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THE JURISPRUDENCE OF UNION

*Gil Seinfeld**

Abstract

The primary goal of this Article is to demonstrate that the interest in national unity does important, independent work in the law of vertical federalism. We have long been accustomed to treating union as a constitutionally operative value in cases involving the duties states owe one another (i.e. horizontal federalism cases), but in cases involving the relationship between the federal government and the states, the interest in union is routinely ignored. This Article shows that, across a wide range of cases relating to the allocation of power between the federal government and the states, the states are constrained by a duty to acknowledge their status, and their citizens' identities, as members of a political community that is national in scope. These decisions are conventionally defended (by both courts and commentators) in supremacy-based terms. But I will show that they are rooted, instead, in an ethic of union.

Introduction

Union is an important constitutional value. It is listed first in the Preamble among the aspirations motivating the adoption of the new charter;[1] it is the central value underlying numerous fragments of constitutional text such as the Full Faith and Credit Clause[2] and the Privileges and Immunities Clause;[3] and it is the driving force behind familiar bodies of judge-made law such as the cases relating to the dormant commerce power. All of this is common ground. Courts and scholarly commentators unhesitatingly

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1 U.S. Const. pmbl. ("We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America.").

2 *Id.* art. IV, § 1.

3 *Id.* art. IV, § 2.

acknowledge that these features of our constitutional architecture are motivated by the interest in union—by which I mean the interest in binding the several states into a single political community. They are designed, as one case put it, "to help fuse into one Nation a collection of independent, sovereign States."[4]

But judicial and scholarly engagement with the constitutional interest in union is characterized by a significant blind spot: vertical federalism is largely ignored. That is, while we have long been accustomed to treating union as a constitutionally operative value in cases relating to the duties states owe one another,[5] it has received scant attention where the relationship between the federal government and the states is at issue.[6] This is a mistake. Union is a constitutional value with ramifications across both contexts. It constrains states not only in their treatment of other states, their citizens, and their laws,

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4 Toomer v. Witsell, 334 U.S. 385, 395 (1948); *see also, e.g.*, Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 276–77 (1935) (noting that "[t]he very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation"); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (characterizing the Commerce Clause—the dormant Commerce Clause doctrine in particular—as essential to our "national solidarity"); Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 789 & n.206 (2004) (identifying these clauses as examples of "individual provisions of the U.S. Constitution [that] suggest specific duties of mutual cooperation and respect, especially among the states and for the Union"); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1507–08 (2007) ("It is . . . clear that the Framers intended [Article IV], especially Sections 1 and 2, to help forge the states into a closer union."); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986) (arguing that a prohibition on purposeful economic protectionism lies at the core of dormant Commerce Clause jurisprudence and that such protectionism is objectionable because "it is inconsistent with the very idea of political union"). The Extradition and Fugitive Clauses, U.S. CONST. art. IV, § 2, are also commonly understood as union-reinforcing devices. *See* Halberstam, *supra*, at 789 & n.206; Metzger, *supra*, at 1507.

5 The Full Faith and Credit Clause, the Privileges and Immunities Clause, and dormant Commerce Clause doctrine constrain states in their interactions with one another, with other states' citizens, and other states' laws.

6 An important exception is Halberstam, *supra* note 4. Professor Halberstam finds traces of a jurisprudence of "fidelity" in the law of American federalism. *Id.* at 789–817. This principle of fidelity (which, he explains, figures more prominently in both the German federal system and in the European Union, *see id.* at 739–89) "insists that each level or unit of a government must always act to ensure the proper functioning of the system of governance as a whole." *Id.* at 734. In describing the German incarnation of fidelity, Halberstam explains that it commands "an attitude conducive to a union," *id.* at 745 (quoting Rudolf Smend, *Verfassung und Verfassungrecht*, *reprinted in* STAATSRECHTLICHE ABHANDLUNGEN 119, 271 (2d ed. 1968)), and that it is focused on "group formation, association, and the formation of a particular common political attitude within parliament and among the citizenry sharing this experience." *Id.* at 748 (quoting Smend, *supra*, at 154). The concept of union that I find lurking beneath the surface of different pockets of the law of vertical federalism, *see infra* Section I.C. and Part II, is similar to the idea of fidelity that Halberstam is working with. In particular, political association and the fostering of "a common political attitude" feature prominently in my account as well as his.

but in their orientation toward the national government and federal law as well.

Part of the reason for our collective inattention to the constitutional interest in union is our tendency, in vertical federalism cases, to focus exclusively on the tug of war between the values of national supremacy and state autonomy. Seen through this prism, the central challenge in a vertical federalism case is to strike the proper balance between these fundamental goals, typically by deciding which must give way to the other. In many contexts, this is an entirely sensible way to approach problems of vertical federalism. The values of national supremacy and state autonomy are enshrined in the Constitution's text.[7] Careful consideration of each, and their relationship to one another, is essential to clear thinking about a host of issues in the law of federal-state relations, including the scope of federal legislative power under the Commerce Clause, Congress's authority to regulate states in connection with traditional government functions, and the scope of states' immunity from damages actions arising under federal law. But it is not always so. Sometimes, if we want to get a handle on what's at stake in a vertical federalism case, it is necessary to consult the constitutional interest in union.[8]

The primary goal of this Article is to demonstrate that the constitutional interest in union does important, independent work in vertical federalism cases. I will show, in particular, that across a wide range of cases relating to the allocation of power between the federal government and the states, the states are constrained by a duty to acknowledge their status, and their citizens' identities, as members of a political community that is national in scope. These decisions, we will see, are conventionally defended in supremacy-based terms. But in fact they are driven by an ethic of union.

Shifting to a union-based understanding of these pockets of case law has three principal virtues. First, and most narrowly, union supplies a more persuasive analytic foundation for the Court's decisions in these areas than the standard supremacy-based accounts. The cases in question are rightly decided, but you could be forgiven for having doubts after reading the Justices' opinions. Second, greater attention to union's role across these bodies of case law affords us a clearer picture of the structure of our Constitution. It reveals that supremacy is not the only constitutional value doing nationalist work in our federal system, and that union's influence on the shape of our federalism is not limited to matters of interstate relations. Finally, a union-based approach allows us to better understand the character of the legal rules established in these cases. In particular, it calls attention to the fact that

7 This is straightforwardly true of national supremacy. *See* U.S. CONST. art VI. That state autonomy qualifies as a fundamental constitutional value is reflected—less explicitly, but still quite clearly—in the Tenth Amendment and in the Framers' decision to enumerate the powers of the national government. *See id.* amend. X.

8 As I explain later, the union-oriented rules I explore in this Article are not unrelated to the interest in national supremacy. *See infra* subsection I.B.2. But they operate differently from the garden-variety, preemption style constraints on state autonomy that are typically associated with that interest.

the rules in question are concerned with the expressive significance of the law. They are concerned, in other words, not with the direct material consequences of the state statutes under review, but with the fact that those statutes send the wrong message about the relationship between the national government and the states. Supremacy-based analysis obscures this point entirely.

This last point is of particular interest because, while expressivist approaches to constitutional rules pertaining to individual rights have received a great deal of scholarly attention,[9] academic commentary exploring expressivism and federalism is in relatively short supply.[10] And while a small number of scholars have joined issue on the question of whether *federal law* might be unconstitutional because it expresses the wrong view of state sovereignty or state autonomy,[11] the relevant commentary generally neglects the possibility that *state law* might be constitutionally infirm because it expresses the wrong view of the national government, federal law, or our union.[12] But there is no reason to think that arguments about expressivism and federalism should run in one direction only and, indeed, the cluster of cases I explore here supports exactly this point. To see this, however, one must look beyond the supremacy frame that so dominates the Justices' opinions and the attendant academic commentary.

My analysis proceeds in three parts. Part I lays the foundation for my claim that the constitutional interest in union does important work in vertical federalism cases. It does so through a detailed analysis of the Supreme

9 *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533–45 (2000) (developing an expressivist account of equal protection doctrine); *id.* at 1545–51 (Establishment Clause); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13–43 (2000) (Equal Protection Clause); William P. Marshall, "*We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986) (Establishment Clause).

10 Exceptions include Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1316–47 (2000) (offering an expressivist defense of the Supreme Court's anti-commandeering doctrine); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003) (examining the law of state sovereign immunity—in particular, its recent focus on the dignity of states as sovereign entities—through an expressivist lens); and Anderson & Pildes, *supra* note 9, at 1556–64 (exploring expressivist accounts of the Rehnquist Court's anti-commandeering and sovereign immunity decisions). For skeptical consideration of expressivist accounts of federalism doctrine, see Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 133–42.

11 *See* Anderson & Pildes, *supra* note 9, at 1556–64; Cox, *supra* note 10, at 1348.

12 The important exception is Anderson & Pildes, *supra* note 9, at 1554 (arguing that the Supreme Court's dormant commerce doctrine is rooted in the notion that "protectionist legislation expresses a constitutionally impermissible attitude toward the interests of other States in the political union"). While Anderson and Pildes contemplate the possibility that state laws might be unconstitutional because they express the wrong view of our union, they do so only in connection with their discussion of horizontal federalism. *Id.* at 1554–55. They do not entertain the possibility that a state law might be constitutionally infirm because it expresses the wrong view of our national government and of states' and citizens' relationship to it.

Court's "valid excuse" decisions—the line of cases relating to the constitutional limits on state courts' authority to decline jurisdiction over federal causes of action. I will show that the interest in national supremacy has emerged as the dominant theme in these cases—especially in the Supreme Court's 2009 decision in *Haywood v. Drown*,[13] which represents the most recent installment in this line—and that the interest in union has received only superficial attention. I then argue that the supremacy-based rationale relied upon by the Court supplies an inadequate foundation for the constraints on state autonomy recognized by the Justices, and I attempt to demonstrate that the cases are better understood by reference to the constitutional interest in union.

Part II situates the valid excuse cases within a broader constitutional framework. It examines Supreme Court decisions from the disparate fields of intergovernmental tax immunity, foreign affairs, and voting rights to help build the case that *Haywood* and its forebears are part of a wide-ranging jurisprudence of union. Here too, we will see that judges and commentators tend to favor supremacy-based accounts of the relevant legal rules, and here too we will see that these accounts are wanting.

In Part III, finally, I attempt to deepen our understanding of the jurisprudence of union. I do this, first, by demonstrating that the constraints on state autonomy explored in this Article are best understood in expressivist terms. Next, I test the constitutional bona fides of the jurisprudence of union by considering its fit with constitutional text, history, structure, and precedent, and by assessing whether the union-based constraints on state autonomy tend to advance or undermine the functional values typically associated with our federal system. I conclude with a brief assessment of how the jurisprudence of union might apply in contexts not yet considered by the courts.

I. State Jurisdictional Autonomy, Federal Supremacy, and the Constitutional Interest in Union

A. *The* Haywood *Decision*

Haywood v. Drown involved two § 1983 actions filed in New York state court by a prison inmate against employees of New York's Department of Corrections. The plaintiff, Keith Haywood, alleged violations of his civil rights in connection with three prison disciplinary proceedings and an altercation with corrections officers.[14] The trial court dismissed the actions on the ground that section 24 of the New York Correction Law prohibited the exercise of jurisdiction. Section 24 provided that New York courts cannot hear suits for damages filed by prison inmates against corrections officers for actions taken in the scope of their employment.[15] Plaintiffs who wish to file

13 556 U.S. 729 (2009).

14 *Id.* at 731–32.

15 N.Y. Correction Law § 24 (McKinney 2003 & Supp. 2012).

such actions are required, instead, to substitute the State of New York as defendant and to seek relief in the New York Court of Claims.[16] A panel of the New York Appellate Division affirmed the trial court's dismissal, as did the New York Court of Appeals.[17]

A line of cases stretching back to the early twentieth century establishes that while state courts are generally competent to entertain federal claims and presumptively enjoy concurrent jurisdiction over federal causes of action, they may refuse to adjudicate a federal claim so long as they have a "valid excuse" for doing so.[18] The central question at issue in *Haywood* was whether section 24—and the policy underlying it—qualified as a constitutionally valid excuse. If it did not, the dismissal of Haywood's § 1983 claims would be impermissible under the Supremacy Clause.

In answering this question in the affirmative, the New York Court of Appeals focused its attention on the fact that section 24 applied evenhandedly to state and federal causes of action. The statute, in other words, prohibited prison inmates from bringing damages actions against corrections officers regardless of whether their claims sounded in state or federal law.[19] According to the Court of Appeals, this sufficed to insulate New York's jurisdictional scheme from Supremacy Clause attack. "[A] state rule will be deemed . . . 'valid,'" the court explained,

> if it does not discriminate against federal claims in favor of analogous state claims. . . . [I]f the same type of claim, arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim. . . .
>
> . . . [B]ut if the state does not hear a particular state claim, it may also decline to consider related federal causes of action in its state courts.[20]

Because section 24 did not distinguish between § 1983 claims and analogous causes of action created by state law, the Court of Appeals determined that New York's jurisdictional scheme was constitutionally sound.[21]

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16 *See id.* The New York Court of Claims is a markedly less favorable forum for plaintiffs. *See Haywood*, 556 U.S. at 734 ("[P]laintiffs in the Court of Claims must comply with a 90-day notice requirement, are not entitled to a jury trial, have no right to attorney's fees, and may not seek punitive damages or injunctive relief." (citations omitted)).

17 *Haywood*, 556 U.S. at 732.

18 The Supreme Court explicitly recognized the presumption of state court competence to adjudicate federal claims as early as 1876. *See* Claflin v. Houseman, 93 U.S. 130, 136–37 (1876). The Court first acknowledged the "valid excuse" doctrine in those particular terms in *Douglas v. New York, New Haven & Hartford Railroad*, 279 U.S. 377, 388 (1929). The principle underlying the doctrine is traceable to *Mondou v. New York, New Haven & Hartford Railroad* (*Second Employers' Liability Cases*), 223 U.S. 1, 59 (1911).

19 Haywood v. Drown, 881 N.E.2d 180, 185 (N.Y. 2007) (noting that section 24 "applies with equal force to all state and federal claims"), *rev'd*, 556 U.S. 729.

20 *Id.* at 184 (citations omitted) (internal quotation marks omitted).

21 *Id.* at 185. The Court of Appeals was not alone in its understanding that the relevant Supreme Court precedents established a simple nondiscrimination requirement. *See, e.g.*, Brewer v. Bd. of Trs. of Univ. of Ill., 791 N.E.2d 657, 664 (Ill. Ct. App. 2003) (affirming the dismissal of a federal claim and emphasizing that "Illinois does not discriminat[e]

The Supreme Court's valid excuse cases do, indeed, draw attention to the question of whether state jurisdictional rules apply evenhandedly to state and federal claims.[22] In fact, every one of the pertinent Supreme Court decisions leading up to *Haywood* can be sorted by reference to the question of anti-federal discrimination: state court dismissals of federal causes of action under discriminatory jurisdictional schemes have uniformly been reversed, while dismissals triggered by evenhanded jurisdictional rules have all been affirmed.[23] At the same time, however, language in the relevant precedents suggests that the valid excuse doctrine is about more than discrimination alone. In particular, the cases intermittently maintain that states cannot strip their courts of jurisdiction to adjudicate federal causes of action simply because they disagree with the policy underlying federal law.[24] Crucially, Haywood argued that New York's legislature enacted section 24 for precisely this sort of reason (i.e., because it disagreed with federal policy pertaining to damages actions against corrections officers),[25] and the state did not put up

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against federal causes of action; its courts do not adjudicate claims of discrimination arising from state law, either" (alteration in original) (citation omitted) (internal quotation marks omitted)); Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 838 (1983) ("States may refuse to adjudicate federal claims when the jurisdictional restriction applies neutrally to exclude claims based on state laws as well.").

22 *See, e.g.*, Testa v. Katt, 330 U.S. 386, 394 (1947); Herb v. Pitcairn, 324 U.S. 117, 123 (1945); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 233–34 (1934).

23 *Compare* Howlett v. Rose, 496 U.S. 356, 382–83 (1990) (reversing state court dismissal of federal claims where the dismissal was pursuant to a discriminatory jurisdictional scheme), *Testa*, 330 U.S. at 394 (same), *McKnett*, 292 U.S. at 233–34 (same), *and Mondou*, 223 U.S. at 59 (same), *with* Missouri *ex rel.* S. Ry. v. Mayfield, 340 U.S. 1, 5 (1950) (remanding so that the state court might reconsider its denial of a motion to dismiss a federal claim under the doctrine of *forum non conveniens* in light of the Court's clarification that such dismissal is permitted so long as the doctrine is evenhandedly applied), *Herb*, 324 U.S. at 128 (affirming state court dismissal of federal causes of action where the dismissal was pursuant to a jurisdictional scheme that was evenhanded in its treatment of federal claims), *and Douglas*, 279 U.S. at 387–88 (same).

Felder v. Casey, 487 U.S. 131 (1988), is something of an exception. In that case, the Court reversed the dismissal of a § 1983 action from the Wisconsin courts even though the dismissal was pursuant to a state notice-of-claim statute that applied with equal force to state and federal causes of action. *See id.* at 160 (O'Connor, J., dissenting) (emphasizing that the statue under review "applies to all actions against municipal defendants, whether brought under state or federal law"). But the question at issue in *Felder* is somewhat different from the one at issue in the *Haywood* line of cases. *Felder* involved a procedural requirement that the state courts wished to apply to § 1983 actions that fell within their jurisdiction. And the question before the Court, ultimately, was whether the relevant procedural rule was inconsistent with the remedial purposes of § 1983. *Haywood*-type cases present the distinct (though related) question whether states can altogether exclude particular federal causes of action from their courts' jurisdiction.

24 *See infra* text accompanying notes 58–61.

25 *See* Brief for Petitioner at 18, *Haywood*, 556 U.S. 729 (No. 07-10374), 2008 WL 3851618.

much of a fight along this dimension.[26] Hence, the outcome in *Haywood* would turn on which conception of the valid excuse doctrine the Supreme Court endorsed. If the Court determined that state-federal neutrality alone suffices to establish the constitutionality of state jurisdictional rules (for Supremacy Clause purposes, at least), then section 24 would pass constitutional muster; if the Court held that jurisdictional rules—even neutral ones—cannot be predicated on state disagreement with federal policy, then the application of section 24 to Haywood's claims would be constitutionally impermissible.

