

2012

## Federalism as a Safeguard of the Separation of Powers

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### Recommended Citation

Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, COLUMBIA LAW REVIEW, Vol. 112, P. 459, 2012 (2012).

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## ARTICLES

### FEDERALISM AS A SAFEGUARD OF THE SEPARATION OF POWERS

Jessica Bulman-Pozen\*

*States frequently administer federal law, yet scholars have largely overlooked how the practice of cooperative federalism affects the balance of power across the branches of the federal government. This Article explains how states check the federal executive in an era of expansive executive power and how they do so as champions of Congress, both relying on congressionally conferred authority and casting themselves as Congress's faithful agents. By inviting the states to carry out federal law, Congress, whether purposefully or incidentally, counteracts the tendency of statutory ambiguity and broad delegations of authority to enhance federal executive power. When states disagree with the federal executive about how to administer the law, they force attention back to the underlying statute: Contending that their view is consistent with Congress's purposes, states compel the federal executive to respond in kind. States may also reinvigorate horizontal checks by calling on the courts or Congress as allies. Cooperative federalism schemes are a more practical means of checking federal executive power than many existing proposals because such schemes do not fight problems commentators emphasize—a vast administrative state, broad delegations, and polarized political parties—but rather harness these realities to serve separation of powers objectives.*

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## INTRODUCTION

Ever since Madison celebrated the “double security” provided by federalism and the separation of powers among the three branches of the national government, courts and commentators have recognized a strong analogy between the two great structural principles of our Constitution.<sup>1</sup> While they also serve distinct values,<sup>2</sup> federalism and the separation of powers diffuse government authority to prevent the accumulation of excessive power in any one actor and to encourage different representatives of the people to monitor the exercises of power by the others.<sup>3</sup> The tension between the state and federal governments, and among the federal branches, we are told, fosters democratically accountable government.

Although the overarching similarities between federalism and the separation of powers are widely recognized, there has been little consideration of how these two structures interact. One important account ar-

1. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

2. For instance, federalism is also championed for accommodating the diverse preferences of a heterogeneous society, fostering experimentation, and promoting democratic participation. See, e.g., David L. Shapiro, *Federalism: A Dialogue* 75–106 (1995) (exploring federalism’s functions); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1, 3–10 (1988) (same); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 *U. Chi. L. Rev.* 1484, 1493–1511 (1987) (reviewing Raoul Berger, *Federalism: The Founders’ Design* (1987)) (same).

3. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (“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.”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1495 (1987) (arguing analogies between separation of powers and federalism are not coincidental, for “in separating and dividing power, whether horizontally or vertically, the Federalists pursued the same strategy: Vest power in different sets of agents who will have personal incentives to monitor and enforce limitations on each other’s powers”).

gues that the separation of powers safeguards federalism.<sup>4</sup> This Article suggests the reverse: Federalism safeguards the separation of powers.

Much contemporary separation of powers scholarship laments the growth of executive power and the lack of vigorous competition between the federal executive and legislative branches. As commentators have advanced proposals to check executive power and restore competition, they have largely overlooked one powerful actor: the states. In recent years, states have, quite loudly in individual cases but quietly as a matter of constitutional theory, assumed a prominent role in challenging federal executive power. Because state challenges to the federal executive register as matters of federalism, it is easy to miss how they also affect the separation of powers.<sup>5</sup> But states often resist executive power in a very particular way—as champions of Congress, both relying on congressionally conferred authority and casting themselves as Congress’s faithful agents.

Consider, for example, California’s attempt to regulate greenhouse gas emissions when the Bush Administration declined to do so. The state insisted that it was attempting to faithfully implement the Clean Air Act and that the federal executive was abdicating its statutory responsibility.<sup>6</sup> Or consider the ongoing dispute between Arizona and the Obama Administration concerning immigration policy. Arizona has framed its opposition to federal immigration policy as a challenge not to the federal government as a whole, but rather to the federal executive branch in particular. The state maintains that it, rather than the federal executive, is seeking to execute federal law as Congress intended.<sup>7</sup>

As these examples suggest, one reason we may overlook how federalism affects the separation of powers is that our dominant understanding of federalism obscures key features of state challenges. Judicial opinions and legal scholarship tend to envision the states as separate sovereigns, resisting federal action from a position entirely outside the federal government. But a prevalent mode of federalism is cooperative federalism, in which states are charged by Congress with administering federal law.<sup>8</sup>

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4. Bradford Clark, to whom I am indebted for the title of this Article, argues that the separation of powers safeguards federalism by limiting the number and kinds of federal laws that may displace state law. See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *Tex. L. Rev.* 1321 (2001); Symposium, *Separation of Powers as a Safeguard of Federalism*, 83 *Notre Dame L. Rev.* 1417 (2008) (responding to Clark’s article).

5. Indeed, I have not attended to this in prior work, instead treating state challenges as challenges to the federal government as an undifferentiated whole. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256 (2009). While this Article parses the federal government, the granularity of the discussion is still limited. The branches of the federal government are not unitary entities, nor are the states or their branches. But, with some exceptions, this Article invokes the three branches and the states as such, reserving further parsing for future work.

6. See *infra* Part III.B.3.a (considering California’s challenge).

7. See *infra* Part III.A.3 (considering Arizona’s challenge).

8. While some accounts limit the term “cooperative federalism” to conditional preemption schemes, e.g., *New York v. United States*, 505 U.S. 144, 167–68 (1992), this

When we turn our attention to cooperative federalism, we can see the distinctive way states may safeguard the separation of powers. Cohabiting a statutory scheme with the federal executive, states frequently challenge not the raw exercise of federal power, as traditional accounts of federalism would have it, but rather the faithfulness of the executive to the statutory scheme. And, in so doing, they rely on authority granted to them by Congress. States need not actually be Congress's faithful agents for them to claim this mantle and to force the federal executive to respond in kind. By assigning states a role in executing federal law, Congress has—often unwittingly—empowered them to provide the sort of check on executive power that it is often unable, or unwilling, to provide directly.

Cooperative federalism schemes are an intriguing safeguard of the separation of powers for practical as well as theoretical reasons. As this Article explains, state administration of federal law is a more organic means of reinvigorating the separation of powers than many existing proposals because instead of fighting problems commentators emphasize, cooperative federalism schemes harness these realities in the service of Madison's vision.

First, cooperative federalism schemes provide a check on federal executive power not despite the expansion of the federal executive branch but because of it. The very growth of the federal administrative state has swept states up as necessary administrators of federal law. The more Congress charges the federal executive with accomplishing, the more likely it is to also give the states a role in carrying out federal law, and this positions states to check the federal executive. Cooperative federalism may thus be a more practical response to the growth of the federal executive branch than proposals to staunch such growth.

Second, cooperative federalism schemes seize on Congress's habit of delegating authority to the federal executive as a means of checking executive power. Commentators lament that broad delegations enhance executive power. But when Congress grants administrative authority to both the states and the federal executive, the more room Congress leaves the federal executive to maneuver, the more room it also leaves for state resistance. As this perhaps counterintuitive point highlights, Congress need not intend cooperative federalism schemes to check federal executive power for them to have this effect; such schemes may give Congress champions in spite of itself.

Third, cooperative federalism schemes harness partisanship to check the federal executive. Because there will never be party unity between the federal government and all fifty states, partisan resistance to the federal executive will arise even during periods of unified federal government. Rather than seek to mute partisanship, cooperative federalism thus seizes

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Article uses the term in a looser sense to refer to all federal schemes that furnish a role for the states. For one overview of such schemes, and the many labels used to describe them, see generally David B. Walker, *The Rebirth of Federalism: Slouching Toward Washington* (2d ed. 2000).

on the polarization of political parties to generate a continual check on federal executive power. For all of these reasons, cooperative federalism schemes are a notable antidote to some pressing separation of powers concerns.

An important caveat is in order. The goal of this Article is to describe an underappreciated and undertheorized dynamic, not to defend a strong normative conclusion. States challenge the federal executive in some of our most contentious policy areas, and their pushback is controversial both in individual cases and writ large. Without seeking to deny the costs of state resistance, this Article focuses on an overlooked benefit: furthering separation of powers values. Even with respect to this benefit, however, the account offered here is partial. In particular, the Article largely brackets first-order questions about the meaning of the separation of powers. The separation of powers is an essentially contested concept,<sup>9</sup> perhaps even an essentially contradictory concept. In its pristine rendering in the Constitution and *The Federalist Papers*, it embraces opposed policies: “separated powers, yet shared and overlapping powers; independence of branch functions, yet functions that check and balance each other.”<sup>10</sup> And the ends it serves are similarly multiple and competing: “promoting efficient specialization, but avoiding the tyranny of too much efficiency,” to name just one tension.<sup>11</sup> This Article focuses on checks and balances, in the form of competition among government actors, and in the service of democratic responsiveness, deliberation, and thick governmental accountability. While many will agree this is a core constellation of separation of powers values, those who privilege distinct separation of powers values may understand state administration of federal law very differently.<sup>12</sup> And even those who embrace these values may rightly note

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9. See W.B. Gallie, *Essentially Contested Concepts*, 56 *Proc. Aristotelian Soc’y* 167, 169 (1956) (positing that essentially contested concepts are “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users”).

10. Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 *Wm. & Mary L. Rev.* 343, 343 (1989).

11. *Id.*

12. Most notably, proponents of the unitary executive position have suggested that cooperative federalism may undermine the separation of powers by interfering with the President’s Article II prerogative to execute federal law. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541, 639–42 (1994) (expounding unitary executive position and suggesting state implementation of federal law must be subject to President’s supervision); cf. *Printz v. United States*, 521 U.S. 898, 922–23 & n.12 (1997) (suggesting Brady Act undermined separation of powers by commandeering state officers to implement federal law without presidential control, but distinguishing cooperative federalism schemes). See generally Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 *U. Kan. L. Rev.* 1075 (1997) (illuminating tensions in unitarian objection to cooperative federalism schemes). Debates about both the originalist grounding of the unitarian position and its translation fill volumes. For a small sample of the literature, see generally Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725 (1996) (arguing values framers sought to further with separation of powers cut against unitary executive), and

that other separation of powers values, such as government efficacy and individual liberty, can be threatened by state contestation. In this initial foray into the relationship between federalism and the separation of powers, I do not attempt to weigh all separation of powers values in the balance, nor do I attempt to defend the desirability of checks and balances in the first instance. I reserve a more complete, normative assessment for future work.

Part I provides a brief overview of two main threats to governmental competition posited by the separation of powers literature: the rise of executive power in the administrative state and the dominance of political parties in motivating government actors. Part II examines the existing account of how cooperative federalism may serve separation of powers values and explains that this account is limited because it depends on a choice by Congress to empower *either* the federal executive or the states to administer federal law. Part III sets forth a new theory of federalism as a safeguard of the separation of powers, explaining how delegation to *both* the federal executive and the states helps check federal executive power and advance congressional authority. After considering how states exercise power in cooperative federalism schemes, this Part addresses how concurrent delegation by Congress to the states and the federal executive may limit federal executive power, lead to robust disputes about which agent is being faithful to Congress, and, in some instances, bring in the courts or Congress to settle the argument, thereby reinvigorating horizontal checks. Part IV explains why cooperative federalism schemes are a realistic response to some key threats to the separation of powers.

Ultimately, this Article suggests, we no longer principally have two independent systems, federalism and the separation of powers, that foster competition in the service of democratically accountable government, but rather an interdependent system—not so much a double security as a redoubled security.

## I. THREATS TO THE SEPARATION OF POWERS

Competition among the three branches of the national government is central to our constitutional design. Indeed, despite the label “separation of powers,” the Constitution does not perfectly separate the legislative, executive, and judicial powers. Instead, it fragments such powers to

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Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1 (1994) (arguing framers did not constitutionalize unitary executive but changed circumstances may require unitary executive). While this Article does not revisit debates about the unitary executive theory, it evidences skepticism of the strong unitarian position. Even some committed unitarians, however, may regard delegation to states more favorably than delegation to other actors beyond the President’s supervision. See Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 *Nw. U. L. Rev.* 62, 80–84, 106, 111 (1990) (suggesting federalism values might justify delegation to states).

foster checking by each branch of the others' exercises of authority.<sup>13</sup> The framers intended such checking both to forestall tyranny, by denying to any one branch the power to consolidate government authority in itself,<sup>14</sup> and to help keep government democratically responsive; when no one branch might unproblematically claim to represent the popular will, a thick form of accountability would emerge through interbranch deliberation and contestation.<sup>15</sup> But two dominant narratives in recent separation of powers scholarship describe how competition among well-matched branches of government has become, in many instances, a parchment aspiration. This Part provides a brief, and necessarily stylized, overview of these two related narratives: the rise of executive power in the administrative state and the rise of political parties.

### A. *Executive Power and Political Parties*

A leading narrative in the separation of powers literature of the past several decades is the rise of executive power. Calling the executive "the most dangerous branch,"<sup>16</sup> and declaring that the executive "subsumes much of the tripartite structure of government,"<sup>17</sup> commentators have

13. See, e.g., The Federalist No. 48, *supra* note 1, at 308 (James Madison) ("[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 *Colum. L. Rev.* 452, 495 (1989) ("[O]ur tendency to describe the constitutional scheme as one of 'separation of powers *and* checks and balances' can be misleading. This conventional, bifurcated phrasing obscures the fact that the latter represented, for those who drafted and defended the Constitution, a vital and indispensable aspect of the former.").

14. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 578 (1984) [hereinafter Strauss, *Place of Agencies*] ("[Checks and balances] seek[] to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle . . .").

15. See, e.g., Bruce Ackerman, *We the People: Foundations* 183–86 (1991) [hereinafter Ackerman, *We the People*] (arguing each branch represents the people in a different and partial way and such fragmented representation ensures no single branch can unproblematically claim mantle of the people); Flaherty, *supra* note 12, at 1821–25 (arguing framers reconceptualized accountability as province of all three branches).

16. Flaherty, *supra* note 12, at 1727; see also, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 125 (1994) ("[T]he framers' factual assumptions [that the legislature would be the most dangerous branch] have been displaced. Now, it is the President whose power has expanded and who therefore needs to be checked.").

17. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314, 2316 (2006); see also, e.g., Farina, *supra* note 13, at 523 ("[T]he dominance of the executive that has followed the delegation of regulatory power cannot be squared with the original commitment to separation of powers . . ."); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 *B.U. L. Rev.* 505, 506 (2008) [hereinafter Marshall, *Eleven Reasons*] ("[The] expansion in presidential power has created a constitutional imbalance between the executive and legislative branches, calling into doubt the continued efficacy of



suggested that the three branches have become unbalanced, with the executive exercising a predominant, and often unchecked, role.

