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Preemption and Commandeering Without Congress

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ESSAY

Preemption and Commandeering Without Congress

Jessica Bulman-Pozen*

Abstract. In a time of polarization, states may introduce salutary pluralism into an executive-dominated regime. With partisan divisions sidelining Congress, states are at once principal implementers and principal opponents of presidential policies. As polarization makes states more central to national policymaking, however, it also poses new threats to their ability to act. This Essay cautions against recent efforts to preempt state control over state officials and to require states to follow other states' policies, using sanctuary jurisdictions and the pending federal Concealed Carry Reciprocity Act as examples.

* Professor of Law, Columbia Law School. My thanks to Olati Johnson, Gillian Metzger, and David Pozen; to the editors of the *Stanford Law Review*; and to students in Columbia's Constitutional Governance Practicum, especially Yasmin Dagne, Zach Freund, Eve Levin, and Joe Margolies.

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Introduction

Contemporary political polarization has marginalized Congress in shaping domestic policy. Hyperpartisanship yields gridlock, particularly though not exclusively under conditions of divided government, and “gridlock makes alternative modes of policy making more attractive by shifting power away from Congress and toward the president and courts.”¹ Accounts of the Obama and Trump Administrations are rife with claims of unilateral executive action, sometimes but not always checked by the federal judiciary.

These accounts tend to ignore the states. Although “the inability to get policy through Congress leads presidents to engage in unilateral action,”² such action is often not so much truly unilateral as joined with state action. When presidents want to achieve durable policy change without Congress, they work together with ideologically aligned states. And as they do so, they are resisted by ideologically opposed states. In an age of polarization, states are at once principal implementers and leading opponents of federal executive policy. Many executive orders, rules, guidance documents, and enforcement decisions are thus better regarded as multilateral, not unilateral, undertakings.

Consider, for instance, one of the most salient and controversial issues in U.S. politics today: immigration. From seeking to strip funding from sanctuary jurisdictions, to rescinding Deferred Action for Childhood Arrivals (DACA), to increasing raids and arrests, the Trump Administration has acted unilaterally, insofar as this means without Congress. But such executive action has significantly involved the states. Red states have assisted the federal executive branch by mandating cooperation with U.S. Immigration and Customs Enforcement (ICE) and enforcing federal immigration laws more stringently within their borders. Blue states have been forceful opponents of President Trump’s policies, suing to enjoin executive decisions and adopting their own laws to furnish protection for undocumented immigrants. These varied state policies mean that federal immigration enforcement looks different across the country as it is shaped by the interaction of federal executive and state policies. It has nearly nothing to do with Congress.

Drawing on immigration and other domestic policy areas, this Essay argues that we should shift much of our focus from the national legislature to the fifty states. The “without Congress” descriptor in the title is, of course, hyperbolic. Congress retains its powers and might be invigorated by bipartisan concerns about President Trump’s autocratic demagoguery (although partisan loyalty is thus far eclipsing such concerns). Moreover, Article I of the U.S.

1. See Nathaniel Persily, *Introduction* to SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 3, 8 (Nathaniel Persily ed., 2015).

2. *Id.*

Constitution looms over all domestic policymaking: Even when Congress does not enact a new law, the President and the states alike purport to be advancing prior legislative decisions, not flouting or ignoring them. But if we focus on Congress at the expense of the states, we miss critical dimensions of contemporary national policymaking.

After describing how states both effectuate and challenge federal executive policy, this Essay addresses novel threats to these state roles. Using immigration federalism as an example, I ask where preemption stops and commandeering begins when the federal government seeks to achieve its ends by removing state officials from the state's control. Looking to proposed firearms legislation, I consider federal efforts to displace state law by requiring states to defer to other states' policies. Such attempts to preempt allocations of authority within and among the states are inconsistent with core federalism principles. They raise particular concerns in an era of polarization when state policymaking capacity is critical to national governance.

I. Partisan, Executive Federalism

It is a commonplace among scholars of the separation of powers and administrative law that the President has eclipsed Congress in setting national policy.³ Presidential dominance predates today's resurgent polarization, but it has been fueled by hyperpartisanship that impedes congressional action, integrates the President and the administrative apparatus, and renders the populace more impatient for presidential results. President Obama sloganized (and reinforced) a popular understanding when his "We Can't Wait" speech suggested that the American people should not have to "wait for an increasingly dysfunctional Congress to do its job."⁴ Although President Trump currently enjoys a unified Republican government, he too has embraced unilateral executive action. Moreover, even when periods of unified government yield substantial legislation, the lengthy, complex statutes that

3. See generally PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953 (2015).

4. See Remarks in Las Vegas, Nevada, 2011 DAILY COMP. PRES. DOC. NO. 00787, at 1 (Oct. 24, 2011), <https://perma.cc/KT8V-RPAD>; see also Kenneth S. Lowande & Sidney M. Milkis, "We Can't Wait": Barack Obama, Partisan Polarization and the Administrative Presidency, 12 FORUM 3, 4 (2014) (arguing that President Obama's "public celebration of unilateralism is emblematic of a far-reaching development within the presidency and American politics: the rise of an executive centered party-system").

almost invariably arise—such as those of the first two years of the Obama Administration⁵—demand significant policymaking by the executive branch with little hope of congressional revision.⁶

The same political polarization that has fueled executive unilateralism in Washington, D.C. has also more thoroughly integrated the states into such executive policymaking. Partisan ties extend across the state-federal divide, so state and federal officials readily recognize one another as allies, and states may furnish policymaking or enforcement capacity or democratic legitimacy that federal executive action lacks. Faced with a hostile Congress after his first two years in office, President Obama worked with a subset of states to advance some of his central policy initiatives, including climate change regulation and expanded healthcare coverage. The Trump Administration is now seeking to roll back President Obama's achievements and further its own agenda through state-dependent executive action. At the same time, today's national political parties mean that presidents find in statehouses not only allies but also fierce partisan opponents. And just as states are in a unique position to facilitate executive branch policymaking, they are also well situated to challenge federal executive action by filing lawsuits, adopting their own laws, withholding administrative cooperation, and more. Recent developments with respect to environmental regulation, healthcare, and immigration illustrate these dynamics of partisan, executive federalism.⁷

A. Environmental Protection

Despite a particular push at the beginning of the Obama Administration, Congress has not adopted legislation to address climate change. The 1970 Clean Air Act, most recently amended in 1990, remains the most pertinent federal law even though it was passed well before climate change was a national

5. See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

6. See generally Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (considering some consequences of aging statutes for administrative law); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2015) (considering some consequences of aging statutes and “hyper-legislation” for administrative law).

