

2016

Executive Federalism Comes to America

Jessica Bulman-Pozen
Columbia Law School, jbulma@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#), and the [Political Theory Commons](#)

Recommended Citation

Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3175

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu, rwitt@law.columbia.edu.

EXECUTIVE FEDERALISM COMES TO AMERICA

*Jessica Bulman-Pozen**

INTRODUCTION..... 953

I. POLARIZATION AND THE ADMINISTRATIVE STATE 957

 A. *The Federal Government*..... 959

 B. *State Governments*..... 963

 C. *Federalism*..... 965

II. BEYOND LEGISLATIVE AND ADMINISTRATIVE FEDERALISM..... 967

III. EXECUTIVE FEDERALISM 971

 A. *Parliaments and Parties* 972

 B. *The American Variant* 976

 1. *Healthcare* 976

 2. *Marijuana*..... 979

 3. *Climate Change*..... 982

 4. *Education* 987

IV. A QUALIFIED DEFENSE 993

 A. *Governance: State-Differentiated National Policy* 994

 B. *Compromise: Disaggregated Negotiation*..... 1001

 C. *Representation: Plurality and Deliberation Beyond Legislatures* 1009

V. DOCTRINAL INVERSIONS..... 1016

 A. *Deference-Enhancing Federalism*..... 1016

 B. *Executive Nonpreemption*..... 1023

 C. *Interstate Compacts and the Separation of Powers* 1025

CONCLUSION..... 1030

INTRODUCTION

DOCTRINE and scholarship tend to assume that Congress establishes national policy and mediates state-federal relations. Although

* Associate Professor, Columbia Law School. I am grateful to Josh Chafetz, Jim Gardner, Heather Gerken, Michael Greve, Jeremy Kessler, Daryl Levinson, Ryan Liss, Gillian Metzger, Henry Monaghan, David Pozen, Chuck Sabel, Miriam Seifter, Bill Simon, Peter Strauss, and Jim Tierney; participants in workshops at Columbia, Cornell, Duke, NYU, the University of California, Berkeley, and the University of Chicago; and the editors of the *Virginia Law Review* for their generous engagement with this project. Thanks to Jeffrey Coyle, Alexander Ely, Kevin Hu, Hilary Oran, Morgan Saunders, and Sarah Sloan for excellent research assistance and to the William S. Friedman Faculty Research Fund for support.

commentators have long recognized the profound significance of the administrative state, they continue to describe agencies as elaborating legislative choices and to cast Congress as the principal broker of state interests in Washington. Some give the legislature an even more prominent role, insisting that contemporary federalism itself comes by the “grace of Congress.”¹

These days, however, very little comes by the grace of Congress. As partisan polarization impedes new legislation, existing statutes grow attenuated from domestic policy concerns. Executive action is critical. Yet this executive action is not the autarchic presidential improvisation popular accounts suggest, nor is it the state-preemptive agency action scholars of administrative federalism study. Instead, today’s executive action entails collaboration among state and federal officials, reliance on state as well as federal initiative, and the contestation that follows from multiple sites of power. Multifaceted executive interactions, not congressional decisions, shape both national policy and our federalism.

This Article proposes a different way of thinking about contemporary American governance, looking to an established foreign practice. Executive federalism—“processes of intergovernmental negotiation that are dominated by the executives of the different governments within the federal system”²—is pervasive in parliamentary federations, such as Canada, Australia, and the European Union. Given the American separation of powers arrangement, executive federalism has been thought absent, even “impossible,” in the United States.³ But the partisan dynamics that have gridlocked Congress and empowered both federal and state executives have generated a distinctive American variant.

Viewing American law and politics through the lens of executive federalism brings four key features into focus. First, executives have become dominant actors at both the state and federal levels. They formulate policy and manage intergovernmental relations. Although executive negotiations have shaped American federalism at least since the New

¹ Abbe R. Gluck, *Our [National] Federalism*, 123 *Yale L.J.* 1996, 1999 (2014); see id. at 1998 (“[F]ederalism now comes from federal statutes. . . . Federalism today is something that mostly comes—and goes—at Congress’s pleasure. It is a question, and feature, of federal statutory design.” (emphasis omitted)).

² Ronald L. Watts, *Executive Federalism: A Comparative Analysis* 3 (1989).

³ Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 *L. & Contemp. Probs.* 107, 118 n.33 (1992); see, e.g., Watts, *supra* note 2, at 7; Herman Bakvis & Douglas Brown, *Policy Coordination in Federal Systems: Comparing Intergovernmental Processes and Outcomes in Canada and the United States*, 40 *Publius* 484, 488 (2010).

Deal, Congress once superintended them. Today, from healthcare to marijuana to climate change, federal and state executives negotiate without Congress. Second, there is a substantial degree of mutuality among these executives, much more than is suggested by the federal government's legal supremacy. Federal and state actors turn to state law as well as federal law to further their agendas; sometimes this amplifies conflict, but it also enables officials to find paths to compromise. Third, national policy frequently comes to look different across the states as a result of executive negotiations. Some states more strongly press a position shared by the federal executive, while others offer competing views. Finally, horizontal relationships among the states are critical in setting national policy, as the federal executive builds on interstate agreements and reshapes them in turn.

In addition to describing executive federalism in the United States, this Article offers a qualified defense. The practice enhances the federal executive's capacity to act amid congressional dysfunction, but so too does it entail the multiplicity and pushback endemic to state-federal relations. Perhaps most notably, it facilitates a form of governance suited to polarization: state-differentiated national policy. Today, for example, marijuana is effectively legal as a matter of federal law in some states but not others; the states are adopting different approaches to climate change regulation in coordination with a federal agency; and they are expanding Medicaid in a variety of ways unforeseen by Congress. Executive federalism is yielding in the United States something loosely akin to Canada's checkerboard federalism or Europe's differentiated integration.⁴

Executive federalism also offers a needed forum for bipartisan compromise. Rather than require a grand deal that satisfies an aggregate national body, executive federalism unfolds through many negotiations among disaggregated political actors. These discrete conversations facilitate intraparty difference at the same time as the process of implementation further complicates, and may attenuate, partisan commitments. Moreover, the most criticized aspect of executive federalism abroad—its

⁴ See generally Alkuin Kölliker, *Flexibility and European Unification: The Logic of Differentiated Integration* (2006) (describing differentiated integration in the European Union); Alexander Stubb, *Negotiating Flexibility in the European Union* (2002) (same); Herman Bakvis, *Checkerboard Federalism? Labour Market Development Policy in Canada*, in *Canadian Federalism: Performance, Effectiveness, and Legitimacy* 197, 197 (Herman Bakvis & Grace Skogstad eds., 2002) (discussing checkerboard federalism in Canada).

relative lack of transparency—may be an asset. In recent years, scholars of American politics have assailed transparency as an impediment to negotiation, but they have not yet looked beyond Congress to consider less visible venues for national policymaking.⁵

Any approach to national policymaking that leaves Congress on the sidelines has a clear strike against it as a matter of democratic representation, and the deficiencies of executive federalism in this respect are apparent. Yet, as recent work in political theory shows, representation is a more complicated process than the law's standard delegate models suggest.⁶ Because executive federalism generates different variants of national policy, it may stimulate deliberation grounded in concrete acts rather than abstract speech. Interactions between states and the federal government also raise the possibility that national representation may be advanced outside of Washington and that constituencies may transcend territorial designations.

If executive federalism is a potentially valuable practice, so too is it vulnerable. Challenges raising a host of doctrinal objections are already flooding the courts, and more can be expected. Courts reviewing these claims should revisit certain assumptions. In considering the intersection of federalism and *Chevron*,⁷ for instance, judges and scholars have asked only whether federalism concerns should diminish judicial deference.⁸ But federalism might instead be deference enhancing insofar as federal agencies are incorporating and enabling state policymaking. This argument aligns with recent advocacy for greater deference to agencies in

⁵ See, e.g., Sarah A. Binder & Frances E. Lee, Making Deals in Congress, *in* Solutions to Political Polarization in America 240, 252–53 (Nathaniel Persily ed., 2015) [hereinafter *Political Polarization*]; Richard H. Pildes, Romanticizing Democracy, Political Fragmentation, and the Decline of American Government, 124 *Yale L.J.* 804, 847–49 (2014); Mark E. Warren & Jane Mansbridge, Deliberative Negotiation, *in* *Am. Political Sci. Ass'n, Negotiating Agreement in Politics* 86, 106–12 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

⁶ See, e.g., Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (2006); Iris Marion Young, *Inclusion and Democracy* (2000); Jane Mansbridge, Rethinking Representation, 97 *Am. Pol. Sci. Rev.* 515 (2003).

⁷ *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

⁸ See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 *Sup. Ct. Rev.* 201, 229–35; Nina A. Mendelson, *Chevron* and Preemption, 102 *Mich. L. Rev.* 737, 741–43 (2004); Gillian E. Metzger, Administrative Law as the New Federalism, 57 *Duke L.J.* 2023, 2027 (2008); Ernest A. Young, Executive Preemption, 102 *Nw. U. L. Rev.* 869, 870–71 (2008).

times of political polarization,⁹ but it conditions such leeway on state involvement rather than unilateral federal action. Courts might particularly respect agency views that state law is *not* preempted.

Executive federalism also raises questions about Compact Clause doctrine given new forms of interstate collaboration. Even as the Supreme Court has generously permitted states to enter into agreements without federal approval, it has framed the relevant issue as protecting “federal supremacy.”¹⁰ Partisan dynamics put pressure on this unified conception of the federal government. As recent developments suggest, the important doctrinal fights going forward are unlikely to be waged in terms of state versus federal power; they will instead concern the relative authority of Congress and the President, acting in conjunction with certain states. Federal executive involvement in interstate agreements should make courts look more, not less, favorably on such agreements.

In charting the emergence of executive federalism in the United States, this Article seeks to identify a distinctive approach to national policymaking and to offer a qualified defense of the phenomenon. After Part I describes some effects of partisan politics on American government, Part II argues that existing models of legislative and administrative federalism do not capture important contemporary dynamics. Part III suggests that a foreign practice long believed impossible in the United States, executive federalism, gives us greater purchase, and it illustrates the claim with discussions of healthcare, marijuana, climate change, and education policy. Moving from the descriptive to the normative, Part IV evaluates the American variant of executive federalism in terms of governance, compromise, and representation. Part V concludes with a few doctrinal suggestions.

I. POLARIZATION AND THE ADMINISTRATIVE STATE

Three trends have converged to shape American government today: the rise of the administrative state, the demise of dual federalism, and the resurgence of intense partisan polarization. The first two developments occurred hand-in-hand as the New Deal, in particular, expanded federal regulation into areas traditionally governed by the states. Even as a growing administrative apparatus enhanced federal executive power,

⁹ See, e.g., Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1, 70–81 (2014); Cass R. Sunstein, *Partyism*, 2015 U. Chi. Legal F. 1, 16.

¹⁰ E.g., *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 460 (1978).

overlapping state-federal jurisdiction required collaboration and negotiation among state and federal actors. The executive branch thus became at once more powerful and obliged to work with the states.¹¹

For most of the twentieth century, however, both national policymaking and the federal arrangement were superintended by Congress. Congress's vitality as the administrative state expanded was bound up in mid-twentieth-century partisan politics: The Democratic and Republican parties were internally diverse, loose confederations that facilitated lawmaking and oversight attentive to state as well as federal interests.¹² Today's Democratic and Republican parties are instead sharply polarized.¹³ The range of issues on which the parties compete has expanded at the same time as partisan intensity has grown, the parties have become vehicles for rival interest group agendas, and partisanship and ideology have become closely aligned.¹⁴ As national political currents have overwhelmed regional partisan difference, partisanship has come to trump institutional affiliations with respect to both the separation of powers and federalism.¹⁵

This Part describes how partisan polarization amplifies certain dynamics inherent in the rise of the administrative state and demise of dual

¹¹ See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *Colum. L. Rev.* 459 (2012).

¹² See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215 (2000).

¹³ E.g., John H. Aldrich, *Why Parties? A Second Look* (2011); Nolan McCarty et al., *Polarized America: The Dance of Ideology and Unequal Riches* (2006); Barbara Sinclair, *Party Wars: Polarization and the Politics of National Party Making* 5 (2006); Jeffrey M. Stonecash et al., *Diverging Parties: Social Change, Realignment, and Party Polarization* (2003).

¹⁴ See Alan I. Abramowitz, *The Disappearing Center* 7 (2010); Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *Political Polarization*, supra note 5, at 15, 15; Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *Persp. on Pol.* 571, 571 (2012); Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 *Ann. Rev. Pol. Sci.* 83, 84 (2006).

Polarization has been asymmetric—Republicans have moved further to the right than Democrats have to the left—and there remain intraparty divisions, such as between Tea Party and more “establishment” Republicans, but each party has become more ideologically cohesive. See Thomas E. Mann & Norman J. Ornstein, *It’s Even Worse Than It Looks: How the American Constitutional System Colluded with the New Politics of Extremism* 3–103 (2012); Jacob S. Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, in *Political Polarization*, supra note 5, at 59, 59.

¹⁵ See Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077 (2014); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311 (2006).

federalism. As Republicans and Democrats are unable to work together in Congress, gridlock increases the already considerable pressure on the federal executive to act on its own. At the same time, polarization makes cogovernance with the states more attractive, and more feasible, than truly independent federal executive action. Partisanship generates a variety of alliances among state and federal executive branch actors, who seize on states' potential as fora for national politics. In focusing on polarization, I therefore do not intend to suggest that executive federalism follows only from polarization, nor do I mean to argue that the rise of the administrative state, the demise of dual federalism, and the rise of polarization are independent, rather than interdependent, phenomena. Rather, I explore polarization as the most recent in a series of developments, one that offers a critical, if also necessarily incomplete, frame for understanding contemporary American governance.

A. The Federal Government

The consequences of political polarization have been most obvious—and most severe—for Congress. Indeed, a rare point of agreement in today's political culture is that Congress has become dysfunctional. The news is full of gridlock, failed attempts at deal making, and falls off cliffs designed to force action.¹⁶ Americans nationwide give Congress approval ratings in the teens, as commentators bemoan its ability to address critical problems or even to perform basic functions.¹⁷

Scholars broadly attribute congressional dysfunction to the mapping of polarized parties onto political structures designed without partisanship in mind.¹⁸ Many suggest that our parties are now the ideological,

¹⁶ See, e.g., Josh Hicks, *Over the Fiscal Cliff: Day One*, Wash. Post (Jan. 1, 2013), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/01/01/over-the-fiscal-cliff-day-one> [<https://perma.cc/M7ZW-8K77>]; Jennifer Steinhauer, *Mitch McConnell Makes Changes, but Senate Gridlock Remains*, N.Y. Times (Mar. 20, 2015), <http://www.nytimes.com/2015/03/21/us/politics/mitch-mcconnell-makes-changes-but-senate-gridlock-remains.html> [<https://perma.cc/SC3N-BV4M>].

¹⁷ See, e.g., Nathaniel Persily, *Introduction*, in *Political Polarization*, supra note 5, at 3, 7–8; *Congress and the Public*, Gallup, <http://www.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/HEF3-ZQEN>].

¹⁸ See, e.g., Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, Closing Keynote Address (Nov. 13, 2013), in 94 B.U. L. Rev. 1159, 1165 (2014); Sarah Binder, *The Dysfunctional Congress*, 18 Ann. Rev. Pol. Sci. 85, 95 (2015);

unified, oppositional parties of a parliamentary system, a useful if only partially illuminating comparison.¹⁹ Such parties need not hinder governance, but ours is not a parliamentary government. Instead, the constitutional separation of powers creates multiple veto points across institutions, while practices such as the filibuster add further barriers within Congress.²⁰ Although the ways in which such structures complicate the project of governance have long been apparent,²¹ they were surmountable obstacles in an era of loose-knit parties when shifting coalitions formed across party lines. For a time it seemed parties themselves might provide just enough cohesion to overcome divides inherent in our separation of powers system.

Polarization defeats this vision. When two polarized parties operate not in a parliamentary system fostering majority rule but rather in a separation of powers system layered with practices that impede majority rule, the costs to governance are clear.²² This is particularly true in times of divided government, but given the filibuster and other minority-empowering devices, Congress may struggle to act even during periods

David Karol, *American Political Parties: Exceptional No More*, in *Political Polarization*, supra note 5, at 208, 208.

¹⁹ E.g., Mann & Ornstein, supra note 14, at 102; Levinson & Pildes, supra note 15, at 2333. Although the comparison to parliamentary parties is helpful, it does not fully capture today's problems, which also stem from "rogue" actors within each party. See Richard H. Pildes, *Focus on Political Fragmentation, Not Polarization: Re-Empower Party Leadership*, in *Political Polarization*, supra note 5, at 146, 151 ("[E]xcessive political fragmentation . . . makes American parties today incapable of functioning as truly parliamentary ones, even as they become more polarized. The primary reason is that the party elite—leaders in the House, the Senate, and the presidency—have lost the capacity they had in some earlier eras for disciplining members of their own party."). Consistent with Professor Pildes's diagnosis, Professor David Schleicher notes that polarized parties are not uniquely problematic for American government: "[N]o constitutional or electoral system functions particularly well when we see the rise of social groups who care little about achieving incremental legislative success or abiding by the norms of political process." David Schleicher, *Things Aren't Going that Well Over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. Chi. Legal F. 433, 460.

²⁰ See, e.g., Josh Chafetz, *The Phenomenology of Gridlock*, 88 *Notre Dame L. Rev.* 2065, 2084 (2013) (describing the filibuster in particular as "democratically dysfunctional").

²¹ Indeed, the way in which these structures thwart simple majority rule has often been seen as their genius. See generally Levinson & Pildes, supra note 15, at 2316–17 (describing this popular view of the separation of powers).

²² See generally Austin Ranney, *Toward a More Responsible Two-Party System: A Commentary*, 45 *Am. Pol. Sci. Rev.* 488, 495 (1951) ("Unified, disciplined and responsible parties are appropriate *only* to a government which seeks to locate *full* public power in the hands of popular majorities.").

of unified government. In recent years, we have seen legislative paralysis on the many issues on which today's Democratic and Republican parties have defined and opposing positions—from the environment to immigration to fiscal policy. Congress does not adopt new laws or update old ones, while drift means that existing laws may fail to keep up with changing conditions.²³ Even in areas where a recent Congress managed to pass substantial legislation, subsequent Congresses have failed to offer statutory fixes as problems become apparent or otherwise to oversee the process of implementation.²⁴ Partisanship also inhibits congressional action with respect to relatively uncontroversial issues. In our polarized times, partisan conflict has become a sort of “tribalism” or “teammanship,”²⁵ and strategic disagreement and the permanent campaign make each party unwilling to hand the other a victory even where compromise is possible or a position commands broad support.²⁶

The same partisan dynamics polarizing Congress and undermining the bicameralism and presentment process increase pressure on the executive branch to act on its own.²⁷ Although unilateral executive action predates the most recent era of polarization,²⁸ it is especially pronounced in times of congressional gridlock.²⁹ On the big issues of the day, the executive branch has sought to formulate and implement policy in the absence of legislative cooperation. Sometimes, it truly acts without Congress; more often, it relies on existing statutory delegations—the broad grants of authority by Congress to the executive branch that have long

²³ See, e.g., Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—And Turned Its Back on the Middle Class* 52 (2010); Binder, *supra* note 18, at 91–93.