The Court endorsed the latter view. Writing for a bare majority, Justice Stevens explained that "a State cannot simply refuse to entertain a federal claim based on a policy disagreement," and he emphasized that "equality of treatment does not ensure that a state law will be deemed a . . . valid excuse for refusing to entertain a federal cause of action."[27] "Although the absence of discrimination is necessary to our finding a state law neutral," the Court held, "it is not sufficient."[28]

The Justices' account of why this is so and, as a corollary, of why section 24 is constitutionally infirm, wavers somewhat erratically between two distinct (but, in the Court's view, related) lines of reasoning. First, the Court echoed the discussions from prior cases signaling that disagreement with federal policy cannot supply the predicate for the dismissal of a federal cause of action from state court.[29] The majority credited Haywood's claim that the enactment of section 24 was motivated by hostility to damages actions against corrections officers,[30] and it highlighted the tension between this policy and the one embodied in § 1983, which invites damages actions against any state official—including a corrections officer—who is accused of violating federal rights.[31]

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26 Though the defendants insisted that New York's jurisdictional policy was not motivated by hostility to the covered claims, they conceded that it was driven by the belief that damages actions filed by prisoners against corrections officers "are numerous and often frivolous." Brief for Respondents at 18, *Haywood*, 556 U.S. 729 (No. 07-10374), 2008 WL 4441076.

27 *Haywood*, 556 U.S. at 737–38.

28 *Id.* at 739.

29 *Id.* at 736 (citing Howlett v. Rose, 496 U.S. 356, 371 (1990) and Mondou v. N.Y, New Haven & Hartford R.R. (Second Employers' Liability Cases), 223 U.S. 1, 57 (1911)).

30 *Id.* at 733 & n.3, 736, 739, 742. The Court buttressed its claim that section 24 was motivated by disagreement with federal policy by emphasizing that New York's trial courts of general jurisdiction routinely adjudicate claims analogous to those covered by section 24. In particular, those courts are free to entertain damages actions under § 1983 against government officials other than corrections officers and can even adjudicate § 1983 suits against corrections officers for relief other than damages. *Id.* at 739–40. This militated against the conclusion that section 24 was an innocuous effort to allocate cases across courts based on the different tribunals' subject matter competence and contributed to the impression that the statute was an exercise in resistance to federal policy. *Id.* at 741 ("[W]e find little concerning 'power over the person and competence over the subject matter' in Correction Law § 24." (quoting *Howlett*, 496 U.S. at 381)).

31 *See id.* at 736–37.

Second, the Court took pains to emphasize that the dismissal of a federal cause of action from state court, even under an evenhanded jurisdictional rule, might do violence to federal law and policy. Thus, the Court maintained that the jurisdiction-based dismissal of a federal cause of action from state court might "undermine federal law,"[32] "thwart [the] enforcement" of a federal claim,[33] "burden . . . a federal cause of action,"[34] or "nullify a federal right."[35] The Justices insisted, in the same vein, that Correction Law section 24 was "effectively an immunity statute cloaked in jurisdictional garb"—which is to say that the rule in question was a thinly veiled effort to quash the covered claims entirely, not an exercise in judicial housekeeping.[36] Of course, the Supremacy Clause forbids states from immunizing defendants from liability under federal law;[37] and it forbids them, more generally, from nullifying or thwarting the enforcement of federal rights. Hence, the application of section 24 to defeat Haywood's § 1983 actions was deemed unconstitutional, and the dismissal of his claims was reversed.

B. Understanding the Doctrine of Valid Excuse: Supremacy?

The *Haywood* Court deployed two rationales to justify its decision, and it is important to distinguish between them. The Court's first contention—that mere disagreement with federal policy does not supply a legitimate basis for a state court's refusal to adjudicate a federal claim—provides a helpful way of understanding what is constitutionally troubling about statutes like Correction Law section 24. When a state uses its jurisdictional law to express disagreement with federal policy, it refuses to take ownership of and responsibility for the norms endorsed by the nation. This is an affront to the constitutional value of union.

I will focus my attention on union later in this Part and in Parts II and III. For now, however, I wish only to emphasize that neither *Haywood* nor its predecessor cases focuses attention on this constitutional value. Indeed, aside from the occasional gesture in the direction of the Supremacy Clause, the valid excuse cases do virtually nothing to explain what constitutional values are threatened by state courts' refusal to exercise jurisdiction over federal claims or, more generally, by states' expression of disagreement with federal policy. The interest in union, in particular, barely makes its way to the surface of the Court's analysis in these cases, and it never receives sustained attention. Thus, *Haywood* and its forebears tell us *what* the states cannot do when it comes to refusing jurisdiction over federal causes of action, but they

32 *Id.* at 739.

33 *Id.* at 741 n.8.

34 *Id.*

35 *Id.* at 736.

36 *Id.* at 742; *see also id.* at 736 n.5 ("In many respects, Correction Law § 24 operates more as an immunity-from-damages provision than as a jurisdictional rule.").

37 *Id.* at 737 n.5 (noting that a "State's decision to extend immunity 'over and above [that which is] already provided in § 1983 . . . directly violates federal law'" (alteration in original) (quoting Howlett v. Rose, 496 U.S. 356, 375 (1990))).

never successfully explain *why* the states cannot do these things. As I explain below, this has caused confusion as to the nature of the constitutional defects that inhere in statutes like section 24, and it impedes efforts to understand how the *Haywood* line of decisions fits into the broader mosaic of U.S. constitutional law.

Before I address these (missing) features of the Court's analysis in the valid excuse cases, however, I want to examine the second set of justifications put forward by the Court in *Haywood*—namely that state court jurisdictional dismissals carry the capacity to "nullify" or "undermine" federal claims, to "burden" federal causes of action, or to "thwart" the enforcement of federal law. This line of reasoning is of interest for two reasons. First, these characterizations of the effect on federal law of state court jurisdictional dismissals are, at best, significantly overstated; at worst, they are just plain wrong. If the doctrine articulated in *Haywood* is to be defended, this is not the way to do it. Second, these claims provide a clear example of the sort of confusion that is encouraged by the Court's half-hearted attention to the constitutional values underlying the rules it has crafted in this area. Had the Court seriously engaged the question of why, exactly, state expressions of disagreement with federal policy are constitutionally troubling, it might have avoided these wrongheaded claims about the consequences of jurisdiction-based dismissals from state court.

1. Nullification of Federal Law and Related Imaginary Problems

Though the majority opinion in *Haywood* expresses serious concern about the threat to federal law that is posed by the jurisdiction-based dismissal of federal causes of action from state court, it tells us little about the precise mechanics of this threat. In particular, the opinion does not explain *how* section 24 served to "undermine"[38] (or "nullify" or "thwart" or "burden") § 1983 claims; it does not explain why section 24 is properly regarded as "an immunity statute cloaked in jurisdictional garb;"[39] and—perhaps most telling—it does not respond to the insistent claims in Justice Thomas's dissenting opinion that section 24 did none of these things and in fact did not function like an immunity statute.

As Justice Thomas emphasized, jurisdictional statutes operate differently from other kinds of legal rules that might trigger the dismissal of a claim from a particular tribunal. "A jurisdictional statute," he explained, "simply deprives the relevant court of the power to decide the case altogether[, and] . . . operates without prejudice to the adjudication of the matter in a competent forum."[40] Thus, the dismissal of Haywood's § 1983 claims from the New York courts posed no obstacle to his re-filing the very same claims in

38 *Id.* at 739.

39 *Id.* at 742.

40 *Id.* at 769 (Thomas, J., dissenting) (citations omitted); *see also id.* at 766 ("Therefore, even if every state court closed its doors to § 1983 plaintiffs, the plaintiffs could proceed with their claims in a federal forum.").

the federal system. And New York's jurisdictional law would of course have no effect whatever on his capacity to secure relief there. This is important because it makes some of the central claims advanced in the majority opinion rather difficult to defend. In particular, it is not clear how a federal cause of action is "undermined"—and it is certainly not *nullified*—by a rule that requires the plaintiff to walk across the street to the federal courthouse and file it there. As the dissenters argued: "Jurisdictional statutes . . . by definition are incapable of undermining federal law. . . . The sole consequence of [a] jurisdictional barrier is that the law cannot be enforced in one particular judicial forum."[41]

I don't think the *Haywood* Court meant to suggest that section 24 undermined federal law in the sense that (a) the exercise of state court jurisdiction over § 1983 claims is mandated by § 1983 itself, and so (b) the federal directive undermined by section 24 is a *jurisdictional* one.[42] Nothing in the text of the *Haywood* decision suggests that what section 24 threatened to undermine or nullify was federal jurisdictional policy. Rather, the most natural reading of the majority opinion is that by closing the doors of the state courthouse to the covered claims, section 24 threatened the central *substantive* aim of § 1983 (i.e., assuring that relief could be had for constitutional violations by state officials).[43]

Another possibility—perhaps captured by the Court's suggestion that section 24 threatened to "burden" § 1983 claims[44]—is that the Justices were concerned that a state court's refusal to adjudicate a federal cause of action would make recovery less convenient or more uncertain for plaintiffs. The elimination of state court jurisdiction over a federal cause of action will compel some litigants to travel a greater distance to secure relief. (Sometimes

41 *Id.* at 769. The analysis here presumes the availability of federal courts with statutory jurisdiction over the claims in question. If lower federal courts were not available to hear the relevant claims, the constitutional analysis might look different. *See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1585 (1986).

42 As Justice Thomas emphasized, and the majority did not dispute, § 1983 does not explicitly require state courts to accept jurisdiction over the cause of action it creates. *See Haywood*, 556 U.S. at 765 (Thomas, J., dissenting). *But see* Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 347 (1976) (arguing that when Congress establishes concurrent state-federal jurisdiction over a federal cause of action "presumably Congress . . . has decided that the substantive policies embodied in the federal statute creating the cause of action and the federal policies concerning the administration of the federal court system are best advanced by distributing the case burden between the state and federal courts").

43 This is reflected, for example, in the Court's contention that section 24 "operates more as an immunity-from-damages provision than as a jurisdictional rule," and its observation that "[t]he State cannot condition its enforcement of federal law on the demand that those individuals whose conduct federal law seeks to regulate must nevertheless escape liability." *Haywood*, 556 U.S. at 736 n.5, 737.

44 *Id.* at 741 n.8.

the federal courthouse is in fact not across the street.)[45] And some litigants may prefer the state jury pool to the federal.[46] From the perspective of these claimants, litigating in federal court might well be "burdensome," and perhaps the Court meant to intimate that the imposition of these burdens is constitutionally problematic in its own right and tantamount to the "nullification" or "undermining" of the underlying claims.

Setting aside the question of whether the existence of such impediments to relief means that a cause of action has been nullified, this line of reasoning finds no support in the text of *Haywood* itself. The majority opinion makes no mention of convenience to litigants, jury pool issues, or similar considerations. Nor, for that matter, do any of *Haywood*'s predecessor cases mention these sorts of concerns.[47]

Meanwhile, the Court's assertion that section 24 "is effectively an immunity statute cloaked in jurisdictional garb" is simply untrue. A rule conferring bona fide immunity on a particular class of defendant would trigger dismissal with prejudice and therefore *would* pose an obstacle to the ultimate vindication of any claim to which it applied.[48] As the dissenting Justices in *Haywood* emphasized, however, section 24 genuinely *operated jurisdictionally*[49] (i.e., it led to dismissal *without* prejudice), and so it is difficult to understand why the Court characterized that statute as a species of immunity rule.

What, then, are we to make of the majority's insistence that states "lack authority to nullify a federal right,"[50] or its claim that a state cannot "thwart [the] enforcement"[51] of federal law? These seem to be uncontroversially accurate accounts of the law, but they lack resolving power on the facts of a case like *Haywood* where the state statute at issue did neither of these things.

To some extent, these components of the Court's analysis can probably be chalked up to careless hyperbole. Section 24 triggered the dismissal of federal claims from state court; the statute evinces hostility to a subset of § 1983 actions; and it suggests a rather cavalier attitude on New York's part

45 *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1027 (1995) ("Congress's primary objective in securing state court enforcement of federal law is probably to assure the availability of a convenient judicial forum without having to create a vast army of geographically dispersed federal courts.").

46 *See, e.g.*, Felder v. Casey, 487 U.S. 131, 150 (1988) ("Litigants who choose to bring their civil rights actions in state courts presumably do so in order to obtain the benefit of certain procedural advantages in those courts, or to draw their juries from urban populations.").

47 Indeed, in *Howlett*, the Court expressly disclaimed the notion that these sorts of considerations drive the requirement that state courts adjudicate federal claims. Howlett v. Rose, 496 U.S. 356, 367 (1990).

48 *See, e.g.*, Howlett v. Rose, 537 So. 2d 706 (Fla. Dist. Ct. App. 1989) (affirming the dismissal with prejudice of plaintiff's § 1983 claim on the ground that defendant was protected by a state-created immunity), *rev'd*, 496 U.S. 356.

49 *Haywood*, 556 U.S. at 772 (Thomas, J., dissenting).

50 *Id.* at 736 (majority opinion).

51 *Id.* at 741 n.8.

toward federal law and policy. It seems fair to say that there is *something* unsettling about section 24's orientation toward federal law, and the overheated rhetoric in *Haywood* might be just a blunderbuss way of communicating as much.

But something more is going on here, I think. For at some level, the Court's confused foray into the rhetoric of nullification and undermining was entirely predictable. Those terms reflect the dominant mode of conceptualizing matters of federal supremacy in our legal culture. And so, once the Court determined that state courts' refusal of jurisdiction over federal causes of action implicates the interest in supremacy—and the doctrine of valid excuse has been grounded squarely in the Supremacy Clause at least since the 1947 decision in *Testa v. Katt*[52]—reliance on the discourse of nullification and undermining followed naturally.

As I explain in the subsection that follows, the Court's decision to frame these cases in supremacy-based terms is understandable. When states close their courthouse doors to federal causes of action because of disagreement with the policy embodied in federal law, it makes sense to say that federal supremacy is under threat. But it is not threatened in the same way that it is in garden variety, preemption-style Supremacy Clause cases, and the line of decisions leading up to and including *Haywood* is inattentive to this point. The overclaiming that characterizes the decision in *Haywood* is both a byproduct, and an example, of this error.

2. Disagreement with Federal Policy and the Interest in Federal Supremacy

Before embarking on its misguided detour into the stuff of nullification and undermining, the *Haywood* Court stated that Correction Law section 24 violated the Supremacy Clause because it constituted a rejection of federal policy pertaining to the liability of government officials. Justice Stevens explained:

> In passing Correction Law § 24, New York made the judgment that correction officers should not be burdened with suits for damages arising out of conduct performed in the scope of their employment. . . . The State's policy, whatever its merits, is contrary to Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages.[53]

New York, the Court held, could not simply jettison federal policy in favor of its own and craft its jurisdictional rules accordingly.[54]

This line of reasoning has two significant virtues. First, in sharp contrast to the Court's battery of claims about section 24 undermining Haywood's § 1983 actions, thwarting the enforcement of federal law, and so on, its contention that New York's jurisdictional law reflected disagreement with federal

52 330 U.S. 386, 394 (1947).

53 *Haywood*, 556 U.S. at 736–37.

54 *Id.* at 736.

policy is unassailable. As the majority emphasized, New York's jurisdictional rule was premised on the notion that damages actions against corrections officers are "by and large frivolous and vexatious."[55] Quite obviously, § 1983 endorses a different view, and so the tension between the relevant state and federal policies is patent.[56]

Second, the central legal claim advanced in this part of the Court's opinion has deep roots in the precedent case law. As noted earlier,[57] the Court has long insisted that states cannot refuse to adjudicate a federal claim simply because they regard it as bad policy. Thus, in *Second Employers' Liability Cases*, the Court rejected the notion that a state tribunal might decline to exercise jurisdiction over a federal claim on the ground that "the Act of Congress is not in harmony with the policy of the State."[58] And in *Testa v. Katt*, the Court explained that "a state cannot 'refuse to enforce [a] right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress.'"[59] Finally, in *Howlett v. Rose*, the Court held that "[t]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content."[60] So when the *Haywood* Court held that "New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy,"[61] it was standing on firm precedential ground.

What is frustrating about this part of the analysis in *Haywood*, however, is the Court's failure to give sustained attention to the question of what constitutional values lay behind this particular constraint on state judicial autonomy. It is clear that the Justices regarded the Supremacy Clause as the

55 *Id.* at 733.

56 The dissenting Justices in *Haywood* resisted the suggestion that section 24 was an expression of disagreement with the policy embodied in § 1983. Specifically, Justice Thomas insisted that "[t]he New York courts . . . have not declared a 'category' of § 1983 claims to be 'frivolous' or to have 'no merit' . . . . These courts have simply recognized that they lack the power to adjudicate this category of claims regardless of their merit." *Id.* at 772 (Thomas, J., dissenting). This claim is baffling. It is true that a particular court's reliance on section 24 to justify the dismissal of a § 1983 action would amount to nothing more than recognition of the statutory limits on its authority. And so it is accurate to say, as the dissenters did, that the New York *courts* "have not declared a 'category' of § 1983 claims to be 'frivolous.'" *Id.* But the question remains why those courts lacked authority to adjudicate the claims in question, and the answer is: "because the state legislature decided they are likely to be frivolous." Notably, the dissenters did not contest the majority's claim—and given the record, how could they?—that this was the reason for the enactment of section 24. *See supra* note 30 and accompanying text. The dissenters' argument on this point thus misses the mark by a wide margin.

57 *See supra* text accompanying note 24.

58 Mondou v. N.Y., New Haven & Hartford R.R. (Second Employers' Liability Cases), 223 U.S. 1, 57 (1911).

59 Testa v. Katt, 330 U.S. 386, 393 (1947) (quoting Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 222 (1916)).

60 Howlett v. Rose, 496 U.S. 356, 371 (1990).

61 *Haywood*, 556 U.S. at 740.

operative constitutional text,[62] and it is evident that the Court was concerned with the subordination of congressional policy to the policy of the state of New York.[63] But this kind of subordination is different from the threatened trumping of federal law that is at issue in conventional, preemption-style Supremacy Clause cases. And while it is easy to see what constitutional value is on the chopping block in a standard preemption case—national law would not be "supreme," in any meaningful sense, and the achievement of legitimate federal objectives might be seriously hampered if state law could conclusively prevent the vindication of federal claims—the same cannot be said where limitations on state court jurisdiction are at issue. The *Haywood* Court ignored this distinction entirely. As a result, the Court's occasional references to the value of supremacy do little to clarify what is at stake in cases of this sort.

To be clear, I do not mean to resist the notion that the constitutional value threatened by jurisdictional rules such as Correction Law section 24 can sensibly be labeled "supremacy." Any subordination of federal policy to that of a state stands in tension with the notion that federal law is "supreme." And this is true even if the tension is relatively weak because the subordination takes the form of a rule that does not impede the ultimate vindication of federal claims or the enforcement of federal law. But the *Haywood* Court gave no indication that this entailment of federal supremacy is distinct from the trumping function of federal law, nor did it explain why the particular breed of supremacy marked by Article VI should be understood to prohibit this comparatively mild exercise in subordination. Once we set aside the nullification/undermining distraction, then, we are left to wonder what is at stake, from a constitutional perspective, when state courts refuse jurisdiction over federal claims.

