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**NOTE: FEDERALISM, SEPARATION OF POWERS, AND THE ROLE OF STATE ATTORNEYS GENERAL  
IN MULTISTATE LITIGATION**

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**SUMMARY:**

... Over the past two decades, state attorneys general have developed and refined the practice of multistate litigation as a powerful law enforcement tool. ... Part I reviews the powers and duties of state attorneys general and describes the rise of the multistate litigation phenomenon. ... Part III then identifies a facet of multistate litigation that may be relevant to a separation of powers analysis but which critics have yet to consider: namely the enforcement of federal law by state attorneys general. While this facet of multistate litigation is the one most vulnerable to criticism on constitutional grounds, Part III argues that several considerations minimize the concerns raised by a separation of powers challenge to enforcement of federal law by state attorneys general. ... I. State Attorneys General and Multistate Litigation ... This type of cooperative law enforcement activity among state attorneys general became known as multistate litigation. ... Whether filed pursuant to state or federal law, multistate litigation is the product of close cooperation among the attorneys general who are parties to the lawsuit. ... This is an inversion of the more commonly expressed federalism concern, which is illustrated by the content of the Supreme Court's docket. ...

Large, wealthy, and well lawyered corporations often have far greater financial and legal personnel resources than even a large state attorney general's office. Faced with the daunting prospect of investigating and prosecuting such defendants, state attorneys general began in the early 1980s to coordinate their prosecutions and share litigation resources. This practice became known as multistate litigation, and it magnified the power and institutional resources that attorneys general could direct toward targets of their investigations. Critics challenge this practice and, by arguing that multistate litigation expands the power of attorneys general in violation of fundamental principles of federalism and separation of powers, seek to undermine its legitimacy. This Note analyzes those criticisms and argues that multistate litigation fully comports with the requirements of federalism and separation of powers.

**TEXT:**  
[\*1998]

Introduction

"Who do these people think they are?"

-U.S. Senator John McCain .Infonotes {text-decoration:none; font-weight:bold; color:#0000FF; font-size:7pt} [1](#)

Over the past two decades, state attorneys general have developed and refined the practice of multistate litigation as a powerful law enforcement tool. In groups ranging from two states to all fifty, the attorneys general now routinely prosecute cases jointly, closely coordinating with each other and sharing legal theories, discovery materials, court filings, litigation expenses, and even staff. The approach has been strikingly effective, and prominent corporations that might otherwise have evaded liability in individual state lawsuits - companies like America Online, Bausch &

Lomb, Sears, General Motors, and the major tobacco manufacturers - have been forced to change their business practices and pay significant settlements when faced with the combined power and institutional resources that a multistate lawsuit brings to bear upon them. Critics, in response, have raised alarms and attacked the legitimacy of multistate litigation. This Note analyzes an important aspect of those criticisms - that in pressing multistate cases, state attorneys general violate fundamental principles of federalism and separation of powers.

Opponents of multistate litigation have been unrestrained in their attacks. One critic of multistate cases, himself an attorney general, has [\*1999] called the phenomenon "the greatest threat to the rule of law today," [2](#) and opponents of multistate litigation have begun calling on state legislatures and Congress to restrict the powers of state attorneys general to pursue these cases. [3](#) Critics of multistate litigation believe the practice is objectionable on a number of grounds, among which is that multistate cases impermissibly increase the power of state attorneys general in violation of principles of federalism and separation of powers. [4](#) In the words of one critic, through multistate litigation the states "get together and by agreement create a new government or regime among themselves, replacing the prerogatives and powers of the constitutionally created federal government." [5](#) Another says:

Recent abuses in government litigation have undermined both federalism and the separation of powers. The purpose of the tobacco litigation ... was to establish through the action of several states a national policy that is properly reserved first to each [\*2000] state legislature and then to Congress in the exercise of its enumerated powers. [6](#)

Their federalism argument is noteworthy in that it is based on the assertion that through multistate cases the states are encroaching on federal power. Federalism concerns have arisen more commonly, at least recently, in the context of protecting state sovereignty from encroachment by the federal government. [7](#)

The critics thus far have made their claims primarily in speeches, policy papers, remarks during panel discussions at think tank conferences, and in newspaper opinion pieces. [8](#) Their analyses are often framed in overheated terms such as, "our forefathers understood the dangers of unchecked power ... [and the] free market and the cause of human liberty cannot survive much more of this litigation madness." [9](#) Despite this inflammatory mode of argument, these claims should be taken seriously because constitutional arguments against features of multistate litigation are beginning to be made in federal courts. [10](#) Moreover, [\*2001] among those making the arguments publicly are prominent current and former public officials who are likely to wield influence in convincing state legislatures and Congress to consider imposing restraints on the ability of attorneys general to pursue these cases. [11](#) The time is ripe, therefore, for a systematic review of these federalism and separation of powers critiques. Using the decisions of the United States Supreme Court as the benchmark articulation of federalism and separation of powers principles, this Note evaluates critiques of multistate litigation and argues that the prosecution of multistate cases comports with the strictures of federalism and separation of powers. In evaluating the claims made by critics of multistate litigation, this Note also develops and considers a constitutional argument that could be, but has not been, made by them.

Part I reviews the powers and duties of state attorneys general and describes the rise of the multistate litigation phenomenon. This Part emphasizes that what is novel about multistate cases is the degree and quality of interstate cooperation being used to enforce the law. Part II evaluates the claim that multistate litigation violates principles of federalism by examining two types of federalism based limits on state action: permanent limits and contingent limits. Permanent limits on state action, as the label implies, are unchanging and include those expressly stated in the text of the Constitution and those that have been inferred by the Supreme Court from the structure of the constitutional plan. Contingent limits on state action - the boundaries of which may shift as a result of action by Congress - include constitutional prohibitions on state action that may be waived by Congress and limits, such as preemption and the Dormant Commerce Clause doctrine, in areas where there is concurrent federal and state authority.

Part III considers the claim that multistate litigation violates principles of separation of powers. This Part finds that critics of multistate litigation have misconstrued separation of powers doctrine in an attempt to apply it to multistate

cases. In fact, separation of powers doctrine has little to say about most multistate litigation. Part III then identifies a facet of multistate litigation that may be relevant to a separation of powers analysis but which critics have yet to consider: namely the enforcement of federal law by state attorneys general. While this facet of multistate litigation is the one most vulnerable to criticism on constitutional grounds, Part III argues that several considerations minimize the concerns raised [\*2002] by a separation of powers challenge to enforcement of federal law by state attorneys general.

## I. State Attorneys General and Multistate Litigation

### A. Role and Powers of State Attorneys General

The office of attorney general originated in English legal history where the attorney general was the appointed representative of the sovereign before the courts. [12](#) Today, state attorneys general are independent executive officers popularly elected in forty-three states. [13](#) In five of the remaining states, attorneys general are appointed by the governor (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming); in Maine the selection is made by secret ballot of the legislature; and in Tennessee it is made by the state supreme court. [14](#) The powers and responsibilities of state attorneys general are defined, often in broad terms, by state constitutions and statutes [15](#) - commonly directing attorneys general no more specifically than to "perform duties 'prescribed by law'" - and in most states attorneys general are recognized as possessing all powers exercised by the office at common law. [16](#) The modern attorney general is the chief legal officer of the state, controlling litigation involving the state and performing a range of other functions, including provision of legal counsel to the governor and state agencies, oversight of criminal law enforcement, engagement in public advocacy through the initiation of civil enforcement [\*2003] litigation, and the exercise of investigative authority in the prosecution of government misconduct. [17](#)

The specific contents of an attorney general's portfolio of powers and duties vary from state to state because state legislatures may play a role in defining the office by statute and through control over the attorney general's budget. [18](#) State court decisions also have shaped the office differently in different jurisdictions. The power to control state litigation, for example, is often at the center of controversy. It is not uncommon for attorneys general and governors (or other state officers) to disagree over litigation posture, and while in most states the attorney general possesses ultimate authority over litigation, a few disputes have produced state case law giving final authority to the governor. [19](#) Generally, however, the attorney general may "exercise all such authority as the public interest requires" and "has wide discretion in making the determination as to the public interest." [20](#)

### B. The Rise of Multistate Litigation

Traditionally, in exercising their broad prosecutorial powers, state attorneys general brought legal actions against private parties on an individual and intrastate basis. That is, an attorney general would act as a single plaintiff and sue private parties in the courts of that attorney general's state to enforce, for example, state consumer protection and antitrust laws. [21](#) In some instances, such as those involving federal antitrust law, attorneys general may pursue enforcement actions as federal claims in federal court. [22](#)

Beginning early in the 1980s [23](#) and without much public attention, state attorneys general began cooperating with each other in ways they never had before. Faced with the daunting prospect of prosecuting large, [\*2004] wealthy, and well lawyered corporations - defendants that often have many times the financial and legal personnel resources of even a large attorney general's office - for violations of state law, state attorneys general began to reach across state lines for help. The attorneys general began looking to other states that might be investigating similar complaints against a defendant and, in groups ranging from two states to all fifty, started to prosecute their cases jointly, sharing with each other legal theories, discovery materials, court filings, litigation expenses, and even staff. This type of cooperative law enforcement activity among state attorneys general became known as multistate litigation. In this litigation, each state is the plaintiff in its own case but the coordination among the attorneys general is close. [24](#) Usually, the offices are so closely coordinated that those participating in the case will choose one or two lead states and cede to them primary responsibility for negotiating with the defendant on behalf of all the states involved. Over the past two decades, multistate litigation has grown to become a powerful and commonly used law enforcement tool.

The trend toward increased cooperation among state attorneys general accelerated later in the 1980s with the promulgation by the National Association of Attorneys General (NAAG) of a series of antitrust and consumer protection enforcement guidelines. [25](#) The guidelines informally coordinated state enforcement actions by encouraging attorneys general to follow uniform standards in the exercise of their prosecutorial discretion. [26](#) Around the same time as the appearance of enforcement guidelines, cooperation among attorneys general became more formal and effective as they began to coordinate their enforcement litigation on an interstate basis, simultaneously pursuing the same causes of action in different states against the same private parties. [27](#)

[\*2005] Contributing to the rise of multistate litigation were the policies of the Reagan Administration. When President Reagan took office, the Justice Department quickly terminated antitrust litigation against IBM, an action that foreshadowed the laissez faire antitrust and consumer protection enforcement guidelines that were soon promulgated by the Justice Department and the Federal Trade Commission. [28](#) During the Reagan years, the size of the staff of the FTC was cut in half, and the agency brought just forty-one new consumer fraud cases in 1982, fewer than half the number under President Jimmy Carter two years earlier. [29](#) State attorneys general stepped in to fill what they perceived to be a void in antitrust and consumer protection enforcement created by the reduced federal presence in these areas. [30](#)

While the policies of the Reagan administration created a climate that encouraged state attorneys general to pursue cases on a multistate basis, the eventual rise of multistate litigation as a frequently used enforcement tool by state attorneys general seems in retrospect to have been inevitable. In enforcement actions against national or multinational corporations, individual attorneys general often had been outgunned. [31](#) For instance, New York, which has one of the largest attorney general offices in the nation, has fewer than thirty lawyers assigned to consumer fraud and antitrust cases. [32](#) A state attorney general pursuing a case against a major corporation would have to commit all or significant portions of her resources to the case, thereby preventing work on other cases. [33](#) In addition, after the early multistate cases, the state attorneys general saw how interstate cooperation magnified their power and increased the effectiveness of their enforcement actions. As Tom Miller, the Attorney General of Iowa, has said, "What we've found is that by coming together, the dynamics of the cases change... . When a corporation [\*2006] discovered it had to face 30 states, instead of one, it suddenly became much more serious about dealing with the issue." [34](#)

Another factor that contributed to the rise of multistate litigation during the past two decades was the dramatic expansion of telecommunications technology since 1980. Fax machines only became widely used in the 1980s, and the development of e-mail allowed for more efficient sharing of information and written work product, such as pleadings and legal briefs, than had been possible before. The wide availability of fax and e-mail technology helped relatively small and overworked offices achieve the level of close cooperation required to pursue multistate cases. [35](#)

The multistate case against the major cigarette manufacturers that was launched in 1995 was a watershed for this practice. The forty-six state, \$ 206 billion settlement reached with the major tobacco companies in 1998 [36](#) - a settlement with an industry that had never lost a lawsuit against it and that wields significant clout in Congress - underscored how powerful state attorneys general had become when they worked together and drew national attention to their activities. As one observer noted, "Before the tobacco settlement, most people were only vaguely aware of the role of their state A.G... . But now the A.G.'s have a national awareness, and a positive one at that. That's a powerful tool. And you can't underestimate that." [37](#) In the years preceding and following the tobacco settlement, the attorneys general have won scores of significant multistate cases.