²⁴ See, e.g., Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 *Geo. Mason L. Rev.* 501, 502 (2015); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 *Colum. L. Rev.* 1739, 1748–52 (2015).

²⁵ Mann & Ornstein, *supra* note 14, at 51; Barber & McCarty, *supra* note 14, at 20.

²⁶ See John B. Gilmour, *Strategic Disagreement: Stalemate in American Politics* 9 (1995); Binder & Lee, *supra* note 5, at 244; see also Pildes, *supra* note 5, at 808 (calling the failure to meet basic challenges the “Decline of American Government”).

²⁷ See, e.g., Barber & McCarty, *supra* note 14, at 50; Persily, *supra* note 17, at 8; David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 6–8 (2014).

²⁸ See generally Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. Econ. & Org.* 132 (1999) (describing the President's power to act unilaterally and thereby make law without Congress).

²⁹ See, e.g., Metzger, *supra* note 24, at 1758 (noting that, in times of gridlock, executive branch actors feel compelled to develop policy even when they believe new legislation would be preferable to administrative decision making).

yielded descriptions of a federal government dominated by executive power.³⁰

Because Congress generally delegates authority to federal agencies, rather than to the President as such, an important aspect of unilateral executive action is the relationship between the President and the federal agencies. Polarized parties more closely link the President and agencies and offer the White House additional leverage over administration.³¹ The point can be overstated—federal agencies enjoy a degree of autonomy and continue to operate under the oversight of Congress—but polarization diminishes congressional supervision while enhancing presidential authority.³² Although Congress continues to wield power through appropriations, for example, spending legislation is hamstrung by polarization, and “congressional influence through appropriations is often felt more through budgetary inaction than actual appropriations legislation.”³³ Legislators may also make their influence felt outside the bicameralism and presentment process, but committee oversight frequently devolves into partisan spectacle, while individual members of Congress may intervene only to appeal to state or federal executives.³⁴

³⁰ See, e.g., Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123 (1994); Thomas W. Merrill, Presidential Administration and the Traditions of Administrative Law, 115 Colum. L. Rev. 1953, 1958, 1968–69 (2015).

³¹ See, e.g., Neal Devins, Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives, 45 Willamette L. Rev. 395, 411–13 (2009); Metzger, *supra* note 24, at 1752–54. See generally Daniel A. Farber & Anne Joseph O’Connell, The Lost World of Administrative Law, 92 Tex. L. Rev. 1137, 1155–60 (2014) (exploring how the White House’s prominent role in administrative decision making departs from traditional expectations); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2272–319 (2001) (describing ways in which the President controls administration).

³² See, e.g., Freeman & Spence, *supra* note 9, at 64; Metzger, *supra* note 24, at 1751–53. See also Abbe Gluck, Anne Joseph O’Connell & Rosa Po, Unorthodox Lawmaking, Unorthodox Rulemaking, 115 Colum. L. Rev. 1789, 1844–45 (2015) (describing how unorthodox lawmaking and rulemaking entail presidential displacement of congressional power).

³³ Metzger, *supra* note 24, at 1750.

³⁴ See, e.g., Richard J. Lazarus, Flexing Agency Muscle?, 48 Ga. L. Rev. 327, 330–32 (2014); Noah Bierman, California’s Darrell Issa Loses Power Along with House Oversight Committee Post, L.A. Times (Mar. 20, 2015), <http://www.latimes.com/nation/politics/la-na-darrell-issa-20150321-story.html#page=1> [https://perma.cc/6BKF-3TYT]; Juana Summers, Constituent Services Give Voters Something to Remember, NPR (Oct. 28, 2014), <http://www.npr.org/2014/10/28/359615965/constituent-services-give-voters-something-to-remember> [https://perma.cc/SZ4K-NNMC].

Meanwhile, recent decades have seen an increase in both centralization and politicization. The President influences federal administration by bringing particular decisions within the White House's purview and by appointing ideologically aligned administrators to make policy decisions in the first instance.³⁵ The President's agenda is especially likely to carry the day for salient political issues.³⁶ References to the "executive branch" in this Article are thus meant to indicate both the President and the federal agencies and to posit the latter as largely in sync with, if not directly controlled by, the former.³⁷

B. State Governments

At the state level, the story is somewhat different. Here too, there has been a gradual expansion of executive power since the mid-twentieth century. Governors have become likely to serve multiple terms, and they frequently enjoy privileges the President does not vis-à-vis the legislature, such as the line-item veto.³⁸ They are especially empowered in the majority of states with legislative term limits and part-time citizen legislatures.³⁹ Although most states impose prohibitions on delegation,⁴⁰ broad grants of policy-making authority to state agencies have grown

³⁵ See, e.g., David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *Geo. Wash. L. Rev.* 1095, 1096 (2008).

³⁶ See, e.g., Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *Yale L.J.* 2, 23–29 (2009).

³⁷ See generally Peter L. Strauss, *Overseer, or "The Decider"?* The President in Administrative Law, 75 *Geo. Wash. L. Rev.* 696, 704–05 (2007) (arguing that the President has oversight rather than decisional authority).

³⁸ See *The Council of State Gov'ts., The Book of the States 2014*, 154–55 tbl.4.4 (2013), <http://www.nga.org/files/live/sites/NGA/files/pdf/BOSTable4.4.pdf> [<https://perma.cc/3PHL-6PR6>].

³⁹ See, e.g., John M. Carey et al., *The Effects of Term Limits on State Legislatures: A New Survey of the 50 States*, 31 *Legis. Stud. Q.* 105, 123–125 (2006) (finding that term limits increase the power of the executive branch over legislative outcomes); Thomas Gais & James Fossett, *Federalism and the Executive Branch*, in *The Executive Branch* 486, 503 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (noting the increase in gubernatorial power since the 1960s); Graeme T. Boushey & Robert J. McGrath, *Experts, Amateurs, and Bureaucratic Influence in the American States*, *J. Pub. Admin. Res. & Theory* (forthcoming) (manuscript at 4), http://dornsife.usc.edu/assets/sites/741/docs/Panel4a_paper5_BousheyMcGrath2015_forweb.pdf [<https://perma.cc/ECV5-XAKN>] (finding that "the eroding professionalism of state legislatures—coupled with the growing expertise of state executive offices" has increased state executive power at the expense of state legislative power).

⁴⁰ See, 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, 1359–62 (2005).

common as state legislative expertise has eroded.⁴¹ In part, these delegations empower a plural executive⁴² or the executive-as-unelected-bureaucracy, but many states have placed administrative agencies under gubernatorial supervision and increased the number of gubernatorial appointees.⁴³ Horizontal relations among states have also enhanced executive power. Interstate agreements entered into by governors and their appointees have enabled state executives to govern without legislatures.⁴⁴ And organizations like the National Governors Association and its partisan variants have pooled resources and political capital and become powerful forces for lobbying in Washington as well as governing in the states.⁴⁵

Although the relative enhancement of executive power at the expense of legislative power is thus apparent at the state as well as the federal level, the way polarization affects state governments is somewhat different. As in Washington, state governments are becoming more partisan and more polarized.⁴⁶ Yet while we rarely see unified party control of both Houses of Congress and the presidency together with the necessary supermajority in the Senate to thwart filibusters, unified party government has become prevalent in the states.⁴⁷ If polarization at the federal level tends to impede lawmaking, polarization at the state level often facilitates it.

Amid polarization, the enhancement of executive power as such may therefore be less significant than partisan reliance on both legislative and

⁴¹ Boushey & McGrath, *supra* note 39.

⁴² See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 *U. Chi. L. Rev.* 1385, 1399–1401 (2008).

⁴³ See Thad Beyle, *The Governors*, in *Politics in the American States: A Comparative Analysis* 220 (Virginia Gray & Russell L. Hanson eds., 8th ed. 2004).

⁴⁴ See Joseph F. Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements* 43–45, 172–76 (2d ed. 2012).

⁴⁵ See, e.g., John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* 115–65 (2009); Gais & Fossett, *supra* note 39, at 503–04; Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 *Ariz. L. Rev.* 709 (2008); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 *Va. L. Rev.* 953 (2014).

⁴⁶ Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 *Am. Pol. Sci. Rev.* 530, 546 (2011).

⁴⁷ See *State and Legislative Partisan Composition*, Nat'l Conf. State Legislatures (Feb. 4, 2016), http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2016_Feb.pdf [<https://perma.cc/JDT6-TT7D>]. Most state legislatures lack supermajority-forcing devices like the filibuster, although a substantial number of states have legislative supermajorities in any event.

executive powers. Because cohesion within the parties has grown hand-in-hand with distance between the parties, single-party governance has become easier as bipartisan governance has become elusive. For instance, even though the Democratic and Republican parties in California's legislature are more polarized than the parties in Congress, Democrats control both houses of the legislature and the governorship, so polarization yields Democratic policy rather than gridlock. Similarly, even though the Democratic and Republican parties in Texas's legislature are more polarized than the parties in Congress, Republicans control both houses of the legislature and the governorship, so polarization yields Republican policy rather than gridlock.⁴⁸

As this suggests, the impact of polarization is often more apparent across states—Red Wisconsin and neighboring Blue Minnesota furnish a much-discussed comparison—than within them.⁴⁹ While some states mirror the federal dynamic of Republican-Democratic contests within legislatures or between legislatures and executives, we increasingly see a checkerboard of red-state governments and blue-state governments, with executives as dominant actors further empowered by ideologically aligned legislatures.

C. Federalism

Polarized parties affect not only the exercise of power within each level of government, but also the relationships among the state and federal governments. In the United States, political parties have long been national—the same parties compete at the federal and state level—and these parties have almost entirely lost distinctive regional variants. While one can still find partisan differences across the states, terms like “Southern Democrat” and “Rockefeller Republican” no longer denote parties within parties. Over time, and accelerating with the rise of polar-

⁴⁸ See Boris Shor, *State Legislatures and Polarization, Measuring American Legislatures* (May 21, 2013), <http://americanlegislatures.com/2013/05/21/state-legislatures-and-polarization/> [https://perma.cc/JX95-ARX5].

⁴⁹ See, e.g., Lawrence R. Jacobs, *Op-Ed., Right vs. Left in the Midwest*, *N.Y. Times* (Nov. 23, 2013), http://www.nytimes.com/2013/11/24/opinion/sunday/right-vs-left-in-the-midwest.html?_r=0 [https://perma.cc/VB72-8Q5A].

ization, this has more closely married state and federal politicians, and state and federal politics.⁵⁰

In the United States today, national partisan conflict and cooperation occur in an integrated way across the states and the federal government. In previous work, I have focused on the contestatory aspects of this “partisan federalism”—the ways in which political actors use both the state and federal governments to stage partisan competition.⁵¹ In one recent display of how partisan alliances trump institutional affiliations and national conflict gets played out in state as well as federal sites, Senate Majority Leader Mitch McConnell sent a letter urging governors to resist the Clean Power Plan promulgated by President Obama’s Environmental Protection Agency (“EPA”).⁵² The most powerful member of Congress thus tried to enlist the states to fight another part of the federal government on partisan grounds. And he addressed his argument to governors in particular, recognizing that the key players in shaping national policy and the state-federal relationship had become the executives at both levels of government.

Importantly, however, partisan federalism creates alliances as well as opposition. The same Clean Power Plan that Senator McConnell opposes also offers an example of state-federal cooperation fueled by shared ideological commitments.⁵³ The decline of dual federalism underlies this dynamic—the fact that the state and federal governments regulate in the same areas facilitates state-federal cooperation. Indeed, the significance of such partisan connections may be most apparent in traditional cooperative federalism schemes, when states and the federal government are jointly administering a federal program. But these connections also matter in the absence of such programs because state legislation or regulation may be a means of furthering a national agenda frustrated in Washington. Unable to get a minimum wage increase through Congress, for example, President Obama seized on already-underway state efforts and argued to the National Governors Association, among others, that states

⁵⁰ State and federal actors are often the same people at different points in time; many American Presidents and executive branch officials got their start in state government, with the path from governor to President particularly well trodden.

⁵¹ Bulman-Pozen, *supra* note 15.

⁵² See Letter from Mitch McConnell, Senate Majority Leader, to Nation’s Governors (Mar. 19, 2015), http://www.mcconnell.senate.gov/public/index.cfm?p=newsletters&ContentRecord_id=d57eba06-0718-4a22-8f59-1e610793a2a3 [https://perma.cc/47GG-525P].

⁵³ See *infra* Subsection III.B.3.

could be critical fora for national governance.⁵⁴ In 2014 and 2015, several blue states increased the minimum wage, advancing within particular jurisdictions a goal broadly shared among Democratic officials.⁵⁵

As the Clean Power Plan and minimum wage examples suggest, national, polarized parties do not generate only federal-state conflict or cooperation. They generate both at the same time. Party identification leads different groups of state and federal actors to ally with each other and against opposing groups of state and federal actors. Even this statement is much too simple. As Parts III and IV of this Article argue, partisan positions become more complicated as state and federal actors interact in a variety of ways. While the most basic and readily apparent dynamic of partisan federalism is that Democrats and Republicans recognize members of their own party as allies—and members of the other party as opponents—across the state-federal divide, diversity exists among officials of the same party, especially when they are able to negotiate on their own instead of aggregating their interests. National parties help to fuel deep federal-state integration, even as a variety of different and shifting relationships emerge from such integration.

II. BEYOND LEGISLATIVE AND ADMINISTRATIVE FEDERALISM

Partisan polarization has diminished the role of Congress and further empowered federal and state executives to shape national policy. Most writing about American government in a time of polarization, however,

⁵⁴ Remarks by the President to the National Governors Association, Office of the Press Secretary, The White House (Feb. 23, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/23/remarks-president-national-governors-association-february-23-2015> [<https://perma.cc/6EMB-N22F>]. That states are sites of national politics has hardly been lost on the policy demanders that shape partisan agendas. For many years now, interest groups like the American Legislative Exchange Council have recognized that national agendas may be advanced in the states. See Alexander Hertel-Fernandez, Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in U.S. State Politics, 12 *Persp. on Pol.* 582, 583 (2014). More recently, lobbyists have decreased their spending on federal lobbying and turned their attention to state politicians. See, e.g., Reid Wilson, Amid Gridlock in D.C., Influence Industry Expands Rapidly in the States, *Wash. Post.* (May 11, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/05/11/amid-gridlock-in-d-c-influence-industry-expands-rapidly-in-the-states> [<https://perma.cc/XY6Q-WC7W>].

⁵⁵ See Michael A. Memoli, Democratic Governors Join Obama in Push for Higher Minimum Wage, *L.A. Times* (Feb. 21, 2014), <http://articles.latimes.com/2014/feb/21/news/la-pn-obama-governors-minimum-wage20140221> [<https://perma.cc/VC5N-TTFX>]; State Minimum Wages, Nat'l Conf. St. Legislatures (Apr. 4, 2016) <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> [<https://perma.cc/HQ69-WKR5>].

ignores the states entirely.⁵⁶ Meanwhile, the federalism scholarship has grown increasingly attentive to the place of states in national policymaking, but our two leading models of state-federal relations neglect important political developments. Even as the dominant literature on legislative federalism appreciates the integration of state and federal actors, it continues to focus on Congress. And even as the burgeoning literature on administrative federalism appreciates the significance of the federal executive branch, it continues to focus on state autonomy.

Both the legal and the political science literature tend to cast Congress as the actor that manages American federalism: Congress represents the states in Washington; it decides how state and federal policy will interact and whether federal law will preempt state law; it devises cooperative federalism programs and charges states with implementing federal statutes.⁵⁷ As this last point in particular suggests, scholars of legislative federalism have moved well beyond a dualist view of separate spheres of state and federal action. They recognize that Congress may not only displace the states through federal law but also empower the states by conferring resources and new forms of authority on them. In its strongest form, this recognition yields the suggestion that state power is a matter

⁵⁶ For instance, a recent book exploring a wide range of “Solutions to Political Polarization in America” does not mention federalism other than a single reference to it as a constitutional structure that may impede policymaking. Persily, *supra* note 17, at 7. Professor Pildes’s account of the “Decline of American Government” likewise treats “American Government” as the federal government alone. Pildes, *supra* note 5; see also *infra* Sections IV.B–C (addressing some of this scholarship).

A growing literature on presidential action similarly considers only the federal government and thus sees unilateralism where there may be state-generated multiplicity. See, e.g., Dino P. Christenson & Douglas L. Kriner, *Political Constraints on Unilateral Executive Action*, 65 *Case W. Res. L. Rev.* 897 (2015); Devins, *supra* note 31; Pozen, *supra* note 27.

⁵⁷ See, e.g., Martha Derthick, *Keeping the Compound Republic: Essays on American Federalism* 38–39 (2001) (discussing choices Congress can make when working with state governments); Daniel J. Elazar, *American Federalism: A View from the States* 53 (3d ed. 1984) (“[T]he acts of Congress have tended to give the states a firm share in virtually all federal domestic programs, including several in which the federal government is apparently given the constitutional right to claim exclusive jurisdiction.”); Nugent, *supra* note 45, at 61–63 (focusing on interactions with Congress in reviewing the means state actors may use to influence federal policymaking); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 *Harv. J.L. & Pub. Pol’y* 181, 181–85 (1998) (contending that in cooperative federalism programs, state and local governments serve as “agencies of Congress”); 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, 558–60 (1954) (emphasizing the role of Congress in preserving federalism); Young, *supra* note 8, at 876 (arguing that the principal safeguards of state autonomy are the representation of the states in Congress and the difficulty of passing federal legislation).

of federal statutory design, that American federalism itself comes by the “grace of Congress.”⁵⁸

While the legislative federalism literature captures important developments in its appreciation of state-federal integration, it glosses over changes within the federal government. In particular, partisan polarization presents a serious challenge to the assumption that Congress is the federal actor that sets national policy and negotiates with the states. Legislative federalism held sway for much of the twentieth century when Congress brokered regional interests and worked across weak party lines. And it has enjoyed moments of resurgence in fleeting periods of unified (and Senate-supermajority) government, such as the first two years of the Obama Administration when Congress enacted the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act, both of which simultaneously altered federal law and conferred new roles on the states.⁵⁹ But by and large, today Congress is not negotiating policy deals or state-federal relations. In areas ranging from climate change to immigration, polarization means the federal legislature is on the sidelines while executives make policy decisions.

This is not to argue that federal statutes are irrelevant to today’s federalism. There are federal laws on the books in nearly all important domestic policy areas, and many of these laws provide for state implementation.⁶⁰ At some level, then, the federal arrangement continues to be authored by Congress even in an era of executive power. Especially as these federal statutes age and federal and state executives must confront novel problems, however, it becomes more difficult to understand the substantive policy choices and the parceling of authority among various

⁵⁸ See Gluck, *supra* note 1, at 1999; see also, e.g., Bridget A. Fahey, Consent Procedures and American Federalism, 128 Harv. L. Rev. 1561, 1568–69 (2015) (endorsing Professor Gluck’s view that today’s federalism comes from federal statutes).