7. The discussion in this Part builds on and updates my lengthier discussions of the partisan and executive-focused nature of contemporary federalism in Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 976-93 (2016) [hereinafter Bulman-Pozen, *Executive Federalism*], and Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1096-108 (2014).

concern.⁸ In response to congressional inaction, the Environmental Protection Agency (EPA) under President Obama adopted rules concerning greenhouse gas emissions, including the Clean Power Plan for power plants and the Tailpipe Rule for automobiles.⁹ In part because these rules relied on the sometimes awkwardly fitting Clean Air Act, they were criticized as instances of executive branch overreach. But the rules also underscored the role of the states in such executive policymaking. Anticipating the Clean Power Plan, President Obama instructed the EPA to adopt a regulatory program that “direct[ly] engage[d] with States, as they will play a central role in establishing and implementing standards for existing power plants.”¹⁰ The resulting plan was “designed to build on and reinforce progress by states,” including California and the northeastern participants in the Regional Greenhouse Gas Initiative (RGGI).¹¹ The Clean Power Plan, in turn, established different emissions targets for each state, based in part on past state policy choices, and gave states a degree of flexibility in determining how to meet those targets.¹²

The states fractured in predictable fashion. A group of Republican state attorneys general sued the EPA, while Democratic states—as well as some blue cities in red states—that were already pursuing their own emissions reduction strategies defended the plan.¹³ The litigation is now being held in abeyance following the EPA’s proposal to repeal the plan at President Trump’s urging.¹⁴ In the meantime, however, the EPA Administrator has cited the pending

8. See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

9. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. §§ 60.5700-.5880 (2017)); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (codified as amended in scattered sections of 40 and 49 C.F.R.).

10. See Memorandum on Power Sector Carbon Pollution Standards, 2013 DAILY COMP. PRES. DOC. NO. 00457, § 1(c)(i) (June 25, 2013), <https://perma.cc/J793-Q8P3>.

11. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,665; see also *id.* at 64,725, 64,733 n.380.

12. See *id.* at 64,665, 64,736, 64,815, 64,888-89.

13. Compare Opening Brief of Petitioners on Core Legal Issues at i, *West Virginia v. U.S. EPA*, No. 15-1363 (D.C. Cir. Feb. 19, 2016), with Brief for State and Municipal Intervenor in Support of Respondents by the State of New York et al. at 36-40, *West Virginia*, No. 15-1363 (D.C. Cir. Apr. 22, 2016), 2016 WL 1614423.

14. See Order, *West Virginia*, No. 15-1363 (D.C. Cir. Mar. 1, 2018); Exec. Order No. 13,783, § 4, 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017); Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (proposed Oct. 16, 2017).

litigation to instruct states that they need not comply with the federal rule.¹⁵ Governors of states that sued the EPA under President Obama appear happy to cooperate with the EPA in undermining the rule.¹⁶ But those states that supported the federal rule are now preparing to assume a new role: suing the Administration to defend the Clean Power Plan.¹⁷

Likely more important, these states are also continuing to pursue the emissions reduction strategies contemplated by the Clean Power Plan. Beyond the efforts themselves (many of which, like those by the California Air Resources Board and RGGI, predate and inform the Clean Power Plan), state actors also describe themselves as “taking up the mantle of climate leadership.”¹⁸ The mantle is a familiar one; during the George W. Bush Administration, it was likewise Democratic states that pursued climate change regulation while the federal government declined to act.¹⁹ These state actions and ensuing negotiations between the Obama Administration and state regulators laid groundwork for subsequent federal rules.

Although the regulation of greenhouse gas emissions remains an ongoing project, the key actors have stayed consistent for decades: The federal executive branch and the states, with the courts as sometimes referee, determine the contours of national policy. Congress remains on the sidelines.

B. Healthcare

With respect to healthcare, too, negotiations between the federal executive branch and the states have critically shaped national policy. In contrast to climate change, there is a recent federal law: The Patient Protection and Affordable Care Act (ACA) was enacted in 2010, while Democrats enjoyed unified party government.²⁰ Soon after the law’s passage, however, and before the Supreme Court rendered its Medicaid expansion optional for states, Republicans regained control of the House, putting a legislative response to the

15. *See, e.g.*, Letter from E. Scott Pruitt, Adm’r, U.S. EPA, to Matt Bevin, Governor of Ky. (Mar. 30, 2017), <https://perma.cc/S45L-FVHP>.

16. *See, e.g.*, Letter from Greg Abbott, Governor of Tex., et al. to Scott Pruitt, Adm’r, U.S. EPA 1 (Apr. 26, 2018), <https://perma.cc/W6Y3-YPRC>.

17. *See, e.g.*, Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman on Clean Power Plan: I Will Sue to Stop Repeal (Oct. 9, 2017), <https://perma.cc/7VGW-HXUU>.

18. *See States & Tribes, WE ARE STILL IN*, <https://perma.cc/5ZPT-8WCE> (archived May 2, 2018).

19. *See, e.g.*, JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., RL 33812, CLIMATE CHANGE: ACTION BY STATES TO ADDRESS GREENHOUSE GAS EMISSIONS 6-8 (2007).

20. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code); *see also Congress Profiles: 111th Congress (2009-2011)*, HIST. ART & ARCHIVES, <https://perma.cc/2TSR-99J9> (archived May 8, 2018).

National Federation of Independent Business v. Sebelius (NFIB) ruling, as well as legislative fixes to the law more generally, off the table.²¹ For the last five years, healthcare policy, like climate change policy, has been shaped principally by cooperation and contestation between the federal executive branch and different groups of states.

In particular, under the Obama Administration, 31 states expanded Medicaid, while 19 did not.²² The pattern was highly partisan: Blue states tended to adopt the expansion, while red states refused.²³ Yet negotiations between federal and state executives yielded some notable departures from the pattern. The Obama Administration approved waivers to facilitate Medicaid expansion in states with Republican governors, including Indiana, Iowa, and Michigan.²⁴ A degree of federal executive branch deference to state interests also yielded several different approaches to health insurance exchanges and to the definition of essential benefits under the law.²⁵ Meanwhile, a coalition of Republican state attorneys general challenged many aspects of the ACA and its implementation (while Democratic states took the federal government's side).²⁶

Despite unified Republican government, federal executive action in conjunction with the states has remained the principal force transforming the law during the Trump Administration. Congress did repeal the individual mandate as part of the December 2017 tax law,²⁷ but other legislative efforts to repeal or transform the ACA have foundered.²⁸ As the EPA was sending "Dear Governor" letters about the Clean Power Plan, however, the Department of Health and Human Services was sending its own letters encouraging states to

21. See Carl Hulse, *Taking Control, G.O.P. Overhauls Rules in House*, N.Y. TIMES (Jan. 5, 2011), <https://perma.cc/6QGV-SZS3>; see also *Nat'l Fed'n Indep. Bus. v. Sebelius* (NFIB), 567 U.S. 519 (2012).