As an example of their effectiveness, between 1995 and 1997 the attorneys general reached settlements in multistate cases with America Online, American Cyanamid, Bausch & Lomb, General Motors, Louisiana Pacific, Mazda, Packard Bell, and Sears, Roebuck. [38](#) In addition to producing agreements under which defendants promise to stop the activity targeted by the litigation, such as price fixing or deceptive advertising, multistate cases have produced significant monetary settlements. In 1987, forty-one attorneys general reached an agreement with Chrysler under which the car company paid more than \$ 16 million to customers whose odometers had been tampered with before they bought their cars. [39](#) Sears, facing multistate litigation pressed by fifty states in 1997, agreed to pay \$ 165 million in penalties, refunds, and legal fees in a case concerning the collection of credit card bills from customers who had [\*2007] filed for bankruptcy protection. [40](#) In a multistate case alleging an unlawful tying arrangement

under section 1 of the Sherman Act, the attorneys general of thirty-three states attained a settlement under which Sandoz Pharmaceuticals Corporation agreed to pay \$ 20 million, including \$ 10 million in credits to eligible customers and \$ 4 million in attorneys' fees to the states. [41](#) All fifty states and the District of Columbia reached a \$ 7.2 million settlement with Keds Corporation in a case involving allegations that Keds conspired to fix the resale prices of women's athletic shoes. [42](#) And in 2000, generic drug manufacturer Mylan Laboratories reached a settlement with thirty-three states for \$ 147 million in a case that alleged Mylan had unlawfully attempted to corner the market in two drugs. [43](#)

### C. The Forms of Multistate Litigation and Methods of Cooperation

Multistate cases can proceed in either state or federal court, depending upon whether the claim being pursued by the attorneys general arises under state or federal law. Multistate litigation arising under state law actually consists of multiple cases: virtual mirror images of the same complaint, adjusted if necessary to account for minor differences in state law, filed in the courts of each state participating in the litigation. In 1999 and 2000, for example, a lawsuit filed by a single state was followed by lawsuits by attorneys general in twenty-seven states accusing Publisher's Clearing House of deceptive trade practices in the advertising and promotion of its sweepstakes. [44](#) When Publisher's Clearing House settled most of the litigation in August 2001 for \$ 34 million and a commitment to change its business practices, it was actually settling separate legal actions that had been pressed collectively by the states. [45](#)

By way of contrast, when states file an action in federal court pursuant to authorization under federal law, the states are joint plaintiffs signing the same complaint. [46](#) There is, in these cases, a single action proceeding before a single court. The recent antitrust suit by nineteen states and the District of Columbia against Microsoft followed this model. [47](#)

[\*2008] Whether filed pursuant to state or federal law, multistate litigation is the product of close cooperation among the attorneys general who are parties to the lawsuit. In the typical multistate case, the offices of the attorneys general participating in the litigation form a working group that includes staff from each office but is led by a designated lead state. [48](#) This group meets regularly by conference call to discuss strategy, share information developed through each state's investigation, and agree on how they will proceed with the case. The attorneys general also share staff and the costs incurred during the litigation, creating, in effect, a temporary law firm dedicated to a single case that has more resources available to it than any individual office could commit to the matter alone. [49](#)

An important form of cooperation among state attorneys general in multistate cases is the sharing of discovery, pleadings, and legal memoranda. Collaboration on these matters and materials prevents redundant effort among participating states and facilitates the recruitment of other states to join litigation. [50](#) Moreover, even though each attorney general individually files an action in her state's court, because each action is based on the same or similar legal theories and discovery, the defendant is faced with what amounts to a single large lawsuit by multiple states and is forced to engage and negotiate with the participating states as a group. [51](#) Importantly, each attorney general retains the authority to end her participation in a suit or reject the terms of a settlement offer.

Cooperation among the attorneys general is facilitated by the nature and activities of NAAG, which provides attorneys general with a ready-made infrastructure for pursuing multistate litigation. Historically, NAAG has been a nonpartisan organization coordinating the activities of its member attorneys general through several meetings each year. [52](#) In addition, NAAG facilitates the coordination of multistate cases through the efforts of its working groups, such as the active and successful NAAG Multistate Antitrust Task Force. [53](#) NAAG even administers a fund from which attorneys general can draw to pay for expert witnesses and other litigation related expenses. [54](#)

[\*2009]

### D. What Is New About Multistate Litigation

At its core, multistate litigation is about interstate cooperation. Most multistate cases can rely on conventional legal theories and need not present any radical challenge to the legal status quo. [55](#) "What is new about these cases is the

unprecedented level of cooperation and coordination between the states bringing them." [56](#) When states bring actions in their courts that are mirror images of actions being brought by other states, their collective enforcement powers are dramatically enhanced. [57](#) Multistate actions possess a critical mass, both in terms of resources poured into the case by the prosecuting states and the magnitude of potential sanctions a defendant faces, that forces defendant corporations to respond, usually in terms of a settlement correcting the behavior about which the attorneys general are complaining and a monetary payment.

Cooperating states also extend the geographical reach of their enforcement powers. The attorney general of a small or mid-sized state, if she can afford to bring an action at all against a major corporation, can, at best, affect the behavior of the defendant in her state alone. Once several states band together, a litigation victory effectively imposes the settlement terms on the defendant on a national basis. If a corporation is forced to change its activities in several states, it is likely to do so in every state in which it operates. [58](#)

Through interstate cooperation, the enforcement powers of the state attorneys general have become more potent. Where before the influence of attorneys general stopped at the borders of their states, today groups of attorneys general can affect the behavior of corporations nationally. It is this rather sudden magnification of the power of the states through the vehicle of multistate litigation that has led some to criticize multistate litigation as violating principles of federalism and separation of powers. [59](#)

## II. Multistate Litigation and Federalism's Limits on State Action

Federalism is two things. First, it is a theory of government that justifies the creation and maintenance of "dual sovereignty" in the form of a [\*2010] National Government on one level and state governments on another. [60](#) The theory was in part a response to specific failings of the Articles of Confederation [61](#) and in part a response to the desire to craft a government that would protect and preserve the liberty of its citizens. [62](#) Second, federalism is the combination of those limitations on government action that are both explicit in the text of the Constitution and implied by the constitutional plan that give life to the theory by marking the boundary between federal and state authority. [63](#)

In rhetoric consistent with the theory of federalism, some opponents of multistate litigation claim the practice has created an imbalance of power between the states and the federal government and, therefore, is a threat to liberty. One has said:

In American political thought, we have a rich history of trying to limit the power of government. Our forefathers understood the dangers of unchecked power. We should follow that tradition by prohibiting governments from using civil lawsuits for abuses against our citizens... . The free market and the cause of human liberty cannot survive much more of this litigation madness. [64](#)

[\*2011]

The federalism question posed by critics of multistate cases is whether the practice has impermissibly encroached upon the sphere of federal sovereignty. This is an inversion of the more commonly expressed federalism concern, which is illustrated by the content of the Supreme Court's docket. Recently, the Court's federalism decisions have concentrated on constraining federal power from encroaching upon the sovereignty of the states. [65](#)

The Constitution and decisions of the Supreme Court have recognized two kinds of federalism limits on state action: permanent limits and contingent limits. Permanent limits on state action include those expressly stated in the text of the Constitution [66](#) and those that have been inferred by the Supreme Court from the structure of the constitutional plan. [67](#) Contingent limits on state action, which may shift as a result of action by Congress, include constitutional prohibitions on state action that may be waived by Congress [68](#) and limits on state action, such as preemption and the Dormant Commerce Clause doctrine, in areas where there is concurrent federal and state authority. [69](#) Sections A through D [\*2012] consider in turn the applicability of each of these federalism based limits to multistate litigation.

## A. Express Prohibitions on State Action

Article I, Section 10, Clause 1 of the Constitution specifies certain activities in which the states may never engage. These include certain fiscal, foreign affairs, military, and lawmaking activities. In the fiscal sphere, no state may "coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts." [70](#) In the area of foreign affairs, the clause prohibits states from "entering into any Treaty, Alliance, or Confederation." [71](#) The power of the states to solicit or encourage military action on their behalf is restricted by the clause's prohibition on "granting Letters of Marque or Reprisal." [72](#) And the power of state legislatures is constrained in that they may not "pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." [73](#)

These explicit prohibitions of the first clause of Article I, Section 10 apply only to narrow categories of state action. The law enforcement activity undertaken in multistate litigation, which consists of state executive officers prosecuting lawsuits against parties believed to be in violation of state or federal law, falls into none of these. Nor is it possible to characterize multistate litigation such that it can be placed into one of those fiscal, foreign affairs, military, or statutory categories. By their terms, therefore, the limitations on state action in Article I, Section 10, Clause 1 can form no basis for an attack on multistate litigation.

## B. Limits on State Action Inferred from the Constitutional Plan

In *New York v. United States* [74](#) and *Printz v. United States*, [75](#) the Supreme Court relied on inferences from the constitutional plan - what the Court has called the Constitution's "essential postulates" - to find Congressional action a transgression of federalism principles and therefore unconstitutional. [76](#) At issue in those cases were invasions of state sovereignty. Considering the attention paid recently by the Supreme Court to state sovereignty and the political interest in recent years surrounding [\*2013] "states' rights," [77](#) it is unusual to hear it suggested, as critics of multistate litigation have, that the states are encroaching on federal sovereignty. Yet, in the same way one can infer federalism limits on federal action from the government structure created by the Constitution, one can infer similar limits on state action. [78](#) The Supreme Court did so as early as 1819 in *M'Culloch v. Maryland*. [79](#)

*M'Culloch* involved two principal questions: whether Congress has the power to incorporate a national bank and whether a state may tax the branches of such bank within its borders. [80](#) Finding the establishment of the Bank of the United State constitutional, the Court proceeded to strike down Maryland's power to tax it. Though relying in part on a syllogistic argument against state power to tax instrumentalities of the federal government, [81](#) Chief Justice Marshall more convincingly found such state action impermissible because of an underlying structural principle. Marshall invoked the principle, articulated in the Revolutionary era by the celebrated phrase "no taxation without representation," that political power cannot be wielded over those not represented in the government wielding it. "When a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control." [82](#) Thus, Marshall argued, Maryland would be imposing a tax, indirectly through the federal government, on the citizens of other states. The *M'Culloch* Court held that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress ... ." [83](#)

[\*2014] While instrumentalities of the federal government are not completely immune from state law, [84](#) the states are prohibited by *M'Culloch* and later decisions from imposing burdens directly upon the federal government or interfering with the valid exercise of federal power. [85](#) This is an important principle limiting state action, but it appears inapplicable to multistate litigation. Multistate cases traditionally are an application of state powers onto private persons and entities. [86](#) In the *Publisher's Clearing House* case, for example, the twenty-eight states involved filed actions in state courts against a private party, complaining of violations of state law. [87](#) Multistate cases of this kind do not touch upon federal entities at all and cannot be said to interfere with any instruments of the federal government.