Central to this story is the emergence of the administrative state. Since the New Deal, administrative agencies have carried out vast amounts of highly discretionary policymaking under broad delegations from Congress. They make rules under open-ended directives, such as setting air quality standards “requisite to protect the public health,”<sup>18</sup> and conduct adjudications under equally open-ended directives, such as granting licenses “if public convenience, interest, or necessity will be served thereby.”<sup>19</sup> Even when Congress delineates their substantive mandates more particularly, agencies retain significant enforcement discretion, effectively allowing them to shape the content of federal law.<sup>20</sup>

While the consolidation of power in administrative agencies might not pose a serious separation of powers concern if the President, Congress, and judiciary simply channeled interbranch competition through the administrative apparatus,<sup>21</sup> commentators worry that, within this apparatus, the President exercises outsized control. In particular, the President shapes administrative action through regulatory review<sup>22</sup> and

the structure of separation of powers set forth by the Framers.”). See generally Bruce Ackerman, *The Decline and Fall of the American Republic* (2010) [hereinafter Ackerman, *Decline and Fall*] (arguing aggrandizement of executive branch threatens our constitutional tradition); Peter M. Shane, *Madison’s Nightmare: How Executive Power Threatens American Democracy* (2009) (arguing executive is unchecked and unbalanced).

18. 42 U.S.C. § 7409(b)(1) (2006); see *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (rejecting nondelegation challenge to this provision). These rules dwarf the volume of traditional legislation. See Peter L. Strauss, Foreword: Overseer, or “The Decider”? The President in Administrative Law, 75 *Geo. Wash. L. Rev.* 696, 752 (2007) (“[A]gencies adopt roughly ten times as many rules each year as Congress adopts statutes.”).

19. 47 U.S.C. § 307(a) (2006); see *NBC v. United States*, 319 U.S. 190, 225–26 (1943) (rejecting nondelegation challenge to this provision).

20. J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 *Tex. L. Rev.* 1443, 1453 (2003).

21. See, e.g., Strauss, *Place of Agencies*, supra note 14, at 579–80 (arguing vitality of separation of powers in administrative law inheres in competition among branches to control administration). But see, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1231, 1248–49 (1994) (rejecting this logic and declaring post-New Deal administrative state unconstitutional outright).

22. Regulatory review took off with President Reagan’s Executive Order No. 12,291, 3 C.F.R. 127 (1981), revoked by Executive Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 (2006), and every President since Reagan has retained a policy of regulatory review. See Exec. Order No. 12,866, 3 C.F.R. 638, reprinted as amended in 5 U.S.C. § 601 (President Clinton); Exec. Order No. 13,422, 3 C.F.R. 191 (2007) (President George W. Bush), revoked by Exec. Order No. 13,497, 74 *Fed. Reg.* 6113 (Feb. 4, 2009); Exec. Order No. 13,563, 76 *Fed. Reg.* 3821 (Jan. 18, 2011) (President Obama); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *Colum. L. Rev.* 1260, 1267 (2006) (stating OMB review “provides a sitting President, Democrat or Republican, with a powerful tool to promote his political agenda”); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2285–90 (2001) (discussing President Clinton’s use of regulatory review).

directives,<sup>23</sup> and the bureaucracy has become increasingly politicized, with Presidents selecting greater and greater numbers of agency political appointees, most of whom are not Senate-confirmed.<sup>24</sup>

As many have noted, what is most remarkable about the rise of executive power in the administrative state from a traditional separation of powers perspective is that the other two branches have largely empowered the executive.<sup>25</sup> For instance, Congress did not object to President Nixon's Reorganization Plan 2, which created the powerful Office of Management and Budget, and it codified President Carter's requested civil service reforms, which "resulted in a tremendous boost for presidential power."<sup>26</sup> More generally, Congress has continued to delegate broadly even as presidential control over administration has increased. At the same time, courts have invalidated Congress's attempts to counterbalance broad delegations, such as the legislative veto.<sup>27</sup> And the judiciary has curtailed its own review of administrative action. Most notably, the Supreme Court in *Chevron* assigned to the executive branch the authority to determine the meaning of ambiguously worded statutes, suggesting it was desirable for agencies to pursue the President's regulatory agenda in interpreting such statutes.<sup>28</sup> The Court has also limited judicial review of agency action by imposing strict limits on standing.<sup>29</sup>

23. See, e.g., Kagan, *supra* note 22, at 2290–99 (describing how President Clinton employed directives). See generally Robert V. Percival, Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?, 79 *Fordham L. Rev.* 2487 (2011) (discussing scholarly debate on President's directive authority).

24. David J. Barron, Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization, 76 *Geo. Wash. L. Rev.* 1095, 1121–32 (2008). The President now appoints approximately 4,000 individuals, and the number of non-Senate-confirmed appointments nearly doubled between 1964 and 1992. *Id.* at 1123.

25. See, e.g., James A. Gardner, Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior, 79 *St. John's L. Rev.* 293, 306–07 (1995) ("The rise of the administrative state . . . gave the President immense and previously unknown power. Yet this power was not seized, but handed over."); Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 *Harv. L. Rev.* 916, 953–54 (2005) ("[C]ongressional abdication of legislative power to the executive is at least as much of a problem as congressional self-aggrandizement.").

26. David E. Lewis & Terry M. Moe, The Presidency and the Bureaucracy: The Levers of Presidential Control, *in* *The Presidency and the Political System* 367, 384 (Michael Nelson ed., 9th ed. 2010); see Terry M. Moe, The Presidency and the Bureaucracy: The Presidential Advantage, *in* *The Presidency and the Political System*, *supra*, at 425, 442–43 (discussing Nixon's Reorganization Plan 2).

27. *INS v. Chadha*, 462 U.S. 919, 944–59 (1983); see also, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721–36 (1986) (striking down Gramm-Rudman-Hollings Act because it allowed Comptroller General, who is removable by Congress, to direct budget cuts).

28. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

29. In particular, the Court's narrow framing of the requirement that litigants show an actual or imminent personal injury makes difficult challenges to many forms of agency action that affect society more diffusely. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 564 (1992) ("[S]ome day' intentions . . . do not support a finding of the 'actual or imminent' injury that our cases require.").

Congressional and judicial decisions to empower the executive thus highlight a deeper concern about the separation of powers: The branches are not engaged in sustained, vigorous competition. A second key narrative of recent separation of powers scholarship provides an explanation for the rise of executive power that follows from this lack of interbranch competition. As Daryl Levinson and Richard Pildes have described in particular detail, political competition has come to be channeled not through the legislative and executive branches as such, but rather through political parties.<sup>30</sup> The degree and kind of interbranch competition thus depends significantly on whether party control of the House, Senate, and presidency is divided or unified, and on the relative cohesiveness and polarization of political parties.

The “separation of parties, not powers” thesis helps explain why the rise of executive power is not principally a story of an imperial presidency wresting control of administration, but rather one of Congress empowering the executive. Simply put, while Congress has many tools to check the executive—appropriations riders, advice and consent, oversight hearings, and investigations, to name a few—it often is not motivated to deploy them.<sup>31</sup> Indeed, because party politics shape legislators’ incentives, legislators frequently accomplish their own policy goals by conferring substantial authority on the executive branch.<sup>32</sup> While in a sense, delegation thus enhances both congressional and executive power, it is the executive who is empowered to act unilaterally. Moreover, broad delegations remain in place even when future Congresses would wish to revoke them, enabling Presidents to achieve their policy ends through the administrative apparatus in times of divided government.<sup>33</sup>

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30. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311 (2006). For other accounts noting the centrality of party politics, see Mark Tushnet, *The New Constitutional Order* 8–32 (2003); Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633, 644–52 (2000) [hereinafter Ackerman, *New Separation*]; Gardner, *supra* note 25, at 312–14.

31. See, e.g., Levinson & Pildes, *supra* note 30, at 2343–47 (describing how Congress checks executive less during periods of unified government); cf. Josh Chafetz, *Congress’s Constitution*, 160 *U. Pa. L. Rev.* 715, 723–24 (2012) (describing how Congress underutilizes tools to enhance its power).

32. See David Epstein & Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* 121–62 (1999) (showing Congress delegates substantially more, and more discretionary, authority to executive in times of unified government). See generally D. Roderick Kiewiet & Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (1991) (describing, more generally, how delegation serves congressional ends).

33. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *Geo. L.J.* 523, 539 (1992) (“Because statutes have an indefinite life, a broad delegation in 1937 (when the preferences of Congress and the President were congruent on many issues) still had important consequences in 1987 (when the political preferences of Congress and the President were very different).”); Levinson & Pildes, *supra* note 30, at 2359–60 (“When government divides, Congress is confronted with large measures of executive policymaking that it would substantively reject if it could. [But] Congress will have limited recourse against an opposite-party executive empowered by broad

### B. *Proposals to Restore Checks and Balances*

Many commentators focused on threats to robust competition among the branches of the federal government, and particularly on the rise of executive power, have looked to Congress and the courts to restore checks and balances. Martin Flaherty and Abner Greene have advocated the revival of the legislative veto,<sup>34</sup> while David Schoenbrod has argued against congressional delegation in the first instance,<sup>35</sup> and Cynthia Farina, William Eskridge, and John Ferejohn have called on the courts to reassert themselves in statutory interpretation by, for example, limiting *Chevron* deference.<sup>36</sup>

Other commentators have concluded that it is hopeless at this point to turn to the legislature and judiciary. Some have proposed internal checks on the executive branch. Focusing on foreign affairs, for instance, Neal Katyal has advocated a set of mechanisms including review of government action by different agencies and enhanced civil-service protections for agency employees.<sup>37</sup> Bruce Ackerman has recently proposed a “Supreme Executive Tribunal” of presidentially nominated, Senate-confirmed individuals who would provide legal advice binding on the President.<sup>38</sup> Maintaining that parties, rather than powers, are key to competition among government actors, Daryl Levinson and Richard Pildes have advanced proposals to restore the checks and balances that party unification undermines. Among other things, they suggest fostering greater independence for the bureaucracy and fragmenting or moderating political parties.<sup>39</sup>

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delegations.”); see also Greene, *supra* note 16, at 182–84 (describing “entrenching presidential veto”); Kagan, *supra* note 22, at 2248 (exploring how President Clinton turned to bureaucracy to achieve policy goals when faced with hostile Congress).

34. See Flaherty, *supra* note 12, at 1832–34 (“[T]here is every functionalist reason to look favorably upon the legislative veto, at least with regard to those functions championed at the Founding.”); Greene, *supra* note 16, at 179 (“If the Court were to . . . validate the legislative veto, it could both limit presidential power . . . and assure strong accountability . . .”).

35. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 20 (1993) (“The Supreme Court should declare unconstitutional all delegation of legislative power . . .”).

36. Eskridge & Ferejohn, *supra* note 33, at 547–51; Farina, *supra* note 13, at 456–67.

37. Katyal, *supra* note 17, at 2322–42.

38. Ackerman, *Decline and Fall*, *supra* note 17, at 143–52.

39. Levinson & Pildes, *supra* note 30, at 2375–85; see also, e.g., Greene, *supra* note 16, at 156 (“[I]ndependent agencies still represent an important curtailment of presidential power.”); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *Yale L.J.* 2446, 2469–78 (2006) (suggesting making Attorney General an independent officer). Still other commentators conclude that we live in “an age after the separation of powers” and that politics and public opinion, not law, are the only meaningful checks on executive power. Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 4 (2010). While political constraints are significant, this Article focuses on checks within the separation of powers framework broadly defined.

While these proposals may be attractive, they are unlikely to succeed. Those focused on changing the behavior of Congress and the courts seem especially bound for failure: Broad delegations are here to stay, but the legislative veto is firmly interred, and *Chevron* deference is not going away. As they stand now, independent agencies are not so independent,<sup>40</sup> and those seeking to further insulate the bureaucracy from presidential supervision are fighting an uphill battle.<sup>41</sup> The more innovative proposals for fostering internal executive branch checking and for moderating political parties are also unlikely to be realized, while less ambitious proposals are unlikely to furnish effective checks.<sup>42</sup>

But there may be another, more realistic check on the federal executive that commentators have largely overlooked. In recent years, some of the most spirited challenges to executive authority have come not from within the federal government, but rather from the states. Although these challenges are quite visible in individual cases, they have received little attention as a constitutional practice. This is not only because separation of powers scholarship trains its focus on the federal government, but also because many of the most powerful state challenges do not fit easily within traditional accounts of federalism that focus on state sovereignty. Instead, they emerge within cooperative federalism schemes, in which Congress charges not only the federal executive but also the states with carrying out federal law.<sup>43</sup> Insofar as such schemes represent a relatively novel mode of federalism, however, they also represent a means of safeguarding the separation of powers. In cooperative federalism schemes, states frequently challenge not federal authority per se, but rather the federal executive's particular exercise of its statutory authority. And they are able to level such challenges because they, too, have been charged by Congress with carrying out federal law. Through cooperative federalism, Congress has thus, both purposefully and incidentally, empowered a cadre of politically motivated actors to challenge the executive even when Congress itself cannot or will not do so.

This is not to suggest cooperative federalism is a panacea for separation of powers problems. In particular, several of the proposals noted

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40. See, e.g., Neal Devins & David E. Lewis, Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design, 88 B.U. L. Rev. 459, 460–61 (2008) (describing presidential control of independent agencies).

41. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010) (rejecting double for-cause limitations on President's removal power as "contrary to Article II's vesting of the executive power in the President" and a violation of President's constitutional authority to oversee faithfulness of officers who execute the laws).

42. See, e.g., Trevor W. Morrison, Constitutional Alarmism, 124 Harv. L. Rev. 1688, 1743 (2011) (reviewing Ackerman, *Decline and Fall*, supra note 17) ("To put the point bluntly, it is nearly impossible to imagine a Congress and President working together to pass legislation creating a Supreme Executive Tribunal.")

43. See supra note 8 (defining "cooperative federalism" broadly for purposes of this Article).

above respond to the federal executive's overweening role with respect to national security and foreign affairs, areas where states are less likely to provide an effective check.<sup>44</sup> Moreover, for those seeking only to constrain federal executive action, the check cooperative federalism furnishes may in many instances seem perverse, as it can force the federal executive to act as well as stop it from doing so. But the executive exercises its substantial authority over domestic law through both action and inaction. Cooperative federalism responds to the unilateral, discretionary nature of the executive's power, and it does so by injecting competition into federal statutory schemes.

## II. EXCLUSIVE DELEGATION

While commentators focused on the rise of federal executive power and the dominance of political parties have largely overlooked the role states might play in safeguarding the separation of powers, a few scholars have attended to how cooperative federalism schemes may serve separation of powers values, suggesting state administration of federal law fosters certain separation of powers goals insofar as Congress may choose *either* the states or the federal executive to administer federal law. After explaining the basic contours of the exclusive delegation theory, this Part probes its limitations before Part III explores how congressional empowerment of *both* the states and the federal executive may safeguard the separation of powers.

### A. *The Existing Account*

In a provocative symposium essay, Roderick Hills suggests that cooperative federalism may promote separation of powers values by allowing states to compete with the federal executive branch for authority to implement federal law.<sup>45</sup> Hills is not concerned about checking executive power. Instead, his account focuses on the distinct, but related, objective of ensuring that federal laws are implemented by officials who are both faithful to the purposes of such laws and independent from Congress.<sup>46</sup>

First, Hills argues, Congress may empower states, rather than the federal executive branch, to implement federal law when it believes they will be more faithful agents. He suggests this choice may be driven by the composition of each type of government body and its attendant institutional culture. In his view, state governments are densely populated by elected politicians, while the federal executive branch houses loosely supervised appointed policy experts.<sup>47</sup> Second, he posits, competition be-

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44. But cf. Matthew C. Waxman, National Security Federalism in the Age of Terror, 64 *Stan. L. Rev.* 289, 296–310 (2012) (considering role of states and localities in national security programs); *infra* note 83 (discussing USA PATRIOT Act).