⁵⁹ See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 Yale L.J. 534 (2011). But cf. *infra* Subsection III.B.1 (discussing executive negotiations around the Affordable Care Act); Subsection III.B.4 (discussing Congress’s recent reauthorization of the Elementary and Secondary Education Act).

⁶⁰ See, e.g., Medicaid Act, 42 U.S.C. § 1396a (2012); Clean Air Act, 42 U.S.C. §§ 7401–7642 (2012); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

actors as congressional decisions.⁶¹ The Clean Air Act, for example, authorizes both the EPA and the states, led by California, to regulate greenhouse gas emissions,⁶² but Congress provided virtually no instruction on how to do so and critical policymaking is necessarily occurring outside the Capitol.⁶³ When Congress does manage to adopt substantial new legislation, moreover, it tends to enact what Professor Michael Greve and Ashley Parrish term “hyper-legislation”—lengthy, complex, and even incoherent statutes that spur “executive government.”⁶⁴

If Congress is no longer at the helm, it may be tempting to characterize the contemporary landscape in terms of administrative federalism. In a growing body of work, scholars have explored how federal agencies allocate power between Washington and the states and thus shape today’s federalism.⁶⁵ These scholars appreciate the substantial amount of national policymaking undertaken by the federal executive branch rather than Congress, recognizing a shift within the federal government that the legislative federalism literature largely neglects. Yet they come at federalism questions in a more traditional way, overlooking or discounting substantial state-federal integration.

The administrative federalism literature asks whether federal agencies, and administrative law more generally, may be trusted to safeguard state autonomy. Even as scholars embrace the administrative state, they adhere to more traditional federalism premises, including that the federal

⁶¹ See Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 *Yale L.J.* 1920, 1938–40 (2014); Freeman & Spence, *supra* note 9; Greve & Parrish, *supra* note 24.

⁶² See, e.g., 42 U.S.C. § 7543(b) (2012) (allowing waiver of preemption for California’s vehicle emissions standards); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (recognizing EPA’s statutory authority).

⁶³ See e.g., Freeman & Spence, *supra* note 9, at 20–21.

⁶⁴ Greve & Parrish, *supra* note 24, at 502–03.

⁶⁵ See generally Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 *Duke L.J.* 1933 (2008) (critiquing the assumption that Congress is superior to agencies in allocating power between states and the federal government); Metzger, *supra* note 8 (arguing that the Supreme Court has been using administrative law to address federalism concerns); Miriam Seifter, *Federalism at Step Zero*, 83 *Fordham L. Rev.* 633 (2014) (contending that the *Chevron* framework adequately protects the states without a special “Federalism Step Zero”); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 *Duke L.J.* 2125 (2009) (arguing that agencies are uniquely positioned to protect state regulatory interests); see also Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 *Duke L.J.* 2111 (2008) (criticizing administrative federalism and insisting on the centrality of Congress to federalism questions).

and state governments are independent and that federal actors will generally seek to displace state law.⁶⁶ As a result, nearly all of the scholarship focuses on a single question: What are the conditions under which federal agencies may preempt state law? While an important issue (to which I return below⁶⁷), administrative preemption is only a slice of state-federal executive interactions. The federal executive branch may, for instance, affirmatively seize on state policies to advance an agenda, incorporating state regulations into federal regulations or deferring to state law in its execution of federal law. State and federal executives may negotiate about how to implement federal law. State executives may work with each other to generate national policy, at least temporarily, without Washington.

In short, the state-federal relationship is more reciprocal, and more political, than the administrative federalism scholarship suggests. In what follows, I seek to build on the important insight that the federal executive branch is a critical player in American federalism while resisting the label “administrative federalism” as denoting too narrow a view of state-federal interaction. More apt is a label largely unused in American discourse⁶⁸ but familiar abroad: executive federalism.

III. EXECUTIVE FEDERALISM

Executive federalism—policymaking through intergovernmental negotiation by executives at different levels of a federal system—is a prominent feature of parliamentary federations, such as Canada and Australia, as well as the European Union.⁶⁹ Because it grows out of executive-empowering parliamentary arrangements at each level of government, executive federalism has long been believed absent, even im-

⁶⁶ See, e.g., Galle & Seidenfeld, *supra* note 65; Metzger, *supra* note 8; Sharkey, *supra* note 65. I elaborate this critique in Bulman-Pozen, *supra* note 61, at 1924–31.

⁶⁷ See *infra* Section V.B.

⁶⁸ Significant exceptions are Gais & Fossett, *supra* note 39, and the literature on waiver, which defines executive federalism narrowly, e.g., Frank J. Thompson & Courtney Burke, Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process, 32 *J. Health Pol., Pol’y & L.* 971, 972 (2007); see also *infra* Subsection III.B.1 (discussing waiver). Although she does not use that term, Professor Erin Ryan calls attention to the significance of the executive branch in her important work on state-federal negotiations. E.g., Erin Ryan, *Federalism and the Tug of War Within* 316 (2011).

⁶⁹ E.g., Watts, *supra* note 2, at 3; Tanja A. Börzel, *Federalism is Dead – Long Live Federalism!*, in *EPS Forum: Debating Federalism and Constitutionalism in the European Union* (2005), <https://www.princeton.edu/~amoravcs/library/eps.pdf> [<https://perma.cc/ZU7R-ZTZL>].

possible, in the United States.⁷⁰ The effects of partisan polarization on American separation of powers and federalism, however, have brought a distinctive variant of executive federalism to the United States. After briefly describing intergovernmental negotiations in parliamentary federations, this Part uses the examples of healthcare, marijuana, climate change, and education to illustrate American executive federalism.

A. *Parliaments and Parties*

Executive federalism, “processes of intergovernmental negotiation that are dominated by the executives of the different governments within the federal system,” is widely understood to follow from parliamentary federal arrangements.⁷¹ A leading commentator describes it as “a logical dynamic resulting from the marriage of federal and parliamentary institutions, . . . a dynamic peculiar to, but common to, all parliamentary federations.”⁷²

In its standard form, executive federalism follows from three characteristics of the parliamentary federal arrangement. First, at each level of government, the executive is the “key engine of the state.”⁷³ In contrast to a separation of powers system that seeks to tame government power by dispersing it across multiple institutions, the parliamentary design seeks to tame government power by fusing legislative and executive authority and placing it under the control of an electoral majority. The party or coalition that wins the most seats in parliament forms the govern-

⁷⁰ See *supra* note 3 and accompanying text.

⁷¹ Watts, *supra* note 2, at 3; see also, e.g., Herman Bakvis et al., *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* xii (2009) (defining executive federalism as “a pattern of interaction in which much of the negotiating required to manage the federation takes place between the executives, elected and unelected, of the main orders of governments”); Donald V. Smiley, *The Federal Condition in Canada* 83 (1987) (“Canadians live under a system of government which is executive dominated and within which a large number of important public issues are debated and resolved through the ongoing interactions among governments which we have come to call ‘executive federalism.’”); David B. Walker, *The Rebirth of Federalism: Slouching Toward Washington* 24–25 (2d ed. 2000) (“*Executive federalism* is not an American term but is frequently found in analyses of Canadian, Australian, and German federalism, given the strength of executive leadership at the national and constituent levels in these three parliamentary federal systems.”).

⁷² Watts, *supra* note 2, at 1–2; see also Field, *supra* note 3, at 118 n.33 (suggesting executive federalism may be “helpful” in Canada yet “impossible” in the United States). To provide a little more texture, the footnotes in this Part focus on the Canadian variant of executive federalism.

⁷³ Thomas A. Hockin, *Government in Canada* 7 (1975).

ment, with the prime minister as leader, and the prime minister and the cabinet she appoints carry out executive functions. Second, even as the parliamentary structure yields cohesion within a level of government, the federal arrangement tempers such unity with a territorial division of power. This division of power complicates the project of national governance because, whether de jure or de facto, states or provinces enjoy a substantial degree of autonomy.⁷⁴ Finally, executive federalism arises because the federal and state or provincial governments are interdependent in practice.⁷⁵ This interdependence yields “a continuous process of . . . consultation and negotiation.”⁷⁶

As this very brief description suggests, executive federalism involves mutual reliance among federal and state or provincial actors. Even when a country’s constitution provides for a dominant federal government, as does Canada’s, for instance, interlocking responsibilities mean that the federal government depends on the provinces to achieve its objectives.⁷⁷ The resulting policy landscape can be variegated. While negotiations among executives offer a route to comprehensive, and uniform, national policymaking, such negotiations may also facilitate differentiation within national policy. Bargains struck between the federal government and

⁷⁴ See, e.g., Richard Simeon & Beryl A. Radin, *Reflections on Comparing Federalisms: Canada and the United States*, 40 *Publius* 357, 360 (2010). Executive federalism has flourished in countries with a small number of provinces or states (for instance, Canada has ten provinces and three territories; Australia has six states and three federal territories), an arrangement that tends to fortify decentralization. See, e.g., Albert Alesina & Enrico Spolaore, *The Size of Nations* 137–44 (2005); Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 *Fla. L. Rev.* 1, 2–6 (2011).

⁷⁵ Watts, *supra* note 2, at 3–4; see also, e.g., Bakvis et al., *supra* note 71, at 103 (noting the interdependence of Canada’s federal and provincial governments); Smiley, *supra* note 71, at 85 (also noting the interdependence of Canada’s federal and provincial governments).

⁷⁶ Watts, *supra* note 2, at 3–4. For instance, in Canada, the provincial and federal governments work together on healthcare because the provinces have jurisdiction over the administration of hospitals, while the federal government has jurisdiction over the health of the population. See Martha Jackman, *Constitutional Jurisdiction over Health in Canada*, 8 *Health L.J.* 95 (2000); see also Simeon & Radin, *supra* note 74, at 360 (noting that interdependence means it is “difficult to imagine any policy debate in Canada in which federalism is not at the center”).

⁷⁷ See, e.g., Bakvis & Brown, *supra* note 3, at 490–91, 499–501. The contours of Canada’s executive federalism have changed over time—the Liberal Chrétien and Martin governments, for instance, embraced high-level provincial-federal cooperation more than the Conservative Harper government—but interlocking responsibilities have made some form of executive federalism a constant. See generally James Bickerton, *Deconstructing the New Federalism*, 4 *Can. Pol. Sci. Rev.* 56, 56–61 (2010) (arguing that all “new federalisms” have entailed some form of joint federal-provincial policymaking).

the Canadian provinces have in some areas yielded what one commentator calls “checkerboard federalism”: different substantive policy, and different configurations of provincial and federal authority, across the provinces.⁷⁸ In the European Union, differentiation of E.U. policy across the member states is still more common.⁷⁹ A related, notable feature of executive federalism is significant collaboration among provincial or state executives, and not only between the center and periphery. National policy may result from horizontal initiatives.⁸⁰

If executive federalism is “a logical dynamic resulting from the marriage of federal and parliamentary institutions,”⁸¹ it is unsurprising that the comparative literature suggests it is not found in the United States and instead, like the domestic literature, emphasizes the role of Congress in shaping federal-state relations.⁸² As the discussion in Part I argued, however, partisan polarization has diminished the role of Congress and enhanced federal executive power; it has made many state governments more parliamentary insofar as single-party government unifies legislative and executive powers and empowers governors; and it has generated strong ties among state and federal officials.

Put differently, partisan polarization has yielded an idiosyncratic American variant of executive federalism. The familiar parliamentary version follows from cohesion within each level of government and distance between them notwithstanding interdependence—that is, from unified governments at both the federal and state/provincial levels and from subunit autonomy. The American version instead follows from internally divided federal government and strong connections among state and federal officials.

⁷⁸ See also Bakvis, *supra* note 4, at 205, 207, 211 (describing how talks between the federal government and each province during the late 1990s reshaped labor market policy, as five provinces negotiated greater autonomy in the area, while four provinces reached agreements to co-deliver programs with Ottawa).

⁷⁹ See *infra* Section IV.A (discussing differentiated integration in the European Union).

⁸⁰ For instance, the Council of Ministers of Education, Canada (composed of the ministers of each province) undertakes cooperative educational initiatives, including administering a countrywide assessment program, in the service of a national education policy, and its work is complemented by regional curriculum consortia. See e.g., Sandra Vergari, *Safeguarding Federalism in Education Policy in Canada and the United States*, 40 *Publius* 534, 538, 542, 544–45 (2010).

⁸¹ Watts, *supra* note 2, at 1.

⁸² See, e.g., *id.* at 6; Bakvis & Brown, *supra* note 3, at 502; Field, *supra* note 3, at 110–12; Simeon & Radin, *supra* note 74, at 360, 362–63.

The partisan genealogy of executive federalism in the United States is striking when compared to Canada, in particular. Canadian provincial and federal parties are largely distinct; different parties compete in provincial elections and federal elections, and even those that share a name often lack a common identity.⁸³ The party structure is thus bound up with the workings of executive federalism: Party government prevails at each level of government, but the parties do not bridge the federal-provincial divide.⁸⁴ In the United States, the partisan story is nearly opposite. The separation of powers and supermajority requirements impede party government in Washington, but a national party system generates ties among state and federal actors. American executive officials thus work together to overcome obstacles within a given level of government as much as to manage the federal arrangement.

Because the parliamentary and American variants of executive federalism have distinct pedigrees, it is unsurprising that they retain important differences, not least among them legislative-executive fusion in the parliamentary version and an absent Congress in the American version.⁸⁵ There is nonetheless a notable convergence: In both systems today, ne-

⁸³ See Bakvis et al., *supra* note 71, at 124; Anthony M. Sayers & Andrew C. Banfield, *The Evolution of Federalism and Executive Power in Canada and Australia*, in *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* 185, 191 (Arthur Benz & Jörg Broschek eds., 2013); Lori Thorlakson, *Patterns of Party Integration, Influence and Autonomy in Seven Federations*, 15 *Party Pol.* 157, 166, 173 (2009). But cf. Anna Lennox Esselment, *A Little Help from My Friends: The Partisan Factor and Intergovernmental Negotiations in Canada*, 43 *Publius* 701, 701, 722 n.1 (2013) (suggesting many of the provincial and federal parties are “cousins”).

Federated parties both reflect and perpetuate the absence of a Canadian federal institution designed to represent the provinces. The Senate is instead appointed upon the Prime Minister’s recommendation, and the Canadian Supreme Court recently rejected the Prime Minister’s proposal to make the Senate popularly elected in the absence of a constitutional amendment. Reference re Senate Reform (2013), [2014] 1 S.C.R. 704, 708 (Can.). It is, however, customary for Canada’s federal cabinet to include a minister from each province. Bakvis et al., *supra* note 71, at 123.

⁸⁴ See Watts, *supra* note 2, at 11; Beryl A. Radin & Joan Price Boase, *Federalism, Political Structure, and Public Policy in the United States and Canada*, 2 *J. Comp. Pol’y Analysis* 65, 69–70 (2000).

⁸⁵ Parliamentary executive federalism is itself a far more diverse phenomenon than the discussion here can capture. For example, I have not even noted the German case, which follows from a federal structure in which the central government sets national policy and the Länder implement it; executive federalism in Germany offers a way for the Länder to influence national policymaking prior to implementation. See, e.g., Watts, *supra* note 2, at 12; Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 173 (2001).

gotiations among state and federal executives generate national policy and mediate federalism.

B. The American Variant

The lens of executive federalism brings into focus several important characteristics of contemporary American governance. This Part uses the examples of healthcare, marijuana, climate change, and education to elaborate these characteristics: the dominance of executive actors, mutual reliance among state and federal executives, national policy that is differentiated across the states, and agreements among state officials that inform national governance. As in its foreign manifestations, American executive federalism is both cooperative and contestatory.⁸⁶ Lacking a congressional ally, the federal executive may be able to achieve seemingly out-of-reach goals by collaborating with the states. At the same time, federal reliance on state authority and state initiative—and federal acquiescence in the face of certain state resistance—complicates an understanding of such executive action as unilateral.

1. Healthcare

Because it confers significant authority on the states as well as federal agencies, the Patient Protection and Affordable Care Act (“ACA”) is the leading example in recent accounts of legislative federalism, the *pièce de résistance* for claims that today’s federalism comes from Congress.⁸⁷ Yet negotiations among state and federal executives have transformed the statutory scheme. Departing from legislative expectations, a series of compromises concerning the Medicaid expansion, health insurance exchanges, and insurance plan coverage, in particular, are remaking national policy.

A principal tool of executive federalism at play in the ACA’s implementation is waiver: The federal executive has permitted states to opt

⁸⁶ Compare, e.g., David Cameron & Richard Simeon, *Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism*, 32 *Publius* 49, 49 (2002) (describing Canadian executive federalism as “collaborative federalism” that entails the codetermination of national policy by relatively cooperative bargaining), with Bakvis et al., *supra* note 71, at 103 (exploring disagreement in Canadian executive federalism), and Watts, *supra* note 2, at 14–15 (same).

⁸⁷ See, e.g., Gluck, *supra* note 59.

out of statutory requirements.⁸⁸ With the Medicaid expansion rendered truly optional by the Supreme Court,⁸⁹ and a Congress that has not responded to this holding, the federal executive has entered into a variety of compromises with state executives to achieve its overall objective of Medicaid expansion. For instance, following consultation between governors and high-up executive branch officials, including White House senior advisor Valerie Jarrett, the federal executive approved waivers for Arkansas, Indiana, Iowa, Michigan, New Hampshire, and Pennsylvania, several of which permit Medicaid expansion through private insurance policies.⁹⁰ The states have not always gotten what they wanted; the federal executive has rejected proposals for partial Medicaid expansion, among others. But notwithstanding the hierarchy baked into the statute, political considerations and federal reliance on state implementation have yielded a range of compromises.⁹¹

⁸⁸ See, e.g., Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in *The Health Care Case: The Supreme Court's Decision and Its Implications* 227, 230 (Nathaniel Persily et al. eds., 2013); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 *Colum. L. Rev.* 265, 281–82 (2013). Waiver has been the main area in which American executive federalism has been recognized to date. See Gais & Fossett, *supra* note 39, at 508 (“The most common administrative device that presidents and federal executives have used to change the operation of grant programs has been the waiver.”); Thompson & Burke, *supra* note 68, at 972 (using the label “executive federalism” to describe “collaboration between the executive branches at both the federal and state levels to modify the implementation of grant programs”); see also Bryan Shelly, *The Bigger They Are: Cross-State Variation in Federal Education and Medicaid Waivers, 1991–2008*, 43 *Publius* 452, 452, 454–55 (2013) (“Federal waivers . . . have become a critical factor in U.S. intergovernmental relations . . .”); Frank J. Thompson, *The Rise of Executive Federalism: Implications for the Picket Fence and IGM*, 43 *Am. Rev. Pub. Admin.* 3, 4, 7 (2013) (noting that waivers shift decision-making authority regarding grant programs to the executive branch).

⁸⁹ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2608 (2012).