22. See *Status of State Action on the Medicaid Expansion Decision*, KAISER FAM. FOUND., <https://perma.cc/W9TU-CZJP> (archived May 2, 2018). Maine has since adopted the expansion through a November 2017 ballot initiative. *Id.*

23. See *id.*

24. See *id.*; see also Shanna Rose, *Opting In, Opting Out: The Politics of State Medicaid Expansion*, 13 FORUM 63, 66 tbl.1 (2015).

25. See Bulman-Pozen, *Executive Federalism*, *supra* note 7, at 976-79, 995, 1003-05. See generally Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Health Care For?*, 70 STAN. L. REV. 1689 (2018) (discussing federal-state negotiations around the Medicaid expansion and health insurance exchanges).

26. Compare, e.g., Brief of the States of Oklahoma et al. as Amici Curiae Supporting Petitioners at 1-2, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2014 WL 7463546, with Brief of the Commonwealth of Virginia et al. as Amici Curiae in Support of Affirmance at 1-2, *King*, 135 S. Ct. 2480, 2015 WL 412333.

27. See H.R. 1, 115th Cong. § 11081 (2017) (enacted) (to be codified at I.R.C. § 5000A).

28. See, e.g., MJ Lee & Lauren Fox, *Bruised Republicans Regroup After Obamacare Repeal Fail*, CNN (updated Sept. 27, 2017, 9:10 AM ET), <https://perma.cc/ZA5P-S2D2>.

seek Medicaid waivers that would depart from the expansion-focused goals of the Obama Administration in favor of alternative approaches, such as including work requirements as a condition of eligibility.²⁹ The Trump Administration granted the first such waiver to Kentucky in January and has since approved work requirements in Arkansas, Indiana, and New Hampshire.³⁰ It has also approved state innovation waivers for Alaska, Minnesota, and Oregon,³¹ following a separate “Dear Governor” letter.³² In addition, the Administration has adopted a rule to further delegate to states determinations about essential health benefits. While the Obama Administration initiated a role for the states by giving them a set of options from which to choose, the Trump Administration would give states virtually unconstrained choice, including allowing them to adopt other states’ benchmarks as their own.³³

As the federal executive branch is seeking to transform healthcare policy through state cooperation, it is again being met with opposition from states that have emerged as some of the ACA’s leading defenders. For instance, when the Trump Administration announced that it would cut off cost-sharing payments, Democratic attorneys general for eighteen states and the District of Columbia immediately sued.³⁴ States have also challenged two rules that would

29. See Letter from Thomas E. Price, Sec’y, and Seema Verma, CMS Adm’r, U.S. Dep’t of Health & Human Servs., to Governor 2 (Mar. 14, 2017), <https://perma.cc/5Q6Q-3B79> (“It is our intent to use existing Section 1115 demonstration authority to review and approve meritorious innovations that build on the human dignity that comes with training, employment and independence.”).

30. See MaryBeth Musumeci et al., *The Henry J. Kaiser Family Found., Approved Changes to Medicaid in Kentucky* (2018), <https://perma.cc/GYP2-BPLE>. Kentucky had implemented a traditional Medicaid expansion in 2014 but is now seeking to transform its program under Governor Matt Bevin. See *id.*

31. See *Medicaid Waiver Tracker: Which States Have Approved and Pending Section 1115 Medicaid Waivers?*, KAISER FAM. FOUND. (May 8, 2018), <https://perma.cc/QU9Q-PVAT> (to locate, select “View the live page,” then select “Work Requirements” from the drop-down menu); *Section 1332: State Innovation Waivers*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://perma.cc/QP4D-EXAU> (listing state waivers under section 1332 of the ACA, which took effect on January 1, 2017); see also 42 U.S.C. § 18052 (2016) (providing for waivers for state innovation with respect to health insurance coverage). Hawaii received such a waiver on December 30, 2016. See *Section 1332: State Innovation Waivers, supra*.

32. Letter from Thomas E. Price, Sec’y, U.S. Dep’t of Health & Human Servs., to Governor (Mar. 13, 2017), <https://perma.cc/HK95-CE7X> (inviting section 1332 waivers).

33. *Compare Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation*, 78 Fed. Reg. 12,834, 12,866 (Feb. 25, 2013) (codified as amended at 45 C.F.R. § 156.100 (2017)), with HHS Notice of Benefit and Payment Parameters for 2019, 83 Fed. Reg. 16,930, 17,068-69 (Apr. 17, 2018) (to be codified at 45 C.F.R. §§ 156.100, .111).

34. See Plaintiffs’ Memorandum of Points and Authorities in Support of Ex Parte Motion for a Temporary Restraining Order and Order to Show Cause Why a Preliminary
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allow employers to exclude contraception from their insurance plans.³⁵ Moreover, blue states have introduced their own legislation to codify certain aspects of the ACA as a matter of state law in the event of repeal.³⁶ For healthcare, as for the environment, policy is being dictated by the federal executive branch and the states.

C. Immigration

Recent immigration policy is strongly associated with unilateral executive power. Notwithstanding repeated efforts, Congress has failed to enact comprehensive immigration reform in the twenty-first century, and presidents have sought to alter immigration policy on their own.³⁷ The Obama Administration adopted DACA and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—programs that would shield Dreamers and parents of U.S. citizens or lawful permanent residents from removal and permit them to work—through Department of Homeland Security guidance documents, after President Obama promised to “fix as much of our immigration system as I can on my own, without Congress.”³⁸ DAPA was enjoined following a lawsuit by Republican states, and President Trump has announced the rescission of DACA.³⁹ He has also issued an executive order

Injunction Should Not Issue at 1, *California v. Trump*, 267 F. Supp. 3d 1119 (N.D. Cal. 2017) (No. 3:17-cv-05895-VC), 2017 WL 6016003.

35. See, e.g., Complaint for Declaratory and Injunctive Relief ¶ 1, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, No. 17-cv-11930-NMG, 2018 WL 1257762 (D. Mass. Mar. 12, 2018), 2017 WL 4466414.