45. Roderick M. Hills, Jr., Federalism in Constitutional Context, 22 *Harv. J.L. & Pub. Pol'y* 181, 181 (1998) [hereinafter Hills, *Constitutional Context*].

46. *Id.*

47. *Id.* at 186–87.

tween the federal executive branch and the states allows Congress to ensure that whatever administrator it has selected is in fact faithful to its purposes: “Congress can discipline either type of organization—federal agency or non-federal politicians—by threatening to replace one with the other if it misbehaves.”<sup>48</sup>

While *Hills* is not focused on cabining executive power, Philip Weiser has picked up on his account to argue that Congress’s selection of states to administer federal law (or its threat to replace the federal executive with the states) may help to keep executive power in check.<sup>49</sup> Read together, *Hills* and Weiser thus suggest one way federalism may safeguard the separation of powers in an era of executive dominance: States may check the federal executive by taking its place in administrative schemes or by lurking in the wings as plausible replacements.

### B. *Limits of the Existing Account*

This account of how cooperative federalism may serve separation of powers values is intriguing but quite limited. First, Congress rarely delegates authority exclusively to the states. Instead, cooperative federalism programs involve varying and complicated combinations of state and federal authority. Second, while in theory Congress could threaten to replace the federal executive with the states, a variety of practical problems make it difficult for Congress to credibly so threaten. Underlying the account of exclusive delegation, moreover, is the premise that Congress will be worried about executive branch infidelity or overreaching, but this often does not aptly describe congressional motivation. Focusing on a deliberate choice by Congress to empower the states instead of the federal executive, or to threaten to do so, thus only begins to describe how cooperative federalism may safeguard the separation of powers.

1. *Cooperative Federalism in Practice.* — Congress generally does not grant states exclusive authority to execute federal law. More commonly, cooperative federalism schemes preserve a significant role for the federal executive even when they empower the states. Any suggestion that Congress is actively checking federal executive power by replacing the federal executive with the states is thus limited as a descriptive matter.

Congress calls upon states to execute federal law in a variety of ways. Most significantly, although it may not commandeer the states,<sup>50</sup> Congress may encourage them to implement a federal regulatory pro-

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48. *Id.* at 190.

49. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. Rev.* 663, 707–19 (2001).

50. *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”); *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

gram.<sup>51</sup> First, Congress may rely on its spending power to condition states' receipt of federal funds on compliance with federal criteria. The Medicaid program, for instance, offers states financial assistance to pay for medical treatment for needy persons if state plans comply with certain requirements.<sup>52</sup> Second, Congress may offer states the choice of regulating according to federal standards or having state law preempted by federal regulation. Such conditional preemption is the basis for the nation's major environmental statutes, among other federal schemes.<sup>53</sup> Often Congress combines conditional grants and conditional preemption, providing funding to cover state costs of implementing federal law.<sup>54</sup>

These cooperative federalism programs do not tend to represent an either-or choice by Congress of the federal executive or the states. To the contrary, when Congress invites the states to implement federal law, it typically also provides a significant role for the federal executive, for instance charging it with promulgating regulations with which the states must comply or giving it authority to approve state plans. Thus, state Medicaid programs must comply with requirements imposed by the Department of Health and Human Services.<sup>55</sup> The Clean Air and Water Acts require the Environmental Protection Agency (EPA) to establish national ambient air quality standards and national emission and effluent standards with which state implementation plans must comply. The EPA also approves state plans and retains the authority to promulgate a federal plan for any state that does not submit an acceptable plan.<sup>56</sup>

Congress may also call on states to enforce federal statutes. While state implementation of federal regulatory regimes is a relatively recent development,<sup>57</sup> state enforcement of federal law has a long pedigree.<sup>58</sup>

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51. *New York*, 505 U.S. at 167–68.

52. 42 U.S.C. § 1396a (2006); see also, e.g., *Schweiker v. Gray Panthers*, 453 U.S. 34, 49–50 (1981) (upholding Medicaid regulations).

53. E.g., *Surface Mining Control and Reclamation Act of 1977*, 30 U.S.C. §§ 1201–1328 (2006); *Clean Water Act*, 33 U.S.C. §§ 1251–1387 (2006); *Clean Air Act*, 42 U.S.C. §§ 7401–7642 (2006).

54. See, e.g., 29 U.S.C. § 672 (2006) (authorizing grants to states to implement Occupational Safety and Health Act); 42 U.S.C. §§ 7405, 7544 (authorizing grants to states to implement Clean Air Act).

55. See 42 U.S.C. § 1396a(a)(4) (requiring state plans to include “such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan”).

56. 33 U.S.C. §§ 1316, 1318(c), 1342; 42 U.S.C. §§ 7409–7411. The EPA plays a similar role in the Resource Conservation and Recovery Act, 42 U.S.C. § 6926, and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1253. See generally Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 *N.Y.U. Envtl. L.J.* 179, 188–204 (2005) (describing environmental cooperative federalism schemes).

57. The New Deal provided a role for states in fiscal programs such as Aid to Families with Dependent Children, but regulatory cooperative federalism began in earnest in the 1960s. Weiser, *supra* note 49, at 669. But cf., e.g., Symposium on Cooperative Federalism, 23 *Iowa L. Rev.* 455 (1938) (documenting earlier instances).

58. For instance, the Judiciary Act of 1789 authorized state justices of the peace and magistrates to arrest those suspected of violating federal criminal law, Judiciary Act of 1789,



Today, a variety of civil federal laws confer enforcement authority on the states,<sup>59</sup> and Congress has also provided for deputized state or local officers to perform certain functions of federal immigration officers.<sup>60</sup>

As when Congress grants states authority to implement federal regulatory programs, when it grants states authority to enforce federal law, it tends not to replace federal with state actors but instead to confer enforcement authority on both. Sometimes such authority is entirely distinct, with the federal and state actors independently entitled to enforce the provision.<sup>61</sup> Other times, Congress gives states a secondary role. For instance, many statutes authorizing states to sue to enforce federal law require the state to give advance notice to the relevant federal agency, provide for federal agency intervention, and forbid the state from proceeding if the same alleged violation is the subject of a pending action by the federal agency.<sup>62</sup> In some cases, Congress authorizes states to enforce only a federal agency's regulations, rather than the statute itself,<sup>63</sup> or it grants states the authority to enforce federal law only under the supervision of the federal executive.<sup>64</sup>

In addition to conferring implementation and enforcement authority, Congress includes states in the execution of federal law in more dis-

§ 33, 1 Stat. 73, 91, a delegation that remains in effect today, 18 U.S.C. § 3041 (2006). The Volstead Act authorized state officials to sue on behalf of the United States to restrain violation of criminal prohibition laws. National Prohibition Act, Pub. L. No. 66-66, ch. 85, tit. II, §§ 22-23, 41 Stat. 305, 314-15 (1919).

59. For instance, state attorneys general may bring civil causes of action to protect free access to abortion clinics, 18 U.S.C. § 248(c)(3), as well as to enforce a variety of federal consumer protection and environmental laws, e.g., 15 U.S.C. § 1194(a) (2006) (regulating flammable fabrics); *id.* § 1264(d) (hazardous substances); *id.* § 2073(b)(1) (consumer products); 30 U.S.C. § 1270 (Surface Mining Control and Reclamation Act); 33 U.S.C. § 1365 (Clean Water Act); 42 U.S.C. § 7604 (Clean Air Act). See generally Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698 (2011) (exploring how state enforcement of federal law furthers state power).

60. 8 U.S.C. § 1357(g) (2006) (permitting deputized state officers to perform functions of immigration officers related to "investigation, apprehension, or detention of aliens in the United States").

61. E.g., 18 U.S.C. § 248 (authorizing both federal and state actors to sue to protect access to abortion clinics).

62. E.g., 15 U.S.C. § 1264(d) (authorizing state enforcement of hazardous substance regulations, subject to procedural requirements); *id.* § 2073 (providing procedural requirements for suits to enforce product safety standards).

63. The recent Dodd-Frank Wall Street Reform and Consumer Protection Act prohibits states from enforcing its provisions against national banks or federal savings institutions but authorizes states to enforce regulations promulgated by the Consumer Financial Protection Bureau against those same entities upon notice to the Bureau. Pub. L. No. 111-203, § 1042(a)(2), 124 Stat. 1376, 2012-14 (2010) (to be codified at 12 U.S.C. § 5552).

64. For instance, Congress authorizes state and local officers and employees to investigate, apprehend, or detain aliens only pursuant to agreements with the federal executive. 8 U.S.C. § 1357(g). Such agreements, which are made at the discretion of the federal executive, subject state officers to federal supervision. *Id.*

crete ways. Some statutes require<sup>65</sup> or permit<sup>66</sup> state and local officials to report information to federal agencies. Others grant state entities the authority to make interstitial decisions or findings for the federal executive branch.<sup>67</sup> And a variety of administrative entities include both state and federal members.<sup>68</sup>

In short, when Congress gives states a role in executing federal law, it tends to delegate not *exclusively* but rather *concurrently*: States may implement federal law by conforming to standards set by the federal executive; state and federal agencies may implement the same regulatory provisions or enforce the same statutes; or state officials may execute federal law under the supervision of a federal agency. Such integration makes sense given Congress's reasons for granting authority to the states. Sometimes, Congress may do so to discipline the federal executive or because it believes the states will be more faithful to its purposes.<sup>69</sup> But Congress often turns to the states for a host of practical reasons: because they have relevant expertise; because they have in place an administrative apparatus that the federal government lacks; because relying on states will be cheaper or will foster experimentation; because states can be "force multipliers" that amplify enforcement of federal law; because congressional delegations fight to protect existing state programs from federal preemption; because of a more diffuse interest in devolution—in other words, for countless reasons not related to disciplining the federal executive. If

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65. E.g., 23 U.S.C. § 402(a) (2006) (requiring reporting of traffic-related fatalities and injuries); 42 U.S.C. § 6933 (2006) (hazardous waste sites). Such reporting requirements are often framed as mandatory, but the Court refrained from deciding whether they constitute commandeering in *Printz v. United States*, 521 U.S. 898, 917–18 (1997).

66. Section 287(g) of the Immigration and Nationality Act, for example, requires that states implement federal immigration law only pursuant to an agreement, but carves out from this requirement the communication of information regarding an individual's immigration status to the federal government. 8 U.S.C. § 1357(g)(10)(A); see also id. § 1373 (providing federal executive branch "shall respond" to inquiries by state or local government agencies seeking to ascertain an individual's immigration status for any purpose authorized by law).

67. For instance, the Patient Protection and Affordable Care Act of 2010 requires the National Association of Insurance Commissioners, a state entity, to recommend medical loss ratio standards to the Department of Health and Human Services. Pub. L. No. 111-148, § 2718, 124 Stat. 119, 137 (2010) (to be codified at 42 U.S.C. § 300gg).

68. E.g., 7 U.S.C. § 2009aa-1(a)(2)(B) (2006) (providing for state and federal members of Delta Regional Authority).

69. Even when Congress turns to the states because it distrusts the federal executive, it may not cut out the latter entirely but rather may grant states an interstitial or redundant role to empower them to check the federal executive. For example, the Dodd-Frank Act seems to reflect a distrust of the federal executive's protection of consumers, but it does not substitute state for federal actors; instead, it grants both authority to enforce provisions of federal law and also scales back preemption of certain state laws. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1042(a)(1), 124 Stat. 1376, 2012 (2010) (to be codified at 12 U.S.C. § 5552) (authorizing states to enforce provisions of Dodd-Frank Act and related regulations); id. §§ 1044–1046 (to be codified at 12 U.S.C. § 25b) (reducing preemption of state law for certain entities); see also *infra* note 79 (discussing Dodd-Frank Act).

anything, most cooperative federalism programs suggest a greater trust of the federal executive than of the states insofar as they give the former a supervisory role. Focusing on exclusive delegation to the states thus captures only a small piece of cooperative federalism.<sup>70</sup>

2. *Restricted Competition.* — Hills and Weiser posit not only that Congress may replace the federal executive in the first instance, but also that Congress may harness competition between state and federal actors to keep the federal executive honest by threatening to replace it “if it misbehaves.”<sup>71</sup> While attractive as a theoretical matter, this hypothesis is also limited as a practical matter.

Once Congress parcels out authority to administer federal law, it is very difficult to change the recipient of the delegation—and because the federal executive knows this, congressional threats to replace it will have limited force. To change its delegate, Congress first must monitor its chosen agent to determine whether it is faithfully executing the law, but, as Hills acknowledges, “Congress, as a whole, obviously cannot monitor the thousands of agency actions that dozens of federal agencies take every year.”<sup>72</sup> Even if Congress devolves this role to committees and subcommittees, which flag infidelity for the entire legislature,<sup>73</sup> Congress will need to pass a new law to transfer authority from federal to state actors,

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70. Congress may also authorize states to execute federal law by approving interstate compacts. When Congress either authorizes in advance or approves an agreement between two or more states, the agreement becomes federal law under the Compact Clause. U.S. Const. art. I, § 10; see *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (“[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”). Even though such compacts circumvent the federal executive, it does not appear Congress has relied on them to discipline the federal executive. As an initial matter, under Supreme Court precedent, most interstate agreements do not require congressional approval, so Congress is often not involved. See *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (limiting application of Compact Clause to agreements “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”). Further, those compacts that do exist are largely state-initiated agreements that are summarily approved by Congress. Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 Fla. L. Rev. 1, 13–14 (1997). In addition, while compacts may allow states to entirely replace the federal executive in carrying out federal law, even compacts may generate state-federal integration. See, e.g., Krent, *supra* note 12, at 80 n.55 (discussing overlapping responsibilities of Northwest Power Planning Council and Bonneville Power Administration).

71. Hills, *Constitutional Context*, *supra* note 45, at 190; see also Weiser, *supra* note 49, at 667 (“[C]ooperative federalism . . . enables Congress to discipline federal agencies by threatening to delegate regulatory authority to the states.”).

72. Hills, *Constitutional Context*, *supra* note 45, at 191.

73. Oversight by committees and subcommittees raises separate concerns. Not only may these committees have different views from the Congress that enacted the governing laws, but they also may not represent the current Congress. For an important empirical investigation, see generally DeShazo & Freeman, *supra* note 20 (exploring how committees may attempt to push agencies to depart from their statutory mandates).

but the obstacles that constrain all lawmaking, including the presidential veto, will make this a challenge. Moreover, once the federal executive has been assigned a function—and the states have not—it will be practically quite complicated to switch this function to the states, which likely will not have built up the requisite capacity. Indeed, the reverse is also true and is a well-known source of state power in cooperative federalism schemes: When the states have assumed a particular role in executing federal law, federal agencies often cannot take over even when the states have not been complying with their mandate and the federal agency is statutorily authorized to replace them.<sup>74</sup> All of these factors blunt Congress's ability to credibly threaten to delegate authority to a different actor.

