 (1991) (noting how in many states *State Farm* review has been ignored or affirmatively rejected).

particular statute under which an agency is making a decision. As Richard Pierce notes, relevant materials for consideration by an agency in exercising their discretion not only include that agency's own statutes and regulations, but broader common law and statutory sources of law and other materials outside of the statute in which Congress directed an agency to address a question.[232] Although a federal agency making a decision is not required to consider related statutes or problems,[233] and an agency cannot consider a factor Congress has prohibited from considering,[234] where a statute itself is silent about a logically relevant factor an agency may consider this.[235] Federal courts reviewing agency action have routinely allowed agencies to explain their decisions using sources outside of the statute governing a particular agency that has been delegated authority to interpret laws, especially where they are logically relevant to the agency's decision.[236] If federal courts routinely do this, it also does not seem to be much of a stretch for state courts—especially those inclined to be less deferential to agencies and more exacting in arbitrary and capricious review—to do the same. The case for such review may be especially compelling where, without judicial review of an agency's decision, there would otherwise be constitutional concerns with incorporation of dynamic sources of law.

It has been recognized that judicial review in many states is more rigorous than in the federal courts.[237] Thus, it is quite possible that this proposal could lead state courts to reject federal standards as arbitrary and capricious (at least

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[232] Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 72–73, 88 (highlighting how the Supreme Court and lower courts have allowed agencies to consider any factors that were logically relevant to the question before the agency, even though the statute that authorized the agency to resolve the question did not explicitly list those factors).

[233] Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 645–46 (1990).

[234] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 464–69 (2001).

[235] *See, e.g.*, Michigan v. U.S. EPA, 213 F.3d 663, 678 (D.C. Cir. 2000) (noting that Congress has forbidden an agency from considering a logically relevant decisional factor only when there is "clear congressional intent to preclude" agency consideration of the cost factor (quoting Nat. Res. Def. Council, Inc. v. U.S. EPA, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc))).

[236] *See, e.g.*, Pierce, *supra* note 232, at 73–74. Pierce notes that this is consistent with the advice Jerry Mashaw and David Harfst provided NHTSA following their detailed case study of its decision-making process against the backdrop of the *State Farm* case:

> This agency, any agency, should always read between the lines of its statute an implicit qualification of the form: "Don't forget that this statute does not exhaust our vision of the good life or the good society. Remember that we have other goals and other purposes that will sometimes conflict with the goals and purposes of this statute. If we forgot to mention all those potential conflicting purposes in your instructions, take note of them anyway. For heaven's sake, be reasonable."

Id. at 74 (quoting JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 214–15 (1990)).

[237] *See, e.g.*, Saiger, *supra* note 176, at 556–57.

for purposes of state law), even though no federal court has done so. However, I do not advance hard look federalism as an invitation for state courts to apply subject federal law to greater scrutiny than federal courts (although if they have a good reason they may). Instead this approach merely recognizes that state courts can offer something different, in terms of the timing of review and their substantive perspective on legal interpretation, than their federal counterparts. In this sense, recognition of arbitrariness review, based on a state bootstrapping the relevant considerations under federal law, has important implications for the development of both federal and state administrative law. It presents a fertile opportunity—yet to be developed by state courts—for both state judiciaries and executive branch agencies to play a more significant role in the development of federal law.

This approach would have some practical implications for state judicial review of regulatory change. First, legal change may face barriers to challenge in federal courts, due to standing and finality requirements, whereas state law may provide for judicial review—in part because a state regulatory agency's decision to adopt a federal standard, even if not final for purposes of review in federal court, could still be final for purposes of review under state law. Second, even where no federal court has imposed the same kind of constraint on a federal agency, a state court could consider federal law as constraining a delegation to a state agency in arbitrary and capricious review. This kind of decision would have no precedential impact on federal law, but would instead only affect how that state treats legal change related to the dynamic incorporation of federal law.