36. See Press Release, N.Y. State Office of the Attorney Gen., On Eve of Trump Administration, A.G. Schneiderman Introduces Comprehensive Contraception Coverage Act—Protecting and Enhancing New Yorkers’ Access to Cost-Free Contraception, Particularly Vital in the Event of an Affordable Care Act Repeal (Jan. 11, 2017), <https://perma.cc/NM7J-GQHP>.

37. See generally Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015).

38. See Remarks on Immigration Reform, 2014 DAILY COMP. PRES. DOC. NO. 00504, at 2 (June 30, 2014), <https://perma.cc/C4FF-TM87>; Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., U.S. Dep’t of Homeland Sec., et al. (Nov. 20, 2014), <https://perma.cc/K89M-RZ4P>; Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., U.S. Dep’t of Homeland Sec., et al. (June 15, 2012), <https://perma.cc/9G5C-6CH5>.

39. See *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016); Statement on the Deferred Action for Childhood Arrivals Policy, 2017 DAILY COMP. PRES. DOC. NO. 00609, at 1 (Sept. 5, 2017), <https://perma.cc/2F7U-VALQ>.

calling for 10,000 additional immigration officers and purporting to strip funding from “sanctuary jurisdictions,” and ICE has increased arrests.⁴⁰

Although significant changes in immigration policy have been undertaken without Congress, states once again play a critical role. For example, most immigration enforcement during the Obama years—as before and since—depended on collaboration with the states because ICE relies on information in their possession. The Obama Administration changed some of the terms of this collaboration when it replaced the Secure Communities program with the Priority Enforcement Program, in part due to state objections.⁴¹ But the Priority Enforcement Program continued to propose state-federal cooperation in removing convicted felons and others who posed threats to public safety, and even states that had denounced Secure Communities worked with ICE on these priorities.⁴² At the same time, the Obama Administration largely succeeded in preempting state efforts to enforce federal immigration law in aggressive ways that departed from federal executive policy.⁴³

During the Trump Administration, states and localities have repeatedly challenged and thereby reshaped federal executive immigration enforcement decisions. They have sued to enjoin an executive order purporting to restrict federal funds for sanctuary jurisdictions⁴⁴ and the Department of Justice’s decision to impose new immigration enforcement conditions on certain law enforcement grants.⁴⁵ Democratic state attorneys general have also sued over

40. See Exec. Order No. 13,768, §§ 7, 9, 82 Fed. Reg. 8799, 8800-01 (Jan. 30, 2017); U.S. Immigration & Customs Enf’t, U.S. Dep’t of Homeland Sec., Fiscal Year 2017 ICE Enforcement and Removal Operations Report 2 (n.d.), <https://perma.cc/N2HB-BTRB>.

41. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, U.S. Dep’t of Homeland Sec., et al. 2-3 (Nov. 20, 2014), <https://perma.cc/MZ9D-YGCS>.

42. See *DHS Releases End of Fiscal Year 2015 Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 22, 2015), <https://perma.cc/M7EW-B48B> (detailing state participation); *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://perma.cc/5L3M-3TRX> (last updated June 22, 2017) (comparing the programs).

43. See, e.g., *Arizona v. United States*, 567 U.S. 387, 400-16 (2012) (holding that most of the challenged provisions of Arizona’s SB 1070 were preempted). For Arizona’s SB 1070, see Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of the Arizona Revised Statutes).

44. See, e.g., *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1201-02 (N.D. Cal. 2017) (enjoining the relevant provision of the executive order), *appeal docketed*, No. 17-17480 (9th Cir. Dec. 14, 2017).

45. See, e.g., *City of Chicago v. Sessions*, No. 17-2991, 2018 WL 1868327, at *1, *15 (7th Cir. Apr. 19, 2018) (affirming a preliminary injunction against some of the new conditions on a law enforcement grant); *City of Philadelphia v. Sessions*, No. 17-3894, 2017 WL 5489476, at *2-4 (E.D. Pa. Nov. 15, 2017) (granting a preliminary injunction preventing the federal government from denying a law enforcement grant to Philadelphia for its

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the rescission of DACA as well as over President Trump's several travel bans.⁴⁶

Outside the courts, states continue to adopt their own legislation with respect to immigration enforcement. In some jurisdictions, this legislation limits the federal executive's ability to maximally enforce federal immigration law, while in others it provides assistance to the federal executive branch. The clearest contrast appears in recent laws adopted by California and Texas.⁴⁷ Both statutes operate by limiting the discretion of state and local law enforcement, but if their tools are similar, their ends are diametrically opposed. Texas's SB 4 *requires* state and local officials to cooperate with ICE: It prohibits localities and universities from adopting policies that would limit the enforcement of immigration laws; mandates compliance with ICE's detainers; and imposes harsh penalties, including removal from office and imprisonment, for officials who violate the state law.⁴⁸ California's SB 54, by contrast, *restricts* state and local cooperation with ICE: It prohibits law enforcement officials from assisting federal immigration authorities in many instances, including with respect to certain information-sharing requests and detainers; limits the use of state resources for immigration enforcement purposes; and emphasizes the importance of trust between the immigrant community and government.⁴⁹

failure to comply with new immigration conditions), *appeal docketed*, No. 18-01103 (3d Cir. Jan. 18, 2018).

46. *See, e.g.*, *Hawaii v. Trump*, 859 F.3d 741, 755-57, 760 (9th Cir.) (per curiam) (affirming a district court's order preliminarily enjoining two sections of President Trump's second travel ban), *vacated as moot per curiam*, 138 S. Ct. 377 (2017); *Batalla Vidal v. Nielsen*, Nos. 16-CV-4756 (NGG) (JO) & 17-CV-5288 (NGG) (JO), 2018 WL 834074, at *1-3 (E.D.N.Y. Feb. 13, 2018) (preliminarily enjoining the rescission of DACA), *appeal docketed*, No. 18-488 (2d Cir. Feb. 20, 2018).
47. *See* Act of Oct. 5, 2017, ch. 495, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE §§ 7282-7282.5, 7284-7284.12 (West 2018)); Act of May 7, 2017, ch. 4, 2017 Tex. Gen. Laws 7 (codified in scattered sections of the Texas Codes). The United States recently challenged portions of California's law. *See* Complaint ¶¶ 1-3, 6-7, *United States v. California*, No. 2:18-cv-00490-JAM-KJN (E.D. Cal. Mar. 6, 2018), 2018 WL 1181625. The Fifth Circuit largely rejected a challenge to the Texas statute, vacating a district court's preliminary injunction except to the extent that it blocked a provision prohibiting officials from endorsing certain immigration policies. *See City of El Cenizo v. Texas*, No. 17-50762, 2018 WL 2121427, at *11, *16 (5th Cir. May 8, 2018).
48. *See* TEX. GOV'T CODE ANN. § 752.053 (West 2017), *invalidated in part by City of El Cenizo*, 2018 WL 2121427; *id.* § 752.0565; TEX. CODE CRIM. PROC. ANN. art. 2.251 (West 2017). Under Texas law, failure to comply with an immigration detainer is a Class A misdemeanor punishable by up to one year of imprisonment. *See* TEX. PENAL CODE § 39.07(a)-(b) (West 2017); *id.* § 12.21.
49. *See* CAL. GOV'T CODE §§ 7282.5, 7284.2(b)-(c), 7284.6. The statute permits law enforcement officers to transfer individuals if they have been convicted of certain crimes and to share information when individuals have been convicted of certain crimes or the information is available to the public. *See id.* §§ 7282.5(a), 7284.6(a).