Even apart from the practical difficulties attending such threats, Congress may not be motivated to make them. Hills and Weiser posit an active and engaged Congress, ready to vindicate its prerogatives against the federal executive. But, for the reasons sketched in Part I, this is often not an apt description. Congress tends to design cooperative federalism schemes for purposes other than checking federal executive power, and it may be no more interested in such checking after it has conferred authority on the executive branch in the first instance. This is not to say that Congress can never be roused to check the federal executive. But, as its continuing practice of broad delegation underscores, checking executive power is generally not Congress's priority.

In sum, granting administrative authority exclusively to the states is only one, quite limited way in which cooperative federalism may safeguard the separation of powers. A more robust account must consider statutory schemes that empower both the states and the federal executive, and, concomitantly, schemes that are driven not by Congress's desire to check the federal executive but by a variety of other interests. Indeed, because open-ended delegations are a foremost source of federal executive power in the administrative state, those concerned about an unchecked executive should explore whether cooperative federalism schemes may serve separation of powers values even when they confer significant authority on the federal executive. The next Part begins to develop such an account.

### III. CONCURRENT DELEGATION

To understand how state administration of federal law safeguards the separation of powers, one must consider not only congressional grants of authority to *either* the states or the federal executive, but also grants of

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74. See, e.g., Fischman, *supra* note 56, at 192 n.37 (noting EPA's threats to revoke approval of state environmental programs are weakened by its lack of capacity to run programs itself); see also Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 *Mich. L. Rev.* 813, 868–69 (1998) (describing instances in which federal agencies could not assume responsibilities of states not complying with federal instruction).

authority to *both* the states and the federal executive. This wider lens better captures existing cooperative federalism schemes and also highlights how states may challenge executive power and advance congressional authority even absent a deliberate congressional design.

Such a wider lens also better captures federal-state competition. While the exclusive delegation account hinges on competition as the mechanism for safeguarding the separation of powers, it actually contemplates quite limited competition. There is competition at the initial moment when Congress is deciding whether to delegate to a state or federal actor. After that moment, however, there is no on-the-ground competition as state and federal actors fight about how to execute the law, but only a sort of hypothetical competition in the shape of Congress's estimation of whether the actor it has not selected would in fact do a superior job. And, with a supine Congress, this hypothetical competition may be just that: hypothetical. In contrast, concurrent delegation to the federal executive and the states might appear less competitive because Congress is empowering both of two possible agents rather than pitting them against one another in the first instance. But the arrangement that seems more cooperative will often be more combative. Concurrent delegation frequently yields intense, ongoing competition as the federal executive and the states dispute how to carry out federal law in the course of execution.

Part III.A describes how concurrent delegation to state and federal actors, in a variety of configurations, gives rise to three main forms of competition. States may *diverge* from federal executive policy, *curb* the federal executive's own implementation of the law, or *goad* the federal executive to take particular actions. Part III.B considers how these practices safeguard the separation of powers in an era of predominant executive power. Not only do states engaging in diverging, curbing, and goading check federal executive authority, but they also champion congressional authority and may reinvigorate horizontal checks and balances when they turn to Congress or the federal courts to enforce their view of the law against that of the executive.

#### A. State Powers

States exercise three main forms of power in cooperative federalism schemes by virtue of the authority granted to them by Congress to administer federal law together with the federal executive: diverging, curbing, and goading. Although this tripartite division is not a perfect one—each practice includes diverse types of actions, and the three bleed into one another at the edges—it offers a basic framework through which to explore how concurrent delegation may safeguard the separation of powers.

1. *Diverging*. — Cooperative federalism schemes frequently grant states and the federal executive parallel authority to administer federal law, and states may use this authority to administer the law differently

from their federal counterparts. Congress may affirmatively grant both state and federal actors the authority to execute a particular law, as, for example, when it authorizes both the federal executive and state attorneys general to enforce a statute.<sup>75</sup> Or the grant of authority to state and federal actors may be more haphazard. For instance, Congress may give states a choice between regulating pursuant to federal instruction or leaving the federal executive to regulate for them, and some states may elect to regulate themselves while others choose to remain subject to the federal executive's authority.<sup>76</sup> As this suggests, diverging will typically look different in the enforcement and implementation contexts. Enforcement is likely to be cumulative, with both the state and the federal executive enforcing the law in the same jurisdiction, while implementation is likely to be alternative, with either the federal or the state authority implementing the statute in a particular jurisdiction. In either instance, however, states may diverge from the federal executive's administrative policy.

Of the three mechanisms explored here, diverging is likely to be the most familiar. Indeed, in recent years, federalism scholars have increasingly focused on the benefits of overlapping state and federal authority over particular areas, in contrast to domain-centric dual federalism. Robert Schapiro's theory of polyphonic federalism, for instance, celebrates the ability of overlapping state and federal power to foster innovation, dialogue, and protection for individuals.<sup>77</sup> Erwin Chemerinsky has similarly championed overlapping state-federal authority in the form of "federalism as empowerment."<sup>78</sup> But because such accounts focus on generating multiple approaches to particular problems, they tend to consider state administration of state law and federal administration of federal law in the same substantive area. Attention to the separation of powers instead pushes us to consider state and federal administration of the same

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75. See *supra* notes 58–64 and accompanying text (discussing grants of authority to both states and federal executive to enforce federal law).

76. For instance, state officials implement the Occupational Safety and Health Act in roughly half of the states, while a federal agency implements the Act in the other half. State Occupational Safety and Health Plans, U.S. Dep't of Labor, <http://www.osha.gov/dcsp/osp/index.html> (on file with the *Columbia Law Review*) (last visited Feb. 20, 2012).

77. Robert Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (2009); cf. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *Yale L.J.* 1035, 1048 (1977) (celebrating dialectic between state and federal courts as means of articulating rights); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *Wm. & Mary L. Rev.* 639, 646, 682 (1981) (identifying "complex concurrency" as dominant American structure of courts, and arguing "the inner logic of 'our federalism' . . . [points] to the social value of institutions in conflict with one another").

78. Erwin Chemerinsky, *Enhancing Government: Federalism for the 21st Century* 145–247 (2008); see also, e.g., David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 *Minn. L. Rev.* 1796 (2008) (examining values of state-federal overlap with respect to environmental law); William W. Buzbee, *Contextual Environmental Federalism*, 14 *N.Y.U. Envtl. L.J.* 108 (2005) (same).

federal law. While, from a federalism perspective, state administration of state law may largely have the same benefits as state administration of federal law, from a separation of powers perspective, the two situations differ, for it is only in the latter that states are agents of Congress.<sup>79</sup>

The Clean Air Act offers a helpful example of diverging. The Act delegates significant authority to the federal executive branch to determine which pollutants to regulate and to what extent. Yet while the Act generally preempts state vehicle emission standards, it permits California to diverge from federal policy—by adopting standards that are at least as protective of public health and welfare as the federal standards—if the state obtains a waiver from the EPA. In a reversal of the usual standard, the EPA must grant a waiver unless the agency makes certain findings.<sup>80</sup> The statute thus effectively gives California and the EPA parallel authority to implement this provision of federal law,<sup>81</sup> and other states may adopt

79. That said, Congress may in some instances endorse state administration of state law as a means of serving federal objectives. For instance, state consumer protection laws have traditionally been broadly preempted by regulations of the Office of the Comptroller of the Currency (OCC), but the recent Dodd-Frank Act expressly scales back such OCC preemption, arguably casting state law as a species of federal law. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1044–1045, 124 Stat. 1376, 2014–17 (2010) (to be codified at 12 U.S.C. § 25b) (eliminating preemption of state law for national bank subsidiaries, agents, and affiliates, and amending preemption standard for state consumer financial laws). The federal agency and the states may thus in some sense both be considered Congress’s agents in regulating consumer protection even when the states are carrying out state law. As the theory of federalism as a safeguard of the separation of powers would predict, state attorneys general and the OCC are engaged in a lively debate about the proper interpretation of the Dodd-Frank Act. See, e.g., Dave Clarke, States Say Bank Regulator Still in Their Way, Reuters (June 28, 2011, 4:46 PM), <http://www.reuters.com/article/2011/06/28/us-financial-regulation-occ-idUSTRE75R6WA20110628> (on file with the *Columbia Law Review*) (discussing letter to OCC by forty-eight state attorneys general arguing proposed OCC rule seeks to preempt state law more broadly than Congress intended).

More generally, one might argue that Congress embraces state law as a means of furthering its objectives to the extent it does not preempt state law that occupies the same field as federal law. While analysis of this dynamic is case-specific, there is not a clear line between state administration of state law and state administration of federal law but rather a continuum. Indeed, the example of diverging taken up in the text, California’s regulation of vehicle emissions pursuant to the Clean Air Act, is technically an example of Congress’s not preempting a state’s lawmaking authority. Because Congress has imposed specific conditions on the state’s exercise of this authority, however, California may be understood to be carrying out federal law.

80. 42 U.S.C. § 7543(b)(1) (2006); see H.R. Rep. No. 95-294, at 23 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1101 (noting provision “would require the Administrator in most instances to waive the preemption . . . with respect to California’s standards”); see also *infra* notes 128–134 and accompanying text (discussing waiver denial).

81. See, e.g., *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 347 (D. Vt. 2007) (stating California emissions standard “becomes a motor vehicle standard of the government, with the same stature as a federal regulation”). See generally Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. Rev. 1097, 1113–28 (2009) (discussing California’s status under Clean Air Act).

California's standards in lieu of the EPA-promulgated standards.<sup>82</sup> By granting both the EPA and California the authority to regulate vehicle emissions pursuant to federal law, the Clean Air Act establishes California as a competitor to the EPA. In contrast to situations in which Congress authorizes only the federal executive to implement federal law, this shared responsibility leaves the state and the federal executive to offer diverging visions of how to implement federal law as they go about doing so.

2. *Curbing*. — States may also flex their muscle in cooperative federalism regimes by curbing the federal executive's ability to implement federal law as it chooses. In particular, when states carry out part of a statute under the supervision of a federal agency, they may rely on this role to interfere with the agency's execution. States are able to do this precisely because they are the federal executive's subordinates; even when they are subject to its direction and oversight, they may frustrate its agenda. Whereas states' power to diverge stems from their ability to regulate more or less independently of the federal executive, their power to curb stems from the executive's inability to regulate independently of them.<sup>83</sup>

In its gentler forms, curbing may arise when states force the federal executive to back off of strong regulatory positions or to grant concessions *ex ante* about how the law will be implemented. While states have some ability to haggle up front, curbing may be especially likely after state participation in a federal scheme is underway. Once the federal executive has come to depend on states to play a particular role—such as determining individuals' eligibility for federal funds or implementing pollution controls—and has therefore not established the ability to do so itself (even when the statute contemplates federal authority as a backstop), states will have a greater ability to force the federal executive to make concessions or, in extreme cases, to undermine federal executive policy.<sup>84</sup>

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82. 42 U.S.C. § 7507.

83. Curbing is a prevalent form of uncooperative federalism, a phenomenon I have elsewhere explored. See generally Bulman-Pozen & Gerken, *supra* note 5. But, as the label suggests, uncooperative federalism focuses on the relationship of the states to the federal government as a whole, not to its component branches. In contrast, consideration of the separation of powers calls attention to state resistance to the federal executive's implementation of federal law, rather than state resistance to the underlying law itself.

Even some challenges to the underlying law may, however, be best understood as directed at the federal executive. For instance, state resolutions concerning the USA PATRIOT Act limit state cooperation not with the entire Act, but rather with particular provisions that seem to give unbridled authority to the executive branch; these resolutions focus on the way the law may be implemented. See, e.g., Legis. Res. 27, 23d Leg., 1st Sess. at 2–3 (Alaska 2003) (prohibiting state agencies from cooperating with investigations, surveillance, or detention absent reasonable suspicion of criminal activity).

84. See, e.g., John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 Md. L. Rev. 1183, 1216 (1995) (“Because, as a practical matter, the federal government must rely on the state governments to carry out federal environmental policy, state concerns and preferences will continue to receive careful consideration . . .”). As this



A strong example of curbing is the way states halted Social Security disability reviews in the early 1980s. Congress amended the Social Security Act in June 1980 to require the Social Security Administration (SSA) to conduct continuing reviews for beneficiaries whose disabilities might not be permanent.<sup>85</sup> The newly elected Reagan Administration adopted a vigorous review policy, and the termination rate quickly rose to nearly fifty percent.<sup>86</sup> In the words of one commentator, "What had been conceived by Congress in 1980 was deliberate invigoration of a review procedure that had been too feeble to have much effect. What was set in motion in 1981 was more like a purge."<sup>87</sup>

States brought this "purge" to a halt. Since the inception of the disability insurance programs, Congress had given states a role in carrying out disability reviews.<sup>88</sup> The 1980 amendments reaffirmed states' role while making clear that they were subordinate to the federal executive: Conditional upon the approval of the Secretary of Health and Human Services, states had only a partial role in a broader scheme (making the initial, reviewable determination as to disability), and this limited role was itself

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suggests, curbing is primarily a regulatory phenomenon. State power to enforce, rather than implement, federal law will tend to yield diverging (or possibly goading, discussed next), not curbing, because in most cases states will not be a constituent part of the federal executive's enforcement apparatus but rather independent enforcers. Nonetheless, in some instances, the federal executive might rely on state enforcement as a practical matter so that a state's decision not to pursue certain actions effectively interferes with the executive's enforcement strategy. To the extent this occurs, it is best understood as curbing. Cf. Bulman-Pozen & Gerken, *supra* note 5, at 1282–84 (discussing federal government reliance on state enforcement of state drug laws).

85. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 311, 94 Stat. 441, 460 (codified at 42 U.S.C. § 421).

86. Donald E. Chambers, *The Reagan Administration's Welfare Retrenchment Policy: Terminating Social Security Benefits for the Disabled*, 5 *Pol'y Stud. Rev.* 230, 232 (1985). Among other things, the Administration began the review process earlier than Congress had called for. Martha Derthick, *Agency Under Stress: The Social Security Administration in American Government* 36 (1990). Meanwhile, the SSA changed its policy from investigating for improvements to conducting a *de novo* decision on current disability. 20 C.F.R. § 416.994 (1981).

87. Derthick, *supra* note 86, at 36; see also *id.* at 34–36 (noting Congress estimated savings of \$10 million in first four years, while Reagan Administration projected savings of \$3.45 billion in six years); Chambers, *supra* note 86, at 232 (arguing Congress intended 1980 amendments simply to further better administration, but Reagan Administration hurried them "as a major cost-cutting venture"); Editorial, *Why Drive Troubled People Crazy?*, *N.Y. Times*, Apr. 20, 1983, at A26 ("For more than a year, the Social Security Administration has been using a Congressional order to purge malingerers from the disability program as a license for bureaucratic mayhem."). But see Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 174 (1983) ("There is currently much evidence . . . that SSA, *responding to congressional concern*, is constraining the supply of disability benefits." (emphasis added)); *id.* at 59–60 (discussing conflicting impulses in 1980 amendments).