C. The Law of the Land and the Constitutional Interest in Union

It is possible to find in *Haywood* and its forebears faint signals that the doctrine of valid excuse is motivated by something other than classic supremacy concerns (i.e., something other than concern that the national government supply the binding legal rule in the face of state law to the contrary). In particular, the cases intermittently suggest that the relevant constitutional constraints on state jurisdictional autonomy are best understood by reference to the interest in union—the interest in binding the individual states and their citizens into a cohesive, national political community. When state courts discriminate against federal claims, or refuse jurisdiction over federal causes of action on grounds of policy disagreement, they treat federal law and policy as exogenous forces—as the impositions of an outsider political community. This is forbidden not because it is tantamount to the nullification of federal law, but because it is corrosive to the sense of union that our Constitution seeks to foster.

62 *See, e.g.*, *id.* at 731.
63 *Id.* at 736–37.

Thus, at the very outset of its discussion, the *Haywood* Court explained: "[We have] long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law 'together form one system of jurisprudence, which constitutes the law of the land for the State.'"[64] This passage is of interest because it suggests not that federal law *trumps* state law (which is the central concern of traditional supremacy analysis), but that, in a sense, federal law *is* state law. From this perspective, the threat posed by jurisdictional rules like the one under review in *Haywood* lies not so much in the state's failure to *subordinate* its law to federal law, but in its failure to *internalize* federal law—to treat federal law as its own.

This conception of states' relationship to federal law is also implicit in the *Haywood* Court's reliance on *Second Employers' Liability Cases* for the proposition that states cannot decline jurisdiction over federal causes of action on grounds of policy disagreement because doing so "'presupposes what in legal contemplation does not exist.'"[65] The thing that "does not exist" here is a distinction between the content of federal policy and the policy of an individual state. And the key point, once again, is that federal law and federal policy are the states' own; when state courts refuse jurisdiction over federal claims because of disagreement with federal policy, they disregard this aspect of our constitutional architecture.[66]

Unfortunately, the *Haywood* Court did not develop or return to this theme. The opinion simply asserts that states are required to orient themselves toward federal law in the specified ways, but offers no argument (unless gesturing in the direction of the words "Law of the Land" counts as "argument") in support of this assertion.[67] Moreover, as we have seen

64 *Id.* at 734–35 (quoting Claflin v. Houseman, 93 U.S. 130, 136–37 (1876)).

65 *Id.* at 736 (quoting Mondou v. N.Y., New Haven & Hartford R.R. (Second Employers' Liability Cases), 223 U.S. 1, 57 (1911)).

66 This point is more fully developed in Caminker, *supra* note 45, at 1022–26.

67 This shortcoming is characteristic of the valid excuse cases as a whole. Some of the decisions in this line fail to identify any textual foundation for the rule they apply and do not devote even a single word to the question of what is at stake, from a constitutional perspective, when state courts decline jurisdiction over federal causes of action. *See* Missouri *ex rel.* S. Ry. v. Mayfield, 340 U.S. 1 (1950); Herb v. Pitcairn, 324 U.S. 117 (1945); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934); Douglas v. N.Y., New Haven & Hartford R.R., 279 U.S. 377 (1929). Others do little more than point to the Supremacy Clause (the "Law of the Land" passage in particular) and, like *Haywood*, assert that federal law and policy count as the states' own. *See* Howlett v. Rose, 496 U.S. 356, 367 (1990); Testa v. Katt, 330 U.S. 386, 389 (1947); *Mondou*, 223 U.S. at 58.

The academic literature relating to this line of cases is much the same. Thus, some commentators count the interest in federal supremacy as the primary nationalist value at stake when it comes to state courts' obligation to adjudicate federal claims. *See, e.g.*, Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 73, 92 (1999); Louise Weinberg, *The Federal-State Conflict of Laws: 'Actual' Conflicts*, 70 TEX. L. REV. 1743, 1773–84 (1992). Others focus attention on the passages highlighted above and emphasize states' obligation to treat federal law as their own; but even these commentators tend not to connect this requirement

already, the Court compounded the problem by repeatedly signaling that the central constitutional value at stake when state courts decline jurisdiction over federal causes of action is the value of supremacy, conventionally understood.

Prior cases in the valid excuse line also hint that the doctrine has its roots in considerations of union. In *Testa v. Katt*, for example, the Justices reviewed a decision by the Rhode Island Supreme Court dismissing a claim under the Federal Emergency Price Control Act (EPCA). The state court had determined that the EPCA (which authorized the award of treble damages to successful plaintiffs) was penal in nature, and it insisted that states "need not enforce the penal laws of a government which is foreign."[68] The Supreme Court dismissed this reasoning out of hand and invoked the interest in union to explain why:

> [W]e cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that *the States of the Union constitute a nation*.[69]

The *Testa* Court drew support for its decision—including this particular passage—from the Supremacy Clause,[70] but there is no indication that the Court was trading in the traditional, federal-law-trumps-state-law sense of supremacy that would figure so heavily in the *Haywood* decision. To the contrary, the passage quoted above suggests that state courts' obligation to entertain federal causes of action is not so much a feature of states' membership in

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to the constitutional interest in union. *See, e.g.*, Caminker, *supra* note 45, at 1024; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2011–12 (1993). Others have argued that Congress is authorized to compel state courts to adjudicate federal claims by virtue of its Article I power to constitute tribunals inferior to the Supreme Court of the United States. *See, e.g.*, James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 225–28 (2007); Prakash, *supra*, at 2007–32. These commentators, too, do not connect state courts' obligation along this dimension to the interest in union.

The closest one comes to an exception to this widespread pattern of ignoring union's role in the development of the doctrine of valid excuse is a recent article by Professor Charlton Copeland. *See* Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511, 581 (2010) (noting that when a state declines jurisdiction over federal causes of action on grounds of policy disagreement, it "rupture[s] the state's relationship from the whole"). Copeland, however, is ultimately concerned not so much with the duties that flow from states' membership in a political union—indeed, he is critical of judicial and scholarly efforts to frame the doctrine of valid excuse by reference to concepts like power and duty—as with the capacity of the valid excuse doctrine to reinforce a behavioral norm of "interest inclusion" between the federal government and the states. *Id.* at 519–24, 540.

68 *Testa*, 330 U.S. at 388.

69 *Id.* at 389 (emphasis added).

70 *Id.*; *see also id.* at 390–91, 394 (characterizing the doctrine in supremacy-based terms).

a nation in which federal law prevails over state law as it is a natural outgrowth of nationhood itself.

Second Employers' Liability Cases,[71] which is typically regarded as the progenitor of this line of decisions, also contains language hinting at a union-based foundation for the doctrine. In that case, the Justices reviewed a decision of the Connecticut Supreme Court affirming the dismissal of a claim arising under the Federal Employers' Liability Act (FELA). The state court's holding was premised, in part, on the notion that the policy reflected in the FELA "is not in accord with the policy of the State."[72] As noted earlier, the Supreme Court rejected this reasoning out of hand, explaining that it "presupposes what in legal contemplation does not exist."[73] The Court elaborated: "When Congress . . . adopted [the FELA], . . . it spoke for *all* the people and *all* the states, and thereby established a policy for *all*."[74] Here too, the crucial point is not so much that federal policy *trumps* state policy, as it is that federal policy *is* state policy.[75] The Court's emphasis in this passage—reflected in the recurring references to the federal government's authority to legislate for "all"—is on Congress's representation of a political community that is national in scope and inclusive of the states.

Howlett v. Rose likewise contains indications that the valid excuse doctrine is best explained by reference to the interest in union. In that case, the Court invalidated a Florida statute that had been construed to extend immunity from actions arising under § 1983 to a local school board. The Court drew on Alexander Hamilton's *Federalist 82* to explain its holding:

> "When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union."[76]

Like the fragments of *Testa* and *Second Employers'* cited above, this passage suggests that state courts' obligation to adjudicate federal claims flows not from federal law's status as superior to state law, but from states' responsibilities as members of a political union—in Hamilton's formulation, as "parts of one whole."

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71 *Mondou*, 223 U.S. at 1.

72 *Id.* at 55.

73 *Id.* at 57.

74 *Id.* (emphasis added).

75 The sentiment is echoed in *Testa*, which notes that "the policy of the federal Act is the prevailing policy in every state." 330 U.S. at 393. Of course, in unmistakable and important ways, federal law is *not* state law. It is neither enacted by state legislatures nor signed by state governors. It is the work-product of representative bodies that have constituencies falling outside of any particular state. It might have been more accurate for the Court to say that federal law is the law of the *people* of every state, and that this triggers obligations on the part of the states.

76 Howlett v. Rose, 496 U.S. 356, 369 (1990) (quoting THE FEDERALIST NO. 82, at 132 (Alexander Hamilton) (E. Bourne ed., 1947)).

As noted earlier, *Howlett* also indicates that a state cannot employ a jurisdictional rule to "dissociate [itself] from federal law."[77] In other words, states must acknowledge not only that they are bound *by* federal law, but that they are bound *to* federal law. And although the Court did not say so explicitly, this feature of states' relationship to federal law flows from their status as members of the political community that generated the legislation in question.

It bears emphasis, finally, that it is not only in scattered passages from the case law that we can see the relevance of union to the development of this body of doctrine. Rather, one of the central elements of the law of valid excuse—the nondiscrimination requirement—owes its shape and function to this constitutional value. The nondiscrimination principle establishes that states cannot afford federal causes of action less favorable treatment than they afford parallel causes of action arising under state law.[78] But why not? We have noted already that a litigant whose cause of action is dismissed from state court on the basis of a jurisdictional rule can simply re-file in an appropriate federal court,[79] and this is as true when the rule in question is discriminatory as it is when the rule is evenhanded. So supremacy, once again—at least in the conventional, trumping sense—cannot serve as the foundation for the relevant rule, and we are left to wonder what lies behind this longstanding, and largely uncontroversial,[80] feature of the doctrine.

Union is the obvious answer. When a federal cause of action is dismissed from state court pursuant to a discriminatory jurisdictional rule, the state does not deny that its courts are functionally competent to adjudicate the claim in question. And since, by hypothesis, the state courts stand ready and willing to enforce parallel causes of action sounding in state law, it cannot even be claimed that the dismissal of covered federal claims is an expression of disagreement with the policy commitments reflected in federal law. Dismissal is required in these cases simply because the cause of action is the work-product of an outsider political community.[81] And it should go without

77 *Id.* at 371.

78 *See supra* text accompanying notes 22–23. Though *Haywood* makes clear that there is more to the doctrine of valid excuse than non-discrimination, it reaffirmed that evenhanded treatment of state and federal claims is a prerequisite to the constitutionality of a state jurisdictional rule. *See supra* text accompanying note 28.

79 *See supra* text accompanying notes 40–41.

80 Although the Justices in *Haywood* split 5-4 on the question of whether a state jurisdictional rule that applies evenhandedly to state and federal claims might nonetheless violate the Supremacy Clause, only Justice Thomas endorsed the view that a discriminatory jurisdictional rule could pass constitutional muster. *See* Haywood v. Drown, 556 U.S. 729, 750 (2009) (Thomas, J., dissenting).

81 One could imagine defending such a rule on grounds of limited judicial resources, but this would not suffice to cause our union-based concerns to dissolve, since it would then raise the question of whether and why the state ought to be allowed to privilege claims rooted in the law of one political community of which state citizens are a part (the state itself) over claims derived from the law of another political community of which state citizens are a part (the nation).

saying that when a state formally classifies the federal government as an "outsider," it emphasizes political fragmentation rather than unity. In contrast, when a federal claim is ousted from state court by virtue of a jurisdictional rule that applies with equal force to state law claims, there is no prima facie reason to regard the dismissal as an exercise in dissociation from the national political community.[82] To be sure, an evenhanded state jurisdictional rule might ultimately prove inconsistent with the constitutional obligations borne of union—this is the central lesson of the *Haywood* decision—but the tension between anti-federal discrimination and the notion of political union is so screamingly obvious, it is hardly surprising that this feature of the law of valid excuse was settled upon quickly and has spawned little dissent in the century-plus since it was first articulated.

It bears repeating that, despite the features of the valid excuse decisions identified here, the doctrine does not present itself as an exercise in policing states' commitment to an ethic of union. For the most part, the pre-*Haywood*

82 Consider, for example, the jurisdictional rule upheld by the Court in *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945). That law prevented city courts in the State of Illinois from adjudicating claims—state or federal—arising outside the territorial jurisdiction of the court. The law was applied in *Herb* to support the dismissal of an action arising under the Federal Employers' Liability Act. *Id.* at 118. It is difficult to see how this application of Illinois law could be construed either as a comment on the merits of the policy embodied in the FELA or as a general expression of hostility toward federal law. The fact that the rule was trans-substantive, together with the fact that it applied to state law claims as well as federal claims, makes either inference untenable. From the perspective of union, then, reliance on the relevant Illinois law to support the dismissal of a federal claim was a non-event. To be sure, as *Haywood* illustrates, formal neutrality is not always a guarantee that state jurisdictional law is truly neutral as to the substantive content of federal policy. But cases like *Herb* remind us that it can be a telling indicator.

The valid excuse cases have never cast doubt on state courts' authority to dismiss federal claims on grounds of a bona fide lack of subject-matter competence, and they have explicitly affirmed state courts' authority to dismiss federal claims on the basis of rules of judicial housekeeping unrelated to the source of the law at issue or the policy it embodies. *See* Missouri *ex rel.* S. Ry. v. Mayfield, 340 U.S. 1, 1 (1950) (remanding a case to state court so that it might reconsider its authority to dismiss a federal claim under the doctrine of *forum non conveniens*); Douglas v. N.Y., New Haven & Hartford R.R., 279 U.S. 377, 387–88 (1929) (affirming dismissal of a federal cause of action under a *forum non conveniens* rule). This is because state courts' authority to dismiss federal cases on these sorts of grounds coexists happily with the values of both supremacy and union.

Professor Weinberg regards *forum non conveniens* rules as presenting "[p]erhaps the hardest case" under the doctrine of valid excuse. Weinberg, *supra* note 67, at 1775. She explains that, on the one hand, "a state's territorial unconnectedness with a case may seem a compelling reason to excuse the state from trying it," but, on the other hand, "[i]t is hard to see why there should be a doctrine of excuse from the obligation imposed by the Supremacy Clause." *Id.* If we understand the relevant obligation in union-based terms, however, it is not at all hard to see why such an excuse ought to exist. It is no affront to the value of union for a state to decline jurisdiction over a federal claim for reasons having nothing to do with the policy underlying that claim or the fact of its "federalness." It is only when we understand states' obligation to enforce federal claims in supremacy-based terms that the *forum non conveniens* decisions present any kind of puzzle.

cases are content either to eschew inquiry into underlying constitutional values or to engage such matters in drive-by fashion only. And *Haywood* itself, as we have seen, ultimately endorses a trumping-oriented supremacy frame. This is unfortunate not only because it impedes understanding of the law of valid excuse, but because it prevents us from seeing the connection between the valid excuse cases and other bodies of law that are rooted in the same constitutional value.

II. The Constitutional Interest in Union: Other Applications

In this Part, I examine additional contexts in which the Supreme Court has recognized constraints on state autonomy that are best understood by reference to the constitutional interest in union. The principal purpose of this discussion is to demonstrate that the valid excuse cases are not outliers; rather, they are part of a broader jurisprudence of union that has application across a diverse array of subjects in the law of vertical federalism.[83] We will see that the interest in union manifests itself in different ways across doctrinal contexts, but that the relevant decisions are rooted in overlapping notions of community, membership, and political identity.

These cases are of further interest because they provide additional evidence of supremacy's powerful grip on our consciousness when it comes to matters of vertical federalism. We will see, again and again, that conventional explanations for the relevant legal rules are couched in supremacy-based terms. And we will see, again and again, that these explanations are wanting. To make good sense of the law in these contexts, it is necessary to consult the interest in union.

A. *Intergovernmental Tax Immunity*

I begin with the law of intergovernmental tax immunity, under which states have long been prohibited from levying taxes directly on the federal government or its instrumentalities. The standard justification for this prohibition is rooted in the interest in national supremacy and was spelled out by the Court in the seminal case of *McCulloch v. Maryland*.[84] "[T]he power to tax," Justice Marshall famously wrote, "involves the power to destroy;"[85] and so, if states were empowered to levy taxes against the federal government or its instrumentalities, "the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, [would be] empty."[86]

83 This discussion will also help to show that the valid excuse decisions are not examples of an overreaching Court seeking to protect nationalist values where none is under genuine threat. Instead, those cases are part of a wide-ranging body of case law demonstrating that affronts to the interest in union are appropriate subjects for judicial review.

84 17 U.S. (4 Wheat.) 316 (1819).

85 *Id.* at 431.

86 *Id.* at 433.

Until the 1930s, the tax immunity doctrine extended not only to direct taxation of the federal government, but also to state efforts to tax private parties' income from contracts with the United States. Thus, states could not tax the salaries of federal employees,[87] income from leases of federal property,[88] or income from federal bonds.[89] The Justices reasoned that "any tax on income a party received under a contract with the government was a tax on the contract [itself] and thus a tax 'on' the government because it burdened the government's power to enter into the contract."[90] Hence, the prohibitions on taxation of private income from transactions with the federal government were thought to follow from the same principles that justify the prohibition on direct taxation.[91]

During the New Deal era, however, the Court abandoned the notion that taxation of private parties' income from dealings with the United States was much the same as direct taxation of the federal government.[92] It discarded many of the concomitant constraints on states' taxing authority[93] and replaced them with a requirement of nondiscrimination, under which "the States can . . . tax any private parties with whom [the United States] does business . . . as long as the tax does not discriminate against the United States or those with whom it deals."[94] This nondiscrimination rule, too, has traditionally been justified by reference to the interest in federal supremacy. As the Court explained in *United States v. County of Fresno*:

> A tax on the income of federal employees, or a tax on the possessory interest of federal employees in Government houses, if imposed only on them, could be escalated by a State so as to destroy the federal function performed by them either by making the Federal Government unable to hire anyone or by

87 Dobbins v. Comm'rs of Erie Cnty., 41 U.S. (16 Pet.) 435, 450 (1842).

88 Gillespie v. Oklahoma, 257 U.S. 501, 505 (1922).

89 Weston v. City Council, 27 U.S. (2 Pet.) 449, 469 (1829). Some of these prohibitions ran in both directions. *See, e.g.*, Collector v. Day, 78 U.S. (11 Wall.) 113, 127–28 (1870) (prohibiting federal taxation of the salary of a state judge).