These state laws mean that federal immigration enforcement will look different in different parts of the country, especially as other jurisdictions also adopt disparate approaches. This is not to deny the independent force of federal policy: The Trump Administration can increase raids, deport individuals, and terrorize families and communities without state or local assistance. But uncooperative states and localities make this more difficult while also offering an alternative political vision.

II. Preemption, Commandeering, and the Outsourcing of Coercion

Across a range of areas, including not only environmental regulation, healthcare, and immigration but also education, drug policy, consumer protection, and more, the federal executive branch and states together generate domestic policy. Given our polarized politics, the ability of states to advance different visions of national policy—some of which accord with federal executive priorities and some of which oppose them—may introduce salutary pluralism into an executive-dominated regime. I have offered the normative case elsewhere and do not reprise it here.⁵⁰ Beginning from the premise that there is value to state inputs into national policy, this Part considers some doctrinal questions that polarization pushes to the fore, with particular attention to novel threats to state initiative and policymaking capacity.

One such question has already received ample consideration: the power of the federal executive branch, rather than Congress, to preempt state law.⁵¹ The rise of the administrative state over the past century has directed attention to preemption that follows from agency regulations, guidance, enforcement decisions, and more.⁵² The Obama Administration's challenge to Arizona's SB 1070 immigration law, for example, turned in part on the preemptive scope of federal executive enforcement decisions.⁵³ The developments explored in

50. See Bulman-Pozen, *Executive Federalism*, *supra* note 7, at 993-1015.

51. See, e.g., Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 N.W. U. L. REV. 695, 698-99 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 N.W. U. L. REV. 727, 774-76 (2008); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2180 (2009); Ernest A. Young, *Executive Preemption*, 102 N.W. U. L. REV. 869, 870, 881 (2008).

52. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 567, 576-78 (2009) (declining to give preemptive effect to an agency preamble); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 865 (2000) (granting preemptive effect to a notice and comment rule).

53. See, e.g., Cox & Rodríguez, *supra* note 37, at 133 (arguing that *Arizona v. United States*, 567 U.S. 387 (2012), reflects the Court's view that "federal immigration law consists not only of the legislature's work, . . . but also of the enforcement choices the Executive makes"); Roderick M. Hills Jr., *Arizona v. United States: The Unitary Executive's Enforcement Discretion as a Limit on Federalism*, 2012 CATO SUP. CT. REV. 189, 202 ("The more persuasive basis for *Arizona's* preemption holdings was the Court's structural
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this Essay lend force to concerns about executive preemption: If state-federal conflict tends to be the basis for preemption, so too is a degree of conflict an indicator of healthy executive federalism. Because states may be furnishing diverse policy inputs that an absent Congress is not, there are substantial costs to allowing the federal executive to dismiss state policymaking outright, especially when the executive acts through less public and procedure-laden channels than notice and comment rulemaking.

Much as contemporary disputes may involve questions about the allocation of authority within the federal government—under what circumstances the federal executive branch rather than Congress can displace state law—they may also involve questions about the allocation of authority within and among the states. Here, preemption meets the prohibition on commandeering, which prevents the federal government from compelling states to enact or administer federal regulatory programs.⁵⁴ Commentators have long recognized the fraught relationship between preemption and commandeering. The prohibition on commandeering follows from structural and normative considerations that also attend federal preemption of state law,⁵⁵ and distinct framings may make a given federal law appear merely to be prohibiting a conflicting state action (preemption) or instead to be coercing a state to undertake a certain activity (commandeering). For example, does the federal Controlled Substances Act⁵⁶ preempt state decisions to legalize marijuana

presumption about the importance of executive discretion in the area of immigration law.”).

54. See *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 161, 188 (1992).
55. See, e.g., Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yeskey*, 1998 SUP. CT. REV. 71, 95-101 (arguing that the distinction between preemption and commandeering is poorly justified by values of constitutional federalism, including political community and the prevention of tyranny); see also Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1054-55 (1995) (“Commandeering precludes state officials from being directly and exclusively responsive to their constituency’s desires, but so does conventional preemption. . . . Prohibiting commandeering but not preemption in the name of securing the accountability of state government is simply arbitrary.”); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2201-02 (1998) (“Standard preemption . . . can obscure the causes of inaction by state officials. . . . Why, then, would commandeering be different?”); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1673 (2006) (“[P]reemption generally causes a greater compromise of federalism values than does commandeering.”).
56. See Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242-84 (1970) (codified as amended in scattered sections of the U.S. Code).

under state law, or would recognizing such scope for preemption in fact require states to enact or enforce a federal regulatory program?⁵⁷

As polarization shifts responsibility for national policymaking onto the states, some urgent variants of this preemption/commandeering puzzle turn on relationships within and among states themselves: May the federal government preempt state laws preventing state officials from carrying out federal regulatory programs? And may the federal government preempt state laws and policies by requiring states to adopt or enforce other states' laws and policies?

A. State Control over State Officials

Questions about commandeering and preemption with respect to state officials' responsibilities have emerged most prominently in the immigration context given federal reliance on state and local cooperation. A variety of states and cities—colloquially but imprecisely labeled “sanctuary” jurisdictions—have imposed restrictions on participation in federal immigration enforcement, including limiting officials' cooperation with detainers and sharing of confidential information. The California Values Act, included in SB 54, is a prime example.⁵⁸ In a pending challenge to that law (as well as to two other California laws concerning immigration enforcement), the Trump Administration has argued that state restrictions on cooperation with ICE conflict with federal law and are preempted.⁵⁹

As in any preemption dispute, the litigation will turn in part on interpretations of particular federal and state provisions, and the clear statement rule

57. Compare, e.g., Brief in Support of Motion for Leave to File Complaint at 11, *Nebraska v. Colorado*, 136 S. Ct. 1034 (2014) (No. 144 Original), 2014 WL 7474136 (arguing that Colorado's law legalizing marijuana is preempted because it “affirmatively authorizes conduct prohibited by federal law”), with Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1462 (2009) (arguing that preempting legalization of marijuana under state law would amount to proscribed commandeering).