Multistate cases enforcing federal law might be different. The states and the federal government can pursue conflicting antitrust enforcement policies in areas of concurrent authority, raising the question whether the states are interfering with federal power. For example, several states may file a federal antitrust action against a defendant whom the Department of Justice feels has committed no violation of law. Or, state and federal antitrust cases against

the same defendant may be consolidated by a federal court, setting the stage for conflicts over litigation strategy and tactics. In such a case, for instance, the federal government eventually may wish to settle litigation the states wish pursue. [88](#) When states pursue cases [\*2015] that are contrary to federal policy, they create a second, competing standard for the exercise of prosecutorial discretion in the enforcement of federal antitrust law. [89](#) Is this not an interference with the operation of federal law?

Despite the confusion this dual enforcement regime might create among those private entities most concerned about avoiding antitrust liability, [90](#) it does not rise to the level of a constitutional interference with federal sovereignty. In cases enforcing federal law, the states can only act because Congress expressly has given them power to do so. After Congress invites the states to act in this sphere, they cannot be said to usurp federal power when they act according to the terms of the invitation. Enforcement of federal antitrust law by the states is not an interference with the operation of federal law, but rather is the intended operation of the law. Moreover, Congress could at any time revoke the authority of the states to press federal claims under the antitrust laws. While dual enforcement of some federal laws by the state and federal governments may be inefficient, the fact that Congress chose to establish such a regime and retains the power to end it undermines the argument that states are usurping federal power.

### C. Waivable Prohibitions on State Action

The second and third clauses of Article I, Section 10 contain a number of additional explicit limitations on state action, but these may be waived by Congress. These restrictions prohibit states, "without the Consent [\*2016] of the Congress," [91](#) from "laying any Imposts or Duties on Imports or Exports," [92](#) from "laying any Duty of Tonnage, keeping Troops, or Ships of War in time of Peace" [93](#) or from "engaging in War, unless actually invaded, or in such imminent Danger as will not admit of delay." [94](#) Like the permanent limitations on state action considered in Sections II.A and II.B, these provisions relating to impost, duties, armies, navies, and military action by their express terms are inapplicable to states engaged in cooperative litigation efforts.

There is, however, another provision in Article I, Section 10 that may provide the basis for a substantive attack on the practice of multistate litigation. Clause 3 of that Section says that "no State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State ... ." [95](#) Like the other provisions of Article I, Section 10, the Compact Clause is designed to prevent the states from usurping the power of the national government. [96](#)

Insofar as opponents of multistate litigation share the concern expressed at the Founding that states may become too powerful, which was addressed in part through the restrictions on state action to be found in Article I, Section 10, it is appropriate to look to one of those restrictions - the Compact Clause - as the basis for an argument against multistate cases. The Compact Clause is also an appealing source for a federalism critique of multistate litigation because it appears on its face to speak to the animating feature of multistate cases: how states work together. [97](#) Below, Subsection 1 describes the elements of Compact Clause doctrine and Subsection 2 applies that doctrine to multistate litigation.

1. The Scope of Compact Clause Doctrine. - Analysis of state cooperation under the Compact Clause requires three inquiries. The first is whether the interstate cooperation at issue constitutes an "agreement or compact" that triggers this clause, because "not all agreements between States are subject to the strictures of the Compact Clause." [98](#) In making that determination, "the mere form of the interstate agreement cannot be dispositive." [99](#) What is relevant is not how formal or informal the interstate [\*2017] agreement may be, but rather its "impact on our federal structure." [100](#) In other words, the test to determine the applicability of the Compact Clause is one not of the form of interstate cooperation, but of its substance and effect.

Specifically, the leading modern case on the Compact Clause, *United States Steel Corp. v. Multistate Tax Commission*, instructs that the Compact Clause is implicated when interstate cooperation rises to the level of "encroaching upon or interfering with the just supremacy of the United States." [101](#) In that case, the Court reviewed a "Multistate Tax Compact" - an agreement among twenty-one states designed, among other things, to facilitate the determination of tax liability for multistate business taxpayers and promote uniformity and compatibility among state tax systems. [102](#) The compact resulted from model legislation adopted by the legislatures of the participating states, which created the Multistate Tax Commission composed of the tax administrators from all of the member

states. [103](#) This commission was authorized to study local and state tax systems, develop recommendations for greater uniformity in state tax laws, and conduct audits of businesses for member states. [104](#)

After reviewing the records of the constitutional convention regarding the drafting of the Compact Clause and the understanding of its meaning found in early Supreme Court cases and in the writings of early commentators on the Constitution, [105](#) the Supreme Court rejected a Compact Clause challenge to the Multistate Tax Commission. The Court followed the rule set forth in *Virginia v. Tennessee*, an 1893 Compact Clause case which held that "it is evident that the prohibition [within the Compact Clause] is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." [106](#) The Supreme Court acknowledged that the Multistate Tax Compact and its creation of a multistate administrative authority increased the power of member states over corporations subject to their respective taxing jurisdictions. "Group action in itself may be more influential than independent actions by the States," the Court noted, "but the test is whether the Compact enhances state power quoad the National Government." [107](#) According to the Court, the Multistate Tax Compact did not impermissibly enhance state power because it did not "purport to authorize the member States to exercise any powers they could not exercise in its absence," there was no "delegation of sovereign power to the Commission[,] each [\*2018] State retained complete freedom to adopt or reject the rules and regulations of the Commission," and each state could "withdraw at any time." [108](#) The interstate cooperation that produced the Multistate Tax Commission "neither projected a new presence onto the federal system nor altered any state's basic sphere of authority." [109](#) Since it did not encroach "upon the full and free exercise of Federal authority," [110](#) the agreement among the states in Multistate Tax Commission was not an "agreement or compact" within the meaning of the Compact Clause. [111](#)

The second inquiry required by the Compact Clause is whether Congress has approved of the agreement, thereby rendering an otherwise unconstitutional compact valid. As the Supreme Court noted in *Cuyler v. Adams*, "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." [112](#) Congress may also condition its approval on acceptance by the states of modification to the agreement or compact. [113](#) Professor Laurence Tribe observes:

The reason for the requirement that compacts be approved by Congress - rather than solely by the states involved - is ... to check any infringement on the rights of the national government. There can be little concern that those rights have been infringed if Congress has ... given its blessing to an interstate compact." [114](#)

Though it is unstated in the cases, complete analysis of a Compact Clause question should conclude with a third inquiry: Is the subject of the compact such that it is invalid notwithstanding Congressional approval? As noted above, there are some activities from which the states are expressly excluded by Article I, Section 10. Congress "cannot authorize a state to disregard an explicit constitutional prohibition." [115](#)

2. The Compact Clause and Multistate Litigation. - Opponents of multistate litigation could fashion a colorable argument that the Compact Clause is implicated by the sort of interstate cooperation in which the attorneys general are engaged. The agreements among states to work [\*2019] together on cases often result in substantial cooperation - information sharing, joint settlement negotiations, joint working groups, some sharing of litigation costs, and participation in joint settlement agreements - that could be enough to trigger the application of the Compact Clause. As the mere form of the agreement is not the dispositive issue, [116](#) the challenge for critics of multistate cases is to fashion a viable argument demonstrating that as a result of the interstate cooperation underlying multistate cases, the states encroach upon or interfere with the just supremacy of the federal government. Opponents of multistate litigation may be starting to pursue this line of attack. Compact Clause challenges to the settlement between the states and the major tobacco companies have been lodged in federal district court. [117](#)

To establish a violation of the Compact Clause, one must first satisfy the threshold requirement by showing that the form of interstate cooperation interferes with federal supremacy. This has been precisely the core claim made by the critics, and if rhetoric alone could constitute a viable argument, they might seem to have demonstrated that

multistate cases encroach upon federal sovereignty. They assert that what the state attorneys general are doing in multistate cases is a usurpation of Congressional power. Critics contend that settlements in multistate cases, which often effectively establish a national behavioral standard for companies in a particular industry, "bypass the exclusive power of Congress to set a national policy" [118](#) and establish a "regime ... replacing the prerogatives and powers of the constitutionally created federal government." [119](#) In this view, groups of attorneys general become "a shadow Congress that would dictate national law in many areas of business regulation." [120](#)

This rhetoric by the opponents of multistate cases tries to turn multistate litigation into something that it is not: an act of national legislation. In most instances, multistate litigation is a collection of individual state lawsuits based on the enforcement of existing laws passed by state legislatures (or, in the case of multistate cases premised upon federal antitrust law, existing laws passed by Congress). When state attorneys general cooperate in the filing of enforcement actions in their respective states, the [\*2020] effort is predicated upon the existence of law upon which a viable complaint can be based. The attorneys general cannot act unless the legislatures have acted first. In pursuing what is a quintessentially executive function - the execution of the law by prosecuting and settling lawsuits against those believed to be in violation of it - the attorneys general are merely giving life to the policies enacted by legislators. Their actions hardly usurp legislative power.

On this point, critics of multistate cases would likely respond by saying that rather than acting as faithful agents enforcing the laws passed by legislators, attorneys general develop innovative and untenable legal theories upon which to build their cases. [121](#) First, this allegation, which is contested, [122](#) has been made primarily in the context of tobacco litigation, an atypical multistate case where "most aspects of traditional multistate coordination were not followed." [123](#) Most multistate cases are founded upon well established antitrust and consumer protection laws. [124](#) Second, if the text of a law will support previously unforeseen applications - applications accepted by the courts - this is no encroachment on legislative power by the attorneys general. The acceptance by courts of novel legal theories may give rise to policy concerns justifying action by the legislature to narrow the applicability of the law in question, but the source of concern in that case is with the exercise of the judicial power to interpret the law, not with the power of attorneys general to bring a case.

The weakness of the argument that multistate cases usurp federal power becomes evident when it is applied to an actual case. Consider for instance the multistate litigation against Publisher's Clearing House for alleged acts of deceptive solicitation in its marketing of magazine subscriptions and its sweepstakes. [125](#) In that case, twenty-seven states sued Publisher's Clearing House for violations of each state's consumer protection laws. The fact that Publisher's Clearing House settled the litigation and changed the way it does business does not, as the critics' argument would suggest, amount to impermissible national regulation of the direct mail marketing industry by state attorneys general. In this case, the attorneys general simply enforced their existing consumer protection laws and did nothing more.

A similar point was an important factor in the Supreme Court's rejection of a Compact Clause argument in *Multistate Tax Commission*. The Court there found it significant that the participating states did not "exercise any powers they could not exercise in [the] absence" of the cooperative effort underlying the litigation. [126](#) Likewise, in multistate litigation [\*2021] the states merely do together what each of them is authorized to do alone, albeit more effectively. In addition to considering the *Publisher's Clearing House* case just mentioned, imagine the following hypothetical: Serendipitously and without cooperation or knowledge of what they each were doing, the attorneys general in ten states sue a major corporation for violation of a consumer protection law on the books in each state. Now assume each state settles its action with the company on similar terms. Here, the participating states have simply enforced their respective preexisting laws. If the hypothetical had been a multistate case, the result would be the same: The states would be enforcing their respective laws, the only difference being that they would do so in a coordinated effort alongside other states.