90 South Carolina v. Baker, 485 U.S. 505, 518 (1988); *see also Gillespie*, 257 U.S. at 506 (holding that a tax on profits from a lease of federal property "is a direct hamper upon the . . . United States").

91 *See, e.g.*, *Dobbins*, 41 U.S. (16 Pet.) at 448 (relying on *McCulloch* in the course of holding that states may not tax the salaries of federal employees).

92 *See* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 480 (1939); *see also* North Dakota v. United States, 495 U.S. 423, 434 (1990) (plurality opinion) (noting that the Court's decision in *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937) "decisively rejected the argument that any state regulation which indirectly regulates the [f]ederal [g]overnment's activity is unconstitutional").

93 *See, e.g.*, *Graves*, 306 U.S. at 486–87 (upholding the constitutionality of a state tax on a federal employees' salary); *James*, 302 U.S. at 161 (upholding a West Virginia tax levied against an independent contractor's gross receipts from a contract with the federal government). This sea change in the law of intergovernmental tax immunity included changes in the law governing the federal government's authority to tax the states. *See, e.g.*, Helvering v. Gerhardt, 304 U.S. 405, 424 (1938) (upholding federal authority to tax the incomes of most state employees).

94 *Baker*, 485 U.S. at 523.

> causing the Federal Government to pay prohibitively high salaries. This danger would never arise, however, if the tax is also imposed on the income and property interests of all other residents and voters of the State.[95]

Thus, the nondiscrimination rule proceeds from the premise that states will not levy excessive taxes on transactions with the federal government if such taxes must be "imposed equally on the other similarly situated constituents of the State."[96] If state taxation can be held in check in this way, the argument goes, the threat it might otherwise pose to federal supremacy—here in the form of inhibiting the federal government's capacity to perform its functions—will dissipate.[97]

But supremacy is not the only constitutional value underlying this body of law; the rules have a union-reinforcing character as well and, indeed, some components of the doctrine are difficult to understand except by reference to the constitutional interest in union.[98] Consider, for example, two modern tax immunity cases—*Davis v. Michigan Department of the Treasury*[99] and *Barker v. Kansas*[100]—both of which involved challenges to state rules governing the taxation of retirement benefits. Under the relevant state laws, benefits paid to former employees of state and local government were exempt from taxation; benefits paid to other employees, including federal employees, were subject to tax.[101] In each case, the Court held that the state could not deny the exemption to federal employees.[102]

Crucially, the taxes at issue in both *Davis* and *Barker* were not targeted specifically at employees of the federal government: each covered a massive pool of state residents, and included federal employees only incidentally.[103] This means that the standard, supremacy-based account of the nondiscrimination rule provides only weak support, if that, for the invalidation of the schemes under review. For while these tax regimes did discriminate between federal and state employees, they did not discriminate between federal

95 429 U.S. 452, 463 n.11 (1977).

96 *Id.* at 462.

97 *See* Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 819 n.1 (1989).

98 My analysis here tracks that in Halberstam, *supra* note 4, at 812–15.

99 489 U.S. 803.

100 503 U.S. 594, 605 (1992).

101 *Barker*, 503 U.S. at 596; *Davis*, 489 U.S. at 805.

102 *Barker*, 503 U.S. at 605; *Davis*, 489 U.S. at 817. Technically, both cases involved application of 4 U.S.C. § 111—the statute through which the United States consented to the nondiscriminatory taxation of its employees' income. As the *Davis* Court explained, "Congress drew upon the constitutional doctrine [of intergovernmental tax immunity] in defining the scope of the immunity retained in § 111," and so "the retention of immunity in § 111 is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at 813.

103 As Justice Stevens noted in his dissenting opinion in *Davis*, under the Michigan taxation scheme at issue in that case, approximately 4.5 million taxpayers were subject to taxation of their retirement benefits, including some 24,000 retired federal employees. The exemption covered roughly 130,000 retired state and local government employees. *Davis*, 489 U.S. at 821 (Stevens, J., dissenting).

employees and the overwhelming majority of taxpayers. One would think—and the standard account posits—that the taxes in question would not be so oppressive as to seriously burden the legions of employees it covered (if they were, the argument goes, the state would not have established the taxes in the first place); and so there appears to have been little basis for concern that the relevant taxes would be so oppressive as to undermine federal objectives and threaten the supremacy of federal law.

Justice Stevens pressed this point in his dissenting opinion in *Davis*. Relying on the Court's prior decision in *South Carolina v. Baker*, he explained:

> "[T]he best safeguard against excessive taxation . . . is the requirement that the government tax in a nondiscriminatory fashion. For where a government imposes a nondiscriminatory tax, judges can term the tax 'excessive' only by second-guessing the extent to which the taxing government and its people have taxed themselves, and the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents."[104]

In Justice Stevens's view, then, the fact that the tax under review was "shared equally by federal agents and the vast majority of a State's citizens" supplied a "'political check against abuse of the taxing power,'"[105] and so "constitutional protection [was] not necessary."[106]

Justice Stevens is half right. It is true that the supremacy-based account of the nondiscrimination rule cannot explain the results in *Davis* and *Barker*, but this does not mean that the cases are wrongly decided. Both can be defended by reference to the constitutional interest in union. *Davis* and *Barker* signal that if states wish to confer a benefit on those who perform "government" work, they must value work performed by and through the federal government no less than they do work performed by and through state and local government. One could imagine attempting to justify limiting a state tax exemption to employees of state and local government on the ground that those employees serve the particular community that is levying the tax. But *Davis* and *Barker* remind us that federal employees *also* serve the particular community that is levying the tax. If a state wishes to provide bene-

104 *Id.* at 820 n.2 (alteration in original) (quoting South Carolina v. Baker, 485 U.S. 505, 526 n.15 (1988)).

105 *Id.* at 819–20 (quoting United States v. Cnty. of Fresno, 429 U.S. 452, 463 (1977)).

106 *Id.* at 819. To imagine a tax rule like the ones at issue in *Davis* and *Barker* actually impeding the achievement of federal objectives, one would have to assume that the exemption seriously affected the federal government's ability to compete in labor markets with state and local government, thus causing the United States to hire individuals less proficient in the implementation of government programs than would be the case absent the state tax law. But the notion that a tax exemption that is denied to all private sector employees would seriously hamper the federal government's competitive position seems highly dubious. As Justice Stevens's dissenting opinion explains, this line of reasoning requires us to assume that the state was willing to impose a serious disadvantage on private employers in the state as well.

fits to the workers who make "their" government tick, then the recipient class must include federal employees.[107]

This pocket of the law of intergovernmental tax immunity has a different inflection from the valid excuse decisions, but the central concerns motivating the two bodies of doctrine are of a piece. Both are rooted in a conception of political identity and in the consequences of membership in a political union. The valid excuse cases require states to take ownership of national law—to acknowledge that federal law belongs to them and to their citizens (that it is *of* them and *of* their citizens), even if state citizens and their representatives in state government disagree with the policy underlying it. The tax immunity cases, meanwhile, direct states to acknowledge kinship with the national government along a different dimension. It requires them, in a particularly literal way, to treat federal employees as their own.

B. Dormant Foreign Affairs Preemption

The controversial body of Supreme Court decisions establishing the doctrine of dormant foreign affairs preemption provides another example of union at work in the law of vertical federalism. The seminal case here is *Zschernig v. Miller*.[108] In *Zschernig*, the Court invalidated an Oregon statute that prohibited nonresident aliens from inheriting property in the state unless it could be shown that citizens of the United States enjoyed reciprocal rights of inheritance in the alien's country of citizenship and that any foreign heir to an Oregon estate would receive the proceeds of that estate without confiscation by her home government.[109] The statute, the Court held, constituted an impermissible "intrusion by the State into the field of foreign

107 Of course, there are limits to this principle. A municipal police department need not invite employees of the local FBI office to the department's holiday party. And when state governments raise the salaries of their employees, they are not constitutionally required to provide salary supplements to locally based employees of the federal government (or, for that matter, to non-locally based federal employees who serve local residents), even if it is true that those employees make "their" government tick every bit as much as state employees do. This is because, from the perspective of union, it matters whether the state is acting in its capacity as an employer (as it is when it pays a salary or throws a holiday party) or its capacity as a government (as it is when it provides a tax exemption). This is because the message the state sends about the character of our union when it pays its employees' salaries is, at least arguably, different from the message it sends when it supplies those employees with a tax exemption that is denied to all others, including federal employees. And this is true notwithstanding the fact that the financial consequences of, and incentives created by, a salary increase may be similar to those that follow from the establishment of a tax exemption. *See id.* at 824. As I explain in Section III.A, *infra*, the jurisprudence of union is, as a general matter, fixated on the content of the messages that are sent by state law. And so this feature of the law of intergovernmental tax immunity fits snugly into the pattern established by the cases as a whole.

108 389 U.S. 429, 440–41 (1968).

109 *Id.* at 430–31.

affairs[,] which the Constitution entrusts to the President and the Congress."[110]

Beyond asserting repeatedly that the field of foreign affairs is constitutionally off limits to the states,[111] the Court struggled to explain the foundation for its holding. The Justices were concerned that state probate courts might "disrupt[ ]" U.S. foreign relations or "embarrass[ ]" the United States by scrutinizing the systems of government in foreign countries and passing judgment on the earnestness of those countries' commitment to the protection of property rights.[112] This kind of state intervention into the realm of foreign policy, the Court suggested, might "affect[ ] international relations in a persistent and subtle way,"[113] "impair the effective exercise of the Nation's foreign policy,"[114] or "adversely affect the power of the central government to deal with [foreign relations] problems."[115]

The difficulty with this analysis is that it is not possible to identify—and the Court did not even attempt to flag—a federal enactment, order, rule, or policy that was jeopardized by Oregon's probate law. Indeed, the amicus brief submitted to the *Zschernig* Court on behalf of the United States explicitly disclaimed the notion that the state law under review "unduly interfere[d] with the [nation's] conduct of foreign relations."[116] So while the rhetoric in the majority opinion repeatedly suggests that the decision rests on a kind of conflict preemption analysis—discussion of state law "impair[ing]," "adversely affect[ing]," or "unduly interfer[ing] with" federal policy is standard fare in conflict preemption cases—this fragment of the Court's reasoning is highly suspect. The Court's more general statements as to the impropriety of state intervention in the realm of foreign affairs[117]—more of a field preemption construct than a conflict preemption one—appear to provide a firmer foundation for the judgment.[118] Justice Stewart's concurring opinion draws attention to this point:

> The Solicitor General, as *amicus curiae*, says that the Government does not "contend that the application of [Oregon law] in the circumstances of this case unduly interferes with the United States' conduct of foreign rela-

110 *Id.* at 432.

111 *Id.* at 436 (noting that "foreign affairs and international relations" constitute "matters which the Constitution entrusts solely to the Federal Government"); *id.* at 437–38 (insisting that "foreign policy attitudes . . . are matters for the Federal Government, not for local probate courts").

112 *Id.* at 435.

113 *Id.* at 440.

114 *Id.*

115 *Id.* at 441.

116 Brief for the United States as Amicus Curiae at 6 n.5, *Zschernig*, 389 U.S. 429 (No. 67-21), 1967 WL 113577.

117 *See supra* notes 110–11 and accompanying text.

118 By this I mean only that the Court's conclusions follow more readily from the stated premises when one deploys a field preemption model. I do not mean to suggest that the field preemption approach to *Zschernig* is immune from criticism. *See infra* note 137 and accompanying text.

> tions." But that is not the point. We deal here with the basic allocation of power between the States and the Nation. . . . [T]he conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.[119]

What is important for our purposes is that—in contrast to the conflict preemption approach to the *Zschernig* problem, which is firmly grounded in the value of national supremacy[120]—the field preemption model, at least as applied here, owes much to the value of union. Once again, Justice Stewart's opinion is on point. With respect to "local interests," he explains, "the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[121] From this perspective, the relevant limits on states' authority are less about guaranteeing that federal law will trump conflicting state law than they are about the structure and meaning of political union.[122] Where foreign affairs are at stake, the case indicates, the only relevant political unit is the nation.

The Court's latest pronouncement on the law of dormant foreign affairs preemption—the decision in *American Insurance Ass'n v. Garamendi*[123]—is of like character. That case involved California's Holocaust Victim Insurance Relief Act (HVIRA), which required insurance companies doing business in California to disclose information about policies sold in Europe before and during the Holocaust.[124] The Court determined that the HVIRA was preempted because it "interfere[d] with the National Government's conduct of foreign relations."[125] In reaching this conclusion, the majority focused its attention on executive agreements between the United States and three European countries (Germany, Austria, and France) relating to the settlement of Holocaust era claims. It held, in particular, that there was a "suffi-

119 *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring).

120 Commentators routinely characterize *Zschernig* in supremacy-based terms. *See, e.g.*, Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 Nw. U. L. Rev. 585, 601 (2006) ("*Zschernig v. Miller* affirmed the supremacy of federal law in the area of foreign relations." (footnote omitted)); Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 Md. L. Rev. 1316, 1335 n.86 (1997) (similar).

121 *Zschernig*, 389 U.S. at 442 (Stewart, J., concurring) (quoting Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889)).

122 As is the case with respect to union's role in the valid excuse cases, I am not strongly committed to the notion that the Supremacy Clause cannot supply the textual hook for the work I am assigning to "union." Nor do I mean to reject the possibility that the value I am drawing attention to might be subsumed within the concept of supremacy. What matters to me, rather, is that we (1) recognize the interest at stake in these cases as something different from the interest in federal law superseding contrary state law, and (2) understand that the values at stake in these cases are rooted in a conception of what it means to be a member of a political union. The labels are important to the extent they help clarify these two points.

123 539 U.S. 396 (2003).

124 *See id.* at 401.

125 *Id.*

ciently clear conflict" between the HVIRA and the policies embodied in those agreements to support preemption of the California law.[126]

In that case, too, the Court's preemption analysis is unusually vulnerable to criticism.[127] To begin with, the executive agreements that provide the foundation for the Court's preemption analysis contain no preemption clause;[128] and they say nothing at all about "state disclosure laws specifically, or . . . information disclosure generally."[129] More generally, the agreements in question do not commit the United States government to do much of anything when it comes to substantive outcomes in reparations cases. As the dissenting Justices emphasized, "none of the executive agreements extinguish[ed] any underlying claim for relief;"[130] and, indeed, the central commitment the United States government *did* make through its agreement with Germany—to encourage U.S. courts to dismiss Holocaust era claims in light of U.S. foreign policy—was clearly designated by the agreement itself to be without legally binding effect.[131] The Court, then, was hard pressed to ground its finding of federal-state conflict in the particulars of the executive agreements on which its preemption analysis is centered. It was left to focus, instead, on alleged tension between the HVIRA and "policy objectives implicit in the . . . agreements."[132] This, the dissenters emphasized, was unprecedented. For the key cases affirming the preemptive effect of executive agreements relating to the settlement of claims all "gave effect to the *express* terms of an executive agreement;" they did not rely on notions of implied preemption.[133]

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126 *Id.* at 420.

127 To be fair, *Garamendi* is no *Zschernig*. In *Garamendi*, at least, the Government insisted that the law under review in fact interfered with federal policy. *Id.* at 413. And in *Garamendi*, unlike *Zschernig*, it was possible to identify concrete articulations of federal foreign policy that were related to the same general subject matter (reparations for Holocaust victims) as the state law under review. *See id.* at 405–08. Nevertheless, for the reasons detailed above, *see infra* text accompanying notes 128–31, the preemption analysis in *Garamendi*—at least to the extent it rests on claims of conflict between state and federal law—is something of a stretch.

128 *Garamendi*, 539 U.S. at 417.

129 *Id.* at 441 (Ginsburg, J., dissenting).

130 *Id.* at 440.

131 *Id.*; *see id.* at 406 (majority opinion).

132 *Id.* at 439 (Ginsburg. J., dissenting).

133 *Id.* at 440 (emphasis added). The Court's preemption analysis is also subject to criticism on the related ground that the Court characterized the federal policy objectives arguably threatened by the HVIRA in highly abstract and general terms. This is perhaps best encapsulated by a State Department official's expression of concern that the HVIRA "threatened to damage the cooperative spirit" that the United States sought to foster in connection with the processing of Holocaust-era insurance claims. *Id.* at 411 (majority opinion). The point is reinforced by the majority's summation of its preemption analysis with the observation that "[t]he basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves." *Id.* at 427. Conflict preemption—even in its more nebulous "frustrates the purpose" form—tends to rest on sharper tensions than

As is true of the *Zschernig* decision, the holes in *Garamendi*'s conflict preemption analysis provide reason to think that something other than the potential undermining of federal policy and the supremacy of federal law is at stake here; and here too, it seems reasonable to conclude that what is at stake is a conception of political union. There are signals to that effect in *Garamendi* itself. Thus, before getting into the nitty-gritty of its preemption analysis, the Court quoted Madison's *Federalist No. 42* for the proposition that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."[134] And, the Court drew support for the conception of government structure underlying its decision by gesturing at dormant foreign commerce doctrine, which is routinely justified by reference to the importance of having the nation speak with one voice when regulating commerce beyond its borders.[135] Framed this way, the core principle driving the decision in *Garamendi* is not that state law and policy must give way to federal law and policy under conditions of conflict, but that, where foreign relations are at issue, it is an entailment of political union that states get out of the way.[136]

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those created by alleged interference with a "cooperative spirit" or deviation from some ethos of "tread lightly."

134 *Id.* at 414 (majority opinion) (quoting THE FEDERALIST NO. 42, at 279 (James Madison) (J. Cooke ed., 1961)).

135 *Id.* (citing Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 449 (1979) (emphasizing "the [n]ational [g]overnment's ability to speak with 'one voice' in regulating commerce with foreign countries")).