The latter appears to be the better answer. Just as this Essay went to print, the Supreme Court held that a federal law that had prohibited state authorization and licensing of sports gambling violated the anticommandeering rule and rejected the federal government's argument that requiring states to refrain from enacting new legislation is meaningfully different from requiring states to enact legislation. See *Murphy v. NCAA*, Nos. 16-476 & 16-477, 2018 WL 2186168, at *13 (U.S. May 14, 2018).

58. See California Values Act, ch. 495, § 3, 2017 Cal. Stat. 3733, 3737-41 (codified at CAL. GOV'T CODE §§ 7284-7284.12 (West 2018)); *supra* notes 47-49 and accompanying text.

59. See Complaint, *supra* note 47, ¶¶ 51-59. The United States also challenges two statutes regulating private employers' cooperation with federal immigration officials and the inspection of immigration detention facilities. See *id.* ¶¶ 3-5. I do not address those laws here.

may further limit the need to address constitutional issues.⁶⁰ But this and other challenges to sanctuary policies also implicate broader questions about executive preemption and state control over state officials. Is the California Values Act preempted, or would the federal executive's interpretation impermissibly compel state participation in federal immigration enforcement? Where does preemption stop and commandeering begin when the federal government seeks to achieve its ends by interposing itself between a state and its officials?

I should be clear that there is a related issue this discussion brackets: Immigration laws like those of California and Texas involve questions of state power over their *subdivisions* as well as state control of state officers. There may be compelling reasons, consistent with the values of federalism, to recognize local autonomy and perhaps an attendant federal power to free local governments from state control.⁶¹ The same is not true of state officials and state control (or, for that matter, local officials and local control). State governance capacity depends on state officials being responsible to state government, as the Supreme Court has long recognized in placing the selection of state officials and the structuring of state government at the core of state power.⁶²

60. See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (“[I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’ (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)). For example, federal provisions governing the sharing of information by state and local officials refer only to the transmission of immigration status information; they do not mention the collection of such information in the first instance or the transmission of other information that the federal government may seek, such as an individual’s date of release from custody. See 8 U.S.C. §§ 1373, 1644 (2016).

61. See, e.g., *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985) (invalidating a state law interfering with local discretion to spend federal funds granted directly to localities); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (arguing for greater judicial scrutiny of state preemption of local regulation based on the value of local self-government); 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, 1205 (1999) (proposing a “presumption of institutional autonomy” that would maximize the ability of localities to spend federal funds without state supervision).

62. See, e.g., *Gregory*, 501 U.S. at 460 (“Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”); *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (opinion of Black., J.) (“No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.”); *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900) (“It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far

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The closest precedent on the question of federal attempts to effectuate a federal regulatory program by preempting state control over state officials—a *New York v. United States* commandeering challenge not about radioactive waste but instead about immigration⁶³—addresses the relationship between preemption and commandeering elliptically. That challenge considered the interaction of a New York City executive order, which prohibited city officers and employees from transmitting immigration status information to the federal government except in certain limited circumstances, and federal statutory provisions, which provided that state and local governments “may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”⁶⁴

Even as the Second Circuit left open ample space for workarounds (which have since been adopted)⁶⁵ and largely skirted the possibility of an information carveout from anticommandeering doctrine,⁶⁶ it suggested that the city could not prohibit voluntary cooperation between its officials and the federal government.⁶⁷ Adopting a familiar, if messy, distinction between federal laws that compel state activity (and thereby constitute commandeering) and those that merely compel state inactivity (and thereby validly preempt state law), the

as plainly provided by the Constitution of the United States.”); *see also* *New York v. United States*, 505 U.S. 144, 169 (1992) (“Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530-31, 556-57 (1985) (suggesting the persistence of certain affirmative limits on federal action affecting the states even while overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), and the “traditional governmental functions” test). *See generally* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (locating constitutional protection for state autonomy in the Guarantee Clause, U.S. CONST. art. IV, § 4, rather than the Tenth Amendment).

63. *See* *City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999).

64. *See id.* at 31-32, 32 n.3 (quoting Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 642, 110 Stat. 3009, 3009-707 (codified at 8 U.S.C. § 1373 (2016))).

65. *See id.* at 36 (suggesting that “a general policy that limits the disclosure of confidential information” might not be preempted); N.Y.C. Exec. Order No. 41, § 2 (Sept. 17, 2003), <https://perma.cc/322G-GNU5> (restricting disclosure of “confidential information”).

66. *See* *Printz v. United States*, 521 U.S. 898, 917-18 (1997) (noting that statutes that “require only the provision of information to the Federal Government . . . do not involve the precise issue before us here, which is the forced participation of the States’ executive in the actual administration of a federal program”).

67. *See* *City of New York*, 179 F.3d at 35.

court placed the federal law in question on the inactivity side of the line.⁶⁸ Given the posture of the case—a facial challenge brought by the city to federal law—the court reasoned that it did not have to “locate with precision the line between invalid federal measures that seek to impress state and local governments into the administration of federal programs and valid federal measures that prohibit states from compelling passive resistance to particular federal programs.”⁶⁹

The Second Circuit’s suggestion that the federal government may prohibit states from mandating “passive resistance” to particular federal programs gives insufficient consideration to the prohibition on commandeering. As the court recognized, the federal provisions at issue were not generally applicable laws; they spoke specifically to state and local government activity.⁷⁰ If the federal government may not compel states to participate in federal regulatory schemes, and if it may not “circumvent that prohibition by conscripting the States’ officers directly,”⁷¹ it likewise should not be able to circumvent that prohibition by interfering with the state’s control over its officials. Because states operate through their officials, the power of the state to decline to carry out a federal program entails the power to forbid state officials from carrying out that federal program.⁷² Sometimes the federal government will be entitled to require state participation in federal schemes.⁷³ But if it may not require

68. *See id.* *But see* *Murphy v. NCAA*, Nos. 16-476 & 16-477, 2018 WL 2186168, at *13 (U.S. May 14, 2018) (rejecting the activity/inactivity distinction as an “empty” one in equating federal laws that compel a state to enact legislation and federal laws that prohibit a state from enacting legislation).