⁹⁰ See John Dinan, *Implementing Health Reform: Intergovernmental Bargaining and the Affordable Care Act*, 44 *Publius* 399, 411, 414–15 (2014); Shanna Rose, *Opting In, Opting Out: The Politics of State Medicaid Expansion*, 13 *The Forum* 63, 66 (2015); Frank J. Thompson & Michael K. Gusmano, *The Administrative Presidency and Fractious Federalism: The Case of Obamacare*, 44 *Publius* 426, 433–34 (2014); see also *infra* Section IV.B (discussing how state-federal negotiations about Medicaid expansion have opened new routes to bipartisan compromise).

⁹¹ This use of waiver is consistent with recent decades of domestic policy. Since the 1980s, waiver has been a central tool in the fields of welfare and healthcare, in particular, with many governors seeking out waivers to advance signature policy initiatives. See Thompson, *supra* note 88, at 13, 15. Estimating that waivers affected three-quarters of welfare recipients, for instance, President Clinton insisted in 1996 that “he and the states had already reformed welfare while the legislative process in Washington had bogged down.” Gais & Fossett, *supra* note 39, at 508. Prior to the ACA, Medicaid policy was also shaped by demonstration and programmatic waivers. See *id.* at 509; Thompson & Burke, *supra* note 68; Thompson,

Other aspects of ACA implementation have also generated novel policies and institutional arrangements. The creation of health insurance exchanges, for example, has involved an unanticipated merging of state and federal authority. Although the federal statute offers a binary choice between state and federal exchanges, the Department of Health and Human Services (“HHS”) responded to state reluctance by proposing various “partnership” exchanges run by the state and federal governments together.⁹² After much back and forth with the Governor, HHS also agreed to allow Utah to continue operating its exchange for small businesses, so that a preexisting state program was folded into the federal law.⁹³ Still more surprising to many observers, HHS has decided what benefits are “essential” to private insurance plans by deferring to state choices. Although Congress drafted the ACA assuming a single, national definition of essential health benefits, the federal executive branch decided instead to allow each state to define essential benefits based on existing insurance plans in the state.⁹⁴ HHS “considered one national definition” but rejected that course in favor of “state flexibility.”⁹⁵

The past few years of ACA implementation thus reveal how state-federal bargaining can remake national policy without congressional involvement. They also underscore how states may enjoy substantial power even when they are administering federal law and the federal executive branch has legal authority to displace state policy. To be able to achieve overarching substantive objectives, to gain political capital, or

supra note 88, at 8–10. In the 1990s, state and federal executives negotiated comprehensive waivers moving Medicaid enrollees from fee-for-service programs into managed care, while in the wake of Hurricane Katrina, demonstration waivers were used in a way “the drafters of the original 1115 [waiver] provision in 1962 almost certainly never envisioned,” as a tool for responding to national disasters. Thompson & Burke, *supra* note 68, at 979–80.

⁹² Dinan, *supra* note 90, at 404.

⁹³ *Id.* at 406–08; see also Thompson & Gusmano, *supra* note 90, at 439 (“[F]ederal administrators respected states that had been ahead of the curve in establishing exchanges.” (emphasis omitted)).

⁹⁴ See Nicholas Bagley & Helen Levy, *Essential Health Benefits and the Affordable Care Act: Law and Process*, 39 *J. Health Pol., Pol’y, & L.* 441, 442 (2014).

⁹⁵ Patient Protection and Affordable Care Act; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 77 *Fed. Reg.* 70,644, 70,665 (proposed Nov. 26, 2012) (to be codified at 45 C.F.R. pts. 147, 155, 156); see Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 *Fed. Reg.* 10,750, 10,813 (Feb. 27, 2015) (to be codified at 45 C.F.R. pts. 144, 147, 153, 154, 155, 156, 158).

for a variety of other practical reasons, the federal executive makes significant concessions to state demands.⁹⁶

The ACA rollout further illustrates the relative ease with which executive federalism may license differences across states with respect to federal law. State-based diversity is not unique to executive federalism; one of federalism's traditional selling points is the accommodation of state difference, and Congress may choose to shelter or promote a variety of state policies in federal statutes.⁹⁷ But because it entails many discrete negotiations between state and federal officials that unfold over time, executive federalism is particularly agile at differentiating federal schemes, and doing so even when Congress has not contemplated different state policy choices.

2. *Marijuana*

Although negotiations about the implementation of federal law often yield substantial changes to statutory schemes, these negotiations can ultimately be traced to a congressional grant of authority. Even waiver provisions are delegations from Congress to the federal executive. The executive federalism frame shifts attention from legislative federalism's focus on the authorizing moment to the process of implementation, but this shift may be more one of emphasis than conceptualization.

Executive federalism does not, however, emerge only from federal law. Sometimes federal and state executives alike rely on state initiative and state law, with the federal executive branch following the state's policy-making lead. In these instances, premises of legislative federalism are inverted: Instead of Congress shaping national policy and federal-state relations, federal and state executives craft national policy, looking to state sources of authority.

⁹⁶ See generally Ryan, *supra* note 68, at 329–30 (exploring sources of state power in federalism negotiations); Dinan, *supra* note 90, at 419 (“[W]hen state nonparticipation threatens the success of a program central to a president’s policy agenda, state leverage is at its peak and federal concessions most likely.”); Heather K. Gerken, Foreword: Federalism All the Way Down, 124 *Harv. L. Rev.* 4, 33–44 (2010) (discussing ways in which states may exercise the “power of the servant”).

⁹⁷ See, e.g., 42 U.S.C. § 7543(b) (2006) (granting California possible waiver from federal preemption of vehicle emissions standards under the Clean Air Act); Gluck, *supra* note 1, at 2008, 2020 (describing how state administration may diversify federal law).

This, at least, is one way to understand today's national marijuana policy.⁹⁸ During the last six years, states have begun legalizing marijuana, and there has been “grudging but growing acceptance on the part of federal executive officials.”⁹⁹ In response to medicinal marijuana laws, the Department of Justice (“DOJ”) first suggested in 2009 that it would limit its enforcement of the federal Controlled Substances Act (“CSA”) with respect to conduct that was legal under state law. Deputy Attorney General David Ogden issued a memorandum to U.S. Attorneys—addressing these officials as a way of communicating with an audience beyond the federal executive branch—providing that the attorneys “should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”¹⁰⁰ Although it emphasized that states could not authorize violations of federal law, the memo was widely read to indicate that the federal government would let states set the contours of federal enforcement.

DOJ soon pulled back from the Ogden memo. As California voters considered a proposition that would have legalized marijuana for personal consumption, Attorney General Eric Holder promised to “vigorously enforce” the CSA in California even if the proposition were to

⁹⁸ It is also a way to understand less visible developments, such as state deputation of federal officers to enforce state law. See *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments* (Mar. 5, 2012), <http://www.justice.gov/sites/default/files/olc/opinions/2012/03/31/state-local-fleo-stafford-act-deployments.pdf> [<https://perma.cc/7EKZ-RJKG>] (concluding that federal law enforcement officers “may accept the deputation conferred by state law and make arrests for violations of state law” even absent express federal statutory authorization); see also *Federal Bureau of Investigation—Statutory Jurisdiction—Authority of Agents Concerning Non-Federal Offenses*, 2 Op. O.L.C. 47, 49 (1978) (opining that even though FBI agents lack federal authority to respond to state law violations, they may enjoy such authority pursuant to state law).

⁹⁹ Sam Kamin, *The Battle of the Bulge: The Surprising Last Stand Against State Marijuana Legalization*, 45 *Publius* 427, 429 (2015); see also Cristina Rodríguez, *Federalism and National Consensus 26–27* (unpublished manuscript) (on file with author) (“[T]he federal government’s position has been quite fluid in response to changing circumstances on the ground, even if opaque at times (perhaps deliberately so, as the federal government’s own position evolved).”)

¹⁰⁰ U.S. Dep’t of Justice, Office of the Deputy Attorney General, *Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009), <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/5UG2-JZ2M>].

pass.¹⁰¹ Deputy Attorney General James Cole issued a new memorandum to U.S. Attorneys, noting that there had been an increase in the cultivation and distribution of marijuana for “purported medical purposes” and insisting that “[t]he Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”¹⁰² U.S. Attorneys in several states responded by indicting medical marijuana dispensary operators.¹⁰³

When Colorado and Washington adopted ballot initiatives legalizing marijuana in 2012, their Governors accordingly worried that they might invest resources in the administrative apparatus necessary to tax and regulate marijuana, only to have federal enforcement effectively nullify the initiatives.¹⁰⁴ Attorney General Holder responded that the DOJ would not seek to challenge the states’ initiatives as preempted and would enforce the CSA in keeping with the priorities laid out in a third DOJ memorandum issued the same day.¹⁰⁵ Those priorities included preventing violence and criminal activity, ensuring marijuana was not distributed to minors, and keeping marijuana from being diverted to other states.¹⁰⁶

¹⁰¹ John Hoeffel, Holder Vows Fight Over Prop. 19, L.A. Times (Oct. 16, 2010), at AA1, <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016> [<https://perma.cc/RAM9-69YD>].

¹⁰² U.S. Dep’t of Justice, Office of the Deputy Attorney Gen., Memorandum for U.S. Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<https://perma.cc/6TVG-FD5Q>].

¹⁰³ See, e.g., Feds Warn, Indict California Medical Marijuana Dispensary Operators, KABC-TV (Oct. 7, 2011), <http://abclocal.go.com/kabc/story?section=news/state&id=8383655> [<https://perma.cc/G6MN-LUAF>].

¹⁰⁴ See, e.g., Sari Horwitz, Washington Set to Legalize Marijuana Use Without Justice Department Guidance, Wash. Post (Dec. 1, 2012), https://www.washingtonpost.com/world/national-security/washington-set-to-legalize-marijuana-use-without-justice-department-guidance/2012/12/01/0a436d64-3b3a-11e2-b01f-5f55b193f58f_story.html [<https://perma.cc/9P4W-Q55U>].

¹⁰⁵ Letter from Eric H. Holder, Jr., Attorney Gen., Dep’t of Justice, to John W. Hickenlooper, Governor of Colo., and Jay Inslee, Governor of Wash. (Aug. 29, 2013), <http://dfi.wa.gov/documents/banks/holder-letter-08-29-13.pdf> [<https://perma.cc/M4LM-M9BM>]. Nebraska and Oklahoma have sued Colorado, arguing that its law is preempted by the CSA. See *infra* Section V.B.

¹⁰⁶ U.S. Dep’t of Justice, Office of the Deputy Attorney Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) [hereinafter Cole Memo], <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/88G7-QP38>].

In effect, DOJ officials proposed a compromise: If states took steps to minimize the externalities of greatest concern to the federal executive, the DOJ would let states determine how federal law would be enforced in their borders. But if state legalization interfered with “federal priorities,” the deal would be off—the federal government might at that point not only bring individual prosecutions, but also “seek to challenge the regulatory structure itself.”¹⁰⁷ So far, the deal seems to be holding as Alaska, Oregon, and Washington, D.C. have also legalized marijuana, and the DOJ and Treasury have removed additional obstacles to state legalization by promulgating a joint guidance for financial institutions dealing with marijuana businesses.¹⁰⁸

Without an amendment to federal law, then, executive federalism has transformed national drug policy. States have taken the initiative by adopting new state laws and establishing novel regulatory apparatuses, but negotiations between state and federal officials over the enforcement of state and federal law have ultimately determined the contours of today’s drug law. Such executive federalism has allowed for differences among the states even in the context of the federal CSA: As a matter of federal as well as state law, marijuana today is effectively legal for recreational purposes in four states, legal for medicinal purposes in nineteen additional states, and illegal in the remaining states.¹⁰⁹

3. *Climate Change*

The discussions of healthcare and marijuana have focused on executive federalism’s prominent vertical dimension, negotiations between state and federal executives that shape national policy. But horizontal relationships among the states are also critical. While legislative and administrative federalism scholars have studied ways in which state actors collaborate to lobby in Washington,¹¹⁰ the practice of executive federalism pushes us to consider collective state governance. Interstate com-

¹⁰⁷ *Id.* at 3.

¹⁰⁸ See Kamin, *supra* note 99, at 427, 432, 436; Dep’t of the Treasury, Fin. Crimes Enf’t Network, Guidance, BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014), http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf [<https://perma.cc/6D7S-DXGN>] (“This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”).

¹⁰⁹ See United States, NORML, <http://norml.org/states> [<https://perma.cc/AWM5-YDX3>].

¹¹⁰ See Nugent, *supra* note 45, at 115–67; Seifter, *supra* note 45.

pacts and more informal agreements among state officials inform federal executive action and are reshaped by such action in turn.

One area in which multistate collaboration has been prominent is climate change. With Congress long inactive and the EPA beginning to regulate only recently, states have taken the lead in addressing greenhouse gas emissions.¹¹¹ Among other programs, more than thirty states have climate action plans and renewable portfolio standards, California has an economy-wide cap and trade program, and a coalition of nine northeastern and mid-Atlantic states have a cap and trade program for the electricity sector, the Regional Greenhouse Gas Initiative (“RGGI”).¹¹² RGGI is an example of horizontal executive federalism: New York Governor George Pataki approached other governors in 2003, and a memorandum of understanding was used to create the initiative.¹¹³ Over time, the character of the initiative has become more partisan¹¹⁴

¹¹¹ See generally Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 *Nw. U. L. Rev.* 1097, 1099 (2009) (exploring how states have addressed climate change but emphasizing that state responses are the result of “repeated, sustained, and dynamic lawmaking efforts” involving the federal government as well).

¹¹² See Kirsten H. Engel, *EPA’s Clean Power Plan: An Emerging New Cooperative Federalism?*, 45 *Publius* 452, 455 (2015); Center for Climate & Energy Solutions, *Climate Action Plans*, <http://www.c2es.org/us-states-regions/policy-maps/climate-action-plans> [<https://perma.cc/N2YA-ZT9W>]; *Regional Greenhouse Gas Initiative*, <http://www.rggi.org> [<https://perma.cc/7RMM-MLG2>].

¹¹³ Gerald B. Silverman, *RGGI Holds Bipartisan Support in Northeast As Climate Change Issues Debated Nationally*, *Bloomberg BNA* (Sept. 20, 2013), <http://www.bna.com/rggi-holds-bipartisan-n17179877193/> [<https://perma.cc/3GFW-47AM>]. See generally *Memorandum of Understanding, Regional Greenhouse Gas Initiative* (Dec. 20, 2005), http://rggi.org/docs/mou_final_12_20_05.pdf [<https://perma.cc/8KY2-DXRC>] (creating the Regional Greenhouse Gas Initiative).

¹¹⁴ Republican Governor Chris Christie officially withdrew New Jersey from RGGI in 2012. See *Notice of Withdrawal of Agreement to the RGGI Memorandum of Understanding from State of New Jersey to Signatory States, Department of Environmental Protection, Regional Greenhouse Gas Initiative* (Nov. 29, 2011) (“New Jersey is withdrawing its agreement to the [Memorandum of Understanding] and will become a Non-Signatory State as of January 1, 2012.”). Republican legislators in New Hampshire have also introduced bills to withdraw from RGGI. See, e.g., Rep. Howard Moffett, *My Turn: Let’s Not Let the Environment Be a Partisan Issue*, *Concord Monitor* (Feb. 17, 2015), <http://infoweb.newsbank.com/resources/doc/nb/news/1538CFB81EBAE5C8?p=WORLDNEWS>. The way in which regional environmental efforts have assumed a partisan cast is also apparent elsewhere in the nation: The Midwestern Greenhouse Gas Reduction Accord and the Western Climate Initiative were largely abandoned following Republican electoral successes. See, e.g., Geoffrey Craig, *Six US States Leave the Western Climate Initiative*, *Platts* (Nov. 18, 2011), <http://www.platts.com/latest-news/electric-power/washington/six-us-states-leave-the-western-climate-initiative-6695863> [<https://perma.cc/HVB3-MBMP>].

(and arguably somewhat less regional as it links to California's program¹¹⁵).

The development of RGGI is consistent with trends over time in interstate cooperation. Although compacts and agreements have been a part of American federalism since the founding, nearly all such agreements prior to the twentieth century dealt with state boundary lines.¹¹⁶ In the 1920s, in keeping with the general enthusiasm of the day for administrative governance, compacts began to tackle regional rather than simply bilateral issues, to address problems that would change over time rather than to offer one-shot resolutions, and to establish new institutions, such as commissions or agencies, to furnish day-to-day governance.¹¹⁷ While the regional consciousness underlying early twentieth-century compacts was often opposed to nationalism,¹¹⁸ many recent interstate agreements are best understood as national undertakings.¹¹⁹ Today, a range of formal and informal interstate agreements seek to address problems that transcend state borders, and these concordats exist not so much to hold off Washington (in keeping with the standard explanation¹²⁰) as to substitute for federal governance because Washington is not acting.¹²¹ Although some commentators have found RGGI per-

¹¹⁵ See Dallas Burtraw et al., *Linking by Degrees: Incremental Alignment of Cap-and-Trade Markets 3–4*, Resources for the Future (2013) (Discussion Paper) <http://www.rff.org/Documents/RFF-DP-13-04.pdf> [<https://perma.cc/5MHP-KZH9>].

¹¹⁶ See Joseph F. Zimmerman, *Horizontal Federalism: Interstate Relations 45* (2011). On Compact Clause doctrine, see *infra* Section V.C.

¹¹⁷ See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 *Yale L.J.* 685 (1925); cf. Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 *Fla. L. Rev.* 1 (1997) (considering how compacts that create ongoing administrative agencies raise democratic concerns).

¹¹⁸ See, e.g., Frankfurter & Landis, *supra* note 117, at 708.

¹¹⁹ See, e.g., Caroline N. Broun et al., *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide 178* (2006); Elazar, *supra* note 57, at 196.

¹²⁰ See, e.g., Nugent, *supra* note 45, at 77–114 (considering how uniform state laws may be adopted to “preempt” federal action).

¹²¹ See, e.g., Ann O'M. Bowman & Neal D. Woods, *Strength in Numbers: Why States Join Interstate Compacts*, 7 *St. Pol. & Pol'y Q.* 347, 359 (2007); see also Ann O'M. Bowman & Neal D. Woods, *Expanding the Scope of Conflict: Interest Groups and Interstate Compacts*, 91 *Soc. Sci. Q.* 669, 670 (2010) (finding that states are most likely to join compacts when they have dense interest group systems).

plexing insofar as its benefits do not accrue only to signatory states,¹²² the initiative fits comfortably within this trend.¹²³

In its most recent exercise of authority under the Clean Air Act, the EPA has built deliberately on state initiatives including RGGI. Responding to a presidential instruction, the agency has adopted a set of significant rules relating to power plant emissions.¹²⁴ Although some commentators have suggested that this Clean Power Plan illustrates the centrality of “two institutions,” a federal agency and the federal courts, in driving environmental policy today,¹²⁵ the plan also underscores the need to look beyond the federal government. There are fifty other actors playing a pivotal role because the federal executive is relying on state policies to establish national policy.¹²⁶ In setting emission reduction goals for each

¹²² See, e.g., Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. Envtl. L.J. 54, 55 (2005) (“[I]t defies economic logic that small subglobal jurisdictions, such as state and local governments in the United States, should be doing much of anything to mitigate their comparatively minor contribution to a global environmental phenomenon.”); Note, *State Collective Action*, 119 Harv. L. Rev. 1855, 1863 (2006) (“Precisely why the states want to participate in RGGI is unclear—because greenhouse gases do not have localized effects, the states do not seem to receive any tangible benefit from this program even though they bear the costs of the cap . . .”).