136 The Court's intervening decision in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), can be understood in the same light. That case involved a Massachusetts law restricting the authority of state agencies to purchase goods or services from companies doing business with Burma. *Id.* at 366. The Court unanimously determined that the law in question frustrated the purposes of (and was therefore preempted by) federal law. *Id.* at 388. Here, the arguments for conflict preemption appear stronger than those available in *Garamendi* (and certainly stronger than those available in *Zschernig*), since the *Crosby* Court was confronted with federal statutory provisions that at least spoke to the set of issues addressed by the state law under review. *Id.* at 374. As others have noted, however, the Court's analysis deviates sufficiently from traditional preemption doctrine so as to raise the suspicion that the decision is best explained as another exercise in *Zschernig*-style dormant foreign affairs preemption. *See* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 171–73 (2001) (describing ways in which the analysis in *Crosby* deviates from ordinary principles of preemption and suggesting that aspects of the Court's reasoning "transform ordinary preemption doctrine into a dormant prohibition, little different from the dormant foreign affairs . . . doctrine[ ]" developed in *Zschernig*, and deployed by the First Circuit in *Crosby* itself); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 752 (5th ed. 2003) (drawing on Professor Young's analysis of *Crosby* and explaining that "[s]ome commentators view the analysis in *Crosby* . . . as sufficiently different from standard preemption analysis as to constitute a kind of dormant foreign affairs preemption 'in disguise[,]' in which the driving force for invalidation was less the federal statute and more the foreign affairs subject matter"). As is true of *Zschernig* and *Garamendi* (and for the very same reasons), to the extent our understanding of *Crosby* veers away from a conflict model

To be clear, I don't mean to endorse the conception of foreign relations preemption that appears to flow from the more sweeping statements in the majority and concurring opinions in these cases. Indeed, I think there's something to the oft-heard criticism that the Court's rhetoric (especially in *Zschernig*) unnecessarily casts doubt on the permissibility of some rather mundane exercises of state judicial power.[137] But the cases do not need to carve the universe of foreign affairs preemption with satisfying precision in order to support my central claim: across a diverse array of cases, the interest in union looms large in the minds of the Justices and appears better adapted to explaining the contours of the law of vertical federalism than the supremacy-based accounts typically favored by judges and commentators. Here, the thrust of the constitutional interest in union is not (as we have previously seen) that things federal "belong" to the states, but that states must take heed of the fact that they belong to something federal.

C. Carrington v. Rash

The Supreme Court's decision in *Carrington v. Rash*,[138] a voting rights case decided in 1965, is likewise best explained by reference to the interest in union. The case involved a provision of the Texas Constitution that prohibited members of the United States Armed Forces who moved to Texas during their military service from voting in any elections in the state.[139] The Supreme Court struck the provision down on the ground that it constituted "invidious discrimination in violation of the Fourteenth Amendment."[140] As Professor Black pointed out in his famous lectures, *Structure and Relationship in Constitutional Law*,[141] it is not difficult to identify a rational justification for the policy under review in *Carrington*, and so the Court's Equal Protection analysis seems incomplete and unsatisfying.[142]

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and toward a field preemption construct, it becomes easier to see the decision as a reflection of the constitutional interest in union.

137 *See, e.g.*, Zschernig v. Miller, 389 U.S. 429, 461–62 (1968) (Harlan, J., concurring in the result); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1847 (1998).

138 380 U.S. 89 (1965).

139 *Id.* at 89.

140 *Id.* at 96.

141 CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

142 The state had argued that "it ha[d] a legitimate interest in immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community." *Carrington*, 380 U.S. at 93. Professor Black, echoing Justice Harlan's dissenting opinion from *Carrington* itself, was unprepared to dismiss this justification as "wholly capricious and arbitrary, or as 'unreasonable' in th[e] constitutional sense." BLACK, *supra* note 141, at 10. "Military personnel," he explained, "are subject to special pressures and might be present in such numbers as simply to take over small communities. They come under orders, and they leave when ordered away; their residence is not a matter of their own desire or intention but of military exigence." *Id.* Hence, "[t]he action of Texas was not really 'arbitrary' in that case; there *are* differences

Still, it would be a mistake to conclude that the decision in *Carrington* lacks constitutional foundation. The key to understanding the case, as Professor Black pointed out, is to frame the central issue as one of constitutional structure and not individual constitutional right. Black explained as follows: "The real question is whether we think Texas . . . should be allowed to annex a disability solely to federal military service," not whether Texas's decision to inflict such a unique disability on servicemembers is amenable to rational justification.[143]

Up to this point, I am generally in accord with Professor Black's reasoning. We part ways, however, with respect to his next move. Black insisted that a state could not inflict such a disability on servicemembers because

> the subjecting of a federal soldier, strictly as such and on no other showing than that of his being a federal soldier, to an adverse discrimination, so clearly tended to impede the operation of the national government as to be forbidden quite without regard to its violation of any specific textual guarantee.[144]

While I agree that the law under review in *Carrington* was unconstitutional without regard to "any specific textual guarantee," I think it far from clear that the law threatened, as Black suggested, "to impede the operation of the national government."

Perhaps Black imagined that provisions like the Texas voting law would lead to reduced enlistment in the military. Would-be servicemembers might balk, the argument goes, at being unable to vote in their states of residence; and they might decline to enlist if it meant that such a voting disability would take hold. I very much doubt this. Indeed, the assumption strikes me as fanciful and it supplies only weak support, at best, for his claim that the provision under review in *Carrington* posed some sort of threat to the achievement of national objectives and the interest in federal supremacy.

I am inclined to think, instead, that the decision in *Carrington* is rooted in the value of union. The provision under review in that case denied the franchise to parties who performed an exceedingly important function for our nation, and *only* parties who performed that function. In this way, the Texas law seems inimical to our sense of union and "common enterprise."[145] This comes through (albeit fleetingly) in the very last passage from the majority opinion in *Carrington*, which states: "[T]he uniform of our country . . . [must not] be the badge of disenfranchisement for the man or woman

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between military people and other people with respect to the meaning of their residence," and "[g]iving effect to those differences is well within the latitude we ordinarily allow to the state, in the general case, under the equal protection clause." *Id.* at 13; *see also Carrington*, 380 U.S. at 99–101 (Harlan, J., dissenting) (similar).

143 BLACK, *supra* note 141, at 13.

144 *Id.* at 23–24.

145 *See* Halberstam, *supra* note 4, at 814–15 (describing the obligation of union for members of a federal system as one of "fidelity to the common enterprise").

who wears it."[146] Note that the Court did not attempt to buttress this claim with a functional argument. That is, the Justices did not contend—as Professor Black would in his lecture a few years later—that a state's disenfranchisement of service members is problematic because it might impede the operation of the national government. The Justices were content, rather, to intimate that there is something unseemly about adding disenfranchisement to the costs of military service. And this unseemliness, I think, is rooted in the fact of our nationhood.

It is telling that Professor Black offered a supremacy-based justification for the decision in *Carrington v. Rash* despite the fact that his threat-to-national-supremacy story is so weak and the union-based account has so much to recommend it.[147] Black, "the dean of structural constitutional interpretation,"[148] is not likely to have been attracted to a supremacy model just because—in contrast to the union-based approach—it can straightforwardly be grounded in a particular fragment of constitutional text.[149] Indeed, the central point of Black's discussion of *Carrington* is to extol the virtues of a structural approach over the clause-bound Equal Protection frame favored by the Court.[150] Yet still he reached for a dubious supremacy-based argument when a sounder, union-based account was available to him. This is a striking indication of our collective failure to acknowledge union as an operative constitutional value in cases involving the relationship between the federal government and the states; it signals that, when nationalist values come under threat, we reach reflexively for the classic supremacy model.[151]

III. Understanding the Jurisprudence of Union

The cases surveyed in Parts I and II demonstrate that the value of union does important, independent, work in shaping the law of vertical federalism. But it is safe to say—even with this account of the case law in place—that the nature and contours of the union-based constraints on state autonomy remain opaque. This is the case, no doubt, because union is typically part of the subtext, not the text, of the relevant Supreme Court decisions. And even

146 *Carrington*, 380 U.S. at 97 (alterations in original) (quoting Message of Governor Ellis Arnall to General Assembly of Georgia 5 (January 3, 1944)).

147 Black's analysis contains faint hints at a more union-oriented understanding of *Carrington* (or, at least, language that is consistent with a union-based approach). *See* Black, *supra* note 141, at 11 (advocating focus on "the logic of national structure"). Nevertheless, he ultimately opted for a supremacy-based model. *See id.* at 17–19.

148 Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1621 (1990).

149 Union is, of course, referenced explicitly in the very first sentence of the Constitution. But the Preamble is not generally treated as a source of constraint on government that can be relied upon as a foundation for legal doctrine.

150 *See* Black, *supra* note 141, at 8, 96.

151 Black does focus attention on the interest in union in his discussion of the right to travel and dormant commerce doctrine. *See id.* at 16, 21. But, of course, those rules form part of the law of horizontal federalism, where union-based justification are far more familiar. *See supra* notes 4–5 and accompanying text.

when union does fight its way to the surface of the Court's opinions, discussion of that value tends to be obscured in a fog of supremacy-speak or is too brief to allow for consideration of its precise shape or application across different contexts. As a result, many challenging questions about the jurisprudence of union remain to be answered. This Part takes the first steps toward doing so.

In Section III.A, I examine the nature of the union-based constraints on state autonomy.[152] I argue, in particular, that these constraints are largely concerned with the expressive significance of the law. They are focused, in other words, on what the laws in question *say* or what they *mean*, not on what they *do*.[153] This observation is important because it provides us with a clearer sense of what, exactly, these bodies of doctrine intend to police; this, in turn, should improve our capacity to identify other species of state action that might raise problems from the perspective of union.

Next, in Section III.B, I take up the question of whether the jurisprudence of union represents a sound exercise in constitutional federalism. It is one thing to show that careful attention to the value of union can help us to understand what the Justices are up to in a series of cases, and it is quite another to show that the conception of union endorsed in those cases is compelling as a matter of constitutional law. Section III.B thus assesses the jurisprudence of union from the perspective of constitutional text and history, the functional values traditionally associated with our federalism, considerations of constitutional structure, and precedent.

We will see that analysis under some of these interpretive modalities (text, history, functional concerns) proves inconclusive, while one (structural analysis) provides at least partial reason to think that the jurisprudence of union stands on firm constitutional ground. The last one (precedent) is something of a mixed bag. On the one hand, the bodies of case law we have examined already constitute the core of our precedential tradition relating to the union-based constraints on state autonomy. In a sense, then, the question of whether the jurisprudence of union is a good fit with established precedent has been asked and answered. But the precedential story is complicated by the Supreme Court's much debated decisions in *New York v. United States*[154] and *Printz v. United States*.[155] As we will see, those cases rest on

152 When I refer here to "the union-based constraints on state autonomy," what I really mean is "the union-based constraints on state autonomy that emerge from the cases surveyed in Parts I and II." As noted at the outset, *see supra* notes 1–5 and accompanying text, union does widely recognized work constraining states in horizontal federalism cases. But those union-based legal rules are beyond the scope of my analysis.

153 We might say, instead, that the cases are concerned with the expressive significance of the Supreme Court decisions that review the state laws in question. *See* Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 84 (2001) (noting that "[b]oth a statute and a judicial decision can have expressive significance by articulating and reinforcing norms that are constitutive of a society's very identity and self-understanding"). I don't think anything turns on which formulation we use.

154 505 U.S. 144 (1992).

155 521 U.S. 898 (1997).

a conception of union that is vastly different from the one we have encountered thus far.

I conclude my analysis in Section III.C with some speculative thoughts as to how the jurisprudence of union might operate in contexts not yet addressed by the courts. As I attempt, in the discussion that follows, to deepen our understanding of the union-based constraints on state autonomy, I will focus once again (especially in Section III.B) on the valid excuse cases and on the particular conception of union they (implicitly) develop and apply. I do this, in part, because those cases have received the most sustained treatment in my analysis to this point and because the relevant body of Supreme Court decisions is relatively large and therefore provides the most raw material to work with. Moreover, those decisions come with a particularly rich body of scholarly commentary in tow. This commentary sheds light on how this fragment of the jurisprudence of union may fit into our federalism more generally, and so it provides a useful starting point for analysis (and, sometimes, a foil). As I have emphasized, however, the valid excuse cases represent but one variation on a coherent theme that drives a wide range of Supreme Court decisions. Thus, even though I focus my attention here on a particular set of union-oriented decisions, the analysis that follows applies to the jurisprudence of union as a whole.[156]

A. *Union and Vertical Federalism: Understanding the Constraints*

1. Union and Expressivism

The union-based constraints on state autonomy are largely concerned with the expressive significance of the law. Expressive theories of U.S. constitutional law are rooted in the notion that "[p]ublic policies can violate the Constitution not only because they bring about concrete costs but because the meaning they convey expresses inappropriate respect for relevant constitutional norms."[157] What matters, for purposes of these theories, are not the immediate, tangible consequences of government action, but "the ideas or attitudes expressed through [that] action."[158] We have seen already that the direct material consequences of at least some of the laws at issue in the

156 A partial exception to the generalizability of the discussion that follows relates to my claims about the expressivist focus of the jurisprudence of union. Although the foreign affairs preemption cases, *see supra* Section II.B, are properly understood in union-based terms, and although I think they, too, are concerned with the expressive significance of the statutes at issue, it is also the case that those decisions lend themselves somewhat more readily than the others studied here to conventional, consequentialist, justification. *See infra* note 159.

157 Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998).

158 Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993). This is not to say that consequences are necessarily irrelevant to expressive theories of law. *See infra* note 166.

Court's union-oriented decisions are uncertain.[159] And that alone provides cause to wonder whether those decisions are motivated by expressivist considerations. What's more, although the relevant cases engage the constitutional interest in union only fleetingly, many of the passages from the case law that do refer (or, at least, allude) to this interest are most easily understood in expressivist terms.

Consider, for example, the Court's insistence, in *Testa v. Katt*, that the Rhode Island statute under review "flies in the face of the fact that the States of the Union constitute a nation;"[160] or take the Court's admonition in *Haywood v. Drown* that "a State cannot employ a jurisdictional rule 'to dissociate [itself] from federal law.'"[161] If we presume that the doctrine of valid excuse is concerned only with the direct material consequences of state jurisdictional law, and not with the ideas or attitudes such law expresses, then it becomes difficult to know what to make of these passages. (What ill effects follow from a state thumbing its nose at the fact of our nationhood? And what immediate, tangible harms result from a state's dissociation from federal law?) If, however, we proceed from the premise that it is constitutionally problematic for a state to use its jurisdictional law to reject the norms endorsed by our national political community, and that it is problematic because doing so emphasizes separation between nation and state and thereby expresses the wrong view of our union, then the concerns raised by the Court in these passages become fully intelligible. For to say that a state law flies in the face of our status as a nation, or dissociates the state from

159 *See supra* text accompanying notes 40–41 (explaining that the consequences—for litigants and for federal law—of the jurisdiction-based dismissal of federal claims from state court are minimal); text accompanying notes 104–05 (raising questions about a consequentialist justification for certain fragments of the law of intergovernmental tax immunity). A consequentialist anxiety operates closer to the forefront of the foreign affairs preemption cases, insofar as those decisions are motivated, in part, by concern about the costs to the nation of state intervention in the realm of foreign affairs. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429, 441 (1968) ("'Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.'" (quoting Hines v. Davidowitz, 312 U.S. 52, 64 (1941))); *see also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART." (alteration in original) (quoting THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (J. Cooke ed., 1961))). But even in this context, there is reason to think that expressivist concerns are doing at least some work in driving the development of the doctrine. For even if state intervention in the realm of foreign affairs carries some of the risks flagged by the Court in these cases, those risks will often be remote, and so the complete ouster of states from the domain seems a rather aggressive prophylactic rule. The rule makes good sense, however, if we conceive of it in expressivist terms and imagine that the Court is concerned not so much with the possibility that states will do genuine violence to national interests, but with the fact that state-level intervention in foreign affairs simply misunderstands states' role within our federal system.

160 330 U.S. 386, 389 (1947).

161 556 U.S. 729, 736 (2009) (alteration in original) (quoting Howlett v. Rose, 496 U.S. 356, 371 (1990)).

federal law, is to say that the law in question expresses and emphasizes separation from, and not kinship with, the national political community.

Consider also, in this vein, the *Second Employers'* Court's oft-quoted claim that the policy embodied in federal law "is as much the policy of Connecticut as if [it] had emanated from its own legislature, and should be respected accordingly in the courts of the state."[162] To begin with, the command for "respect" sounds in the register of expression; it is a directive that states adopt a particular attitude toward federal law and the federal government. Without the expressivist overlay, moreover, we are left to wonder *why* Connecticut must treat federal law as if it emanated from its own legislature. Neither the passage itself nor the surrounding discussion from *Second Employers'* supplies an answer. Here too, however, if we presume that states cannot use their jurisdictional law to express separation from federal law and policy, then the requirement that states respect federal law as they do their own explains itself.

An expressivist understanding of this body of law also helps to explain the Court's fixation, from the earliest stages of the doctrine's development, on the question of whether state jurisdictional rules discriminate against federal causes of action.[163] State discrimination against federal claims is a sharp, particularly transparent, way of expressing separation from our national political community. When a federal cause of action is dismissed pursuant to a discriminatory jurisdictional scheme, the state bluntly proclaims the cause in question to be "not its own" (and disfavored for that reason alone). If we presume that this body of doctrine is centrally concerned with the expressive significance of the laws at issue, then it is hardly surprising that the Court was quick to flag as constitutionally problematic this rather stark means of expressing a state's separateness from our national political community.

2. Two Approaches Toward Union and Expressivism

Even if one is persuaded by the claim that the jurisprudence of union is motivated by expressivist considerations, the question remains why we ought to care about laws that send the wrong message about our union. What, exactly, is so bad about laws of this sort, and what reason is there to think that our Constitution takes a position on the question?[164] The cases, unfortunately, provide no answers. This is one of the significant casualties of the

162 Mondou v. N.Y, New Haven & Hartford R.R. (Second Employers' Liability Cases), 223 U.S. 1, 57 (1911).

163 *See supra* notes 22–23 and accompanying text.

164 Numerous commentators have joined issue on the question of whether expressive theories of law, generally, and/or expressive theories of U.S. constitutional law, in particular, are persuasive. *Compare, e.g.*, Anderson & Pildes, *supra* note 9, *with* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000). I will not engage this debate at so high a level of generality. Instead, I will focus my attention on the narrower question of whether and why someone open to the possibility of grounding constitutional doctrine in expressivist considerations might find the jurisprudence of union compelling.

Court's consistent failure to explore the interest in union in any detail—it leaves us in the dark as to why this particular constitutional value is safeguarded in this particular way. Perhaps the best way to think about the problem, then, is to examine the jurisprudence of union in light of the analytic frameworks that have been developed to explain expressivist theories in other contexts. I have in mind here the two broad categories into which commentators tend to divide expressivist theories of constitutional law—consequentialist and non-consequentialist. In the subsections that follow, I consider the jurisprudence of union from each of these perspectives.

a. A Consequentialist Model: State Law and the Shaping of Public Attitudes

I noted above that it is a defining feature of expressivist theories of constitutional law that they are not concerned with the direct material consequences of government action. So it might be surprising to learn that some expressivist theories travel under the heading "consequentialist." But the effects of government conduct need not be entirely irrelevant to expressivists, for some expressivist theories focus attention on the capacity of government expression to mold social norms and thereby affect judgments and behavior.[165] These theories are *consequentialist* because they are ultimately justified by reference to the effects of government action, but they are *expressivist* because it is the social meaning of government action that triggers the relevant effects.