88. Somewhat ironically, as it turned out, states had been brought into the administration of the federal program as a concession to opponents of disability insurance, who believed states would have no interest in expanding the federal program. Derthick, *supra* note 86, at 39.

subject to regulations crafted by the Secretary “in such detail as [the Secretary] deems appropriate.”<sup>89</sup> Even though they were directed and overseen by the federal executive, states were able to curb the agency’s policy because the agency relied on their service. Led by Massachusetts and New York, over half of the states suspended disability reviews by 1984, and the review process ceased until Congress enacted new legislation.<sup>90</sup> Charged with administering part of a federal scheme, the states engaged in curbing, deploying their statutory power to thwart the policy of the federal executive.<sup>91</sup>

3. *Goading*. — States may also use authority granted to them by Congress in cooperative federalism schemes to push the federal executive to take certain actions it otherwise would not have. The defining feature of goading is that the states are able to harness their federal statutory authority to drive the federal executive’s own agenda. Goading is thus similar to curbing inasmuch as it represents states shaping the federal executive’s own actions, but it pushes the executive in the opposite direction: Curbing ramps down regulation or enforcement, while goading ramps it up.

Weak forms of goading may arise when states use enforcement powers granted to them by Congress to nudge the federal executive to bring actions it had declined to pursue or when they rely on their role in a regulatory scheme to push the federal executive to implement a program in a more aggressive way. Such goading may be best understood as a form of agenda setting with bite. While states may influence the federal executive’s agenda in many ways—including petitioning for rulemaking, lobbying, and using their position as separate sovereigns to set an example—there is special force to their actions when they rely on concurrent federal authority. In such cases, states exercise federal statutory authority to instantiate their view; they are not mere supplicants but empowered actors in their own right. And because they are relying on the same law that the federal executive administers, it is more difficult for the federal executive to shrug off their actions as occupying a distinct sphere. When, for instance, in 1999, New York’s then-Attorney General Eliot Spitzer an-

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89. Social Security Disability Amendments § 304(a), 94 Stat. at 453–54 (codified as amended at 42 U.S.C. § 421(a)).

90. Edward D. Berkowitz, *Disabled Policy: America’s Programs for the Handicapped* 142–43 (1987).

91. Although this Article does not revisit debates over the unitary executive theory, see *supra* note 12, the practice of curbing underscores that a formalistic view of the President’s authority may actually render the unitarian objection a rather limited one. The leading unitarian account posits that presidential supervision over state administration renders such administration constitutional even though the President does not have the power to appoint or remove state officers. Calabresi & Prakash, *supra* note 12, at 639. But see Caminker, *supra* note 12, at 1085–100 (challenging logic of this position). But some of the most powerful state challenges to presidential control over administration occur when states are subject to federal oversight, as when states thwarted disability reviews. This observation underscores a familiar point: The formal power to control an actor does not necessarily entail the practical power to do so.

nounced that he would sue coal-burning power plants under a provision of the federal Clean Air Act that the EPA had not sought to use, the agency quickly came to rely on Spitzer's theory to bring an action against more than one hundred plants.<sup>92</sup> By calling attention to how the EPA could enforce federal law more aggressively—and by stating he would do so pursuant to his own congressionally conferred authority—Spitzer pushed the agency to assume a stronger position. Diverging, in other words, may yield goading.

Congress may also confer special authority on states to goad a federal agency to deploy its rulemaking or enforcement powers. The recent Dodd-Frank Wall Street Reform and Consumer Protection Act, for instance, provides that the Bureau of Consumer Financial Protection “shall issue a notice of proposed rulemaking whenever a majority of the States has enacted a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau.”<sup>93</sup>

A strong instance of goading, which we might call reverse commanding, is playing out across the country right now in the realm of immigration law, as states seize on mandatory provisions of federal law to attempt to drive federal executive action. Following Arizona's lead, numerous states have passed laws that challenge the enforcement of federal immigration law and seek not only to supplement federal enforcement with state enforcement, but also to force the federal executive itself to take more action.<sup>94</sup> They do so by incorporating into state law provisions of federal law that involve a role for the states.

Section 2 of Arizona's law, S.B. 1070, is illustrative. This section requires state officers to determine the immigration status of arrestees by verifying such status with “the federal government pursuant to 8 United States Code section 1373(c),”<sup>95</sup> a provision of federal law that directs the Department of Homeland Security (DHS) to respond to immigration-sta-

92. Lemos, *supra* note 59, at 743–44.

93. Pub. L. No. 111-203, § 1041(c)(1), 124 Stat. 1376, 2011 (2010) (to be codified at 12 U.S.C. § 1551).

94. The Ninth Circuit approved an injunction against part of Arizona's law, and the Supreme Court has granted certiorari. *United States v. Arizona*, 641 F.3d 339, 369 (9th Cir.), cert. granted 80 U.S.L.W. 3090 (U.S. Dec. 12, 2011) (No. 11-182). States that have followed Arizona's lead include Alabama, Georgia, Indiana, and Utah. See *Beason-Hammon Alabama Taxpayer and Citizen Protection Act*, Pub. Act No. 535, 2011-3 Ala. Adv. Legis. Serv. 677 (LexisNexis); *Illegal Immigration Reform and Enforcement Act of 2011*, No. 252, 2011 Ga. Code Ann. Adv. Legis. Serv. 252 (West) (to be codified in scattered sections of Ga. Code Ann. tits. 13, 16, 17, 35, 36, 42, 45, 50); *Act of May 5, 2011*, Pub. L. No. 171, 2011 Ind. Legis. Serv. 171 (West) (to be codified in scattered sections of Ind. Code tits. 4, 5, 6, 11, 12, 22, 34, 35); *Illegal Immigration Enforcement Act*, ch. 21, 2011 Utah Legis. Serv. 21 (West) (to be codified in scattered sections of Utah Code Ann. tits. 76, 77), as amended by *Act of Mar. 15, 2011*, ch. 18, 2011 Utah Legis. Serv. 18 (West). Each of these state statutes is also the subject of ongoing litigation. See, e.g., *United States v. Alabama*, Nos. 11-14532-CC, 11-14535-CC, 2011 WL 4863957, at \*6 (11th Cir. Oct. 14, 2011) (granting preliminary injunction against parts of Alabama's law).

95. *Ariz. Rev. Stat. Ann.* § 11-1051(B) (2010).

tus inquiries from states and localities.<sup>96</sup> By incorporating a provision of federal law that provides a role for states, section 2 thus effectively requires not only state, but also federal, actors to follow its prescriptions.<sup>97</sup> As a matter of law, section 2 commandeers the federal executive in a relatively limited way: DHS will have to respond to a greater number of immigration-status inquiries. The state law does not purport to require DHS agents to do anything after they provide information about an individual's status, nor could it. But this is the elephant in the room. As a practical matter, section 2 is likely to force DHS to remove individuals it has identified as being unlawfully present. Once DHS has confirmed such an individual's status, that is, it will be difficult for the agency to refuse additional state "cooperation" and to ignore the individual's presence in the United States.<sup>98</sup> The state law thus capitalizes on a federal statutory provision to attempt to compel the federal executive to enforce federal law more aggressively.

The sense in which section 2 may significantly, though indirectly, compel federal executive action underscores how goading may occur even absent a federal law that expressly permits states to make demands on federal agents. As suggested above,<sup>99</sup> Congress often includes states in federal schemes in ways that lend them soft power to force federal executive action. States will be able to exercise such power based on the broader political climate, the politics of a particular issue, and the extent to which the federal executive relies on the states in a particular scheme, among other factors. With the Arizona law, the politics of immigration are paramount.

Arizona's goading of the federal executive may also illustrate another general dynamic. Ironically, it is a provision of the state's law that casts the state as subordinate to the federal executive that effectively compels federal executive action. Indeed, Arizona may well have incorporated 8 U.S.C. § 1373 in order to save the state law from preemption: Arizona does not purport to independently determine individuals' immigration

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96. 8 U.S.C. § 1373(c) (2006) (providing DHS "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information").

97. See Brief for Appellee at 50, *Arizona*, 641 F.3d 339 (No. 10-16645), 2010 WL 5162512 (arguing Arizona's law "harnesses the federal apparatus in pursuit of a scheme over which the federal government would have no control, and would proceed without regard to federal practice and policy").

98. See *Arizona*, 641 F.3d at 379 & n.12 (Bea, J., concurring in part and dissenting in part) ("[While] federal authorities are free to refuse additional cooperation offered by the state officers, and frankly to state their lack of interest in removing the illegal alien . . . , they might be subject to criticism for not enforcing federal immigration law . . . ."); cf. Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 *UCLA L. Rev.* 1819, 1853–58 (2011) (discussing state arrests as means of putting pressure on federal government).

99. See *supra* text accompanying note 92.

status but simply follows the federal agency's determination.<sup>100</sup> So, too, various provisions of federal law that appear designed to subordinate state powers to federal agency powers may paradoxically generate goading. For instance, many provisions conferring enforcement authority on state attorneys general require them to provide advance notice of any suit to the relevant federal agency.<sup>101</sup> While this may give the federal agency an opportunity to influence or halt state proceedings, it may also do more or less the opposite, pushing the federal agency to pursue cases to which it would not have devoted its resources.

## B. *The Separation of Powers*

Through the state practices of diverging, curbing, and goading, concurrent delegation helps safeguard the separation of powers in an era of executive dominance by checking federal executive power, advancing congressional authority, and spurring the other two branches of the federal government to review exercises of federal executive power.

1. *Checking the Federal Executive.* — Diverging, curbing, and goading each check the power of “the most dangerous branch” over the administrative state. The way in which states limit federal executive power is probably most apparent with respect to curbing, which involves state interference with the executive's ability to enforce or implement the law as it chooses. When states halted disability reviews, for instance, they thwarted the Reagan Administration's ability to carry out the Social Security Act as it wished. Goading also limits executive power in a straightforward manner. Here, states do not stop federal action—they force it—but they nonetheless curtail the executive's ability to proceed as it chooses. Arizona's immigration law, for example, would push the Obama Administration to enforce federal immigration law more aggressively than it has elected to do.

Diverging, although perhaps not immediately recognizable as a source of checking, also constrains federal executive power in significant ways. When states diverge from federal executive policy, they generate competition on the ground. Even if their departure from federal policy is not motivated by a spirit of dissent, states may effectively challenge the federal executive's power simply by modeling a different way of administering the law. When California promulgates different emissions standards from the EPA, for instance, it deprives the latter of its monopoly on decisions about how to carry out the law. As this suggests, from the per-

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100. See, e.g., Appellants' Opening Brief at 1, *Arizona*, 641 F.3d 339 (No. 10-16645), 2010 WL 5162518 (“The Arizona Legislature carefully crafted the Act to ensure that Arizona's officers would [act] in compliance with existing federal laws . . . .”); see also Brief of Amici Curiae Congressmen Ed Royce et al. in Support of Appellants and Reversal at 6, *Arizona*, 641 F.3d 339 (No. 10-16645), 2010 WL 5162511 [hereinafter Brief of Amici Curiae Congressman Ed Royce et al.] (stating Arizona law “incorporates by reference, in virtually all significant respects, the actual provisions of federal law”).

101. See *supra* note 62 (citing statutes).

spective of executive power, the simple fact that the federal executive is not the only administrator matters. Congress's concurrent grant of authority to the states and the federal executive curtails federal executive power in the first instance. Indeed, a state with concurrent authority may limit federal executive power even when it does not in fact diverge from the federal executive's policy. The federal executive's control over how to enforce or implement the law is typically an important source of power, but the grant of such authority to another actor—even if this actor does not challenge executive branch decisions—strips the federal executive of this unilateral prerogative.

What may be most notable about the check cooperative federalism schemes furnish on executive power is that it operates even when, perhaps especially when, Congress has delegated broadly or crafted an ambiguous statute. When Congress enacts an open-ended provision and grants administrative authority only to the federal executive, the latter's power is at its height. But when Congress grants administrative authority to both the states and the federal executive, an open-ended grant of authority may instead stimulate competition by empowering states to challenge the federal executive. In fact, the broader the delegation, or the more ambiguous the statute, the more room there may be for states to contest federal executive power.

The Clean Air Act, for instance, confers substantial discretion on the EPA,<sup>102</sup> and Presidents have consistently sought to influence the agency's implementation of the Act's open-ended provisions.<sup>103</sup> But precisely because of the open-endedness of the grant of authority to the EPA Administrator to determine whether emissions should be regulated because "in his judgment [they] cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,"<sup>104</sup> this grant becomes not only a source of federal executive power but also a site of competition when California is also authorized to make a determination pursuant to the standard.

So, too, in the Social Security Act amendments of 1980, Congress had a broad goal and granted substantial discretion to the SSA to see it through.<sup>105</sup> Yet Congress empowered not only the federal agency but also the states to administer the Act.<sup>106</sup> While the SSA was clearly dominant in the venture, the inclusion of the states established them as rivals in inter-

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102. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (considering but rejecting nondelegation challenge to Clean Air Act).

103. See generally Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, *Law & Contemp. Probs.*, Autumn 1991, at 127 (exploring impact of White House review of EPA rulemaking and decisionmaking).

104. 42 U.S.C. § 7521(a)(1) (2006).

105. Derthick, *supra* note 86, at 79, 82 (noting broad discretion granted to SSA); see *supra* note 87 (suggesting ambiguity of Congress's purposes in Act).

106. See *supra* note 89 and accompanying text (discussing state role in determining disability).

preting and implementing the Act and thus limited the degree to which a broad grant of authority enhanced federal executive power.

The federal executive also typically has great discretion as to how to enforce federal law.<sup>107</sup> Here, its power is not necessarily the result of a decision by Congress to delegate broadly, but often the absence of any decision by Congress to cabin executive discretion.<sup>108</sup> But Congress need not directly limit federal executive discretion for a concurrent delegation of enforcement authority to state and federal actors to have this effect. As the Arizona immigration litigation underscores, even when the states have a small part in the statutory scheme, their inclusion may transform what would normally be a source of federal executive discretion into a source of competition.

Indeed, as elaborated below,<sup>109</sup> even ultimately unsuccessful state attempts at diverging, curbing, and goading may check federal executive power. In resisting state efforts to shape its own actions or to depart from its policies, the federal executive may be forced to provide public reasons for its actions and to justify its preferred policies in a way it would not were it the sole administrator of a given law. Because states are co-administrators, that is, the federal executive must respond seriously to their challenges. In this sense, states check the federal executive not only by directly limiting its power but also by refining the exercise of, and shaping the discourse around, this power. By generating public accounting and deliberation, state checks can begin as well as end a conversation.<sup>110</sup>

2. *Advancing Congressional Authority.* — Cooperative federalism schemes do not affect the federal executive's power in isolation, but rather vis-à-vis Congress. In some sense, any challenge to the executive alters the balance of power among the branches of the federal government: Simply by checking federal executive power, state administration of federal law affects the relative power of the executive and Congress. But cooperative federalism schemes also influence the relationship between the federal legislative and executive branches more directly, as states challenging the federal executive through diverging, curbing, and goading tend to advance congressional authority in two closely related respects.

First, states rely on their federal statutory authority to launch their challenge. Their role in checking federal executive power is thus surpris-

107. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 827–35 (1985) (describing executive branch decisions not to pursue enforcement action as presumptively unreviewable).