¹²³ As Professor Aziz Huq has noted, undertakings like RGGI that generate public goods can be explained by the political benefits obtained by leaders of states with “significant voting blocs of environmentally conscientious constituents.” Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 Stan. L. Rev. 217, 265 (2014). Put slightly differently, these state choices can be explained by partisan politics, which places state governance in a national frame and makes state voters and thus state politicians more likely to take a community beyond the state as their object of concern. Although interstate agreements designed to benefit a group beyond signatory states remain rare, they have become more prevalent in recent years. For instance, the proposed National Popular Vote Interstate Compact would commit states that control a majority of electoral votes to casting their votes for the presidential candidate who prevails in the national popular vote. By agreeing to cast all of their electoral votes for that candidate even if she loses in the participating states, those states would be marshaling state power on behalf of a national majority. See *National Popular Vote*, <http://www.nationalpopularvote.com/pages/explanation.php> [https://perma.cc/Y9S2-KP68].

¹²⁴ *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter *Clean Power Plan*].

¹²⁵ Freeman & Spence, *supra* note 9, at 28.

¹²⁶ In so doing, the EPA is following a presidential instruction to “launch [a new regulatory program] through direct engagement with States, as they will play a central role in establishing and implementing standards for existing power plants.” *Power Sector Carbon Pollution Standards*, 78 Fed. Reg. 39,535, 39,536 (July 1, 2013). The turn to the states also reflects a critical decision that can be traced to Congress—the Clean Air Act’s provision for

state and guidelines for state plans to achieve these goals, the regulations embrace California's cap and trade plan, RGGI, and other state undertakings.¹²⁷ As the EPA puts it, in recognition of the states' "leadership role," its guidelines "are based on and would reinforce the actions already being taken by states."¹²⁸

Beyond blessing certain existing state efforts as a matter of federal law, the Clean Power Plan also facilitates state governance in two notable respects. First, the Plan establishes a different emissions reduction target for each state and gives states flexibility in determining how to meet the targets.¹²⁹ These targets are, moreover, based in part on past state policy choices, as manifested in the state's 2012 carbon dioxide emission figures.¹³⁰ Second, the EPA explicitly recognizes and encourages multistate efforts to address climate change.¹³¹ Even though regions are often more sensible units than states for addressing environmental issues and interest in multistate governance is longstanding,¹³² there are very few ways in which groups of states may assume legal status; most of our existing legal frameworks adopt a state-federal binary. Recognition by the federal government that multistate governance may constitute a form of national governance is one way in which "our regions [become] realities."¹³³ The Clean Power Plan endorses extant multistate responses to climate change while smoothing the path to future collaborations among states. In response to state comments seeking more flexibility in multistate approaches—for instance, state-specific plans with

state implementation plans—although the EPA is engaging with the states in novel ways, as I will discuss.

¹²⁷ See, e.g., Clean Power Plan, *supra* note 124, at 64,678, 64,735, 64,783, 64,796, 64,888.

¹²⁸ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,832, 34,850 (proposed June 18, 2014) [hereinafter Clean Power NPRM]; see Clean Power Plan, *supra* note 124, at 64,665 (noting that the Clean Power Plan is "designed to build on and reinforce progress by states, cities and towns").

¹²⁹ Clean Power Plan, *supra* note 124, at 64,665, 64,888–89.

¹³⁰ *Id.* at 64,736, 64,815; see also Engel, *supra* note 112, at 462 (discussing the notice of proposed rulemaking for the Clean Power Plan, which involved a greater degree of state differentiation).

¹³¹ See, e.g., Clean Power Plan, *supra* note 124, at 64,838 ("The EPA sees particular value in multi-state plans and multi-state coordination, which allow states to implement a plan in a coordinated fashion with other states.").

¹³² See, e.g., Frankfurter & Landis, *supra* note 117, at 707–08.

¹³³ *Id.* at 729. Interstate compacts are another way. See, e.g., *supra* notes 116–20 and accompanying text; *infra* Section V.C.

regionally shared elements¹³⁴—the final rule allows for both multistate plans and individual state plans that will be implemented in coordination with other state plans.¹³⁵

The Clean Power Plan thus seizes on existing state policies as a basis for writing fifty-state differences into a federal rule and further encourages states to collaborate with one another in formulating national policy solutions going forward. Against a backdrop of congressional inaction and an aging statute that is an awkward fit with greenhouse gas regulation,¹³⁶ the EPA's regulation can be understood to substitute state regulatory specificity for federal legislative specificity.

4. *Education*

Education policy for the past decade has been set by a series of executive agreements—among the states, between groups of states and the federal executive branch, and between individual states and the federal executive branch. Recent federal legislation challenges such executive federalism in both form and substance. The area in which state and federal executive policymaking has been most aggressive thus now offers a test for the practice. It is too soon to say whether the Every Student Succeeds Act (“ESSA”) reveals executive federalism's limits or, instead, demonstrates its durability, but there is reason to suspect the latter.

Between 2007, when the No Child Left Behind Act (“NCLB”) was due to be reauthorized, and December 2015, when the ESSA was passed, state and federal executives assumed control of national education policy in Congress's absence.¹³⁷ States collaborated with one another, and the Department of Education, together with the White House, embraced, further incentivized, and remolded interstate agreements. Although NCLB imposed a set of requirements for states to receive federal funding, it left the content of educational standards and assessment to

¹³⁴ See, e.g., Letter from Mary D. Nichols, Chairman, Cal. Air Res. Bd., to Janet McCabe, Acting Assistant Adm'r, Office of Air & Radiation, U.S. EPA 7 (Nov. 24, 2014), http://www.eenews.net/assets/2015/01/05/document_cw_01.pdf [<https://perma.cc/KPZ4-CTKL>] (“California . . . strongly supports allowing regional plans to be implemented in a modular fashion, under which states might agree to common plan elements.”).

¹³⁵ Clean Power Plan, *supra* note 124, at 64,838–40.

¹³⁶ See Freeman & Spence, *supra* note 9, at 21.

¹³⁷ See Every Student Succeeds Act, Pub. L. No. 114-95 (2015); No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

states.¹³⁸ In April 2009, governors and commissioners of education from 48 states launched an effort to develop common proficiency standards for English language and mathematics, resulting in the Common Core State Standards.¹³⁹ The adoption of these standards largely occurred through state executive branches¹⁴⁰ and prodded additional interstate collaboration around implementation.¹⁴¹

As state executives were collaborating on the Common Core, the federal executive branch was grappling with the nonamendment of NCLB and concerns about enforcing federal statutory requirements that no state would be able to satisfy.¹⁴² Relying first on Recovery Act funds and then on its broad waiver authority under NCLB itself,¹⁴³ the federal executive incentivized states to adopt the Common Core standards.¹⁴⁴ The Department of Education did not simply bless interstate governance, but effectively required it as an aspect of participation in a federal scheme. Although the federal executive was not responsible for the establishment of the Common Core, then, it was largely responsible for its rapid diffusion.¹⁴⁵ The Department further stimulated state collaboration through funding to “consortia of states” that would develop assessment systems for the Common Core standards.¹⁴⁶ The resulting consortia—the Partner-

¹³⁸ See, e.g., Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 *Calif. L. Rev.* 565, 595–99 (2015).

¹³⁹ Development Process, Common Core State Standards, <http://www.corestandards.org/about-the-standards/development-process> [<https://perma.cc/SQ9E-FSW2>].

¹⁴⁰ Ashley Jochim & Lesley Lavery, *The Evolving Politics of the Common Core: Policy Implementation and Conflict Expansion*, 45 *Publius* 380, 383 (2015) (noting that thirty-nine states adopted the Common Core through actions by their Chief State Education Officer or Board of Education).

¹⁴¹ See Kurzweil, *supra* note 138, at 623–24.

¹⁴² See *id.* at 605.

¹⁴³ 20 U.S.C. § 7861(a) (2006).

¹⁴⁴ In effect, the Department of Education provided that states would have to adopt these standards to compete for \$4.35 billion in grant money or to obtain a waiver from NCLB requirements. See Kurzweil, *supra* note 138, at 603–04.

¹⁴⁵ See Jochim & Lavery, *supra* note 140, at 382. More than 80% of states received waivers. Kenneth K. Wong, *Federal ESEA Waivers as Reform Leverage: Politics and Variation in State Implementation*, 45 *Publius* 405, 405 (2015). The ways in which the Department of Education authorized state governance in the service of a set of shared goals, while retaining a role in monitoring and evaluating diverse state actions, also made its actions an example of experimentalism. See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 *Geo. L.J.* 53, 55–56 (2011).

¹⁴⁶ Overview Information; Race to the Top Fund Assessment Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 75 *Fed. Reg.* 18,171, 18,171 (Apr. 9, 2010).

ship for Assessment of Readiness for College and Careers (“PARCC”) and the Smarter Balanced Assessment Consortium—received funding by entering into “cooperative agreements” that provided for “communication, coordination and involvement” with Department of Education officials.¹⁴⁷

The federal executive branch also engaged in ongoing negotiations with individual states around the NCLB waivers in particular.¹⁴⁸ For instance, Oklahoma lost its NCLB waiver after the Governor repudiated her support for the Common Core and state membership in the PARCC consortium. State officials then entered into discussions with the Department of Education, and the waiver was ultimately reinstated, leading one critic to cite “an interesting mix of federal influence and state persistence in resolving the intergovernmental tension over decisions on state standards.”¹⁴⁹

Insofar as interstate action facilitated federal executive action and was then altered by it—with Congress sitting on the sidelines all the while—education policymaking has exemplified executive federalism over the past decade. It may now reveal the practice’s limits. In December 2015, Congress passed and President Obama signed into law the ESSA, a lengthy statute that reauthorizes the Elementary and Secondary Education Act on new terms, replacing NCLB. The ESSA stands out as substantial federal legislation enacted during a period of divided government, with a thoroughly bipartisan vote in Congress.¹⁵⁰ In addition to complicating (though by no means undermining) claims of polarization-induced congressional dysfunction, the ESSA also raises questions about the robustness of executive federalism. In form, the very fact of such federal legislation is a challenge to strong variants of executive federalism. In substance, the ESSA renders “null and void” the waivers granted in recent years by the Department of Education to states and consortia,

¹⁴⁷ U.S. Dep’t of Educ., Cooperative Agreement Between the U.S. Department of Education and the Partnership for Assessment of Readiness of College and Careers (2011), <http://www2.ed.gov/programs/racetothetop-assessment/parcc-cooperative-agreement.pdf> [<https://perma.cc/CR8V-DBB4>]; U.S. Dep’t of Educ., Cooperative Agreement Between the U.S. Department of Education and the Smarter Balanced Assessment Consortium and the State of Washington (fiscal agent) (2011), <http://www2.ed.gov/programs/racetothetop-assessment/sbac-cooperative-agreement.pdf> [<https://perma.cc/C7NN-HFLF>].

¹⁴⁸ See *infra* Section IV.B.

¹⁴⁹ Wong, *supra* note 145, at 420–21.

¹⁵⁰ Every Student Succeeds Act of 2015: Record Vote No. 334, 161 Cong. Rec. S8561 (Dec. 9, 2015); Roll No. 665, 16 Cong. Rec. H884–94 (Dec. 2, 2015).

and it curbs federal executive supervision of state education policy going forward.¹⁵¹

Even as the ESSA curtails federal involvement in education policy, however, it also blesses certain arrangements that arose from the Department of Education's negotiations with the states. For instance, while the ESSA has been celebrated for authorizing states to design their own academic standards and intervention approaches for low-performing schools, this is what states have been doing pursuant to waivers from NCLB's requirements. The White House's suggestion that the ESSA codifies "many of the key reforms the Administration has . . . encouraged states and districts to adopt in exchange for waivers" is no more exaggerated than claims that the ESSA offers a thorough "re-buke" to the federal executive branch.¹⁵² The Act also does not affect horizontal interstate collaboration, such as that which produced the Common Core.¹⁵³ Indeed, although the ESSA expressly provides that it does not prohibit states from withdrawing from the Common Core, neither does it invalidate that initiative.¹⁵⁴

More notably, the ESSA creates some fertile new conditions for executive federalism. For one thing, it expands the federal role in discrete areas, providing annual funding for preschool education, for example. Because the ESSA entrusts these portions of the Act to HHS, the need for interagency coordination may spur not only federal executive, but al-

¹⁵¹ ESSA § 4(c). In limiting federal oversight, the Act also reprimands the Department of Education (which nonetheless supported the bill) with descriptions of the many forms of authority the Department may not exercise. E.g., *id.* § 1005 (amending 20 U.S.C. § 6311) ("The Secretary shall not have the authority to mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a State.").

¹⁵² White House, Fact Sheet: Congress Acts to Fix No Child Left Behind (Dec. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/12/03/fact-sheet-congress-acts-fix-no-child-left-behind> [<https://perma.cc/SY6N-GDGZ>]; see Diane Ravitch, Farewell, NCLB, We Won't Miss You, Diane Ravitch's Blog (Nov. 20, 2015), <http://dianeravitch.net/2015/11/20/farewell-nclb-we-wont-miss-you/> [<https://perma.cc/K3ZZ-GY9G>].

¹⁵³ ESSA § 1005(j) ("A State retains the right to enter into a voluntary partnership with another State to develop and implement the challenging State academic standards and assessments required under this section . . .").

¹⁵⁴ See *id.* § 8036 ("Nothing in this Act shall be construed to prohibit a State from withdrawing from the Common Core State Standards or from otherwise revising their standards.").

so more centralized, White House involvement.¹⁵⁵ Even as the ESSA expressly restricts the Secretary of Education's authority,¹⁵⁶ moreover, it retains federal executive oversight, with few parameters set by Congress. Although states will now devise their own accountability goals for schools, for example, they must submit their plans to the Department of Education.¹⁵⁷ Instead of a congressional judgment about metrics by which to hold schools accountable, the ESSA provides for state decision making with federal executive superintendence. Further, although the ESSA narrows the Department's waiver authority, it does not eliminate it; as under NCLB, the federal executive branch may free states from particular statutory or regulatory requirements.¹⁵⁸ And in crafting a more state-centric law, the ESSA codifies a framework for back-and-forths between state and federal executives around state plans and waivers.¹⁵⁹

The ESSA thus diminishes federal involvement in education principally in the form of congressional decisions. It is not clear that it will appreciably reduce state-federal executive collaboration, and contestation, around education policy. As one early critic summarized the federalism implications of the ESSA, "States would be stuck in a dance with whoever happens to be running the Department [of Education] at any given moment."¹⁶⁰

I have attempted in this Part to explore a few examples of executive federalism in some detail rather than to exhaustively canvass domestic policy. It bears mention, then, that similar processes of state-federal ne-

¹⁵⁵ See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1137 (2012). At the state level, the ESSA requires state educational agencies to consult with the governor in developing state plans. ESSA § 8032.

¹⁵⁶ See, e.g., ESSA § 8023.

¹⁵⁷ See id. §§ 1005, 8014.

¹⁵⁸ See id. § 8013.

¹⁵⁹ For example, if the Secretary of Education seeks to disapprove a state plan, she must (among other things) notify the state, offer an opportunity for revision and resubmission, and furnish technical assistance to the state. See id. §§ 1005, 8014.

¹⁶⁰ Connor Williams, *Why Progressives Should Fear, Conservatives Should Hate and Obama Should Veto the NCLB Rewrite*, *The Seventy Four* (Nov. 29, 2015), <https://www.the74million.org/article/williams-why-progressives-should-fear-conservatives-should-hate-and-obama-should-veto-the-nclb-rewrite> [<https://perma.cc/J5G6-EKWX>].

gotiation and coevolution are apparent in a variety of other areas, including criminal justice,¹⁶¹ labor,¹⁶² national security,¹⁶³ and even immigration.¹⁶⁴

The interactions of state and federal executives have also given rise to some distinct yet closely related practices. Most notably, in recent years federal agencies and state attorneys general have undertaken joint enforcement and litigation efforts. Multistate attorney general litigation has received substantial attention, as have the transparently partisan efforts of state attorneys general to challenge federal law.¹⁶⁵ But state attorneys general are increasingly not only setting national policy without Washington or opposing the national policy Washington has set; they are also working together with the federal executive branch to further shared policy aims.

For example, joint federal agency-state attorney general action has become a leading regulatory strategy in the area of consumer protection. In 2012, DOJ, the Department of Housing and Urban Development, and forty-nine state attorneys general reached a \$25 billion settlement with the nation's five largest mortgage servicers that not only provided financial relief, but also required the servicers to change their operating practices going forward.¹⁶⁶ In announcing the settlement, Colorado's attor-

¹⁶¹ See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *Crime & Just.* 377 (2006).

¹⁶² See *Savings Arrangements Established by States for Non-Governmental Employees*, 80 *Fed. Reg.* 72,006 (proposed Nov. 18, 2015) (to be codified at 29 C.F.R. pt. 2510) (proposing a rule that would create a safe harbor from ERISA preemption for state payroll deduction savings programs, following state innovation in the area).

¹⁶³ See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 *Stan. L. Rev.* 289 (2012).

¹⁶⁴ See Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., Re: Secure Communities (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/GV39-WB7H>] (discontinuing the Secure Communities program in the face of resistance from "Governors, mayors, and state and local law enforcement officials"; introducing the Priority Enforcement Program for federal-state collaboration; and noting that the Secretary is "willing to personally participate" in discussions with state and local governments about immigration enforcement); Rodríguez, *supra* note 99.

¹⁶⁵ See, e.g., Paul Nolette, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America 198–203* (2015).

¹⁶⁶ See Press Release, U.S. Dep't of Justice, *Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses* (Feb. 9, 2012), <http://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest> [<https://perma.cc/VT8Z-UWMV>].

ney general stated that “partnership with the federal agencies made it possible to achieve favorable terms and conditions that would have been difficult for the states or the federal government to achieve on their own.”¹⁶⁷ An ongoing example of such national policymaking through conjoined state and federal action involves a slew of investigations, enforcement actions, and lawsuits against for-profit colleges by the Consumer Financial Protection Bureau, the Securities and Exchange Commission, the Federal Trade Commission, the Department of Education, DOJ, and dozens of state attorneys general.¹⁶⁸ Because multistate-federal litigation raises some different questions than the practices I explore in this Article, I do not further address this ascendant form of “regulation through litigation,”¹⁶⁹ but mention it here simply to suggest the variety of forms state-federal executive governance may assume.

IV. A QUALIFIED DEFENSE

Given the ways in which executive federalism departs from traditional understandings of both the separation of powers and federalism, criticisms of the practice come easily. For those who continue to oppose the rise of the administrative state and cooperative federalism, in particular, executive federalism will be the latest abomination.¹⁷⁰ But even those more sanguine about federal administrative authority and the integration of state and federal governments may well be concerned about leaving Congress on the sidelines of national policymaking. My aim in this Part is to present an affirmative case for executive federalism—not as a first-best design, but as a relatively attractive option given political realities—while also suggesting some areas of concern and standards against which to judge its practice.