Also consistent with the holding of *Multistate Tax Commission* is that the cooperative effort in a multistate case is a nonbinding one and "each State is free to withdraw at any time." [127](#) Multistate cases "neither project a new presence onto the federal system nor alter any state's basic sphere of authority," [128](#) and therefore are consistent with the underlying purpose of the Compact Clause to protect "the full and free exercise of Federal authority." [129](#) It is undoubtedly the case that multistate litigation increases "the bargaining power of the ... States quoad the corporations subject to their respective ... jurisdictions." [130](#) But this does not become a federalism concern unless it

"enhances state power quoad the National Government." [131](#) Because multistate litigation passes the threshold test for determining whether interstate cooperation triggers the application of the Compact Clause, one need not reach the second and third prongs of Compact Clause doctrine.

Application of the first step of Compact Clause analysis to multistate cases enforcing federal law appears on the surface to stand on a different footing. Multistate action in this area might be seen as an infringement upon the rights of the federal government when, for example, the states pursue antitrust policies under federal law that conflict with those of the Department of Justice. [132](#) Yet, though the states and the Justice Department could simultaneously pursue conflicting antitrust enforcement policies, litigation by the states would not be an encroachment into the domain of the federal executive branch. Within the narrow slice of federal antitrust law, the federal executive's enforcement power is not exclusive. [\*2022] Congress gave states the power to pursue certain antitrust cases in federal court, and they therefore share the power to enforce certain provisions of federal antitrust law with federal executive authorities. This express grant of power to the states in this area belies any claim that their exercise of it encroaches on federal power. [133](#) Nevertheless, even if one concluded that concurrent antitrust enforcement by the states in multistate cases invaded federal sovereignty and constituted a compact under the Compact Clause, the federal antitrust statutes would constitute Congressional approval of such compacts. [134](#)

#### D. Limits on State Action in Areas of Concurrent Authority

The dual sovereignties of federal and state power can be imagined as two partially overlapping circles, creating three areas of authority: an area of federal sovereignty within which the states are forbidden to act, an area of state sovereignty within which the federal government is forbidden to act, and an area of concurrent authority where both may act. [135](#) Within the area of concurrent authority, however, federal and state sovereignty are not equal. The Constitution makes federal law supreme, and areas of concurrent authority can be transformed into areas of exclusive control by the federal government. [136](#) This transformation can occur through the preemptive effect of federal legislation and through the application by courts of the Dormant Commerce Clause.

Under Supreme Court doctrine originating in the Supremacy Clause of Article VI, state law can be preempted by Congress in one of three ways: (1) "express preemption" results when Congress explicitly states in the language of a statute its intention to preclude state activity in a certain area; (2) "implied preemption" results, as its name suggests, when the structure or objectives of Congressional enactments preclude state action by implication; and (3) "conflict preemption" results when "Congress did not necessarily focus on preemption of state regulation at all, but where the particular state law conflicts directly with federal law, or otherwise stands as an obstacle to the accomplishment of federal statutory objectives." [137](#)

[\*2023] The restrictions on state regulation of interstate commerce based on the Dormant Commerce Clause, on the other hand, do not originate in the text of the Constitution - nowhere does the Constitution expressly limit state regulation of interstate commerce. Rather, the Dormant Commerce Clause is an implicit restraint on state activity resulting from the Supreme Court's construction of the Commerce Clause. Under the Court's Commerce Clause jurisprudence, states may regulate interstate commerce unless a state's regulation "clearly discriminates against interstate commerce ... [and is not] demonstrably justified by a valid factor unrelated to economic protectionism;" [138](#) or "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." [139](#)

The power of Congress to preempt state law and the Supreme Court's Dormant Commerce Clause doctrine are important federalism based limits on state action, but they cannot form the basis of a general critique of multistate litigation. These doctrines do not apply directly to the actions of state attorneys general in pursuing multistate cases. Instead, these doctrines target and invalidate individual state laws. [140](#) Preemption and Dormant Commerce Clause doctrines have nothing to say about multistate cases when those cases are based on valid state law. These doctrines also are inapplicable to federal laws authorizing legal action by state attorneys general and therefore leave unaffected multistate cases based on these laws.

Valid state laws are the necessary predicate for attorney general action, and challenging these laws is one tactic critics of multistate cases may adopt in opposing these cases. The usefulness of preemption doctrine and the Dormant Commerce Clause, then, lie in applying them to particular cases to challenge the underlying law, not as a general federalism based rationale for limiting the power of state attorneys general. [141](#) [\*2024] Yet, these doctrines

are not likely to be successful in the majority of multistate cases. It is beyond the scope of this Note to present a survey of the constitutional status of all the various state laws under which state attorneys general can pursue multistate cases. Nevertheless, a brief point can be made about the laws most used by state attorneys general in multistate litigation: state consumer protection laws and state antitrust laws.

The consumer protection statutes in most states are remarkably similar and give state attorneys general broad power to take action against "deceptive acts or practices in the conduct of any business." [142](#) These statutes are the foundation of much multistate litigation activity. [143](#) Preemption attacks on these laws, however, have been unsuccessful. Under federal law, the Federal Trade Commission has almost identical enforcement powers, [144](#) but these powers have not been found to preempt the state consumer protection laws. [145](#) Similarly, state antitrust statutes rest on a solid foundation. Dormant Commerce Clause and preemption attacks on state antitrust law generally fail. [146](#)

### III. State Attorneys General and Principles of Separation of Powers

This Part evaluates the claim that state attorneys general violate separation of powers principles when they prosecute multistate cases. Section A summarizes separation of powers doctrine. Section B applies separation of powers principles to multistate litigation enforcing state law. Section C applies separation of powers principles to multistate cases enforcing federal law, a context not considered by critics of multistate litigation.

[\*2025]

#### A. Principles of Separation of Powers

Where in the traditional conception American federalism is the vertical division of power between the federal and state levels of government, separation of powers is the horizontal division of powers among the legislative, executive, and judicial branches of the same level of government. Separation of powers doctrine arises as an inference from the structure of the federal government created by the Constitution and the value placed by the Framers on the division of power among branches. [147](#) The Vesting Clauses give legislative, executive, and judicial power to the Congress, the President, and the courts respectively. [148](#) Other parts of the Constitution reinforce this separation, such as the restrictions on interbranch service in the Emoluments and Incompatibility Clauses [149](#) and the insulation from tampering provided to executive and judicial salaries, which eliminates a potential means of congressional coercion over the other branches. [150](#)

In reality, the federal government consists of powers not purely separate; they are somewhat mixed. The Constitution provides some role for the branches in the work of the others, checking and balancing the powers among them. [151](#) On this point, the Supreme Court has said:

When we speak ... of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the [\*2026] other departments; and that such exercise of the whole would subvert the principles of a free constitution. [152](#)

The text of the Constitution "contemplates that the Executive will perform a 'legislative' function when exercising power to veto legislation; that the House will indict and the Senate adjudicate in cases of impeachment; and that the Supreme Court will 'make' such law as it must in expounding or modifying ... federal legal principle." [153](#)

An argument that a "governmental scheme" violates the separation of powers doctrine usually comes in one of two forms. [154](#) First, the argument could be that one branch has "interfered impermissibly with the other's performance

of its constitutionally assigned function." [155](#) Second, "the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." [156](#) Separation of powers arguments are thus generally either arguments based on interference or arguments based on usurpation. *Morrison v. Olson* illustrates a dispute of the first kind. [157](#) In *Morrison*, the Supreme Court considered the question whether limitations on the power of the President to remove an independent prosecutor impermissibly interfered with the President's obligation to execute the laws. The Court upheld the arrangement over the lone, but powerful, dissent of Justice Scalia. [158](#)

*Bowsher v. Synar* illustrates a violation of the second kind. [159](#) The Supreme Court held in *Bowsher* that it is impermissible for Congress to empower the Comptroller General - an official subject to congressional supervision - to order budget cuts in order to bring federal spending under the ceiling specified by the Gramm-Rudman Act. [160](#) Such action was "executive" in nature and, therefore, could not be exercised by an official appointed and controlled by Congress. [161](#)

[\*2027]

## B. Separation of Powers and Attorney General Enforcement of State Law

Opponents of multistate litigation appear to conflate the doctrines of federalism and separation of powers and refer to them interchangeably. The critics' central federalism argument, that attorneys general usurp the power of Congress by creating what amounts to national business regulation, [162](#) is also their chief separation of powers argument. In one place, a critic says, "I believe in the strict separation of governmental powers... . The states that have sued the tobacco industry are using the courts in an effort to circumvent their legislatures and Congress." [163](#) In another place, the same argument is used more properly as the basis for the claim that multistate litigation does not comport with federalism. [164](#) These critics fail to develop a true separation of powers critique of the role of attorneys general in multistate litigation.

Even if the critics had developed a separation of powers argument, in the sphere of the enforcement of state law, reliance on federal separation of powers principles to criticize the role of state attorneys general in multistate litigation would be misplaced. Separation of powers principles speak to the relationship between the branches of the federal government, not to the relationship between the federal government and state governments. This point is well settled in the jurisprudence of the Supreme Court, which "has repeatedly stated that the doctrine of separation of powers does not apply to the states." [165](#) In cases where the issue has arisen, the Court has dismissed it by observing that "the Constitution does not impose on the States any particular plan for the distribution of governmental powers." [166](#)

Despite the Supreme Court's pronouncements on this subject, some commentators have noted that "it is something of an overstatement to say that the principle of separation of powers has no application to the [\*2028] states." [167](#) They point to a number of constitutional provisions that implicitly assume that state governments will be structured in ways similar to that of the federal government. For example, the amendment procedure in Article V of the Constitution refers to state legislatures. [168](#) The Seventeenth Amendment refers both to state legislatures and state executives in its provisions for filling vacancies in a state's delegation to the United States Senate. [169](#) "The Supremacy Clause treats state courts as distinct from other organs of state government." [170](#) Providing what may be "the most plausible textual home for a federal constitutional requirement of state separation of powers" is the Guarantee Clause of Article IV, Section 4. [171](#) The Guarantee Clause assumes that states will have distinct legislatures and executives: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." [172](#)

The Constitution, therefore, implicitly assumes some separation of powers among state legislative, executive, and judicial branches, "but certainly not everything required of the federal government." [173](#) To implicate a federal constitutional separation of powers concern, a state governmental scheme would likely have to be "so extreme as to warrant the conclusion that a state lacks a distinct legislative, executive and judicial branch." [174](#) No such threat is posed by the role of state attorneys general in multistate litigation because in these cases attorneys general merely pursue their long established, state executive branch responsibility for prosecuting legal actions in state courts to enforce state law. To the extent separation of powers concerns are raised by multistate litigation, they are state

separation of powers concerns to be considered, on a case by case basis, according to state constitutional law. Federal separation of powers doctrine, on the other hand, presents no concerns with respect to multistate litigation enforcing state law and it is inappropriate to invoke the doctrine in critiquing these multistate cases.