108. See *id.* at 833 (“Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”).

109. See *infra* Part III.B.2–3.

110. Cf. Larry D. Kramer, “The Interest of the Man”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 *Val. U. L. Rev.* 697, 736 (2006) (“[T]he use of a constitutional check is not meant to conclude a dispute. It is meant to begin one: to force the kind of public debate needed for ‘the reason of the society’ to emerge and coalesce.”).

ing from the perspective of traditional accounts of federalism. Such accounts suggest that states' strongest claims follow from their status as separate sovereigns. Yet in cooperative federalism schemes, states effectively relinquish arguments from their status as autonomous entities and instead make claims based on their congressionally conferred authority. Rather than rely on their sovereign status to challenge the federal government writ large, that is, states rely on the power granted to them by one part of the federal government, the legislature, to contest the power of another part, the executive. Their opposition comes from inside the federal scheme rather than from purely outside of it.

Second, when state and federal policies clash, states cast themselves as faithful agents of Congress, seeking to carry out a statute as Congress intended, in contrast to a wayward federal executive branch. States therefore not only owe their ability to contest federal executive policy to Congress in the first instance, but also take up Congress's mantle as they duke it out with the federal executive, emphasizing the primacy of the legislative branch. Their challenges thus concern the separation of powers as much as federalism.

When a state and the federal executive disagree about how to execute federal law, the state's strongest claim of right comes from an appeal to the underlying statute. It is immaterial what is actually driving state resistance. Just as Congress includes states in statutory schemes for many reasons not related to checking the federal executive, so, too, state actors will fight with the federal executive for many reasons not related to ensuring that the President is satisfying his Take Care obligation—appealing to voter interests in the state, safeguarding budgets, generating a name for themselves in national politics. But whatever the reason they challenge federal executive policy, it will be in state actors' interest to cast their resistance in terms of fidelity to the statute because as a legal matter states can only trump the federal executive by invoking Congress. They will accordingly claim fidelity in conversations with the federal executive, in arguments to the courts or Congress, or in appeals to the public at large.

When states stopped cooperating with disability reviews, for instance, they insisted that the SSA was abusing its statutory mandate.<sup>111</sup> When California has sought waivers under the Clean Air Act, it has frequently suggested that the Act requires stronger regulation than the EPA is providing. Most recently, as discussed below,<sup>112</sup> California sought to regulate greenhouse gas emissions, arguing that the Bush Administration had abdicated its statutory duty to do so and the state was thus vindicating con-

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111. Court rulings that the SSA's policy of terminating benefits absent current evidence of disability was unlawful bolstered the states' claim. See, e.g., *Patti v. Schweiker*, 669 F.2d 582, 587 (9th Cir. 1982) (holding disability claimants entitled to presumption that disability still exists); see also Derthick, *supra* note 86, at 45–46 (suggesting judicial rulings encouraged state defiance).

112. See *infra* notes 128–134 and accompanying text.



gressional intent.<sup>113</sup> Arizona has similarly presented its bid to enforce federal immigration law as vindicating congressional intent against an executive branch bent on underenforcing the law.<sup>114</sup>

When a state argues that it is Congress's superior agent, this forces the federal executive to do the same. In any given case, either the state or the federal executive may in fact have a stronger claim of fidelity. In other words, states need not actually be Congress's faithful agents. What matters is that, with two agents, each will be pushed to claim Congress's mantle. Counteracting the tendency of federal statutes to take on a life of their own in the executive branch, the resulting competition between Congress's two agents can restore the focus of administration to Congress and to the initial grant of statutory authority, a focus that is salutary even in the case of ambiguous statutes and broad delegation by Congress.

The litigation concerning Arizona's immigration law offers a vivid example of how each of the legislature's two agents may strive to present itself as the superior agent. To stop Arizona's challenge, the federal executive branch has sued, arguing that the state law is preempted. But this has required the federal executive to justify its enforcement policy, and in particular the ways in which it may not enforce the immigration laws to their fullest extent, with reference to Congress's purposes. The resulting legal battle is a contest between the federal executive and Arizona to establish which is truer to congressional intent. The federal executive—speaking in the voice of the “United States” as the branch of the government responsible for litigation<sup>115</sup>—argues that its enforcement priorities are consistent with Congress's purposes.<sup>116</sup> Arizona, meanwhile, insists

113. E.g., California Mandates Cleaner Cars by 2009, Ethics Newslines (July 29, 2002), <http://www.globalethics.org/newsline/2002/07/29/california-mandates-cleaner-cars-by-2009> (on file with the *Columbia Law Review*); see also *Massachusetts v. EPA*, 549 U.S. 497, 505 n.2 (2007) (involving California as petitioner).

114. E.g., Appellants' Opening Brief, *supra* note 100, at 1, 2010 WL 5162518 (“The Department of Homeland Security . . . has demonstrated its inability (or unwillingness) to enforce the federal immigration laws effectively. The Act's primary purpose, therefore, is to enhance the assistance Arizona and its law enforcement officers provide in enforcing federal immigration laws.”). This Article has focused on section 2 of S.B. 1070, but other provisions of the law have a similar cast. For instance, section 3 makes it a state criminal offense for an alien in Arizona to violate federal laws that require aliens to carry registration cards or certificates or to apply for registration. *Ariz. Rev. Stat. Ann.* § 13-1509(B) (2010). Arizona's lawmaking power has thus been marshaled not to define a new offense but rather to provide new penalties for, and a greater guarantee of enforcement of, provisions that are already on the federal books.

115. But see Brief of Amici Curiae Congressmen Ed Royce et al., *supra* note 100, at 3 (pointedly calling appellee “Department of Justice”); *id.* at 4 (arguing use of term “federal government” is deliberate mischaracterization “to establish a foundation for [the] claim that the President has authority not only to *not* enforce the immigration laws passed by Congress but to thwart state efforts to enforce the very laws enacted pursuant to the plenary authority of Congress”).

116. E.g., Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof at 13, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-NVW), 2010 WL 2959365.

that the federal executive is betraying Congress by underenforcing the federal immigration laws. Supported by some members of Congress and several other states as amici, the state insists that its law is true to congressional intent and a needed corrective to a willful executive.<sup>117</sup>

As this underscores, Congress's use of two agents in the realm of immigration law encourages each to check the other's fidelity to Congress. To be sure, the federal executive branch and the states are not equally empowered; states are at best junior partners in enforcing federal immigration law.<sup>118</sup> But because Congress has given states a role in enforcing immigration law, they are in a position to challenge the federal executive's exercise of its authority and to claim to represent Congress in so doing.

More generally, by giving two different actors some role in a statutory scheme, whether or not these roles are identical or commensurate, Congress bakes competition into the scheme. Each agent has the incentive and ability to monitor the other, and, when they disagree, to claim that it is the superior agent of Congress. Indeed, the virtues of empowering two agents are touted in the administrative law literature concerning overlapping delegations of power by Congress to multiple federal administrative agencies. Here, too, commentators argue, competition can help keep administration focused on the underlying statute.<sup>119</sup> But to the extent one is concerned about the eclipse of federal legislative authority with executive authority, states may be superior co-agents. When Congress divides authority across two or more federal agencies, these agencies answer to two principals, Congress and the President, and the President is usually a stronger principal. One of the President's greatest claims of authority over the administrative state is the responsibility to

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117. E.g., Appellants' Opening Brief, *supra* note 100, at 2 ("The fundamental premise of the United States' argument is that DHS has exclusive authority to determine whether and to what extent it may receive assistance from state and local authorities in the enforcement of federal immigration laws. The United States' position, however, is contradicted by express directives from Congress . . ."); Brief of Amici Curiae of Members of Congress Brian Bilbray et al. at 3, *Arizona*, 641 F.3d 339 (No. 10-16645), 2010 WL 5162520 ("The heart of the Administration's claims against sections 2 and 3 of S.B. 1070 is that those provisions seek to enforce federal provisions that the Executive chooses either not to enforce, or to enforce selectively."); Brief of Amici Curiae States of Michigan et al. at 8, *Arizona*, 641 F.3d 339 (No. 10-16645), 2010 WL 5162508 ("[A] State enforcing Congress's intent too well cannot violate Congress's intent.").

118. See, e.g., 8 U.S.C. § 1357(g)(3) (2006) (providing state officers' performance of various immigration functions "shall be subject to the direction and supervision of the Attorney General").

119. See, e.g., Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 Sup. Ct. Rev. 201, 212 ("Giving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent."); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1255 (1995) (discussing how Clean Water Act's empowerment of both EPA and Army Corps of Engineers keeps administrators focused on statute).

reconcile overlapping and interdependent provisions of federal law,<sup>120</sup> and when federal agencies are fighting, this authority is at its height. Granting two different federal executive branch actors authority to administer a statute may therefore increase the likelihood that the President will drive agency policy.<sup>121</sup> Furnishing authority to the federal executive and the states does not similarly enhance presidential power because the states do not answer to the President. The only principal the states and the federal executive branch have in common in such schemes (besides the ultimate principal, the people) is Congress, so their competition revolves around Congress.

There may be something particularly fitting about the way cooperative federalism furthers congressional authority. Congress is the branch of the federal government designed to represent state interests.<sup>122</sup> When states rely on powers granted to them by Congress to champion congressional authority, the relationship comes full circle. Indeed, we see a variation on the classic political safeguards of federalism argument: If Wechsler and his followers suggest members of Congress use congressional authority to safeguard federalism, the argument here suggests members of Congress, whether deliberately or incidentally, may use federalism to safeguard congressional authority.

3. *Reinvigorating Horizontal Checks.* — When a state and the federal executive fight and each claims Congress's mantle, pressure mounts to settle the dispute. Sometimes, the state and the federal executive may be able to reach consensus about how to execute the law. In other instances, the state or the federal executive will call on an external arbiter: the courts or Congress. Concurrent delegation to state and federal agents thus may safeguard the separation of powers not only by pushing states and their federal executive counterparts to focus attention on Congress,

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120. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. Econ. & Org.* 132, 143 (1999) (“The president’s proper role . . . is to rise above a myopic focus on each statute in isolation . . . and to resolve statutory conflicts by balancing their competing requirements. All of this affords him enormous discretion to impose his own priorities on government unilaterally . . .”).

121. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *Harv. L. Rev.* (forthcoming 2012) (manuscript at 5) (on file with the *Columbia Law Review*) (“Fragmented delegations . . . present [the President] with opportunities to put his stamp on policy.”); *id.* (manuscript at 29, 42–44) (arguing in favor of President’s coordinating agency action by directing interagency consultation and exerting centralized oversight of agency policymaking and implementation). But cf. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 52 (2010) (noting Congress may grant administrative role to multiple agencies to increase costs of presidential coordination and control).

122. See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 546–52 (1954) (describing states’ role in selecting members of Congress); see also Clark, *supra* note 4, at 1342–46, 1357–67 (discussing Senate’s particular role in representing states).

but also by making it more likely that the other two branches of the federal government will check the federal executive.

a. *Courts.* — Turning to the courts is one way for a state to vindicate its view of the law when it clashes with the federal executive. In some instances, the state will not turn to the judiciary itself, but rather force the federal executive to call on the judiciary to halt a state challenge. Which actor turns to the courts will depend on which has the power to set the agenda absent a court ruling. When a state is seeking a waiver to regulate differently from the federal executive and such a waiver is denied, it will be the state that calls on the courts as allies. When a state seeks to commandeer the resources of the federal executive through the incorporation of federal law, it will be the federal executive that turns to the courts to vindicate its view of the statutory scheme.<sup>123</sup>

Because of their resources, political might, and access to information about the administration of a statutory scheme, states will be more formidable opponents than most litigants suing the federal executive. States' role in challenging Social Security disability reviews in court offers an extreme example. Many private parties challenged the SSA's policy regarding continuing disability reviews, but, although the courts repeatedly held the SSA's decisions unlawful, the agency announced a policy of nonacquiescence.<sup>124</sup> By bringing lawsuits on behalf of all interested parties in the state, states were able to tame the agency's policy of nonacquiescence in a way individual litigants could not.<sup>125</sup>

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123. In still other instances, state-federal competition will not yield administrative problems that push the state or the federal executive to call on the courts; diverging in particular will frequently not manifest as a clash. But private parties who are subject to different state and federal regimes, or who are subject to only one of these regimes but prefer the alternative, may bring a legal challenge. E.g., *Chamber of Commerce of the U.S. v. EPA*, 642 F.3d 192 (D.C. Cir. 2011) (considering suit by Chamber of Commerce and National Automobile Dealers Association challenging California's receipt of Clean Air Act waiver to regulate greenhouse gas emissions).

124. See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *Yale L.J.* 679, 692–704 (1989) (describing SSA nonacquiescence). The agency cited separation of powers principles in declaring that it would respect court judgments in individual cases but otherwise continue to apply its regulations. See H.R. Rep. No. 98-618, at 24 (1984) (statement of Associate Comm'r for Hearings and Appeals, Social Security Administration) ("Federal courts do not run SSA's programs."); SSR 82-10c, 1982 WL 31431 (Jan. 1, 1982) (nonacquiescence letter) (rescinded without replacement); SSR 82-49c, 1982 WL 31432 (Jan. 1, 1982) (nonacquiescence letter) (rescinded without replacement). The courts responded, "Far from raising questions of judicial interference in executive actions, [the policy of nonacquiescence] presents the reverse constitutional problem: the executive branch defying the courts and undermining what are perhaps the fundamental precepts of our constitutional system—the separation of powers and respect for the law." *Lopez v. Heckler*, 725 F.2d 1489, 1497 (9th Cir. 1984).

125. See Derthick, *supra* note 86, at 150 (discussing New York class action). By ceasing to cooperate with the SSA, the states thus cast themselves not only as agents of Congress, but also as agents of the federal courts, vindicating judicial rulings against a recalcitrant federal agency.

*Massachusetts v. EPA*'s broad recognition of state standing further suggests that states may be able to bring lawsuits in the first instance where private parties cannot.<sup>126</sup> While the Court has limited private actors' standing to contest many executive branch decisions, state challenges to the federal executive confer a sort of political legitimacy on judicial intervention, as the Court casts itself as a neutral arbitrator between two political bodies.<sup>127</sup> Yet even as *Massachusetts* may suggest a broad role for states in challenging federal executive action—and federal executive inaction—the case underscores that states are better positioned to launch such challenges when they are granted a role in administering federal law than when they are appealing from outside the federal scheme. Consider, by comparison to the *Massachusetts* lawsuit, California's attempt to regulate greenhouse gas emissions itself when it argued the Bush Administration was abdicating its statutory duty to do so—a situation involving the same basic facts and many of the same players (including California) as *Massachusetts*. When, for the first time in history, the EPA rejected in full California's request for a waiver,<sup>128</sup> the state filed suit. Ultimately, the dispute was resolved outside the courts when the presidency changed hands,<sup>129</sup> but a consideration of how the state's lawsuit might have unfolded helps illuminate how California is uniquely positioned to call on the courts because of the role Congress has given it.

First, whereas the Supreme Court's recognition of *Massachusetts*'s standing was unusual—and judicial recognition of enhanced state stand-

126. See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (discussing Court's "special solicitude" for state interests).