69. *See id.*

70. *E.g.*, 8 U.S.C. § 1373(a) (2016) (“[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”); *see Murphy*, 2018 WL 2186168, at *16 (“[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States.”); *see also id.* at 20 (“The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.”).

71. *See Printz*, 521 U.S. at 935.

72. *Cf. City of Philadelphia v. Sessions*, No. 17-3894, 2017 WL 5489476, at *56 (E.D. Pa. Nov. 15, 2017) (“[T]his Court declines to rest a preliminary injunction on Tenth Amendment grounds, but notes that the effect of Section 1373 compliance may be to ‘thwart policymakers’ ability to extricate their state or municipality from involvement in a federal program.” (quoting *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 949 (N.D. Ill. 2017))), *appeal docketed*, No. 18-1103 (3d Cir. Jan. 18, 2018). *See generally* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) (proposing a constitutional duty to supervise the exercise of governmental power given systemic features of administration).

73. *See, e.g., Reno v. Condon*, 528 U.S. 141, 151 (2000) (rejecting an anticommandeering challenge to the Driver’s Privacy Protection Act of 1994, Pub. L. No. 103-322, tit. XXX, 108 Stat. 1796, 2099-102 (codified as amended at 18 U.S.C. §§ 2721-2725 (2016))), because

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state participation as such, neither may it require states to allow their employees to participate in their official capacities.

The contrary position—that states may not prevent their officials from participating in a federal scheme—ultimately marks less a celebration of intergovernmental cooperation⁷⁴ than skepticism about government. By restricting state supervision, this position would treat state officials as free agents. Current federal immigration enforcement appears to follow this approach: The lifting of Obama-era guidance locates discretion at the level of individual ICE agents, so that federal immigration enforcement becomes a matter of government power without government responsibility. Even if a free-agent policy is permissible at the federal level,⁷⁵ however, it becomes a federalism concern when the federal government forces states to adopt such a policy against existing norms of supervision and accountability.

When states are shaping national policy together with the federal executive branch, there is particular hazard to undermining their ability to function as discrete political communities. As the Chief Justice reasoned in extending anticommandeering principles to the Spending Clause context, “The States are separate and independent sovereigns. Sometimes they have to act like it.”⁷⁶ The federal government would eliminate states’ ability to “act like it” in a fundamental way if it could, over the states’ objection, enlist individual state officials in administering its programs.

B. Horizontal Federalism: “Reciprocity” Without Reciprocity

As states have grown vital to national policymaking, questions about relationships among the states assume new significance as well. Notwithstanding fears of sectionalism, voluntary multistate collaboration may look more attractive in the absence of federal legislation.⁷⁷ At the same time, concerns about one state dictating another’s policies may be weightier. Most questions

the generally applicable federal law regulated the states as owners of databases rather than sovereigns).

74. *Cf.* *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (“A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system.”).

75. *But see Metzger, supra* note 72, at 1929 (“Precluding prospective and categorical articulation of immigration enforcement policy and priorities is tantamount to insisting that nonenforcement decisions be made by lower-level officials, a requirement as much at odds with constitutional structure as a presidential dispensation power.”).

76. *See Nat’l Fed’n Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 579 (2012) (opinion of Roberts, C.J.).

77. *See* Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 432-40 (2018).

about unwanted influence of one state's policy on another's fall under doctrines associated with the dormant Commerce Clause, the Due Process Clause, and the Privileges and Immunities Clause.⁷⁸ Federal intervention to favor certain states' policies over others'—without simply adopting those state policies as uniform federal law—is exceedingly rare. The fugitive slave laws are the glaring example.⁷⁹

But the overlap of state and federal governance domains, coupled with a Congress that is unable or unwilling to make a variety of difficult policy decisions, suggests that national policy might increasingly be made through selective privileging of state policies. The federal government has previously authorized states to follow particular states' lead and thereby increase regulation above a federal floor; California's role under the Clean Air Act is the paradigmatic example.⁸⁰ Today, however, there are stirrings of a more coercive form of federalism from a federal government that is at least rhetorically skeptical of imposing national policy: *compelling* states to adopt other states' policies as their own.

When the federal government seeks to regulate not by adopting a federal requirement but instead by making some states beholden to others, a different variant of the preemption/commandeering puzzle noted above comes into view. Does the federal power to preempt state law extend beyond a substantive federal law that displaces conflicting state law to a federal requirement that states administer the laws of other states? Or would such a requirement constitute unlawful coercion, forcing the states to carry out other states' regulatory decisions? How should we classify federal compulsion without substantive federal law?

The most salient example comes from the Concealed Carry Reciprocity Act passed by the House of Representatives in December 2017.⁸¹ The bill would

78. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (“[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.”); *Edgar v. MITE Corp.*, 457 U.S. 624, 640-43 (1982) (discussing the dormant Commerce Clause); see also U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

79. See Lynn A. Baker & Ernest A. Young, Essay, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 1, 75, 121-24 (2001). Unlike the handful of other full faith and credit laws Congress has enacted, the Defense of Marriage Act (DOMA) might seem to be an example because it privileged a particular substantive position (against recognizing same-sex marriage). See Pub. L. No. 104-199, § 2(a), 110 Stat. 2419, 2419 (1996) (codified at 28 U.S.C. § 1738C (2016)), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). But that statute did not require certain states to adhere to other states’ policies; it did the opposite, authorizing states to give no effect to other states’ recognition of same-sex marriages. See *id.*

80. See 42 U.S.C. §§ 7507, 7543(b) (2016).

81. H.R. 38, 115th Cong. (as passed by House, Dec. 6, 2017).

require states to defer to other states' more permissive concealed firearms policies: In effect, if an individual could carry a concealed firearm in her home state, she could do so in any state, regardless of that state's firearms laws.⁸² The legislation's titular emphasis on "reciprocity" is thus misleading in suggesting mutuality; states are already free to recognize other states' concealed carry permits, and many do so.⁸³ The bill would instead require unwilling states to recognize other states' permits (or in the case of a growing number of permitless carry states, decisions to allow the carrying of concealed firearms

82. The bill provides:

[S]ubject only to the requirements of this section, a person who is not prohibited by Federal law from possessing, transporting, shipping, or receiving a firearm, who is carrying a valid identification document containing a photograph of the person, and who is carrying a valid license or permit which is issued pursuant to the law of a State and which permits the person to carry a concealed firearm or is entitled to carry a concealed firearm in the State in which the person resides, may possess or carry a concealed handgun (other than a machinegun or destructive device) that has been shipped or transported in interstate or foreign commerce, in any State that—

(1) has a statute under which residents of the State may apply for a license or permit to carry a concealed firearm; or

(2) does not prohibit the carrying of concealed firearms by residents of the State for lawful purposes.