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., Kelly Field, *As Scrutiny Intensifies, For-Profit Colleges Face Threats on Several Fronts*, *Chron. Higher Educ.* (May 18, 2015), <http://chronicle.com/article/As-Scrutiny-Intensifies/230215> [<https://perma.cc/H93J-57SV>].

¹⁶⁹ *Regulation Through Litigation* (W. Kip Viscusi ed., 2002).

¹⁷⁰ See generally Michael S. Greve, *The Upside-Down Constitution* (2012) (cooperative federalism); Philip Hamburger, *Is Administrative Law Unlawful?* (2014) (administrative state); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231 (1994) (administrative state). Indeed, after drafting this Article, I found a blog post suggesting just such opposition. Michael S. Greve, *The Rise of Executive Federalism*, *Real Clear Policy* (May 26, 2015), http://www.realclearpolicy.com/blog/2015/05/26/the_rise_of_executive_federalism_1305.html [<https://perma.cc/T3PN-CUYN>].

Any plausible claim about the current functioning of our constitutional institutions must take political polarization into account. It is of limited utility to compare executive federalism to a well-functioning separation of powers system, one that involves congressional debate and compromise on issues of national importance as well as a productive friction among the branches and among the federal and state governments. Considered in context, executive federalism emerges as a path to national policymaking amid polarization. While enhancing the federal executive's capacity to act in the face of congressional dysfunction, it also entails the contestation endemic to state-federal relations. Moreover, even as executive federalism generates additional sites for partisan conflict, so too does it offer new routes to bipartisan compromise and negotiation that seem out of reach in Congress.

This Part attempts to account for the centrality of polarized parties in considering executive federalism along three dimensions: governance, compromise, and representation. First, I suggest that executive federalism facilitates governance in a polarized polity and that it does so in part by accommodating diversity within national policy, in a manner loosely akin to Europe's differentiated integration or Canada's checkerboard federalism. Second, I argue that executive federalism offers a promising forum for bipartisan compromise and transactional politics given its emphasis on implementation and iterative interactions among disaggregated institutional actors. The most often-criticized aspect of executive federalism abroad—its relative lack of transparency—may in fact be a selling point in this regard. Finally, I consider how executive federalism may be something other than a threat to democratic representation despite its obvious shortcomings. Our federal system generates opportunities for national political representation beyond Washington, and executive federalism holds out the possibility that concrete policy choices may stimulate deliberation and that constituencies may transcend territorial designations.

A. Governance: State-Differentiated National Policy

Perhaps the most straightforward reason to embrace executive federalism is that it enables national governance in an era when polarization paralyzes Congress. As Professors Mark Warren and Jane Mansbridge have argued, accounts of democracy often focus on the “demos,” not the “kratos,” but “the capacity for action is *part* of democracy, insofar as a political system should empower collectivities to respond to their collec-

tive problems and aspirations.”¹⁷¹ Even absent polarization, our constitutional structure impedes national majority rule, but polarization leads to extreme forms of inaction on issues of general concern. Executive federalism offers a potential path forward: national policy that encompasses partisan differentiation across the states. Some states may more fully or strongly press a position shared by the federal executive while others offer dissenting or competing views, but in both cases different state approaches are part of national policy.

As I have suggested, executive federalism grows out of the political polarization of our times. Hyperpolarized parties gridlock Congress and further empower the executive branch, but they also create strong links across the state-federal divide.¹⁷² These links may enable something like party government through state-federal cooperation among co-partisans, enhancing the ability of the federal executive and certain states to act. At the same time, the state-federal connection amplifies opportunities for partisan resistance and contestation. If state and federal executives seek each other out because of partisan affinity, their collaborations tend also to bring in other state actors with opposing positions.

The most basic way executive federalism has negotiated these distinct possibilities is by allowing for differentiation within national policy across states. For instance, waivers under the ACA have fostered Democratic states’ implementation of the Act while permitting departures from federal statutory provisions in certain Republican states.¹⁷³ Federal executive deference to state understandings of required insurance coverage has likewise made the ACA’s essential benefits provision differ across the states.¹⁷⁴ Similarly, Colorado, Washington, Oregon, and Alaska have effectively nullified the federal CSA with respect to most marijuana offenses within their borders, but the CSA remains operative in states that continue to criminalize marijuana.¹⁷⁵ The EPA’s Clean Power Plan is a more deliberately designed state-differentiated policy.¹⁷⁶ The final rule walks back a surprising form of differentiation found in the

¹⁷¹ Warren & Mansbridge, *supra* note 5, at 87–88; cf. Gluck, O’Connell & Po, *supra* note 32, at 1842 (“[U]northodox policymaking may . . . advance[] the legitimacy of *government getting its work done*.”).

¹⁷² See *supra* Part I.

¹⁷³ See *infra* Section IV.B (exploring more complicated bipartisan negotiations around ACA implementation).

¹⁷⁴ See *id.*

¹⁷⁵ See *supra* Subsection III.B.2.

¹⁷⁶ See *supra* Subsection III.B.3.

proposal—an apparent attempt to pacify opposition in coal-reliant, Republican jurisdictions—that would have required the states emitting the most greenhouse gasses to do the least.¹⁷⁷ But the rule continues to furnish different emissions reduction targets for each state while allowing for state flexibility in meeting these targets.¹⁷⁸

State-differentiated policy of this sort is relatively novel in the United States, but it has analogues abroad.¹⁷⁹ In a variety of federations with stronger traditions of executive federalism, national policy is often developed in a nonuniform fashion.¹⁸⁰ In Canada, for example, negotiations can yield significant policy variation across the provinces and different degrees of provincial and federal responsibility, an outcome sometimes called “checkerboard federalism.”¹⁸¹ In the European Union (E.U.), states often work toward shared objectives at varied speeds, or subgroups of states pursue shared policies without full E.U. participation.¹⁸² This practice of “differentiated integration” allows groups of states to create E.U. policy in the absence of consensus.¹⁸³ Sometimes the differentiation is simply a matter of timing: With “multi-speed” integration, a subgroup of states realizes a common policy faster than other

¹⁷⁷ If the proposal was an attempt to appease such jurisdictions, it did not succeed. See *West Virginia v. EPA (In re Murray Energy Corp.)*, 788 F.3d 330, 333–34 (D.C. Cir. 2015) (declining a challenge by States including West Virginia to EPA’s proposed rule because it was not final agency action). Many States are now challenging the final Clean Power Plan. See *West Virginia v. EPA*, No. 15A773, 136 S. Ct 1000 (Mem.), 2016 WL 502947 (Feb. 9, 2016) (granting application for a stay of the Clean Power Plan pending judicial review in the D.C. Circuit); Alan Neuhauser, *Mess of Lawsuits Set to Challenge Clean Power Plan*, U.S. News (Oct. 23, 2015), <http://www.usnews.com/news/articles/2015/10/23/mess-of-lawsuits-set-to-challenge-clean-power-plan> [<https://perma.cc/LE8J-56RP>].

¹⁷⁸ See Clean Power Plan, *supra* note 124; Engel, *supra* note 112.

¹⁷⁹ See Timothy Conlan et al., *Unsafe at Any Speed? The Emergence of Variable Speed Federalism in the United States and the European Union* 2–5, 20–21 (Aug. 25, 2014) (unpublished manuscript), <http://papers.ssrn.com/abstract=2454136> [<https://perma.cc/EZU2-XXXX>] (comparing recent developments in U.S. law to Europe’s multi-speed federalism).

¹⁸⁰ The point applies to other multimember institutions as well. See Anu Bradford, *How International Institutions Evolve*, 15 *Chi. J. Int’l L.* 47, 52 (2014) (“An inquiry into evolving dynamics of some key institutions, such as the WTO, the EU, and NATO, reinforces the conclusion that after [a certain threshold of diversity] is met . . . universal obligations give way to differentiated responsibilities.”). “Common but differentiated responsibilities” are also a feature of international law. For instance, international environmental agreements adjust states’ obligations in light of their capacity to comply. *Id.* at 72–73.

¹⁸¹ Bakvis, *supra* note 4.

¹⁸² See Kölliker, *supra* note 4; Stubb, *supra* note 4.

¹⁸³ See Kölliker, *supra* note 4, at 14–16.

states, but all states ultimately participate.¹⁸⁴ In other instances, differentiation may be long lasting or permanent: With “variable-geometry integration,” only certain states participate in a common project, while “a la carte integration” permits states to adopt particular aspects of policies.¹⁸⁵ These various forms of differentiated integration have led commentators to observe that there is not one Europe, but rather many Europes, depending on “the policy field in question.”¹⁸⁶

In the E.U., Canada, and several other federations, differentiated integration or related forms of variegated policymaking arise principally because of subunit autonomy and consensus rules. Demanding full, uniform participation would foreclose the pursuit of certain policies or water down obligations for all.¹⁸⁷ As with executive federalism generally, state-differentiated national policy arises from distinct circumstances in the United States. The federal government has legal authority to mandate national policy and to override conflicting state views in the absence of unanimity. Indeed, it was designed to facilitate collective governance without consensus rules.¹⁸⁸ But polarization makes the political realities of American governance more closely resemble those in federations with weaker central governments and stronger subunit autonomy. Frequently, the federal government cannot act even when it is constitutionally authorized to do so; states therefore become necessary engines of national policymaking, yet states are also polarized, so national policy cannot be made by the fifty states working collectively. Instead, the federal executive branch and the states seek out one another to push forward particular objectives. In response to political polarization, then, the

¹⁸⁴ Douglas Webber, *The Politics of Differentiated Integration in the European Union: Origins, Decision Making and Outcomes* 4 (Monash Univ. European & EU Ctr., Working Paper No. 2012/1, 2012), http://artsonline.monash.edu.au/europecentre/files/2012/08/MEEUC_WP2012_01-Webber.pdf [<https://perma.cc/TN7D-PJL6>].

¹⁸⁵ *Id.* For instance, the United Kingdom, Denmark, and Sweden do not participate in the Eurozone, while the United Kingdom and Ireland do not participate in the Schengen Agreement removing internal border controls. Meanwhile, non-E.U. members, including Iceland, Norway, and Switzerland, have opted into Schengen. See Schengen Visa Countries List, Schengen Visa Info, <http://www.schengenvisainfo.com/schengen-visa-countries-list> [<https://perma.cc/X6VV-NX64>].

¹⁸⁶ See Conlan et al., *supra* note 179, at 20.

¹⁸⁷ See Kölliker, *supra* note 4, at 2, 16, 28; Bradford, *supra* note 180, at 72–73.

¹⁸⁸ See Jack M. Balkin, *Living Originalism* 138–82 (2011); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *Stan. L. Rev.* 115 (2010); Richard E. Levy, *Federalism and Collective Action*, 45 *U. Kan L. Rev.* 1241 (1997).

United States is groping its way toward checkerboard federalism or differentiated integration.¹⁸⁹

As this account suggests, state-differentiated national policy is not likely to be embraced as a first-best governance strategy; some would prefer uniform policy set by the federal government, while others would prefer more devolution to the states.¹⁹⁰ It is worth noting, however, that these preferences largely depend on the partisan composition of each government rather than something about state versus federal authority as such.¹⁹¹ The same Democrats who today favor federal policy solutions championed state authority during George W. Bush's presidency, and the same Republicans who today disparage federal overreach were eager to preempt state experimentation when Bush was President.¹⁹² While such partisan motivations need not discredit the institutional arguments that result, they do suggest that we might more forthrightly consider politics in our legal analysis.

Taking politics into account, there is a strong case for state-differentiated federal policy as compared to the alternatives that emerge from a polarized Congress. In contrast to unilateral federal executive action, state participation builds multiplicity and a degree of contestation into federal policy; it diminishes the specter of unchecked authoritarianism that haunts exercises of executive power.¹⁹³ State participation also incorporates values traditionally associated with federalism, such as diversity and experimentation, into national policy.¹⁹⁴

State-differentiated policy may be superior to pure decentralization as well. A basic descriptive observation is that independent state action is not possible in many areas given federal laws already on the books. But autonomous state action is not necessarily desirable either. In contrast to outright devolution, state-differentiated policy respects the need for national responses to certain problems. It acknowledges the possibility of,

¹⁸⁹ See Conlan et al., *supra* note 179.

¹⁹⁰ See *id.* at 27 (arguing that differentiated integration is a second-best solution). But see Bradford, *supra* note 180, at 50, 52–53 (defending differentiated integration as a desirable end goal).

¹⁹¹ See Bulman-Pozen, *supra* note 15, at 1091–92; see also Eric A. Posner & Cass R. Sunstein, Institutional Flip-Flops, 94 *Tex. L. Rev.* 485, 486 (2016) (“What is the proper relationship between the national government and the states? . . . [I]n numerous cases . . . responses seem to depend on the answer to a single (and apparently irrelevant) question: Who currently controls the relevant institutions?”).

¹⁹² E.g., Bulman-Pozen, *supra* note 15, at 1102–03.

¹⁹³ See Bulman-Pozen, *supra* note 11; Bulman-Pozen, *supra* note 61, at 1922, 1935–46.

¹⁹⁴ See Gluck, *supra* note 1, at 1999.

and the responsibility of working toward, national cohesion even in the face of disagreement.¹⁹⁵

This last point raises the important question of whether, in the United States, state-differentiated national policy may still fairly be described as differentiated “integration.” There is an obvious sense in which the label does not fit. In contrast to federations like the E.U., the United States is not in the process of forming a union, and, apart from perhaps some minor tinkering, the country is not going to alter the composition of its fifty-state membership. If the partial adoption of national policy is not bringing more states into closer union but instead allowing some states to disengage, then perhaps in the American context differentiated integration is a form of disintegration?

To some extent, this is an empirical question that awaits data: Over time, will allowing for state difference facilitate national policymaking on contentious issues and enhance consensus, or will it underlie further state-based dissent and disengagement from the project of national governance? One particular form this question might take concerns feedback effects. Might executive federalism make Congress even less capable of governing by removing pressure for it to address certain issues? Although the question merits further study, we should not reject executive federalism offhand on this assumption. Recent action-forcing devices, like the fiscal cliff and sequester, underscore the problematic character of an if-things-get-bad-enough-Congress-will-act logic. Moreover, the ESSA suggests the opposite may be true: Executive federalism may complicate partisan commitments, forge unexpected coalitions, and expose new issues in ways that facilitate congressional action.¹⁹⁶ While this single piece of legislation by no means furnishes sufficient support for the proposition that executive federalism makes Congress more capable of governing—indeed, the Act is itself an ambivalent act of national policymaking, a federal law that militates toward less federal control and less consistent policy across the country¹⁹⁷—it at least belies the strong claim that executive federalism forecloses legislation. Moreover, even

¹⁹⁵ See generally Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *Yale L.J.* 1889 (2014) (describing how federalism may serve national ends); Gerken, *supra* note 96 (same); Rodríguez, *supra* note 99 (arguing that disagreement among the states may further national policy interests).

¹⁹⁶ See *supra* Subsection III.B.4; *infra* Section IV.B.

¹⁹⁷ Cf. Gluck, *supra* note 1, at 2020 (noting that Congress may seek “*disuniform* implementation of national law”).

without inspiring new federal legislation, state differentiation may ultimately facilitate agreement about national policy. The history of Medicaid, for instance, bolsters the prediction that state resistance to the ACA will dissipate over time.¹⁹⁸ In the European context, subgroups moving ahead in a particular policy area have commonly pulled other states along, as outsiders come to see benefits from being included in ongoing cooperative projects or to realize costs from remaining excluded.¹⁹⁹

We cannot confidently predict that state-differentiated policy will yield national uniformity and consensus, however. For one thing, in many areas, federal intervention occurs because of collective action problems; if certain groups of states agree to move ahead on these issues, they may well create benefits on which nonparticipating states free-ride, leaving them no incentive to join at a later time.²⁰⁰ Further, partisan polarization has already upset much conventional wisdom about state-federal relationships, for instance, that states always accept federal grants.²⁰¹ State-differentiated national policy could exacerbate both the partisanship that drives intergovernmental disagreement and the resurgent sectionalism of American politics.

While the empirics are uncertain, a commitment to national integration nonetheless suggests that certain forms of differentiation are more attractive than others and that the parameters of differentiation should vary between those states that are part of a longstanding union and those that are still experimenting with union formation. For the former, we should be particularly concerned about full state opt-outs from national policy. This is in part for the practical reason that opt-outs may damage the prospect of national policymaking; if government is responding to collective action problems, state opt-outs may vitiate participation alto-

¹⁹⁸ See, e.g., Shanna Rose, *Financing Medicaid: Federalism and the Growth of America's Health Care Safety Net* 14, 17–18, 245–46 (2013).

¹⁹⁹ See Kölliker, *supra* note 4, at xix, 2, 4, 278; Stubb, *supra* note 4, at 154–56, 167; Jan-Emmanuel De Neve, *The European Union? How Differentiated Integration Is Reshaping the EU*, 29 *Eur. Integration* 503, 512 (2007).

²⁰⁰ See Kölliker, *supra* note 4, at xix (“Differentiated integration theory suggests that such centripetal effects of flexible arrangements on initially reluctant outsiders depend both on whether non-participants can be excluded from the benefits cooperation generates, as well as on whether the consumption of such benefits is rival, neutral, or even complementary. . . . The weakest centripetal effects are expected in the case of common pool resources, which combine non-excludability and rivalry in consumption.”); Cooter & Siegel, *supra* note 188, at 144.

²⁰¹ See Sean Nicholson-Crotty, *Leaving Money on the Table: Learning from Recent Refusals of Federal Grants in the American States*, 42 *Publius* 449, 461–62 (2012).

gether. Although partial concessions to oppositional states might also mean some states are contributing disproportionately to a collective endeavor, the fact of universal participation should mitigate a “sucker effect” for those states carrying the greatest burden.²⁰² More deeply, even in polarized times, we should seek differentiation that generates political interaction among those who disagree about policy choices.²⁰³ Allowing states to opt out of national policymaking altogether short-circuits such interaction and the integrative possibilities of even contestatory forms of engagement.

In judging the state-differentiated national policies produced by executive federalism, then, we should consider whether both states and the federal government alike are participating in some form in national policymaking. In contrast to a system of opt-ins and opt-outs, diversified participation may have salutary implications for democratic representation, as I discuss below.²⁰⁴ It may also create new opportunities for bipartisan negotiation and compromise, as I now address.

B. Compromise: Disaggregated Negotiation

A growing body of literature searching for “solutions to political polarization in America” has resigned itself to working with the parties and the institutions we have.²⁰⁵ This literature departs from proposals to fundamentally alter government structures or the politicians who occupy them. Taking our separation of powers system and polarization as a given, scholars seeking paths to policymaking by “enemies, not friends,” highlight the centrality of negotiation.²⁰⁶ Because this work focuses only

²⁰² See Mel E. Schnake, *Equity in Effort: The “Sucker Effect” in Co-Acting Groups*, 17 *J. Mgmt.* 41, 43–45 (1991).

²⁰³ See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 *Mich. L. Rev.* 57, 78–99 (2014).