### C. Separation of Powers and Attorney General Enforcement of Federal Law

Though federal separation of powers doctrine does not apply in a rigorous fashion to arrangements between the branches of state government, [\*2029] an alternative argument can be made that grants of authority to state attorneys general by Congress to enforce federal law impermissibly interfere with the powers of the federal executive branch. This argument rests on the "unitarian" view of the federal executive: that Article II vests the power to execute and enforce federal law solely in the hands of the President and those under his control. [175](#) Instances of the execution of federal law by those outside the direct control of the President - such as citizens' suit provisions in federal statutes and state implementation of federal regulatory standards - have touched off a vigorous judicial and academic debate. [176](#)

In summary, the argument made by unitarians proceeds as follows:

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "Heads of Departments" who are themselves Presidential appointees)... . The insistence of the Framers upon unity in the Federal Executive - to insure both vigor and accountability - is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws. [177](#)

This reasoning by Justice Scalia for the Court, which in *Printz* was applied to the commandeering of state officials to implement federal law, logically extends to arrangements under which state officers voluntarily enforce federal law. In his dissent in *Printz*, Justice Stevens made this [\*2030] observation by noting that if applied literally, the majority's unitary executive principle would undermine a range of federal statutes that rely on voluntary local implementation. [178](#)

Under the unitarian conception of the federal executive, enforcement of federal law by state attorneys general violates separation of powers. In the Microsoft antitrust case, for example, the states acted pursuant to the Clayton Act. [179](#) Critics of multistate cases could adopt the unitary executive principle to argue that enforcement of this law by state attorneys general proceeds from an impermissible delegation by Congress of federal executive authority and, therefore, is a usurpation of that authority.

Four considerations argue against the use of the unitary executive theory to critique the role of state attorneys general in multistate cases enforcing federal law. First, historical practice and Supreme Court precedent provide support for the constitutionality of delegations of federal executive authority to state officers. [180](#) In 1883, for example, the Supreme Court observed in *United States v. Jones* that "from the time of its establishment [the federal] government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as agents." [181](#) Moreover, the Court concluded that "their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government." [182](#) This view has been ratified by perhaps the most historically minded of the current Supreme Court justices, Justice Thomas. He has said, "I do not know of a principle of federal law that prohibits the States from interpreting and [\*2031] applying federal law. Indeed, basic principles of federalism compel us to presume that States are competent to do so." [183](#)

Second, the unitary view of the federal executive has not been adopted by a majority of the justices of the Supreme Court. In fact, Justice O'Connor, who otherwise joined the majority opinion in *Printz*, wrote a separate, two paragraph concurrence that, while ambiguous, could be interpreted as indicating she would not endorse an

application of the unitarian position to voluntary enforcement by the states of federal law. [184](#) Nevertheless, there is evidence that support for this position may be growing. Justice Scalia's espousal of this view appeared in a lone dissent in *Morrison* but was supported by three other justices in *Printz*. [185](#)

Third, adoption by the Supreme Court of the unitarian view of executive power would not necessarily invalidate enforcement of federal law by state attorneys general. Justice Scalia himself suggested that voluntary enforcement by the states of federal law could be an exception to unitarian doctrine: "The dissent is correct that control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs, but the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency." [186](#) It is not evident why voluntary state participation protects the power of the Presidency, and this conclusion does not follow logically from the reasoning underlying the unitarian position. [187](#) Still, this statement is an indication that cooperative federalism may not be entirely swept away should the unitarians command a majority in the Supreme Court.

Fourth, even if the principle of the unitary executive is ultimately embraced by the Court, it is not clear that the result should be to invalidate federal statutes that give an enforcement role to state attorneys general. Theoretically, the requirements of the unitary executive principle [\*2032] would be met simply by asserting oversight by having the President oversee state enforcement of federal law. [188](#)

The issue of whether enforcement by state attorneys general of federal law violates separation of powers principles has not been litigated extensively. In fact, there appears to be only one reported case where the issue has arisen. [189](#) In what is perhaps a faint signal of the future of this issue, the district court upheld the federal grant of power to state attorneys general to enforce federal antitrust law. [190](#)

## Conclusion

As a relatively new and complex phenomenon, multistate litigation raises a range of important policy issues. The range extends from the use by attorneys general of settlement proceeds as an off-budget source of revenue to the potential for conflicting standards for the exercise of prosecutorial discretion in the enforcement of federal antitrust law. Multistate litigation does not, however, violate principles of federalism and separation of powers. In multistate cases, the states simply do together what they could do alone. This activity neither invades the sphere of federal sovereignty nor interferes with the responsibilities of the federal executive.

Multistate litigation is a powerful tool for law enforcement that arose in response to the evolving needs of state authorities, and its novelty reflects the flexibility permitted within the bounds of our federal structure. As the Supreme Court has said, "the Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships." [191](#) The suppleness of our system of government, which permits within limits adaptation to address new challenges, is a strength that should be celebrated, not attacked.

## FOOTNOTES:

n1. David J. Morrow, *Transporting Lawsuits Across State Lines*, N.Y. Times, Nov. 9, 1997, 3, at 1 (quoting Senator John McCain criticizing state attorneys general).

n2. Alabama Attorney General William H. Pryor, Jr., *Fulfilling the Reagan Revolution by Limiting Government Litigation*, Address at the Reagan Forum 2 (Nov. 14, 2000) (on file with the Columbia Law Review) [hereinafter Pryor, *Reagan Revolution*].

n3. See John R. Wilke, *Mediator in Microsoft Suit Blasts State Role in Antitrust Enforcement*, Wall St. J., Sept. 19, 2000, at B15 (quoting Judge Posner); Pryor, *Reagan Revolution*, supra note 2, at 17-19; Alabama Attorney

General William H. Pryor, Jr., Regulation by Litigation: The New Wave of Government-Sponsored Litigation, Remarks at Manhattan Institute Conference 5-6 (June 22, 1999) (on file with the Columbia Law Review) [hereinafter Pryor, Regulation by Litigation].

n4. See Thomas C. O'Brien, Constitutional and Antitrust Violations of the Multistate Tobacco Settlement, Policy Analysis (Cato Institute, Washington, D.C.) May 18, 2000, at 1, 8-10, available at <http://www.cato.org/pubs/pas/pa-371es.html> (on file with the Columbia Law Review); Alabama Attorney General William H. Pryor, Jr., The Law is at Risk in Tobacco Suits, N.Y. Times, Apr. 27, 1997, 4, at 15 [hereinafter Pryor, Law at Risk]; Hal Stratton, Attorneys General in State of Collusion, Wall St. J., June 10, 1988, at 22; Pryor, Reagan Revolution, supra note 2, at 14-19; [Pryor, Regulation by Litigation, supra](#) note 3, at 2-4; U.S. Attorney General Richard Thornburgh, Regulation by Litigation: The New Wave of Government-Sponsored Litigation, Remarks at Manhattan Institute Conference 26 (June 22, 1999) (on file with the Columbia Law Review); see also Smoke Screen, Wall St. J., Feb. 20, 2001, at A22 (urging "the Justice Department to challenge the very constitutionality of the tobacco settlement").

In addition to federalism and separation of powers claims, critics advance nonconstitutional arguments against multistate litigation. They argue, for example, that the retention of settlement proceeds by attorneys general infringes on the appropriations power of state legislatures by giving these officials an off-budget revenue source; that the use in some cases of private lawyers through contingency fee arrangements is unethical; and that because multistate cases pose such a significant liability threat to defendants, these cases result in "legalized extortion." See, e.g., Lester Brickman, Regulation by Litigation: The New Wave of Government-Sponsored Litigation, Remarks at Manhattan Institute Conference 27-29 (June 22, 1999) ("My thesis is simple. Partnerships between state governments and private attorneys [in multistate cases] amount to a corruption of both legal ethics and the legal process.") (on file with the Columbia Law Review). Consideration of these nonconstitutional criticisms is beyond the scope of this Note.

n5. O'Brien, supra note 4, at 8.

n6. Pryor, Reagan Revolution, supra note 2, at 15-16.

n7. See, e.g., [Trs. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 962-63, 968-69 \(2001\)](#) (holding that the Americans with Disabilities Act is not "appropriate legislation" under Section 5 of the Fourteenth Amendment and, therefore, does not abrogate states' immunity from suits by citizens for money damages); [United States v. Morrison, 529 U.S. 599, 627 \(2000\)](#) (holding that the civil rights remedy of the Violence Against Women Act exceeded Congress's power under both the Commerce Clause and Section 5 of the Fourteenth Amendment); [Alden v. Maine, 527 U.S. 706, 712 \(1999\)](#) (holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"); [City of Boerne v. Flores, 521 U.S. 507, 529-36 \(1997\)](#) (finding that the Religious Freedom Restoration Act exceeded Congress's power under Section 5 of the Fourteenth Amendment); [Printz v. United States, 521 U.S. 898, 933 \(1997\)](#) (holding that the federal government may not compel state executive officials to administer federal regulatory programs); [United States v. Lopez, 514 U.S. 549, 567-85 \(1995\)](#) (finding the Gun-Free School Zones Act to exceed Congress's power under the Commerce Clause); [New York v. United States, 505 U.S. 144, 188 \(1992\)](#) (holding that the federal government may not compel state legislatures to enact federal regulatory programs). But see [U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 844-45 \(1995\)](#) (Kennedy, J., concurring) (finding unconstitutional a term limit amendment to the Arkansas State Constitution limiting the number of terms a member of the U.S. House of Representatives or Senate may serve because it "intrudes upon [the] federal domain").

n8. See supra notes 2-4. One commentator has examined whether nonbinding national guidelines for attorney general prosecutions comport with principles of federalism. Note, To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation, [102 Harv. L. Rev. 842, 842 & n.3 \(1989\)](#). As of this writing, however, there has been no treatment in the academic literature of whether multistate cases violate principles of federalism or separation of powers.

n9. [Pryor, Regulation by Litigation, supra](#) note 3, at 6.

n10. [PTI, Inc. v. Philip Morris Inc., 100 F. Supp. 2d 1179, 1187, 1197-98 \(C.D. Cal. 2000\)](#); First Am. Compl., Star Scientific, Inc. v. Earley at 1, 31-47, No. 3:00CV835 (E.D. Va. filed Jan. 9, 2001) (on file with the Columbia Law Review). Two commentators, though, have observed that "whether or not the multistate enforcement investigation comports with federalism principles ... is generally only of theoretical interest." Stephen Paul Mahinka & Kathleen M. Sanzo, Multistate Antitrust and Consumer Protection Investigations: Practical Concerns, 63 Antitrust L.J. 213, 214 (1994). That may have once been the case. Today, as this Introduction describes, prominent commentators are criticizing the attorneys general on just this ground.

n11. Former United States Attorney General Richard Thornburgh, Attorney General of Alabama William H. Pryor, Jr., and former Attorney General of New Mexico Hal Stratton have spoken out on this issue. See supra notes 2-4. The quote at the beginning of the Introduction of this Note identifies at least one United States senator, John McCain, who would appear to welcome the imposition of restraints on the activities of the attorneys general.