A consequentialist (expressivist) account of the jurisprudence of union might posit that when state laws express the wrong view of our union, they threaten to foster among citizens a sense of alienation from the national government. And this, the argument goes, might have an adverse effect on the federal government's capacity to implement national policy. Seen in this light, the constitutional interest in union is parasitic on the interest in national supremacy. Union matters, on this theory, because the erosion of our sense of national identity might decrease the likelihood that states and their citizens will respect the supremacy of federal law.[166] The presumed

165 *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–29 (1996); Pildes & Niemi, *supra* note 158, at 509; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 569–84 (2003).

166 Although this line of argument is speculative (a point I will return to in a moment), it has intuitive appeal. In order for a federation of states that has delegated meaningful lawmaking authority to a central government to function well, individual members must be willing, across some policy domain, to subordinate local preferences to those of the nation. When the general considerations that motivated the decision to enter into a political union seem remote from a particular policy question (or perhaps even when they don't), this subordination might not come easily. All else being equal, member-state willingness to comply with federal policy should be positively correlated with citizens' sense of identification with the national government. The jurisprudence of union, then, might be understood as an exercise in political conditioning, the central goal of which is to encourage habits of mind and behavior that are conducive to securing state compliance with federal directives. Whether and how state laws of the sort examined in Parts I and II are likely to

"erosion," on this account, would take place not because people are generally aware of, say, the content of state jurisdictional law or the distinctions a state might draw among different categories of retirees for purposes of a tax exemption. Rather, it would kick in because government officials (at least some of them) *are* aware of these sorts of things. And *their* sensibilities about the federal government can be shaped, in part, by the legal norms that guide their decisions—in particular, norms governing when and how state officials interact with the federal government and federal law.[167]

From this point, the consequentialist account might run in two (non-mutually exclusive) directions. First, we might posit that state officials who internalize the message that citizens' bonds of kinship with the federal government are comparatively thin will exercise their authority accordingly. They might enact laws that are inimical to federal policy—that actually *do* undermine federal objectives—or enforce existing law with an eye to diminishing the capacity of the national government to shape local affairs. Second, we might imagine that state officials, who can exert significant influence over public debate, will transmit to the public at large the lessons they learn about the relationships among the federal government, the states, and the people. And this, in turn, might stimulate resistance to the impositions of the federal government.

It is tempting to dismiss this line of reasoning on the ground that people's sense of political identity is shaped by forces grander than those at issue in the union-based decisions surveyed above. Thoughtful commentators have emphasized the role of transformative events such as war, mass immigration, advances in communication and transportation technology, and the development of the modern administrative state in stimulating the development in the United States of a widespread sense of national political identity.[168] But it would be a mistake to overlook the nationalizing, norm-generating capacity of basic features of our governmental architecture, such as the conditions under which state institutions and officials may and must grapple with federal law. These foundational rules of engagement provide a framework for the day-to-day operations of government and send authoritative signals about what is possible, what is ordinary, and what is out-of-bounds within the confines of our federal system.

Alexander Hamilton highlighted these dynamics in *Federalist No. 27*, in the course of discussing states' role in the implementation of federal law. He explained:

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affect public attitudes toward the national government is open to question. But if they did have such an effect, it would strengthen the case for the interventions we see in the case law.

167 *Cf.* Adler & Kreimer, *supra* note 10, at 133–40 (outlining, albeit skeptically, arguments relating to the capacity of the Supreme Court's anti-commandeering doctrine to "inculcate a sensitivity among lower courts and governmental officials to the importance of values of federalism").

168 *See* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE 100–15 (2008).

> [E]mploy[ing] the ordinary magistracy of each [State] in the execution of [federal] laws . . . will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed; and will give the Federal Government the same advantage for securing due obedience to its authority, which is enjoyed by the government of each State; in addition to the influence on public opinion, which will result from the important consideration of its having power to call to its assistance and support the resources of the whole Union.[169]

Others took a different view, during the early constitutional period and after, of how best to cultivate among the people a sense of connection to federal law.[170] For present purposes, however, what matters is not whether Hamilton or these other commentators had the best understanding of how to forge a sense of connection between the federal government and the people. What matters is that all of these commentators took as their premise that widely held sensibilities about the federal government and federal law might be shaped, in part, by constitutional practice relating to state institutions' interface with that law. And this, in turn, lends support to a consequentialist justification for the Court's policing of state expression relating to the nature of our union.

Perhaps the most pressing reason to be skeptical about this consequentialist account is that identifying "the effects of a *message*" is a highly speculative endeavor.[171] It is difficult for courts to make accurate assessments of how people will understand and respond to the messages embedded in government action. Thus, we might balk at the prospect of assigning a rationale to the jurisprudence of union that relies on judges' capacity to perform this sort of calculus.[172]

In light of the difficulties that inhere in determining the likely consequences of the government's delivery of any particular message, an appropriately modest consequentialist theory would consider the effects of government expression at the wholesale level. Thus, we ought not to ask whether it is probable that a particular state law or Supreme Court decision will shape union-related social norms in one way or another; rather, we should ask whether the law's repeated, multi-front reinforcement of a message ("states must treat the federal government and federal law as their

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169 THE FEDERALIST NO. 27, at 174 (Alexander Hamilton) (Cooke ed., 1961).

170 *See, e.g.*, *Federal Judiciary. No. II.*, WASH. FEDERALIST, Jan. 28, 1801 at 2 (suggesting that the "tribunals [of the United States] must be established throughout the Union, [in order] to bring the authority of the Federal Judiciary closer to the feelings, understanding, and affections of all the citizens"); *see also* Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 561 (1925) (quoting the same article from the *Washington Federalist*).

171 *See* Primus, *supra* note 165, at 571.

172 *Cf.* Caminker, *supra* note 153, at 90 ("Can the Court correctly predict how the people, even assuming they are aware of the issue at all, will perceive and internalize judicial protection of states from private damages claims?"); *see also* Adler & Kreimer, *supra* note 10, at 137–38 (highlighting the difficulty of discerning the effect of judicial decisions on social norms).

own") has the capacity to shape attitudes toward our union. That possibility, I think, is not so easily dismissed.

b. A Non-Consequentialist Model: Union and the Constitution of Political Identity

An alternative way of thinking about the expressivist considerations underlying the jurisprudence of union is to eschew entirely any claims about the consequences of government expression and to insist that, at least in some circumstances, government expression can be "*intrinsically* important."[173] It can be important because "norms demanding public acknowledgment of the respect we owe to one another, or that groups and States owe to one another, are constitutive of the ways important relationships are mutually understood."[174] On this account, government expression plays a crucial role in constituting "the political identity of a state."[175] It tells us, and helps make us, who we are as a political community by "speaking on behalf of the nation's basic principles and commitments."[176] From this perspective, state laws (or, for that matter, federal laws), that rest on a mistaken conception of our political identity can be constitutionally suspect for that reason alone.

In different ways, the statutes addressed through the jurisprudence of union downplay the significance of national political identity. Many of these statutes seem to take as their premise that political identity is, or should be, predominantly oriented toward the state and not the nation. And some signal, in particular, that state law "belongs" to the people in a way that federal law does not. The jurisprudence of union teaches that our Constitution takes a different view: it frowns upon these parochial conceptions of political identity in favor of one focused on what we hold in common as citizens of the United States.[177]

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173 Adler & Kreimer, *supra* note 10, at 134.

174 Anderson & Pildes, *supra* note 9, at 1561; *see also* Caminker, *supra* note 153, at 84 ("Both a statute and a judicial decision can have expressive significance by articulating and reinforcing norms that are constitutive of a society's very identity and self-understanding.").

175 Jean Hampton, *Punishment, Feminism and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 CAN. J.L. & JURISPRUDENCE 23, 23 (1998); *see also id.* (noting that "the expressive nature of certain laws can be essential in the creation, maintenance or revision of a unifying identity for that society").

176 Sunstein, *supra* note 165, at 2028.

177 In the course of developing expressivist accounts of other pockets of constitutional law, commentators have focused on the interest in eschewing divisive conceptions of citizenship. *See, e.g.*, Anderson & Pildes, *supra* note 9, at 1533–34 (noting that "[e]qual [p]rotection doctrine . . . opposes laws that, by giving too much weight to suspect classifications, express a divisive conception of citizens—a conception that represents their racial, ethnic, religious, or other parochial identities as more important than their common identity as citizens of the United States"); *id.* at 1548 (noting that Establishment Clause doctrine reflects the Court's worry that "state aid to parochial schools could inspire citizens to identify themselves primarily along religious lines, to regard those not belonging to their religion as antagonists, and thereby to submerge their common identities as U.S. citizens

Of course, this raises the question of whether the conception of political identity endorsed by the jurisprudence of union is constitutionally sound. For even if we could all agree that the relevant cases are (and ought to be) about policing the construction of our political identity, we might still differ on the question of what the Constitution has to say about how that identity is constructed. It is to that question that I now turn.

B. Union and Vertical Federalism: Evaluating the Doctrine

In this Section, I test the constitutional bona fides of the jurisprudence of union. In particular, I scrutinize the principles of federalism that appear to motivate this body of jurisprudence in light of constitutional text and history, the functional values traditionally associated with federalism, constitutional structure, and precedent. We will see that text, history, and functional analysis provide neither emphatic support for the jurisprudence of union nor compelling reasons to doubt its soundness. Considerations of constitutional structure, on the other hand, are more telling: they tend to confirm that the statutes under review in the Court's union-oriented decisions advance a mistaken conception of our political identity.

As far as precedential analysis goes, the cases surveyed above[178] tell much of the relevant story. In fact, it is appropriate to say that those cases *define* our constitutional tradition when it comes to the value of union. But they do not tell all of the story; for, as we will see, two widely debated decisions handed down by the Rehnquist Court—*New York v. United States* and *Printz v. United States*—advance a conception of constitutional structure and union that is quite different from the one embodied in the cases we have examined thus far. These cases complicate efforts to understand what our Constitution has to tell us about union and the mutual obligations of the federal government and the states.

1. Text and History

The text of the United States Constitution does not tell us, in so many words, how far states may go when it comes to expressing disagreement with national law. Nor does it indicate, more generally, when a state's refusal to take ownership of things federal will fall on the wrong side of the line that distinguishes tolerable entailments of state autonomy from intolerable exercises in disunion. It does not speak in terms of the balance between national and state political identity, and it does not explicitly connect the specific commands and prohibitions in the Constitution's text to a particular conception of political self. By any metric, the text of the Constitution is underspecified with respect to the questions that concern us here.

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in favor of religious self-identifications"). *See generally* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (describing the development of an "antibalkanization principle"—focused on the interest in social cohesion and union—in the Court's race equality cases).

178 *See supra* Parts I and II.

Analysis of the historical record from the ratification era, along with that of the early constitutional period, is scarcely more illuminating. Although historical analysis has become a staple of modern cases relating to the shape of our federalism,[179] the jurisprudence of union has developed without sustained attention to historical materials. Indeed, other than the Court's reliance on *Federalist No. 82* in *Howlett v. Rose*,[180] and a lengthy discourse in the solo component of Justice Thomas's dissenting opinion in *Haywood* (which altogether rejects the central tenets of the Court's jurisprudence of union),[181] one sees nothing of this sort across the bodies of doctrine examined in Parts I and II.[182]

A number of scholars have carefully mined the available historical evidence (at least in connection with Congress's power to compel state courts to adjudicate federal claims), but their analyses point in different directions. Thus, Professor Warren's widely cited article *Federal Criminal Law and the State Courts*—which offers a detailed account of the development of federal jurisdictional law during the late eighteenth and early nineteenth centuries—concludes that "[w]hile Congress has no power to *force* jurisdiction upon a State Court, it has the power to *leave* jurisdiction to a State Court."[183] Professor Collins, meanwhile, agrees that the relevant historical record contains "almost no suggestion" that Congress could require state courts to adjudicate federal claims.[184] But he goes even further and insists that, with respect to significant chunks of federal business, there was a widespread understanding that state courts were not even *permitted* to exercise jurisdiction.[185] Professor Prakash, finally, on the basis of his review of the ratification era history, determines that "the Founding Generation understood that state courts *could* be commandeered to enforce federal law."[186] There is, it would seem, no consensus as to what the historical evidence tells us about state courts' powers and duties with respect to the enforcement of federal law. And without further development in our understanding of the historical record—pertaining to the issue of state judicial autonomy or to the issues ventilated in the other cases examined earlier—this sort of analysis cannot provide real traction on the question of what the union-based constraints on state autonomy ought to look like.[187]

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179 *See, e.g.*, Alden v. Maine, 527 U.S. 706, 715–27 (1999); Printz v. United States, 521 U.S. 898, 905–18 (1997).

180 *See supra* text accompanying notes 76–77.

181 *See* Haywood v. Drown, 556 U.S. 729, 743–56 (2009) (Thomas, J., dissenting).

182 *See supra* Parts I and II.

183 Warren, *supra* note 170, at 546.

184 Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 135.

185 *Id.* at 74.

186 Prakash, *supra* note 67, at 2032 (emphasis added).

187 One conclusion that I think safely can be drawn from the available historical evidence is that the conception of union that appears to drive the valid excuse cases was not widely shared during the first half-century or more under the Constitution. *Federalist No. 27* notwithstanding, *see supra* note 169 and accompanying text, members of the founding

2. The Functions of Federalism

Another way to assess whether the jurisprudence of union represents a sound exercise in constitutional federalism is by considering the functional values our federal system is traditionally thought to serve. We might ask, for example, whether the constraints on state autonomy announced in the case law undermine the capacity of our federal system to deliver increased individual liberty, enhanced opportunities for political participation, or the tailoring of policies to suit the diverse needs of a heterogeneous society.[188] If they do, then there is reason to doubt whether these decisions fit comfortably into our constitutional design. To gain insight into these questions, I focus, once again, on the valid excuse cases and on the limits on state autonomy to decline jurisdiction over federal cause of action.

Take first the interest in protecting individual liberty. As Alexander Hamilton explained in *Federalist No. 28*, dividing power between the federal government and the states is, among other things, a strategy for preventing its abuse:

> Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.[189]

There is little reason to think that requiring state courts to adjudicate federal claims will impede states' capacity to contribute to the preservation of liberty

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generation apparently did not consider state court adjudication of federal claims to be a union-reinforcing device (at least not in the sense of cultivating a widespread sense of national political identity). Instead, there is evidence that some who supported at least the permissibility of state court adjudication of federal claims did so "out of a desire to allay State jealousy and to reduce Federal power." Warren, *supra* note 170, at 581. Others denied the existence of any such power on the theory that state court adjudication of federal claims was inimical to national interests. *See, e.g.*, *id.* at 561, 567. Unsurprisingly, the seeds of the valid excuse doctrine were planted shortly after the Civil War, *see* Claflin v. Houseman, 93 U.S. 130, 137 (1876), at which time the imperatives of union must have looked quite different than they had during the early constitutional period. *See, e.g.*, Testa v. Katt, 330 U.S. 386, 390 (1947) (noting that questions pertaining to state courts' responsibilities with respect to the enforcement of federal law were largely settled "after the fundamental issues over the extent of federal supremacy had been resolved by war").

188 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (taking note of the values traditionally associated with the establishment of federal systems). There is a great deal of scholarly debate on the question of whether federalism is either necessary or sufficient to provide these benefits. *See* FEELEY & RUBIN, *supra* note 168, at 7–38. I will not engage that debate here. Instead, I presume that federalism, generally speaking, is capable of advancing the values mentioned above and inquire whether and how its capacity to do so might be affected by the jurisprudence of union. The analysis in the ensuing paragraphs mirrors (though it is less detailed than) Professor Caminker's analysis of *New York v. United States* and of the functional implications of the prohibition on congressional commandeering announced in that case. *See* Caminker, *supra* note 45, at 1060–87.

189 THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (J. Cooke ed., 1961).

in this way. This is so for two reasons. First, the substantive scope of federal regulatory authority—the potential expansion of which represents, for purposes of this analysis, perhaps the single most important threat to individual liberty—is simply not at issue in this context. The central question raised by the valid excuse cases is *how* valid federal law is to be enforced, not *whether* federal law is valid in the first place. Second, the primary means through which state governments and officials might help to check the expansion of federal power—by "'sound[ing] the alarm' to alert the national electorate and by mobilizing political forces against federal policies"[190]—are not undermined by federal legislation that compels state courts to adjudicate federal claims.

A related worry is that by requiring state judges to devote their time and energy to the adjudication of federal claims, federal commandeering of state judiciaries will sap state governments of the independence and vitality necessary for them to serve as alternate centers of political power capable of checking the federal government.[191] I do not think this concern is a serious one. The question of whether people view state government as meaningfully independent of the federal political process, and, as a corollary, whether they view participation in state government as a worthwhile endeavor, would seem to turn primarily on whether states enjoy a meaningful measure of regulatory freedom and capacity. It turns, in other words, on what state governments get to *do*, all things considered. And there is no mistaking the fact that, notwithstanding the vast reach of federal power under modern conditions, state and local governments continue to enjoy significant authority and exercise wide discretion across many policy domains. Certainly it is the case that, to this point in our history, neither state courts' routine adjudication of federal claims as they arise in connection with state law causes of action, nor the longstanding practice of (both voluntary and compelled) state court adjudication of federal claims, has created the perception that the work of the state judiciaries is "superfluous to participation in the national political process."[192]

It is likewise difficult to see why compulsory state court adjudication of federal claims would diminish opportunities for political participation in local government. Even assuming that a consequence of requiring state courts to adjudicate federal claims is that state judges spend less of their time on state law matters, there is no reason to think this represents a difference in the quantity or quality of the participatory exercise.[193] Indeed, requiring

190 *See* Caminker, *supra* note 45, at 1075 (alteration in original) (footnotes omitted) (quoting THE FEDERALIST NO. 26, at 172 (Alexander Hamilton) (Rossiter ed., 1961)).

191 *See, e.g.*, Cox, *supra* note 10, at 1328.

192 *Id.*; *see also* Caminker, *supra* note 45, at 1077 ("Congress's decision to have state rather than federal officials implement a particular policy does not materially reduce the universe of governing tasks left to state officials, and thus should not appreciably undermine the state's character as an independent political culture.").