²⁰⁴ See *infra* Section IV.C.

²⁰⁵ E.g., Persily, *supra* note 17.

²⁰⁶ Jane Mansbridge, *Helping Congress Negotiate*, in *Political Polarization*, *supra* note 5, at 262, 263; see also Binder & Lee, *supra* note 5, at 240–41, 257–59 (“In the United States, both political and policy considerations complicate successful negotiation, especially in periods of polarized parties.”); Pildes, *supra* note 5, at 828, 831–32 (“[W]e should focus less on individual citizens and turn instead to the current or possible organizational entities that have the most powerful incentives to aggregate the broadest array of interests into democratic politics—and to force compromise, negotiation, and accommodation between those interests.”); Jonathan Rauch, *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy*, Brookings Ctr. for Effective Pub. Mgmt. 1–2 (2015), <http://www.brookings.edu/~media/Research/Files/Reports/2015/04/political-realism>

on the federal government and Congress in particular, however, it overlooks some of the most effective “institutional environments or structural conditions that enable effective negotiations among political leaders” about national policy.²⁰⁷ Scholars have long noted that “[b]argaining is the usual mode of intergovernmental relations.”²⁰⁸ With states today operating as national partisan actors, such bargaining has implications not only for federalism but also for party politics and the development of national policy. And some of the factors that scholars of polarization cite as critical to political negotiation—such as repeat play and a degree of confidentiality—come more naturally to state-federal executive relations.

Compared to legislative processes, executive federalism has several advantages in fostering negotiation across the political spectrum. First, as differentiated integration underscores, negotiations may be bilateral or partially multilateral. Instead of a need for a grand compromise that satisfies an aggregate national body, executive federalism may unfold through many smaller compromises that satisfy disaggregated political actors.²⁰⁹ The sum total of these negotiations shapes national policy, but no one negotiation does. This disaggregated quality can reduce the partisan temperature and bring intraparty difference to the fore. Second, because it tends to arise in the process of implementing national policy over a period of time, state-federal bargaining involves iterated interactions over both bigger-picture issues and smaller details. Such implementation is policymaking, not mere transmission of preexisting instructions, but it is more concrete than lawmaking, and partisan dogmas may be unsettled as new issues arise in the implementation process. Third, federal and state executives tend to be differently situated with respect to particular programs: The states may rely on the federal executive for funding as the federal executive relies on the states to achieve its policy goals; or the states may rely on federal cooperation to achieve their policy goals as the federal government relies on the states for political capi-

m-rauch/political-realism-rauch.pdf?la=en [https://perma.cc/KES8-588P] (advocating political realism, grounded in transactional politics).

²⁰⁷ Pildes, *supra* note 5, at 845.

²⁰⁸ Derthick, *supra* note 57, at 39; see also Ryan, *supra* note 68, at 279 (“The boundary between state and federal power [i]s a project of ongoing negotiation across the regulatory spectrum.”).

²⁰⁹ The move to disaggregated, bilateral institutions has also occurred abroad. See, e.g., Smiley, *supra* note 71, at 98 (noting that negotiations between the Canadian federal government and individual provinces have been more likely to yield agreement).

tal. Such mutual reliance, but varied responsibilities and interests, may create more paths to, and incentives for, compromise. Finally, executive negotiations may transpire in greater secrecy than legislative deliberations that occur in the sunshine.

Consider, for instance, how executive federalism has been remaking national healthcare law, with state-federal negotiations about insurance exchanges and the Medicaid expansion opening new routes to bipartisan compromise.²¹⁰ Such compromises are mostly arising from discrete interactions among particular state and federal executives, and they seize on finer-grained questions to begin to find common ground, or at least mutual acquiescence, amid sharp polarization. For instance, in negotiations around the creation of insurance exchanges, HHS repeatedly extended filing deadlines partly in response to requests from Republican governors; it allowed Utah to operate a separate small business exchange that the state cast as more “market-based” than HHS’s understanding of the Act, which required “a more government-centric” approach resulting in “less choice and more reliance on public programs”; and it developed alternative forms of partnership exchanges that created ongoing working relationships between federal officials and Republican state officials.²¹¹ Today, Arkansas, Kansas, Nebraska, Ohio, and South Dakota, among other red states, have agreed to coordinate with the federal executive.²¹² Although HHS has decisive legal authority with respect to such exchanges, it also has a strong practical and political need for state assistance. Negotiations over the concrete particulars of exchange design have allowed Republican state officials to achieve significant concessions, as Democratic federal officials get more buy-in for the program.

Medicaid waivers have similarly involved bipartisan cooperation. Early developments followed a standard partisan line: Democratic-led states quickly agreed to expand Medicaid while Republican-led states resisted, and the federal executive branch initially gave blue states Medicaid waivers to jumpstart implementation of the law.²¹³ More recently,

²¹⁰ See Metzger, *supra* note 24, at 1779–86.

²¹¹ Dinan, *supra* note 90, at 403–04, 406–08 (quoting Letter from Gary R. Herbert, Governor of Utah, to Barack H. Obama, President of the United States (Dec. 10, 2012), <http://www.scribd.com/doc/116430186/PPACA-Fiscal-Cliff-Letter-to-the-President> [<https://perma.cc/RW27-2S92>]) (internal quotation marks omitted).

²¹² See *id.* at 406; State Health Ins. Marketplace Types, 2016, Kaiser Family Found., <http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types> [<https://perma.cc/5HW2-JEME>].

²¹³ See Rose, *supra* note 90, at 65–66; Thompson & Gusmano, *supra* note 90, at 432.

however, the administration has been using waivers to encourage states with Republican governors, or Democratic governors needing to work with Republican legislatures, to participate in the expansion.²¹⁴ Perhaps most notably, the Centers for Medicare and Medicaid Services negotiated waivers with Arkansas, Indiana, Iowa, Michigan, New Hampshire, and Pennsylvania, several of which permit Medicaid expansion through private insurance policies and can thus be held out as “conservative.”²¹⁵ Other waivers permit states to require copays from Medicaid beneficiaries, to use healthy behavior incentives, and to exclude certain Medicaid benefits such as nonemergency medical transportation.²¹⁶ With these waivers, Republican state officials win policy skirmishes while Democratic federal officials win critical state participation in Medicaid expansion. If such compromises do not seem the stuff that bipartisan governance is made of, they are miles apart from the monotone discussion within the federal government.²¹⁷

Although the ACA is a particularly high-stakes example—in terms of partisan controversy, the amount of money involved, and the signifi-

²¹⁴ The Medicaid expansion has more generally showcased intraparty divisions that were absent in Congress, with several Republican Governors seeking to expand Medicaid over the objections of their Republican legislatures. In Ohio, for instance, Governor John Kasich negotiated a premium-assistance plan with federal officials, but the legislature passed a bill preventing the expansion. Robert Pear, *States Urged to Expand Medicaid with Private Insurance*, N.Y. Times (Mar. 21, 2013), http://www.nytimes.com/2013/03/22/us/politics/states-urged-to-expand-medicaid-with-private-insurance.html?_r=0 [<https://perma.cc/77YU-ERE3>]. Using his line-item veto power, Governor Kasich vetoed this provision and then employed the state’s Controlling Board to approve a traditional Medicaid expansion. Thomas Suddes, *Gov. Kasich Turns to the Controlling Board to Get Medicaid Expansion Through in Ohio*, Cleveland.com (Oct. 13, 2013), http://www.cleveland.com/opinion/index.ssf/2013/10/gov_kasich_turns_to_the_contro.html [<https://perma.cc/6DH9-CCZ5>]; see *State ex rel. Cleveland Right to Life v. Ohio Controlling Bd.*, 3 N.E.3d 185, 189–90 (Ohio 2013); Rose, *supra* note 90, at 73–74.

²¹⁵ Rose, *supra* note 90, at 66; see also Thompson & Gusmano, *supra* note 90, at 433–34 (“Republican supporters of premium assistance saw it as a market-oriented, ‘conservative’ alternative to the traditional ‘broken’ Medicaid program that Obamacare sought to expand.”).

²¹⁶ See MaryBeth Musumeci & Robin Rudowitz, *The ACA and Medicaid Expansion Waivers*, Kaiser Comm’n on Medicaid & the Uninsured 6, 9–12, <http://kff.org/report-section/the-aca-and-medicaid-expansion-waivers-issue-brief/> [<https://perma.cc/9G5F-PKP3>] (last updated Nov. 20, 2015).

²¹⁷ See, e.g., Russell Berman, ‘Promise Kept’: The Senate Finally Votes to Repeal Obamacare, *Atlantic* (Dec. 4, 2015), <http://www.theatlantic.com/politics/archive/2015/12/the-senate-finally-votes-to-repeal-obamacare/418644> [<https://perma.cc/XQM3-RLES>] (noting that Republicans in the House of Representatives have voted to repeal Obamacare more than fifty times).

cance of the policy at issue—bipartisan agreements are a staple of federal executive waivers more generally. A recent study found no evidence that shared partisan identification between a governor and the President increased a state's likelihood of receiving a Medicaid waiver prior to the ACA.²¹⁸ This makes sense insofar as waiver holds out two quite distinct possibilities as a tool of executive federalism: It allows the federal executive to achieve policy objectives through partisan alliances, but it also enables bipartisan compromise between particular state and federal actors.²¹⁹

Even this bifurcated framing is too simple. While, at a certain level of generality, state and federal executive priorities may be aligned or opposed because of partisan commitments, the very process of implementation frequently reshapes understandings of goals and interests and may generate coalitions or fractures that were not apparent when policies could be discussed in more abstract terms.²²⁰ We see this, for instance, in how the federal executive branch has altered its position on marijuana enforcement in response to state actions. It has also been a defining feature of education policymaking over the past decade. In some respects, the big-picture partisan story with respect to education inverts the healthcare story: The initial NCLB law and state Common Core initiative represented rare triumphs of bipartisanship, rather than the summa of partisan polarization, and the implementation process then highlighted intraparty dispute. At the time of NCLB's enactment, President George W. Bush and Senator Ted Kennedy could agree on high-level values like educational excellence and equal opportunity.²²¹ So too, the initial development of the Common Core standards reflected rare accord, with the vast majority of states signing on in the first year after the standards were released.²²² As the federal executive branch and the states worked out details of education assessment, a classic partisan split de-

²¹⁸ Shelly, *supra* note 88, at 455–56, 461–62, 467; see also Thompson, *supra* note 88, at 18 (“Presidents have strong incentives to build supportive relationship[s] with governors of their own party by approving their waiver requests. But it deserves emphasis that states with Republican governors under Clinton and Democratic governors under Bush also succeeded in winning approval for their proposals.”).

²¹⁹ See Metzger, *supra* note 24, at 1767, 1770–71.

²²⁰ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 284–85 (1998).

²²¹ Andrew Rudalevige, *The Politics of No Child Left Behind*, *Educ. Next*, <http://educationnext.org/the-politics-of-no-child-left-behind/> [https://perma.cc/N4HH-YMU X].

²²² See Jochim & Lavery, *supra* note 140, at 380.

veloped, with conservative Republicans resisting what they viewed as a national takeover of a state domain.²²³

But as the standards began to be implemented and discussions turned to programmatic details, diverse groups of detractors and supporters emerged. “[T]heoretical understandings of equity and excellence were replaced by a keen awareness that standards fit hand in glove with testing, accountability, education spending, and student privacy.”²²⁴ Teacher union opposition to testing fractured the Democratic coalition, even as more establishment Republicans defended educational standards against Tea Party detractors.²²⁵ The hashing out of concrete details created new fissures—which made state-federal bargaining all the more necessary, while also reshaping the expected partisan lineups.²²⁶ Indeed, it does not seem too strong to suggest that executive federalism with respect to education policy ultimately enabled legislative bipartisanship (even if the substance of the compromise was largely that Congress should devolve authority).²²⁷

In addition to focusing on implementation, another feature facilitating state-federal executive negotiations is their relative opacity. Casting nontransparency in a positive light may be surprising. Not only is there a deep fear of secrecy around American government, but a lack of transparency has been one of the leading criticisms of executive federalism as it is practiced abroad. In describing Canadian executive federalism, for instance, the scholar who coined the term, Professor Donald Smiley, listed as his first “charge[] against executive federalism” that “it contributes to undue secrecy in the conduct of the public’s business.”²²⁸ Many critics have echoed his complaint, and others have similarly assailed other nations’ executive federalism as “an exercise in horse trading be-

²²³ See Republican Nat’l Comm., Resolution Concerning Common Core Education Standards, Apr. 12, 2013 (describing the Common Core as “an inappropriate overreach to standardize and control the education of our children so they will conform to a preconceived ‘normal’”).

²²⁴ Jochim & Lavery, *supra* note 140, at 399.

²²⁵ *Id.* at 384–400.

²²⁶ See generally Wong, *supra* note 145 (describing state-federal bargaining around NCLB waivers); *supra* Subsection III.B.4.

²²⁷ See *supra* Subsection III.B.4 (discussing the ESSA).

²²⁸ Richard Simeon & David Cameron, Intergovernmental Relations and Democracy: An Oxymoron if There Ever Was One?, *in* Canadian Federalism, *supra* note 4, at 278, 278 (quoting Donald Smiley, An Outsider’s Observations of Intergovernmental Relations Among Consenting Adults, *in* Consultation or Collaboration: Intergovernmental Relations in Canada Today (R. Simeon ed., 1979)).

hind closed doors” that occurs beyond “democratic scrutiny and accountability.”²²⁹

In the United States today, however, some lack of transparency may be a virtue. Scholars contemplating how to foster political compromise in polarized times argue that discussion and negotiation must occur in part behind closed doors. Publicity makes politicians adhere more strictly to party messages, reduces their willingness to reveal flexibility in their positions, and interferes with a search for zones of agreement through the exploration of more policy options.²³⁰ But closed-door interactions can be difficult in Congress and other federal government bodies. Indeed, politicians and scholars alike have credited transparency laws like the Government in the Sunshine Act and the Federal Advisory Committee Act (“FACA”) with perversely undermining negotiation.²³¹

Most executive federalism negotiations unfold in greater privacy. As an initial matter, state-federal consultations are exempt from the requirements of transparency laws like FACA, so state and federal officials are not under a legal obligation to treat their conversations as meetings of public interest and to allow public attendance or disclose meeting minutes.²³² More generally, executive federalism tends to occur through a series of conversations between particular state and federal executives. Such conversations are usually punctuated with publicity by one side or the other—whether missives intending to apply political pressure, such as the Utah Governor’s letter to the President about the state’s small business exchange,²³³ or publications seeking to inform the public of a tentative decision, such as the DOJ’s series of letters about the enforcement of federal marijuana offenses.²³⁴ As a simple matter of politics, we might expect state and federal officials to trumpet their policy achievements. And the results of these negotiations inevitably become public as

²²⁹ See, e.g., Kenneth Wiltshire, *Australia’s New Federalism: Recipes for Marble Cakes*, 22 *Publius* 165, 167, 180 (1992) (discussing Australia). The most pronounced criticisms of executive federalism in these terms have concerned constitutional negotiations of the sort least translatable to American executive federalism.

²³⁰ See Binder & Lee, *supra* note 5, at 252–53; Pildes, *supra* note 5, at 847–49; Warren & Mansbridge, *supra* note 5, at 106–12.

²³¹ 5 U.S.C. § 552b (2012); *id.* app. §§ 2–3; see Pildes, *supra* note 5, at 846.

²³² See Miriam Seifter, *States, Agencies, and Legitimacy*, 67 *Vand. L. Rev.* 443, 470–71 (2014).

²³³ See *supra* note 211.

²³⁴ See *supra* notes 100–106 and accompanying text.

policy is reshaped. But critical back-and-forths, offers and counteroffers, happen out of the public eye.

By highlighting executive federalism as a forum for less transparent governance, I do not mean to celebrate government secrecy as such. The public is rightly concerned to make sure that state and federal executives are taking important considerations into account, not making corrupt deals, and the like.²³⁵ And such concerns may be, if anything, more acute for executive branch negotiations than their legislative counterparts. But we should not automatically be suspicious of confidential negotiations. Instead, we should think about what types of publicity may facilitate public oversight without unduly impeding negotiation. The American Political Science Association task force on negotiating agreement in politics, for instance, has suggested that “citizens should not demand *transparency in process*, opening to the public the process of reaching [particular] decisions, but instead *transparency in rationale*, making the reasons for decisions public.”²³⁶

To apply this or a similar standard in the executive federalism context, we might begin by focusing on legal requirements that already govern this space. For instance, some acts of executive federalism unfold in part through notice and comment rulemaking, while others follow less rigorous administrative procedures.²³⁷ We should also consider how executive actors themselves may generate expectations of transparency. In the past, the federal executive branch has, unprompted, required publicity for some intergovernmental negotiations. For instance, under President Clinton, HHS noticed Medicaid waivers in the Federal Register and received comments.²³⁸ Various memoranda and directives during President Obama’s tenure have more generally created guidelines for public transparency in agency action.²³⁹ The point is not that any of these prac-

²³⁵ See Pildes, *supra* note 5, at 848.

²³⁶ Mansbridge, *supra* note 206, at 267; see Warren & Mansbridge, *supra* note 5, at 108.

²³⁷ Compare, e.g., Clean Power Plan, *supra* note 124 (notice and comment rulemaking), with Cole Memo, *supra* note 106 (letter describing DOJ’s intentions regarding enforcement of the CSA).

²³⁸ See Thompson & Burke, *supra* note 68, at 994.

²³⁹ See, e.g., Memorandum for the Heads of Executive Departments and Agencies from President Barack Obama, Re: Transparency and Open Government (Jan. 21, 2009), https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment [<https://perma.cc/RH33-VQUH>]; Memorandum for the Heads of Executive Departments and Agencies from Peter R. Orszag, Dir., OMB, Re: Open Government Directive (Dec. 8, 2009), https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf

tices gets it right, but simply that there is capacity within the federal executive branch to furnish transparency. Those seeking to balance the need for private negotiations with public accountability should take advantage of the fact that executive federalism is not governed by sunshine laws like FACA and shape transparency requirements more delicately in this arena.

C. Representation: Plurality and Deliberation Beyond Legislatures

When scholars of political polarization consider how to foster negotiation, they are almost always talking about legislatures, and their ultimate concern is democratic representation. Professors Warren and Mansbridge write:

[T]he legislature—the official law-giving body—has a unique and central role in a democracy. . . . Because Congress is composed of many representatives, elected from every part of the country, it . . . can come far closer than the executive to representing and communicating with the people in all of their plurality. When Congress is unable to act in the face of urgent collective problems, power flows to other parts of the political system, diminishing its democratic capacity and legitimacy.²⁴⁰

As this suggests, scholars are likely to view legislative gridlock as a problem for representation precisely because it displaces political power onto the executive. The focus on legislatures is not incidental; democratic representation is defined in terms of legislative bodies.²⁴¹

Insofar as such accounts consider only the federal government, however, they overlook ways in which national representation may be advanced outside of Washington.²⁴² State participation in national govern-

[<https://perma.cc/36CK-9ABD>]; see also Bagenstos, *supra* note 88, at 237 (discussing transparency around waivers during the Obama Administration).