This also is not an unprecedented assertion of state judicial power: at the time of the Founding it was common for state courts to play a central role in interpreting federal law.[238] Unlike at the time of the Founding, when state court interpretations of federal statutes may have controlled, here the state court assessment of the reasonableness of a federal agency only would have an immediate legal effect on the state's voluntary incorporation of dynamic federal law; where federal courts have made a controlling interpretation of federal law that does not leave the state the option of opting into federal law, this would still preempt state judicial decisions to the contrary. Involving state courts in the interpretation of federal law can also produce desirable benefits for federalism—as state courts reach their own conclusions regarding the reasonableness of future changes in federal law. It is unlikely that the judiciary of every state will agree, and also not likely that state judiciaries will follow federal arbitrary and capricious review in lockstep. By engaging in such review state courts would not be limited to mere bystanders in the monitoring

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[238] *See* Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1504–05 (2006).

of changes in federal law, and may even be able to play a significant trans-state role in interpreting and legitimating dynamic federal law.[239]

State court arbitrary and capricious review of a federal state agency's change in law—using constraints, standards and considerations that are recognized under federal law—may enable state courts to play a more significant role in assessing that future legal changes related to federal law are not arbitrary. This kind of hard look federalism would also shift the role of state courts from using the nondelegation doctrine under their constitutions to impose a strong *ex ante* resistance norm against state incorporation of dynamic federal law, to use *ex post* judicial review in a manner similar to federal appellate courts. A notable democratic process federalism benefit of hard look federalism would be to more directly engage both state courts and state agencies in the evaluation of the relevant legal considerations and constraints on dynamic federal law. Such an approach can enable states to continue to experiment even further with the incorporation of dynamic federal law. By contrast, the traditional approach views federal courts as possessing a monopoly over the relevant considerations and constraints on legal change in federal law. This relegates state courts and agencies to the passive role of a bystander on the sidelines, rather than an active participant in the development of federal regulation.

IV. CONCLUSION

Treating the nondelegation doctrine as an *ex ante* limit on legislative incorporation of dynamic federal law significantly increases the costs of a state using the expertise and judgment of federal agencies to benefit its lawmaking process, promoting uniform and consistent approaches with neighboring jurisdictions, or coordinating with the federal government. But it also has implications for how we think about state constitutions. Dan Rodriguez once called for a "trans-state" constitutionalism, in which state constitutional issues are not entirely jurisdiction-specific but instead "raise similar stakes and have more or less similar shapes."[240] The study of state legislative adoption of dynamic federal law highlights how fixation on a jurisdiction-specific approach to dynamic incorporation of federal law has impoverished both state separation of powers and federalism.

I have argued that a state court's use of the nondelegation doctrine as an *ex ante* constrain on dynamic incorporation of federal law should be rejected as inconsistent with separation of powers under state constitutions. A functional approach to understanding separation of powers under state constitutions does not view separation of powers in state constitutions as fixated on protecting state sovereignty at all costs, especially where other important values, such as

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[239] *See* Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 920–24 (2013).

[240] Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 301 (1998).

participation, accountability, and nonarbitrariness can be advanced in significant ways by the incorporation of dynamic federal law.[241] In many instances, as I have argued, looking to dynamic sources of federal law can create some accountability benefits for a state.[242] Sometimes these benefits may even exceed the state government's ability to protect accountability on its own. Through institutional design, a state legislature also can create accountable intermediaries, such agencies accountable to the state legislature, to ensure that dynamic federal law does not blindside citizens or otherwise affect a state's interests in ways that a legislature would not endorse if it were adopting a specific federal standard on its own.

Most significantly, the availability and role of *ex post* judicial review in protecting against arbitrary adoption and enforcement of future federal law should not be ignored in assessing separation of powers under state constitutions. *Ex post* review of federal legal change under the arbitrary and capricious standard is also not something over which federal courts should have a monopoly: Even where no specific state source of law is available for judicial review, any state legislature adopting dynamic federal law would expect federal statutes and administrative procedures to constrain future federal law. Thus, in incorporating dynamic federal law, a state legislature should be understood to be implicitly opting into any federal standards that limit future legal change. In applying arbitrariness review, state courts can use these external standards to bootstrap judicial review of dynamic federal law. This type of hard look federalism not only holds promise to return state separations of powers to its core purposes; it also opens up new possibilities that enhance the voice of state courts and agencies in the development and interpretation of federal law.

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[241] There are notable federalism benefits too. Some of the staunchest advocates of courts endorsing resistance norms under the federal constitution view these resistance norms as enabling a form of process federalism. *See* Young, *supra* note 112, at 1607–08 and accompanying text. By contrast, any use of a resistance norm against dynamic incorporation of federal law works to disable the political process.

[242] *See supra* Part IV.A.


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