193 If state judges generally had less discretion in cases involving federal law than in cases involving state law, there might be reason to think that the measure of their participa-

state judges to adjudicate federal claims would seem to enhance opportunities for participation in governance; first, through simple diversification of the substantive legal regimes state judges are called upon to enforce and, second, by giving state judges a hand in the development of a body of law that would otherwise fall exclusively to federal officials to enforce.[194]

It is also the case that constraining state courts' authority to decline jurisdiction over federal causes of action should in no way affect states' capacity to produce substantive policy diversification and thereby increase the likelihood of government serving the unique needs of different pockets of American society. It is crucial here, once again, that the legal doctrine in question does not concern the scope of federal substantive lawmaking authority. If Congress is disabled from compelling state court participation in the adjudication of federal claims, it will neither increase the scope of state legislative authority nor diminish the preemptive effect of federal law. It will mean only

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tion in the stuff of governance was contingent on the amount of federal law adjudication they were called upon to perform. But even allowing for differences in our constitutional disposition toward the creation of federal common law and state common law, this seems a dubious conclusion. Statutory and constitutional interpretation often involve the exercise of significant discretion. And even when this discretion is relatively cabined, the adjudicative process would still seem to provide significant opportunity for participation in governance.

194 *Cf.* Caminker, *supra* note 45, at 1078 (noting that "when Congress uses bounded discretion mandates to leave state and local governments with substantial control over important subsidiary policies, . . . Congress actually preserves a greater role for local political participation than were it to preempt state regulation entirely"). One might worry that the participatory experience of state legislators or administrative officials—not state judges—would be desiccated by virtue of congressional commandeering of state courts. This would be the case if, absent authority to involve state judges in the process of enforcing federal law, the law in question might not be enacted at all, thus leaving room for states to regulate as they please. The question of how seriously to take this concern turns on a complex assessment of the likelihood that, faced with the possibility of one or more states declining to adjudicate some set of federal claims, Congress would abandon the relevant component of its regulatory effort. The necessary analysis would then require weighing the "participation costs" suffered by states when their judges do not have a hand in the interpretation of federal law (when Congress goes ahead and enacts the law notwithstanding the possibility that some states will opt out of enforcement) and the "participation benefits" enjoyed by states when their legislative and executive officials enjoy the enhanced regulatory freedom that accompanies a congressional decision not to regulate. I do not pretend to know precisely what results such an assessment would yield. I am inclined to think the set of circumstances in which the federal government would forego regulation altogether if it could not rely on its authority to compel state courts to adjudicate federal claims is rather small. But if we imagine full-scale withdrawal by the states from the process of adjudicating the claims associated with a particular federal law, and the potentially significant costs to the federal government of requiring federal tribunals to shoulder the entire load, then the possibility of regulatory abstention by the federal government seems more plausible.

that states participate less in the interpretation and development of such federal law as is enacted.[195]

Finally, in assessing the impact of compulsory state court adjudication of federal claims on the functioning of our federal system, we might consider the argument—advanced by the Supreme Court in *New York v. United States* and *Printz v. United States*—that when Congress commandeers arms of state government, it undermines the accountability of both state and federal officials. The crux of the argument is that commandeering causes voter confusion; in particular, it might cause voters mistakenly to blame the enforcing government (the state) for the policies of the enacting government (the feds).[196]

Others have exposed the significant weaknesses that inhere in this accountability argument, and I will not rehearse the key moves here.[197] It is worth adding, however, that in the particular context of state court adjudication of federal claims, the likelihood of voter confusion on the question of who bears responsibility for a particular law seems especially low. This is because of the deeply entrenched expectation (it is, perhaps, properly regarded as a requirement) that judges give reasons for the decisions they make.[198] Hence, even if we indulged the dubious assumption that there is cause to be concerned about official accountability when Congress commandeers arms of state government, the concern appears muted where state judiciaries are concerned. And on the whole, accountability concerns provide little reason to doubt the constitutional bona fides of the jurisprudence of union.

3. Structure

One might find support for the jurisprudence of union by reference to considerations of constitutional structure, though it must be acknowledged that the structural argument is a contingent one. It is tempting to maintain that it is simply a contradiction in terms to have a union in which member states fail to take ownership of federal directives or somehow resist the notion of their belonging to a political community that is national in scope. But this argument is overstated. The label "union" can sensibly be applied to a wide

195 *See supra* note 194 and accompanying text; *cf.* Caminker, *supra* note 45, at 1079 (observing, for similar reasons, that federal commandeering of state legislatures "works no greater, and perhaps a substantially smaller, direct intrusion on state autonomy in the regulated field than does conventional federal governance").

196 *See* Printz v. United States, 521 U.S. 898, 930 (1997); New York v. United States, 505 U.S. 144, 169 (1992).

197 *See, e.g.*, Caminker, *supra* note 45, at 1061–74; 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, 824–31 (1998).

198 *See, e.g.*, Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 838 (1991) ("In our law . . . the exercise of a power to speak authoritatively as an interpreter carries with it an obligation to explain the grounds upon which the interpreter gives that authoritative judgment.").

variety of political federations exhibiting greater and lesser degrees of tolerance for expressions of separation by individual states or signals from those states that membership in a local political community is somehow paramount over membership in the national.[199] The United States, certainly, would not cease to be a union if states were permitted to provide tax benefits to state and local employees while denying them to federal employees. And I do not think we would regard "union" as a misnomer for our structure of government if state courts were given greater freedom to decline jurisdiction over federal claims. So it just won't do to insist that, simply by virtue of establishing a federal union, our Constitution prohibits states from enacting laws that treat state, rather than national, political identity as primary.[200]

More promising is the argument that state laws that treat the federal government or federal law as outsiders are out of step with the prevailing constitutional order in the United States today. Nobody doubts that our national government enjoys extremely broad legislative authority. Federal law covers fields as diverse as employment, securities trading, and environmental protection. It touches the most intimate details of our lives, including whom we can marry, how we care for our loved ones when they are ill, and whether a woman must carry a pregnancy to term. Our practice of looking to the national government to address our most pressing (and, sometimes, our most personal) challenges—a practice that has been reinforced and accelerated over the course of generations—signals an extraordinarily high measure of citizen identification with the national government.[201] Seen in this light, the difficulty with state statutes that rest on a thin conception of citizens' kinship with the federal government is not so much that they are misguided or dangerous as that they trade in a notion that simply isn't true.[202]

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199 The term "union" is attached to political systems as diverse at the United States, United Kingdom, European Union, United Nations, United Arab Emirates, United Mexican States, United Arab Republic, and so on. *See* Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, *in* THE FEDERAL VISION 213, 213–51 (Kalypso Nicolaidis & Robert Howse eds., 2001) (exploring variance in the law of different federal systems—specifically, the United States, Germany, and the European Union—with respect to the question of whether the central government is permitted to commandeer subnational government units).

200 *Cf.* Metzger, *supra* note 4, at 1503 (noting, in the course of examining the implications of union for a variety of doctrines in the law of horizontal federalism, that "[v]iewed functionally, the demands of national union have little preset, acontextual content").

201 *See* Caminker, *supra* note 153, at 88–89 (noting that "over the course of two centuries, we have become a unified nation with primarily national rather than state affiliations and loyalties" and explaining that we "perceive ourselves as national citizens first and state citizens second (if much at all)"); *see also* FEELEY & RUBIN, *supra* note 168, at 115 ("[T]he American people . . . have a unified political identity.").

202 Professor Manning has argued that "it is . . . difficult to infer particular restrictions on state power from the broad proposition that we are a nation." John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2068 n.286 (2009). This is a fair point. A full-throated defense of structural inference as an interpretive method (in federalism cases or otherwise) is beyond the scope of this Article. For present purposes, however, I wish to note, first, that the structural account offered

To be sure, there are those who object to the extent of federal power. Vigorous opposition to the scope of federal authority, and to the pervasiveness of federal regulation, is not only a familiar feature of the academic literature pertaining to federalism,[203] it is a highly salient feature of modern political discourse as well.[204] But this is, at the end of the day, a rearguard action. And, perhaps more importantly, it is one that few seem serious about in its more aggressive forms. This is to say that (a) the likelihood of a truly significant retrenchment in the scope and nature of federal regulatory power is vanishingly small; and (b) for all the rhetoric in the political and judicial sphere about the need to rein in the authority of the national government, one is hard pressed to find those who would curtail federal authority in ways sufficiently dramatic as to shift us off the course outlined immediately above.[205] If the law is to "conform with and reflect the nation's political identity,"[206] then, it must take heed of these powerful signals that that identity is primarily national in character.

I don't want to overstate the point. One can imagine a multitude of arguments that begin with the notion that the federal government is pos-

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here is the best tool for making sense of the diverse body of cases examined in Parts I and II. One of the significant casualties of Manning's constitutional textualism is our ability to make sense of large swaths of constitutional law. *See* Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 103 (2009) (taking note of the "destabilizing implications" of Manning's approach toward constitutional interpretation). The union-oriented decisions highlighted here would simply add to the body count. Second, it is worth considering (in light of the Preamble) whether union in fact counts as a value that is "attached to no particular clause of the document," or, instead, whether we should regard the union-driving components of the Constitution (including the Preamble) as fragments of the text that are not "precisely drawn" and "leave room for interpretation." Manning, *supra*, at 2008, 2068.

203 *See, e.g.*, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1454 (1987).

204 *See, e.g.*, Trip Gabriel, *G.O.P. Anti-Federalism Aims at Education*, N.Y. TIMES, Oct. 9, 2011, at A28 (noting that "the quest to sharply shrink government that all the Republican candidates [in the presidential election of 2012] embrace . . . has brought a sweeping anti-federalism to the fore on education, as in many other areas").

205 *See, e.g.*, Andrew C. McCarthy, *Big-Government Republicans*, NAT'L REV. ONLINE (Feb. 2, 2012, 4:00 AM), http://www.nationalreview.com/articles/289905/big-government-republicans-andrew-c-mccarthy ("The brute fact is that today's Republican establishment does not believe in limited government. 'Limited government' is a slogan reserved for campaigns and fund-raising drives. The idea is not to rein in big government; it's to hold the reins of big government.").

Even among the conservative Justices who have shown a willingness to reinvigorate limits on the scope of Congress's power under the Commerce Clause, only Justice Thomas has shown the slightest hint of enthusiasm for returning to an original understanding of that Clause which, by Justice Thomas's lights at least, would require jettisoning Congress's power to regulate activity on the ground that it substantially affects interstate commerce. *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 596 (1995) (Thomas, J., concurring).

206 Caminker, *supra* note 153, at 85.

sessed of enormous power and end with the conclusion that some state enactment (with ramifications for federal law or the federal government) cannot be reconciled with our constitutional structure. Things cannot always be so simple. But for purposes of the particular inquiry pursued here, the scope of federal authority within our modern constitutional order seems genuinely probative. The nature of our political identity—and, as a corollary, the question of whether a state statute expresses the right view of that identity—is partially contingent on the role different levels of government play in our lives. It is contingent, in other words, on the role that we, by virtue of our evolving social and legal traditions, permit (and sometimes demand) those different levels of government to play in our lives. It seems fair to say, then, that the fact of our federal government's broad authority and pervasive activity sheds light on the question of whether the jurisprudence of union rests on a sound conception of our constitutional structure.

4. Precedent: The Anti-Commandeering Decisions and the Jurisprudence of Union

In assessing the merits of a claim about constitutional meaning, it is conventional to inquire as to the quality of the claim's fit with our precedential traditions. In this case, the decisions surveyed already (in Parts I and II) constitute the core of the relevant tradition. Collectively, these decisions establish a firm foundation for the imposition, in vertical federalism cases, of union-based constraints on state autonomy. But there are Supreme Court decisions that sound a different note with respect to the obligations of membership in our union. In particular, the Court's anti-commandeering cases—*New York v. United States* and *Printz v. United States*—rest on a conception of union that is markedly different from the one we have encountered thus far.

New York and *Printz*, respectively, hold that Congress may neither compel state legislatures to enact federal regulatory programs nor require state executive officials to enforce federal law.[207] Such exercises of federal authority, the Court held, impermissibly "commandeer" arms of state government and press them into federal service.[208] The tension between these decisions and the valid excuse cases—which, we have seen, affirm congressional authority to compel state courts to enforce federal law—is not news. Indeed, the Court took pains in *New York* and *Printz* to distinguish the holding in *Testa v. Katt*,[209] and the dissenting Justices in *Printz* emphasized the difficulty of doing so.[210] But it is only when we come to see *Testa* as part of a larger body of cases reinforcing a particular conception of our union that we get a clear picture of how difficult it is to fit *New York* and *Printz* into the body of case law that preceded those decisions.

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207 Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 188 (1992).

208 *Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 176.

209 *See Printz*, 521 U.S. at 928–29; *New York*, 505 U.S. at 178–79.

210 *See Printz*, 521 U.S. at 967 (Stevens, J., dissenting).

To see this, it is useful to contrast our discussion of the expressivist considerations that seem to motivate the jurisprudence of union with expressivist accounts of the anti-commandeering doctrine. Professor Cox, for example, has argued that *New York* and *Printz* are driven by the intuition that "commandeering of states—more so than other mechanisms of federal control of state regulatory capacities—expresses denigration for state autonomy."[211] Cox finds support for this claim in the rhetoric deployed by the *Printz* majority, including the Court's observations "that commandeering 'reduc[es] [the states] to puppets of a ventriloquist Congress' and 'dragoon[s]' state officials."[212] Along these same lines, Professors Anderson and Pildes emphasize that *New York* and *Printz* trade in the "language of degradation, subordination, and domination."[213] And they argue, further, that the anti-commandeering cases signal that "[t]he political relationships constituted by and expressed through national legislation that simply orders state officials to become vehicles of Congress [are] . . . inconsistent with the structural relationships that the Constitution establishes."[214]

But, of course, the vision of state participation in the enforcement of federal law that these commentators find implicit in the anti-commandeering decisions is nothing like the one that quietly informs cases like *Testa* and *Haywood*.[215] In those cases, we have seen, state courts' role in the enforcement of federal law is depicted not as an exercise in degradation and subordination, but as an expression of union and ownership, association and responsibility.

It could be argued, perhaps, that from the perspective of union, commandeering state legislatures, at least, is different from commandeering state courts. If states' central obligation under the valid excuse cases is to treat federal law and policy as their own,[216] then it would seem to matter whether the federal government has actually enacted law that specifies the content of federal policy or, instead, has left a regulatory void and demanded that that void be filled by law and policy of the states' design. The obligation of union, the argument goes, requires states to adopt a particular attitude toward existing federal law and policy, but it does not require them to establish that law and policy themselves.[217]

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211 Cox, *supra* note 10, at 1330.

212 *Id.* at 1331–32 (alterations in original) (quoting *Printz*, 521 U.S. at 928).

213 Anderson & Pildes, *supra* note 9, at 1559.

214 *Id.*

215 *See supra* notes 18–80 and accompanying text.

216 *See supra* text accompanying notes 64–66.

217 The federal government advanced a version of this argument in the brief submitted to the Supreme Court in *Printz*, though of course the interest in union did not make an appearance. *See* Brief for the United States at 10, *Printz*, 521 U.S. 898 (Nos. 95-1478, 95-1503), 1996 WL 595005, at *10 (emphasizing that the law under review "d[id] not require the States to add anything in the way of policy to those choices made by the federal government, or otherwise to devise a solution to the problem [addressed by federal law]"); *see also id.* at 10–11 (noting that "[i]n the statute under review in New York, Congress identified a national problem . . . but failed to enact a federal solution").

But this distinction has no more than surface appeal. Nothing inherent in the concept of union suggests that states should be exempt from the obligation to internalize federal policy simply because that policy is underspecified. The central lesson of the valid excuse cases—and the jurisprudence of union more generally—is that states must respect their citizens' identities as members of a national political community. When the national law that binds those citizens (and is of those citizens) declares a policy in favor of states devising solutions to a federally identified problem, it is difficult to see why states' duty of respect ought to be any different from the one that kicks in when national law not only identifies a problem but mandates a particular solution to it. At least, nothing about the value of union itself suggests any such distinction.

Justice Scalia's opinion for the Court in *Printz* takes a stab at explaining why the commandeering of state judiciaries is permitted under the *Testa* line of cases, while the commandeering of other branches of state government is constitutionally prohibited. "It is understandable," Justice Scalia wrote, "[that] courts should have been viewed distinctively in this regard; unlike state legislatures and executives, they appl[y] the law of other sovereigns all the time."[218] But this contention turns the reasoning of *Testa* on its head. It imagines that case to be rooted not in the uniqueness of states' relationship to federal law and the federal government, but in the polar opposite notion—that states' obligations with respect to federal law represent a variation on the traditions governing states' interface with the laws of foreign nations. Yet *Testa* provides explicitly (and, indeed, seems to rest its conclusion on the notion) that "*state courts do not bear the same relation to the United States that they do to foreign countries.*"[219]

The point is worth lingering over for a moment because it sheds bright light on the conception of union that lies at the heart of the valid excuse decisions. One can imagine the *Testa* Court having justified its conclusion—that state courts of competent jurisdiction cannot decline to hear federal causes of action—on the ground suggested by Justice Scalia—namely that state courts routinely tackle whatever business comes over the transom, and so it is no affront to the autonomy of the states for Congress to add federal causes of action to the mix. But the Court did no such thing. Instead, it flatly rejected the state court's assumption "that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country."[220] That assumption, we have seen, "flies in the face of the fact that the States of the Union constitute a nation."[221] Hence, the *Printz* majority managed to distinguish *Testa* only by

218 *Printz*, 521 U.S. at 907.
219 Testa v. Katt, 330 U.S. 386, 389 (1947) (emphasis added).
220 *Id.*
221 *Id.*

ignoring what it says and by disregarding the conception of union on which that decision is premised.[222]

The dissenting Justices in *Printz* scarcely did better along this dimension. Thus, Justice Stevens's dissenting opinion joins issue with the majority on the question of whether the anti-commandeering decisions can be reconciled with *Testa*,[223] but it does not focus attention on the conflicting visions of union underlying the cases.[224] Indeed, for the most part, the dissenting opinion eschews talk of underlying constitutional values and grounds its analysis in text and history.[225] If anything, the dissent implies that the cardinal value at stake when Congress seeks to compel state government to take a hand in the implementation of federal law is the value of supremacy, and it suggests that the central interest at stake is the interest in allowing Congress to implement federal policy in the manner it deems most efficacious.[226]

The Court's failure, in its union-oriented decisions, to give sustained attention to the constitutional values at stake thus came home to roost in the anti-commandeering decisions. Faced with a set of questions about the extent of states' obligation to take ownership of federal law and policy, the Justices largely neglected the diverse body of decisional law through which

222 The *New York* and *Printz* Courts both attempted to distinguish *Testa* on the ground that the Supremacy Clause, through its explicit reference to state judges (and failure to refer explicitly to state executive officers and legislators), calls for different treatment of the branches of state government for commandeering purposes. *See Printz*, 521 U.S. at 928–29 & n.14; New York v. United States, 505 U.S. 144, 178–79 (1992). For reasons persuasively laid out by Professor Caminker, this argument fails to persuade. *See* Caminker, *supra* note 45, at 1034–42; *see also Printz*, 521 U.S. at 968 n.31 (Stevens, J., dissenting) (explaining that the Judges Clause establishes a choice of law rule to govern state court adjudication in cases falling within the jurisdiction of the state courts but does not supply independent authority for commandeering state judges).