127. Indeed, in *Massachusetts*, the Court not only recognized broad state standing, but also reviewed a form of executive inaction—the denial of a rulemaking petition—that many believed would not be justiciable, and subjected this form of inaction to hard look review. *Id.* at 527–35. The fact that the petitioners were states seemed central to the Court's bending of administrative law doctrine. A role for states in ratcheting up judicial review of the executive branch also surfaced in *Gonzales v. Oregon*, in which the Court refused to grant *Auer*, *Chevron*, or even *Skidmore* deference to an Attorney General interpretive rule. *Gonzales v. Oregon*, 546 U.S. 243, 256–75 (2006). Gillian Metzger has suggested that *Massachusetts* and *Gonzales* reveal administrative law to be the new federalism, with the Court both applying administrative law doctrines to ensure state prerogatives are considered and developing some extraordinary federalism-inspired administrative law analyses. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 *Duke L.J.* 2023, 2029–72 (2008). Metzger is clearly on to something. But a sort of reverse claim also seems true: The Court was not only seeking to protect the states; it was also looking to the states to justify its own stringent review of executive branch action. Cf. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 *Colum. L. Rev.* 1, 25–34 (2011) (arguing three preemption cases from 2008 Term suggest Court was looking to states to improve federal agency performance).

128. *Notice of Decision Denying a Waiver of Clean Air Act Preemption*, 73 *Fed. Reg.* 12,156, 12,159–69 (Mar. 6, 2008) (reasoning California did not need its standards to meet compelling and extraordinary conditions). Since 1970, California has been granted over fifty waivers of preemption; this was the first complete denial. See *Notice of Decision Granting a Waiver of Clean Air Act Preemption*, 74 *Fed. Reg.* 32,744, 32,745 (July 8, 2009).

129. See *Notice of Decision Granting a Waiver of Clean Air Act Preemption*, 74 *Fed. Reg.* at 32,783 (granting California waiver).

ing may well not persist<sup>130</sup>—California would necessarily have standing to challenge the waiver denial. In *Massachusetts*, the Court suggested that because states have been cut out of the federal scheme, standing was appropriate as a sort of compensation for states’ powerlessness,<sup>131</sup> but California’s standing would follow from Congress’s inclusion of the state in the regulatory scheme—in other words, from the state’s statutory authority, not its lack thereof. Second, California would be seeking review of the agency’s denial of its own ability to act, even as this question would necessarily implicate the agency’s refusal to regulate, so judicial review would not be curtailed by doctrine limiting challenges to administrative inaction.<sup>132</sup> And while a court ruling for Massachusetts would only force the EPA to reconsider its decision under a statutory standard that vests significant discretion in the Administrator,<sup>133</sup> a court ruling for California would allow the state to effectively replace the EPA, standing in for a federal agency the state deemed to be disregarding its statutory obligation.<sup>134</sup>

The ability of states that are included in federal statutory schemes to effectively force judicial review of federal executive inaction is further apparent in the case of Arizona’s immigration law. Here, it is the federal executive that has sued to enjoin the state law. But as part of its preemption argument, the executive must explain why the enforcement priorities it has established are consistent with federal law. Typically, this sort of question is not justiciable; an agency’s priorities and the manner in which it marshals its resources to carry out federal law are issues courts usually do not evaluate.<sup>135</sup> These issues effectively become justiciable, however,

130. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA*: From Politics to Expertise, 2007 Sup. Ct. Rev. 51, 70 (“It is not clear which if any components of the Court’s standing analysis will generalize beyond this case. There is reason to think that ‘special solicitude’ in particular will be limited and short-lived . . .”).

131. See *Massachusetts*, 549 U.S. at 519 (“When a State enters the Union, it surrenders certain sovereign prerogatives. . . . These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) . . .”).

132. Specifically, a court considering California’s challenge would have determined whether the state had shown “compelling and extraordinary” conditions to merit a waiver. See, e.g., Notice of Decision Denying a Waiver of Clean Air Act Preemption, 73 Fed. Reg. at 12,159–69 (considering whether California had established the existence of compelling and extraordinary conditions). Although a decision holding California entitled to a waiver would be distinct from a ruling that the EPA should itself regulate certain emissions, it would also amount to a challenge to agency inaction because EPA’s denial of a waiver effectively mandates inaction as the only statutory policy for both federal and state actors.

133. Indeed, despite the Supreme Court’s ruling for Massachusetts, the EPA did not conduct a rulemaking concerning greenhouse gas emissions during the Bush Administration.

134. See Barron, *supra* note 24, at 1145–48 (suggesting California could substitute for a missing federal administrative voice and if Court performed expertise-forcing review it applied in *Massachusetts* to California’s challenge to waiver denial, EPA likely would lose).

135. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 827–35 (1985) (describing agency decisions not to pursue enforcement action as presumptively unreviewable).

because Congress has given the states a role in the federal scheme, thereby at least arguably depriving the executive branch of its monopoly over enforcement decisions.

b. *Congress*. — When Congress's state and federal agents find themselves at loggerheads over the administration of a statute, they may also appeal to their principal. As suggested above, one advantage of concurrent delegation is that each agent will monitor the other's actions and force it to justify its preferred course in terms of the underlying statute. In other words, concurrent delegation may be especially useful when Congress is not up to the task of monitoring its agents itself. But that does not mean the states and the federal executive will not turn to Congress. To the contrary, their monitoring will often lead them to seek congressional oversight or correction.

To put it somewhat differently, when they are included in federal schemes, states may generate particularly effective fire alarms.<sup>136</sup> As many have noted, a key way in which Congress oversees administrative action is by relying on interested parties to bring concerns to its attention.<sup>137</sup> For instance, regulated parties or specialized nonprofit groups may complain to Congress about proposed agency action, and Congress may then hold oversight hearings, threaten budget cuts, or even pass new legislation. States charged with partially administering a federal scheme are in a particularly good position to sound such alarms because they have the incentive, opportunity, and expertise to monitor federal executive action—and the ability to get Congress to listen to them.

First, states have a strong incentive to monitor the federal executive branch insofar as its actions affect their own ability to carry out desired policies. In many instances, such monitoring will simply be the byproduct of a state attempt to administer federal law as the state would like. No extra effort on the part of the states was required for them to notice that the Reagan Administration was conducting disability reviews in a particular way, for California to notice that the Bush Administration was not regulating greenhouse gases, or for Arizona to notice that the Obama Administration has not been enforcing immigration laws to their fullest possible extent.

Second, because they are embedded in the statutory scheme, states have a privileged opportunity to monitor the federal executive and to furnish Congress with information about the administration of a statute. For instance, Arizona's officers who are deputized to help carry out immigration law have firsthand knowledge about how DHS enforces federal immigration law. A frequent obstacle to effective congressional oversight of executive branch action is a lack of information. In extreme cases, the President's control over information and assertions of privilege may limit

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136. Federal agencies may also generate fire alarms regarding state administration in much the same way states may generate alarms regarding federal administration.

137. E.g., Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 *Am. J. Pol. Sci.* 165, 166–67 (1984).

the ability of Congress to engage in oversight at all.<sup>138</sup> But even when there is not a concerted effort by the executive to withhold information from Congress, it may be difficult for legislators to find a toehold that facilitates effective oversight or provides a basis for corrective legislation. States are not the only parties that can provide helpful information, but, to the extent they are embedded within a statutory scheme, they may have a particularly good opportunity to collect information.

Third, and related, states often have expertise that helps them to monitor the federal executive and to frame information about the administration of federal law for nonspecialist legislators. With respect to continuing disability reviews, for instance, state officials testified repeatedly before Congress, providing legislators with concrete information about how the program was being carried out that boosted efforts to pass corrective legislation.<sup>139</sup> When California adopted regulations for greenhouse gas emissions, it could furnish specific, expert information about how such regulations would work.<sup>140</sup>

States may be in a good position not only to monitor federal executive action, but also to make persuasive appeals to Congress. One need not endorse the political safeguards of federalism theory with respect to judicial review to appreciate that state actors may make especially strong entreaties to the members of Congress charged with representing their interests.<sup>141</sup> Because of the ties that bind state actors and their congressional representatives, state actors are likely to have their concerns taken seriously. And when these ties are not enough, states' particular ability to appeal to the public and to harness the power of the media helps them to get legislators' attention.

States may also be able to engage a different group of legislators than might pay attention to a particular agency's action in the normal course. A common concern about congressional oversight is that only one part of Congress, usually a committee or subcommittee, will monitor agency action, and this committee or subcommittee may have different views from Congress as a whole.<sup>142</sup> If state actors take issue with the federal executive's administration of the law, however, they may complain to their state representatives regardless of what committees these individuals sit on. Particularly if many states complain, they may therefore be able to mobil-

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138. Marshall, *Eleven Reasons*, *supra* note 17, at 520.

139. See, e.g., Derthick, *supra* note 86, at 162 (discussing state representatives' testimony and provision of studies by Massachusetts legislature and Michigan task force).

140. See, e.g., State Agency Greenhouse Gas Reduction Report Card, available at [http://www.climatechange.ca.gov/climate\\_action\\_team/reports/2012\\_CalEPA\\_Report\\_Card.pdf](http://www.climatechange.ca.gov/climate_action_team/reports/2012_CalEPA_Report_Card.pdf) (last visited Feb. 20, 2012).

141. See, e.g., Victoria Nourse, *The Vertical Separation of Powers*, 49 *Duke L.J.* 749, 761–68, 784–88 (1999) (arguing Congress's political constituencies create special incentives to cater to state interests).

142. See *supra* note 73 (discussing oversight by committees and subcommittees).



ize Congress, yielding not only oversight but in some cases new laws, such as the Social Security Disability Benefits Reform Act of 1984.<sup>143</sup>

In short, although state administration of federal law does not negate the pathologies that afflict Congress, it can make Congress more likely to pay attention, to have the information it needs, and to be motivated to correct the administration of federal law. Cooperative federalism schemes thus may not only restore the focus of administration to Congress but also engage Congress itself in administrative oversight.

#### IV. A REALISTIC RESPONSE

Cooperative federalism is not an ideal response to threats to the separation of powers. It is a realistic one. In several important respects, cooperative federalism schemes seize on attributes of our administrative state that are widely thought to undermine separation of powers values and recast these stubborn problems as solutions. In particular, such schemes respond organically to the two threats to the separation of powers canvassed in Part I: the rise of federal executive power in the administrative state and the rise of political parties.

##### A. *Expansion as a Check*

Perhaps the most oft-cited reason for the rise of federal executive power is the growth of the administrative state and the sheer amount of policymaking and execution that is entrusted to the federal executive.<sup>144</sup> Cooperative federalism schemes are a practical, even organic, response to this development, as states provide a check on executive power because of, not in spite of, the growth of the federal executive branch.

The very rise of the executive branch has meant the incorporation into its operations of a variety of actors who are not a part of it. In particular, the more Congress tasks the federal executive with accomplishing, the more likely it is to involve the states in a statutory scheme. But even as states in some sense become a part of the federal apparatus, they remain distinct entities, populated by actors with interests and motivations different from those of the federal executive.<sup>145</sup> In this way, the expansion of the executive branch presents a separation of powers solution even as it presents a separation of powers problem: The federal executive may be checked from within its own domain.<sup>146</sup> The fact that the federal execu-

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143. Pub. L. No. 98-460, 98 Stat. 1794 (1984) (codified as amended in scattered sections of 42 U.S.C.).

144. See *supra* notes 16–29 and accompanying text.

145. See generally Bulman-Pozen & Gerken, *supra* note 5, at 1270–71 (arguing state officials in cooperative federalism schemes serve “two masters”); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 *Sup. Ct. Rev.* 341, 386–95 (exploring how state and national constituencies have interests likely to clash).

146. This Article is not the first to suggest that separation of powers values may be furthered within the executive’s domain, but past commentators have focused only on the

tive's broad mandate requires co-administration with the states positions the states to challenge federal executive power, and the broader the executive's mandate, the more room there may be for state challenges in the realm of administration.

Indeed, as canvassed above,<sup>147</sup> cooperative federalism schemes may generate a particularly robust check on federal executive power when Congress has delegated broadly to the executive. Delegation is typically regarded as enhancing executive power. When Congress grants open-ended administrative authority to the federal executive alone, the executive has substantial power to make policy and carry out the law as it sees fit. But when Congress grants open-ended authority to both the states and the federal executive, states have substantial power to challenge the federal executive. Cooperative federalism schemes can thus transform a common source of executive power into a check on executive power.

The check furnished by states in cooperative federalism schemes is especially noteworthy from a separation of powers perspective insofar as it not only limits federal executive power but also fosters the sort of vigorous, visible public debate about federal law that our horizontal system of checks and balances aspires to generate.<sup>148</sup> When states fight with the federal executive, they frequently appeal to the public about whether the executive is really representing the people's will. For instance, California's challenge to the federal executive's environmental policy and Arizona's challenge to its immigration policy have played out not only in courtrooms, but also in media across the country.<sup>149</sup>

Such competition regarding federal law thus reproduces within the executive's domain benefits of divided representation typically associated with the split of authority between the federal legislative and executive branches. The federal executive cannot unproblematically claim to be the people's "true" representative even within its sphere of competence, for the states speak for the people as much as it does. This sort of "fractal

federal executive branch and thus not considered the full extent of this domain. For two accounts of "internal separation of powers," see generally Katyal, *supra* note 17, and M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. Pa. L. Rev. 603 (2001). Magill argues that power is significantly fragmented and diffused within the branches of the federal government, so the concentration of power in a particular branch is not a concern. Magill, *supra*, at 653–54. Arguing that "[t]ime has not been kind" to Magill's claim of sufficient internal fragmentation, Katyal advocates for a more robust system of internal checks to constrain federal executive power. Katyal, *supra* note 17, at 2322 n.21.

147. See *supra* notes 102–108 and accompanying text.

148. See generally Ackerman, *We the People*, *supra* note 15, at 183–86 (describing how each branch of federal government represents the people in a different way and disputes among branches thus emphasize problematic nature of each branch's effort to speak for the people).

149. See, e.g., Marc Lacey, *Injunction on Arizona Is Upheld: Appeals Court Rules in Immigration Case*, N.Y. Times, Apr. 12, 2011, at A12 ("This battle is a battle of epic proportions . . . about a state's right to enforce the laws of this land . . .") (quoting Arizona State Senator Russell K. Pearce)).

separation of powers”—the recursive reproduction of separation of powers values within the executive’s domain—is possible precisely because the administrative domain has expanded to include the states as well as the federal executive.

The fact that states provide a check on federal executive power because of the growth of the federal executive branch highlights that there is another story here, too, one about federalism rather than the separation of powers. The rise of the executive branch is closely related to the shift of authority from the states to the federal government: State powers assumed by the federal government have enlarged the federal executive’s scope of activity.<sup>150</sup> But as the federal government has sought to exercise its magnified authority, it has turned to the states as necessary administrators of federal law. States may have lost much of their authority as separate sovereigns since the New Deal, but they have gained authority as administrators of federal law. Although this Article focuses on the separation of powers, the account of federalism as a safeguard of the separation of powers thus complicates not only the narrative of the rise of the executive branch, but also the narrative of the rise of federal over state authority. State power may have been transformed, more than lost, as the federal government has grown.<sup>151</sup>

### B. *Partisanship as a Check*

Cooperative federalism schemes also represent a practical response to the rise of executive power in that they harness the strength of political parties to generate a continual check on the federal executive.