n12. State Attorneys General: Powers and Responsibilities 15 (Lynne M. Ross ed., 1990) [hereinafter Powers & Responsibilities]. The office of attorney general is an ancient one, "older than the United States." [Florida ex rel Shevin v. Exxon Corp., 526 F.2d 266, 268 \(5th Cir. 1976\)](#); see Powers & Responsibilities, supra, at 3. In sixteenth-century England, the responsibility and concomitant powers of representing the sovereign as legal counsel were consolidated into a single office that became the chief representative of the crown in the courts. See VI W. S. Holdsworth, A History of English Law 457-70 (1924) (tracing the evolution of the crown's law officers). The office, though subject to the command of the crown, wielded significant power and discretion in its sphere. Not only did the attorney general provide legal counsel to and pursue legal actions on behalf of the sovereign, but by the middle of the eighteenth century the office also came to be responsible more generally for protecting the public's interests. See XII Holdsworth, supra, at 305 & n.6 (1938). "Transposition of the [office of attorney general] to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch ... broadened this area of the attorney general's discretion," and state attorneys general historically have "enjoyed a significant degree of autonomy." [Florida ex rel Shevin, 526 F.2d at 268](#).

n13. Powers & Responsibilities, supra note 12, at 15.

n14. Id.

n15. Id. at 40; Scott M. Matheson, Jr., Constitutional Status and Role of the State Attorney General, 6 Fla. J.L. &

Pub. Pol'y 1, 3 (1993); 7A C.J.S. Attorney General 2 (1980).

n16. Powers & Responsibilities, supra note 12, at 31, 35-39; see also [Florida ex rel Shevin, 526 F.2d at 268](#) ("Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law.").

n17. Powers & Responsibilities, supra note 12, at 11-14; see, e.g., Lacy H. Thornburg, Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General, 12 Campbell L. Rev. 343, 361-80 (1990) (describing the structure and responsibilities of North Carolina's attorney general's office).

n18. [Florida ex rel Shevin, 526 F.2d at 268.](#)

n19. Compare [Feeney v. Commonwealth, 366 N.E.2d 1262, 1266-67 \(Mass. 1977\)](#) (holding attorney general possesses ultimate authority over litigation), with [People ex rel Deukmejian v. Brown, 624 P.2d 1206, 1209 \(Cal. 1981\)](#) (holding governor possesses ultimate authority over litigation).

n20. [Florida ex rel Shevin, 526 F. 2d at 268-69](#) (listing cases).

n21. Interview with James E. Tierney, Attorney General of Maine, 1980-1990, in New York, N.Y. (July 24, 2001) (on file with the Columbia Law Review) [hereinafter Tierney Interview]; Mahinka & Sanzo, supra note 10, at 215, 219-24.

n22. States may bring actions for injunctive relief and to recover damages in their capacities as direct purchasers and on behalf of their consumers under the parens patriae provisions of federal antitrust laws. [15 U.S.C. 15c](#) (1994); Mahinka & Sanzo, supra note 10, at 215. Injunctive relief can also be sought by the states under section 26 of the Clayton Act. [15 U.S.C. 26](#) (1994).

n23. One of the earliest multistate cases was state enforcement of federal antitrust laws. [In re Mid-Atl. Toyota Antitrust Litig., 516 F. Supp. 1287, 1289 \(D. Md. 1981\)](#), settlement approved, [605 F. Supp. 440 \(D. Md. 1984\)](#) (prosecuting sale of automobiles allegedly unlawfully tied to purchase of accessories).

n24. In multistate cases enforcing federal law, the states act as joint plaintiffs in a single legal action. See infra Part I.C.

n25. NAAG, founded in 1907, is the professional organization of state attorneys general and serves as a

nonpartisan forum in which attorneys general share information and coordinate their activities. The membership of NAAG consists of the attorneys general of the fifty states, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. National Association of Attorneys General, at <http://www.naag.org/about/index.cfm> (last visited Aug. 13, 2001) (on file with the Columbia Law Review); Vertical Restraints Guidelines, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1243, at 996 (Dec. 5, 1985); Horizontal Merger Guidelines, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1306, at S-1 (Mar. 12, 1987); Guidelines for Air Travel Advertising, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1345, at S-1 (Dec. 17, 1987); Report and Recommended Guidelines of NAAG's Task Force on the Car Rental Industry, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1395, at 1022 (Dec. 15, 1988).

n26. See Note, *supra* note 8, at 842 n.3.

n27. See Tierney Interview, *supra* note 21; Mahinka & Sanzo, *supra* note 10, at 214-16; Paul M. Barrett, Attorneys General Flex Their Muscles: State Officials Join Forces to Press Consumer and Antitrust Concerns, *Wall St. J.*, July 13, 1988, at 25; Morrow, *supra* note 1; Thomas Greene et al., *State Antitrust Law and Enforcement* 6 (Mar. 19, 1999) (unpublished manuscript, on file with the Columbia Law Review); Jacob Weisberg, *Microsuits: Why State Attorneys General Are Suddenly Suing Everybody*, *Slate* (May 22, 1998), at <http://slate.msn.com/StrangeBedfellow/98-05-22/StrangeBedfellow.asp>. (on file with the Columbia Law Review).

n28. Pryor, *Reagan Revolution*, *supra* note 2, at 4-5.

n29. Morrow, *supra* note 1.

n30. See, e.g., Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, [61 Geo. Wash. L. Rev.](#) 657, 661-62 (1993) (suggesting that increased level of state enforcement activity in antitrust and consumer protection areas was in part a response to perceived inadequacy of federal enforcement); Morrow, *supra* note 1 (quoting Federal Trade Commission official saying reduced enforcement by the Reagan administration "left a big hole ... which the attorneys general stepped in to fill"); Pryor, *Regulation by Litigation*, *supra* note 3, at 5 (citing NAAG antitrust guidelines as beginning of response by state attorneys general to Reagan administration policies).

n31. Tierney Interview, *supra* note 21.

n32. Morrow, *supra* note 1.

n33. Tierney Interview, *supra* note 21.

n34. Morrow, *supra* note 1; see also Barrett, *supra* note 27 ("By working together, the prosecutors can share the

cost of investigations and wield greater clout. 'There's even more strength in numbers,' explains Oregon Attorney General David Frohnmayer. Companies pay closer attention, he says, when they face potential prosecution from several states at once.").

n35. Tierney Interview, *supra* note 21.

n36. A New Tobacco Deal, *N.Y. Times*, Nov. 22, 1998, 4, at 2.

n37. Morrow, *supra* note 1 (quoting Jodie Bernstein, Director, Federal Trade Commission's Bureau of Consumer Protection).

N38. Morrow, *supra* note 1.

n39. Barrett, *supra* note 27.

n40. Morrow, *supra* note 1.

n41. Mahinka & Sanzo, *supra* note 10, at 218-19.

n42. *Id.* at 217.

n43. Teresa F. Lindeman, Mylan to Pay \$ 147 Million to Settle Suits on Price Hikes, *Pittsburgh Post-Gazette*, July 13, 2000, at A1.

n44. See Brandon Loew & Lauren Rosenberg, Publisher's Clearing House: A Case Study in Multistate Litigation by Attorneys General 16-24 (2001) (unpublished manuscript, on file with the Columbia Law Review).

n45. *Id.* at 25; National Association of State Attorneys General, 26 Attorneys General Win \$ 34 Million Settlement From Publishers Clearing House as Restitution for Consumers, at <http://www.naag.org/features/pubhousereres.cfm> (last visited Oct. 18, 2001) (on file with the Columbia Law Review).

n46. Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, *Antitrust*, Summer 2001, at 34, 36 [hereinafter O'Connor, *Illinois Brick*].

n47. Compl., *New York v. Microsoft* (D.D.C. filed May 18, 1998), <http://www.naag.org/features/microsoft/court.cfm> (on file with the Columbia Law Review).

n48. O'Connor, *Illinois Brick*, supra note 46, at 36; Tierney Interview, supra note 21; Interview with State Antitrust Enforcer, Kevin J. O'Connor, Wisconsin Department of Justice, *Antitrust*, Spring 1999, at 35, 39 [hereinafter O'Connor Interview].

n49. See Barrett, supra note 27; Morrow, supra note 1; Tierney Interview, supra note 21.

n50. Tierney Interview, supra note 21.

n51. *Id.*

n52. *Id.*

n53. Mahinka & Sanzo, supra note 10, at 215.

n54. Tierney Interview, supra note 21. This fund is called the "milk fund" by attorneys general because it was created with the proceeds of a settlement in a milk price-fixing case. *Id.*; O'Connor Interview, supra note 48, at 40.

n55. Some believe that the tobacco litigation was an exception. Compare Pryor, *Law at Risk*, supra note 4 ("The state attorneys general who are suing the tobacco industry are ... trying to get around accepted legal principles."), with Attorney General Eliot Spitzer, *Regulation by Litigation: The New Wave of Government-Sponsored Litigation*, Remarks at Manhattan Institute Conference 7 (June 22, 1999) (stating that the tobacco cases "do not make new law" and "contain no new theories of liability") (on file with the Columbia Law Review).

n56. Tierney Interview, supra note 21.

n57. See supra note 34 and accompanying text.

n58. Tierney Interview, *supra* note 21. Note, however, that states participating in a settlement cannot force a defendant to adhere to its terms within jurisdictions that are not parties to the settlement. A corporation is likely to conform its behavior nationwide to that mandated by a settlement because it is more efficient to manage a company according to a set of unified standards rather than standards that differ according to jurisdiction.

n59. See *supra* notes 2, 4 and accompanying text.

n60. [Printz v. United States, 521 U.S. 898, 918 \(1997\)](#); [Gregory v. Ashcroft, 501 U.S. 452, 457 \(1991\)](#); [Tafflin v. Levitt, 493 U.S. 455, 458 \(1990\)](#).

n61. See The Federalist No. 15, at 106 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("There are material imperfections in our national system and ... something is necessary to be done to rescue us from impending anarchy.").

n62. [Printz, 521 U.S. at 921](#) ("This separation of the [federal and state governments] is one of the Constitution's structural protections of liberty."); [Gregory, 501 U.S. at 458](#) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); The Federalist No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("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 Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("The power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other ...").

n63. See U.S. Const. art. I, 8; *id.* art. I, 10; *id.* art. III, 2; *id.* art. IV, 2; *id.* art. IV, 3; *id.* art. V; [Alden v. Maine, 527 U.S. 706, 713-14 \(1999\)](#) (referring both to textual provisions of the Constitution and implication of the "constitutional design" as source of federalism constraint on government action); [Printz, 521 U.S. at 919-22](#) (same); [New York v. United States, 505 U.S. 144, 155-59 \(1992\)](#) (same); see also 1 Laurence H. Tribe, American Constitutional Law 906-12 (3d ed. 2000) [hereinafter 1 Tribe, American Constitutional Law] (explaining sources of federalism in both text and structural assumptions inherent in the Constitution); *id.* at 908 ("The 'tacit postulates' of the constitutional plan, as explicated in a decision like *Printz*, may well be as sound a basis for doctrine as any express provision of the Constitution can be ...").

n64. [Pryor, Regulation by Litigation, supra](#) note 3, at 6.

n65. See *supra* note 7.

n66. See U.S. Const. art. I, 10, cl. 1. That part of the Constitution reads:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Id.

n67. 1 Tribe, *American Constitutional Law*, supra note 63, at 1024. Professor Tribe observes:

There are Union-reinforcing restrictions [on state action] that flow from the Constitution's structure alone... . Such restrictions include the ban on state secession, the rules that flow from the core principle that in our Union of states citizens choose states rather than states choosing citizens, and the principle that neither the states nor Congress may reshape the relationships specified in the Constitution between citizens of the nation and their federal representatives.