223 *Printz*, 521 U.S. at 967–70 (Stevens, J., dissenting).

224 The dissenters did rely heavily on *Testa* to defend the claim that "not only the Constitution, but every law enacted by Congress as well, establishes policy for the States just as firmly as do laws enacted by state legislatures." *Id.* at 944; *see also id.* (quoting at length from *Testa*, including the well-known passages providing that federal legislation "establishe[s] a policy for all" and "is as much the policy of [the State] as if [the law] had emanated from its own legislature"). As noted earlier, this conception of states' relationship to federal law is best understood as an obligation that inheres in union. *See supra* text accompanying notes 64–66, 68–74. But the dissenters in *Printz* were content simply to identify, rather than explain, these features of our federalism, and their subsequent analysis suggests that they tended to view the problem in supremacy-based terms. *See infra* note 226 and accompanying text.

225 In particular, the dissenters argued that the regulation at issue in *Printz* fell within the scope of the Commerce and Necessary and Proper Clauses, and that there is no support in the text of the Constitution for the anti-commandeering rule announced by the Court. *See Printz*, 521 U.S. at 941–44 (Stevens., J., dissenting).

226 This is reflected most prominently in the final passage of the dissenting opinion, which states: "If Congress believes that . . . a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power." *Id.* at 970.

the Court has been grappling with these questions—in assorted variations—for decades. And to the extent the Court did engage with these precedents, it failed to grasp their import. This is not to say that the anti-commandeering cases would have been decided differently if only the Court's earlier decisions had been clearer about union's role in underwriting constraints on state autonomy. But it might have enabled the Justices to have a more illuminating conversation about when and why states ought to be required to take a hand in the development and implementation of federal law and policy. Instead, we are left with a pair of decisions that fit poorly into a longstanding constitutional tradition and seem barely conscious of it.

C. Union and Vertical Federalism: Further Applications

In this Section, I take up the question of whether and how the jurisprudence of union might apply in two scenarios not yet addressed by the courts. Both involve state laws that express disagreement with federal law and policy and thus appear to transgress the limits articulated in the Court's jurisprudence of union. Yet application of the principles examined in this Article to these scenarios is far from straightforward.

Consider, first, the Illinois Abortion Law of 1975. It reads:

> [T]he General Assembly finds and declares that [the] longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.[227]

Louisiana enacted a similar statute in 1981.[228] These provisions unabashedly distance the enacting states from the policy embodied in federal law. And because neither statute calls for the actual implementation of state policy pertaining to abortion, it seems safe to say that they are designed simply to express the enacting states' disagreement with federal law and policy.[229]

At first blush, this sort of thing seems straightforwardly impermissible, since the jurisprudence of union—the doctrine of valid excuse, in particular—signals that states cannot use their law to express disagreement with federal policy.[230] On reflection, however, there is reason to think that statutes

227 720 ILL. COMP. STAT. ANN. § 510/1 (West 2013).

228 *See* LA. REV. STAT. ANN. § 40:1299.35.0 (2012).

229 These statutes might serve the additional purpose of spring-loading state policy relating to abortion so that, in the event of a change in federal constitutional law, state policy can be implemented without the need for additional legislative action.

230 I leave to one side the question of whether a state law of this sort (i.e., one that explicitly orders the non-implementation of the policy it embodies) is subject to judicial review. As other commentators have noted, cases involving allegations of expressive harm tend to confound conventional standing analysis. *See, e.g.*, Samuel Issacharoff & Pamela S.

like these are constitutionally unproblematic. When a state uses its law as a means of expressing opposition to federal policy, but announces in the very same breath that it will continue to adhere to the federal norm, it expresses commitment to the national political community and, indeed, highlights its willingness to incur costs to make good on that commitment. In this way, the Illinois Abortion Law and its Louisiana counterpart, far from downplaying the significance of national political identity, highlight the potency of that identity.

To see the difference between the expressive content of statutes like the Illinois and Louisiana abortion laws and the expressive content of statutes that run afoul of the union-based limits on state autonomy, consider the following example: Say my family is having guests over for dinner, and I ask my children to help clean the house in preparation for the guests' arrival. Son #1 is outraged (obviously). He (loudly) expresses his lack of regard for the "let's clean up" initiative and, although he pitches in and cleans his room, protests vigorously all the while. Son #2 is equally outraged (equally obviously), but he adopts a different strategy: he sits around and does nothing, leaving the rest of the family to clean without his help. Quite obviously, there is reason to object to Son #2's behavior if he makes it impossible for us to clean the house in time. He will thereby have undermined the family's chosen objective.[231] But even if that's not the case—even if we can (and do) get the job done easily without his help—there is reason to think differently about the two boys' behavior, for they send different messages about what it means to be a member of our family.

Son #1 communicates that membership in our family comes with responsibilities attached, and that we help each other out, even if it means doing something we find burdensome or unpleasant. Son #2 acts on a thinner conception of what membership in our family entails. He seems to think his responsibilities extend only so far as he approves of whatever the family happens to be doing. I'd be justified in insisting that Son #2 lend a hand, even if his contribution to the cleaning effort is not strictly necessary and even if the additional burden faced by other family members as a result of his non-participation is trivial. Such insistence would help constitute my family as a community in which pitching in is the norm.

Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2285–91 (1998); Pildes & Niemi, *supra* note 158, at 513–16. Within the universe of such cases, moreover, one involving a provision like the Illinois Abortion Law—which *says* something ("we oppose federal policy pertaining to abortion") but doesn't *do* anything—would appear to present a particularly weak case for Article III standing. In cases from the *Testa/Haywood* line, the relevant states express something *by doing something* (i.e., carving cases out of the jurisdiction of state courts). But the abortion statutes examined here do not communicate a message through the implementation of some policy; they communicate a message simply by *saying* something. Even one who is willing to recognize legally cognizable harm in the former sort of case might balk at doing so in the latter scenario.

231 We will pretend, for purposes of this discussion, that "the family's objective," in my house, is determined by the parents.

The abortion statutes mentioned above look more like the behavior of Son #1 than that of Son #2. They express disagreement with federal policy, but they don't act on that disagreement. On the other hand, the state courts that dismiss federal claims on grounds of disagreement with federal policy seem more like Son #2, who refuses to pitch in and help clean the house. We are justified, in that scenario, in insisting that the state lend a hand, even if its adjudication of the relevant federal claims is not strictly necessary to the advancement of federal policy (which is to say, even if state jurisdictional law poses no real threat to federal supremacy). Such insistence helps constitute our union as one in which states identify with the national government and federal law.

Next, consider provisions like the marijuana decriminalization initiatives passed in Colorado and Washington in 2012.[232] It is possible that these measures (and the regulatory schemes they've spawned) are preempted outright by federal law.[233] After all, they attempt to regulate (to make *regular*) that which federal law prohibits. But what I'd like to focus on is the distinct question whether Colorado and Washington have run afoul of the union-based constraints on state autonomy. For the measures in question not only express the enacting states' disagreement with federal drug policy, they *act* on that disagreement by repealing state-level criminal penalties for the covered conduct and calling for the establishment of regulatory infrastructure to govern behavior that federal law forbids. Thus, we are (at least) one step removed from the abortion laws mentioned above, since the abortion provisions do nothing more than formally express states' disagreement with federal law and policy.

I think this is a difficult case. On the one hand, no one thinks states are obligated to replicate in their statute books the prohibitions codified in federal law. So if we imagine a time at which neither the states nor the federal government has any anti-drug laws, and imagine further that the federal government changes its policy and establishes criminal prohibitions on the possession and use of marijuana, no one would argue that states would immediately be obligated to enact parallel prohibitions under state criminal law. And even if some state declined, under these conditions, to criminalize marijuana possession because it disagreed with the policy embodied in federal law, no one would think it cause for constitutional concern. Our legal tradition simply provides no support for the notion that the existence of a gap between the content of state and federal criminal law is, without more, constitutionally problematic.

On the other hand, the Colorado and Washington marijuana initiatives seem quite different from a state's refusal to take affirmative steps to replicate criminal prohibitions established by federal law. These repeals come in

232 *See* COLO. CONST. art. 18, § 16; 2013 Wash. Legis. Serv. Ch. 3. (I.M. 502) (West).

233 For preliminary speculation on this issue, see the exchange between Professors Dorf and Lederman. *See* Mike Dorf, *Don't Break Out the Cheetos and Goldfish at All (Not Even the Vegan Alternatives)*, DORF ON LAW (Nov. 19, 2012, 12:30 AM), http://www.dorfonlaw.org/2012/11/dont-break-out-cheetos-and-goldfish-at.html.

the midst of highly salient public debate as to the wisdom of the criminal prohibitions in question. Moreover, there is a longstanding tradition of federal-state collaboration in the enforcement of this particular federal policy, and there can be no doubt that states' withdrawal from the field (coupled with resource constraints that limit what the federal government can do on its own along this dimension) will render enforcement of the policy codified in our federal drug laws a de facto impossibility.[234] There is, in short, no escaping the fact that the decriminalization efforts in Colorado and Washington constitute a sharp rebuke of federal drug policy, and it cannot be denied that the state laws in question will affect the real-world implementation of that policy. Given the emphasis, in the Court's jurisprudence of union, on states' obligation to take ownership of federal law and policy, there is cause to doubt the constitutionality of these measures.

That said, there are also reasons to think the Colorado and Washington initiatives are salvageable. To begin with, the expressive content of the Colorado and Washington measures seems different from the expressive content of the state action deemed impermissible in the union-oriented decisions examined in Parts I and II. Again, an example from the domestic sphere can help to illustrate the point. Imagine now that one of my kids (let's call him "the Unicorn") has long been in the habit of helping clean the house when he sees one of his parents doing so. And imagine further that my family will be hosting guests one evening, but I haven't asked my kids to clean up in anticipation of their arrival. The Unicorn, let us assume, has grown weary of the thoughtfulness and decency that characterized his earlier behavior, and he sits idly by and watches as the rest of the family tidies up. To be sure, the shift in behavior is lamentable, and it hardly seems consistent with a thick conception of responsibility to the community that is our family. But it differs from the behavior of Son #2 in our prior example, which, you will recall, entailed outright refusal to help in the face of a direct request.[235] Perhaps

234 *See* MARIJUANA POLICY PROJECT, STATE-BY-STATE MARIJUANA LAWS 1 (2011), *available at* http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2011.pdf (noting that "99% of all marijuana arrests in the nation are made by state and local (not federal) officials").

235 Whether it makes sense to regard the federal government as having asked the states for help with the enforcement of federal anti-drug law is by no means a simple question. Much of the activity that has been decriminalized in Washington and Colorado—low quantity possession and use—is formally prohibited by federal law, but has never been a significant priority for federal law enforcement officials. So, on the one hand, one might conclude that the states' change of heart along this dimension is perfectly consistent with federal policy, as expressed through longstanding federal enforcement practice. On the other hand, we might say that federal policy is very much in favor of the arrest and prosecution of small-time marijuana users and that the federal government has long tacitly relied on states to provide the enforcement muscle necessary to effectuate this policy. To the extent the latter formulation is sound, the changes in Colorado and Washington law look more like disclaiming responsibility for federal law and refusing to lend a hand when the federal government has asked for help. I do not think there is a right answer to the question of which of these accounts of states' role in the enforcement of federal drug policy is sound. For purposes of the analysis here, however, I want to emphasize that the federal

the union-based constraints on state autonomy should encompass behavior that looks like that of Son #2, but not behavior that resembles the passive-aggressive conduct exhibited by the Unicorn and, arguably, Colorado and Washington.

More fundamentally, we might push back on the central premise of this inquiry—that the Colorado and Washington initiatives actually defy federal policy. It is clear that the initiatives are out of step with federal law on the books, but it is at least arguable that they reflect (and are helping to accelerate) a shift in national attitudes toward the criminalization of marijuana use. This raises the intriguing possibility that, in some instances, federal law does not accurately capture "the union's" stance toward a particular issue.

It is noteworthy, in this vein, that the Department of Justice recently issued a Guidance Memorandum in which it explained that "the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," and that it "has left such lower-level or localized activity to state and local authorities."[236] The Memorandum specifies, moreover, that notwithstanding the changes in Colorado and Washington, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."[237] And the Department of Justice has informed the Governors of both Colorado and Washington that "it is deferring its right to challenge their legalization laws."[238] Thus, it may be too hasty to dismiss the Colorado and Washington initiatives as exercises in dissociation from national drug policy; they might be regarded, instead, as signals that this policy is changing. At the very least, to the extent it was thought that federal drug policy required sustained enforcement (by either state or federal officials) of criminal prohibitions against small-time marijuana possession and use, the Department's response to the Colorado and Washington initiatives indicates otherwise.

Parallel questions arise when states enact laws that run counter to existing Supreme Court doctrine and then (departing from the Illinois/Louisiana model discussed above) go ahead and enforce the state policy in the face of established doctrine to the contrary. In some of these cases, the relevant state officials enact and enforce state policy with the goal of stimulating

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government has not formally reached out to the states for enforcement in the same way it did in the circumstances presented in *Printz*. This makes it plausible to classify the expressive significance of states' withdrawal from the enforcement of criminal prohibitions on small-time marijuana use differently from the expressive significance of states' refusal to perform the background checks required under the federal law at issue in *Printz*.

236 Memorandum from Deputy Attorney Gen. James M. Cole to All U.S. Attorneys, Guidance Regarding Marijuana Enforcement 2 (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

237 *Id.* at 3.

238 Press Release, Dep't of Justice Office of Pub. Affairs, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), www.justice/gov/opa/pr/2013/August/13-opa-974.html.

legal challenges and with the hope and belief that the prevailing understanding of pertinent constitutional norms either has changed or is on the brink of change. Is this sort of constitutional reclamation project an affront to union because it takes as its premise a view of our Constitution that is different from that embodied in existing legal doctrine? I would argue that it depends on whether the relevant state officials are acting in good faith. Good faith efforts by government officials to anticipate and even accelerate plausible changes in constitutional norms might prove to violate the principle of supremacy (should the courts ultimately decline the invitation to modify existing law), but they need not be regarded as an affront to the value of union since the relevant state actors purport to be advancing constitutional norms (properly understood) rather than flouting them. Of course, it is easy to imagine state officials advancing implausible claims about the shape of our constitutional law and attempting to pass them off as the stuff of "true" constitutional understanding. (It is likewise easy to imagine a state official insisting that some exercise in dissociation from national policy in fact reflects a considered judgment about the future trajectory of that policy.)[239] But this is a problem of implementation, and not a deficit in the underlying theoretical claim about when official state defiance of established law counts as an affront to union.[240]

CONCLUSION

In the pantheon of constitutional values pertaining to American federalism, national supremacy takes up a great deal of space. We have seen that, when federal law or national interests appear to be threatened by state action, courts and commentators turn to this value almost reflexively, and

239 *Cf.* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1273 (2009) (taking note of the problem "familiar to scholars of civil disobedience [of] . . . distinguishing between the scofflaw and the civil disobedient").

240 Although they are cagey about endorsing outright the notion that it is generally worthwhile to facilitate state dissent from federal policy, Professors Bulman-Pozen and Gerken have highlighted some of the virtues of constitutional doctrines and administrative schemes that are conducive to such dissent. *See id.* at 1260, 1284–1307, 1310. Of particular relevance to the discussion immediately above, they note state officials' capacity to challenge and perhaps reshape national policy by "appeal[ing] to the nation's shared laws and traditions" as the best justification for some state action, as opposed to justifying that action strictly by reference to state or local policy. *Id.* at 1289. This observation (like much of the analysis in their article) calls attention to the difficulty of distinguishing constitutionally tolerable efforts to coax federal policy in new directions from constitutionally problematic exercises in disunion. It seems safe to say, despite the authors' appropriately cautious disclaimer of a one-size-fits-all approach to the normative questions raised by their observations about state dissent, that they are more sanguine about this sort of state action than I am. For the most part, they shy away from the question of whether different species of state dissent from federal policy constitute an affront to federal supremacy (the notable exception is their treatment of preemption doctrine, which, they argue, should be more accommodating of conflict between state and federal law) and do not address the consequences of such dissent for the constitutional value of union at all. *Id.* at 1304.

they do so even when considerations of federal supremacy do not quite capture what's at stake. This has the effect of obscuring the role played by union in defining the contours of the relationship between the federal government and the states. I have focused my attention here on the body of decisions pertaining to state court duties to adjudicate federal claims, but we have seen that in other contexts, too, it is union—and not supremacy—that best explains the constitutional constraints on state authority.

Once we acknowledge that the interest in union drives these diverse bodies of case law, important features of our constitutional law—features that have gone largely unappreciated—come into focus. First, we can see that the value of union, already widely recognized as an important driver of doctrine in horizontal federalism cases, has application to vertical federalism cases as well. Second, we can see that expressive considerations play a more prominent role in the law of federalism than is generally understood. The cases explored here constitute a new data set supporting the intuition that it makes sense to understand federalism doctrine (some of it, at least) in expressivist terms. They signal, moreover, that it is not only the federal government that is subject to constraints on what it expresses about our federal system (a claim that some scholars have advanced already)—the states are constrained in this way as well.

I am not of the view that increased sensitivity to the constitutional interest in union will change the fundamental dynamics of constitutional analysis in federalism cases. We will continue to operate in a space in which the text of the Constitution provides limited guidance and in which the lessons that can be gleaned from the historical record of the founding and the early constitutional period are hotly contested. Disputed background assumptions about constitutional history and structure will shape our thinking about the contours of the union-based constraints on state authority just as these assumptions drive our intuitions about federalism when we deploy a supremacy-based analytic frame.[241] But even if these features of our thinking about federalism remain unchanged, closer attention to the value of union will afford us a clearer picture of why certain species of state action present challenges from the perspective of constitutional structure. Instead of talking past one another about federal supremacy, we might have an intelligible conversation about the entailments of political union.

241 *See* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1228–29 (1988).