An important strand of recent separation of powers scholarship be-  
moans the way in which partisan politics has eclipsed the branches as  
such in channeling political competition.<sup>152</sup> In particular, commentators  
worry that when a single party controls Congress and the presidency, inter-  
branch competition dissipates and, among other things, there is no  
meaningful check on the executive. Those concerned about the party  
substitute for powers regard polarized and cohesive political parties as a  
particular threat and have put forward proposals to prevent strong parties  
from taking hold.<sup>153</sup> But cooperative federalism may be a more practical  
way to stimulate competition because it follows from strong parties in-  
stead of resisting them.

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150. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) (“Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity.”).

151. See generally Bulman-Pozen & Gerken, *supra* note 5 (exploring how cooperative federalism schemes may further values traditionally associated with sovereignty model of federalism).

152. See *supra* notes 30–33 and accompanying text.

153. See Levinson & Pildes, *supra* note 30, at 2379–85 (suggesting strategies such as ending safe districts and making greater use of open primaries).

Simply put, there will never be party unity between the federal executive and all fifty states.<sup>154</sup> Just as political parties have overwhelmed branch affiliation, so too have they overwhelmed the state versus national affiliation of politicians.<sup>155</sup> Because there will never be unified party government between the federal executive and all of the states, however, the rise of partisanship does not have the same consequences for the separation of powers and federalism. They may be motivated by partisanship more than a commitment to state authority, but at least some states can nonetheless be counted on to disagree with federal policy.<sup>156</sup> Even in times of unified federal government, that is, partisan rivalry should lead Republican-dominated states to challenge decisions of Democratic administrations, and vice versa.<sup>157</sup> For example, a Democratic state legislature pushed to regulate greenhouse gas emissions pursuant to the Clean Air Act when a Republican administration refused to do so, and a state controlled by a Republican legislature and executive has leveled the primary challenge to immigration policy pursued by a Democratic administration.

Cooperative federalism may usefully check the federal executive not only in times of unified federal government, but also in times of divided government. One might object that this takes the logic of checking too far. Perhaps, that is, administrative competition is a second-best option when party unity has dampened interbranch competition, but when there is already party-based competition between the federal legislative and executive branches, we should not layer on administrative competi-

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154. This may be due to more than the fact of fifty states with varying constituencies, as there is a historical pattern of backlash against the President's party in state midterm legislative and gubernatorial elections. Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 *Yale L.J.* 2611, 2621 (2006) (citing sources).

155. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215, 219 (2000) [hereinafter *Kramer, Putting the Politics Back*] ("Party politics . . . complicated what the Founders had erroneously assumed would be a permanent and natural antagonism between state and national politicians. Within less than a decade, cross-system connections established through the incipient parties rendered the state governments unreliable watchdogs over federal activity.").

156. Indeed, *Kramer's* example of how parties quickly rendered states unreliable watchdogs, *id.*, shows that two states, Virginia and Kentucky, led the fight against the Alien and Sedition Acts, even though the remaining states did not join the cause because they were controlled by Federalists. *Id.* at 275.

157. Cf. *Barkow*, *supra* note 157, at 57 ("[T]he fifty state AGs will undoubtedly represent different parties, so even if an administration is in power that is partial to business interests, there is likely an AG of the opposite party who is more sympathetic to consumer claims."); Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, *Publius*, Spring 2003, at 37–38, 40 (observing partisan differences in state AG behavior). Insofar as cooperative federalism schemes seize simultaneously on the power of partisanship and the power of administration, they might therefore be considered a merger of two proposed institutional responses to unified federal government: creating minority opposition rights within the bureaucracy. See *Levinson & Pildes*, *supra* note 30, at 2368–79 (proposing minority opposition rights and insulated bureaucracy).

tion. While state challenges present costs that should not be overlooked, there are two reasons to think that they can be salutary even in times of divided government.

First, one effect of the extreme competition that manifests in times of party division, gridlock, may push the executive to rely on broad delegations that remain in effect from prior Congresses. While it may ramp up legislative oversight, “Congress will have limited recourse against an opposite-party executive empowered by broad delegations.”<sup>158</sup> But states may have recourse. As discussed above,<sup>159</sup> a particular benefit of cooperative federalism schemes is that they foster competition even when—perhaps especially when—the executive relies on open-ended grants of authority. Including states within federal schemes thus furnishes a check on the executive when it relies on outstanding delegations the current Congress would curtail if it could.

Second, to the extent there is competition around administration between the legislative and executive branches in times of divided government, state-federal disagreements may look quite different. When government divides, congressional oversight will often take the form of broad-gauged, rhetorical battles designed to win political points, not fine-grained disputes about policy details. When state and federal administrators disagree about how to execute federal law, their competition may assume a more practical cast, focusing on the sorts of interstitial questions that disputes between Congress and the federal executive elide.

Cooperative federalism schemes may be a particularly realistic response to the rise of executive power not only because such schemes seize on the power of partisanship to check the executive, but also because strong political parties should be a boon to such schemes themselves. As Larry Kramer has argued, the party ties that bind state and federal politicians may make members of Congress more sensitive to state prerogatives.<sup>160</sup> On Kramer’s account, the role political parties play in building relationships among politicians is what matters: Democratic Congresspersons may be inclined to protect state prerogatives because of their relationships with state Democratic parties, and Republican Congresspersons because of their relationships with state Republican parties, but this should in the aggregate lead Congress to attend to state prerogatives. If this is so, party politics may safeguard not only state autonomy, but also states’ role in administering federal law. To the extent state politicians want to administer portions of federal law, that is, their connections to federal legislators should help insure they are included in federal schemes. And the stronger the parties, the stronger these connections between state and federal politicians should be, leading to coopera-

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158. Levinson & Pildes, *supra* note 30, at 2359–60.

159. See *supra* notes 102–108 and accompanying text.

160. Kramer, *Putting the Politics Back*, *supra* note 155, at 278–87.

tive federalism schemes that, in turn, introduce a check on the federal executive into the administration of federal law.

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Political parties channel not only competition but also cooperation. The fact that all fifty states will never be controlled by a single political party thus suggests that, at any given time, the federal executive may forge partisan alliances with the states as well as face partisan resistance from them. This point calls attention to a broader one that cuts to the heart of the argument of this Article. Cooperative federalism schemes may, in some instances, not check federal executive power but enhance it. States and the federal executive may collaborate rather than compete. Sometimes, they may even collude to challenge congressional authority.

In focusing on an overlooked way in which cooperative federalism schemes advance the separation of powers, this Article does not seek to deny such cross-cutting tendencies, which merit further exploration. Yet even as the above discussion of partisanship suggests ways that cooperative federalism schemes might enhance federal executive power, it also underscores why they should never just do that. To the extent the federal executive is able to find allies among the states, it will also find opponents. And, for one concerned about the already-significant power of the federal executive, the opponents should weigh in the balance more than the allies.

More generally, cooperative federalism schemes should reliably generate a check on the federal executive because of the diversity of actors they incorporate. States have different interests and constituencies both from the federal executive branch and from each other. Cooperative federalism thus yokes the laboratory aspect of federalism to the administration of federal law, generating variegated competition regarding how federal law is executed.<sup>161</sup>

#### CONCLUSION

States, this Article argues, check the exercise of federal executive power in an era of expansive executive power, and they do so as champions of Congress, both relying on congressionally conferred authority and casting themselves as Congress's faithful agents. When they disagree with the federal executive about how to administer federal law, states force attention back to the underlying statute: Contending that their view is consistent with Congress's purposes, states compel the federal executive

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161. Cf. Susan Rose-Ackerman, *Risk-Taking and Reelection: Does Federalism Promote Innovation?*, 9 *J. Legal Stud.* 593, 614–16 (1980) (suggesting states are generally unlikely to innovate but cooperative federalism makes innovation somewhat more likely); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 923–26 (1994) (arguing most significant state experimentation in recent years has been organized by national government).

to respond in kind. In addition, states may reinvigorate horizontal checks by calling on the courts or Congress as allies. State administration of federal law may be a particularly realistic means of checking federal executive power because instead of fighting problems commentators emphasize—a vast administrative state, broad delegations to the executive branch, and powerful political parties—cooperative federalism harnesses these realities to further separation of powers objectives.

Because cooperative federalism has been largely overlooked as a means of safeguarding the separation of powers, additional descriptive and normative work remains to be done to develop a full-fledged theory. Perhaps most important, this Article explores how states check the federal executive while advancing congressional authority, but this is not the only way cooperative federalism schemes may influence the separation of powers. Additional attention to the varied ways state administration of federal law affects the components of the federal government—in particular, ways cooperative federalism schemes may enhance federal executive power—will help to develop the theory and to illustrate its limits.

Moreover, this Article focuses on checks and balances, in the form of competition among government actors, but further attention to other separation of powers values is warranted. Some such values, such as energy and efficiency, pose tradeoffs with the values identified here and may be threatened, rather than advanced, by cooperative federalism schemes. Other separation of powers values may be furthered in quite different respects by state administration of federal law. For instance, cooperative federalism schemes may usefully advance the formal separation of particular powers. While it is commonplace to assert that the power to make the law must be separated from the power to execute it,<sup>162</sup> the rise of federal agencies with policymaking and execution authority poses a well-recognized challenge to this tenet. Some cooperative federalism schemes may assign policymaking, a variant of lawmaking, to the federal executive branch and execution to the states, thereby advancing a more robust separation between these two functions than is possible in the federal executive branch alone.<sup>163</sup>

Other cooperative federalism schemes may advance a different vision of separated powers by restoring the role of legislators, rather than executive branch actors, as policymakers. One argument for separating powers

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162. See, e.g., Ackerman, *New Separation*, *supra* note 30, at 689 (“The power to make laws must be separated from the power to implement them. If politicians are allowed to breach this barrier, the result will be tyranny. Although we may pretty this conclusion up with a citation from Madison or Montesquieu, it is simple common sense.”).

163. For instance, the nation’s major environmental statutes charge the EPA with establishing pollution standards—a type of policymaking we might consider analogous to lawmaking—but states then craft implementation plans and administer these standards. 33 U.S.C. §§ 1316, 1318(c), 1342 (2006); 42 U.S.C. §§ 7409–7411 (2006). Similarly some conditional grant schemes contemplate that the states will distribute benefits pursuant to regulations issued by federal agencies. E.g., 42 U.S.C. § 1396a(a) (providing for state distribution of Medicaid benefits).

by function rather than some other criterion<sup>164</sup> is that certain types of powers are best matched with certain types of decisionmakers.<sup>165</sup> But such normative matchmaking sits uneasily with the rise of the administrative state and the executive's attendant role in policymaking. In some cases, cooperative federalism may restore legislative control over policymaking—in the form of state legislation.<sup>166</sup> While state legislatures are not Congress, if one is concerned about particular kinds of decisionmakers making particular kinds of decisions, state legislators may serve as well as federal ones. Especially insofar as one is concerned about the relative power of the popular constituencies represented by each branch of the federal government,<sup>167</sup> state legislatures may be a good stand-in for Congress, perhaps better than the real thing.

The theory of federalism as a safeguard of the separation of powers should also move beyond a two-branch theory. This Article treats courts as arbiters of separation of powers contests involving the legislative and executive branches, but the judiciary is of course a constitutional branch in its own right. How might further attention to the judiciary complicate or reinforce the theory offered here?<sup>168</sup> An integrated approach to federalism and the separation of powers also presents a rich opportunity for

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164. For instance, authority could be divided not by function but by subject matter. See Jacob E. Gersen, *Unbundled Powers*, 96 Va. L. Rev. 301, 304 (2010) (comparing separation of functions to “the ‘unbundled powers alternative’: Multiple branches exercising combined functions in topically limited domains”).

165. Legislative power may be entrusted to Congress so that policy is set by a deliberative body whose members are subject to frequent and staggered election cycles that make them responsive to the people; executive power may be vested in the President to further unified, efficient administration by an elected officer; and judicial power may be granted to judges who have lifetime tenure and salary protections to ensure their independence. David P. Currie, *The Distribution of Powers After Bowsher*, 1986 Sup. Ct. Rev. 19, 19.

166. For instance, California's legislature directed state regulation of greenhouse gas emissions pursuant to the Clean Air Act, Cal. Health & Safety Code § 43018.5 (West 2006), precisely the sort of controversial, norm-setting type of decision that critics of the administrative state argue should be made by deliberative, democratically responsive legislators.

167. See Nourse, *supra* note 141, at 766 (arguing separation of powers questions must be understood in terms of the relative power of the popular constituencies represented by the three branches of government); see also *Clinton v. New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised.”).

168. For an interesting suggestion about the relationship between federalism and separation of powers focused on the judiciary, see A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 Nw. U. L. Rev. 1346, 1357 (1994). Froomkin argues that “[c]ongressional weakening of federal courts means that the state courts gain, not Congress itself, and the balance of power among the branches is only tilted, not destroyed”; thus “federalism works to support the balance of power among the branches.” *Id.*



comparative scholarship<sup>169</sup> and for analysis of the relationship between cooperative federalism and state separation of powers.<sup>170</sup>

While there is thus much more work to be done, this Article represents a first step toward developing an integrated account of federalism and the separation of powers. And there is good reason to expect the role this Article posits for federalism in safeguarding the separation of powers will continue to grow. The more Congress tasks the federal executive with accomplishing, the more likely it is also to grant the states a role in administering federal law. For instance, the most ambitious statutes enacted during President Obama's tenure—the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act—give important roles to both the federal executive and the states.<sup>171</sup> The theory of federalism as a safeguard of the separation of powers thus may not only shed new light on a feature of our current constitutional landscape, but also provide a tool for understanding and evaluating the most important laws of the twenty-first century.

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169. Cf. Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 173 (2001) (comparing federalism in United States and Germany).

170. E.g., Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 *Wm. & Mary L. Rev.* 1343 (2005) (considering state separation of powers issues arising in cooperative federalism schemes); cf. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures' Control*, 97 *Mich. L. Rev.* 1201, 1202 (1999) (exploring whether federal law may delegate power to state institutions against will of state legislature).

171. Among other things, the Patient Protection and Affordable Care Act gives both states and the federal executive authority to establish high-risk health insurance pools and exchanges through which individuals and small businesses may purchase insurance. Pub. L. No. 111-148, §§ 1101, 1311, 1321, 124 Stat. 119, 141–143, 173–179, 186 (2010) (to be codified at 42 U.S.C. §§ 18001, 18031, 18041). See generally Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *Yale L.J.* 534 (2011) (exploring how Congress uses state implementers to entrench new national programs, and focusing on the Patient Protection and Affordable Care Act). The Dodd-Frank Act, among other things, grants states the authority to enforce certain regulations promulgated by the Consumer Financial Protection Bureau against national banks or federal savings institutions. Pub. L. No. 111-203, § 1042(a)(2), 124 Stat. 1376, 2012–14 (2010) (to be codified at 12 U.S.C. § 5552).