Id. (footnotes omitted). Cases dealing with intergovernmental immunity have relied on structural inferences to establish limits on state action. See, e.g., [M'Culloch v. Maryland, 17 U.S. \(4 Wheat.\) 316, 428-31 \(1819\)](#) (holding that the principle that government may not tax or regulate those whom it does not represent, when applied to the federal structure, prohibits the states from taxing or controlling a federal instrumentality); see also 1 Tribe, *American Constitutional Law*, supra note 63, at 1221 ("When Congress has not [waived its immunity from state regulation], the remaining question is the degree of so-called 'constitutional immunity' - the immunity to be inferred, subject to congressional revision, from the plan of the Constitution." (footnote omitted)).

n68. See U.S. Const. art. I, 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws ... ."); Id. cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power or engage in War ... ."); 1 Tribe, *American Constitutional Law*, supra note 63, at 1023.

n69. "Congress enjoys the unique ... power to displace state laws through preemption whenever it regulates in the realm of concurrent federal and state jurisdiction." Evan H. Caminker, Printz, State Sovereignty, and the Limits of Formalism, [1997 Sup. Ct. Rev. 199, 207](#). Also, though states may regulate interstate commerce in some forms, this power is restricted by the Dormant Commerce Clause. See infra notes 138-146 and accompanying text.

n70. U.S. Const. art. I, 10, cl. 1.

n71. *Id.*

n72. *Id.* Letters of marque and reprisal were "licenses authorizing a private citizen to engage in reprisals against citizens or vessels of another nation." Black's Law Dictionary 917 (7th ed. 1999).

n73. U.S. Const. art. I, 10, cl. 1.

n74. [505 U.S. 144 \(1992\)](#).

n75. [521 U.S. 898 \(1997\)](#).

n76. [Id. at 918-22; New York, 505 U.S. at 162-66](#).

n77. See supra note 7; Linda Greenhouse, Hearing a Final Clinton Federalism Case, N.Y. Times, Jan. 17, 2001, at A16 (referring to "the court's renewed debate over states' rights and Congressional authority").

n78. See, e.g., Laurence Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv. L. Rev. 682, 700 (1976) [hereinafter Tribe, Intergovernmental Immunities] ("[Intergovernmental immunities] may still be inferred from the plan of the Constitution.").

n79. [17 U.S. \(4 Wheat.\) 316 \(1819\)](#).

n80. [Id. at 401, 425](#).

n81. The Chief Justice reasoned:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

Id. at 431.

n82. Id. at 436. For a discussion of the importance to the Founders of preserving representation of the people in a federal system, see Gordon S. Wood, *The Creation of the American Republic: 1776-1787*, at 544-47, 600 (1969).

n83. [M'Culloch, 17 U.S. \(4 Wheat.\) at 436](#); see also [Weston v. City Council of Charleston, 27 U.S. \(2 Pet.\) 449, 466-69 \(1829\)](#) (using reasoning of M'Culloch to find municipal tax on stock issued by United States unconstitutional).

n84. Professor Tribe has explained:

Immunity from interference obviously cannot include a general immunity from state law, including nondiscriminatory taxes of every description, for all federal agents or instrumentalities acting within the scope of their agency or carrying on their functions as federal instruments. Given the interstitial character of federal law, any contrary principle, at least in the matter of regulation even if not in the matter of taxation, would require Congress to undertake the overwhelming burden of having to provide a comprehensive body of rules to govern all of the rights and obligations of all those who act on its behalf, including the mode of turning at the corners of streets.

1 Tribe, *American Constitutional Law*, supra note 63, at 1223 (internal quotation marks omitted).

n85. "The States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere." [U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 841 \(1995\)](#) (Kennedy, J., concurring); see also [Sperry v. Florida, 373 U.S. 379, 385 \(1963\)](#) (prohibiting state from enjoining, as unauthorized practice of law, the giving of advice by patent agents licensed by U.S. patent office to give such advice); [Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 190 \(1956\)](#) (per curiam) (holding that private contractor cannot be required to submit to state licensing procedures as precondition of bidding for federal contract where governing federal procurement statute provides standards for competitive bidders); [Mayo v. United States, 319 U.S. 441, 445 \(1943\)](#) (finding unenforceable, as applied to federal fertilizer distribution program, a state law requiring bags of fertilizer to be stamped as evidence of payment of inspection fee).

n86. See supra Part I.B.

n87. See supra notes 44-45 and accompanying text.

n88. This is precisely the scenario that has played out in the Microsoft antitrust litigation. In that case, a multistate action in federal court by nineteen states was consolidated with a suit brought by the Department of Justice. As this Note goes to press, the federal government and Microsoft have agreed to terms of a proposed settlement. Stephen Labaton & Steve Lohr, Justice Department and Microsoft Are Seen in Tentative Settlement, N.Y. Times, Nov. 1, 2001, at C1. A number of the states involved, however, have indicated that they will actively oppose the settlement before the district court handling the case. Stephen Labaton & Steve Lohr, Judge to Hear From 9 States On Microsoft: Group Challenges U.S. On Proposed Settlement, N.Y. Times, Nov. 7, 2001, at C1.

n89. Note that the same statutory and case law binding federal enforcement authorities would still bind the states. The divergence would be in how each enforcement actor - state or federal - chooses to exercise its significant discretion in starting investigations and filing actions in court.

n90. There is a well developed literature arguing that the states' role in antitrust enforcement is inefficient and confusing. See, e.g., David A. Zimmerman, Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers, [48 Emory L.J. 337, 365 \(1999\)](#) ("The proliferation of state actions challenging mergers has brought greater uncertainty and undermined federal antitrust policy."). These critiques are principally policy based, however, and do not contend that the states invade federal sovereignty when they act pursuant to federal antitrust law.

For an argument that concurrent federal and state antitrust enforcement is a strength, and not a weakness, of the federal system, see O'Connor, Illinois Brick, *supra* note 46, at 38 (suggesting coordinated multistate litigation can reduce waste and uncertainty for plaintiffs and defendants alike), and O'Connor Interview, *supra* note 48, at 35, 37 (explaining efficiencies and other benefits created by multistate enforcement of antitrust laws).

n91. U.S. Const. art. I, 10, cl. 2; *id.* cl. 3.

n92. *Id.* cl. 2.

n93. *Id.* cl. 3.

n94. *Id.*

n95. *Id.*

n96. Professor Tribe sees these restrictions on state power as part of the Constitution's plan for preserving the Union. 1 Tribe, American Constitutional Law, *supra* note 63, at 1021. In the debate at the constitutional convention over what would become the provisions of Article I, section 10, Madison asked, "Will it prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified, among ourselves, as well as in every other confederated republic ancient and Modern." 1 Wilbourn E. Benton, 1787: Drafting the U.S.

Constitution 1049 (1986).

n97. See supra Part I.D.

n98. [U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 469 \(1978\).](#)

n99. [Id. at 470.](#)

n100. [Id. at 471.](#)

n101. Id.

n102. [Id. at 456.](#)

n103. Id.

n104. [Id. at 456-57.](#)

n105. [Id. at 459-72.](#)

n106. [Id. at 471](#) (quoting [Virginia v. Tennessee, 148 U.S. 503, 519 \(1893\)](#)).

n107. Id. at 473.

n108. Id.

n109. Tribe, Intergovernmental Immunities, supra note 78, at 712.

n110. [Virginia, 148 U.S. at 520 \(1893\)](#).

n111. [Multistate Tax Comm'n, 434 U.S. at 472-79](#).

n112. [449 U.S. 433, 441 \(1981\)](#) (citing [Virginia, 148 U.S. at 521](#); [Green v. Biddle, 21 U.S. \(8 Wheat.\) 1, 85-87 \(1823\)](#)).

n113. See [Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 275 \(1959\)](#) (finding that Congress conditioned approval of interstate agency on the state's waiving of any immunity from suit it might have enjoyed).

n114. 1 Tribe, *American Constitutional Law*, supra note 63, at 1240 (internal citations and quotation marks omitted) (quoting Justice Story).

n115. *Id.* at 1238. Professor Tribe also notes that "Congress cannot authorize a state to violate a constitutional command designed to protect private rights against government action (such as the commands of 1 of the Fourteenth Amendment)" or "license state violation of a constitutional norm too basic to the very nature and structure of the Union for it to be subject to compromise." *Id.*

n116. [Multistate Tax Comm'n, 434 U.S. at 470](#); see also [Virginia, 148 U.S. at 519](#) (finding "any combination" between the states may trigger the prohibition of the Compact Clause if the Supreme Court's functionalist test is met). On at least one occasion, the cooperation among state attorneys general became quite formal. Following the adoption of horizontal merger enforcement guidelines by NAAG in 1987, see supra note 25 and accompanying text, "a formal 'compact' of states was formed within the organization for those who agree to abide by the [guidelines] and work together against any mergers [that violate them]. The attorneys general of 44 states ... signed up ... ." Stratton, supra note 4.

n117. See supra note 10. In the PTI litigation, the district court rejected the Compact Clause argument. [PTI, Inc. v. Philip Morris Inc., 100 F. Supp. 2d 1179, 1198 \(C.D. Cal. 2000\)](#). In *Star Scientific* the court had not ruled on the argument as of this writing.

n118. Pryor, *Reagan Revolution*, supra note 2, at 16.

n119. O'Brien, supra note 4, at 8.

n120. Stratton, *supra* note 4.

n121. See, e.g., Pryor, *Law at Risk*, *supra* note 4 ("The state attorneys general who are suing the tobacco industry are ... trying to get around accepted legal principles.").

n122. See Spitzer, *supra* note 55, at 7.

n123. O'Connor, *Illinois Brick*, *supra* note 46, at 36.

n124. See Spitzer, *supra* note 55, at 7.

n125. See *supra* notes 44-45 and accompanying text.

n126. [U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 \(1978\).](#)

n127. [Id. at 473.](#) Not surprisingly, state attorneys general will often disagree about how to handle a case and refuse to proceed according to terms with which they disagree. For example, a contributing factor to the breakdown of the mediation effort led by Judge Posner following the conclusion of the Microsoft antitrust trial was the inability of the nineteen states involved in the case to agree on a form of settlement acceptable to each of them. Ken Auletta, *Final Offer*, *The New Yorker*, Jan. 15, 2001, at 40, 44-45.

n128. Tribe, *Intergovernmental Immunities*, *supra* note 78, at 712.

n129. [Virginia v. Tennessee, 148 U.S. 503, 520 \(1893\).](#)

n130. [Multistate Tax Comm'n, 434 U.S. at 473.](#)

n131. *Id.*

n132. See *supra* notes 88-89 and accompanying text.

n133. But see *infra* Part III.C for consideration of separation of powers concerns raised by state enforcement of federal law.

n134. See [Virginia v. Tennessee, 148 U.S. 503, 521 \(1893\)](#) ("Consent [to a compact] may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them.").

n135. In this Venn diagram of federalism, neither the federal nor state governments may act in the area outside the circles. This area represents, for example, those freedoms protected by the Bill of Rights.

n136. U.S. Const. art. VI, cl. 2; [Clafin v. Houseman, 93 U.S. 130, 136 \(1876\)](#) ("The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty.").

n137. 1 Tribe, *American Constitutional Law*, *supra* note 63, at 1176-77; see also [English v. Gen. Elec. Co., 496 U.S. 72, 78-79 \(1990\)](#) (describing express, implied, and conflict preemption); [Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 \(1983\)](#) (same).

n138. [Wyoming v. Oklahoma, 502 U.S. 437, 454-55 \(1992\)](#).

n139. [Pike v. Bruce Church, Inc., 397 U.S. 137, 142 \(1970\)](#).