Id. § 101(a). Given that every state allows the carrying of concealed firearms in certain circumstances—even though some impose substantial limits on the practice while others impose no limits—the bill's provisions would apply in all fifty states. *See Concealed Carry: Summary of State Law*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/GAS7-GVWE> (archived May 14, 2018).

The bill might, in fact, extend beyond nonresident concealed carry and purport to override state law with respect to states' own residents as well. Some states issue concealed handgun permits to out-of-state applicants, allowing nonresidents to lawfully carry concealed handguns in those states (and others that recognize those states' nonresident permits) even if these individuals may not carry in their home states. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3112(Q)-(R) (2018), *amended by* H.R. 2328, 53d Leg., 2d Reg. Sess. (Ariz. 2018) (enacted) (to be codified at ARIZ. REV. STAT. ANN. § 13-3112); *see also* Joshua Gillem, *Top 5 Best Non-resident Concealed Carry Permits*, CONCEALED CARRY.COM (Aug. 14, 2017), <https://perma.cc/F4US-NWLG> (describing "states where you can get your permit in the mail without actually having to physically go, or adhere to strict laws"). The descriptive title of the Concealed Carry Reciprocity Act states that it is an act "to provide a means by which *nonresidents* of a State whose residents may carry concealed firearms may also do so in the State," H.R. 38 (emphasis added), suggesting that it applies only to nonresidents and not also to state residents who may not lawfully carry under their own state law but who may obtain a permit from another state. The text itself, however, is not clear on this point.

83. *See, e.g.*, *Concealed Weapon License Reciprocity*, FLA. DEP'T AGRIC. & CONSUMER SERVS., <https://perma.cc/EE63-SK2M> (archived May 14, 2018). *See generally* *Gun Laws*, NRA-ILA, <https://perma.cc/FA6W-EG6C> (archived May 14, 2018) (to locate, select "View the live page," then select "Right to Carry Reciprocity and Recognition" from the "Select Law" drop-down menu (capitalization altered)).

without any permit).⁸⁴ While many problems with the proposed legislation lie beyond the scope of this Essay, the way in which it purports to use federal authority to require states to adhere to other states' policies warrants attention here. The bill's language is the language of federal preemption ("Notwithstanding any provision of the law of any State or political subdivision thereof . . ."),⁸⁵ yet nowhere is there a substantive federal policy that displaces state law. Instead, the federal policy is that nonconsenting states must abide by other states' concealed carry determinations.

It is this outsourcing of coercion to states that explains the apparently paradoxical description of proposed federal legislation itself as a form of policymaking "without Congress." It is also this outsourcing that poses particular federalism concerns. Departing from common presumptions of territoriality,⁸⁶ the bill would allow states with the most permissive regimes to determine policy outside as well as inside their borders. It would impose on interstate relations the coercion and interference with political accountability that a variety of federalism doctrines police with respect to state-federal relations.⁸⁷

Insofar as the federal government is not setting a uniform national concealed carry policy because of constitutional or political questions about its power to do so, the attempted workaround raises its own serious questions about the manner in which the federal government may regulate by enlisting the states. Indeed, while many unremarkable instances of federal preemption also pose concerns about political accountability and related values,⁸⁸ the overriding of state policy with uniform national policy is different from the overriding of state policy with other states' policies. As Chief Justice Marshall asked long ago, "Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not."⁸⁹ Although the Concealed Carry Reciprocity

84. See Katie Zezima, *More States Are Allowing People to Carry Concealed Handguns Without a Permit*, WASH. POST (Feb. 24, 2017), <https://perma.cc/X3A7-V82A>.

85. See H.R. 38, § 101(a).

86. See generally Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

87. See, e.g., *Nat'l Fed'n Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 577-78 (2012) (opinion of Roberts, C.J.) (noting that anticommandeering doctrine and Spending Clause doctrine are concerned with protecting the states from federal coercion and maintaining political accountability).

88. See *supra* note 55 and accompanying text.

89. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

Act would be a federal law, a “confidence”⁹⁰ problem attends its novel delegation of power to some states to control others’ laws.⁹¹

The approach suggested by the concealed carry bill turns salutary practices of contemporary federalism upside-down. Across a variety of domains, the federal government—and the federal executive branch in particular—has looked to the states to supply policymaking initiative. The result is often state-differentiated national policy: environmental, health, immigration, or other policies that are national in scope but vary to some degree by state.⁹² Although this approach is not without its own problems, such state-differentiated national policy has the virtue of bringing federalism’s traditional values into contact with federal law. The use of federalism to override state decisions threatens these very values of diversity, contestation, and political community.

Conclusion

With Congress largely on the sidelines, states are becoming ever more important to setting domestic policy as they both effectuate and challenge federal executive decisions. States’ ability to productively intervene in national policymaking is endangered by a variety of forces, including the many that plague state democracy. It will be further damaged if doctrines intended to preserve space for state initiative yield to novel claims of federal preemption that undermine states’ ability “to respond . . . to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”⁹³ We should be particularly wary of efforts to preempt state control over state officials and to preempt state law with the laws of other states. These practices undermine states’ ability to fill in for a missing Congress and to offer a different policy vision than the federal executive.

90. *Cf. id.*

91. Some might resist the language of “delegation.” *See, e.g.,* *United States v. Sharpnack*, 355 U.S. 286, 286 (1958) (upholding the Assimilative Crimes Act of 1948, Pub. L. No. 80-772, § 13, 62 Stat. 683, 686 (codified as amended at 18 U.S.C. § 13 (2016)), which subjects federal enclaves to the criminal law of the states in which they are located). In contrast to the “assimilation” at issue in *Sharpnack*, however, the concealed carry bill would apply one state’s policy in another state. It does not represent a congressional decision to conform federal law to surrounding state law, but rather a congressional grant of power to some states to displace the law of other states within those states’ own borders. Moreover, the law would require states to follow other states’ policies even though those policies might change in the future. While the practical import of this prospectiveness is not especially significant (some states already do not require a permit, and there is not a basement below that floor), it underscores the structural concern.

92. *See generally* Bulman-Pozen, *Executive Federalism*, *supra* note 7.

93. *Bond v. United States*, 564 U.S. 211, 221 (2011).