n140. See, e.g., [English, 496 U.S. at 78](#) ("Our cases have established that state law is pre-empted under the Supremacy Clause ... in three circumstances.") (emphasis added); [Pacific Gas & Electric Co., 461 U.S. at 204](#) ("State law is pre-empted to the extent it actually conflicts with federal law.") (emphasis added); [Pike, 397 U.S. at 142](#) ("Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly ...") (emphasis added).

n141. This is one of the tacks taken by the plaintiffs in *Star Scientific, Inc. v. Earley*, No. 3:00CV835 (E.D. Va. filed Jan. 9, 2001). See Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 22-24 (Feb. 16, 2001). The states participating in the Master Settlement Agreement in the tobacco litigation have passed statutes that require all tobacco manufacturers doing business in the states to pay monies into escrow accounts. The purpose of the statutes is to "prevent [manufacturers not participating in the settlement from using] a resulting cost advantage to derive large, short-term profits in the years before liability might arise without insuring that the states will have an eventual source of recovery from them if they are proven to act culpably." Pl.'s First Am. Compl. at 5 (Jan. 9, 2001). The plaintiffs have attacked these statutes as violating the Dormant Commerce Clause. Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 22-24.

n142. See, e.g., Fla. Stat. Ann. 501.204(1) (West 1997) ("Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."); Mass. Gen. Laws Ann. ch. 93A, 2(a) (West 1994) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."); N.Y. Gen. Bus. Law 349(a) (McKinney 1988) ("Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.").

n143. See Tierney Interview, *supra* note 21.

n144. [15 U.S.C. 45\(a\)\(2\)](#) (1994).

n145. [Am. Fin. Servs. v. F.T.C., 767 F.2d 957, 989 n.41 \(D.C. Cir. 1985\)](#) ("The expansion of the FTC's jurisdiction [over unfair and deceptive trade practices] is not intended to occupy the field or in any way preempt state or local agencies from carrying out consumer protection or other activities ... ." (quoting legislative history of [15 U.S.C. 45](#))); [Double-Eagle Lubricants, Inc. v. Texas, 248 F. Supp. 515, 518 \(N.D. Tex. 1965\)](#) ("State laws providing for regulation of unfair or deceptive practices in commerce are valid unless they conflict with [15 U.S.C. 45](#) to the extent that both cannot stand in the same area.").

n146. Zimmerman, *supra* note 90, at 340 n.15.

n147. See The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.").

n148. "All legislative Powers herein granted shall be vested in a Congress of the United States... ." U.S. Const. art. I, 1. "The executive Power shall be vested in a President of the United States of America." Id. art. II, 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Id. art. III, 1.

n149. Id. art. I, 6, cl. 2.

n150. Id. art. II, 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected ... ."); Id. art. III, 1 ("The Judges ... shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

n151. "The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

n152. [Dreyer v. Illinois, 187 U.S. 71, 84 \(1902\)](#) (quoting Joseph Story, Commentaries on the Constitution of the United States 393 (5th ed. 1891)).

n153. 1 Tribe, American Constitutional Law, *supra* note 63, at 122 (footnotes omitted).

n154. *Id.*

n155. [INS v. Chadha, 462 U.S. 919, 963 \(1983\)](#) (Powell, J., concurring).

n156. *Id.*

n157. [487 U.S. 654, 660 \(1988\)](#).

n158. "In the [time] since Morrison v. Olson was decided, nearly every float in the parade of horrors predicted by Justice Scalia has come to pass." Nick Bravin, Note, Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence, [98 Colum. L. Rev. 1103, 1106 \(1998\)](#). A portion of Justice Scalia's dissent in Morrison is cited by Alabama Attorney General William Pryor in his remarks and writing as a source for his thinking about the federalism and separation of powers issues attending the role of state attorneys general in multistate cases. [Pryor, Regulation by Litigation, \*supra\* note 3, at 2-3](#); Pryor, Reagan Revolution, *supra* note 2, at 15. Professor Tribe filed an amicus curiae brief supporting the constitutionality of the independent prosecutor law at issue in Morrison, but later changed his mind and acknowledged that Justice Scalia's dissent "powerfully demonstrated the weakness of the majority's analysis" of a key aspect of the case. 1 Tribe, American Constitutional Law, *supra* note 63, at 680 n.18, 682.

n159. [478 U.S. 714 \(1986\)](#).

n160. [Id. at 727-32](#).

n161. *Id.*

n162. See supra notes 4-6, 118-120 and accompanying text.

n163. Pryor, Law at Risk, supra note 4.

n164. Pryor, Reagan Revolution, supra note 2, at 15-16 ("Recent abuses in government litigation have undermined ... federalism... . The purpose of the tobacco litigation ... was to establish through the action of several states a national policy that is properly reserved ... to Congress ... ."); Stratton, supra note 4 ("The leaders of [NAAG] are reserving regulatory power to their states, and then banding together to inhibit interstate commerce in a way that was contemplated neither by the Framers nor by those that have legislated federal law.").

n165. Michael C. Dorf, The Relevance of Federal Norms for State Separation of Powers, [4 Roger Williams U. L. Rev. 51, 53 \(1998\)](#).

n166. [Mayor of Philadelphia v. Educ. Equal. League, 415 U.S. 605, 615 n.13 \(1974\)](#); see also [Bush v. Gore, 531 U.S. 98, 112 \(2000\)](#) (Rehnquist, C.J., concurring) ("Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character."); [Sweezy v. New Hampshire, 354 U.S. 234, 255 \(1957\)](#) ("This Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments."); [Dreyer v. Illinois, 187 U.S. 71, 84 \(1902\)](#) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate ... is for the determination of the State.").

n167. Dorf, supra note 165, at 54; see also 1 Tribe, American Constitutional Law, supra note 63, at 133 (stating that the rulings by the Supreme Court "do not mean ... that the Constitution is wholly agnostic with respect to state governmental arrangements or that separation-of-powers-like norms have no application to state governments").

n168. U.S. Const. art. V.

n169. Id. amend. XVII, cl. 2.

n170. Dorf, supra note 165, at 55.

n171. Id. at 59.

n172. U.S. Const. art. IV, 4.

n173. Dorf, *supra* note 165, at 69.

n174. *Id.*

n175. "Those who believe in what has come to be called the theory of the unitary Executive contend that the Constitution requires effective presidential control of all exercises of the executive power." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, [104 Yale L.J. 541, 545 n.6 \(1994\)](#).

n176. For examples of arguments supporting the unitarian position, see generally [Printz v. United States, 521 U.S. 898, 922-23 \(1997\)](#); [Morrison v. Olson, 487 U.S. 654, 697 \(1988\)](#) (Scalia, J., dissenting); Calabresi & Prakash, *supra* note 175, at 570-99; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, [105 Harv. L. Rev. 1153, 1165-68 \(1992\)](#); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, [85 Nw. U. L. Rev. 62, 71-77 \(1990\)](#); Gary Lawson, *The Rise and Rise of the Administrative State*, [107 Harv. L. Rev. 1231, 1241-43 \(1994\)](#); Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, [102 Yale L.J. 991, 1014-15 \(1993\)](#).

For examples of arguments against a strong unitarian view, see generally A. Michael Froomkin, *The Imperial Presidency's New Vestments*, [88 Nw. U. L. Rev. 1346, 1369-76 \(1994\)](#); Bruce Ledewitz, *The Uncertain Power of the President To Execute the Laws*, [46 Tenn. L. Rev. 757, 796-806 \(1979\)](#); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, [57 Geo. Wash. L. Rev. 627, 634, 689-91 \(1989\)](#); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, [96 Yale L.J. 787, 789-808 \(1987\)](#).

n177. [Printz, 521 U.S. at 922-23](#) (citations omitted).

n178. [Id. at 960-61](#) (Stevens, J., dissenting) (mentioning the Clean Water Act, the Occupational Safety and Health Act of 1970, and the Resource Conservation and Recovery Act of 1976). Numerous commentators have also observed the threat that the unitarian view of the executive poses to "cooperative federalism" programs. See, e.g., 1 Tribe, *American Constitutional Law*, *supra* note 63, at 716 ("Justice Scalia's alternative holding, if taken literally, would sweep well beyond congressional programs 'commandeering' state officers to cast doubt even on cooperative federal-state programs."); Caminker, *supra* note 69, at 230-31 ("Arguably, the requirement of presidential supervision should run to all forms of state administration of federal programs, even when the state voluntarily enacts state regulations designed specifically to serve federal objectives or satisfy federal standards."); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, [79 N.C. L. Rev. 663, 711-12 \(2001\)](#) ("Although Justice Scalia commented in *Printz* that state consent to a delegation of federal authority would mitigate Article II concerns, the rationale behind this version of an anti-delegation argument would preclude all federal delegations of executive authority to state officials.").

n179. Compl., *New York v. Microsoft* (D.D.C. filed May 18, 1998), <http://www.naag.org/features/microsoft/court.cfm> (on file with the Columbia Law Review).

n180. Weiser, *supra* note 178, at 715; see also, e.g., Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, [\*38 Am. U. L. Rev.\* 275, 281 \(1989\)](#) ("From the inception of the republic, ... state officials have played significant supporting roles in federal criminal law enforcement.")

n181. [\*109 U.S.\* 513, 519 \(1883\)](#) (upholding federal law delegating to states authority to determine compensation in takings cases).

n182. *Id.*

n183. [\*AT&T Corp. v. Iowa Util. Bd.\*, 525 U.S. 366, 411 \(1999\)](#) (Thomas, J., dissenting).

n184. [\*Printz v. United States\*, 521 U.S. 898, 935-36 \(1997\)](#) (O'Connor, J., concurring) ("Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in the federal program.").

n185. [\*Morrison v. Olson\*, 487 U.S. 654, 697, 705 \(1988\)](#) (Scalia, J., dissenting). In *Printz*, Justice Scalia's articulation of the unitary executive position was joined by [\*Chief Justice Rehnquist and Justices Kennedy and Thomas\*, 521 U.S. at 898](#). In addition, Calabresi and Prakash believe that "the weight of academic opinion has shifted back to the theory of the unitary Executive." Calabresi & Prakash, *supra* note 175, at 545. Professor Tribe, however, believes that the unitarian view is not likely to establish itself as the majority view on the Supreme Court. 1 Tribe, *American Constitutional Law*, *supra* note 63, at 717.

n186. [\*Printz\*, 521 U.S. at 923 n.12](#).

n187. See *supra* note 178 and accompanying text. Professor Tribe notes that it is unlikely that requiring voluntary participation by the state would in fact limit the ability of Congress to reduce the power of the executive. Congress effectively induces "voluntary" state participation in federal programs all the time through its use of its conditional spending power. 1 Tribe, *American Constitutional Law*, *supra* note 63, at 717.

n188. Calabresi & Prakash, *supra* note 175, at 639 ("If one accepts the proposition that the President is the only individual constitutionally granted the executive power and that this authority includes the ability to direct the execution of federal law, then ... the President could direct state officers in their execution of federal law ...").

n189. [Tennessee v. Highland Mem'l Cemetery, Inc., 489 F. Supp. 65, 65 \(E.D. Tenn. 1980\)](#). Unfortunately, the court's opinion does not provide its reasoning. It merely states: "Still another argument made by defendants is that [15 U.S.C. 15c](#) which allows the State Attorney General to sue its own citizens is unconstitutional. This case presents a case or controversy under federal law. Diversity of citizenship is not required and there is no unconstitutional delegation of executive authority." [Id. at 68](#) (emphasis added).

n190. Id.

n191. [New York v. O'Neill, 359 U.S. 1, 6 \(1959\)](#).

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