²⁴⁰ Warren & Mansbridge, *supra* note 5, at 87.

²⁴¹ See, e.g., Hanna Fenichel Pitkin, *The Concept of Representation* 235 (1967) (“We would be reluctant . . . to consider a government representative unless it included some sort of collegiate representative body in a more than advisory capacity.”).

²⁴² Cf. Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 *Am. Pol. Sci. Rev.* 9, 15 (1978) (arguing that American democracy is designed around “representational federalism” because the same electorate chooses state and federal governments, with a federal perspective informing state voting and a state perspective informing federal voting). Today, the federal system is not principally relevant to national representation because a

ance tempers the contrast of a multimember legislature and a singular executive. Because executive federalism involves state as well as federal actors, it is a form of executive action that is plural. And because executive federalism generates different variants of and institutional responses to national policy, it may spur deliberation grounded in concrete acts rather than abstract speech. To be clear, in elaborating these claims, I do not seek to defend executive action as superior to legislative action; a national legislative process has virtues that cannot be replicated by executive negotiations. My aim is more modest: to push back against arguments that a shift to executive governance is only a problem for representation and to highlight some ways in which this shift might involve distinct benefits as well as costs.²⁴³

A first thing to note about executive federalism in this regard is that it disturbs the assumption that Congress is plural and the executive is unitary. Given the wide variety of interests and identities in the nation, a multimember body should have a superior claim to reflecting the people's will than any unitary representative. Hence Professors Warren and Mansbridge's argument that Congress comes "far closer than the executive to representing and communicating with the people in all of their plurality."²⁴⁴ Because executive federalism involves the federal executive branch and the executives of all fifty states, however, it too incorporates many different actors. While the federal executive branch is itself a plural entity, executive federalism involves much more substantial diversity because it encompasses elected politicians who purport to speak for each state and both political parties.²⁴⁵

state perspective informs congressional selection, but instead because fifty state governments are themselves fora for national politics.

²⁴³ The simplest way to defend executive federalism might be to abandon a legislative model of representation altogether. Instead of seeking multiplicity and deliberation, for instance, one might privilege simple electoral accountability. Here, executives have an advantage: The President has a much higher profile than members of Congress, and Governors have much higher profiles than state legislators. See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. Ill. L. Rev. 363, 418. This type of argument, however, asks both too much and too little of representation. Although voters pay greater attention to executives, they are by no means well informed. See, e.g., *id.* at 381. More generally, this understanding of representation strips it of salutary forms of complexity, as the discussion in the main text will suggest.

²⁴⁴ Warren & Mansbridge, *supra* note 5, at 87.

²⁴⁵ It would be easy to oversell executive federalism as a plural arrangement. Among other things, all of the actors involved are executive officials. Many accounts of representation insist not just on multimember bodies but on multiple sources of representation. No single institutional arrangement will suffice if multiplicity is a means of representing various "aspects

If this plural character makes executive federalism more similar to multimember bodies than one might initially assume, it is the way executive federalism most clearly departs from legislative action—in how it translates diverse views into policy and fosters deliberation—that may paradoxically lend it the strongest claim to advance democratic representation. Because most conceptions of representation are oriented around legislative processes, they assume that deliberation precedes action and ultimately yields a single accord. The disaggregated quality of executive federalism inverts these premises: Deliberation may follow from policymaking and be a matter of exploring ongoing disagreement rather than settling it. It is in these two respects that the plural character of executive federalism is most important—not because it is a satisfying form of multiplicity in and of itself, but because it enables a variety of different policy choices to be instantiated and, at least potentially, to spur richer governmental and public conversations.

The practice of executive federalism suggests, first, that policy decisions may be the basis for deliberation by politicians and the general public. Recent work defending representation (as compared to direct democracy, in particular) has emphasized the ways in which representatives facilitate deliberation both within government and beyond it.²⁴⁶ On a legislative model of representation, deliberation is generally taken to precede policy. But the adoption of various policies may also commence or reinvigorate a deliberative process when decisions are manifold and iterative. State choices to expand Medicaid in particular ways have prompted and informed national discussions about the provision of healthcare, for instance, while state choices to legalize marijuana have changed conversations across the nation about drug policy, and the implementation of the Common Core standards has reshaped discourse around education policy.²⁴⁷

of a person's life experience, identity, or activity where she . . . has affinity with others," Iris Marion Young, *Deferring Group Representation*, in *Ethnicity and Group Rights* 349, 355, 362 (Ian Shapiro & Will Kymlicka eds., 1997) (emphasis omitted), or of making visible the inherently problematic nature of representation, see Bruce Ackerman, *We the People: Foundations* 183–86 (1991). To satisfy such understandings, multiplicity must be found in many institutions rather than within any single one.

²⁴⁶ See, e.g., Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 *Pol. Theory* 758, 766–67 (2000).

²⁴⁷ On the virtues of concrete action, as compared to more abstract speech, in informing deliberation, see Heather K. Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745 (2005), and Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture*

While any policy decision might be said to facilitate deliberation, the claim is a hollow one absent the prospect of a new decision. Because executive federalism furnishes many venues for policymaking and yields decisions that can be amended relatively easily, the discussions and reflection it spurs may contribute not only in a long-term, indirect sense to future policymaking, but in a more immediate sense as well. Concrete policies may be particularly useful in fostering dynamic relationships between government officials and the public. Recent work has insisted that representation must be understood not only as a matter of giving voice to preexisting constituent interests, but also of “shap[ing] and reshap[ing]” political interests.²⁴⁸ As compared to more abstract speech, policy choices make visible what these political interests entail and better organize the claims elected officials make to constituents.²⁴⁹

If executive federalism’s plural governance sites enable concrete decisions to shape deliberation, so too do they suggest that deliberation need not be in the service of a single shared agreement. Legislative deliberation is generally understood to yield political settlement, if not deep consensus; even on more aggregative or contestatory conceptions, the legislature deliberates so as to promulgate one law.²⁵⁰ Because executive federalism enables multiple versions of national policy to be instantiated at once, the discussions it stimulates both within government and beyond it may be a matter of exploring ongoing disagreement rather than resolving it. Deliberation may generate new interests, new coalitions, and new judgments of existing policies, but it need not eliminate difference.²⁵¹

of Experimentalist Governance in the EU, *in* *Experimentalist Governance in the European Union: Towards a New Architecture* 1, 6 (Charles F. Sabel & Jonathan Zeitlin eds., 2010).

²⁴⁸ Clarissa Rile Hayward, *Making Interest: On Representation and Democratic Legitimacy*, *in* *Political Representation* 111, 112 (Ian Shapiro et al. eds., 2009); see also, e.g., Bernard Manin, *The Principles of Representative Government* 226 (1997) (“Representatives are persons who take the initiative in proposing a line of division.”); Urbinati, *supra* note 6, at 24 (“[R]epresentation is not meant to make a preexisting entity—i.e., the unity of the state or the people or the nation—visible; rather, it is a form of political existence created by the actors themselves (the constituency and the representative).”).

²⁴⁹ Cf. Urbinati, *supra* note 6, at 16 (arguing that representation furnishes the demos with an opportunity to “reflect upon itself and judge its laws, institutions, and leaders”). See generally Michael Saward, *The Representative Claim*, 5 *Contemp. Pol. Theory* 297, 299 (2006) (casting representation as a process of claim-making).

²⁵⁰ See generally Hayward, *supra* note 248, at 124–25 (discussing aggregative, deliberative, and contestatory conceptions of democratic politics).

²⁵¹ Cf. Sabel & Zeitlin, *supra* note 247, at 4 (“In the EU . . . deliberative decision making is driven by the discussion and elaboration of persistent difference.”); cf. also Bagenstos, *supra*

Critical to accepting executive federalism as plural and deliberation-facilitating is recognizing it as a large-scale arrangement, the legitimacy of which inheres not only in discrete relationships between particular constituents and elected officials, but also in the “over-all structure and functioning of the system, the patterns emerging from the multiple activities of many people.”²⁵² Colorado’s legalization of marijuana is not, on this view, relevant only to residents of Colorado, nor is RGGI’s regulation of emissions relevant only to residents of northeastern states. Rather, state decisions are part of national policymaking, and individuals may have representative relationships with political actors they are not eligible to vote for—or, at least, a meaningful connection to decisions made beyond their designated territorial districts.²⁵³ Both claims are plausible because of the partisan dynamics shaping executive federalism.

I have elsewhere suggested that today’s partisan politics generates a “federalist variant of surrogate representation.”²⁵⁴ Because states are key players in national politics, their policy decisions are often directed at, and have consequences for, the national public. Thus, individuals in one state may in some sense be represented by another state, by politicians with whom they have no electoral connection. Such surrogate representation may arise even when states act alone given how partisanship bridges the state-federal divide. But the ways in which states may contribute to representing a national polity are particularly pronounced in the case of executive federalism because interactions among state and federal actors establish national policy. When the federal executive considers how to respond to state education initiatives, or when Arkansas negotiates an exception to Medicaid, the implications for a national public are more immediate and readily apparent than when a state regulates on its own. Federalist surrogate representation thus elaborates on a sug-

note 88, at 239 (“[A] waiver regime, honestly engaged, can provide the opportunity for political debate, contestation, and accountability.”).

²⁵² Pitkin, *supra* note 241, at 221–22.

²⁵³ See generally *supra* Part I. Recent political theory goes further, positing that political representation occurs beyond government altogether, in “a pluralistic public sphere of associations, political movements, and opinions,” although proponents acknowledge the risks of such an extension. Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 *Ann. Rev. Pol. Sci.* 387, 406–07 (2008).

²⁵⁴ Bulman-Pozen, *supra* note 15, at 1132–34; see also Mansbridge, *supra* note 6, at 522–23 (describing surrogate representation of voters by legislators with whom they have no electoral relationship).

gestion in the political theory literature that constituencies are not fixed, preexisting entities but are rather created by representative relationships and claims.²⁵⁵ Constituency need not be bounded by territory, on this view, but may have affective, ideological, and other nongeographic aspects.

If this sounds fanciful, it is worth noting the extent to which surrogate representation is already a part of our law. Perhaps most fundamentally, the American system of congressional representation is principally, if often implicitly, defended in terms of surrogate representation. With territorial districting and first-past-the-post elections, many voters lose in their districts. They are nonetheless believed to achieve representation within Congress because voters in other districts elect politicians who advance their substantive interests.²⁵⁶

Recently, the Supreme Court has more explicitly embraced a form of surrogate representation, albeit without offering a theoretical justification. In *McCutcheon v. FEC*, the Court invalidated campaign finance restrictions that limited the number of candidates to whom an individual could contribute.²⁵⁷ Casting campaign finance questions as matters of political participation rather than speech alone, the Court concluded: “Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.”²⁵⁸ Curiously, however, the “constituent” in question was not a constituent in the classic sense: Shaun McCutcheon was not eligible to vote for the far-flung candidates he funded.²⁵⁹ Because the opinion defends his contributions in terms of representation but never explains why McCutcheon is properly seen as a constituent,

²⁵⁵ See, e.g., Urbinati, *supra* note 6, at 24; Young, *supra* note 6, at 130–31; Hayward, *supra* note 248, at 112; Saward, *supra* note 249, at 297–98.

²⁵⁶ For descriptions of this practice, see Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 130 (1994); Mansbridge, *supra* note 6, at 522–25; Robert Weissberg, *Collective vs. Dyadic Representation in Congress*, 72 *Am. Pol. Sci. Rev.* 535 (1978).

²⁵⁷ 134 S. Ct. 1434, 1448–49 (2014).

²⁵⁸ *Id.* at 1462.

²⁵⁹ Justice John Paul Stevens, Address at the Administrative Law Section of the D.C. Bar, 2014 Harold Leventhal Lecture: Oops! 4 (Sept. 12, 2014) (transcript available at [http://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech\(DC\)_09-12-2014.pdf](http://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech(DC)_09-12-2014.pdf)) [<https://perma.cc/2XP2-DYYZ>].

the Court fails to offer a theory of monetary surrogate representation to justify its holding.

The most sympathetic rationale it might have offered inheres in the recognition that all politics today is a national, multiveneue undertaking, and territorial districts do not fully define constituencies.²⁶⁰ On this logic, McCutcheon has representative relationships with officials he may not vote for, and the Court's decision accommodates this political reality. I do not mean, in suggesting this rationale, to defend the *McCutcheon* decision or territorial districting more generally. There are powerful arguments against both.²⁶¹ I do mean to argue that surrogacy is already an aspect of our political system and that those who reject federalist surrogacy likely must reject more settled approaches to democratic representation in the United States as well. Indeed, the surrogate representation generated by executive federalism may be more attractive than some of these other forms of surrogacy. While monetary constituencies interfere with officials' ability to speak for their electoral constituents,²⁶² federalist surrogate representation may be ideological or affective rather than transactional.

Accepting that executive federalism may facilitate national representation under certain conditions suggests that we might attend to these conditions before dismissing the practice outright. One obvious risk of executive as compared to legislative action, for instance, is that it may collapse into unilateralism, inhibiting pluralism and deliberation alike. I have suggested that the federal system moderates this possibility, but only if there is interaction and mutuality among state and federal officials. An important question is thus how to ensure cogovernance by state and federal actors so that executive federalism is not reduced to federal executive governance. In the next Part, I turn to some doctrines bearing on this issue.

²⁶⁰ See Bulman-Pozen, *supra* note 15, at 1133–34.

²⁶¹ See, e.g., Guinier, *supra* note 256, at 119–37; Richard Briffault, *Of Constituents and Contributors*, 2015 U. Chi. Legal F. 29, 33–34; Joseph Fishkin, *Who Is a Constituent?*, Balkinization (Apr. 3, 2014), <http://balkin.blogspot.com/2014/04/who-is-constituent.html> [<https://perma.cc/B9TC-WV4E>].

²⁶² See Briffault, *supra* note 261, at 48 (offering evidence that politicians are responsive to their contributors at the expense of their electoral constituents).

V. DOCTRINAL INVERSIONS

If executive federalism is shaping much domestic policy and this may be a salutary development, as I have argued, a critical question I have thus far bracketed is the extent to which courts will constrain the practice. Already, plaintiffs are contending that the Clean Power Plan exceeds the EPA's authority, that Colorado's legalization of marijuana is preempted, and that the Common Core testing consortia are unconstitutional interstate compacts. More lawsuits are sure to come.

Our doctrine is ill-equipped to deal with these challenges because it begins from the premise of legislative federalism. In considering questions ranging from *Chevron* deference for federal agency decisions to the validity of interstate agreements under the Compact Clause, courts assume that Congress is deciding how to reconcile state and federal authority. If legislative federalism is no longer our federalism, however, we need to think differently about constitutional and administrative law. In particular, we might shift from principal-agent models of delegation and accountability to less hierarchical, more polyarchic understandings. Instead of fearing principal-less agents running amok, courts might come to see many interconnected and mutually reliant state and federal actors.

The arguments I advance here, and the practice of executive federalism more generally, potentially implicate many doctrines, including the limits of the President's enforcement discretion, the anticommandeering rule, the dormant Commerce Clause, the equal sovereignty principle, and separation of powers at the state level. I focus in this Part on the questions of *Chevron* deference, preemption, and the Compact Clause that underlie leading contemporary challenges. In each area, I suggest that a doctrinal inversion is warranted: Federalism might be a basis for enhanced, not diminished, deference to federal agencies; courts might recognize executive *non*-preemption of state law; and federal executive involvement in interstate agreements might make courts look more, not less, favorably on these agreements.

A. Deference-Enhancing Federalism

A contentious administrative law question today concerns how much deference agencies should receive when they engage in significant policymaking in the absence of congressional instruction. In broad strokes, this is simply the question of *Chevron* deference. The Supreme Court

recognized in 1984 (if not long before) that agencies have a role to play when statutes fail to address particular issues, when they are vague or ambiguous, or when they endure as circumstances change.²⁶³ While most renditions of *Chevron* deference assume interstitial statutory gaps, however, partisan polarization and congressional gridlock instead leave gaping holes.²⁶⁴ Courts may be inclined to withhold deference in such circumstances—especially when agency decision making implicates state interests.²⁶⁵ Yet federalism, in the particular form of state-federal cogovernance, should instead be understood to offer a basis for judicial deference.

Because the reigning model of agency legitimacy is legislative, courts reviewing agency policymaking in the face of substantial statutory gaps or an awkward fit between an old statute and a new question may believe no deference is warranted. Indeed, some recent statements in Supreme Court opinions suggest a general wariness about agencies making significant policy decisions, whether cast doctrinally as a matter of reasonableness or the major questions exception. Considering an EPA interpretation of the Clean Air Act, for instance, the Court found the agency's position "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."²⁶⁶ And even as the Court ultimately agreed with the IRS's interpretation of the Affordable Care Act—setting the case apart from precedents in which it withheld deference because it

²⁶³ *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Against the opinion's reception, its author, Justice Stevens, insists that it was not a watershed decision but rather a reflection of existing doctrine. See, e.g., Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *Administrative Law Stories* 399, 420–21 (Peter L. Strauss ed., 2006).

²⁶⁴ See, e.g., Freeman & Spence, *supra* note 9, at 63 (“[C]ourts are likely to face an increasing number of cases in which they must decide the legality of agency policy decisions on issues not foreseen by Congress when it enacted the agency's enabling legislation.”).

²⁶⁵ See generally *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting an agency interpretation that would have raised “federalism questions”); Gersen, *supra* note 8, at 203.

²⁶⁶ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). But cf. *EPA v. EME Homer City Generation*, 134 S. Ct. 1584, 1610 (2014) (holding, given ambiguity in the Clean Air Act, that “EPA's cost-effective allocation of emission reductions among upwind States . . . is a permissible, workable, and equitable interpretation of the Good Neighbor Provision”).

disagreed with an agency's view²⁶⁷—it determined that the question of whether tax credits are available on federal exchanges was too important to commit to an administrative agency.²⁶⁸

Citing legislative gridlock, some scholars have argued that there are, to the contrary, strong arguments for granting particular deference to agencies when they are addressing novel problems in polarized times.²⁶⁹ With an unclear mandate from the enacting Congress and little prospect of intervention from the current Congress, a lack of deference means that courts themselves will be engaging in policymaking, and *Chevron's* emphasis on democratic accountability and expertise suggest, for many, why this role should fall instead to agencies. In keeping with the *Chevron* opinion itself, however, scholars have offered two very different rationales for deference. Professors Jody Freeman and David Spence, for instance, focus on the democratic accountability and political responsiveness of federal agencies, and argue that “[t]he case for deference seems especially strong when agencies seek to address problems unforeseen by the enacting Congress.”²⁷⁰

Others advance a view of agencies as expert bodies insulated from political forces. Professor Cass Sunstein, for example, defends deference in polarized times with reference to agencies' technocratic approach to factual determinations. He argues that agencies should have “the authority to adapt statutory terms to new or unanticipated circumstances, even when the interpretation fits awkwardly with the apparent meaning of the text,” because such deference takes decision making out of politics in the “simple or crude sense” and instead privileges attention to facts.²⁷¹ This argument inverts the democratically-accountable-agencies

²⁶⁷ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (declining to defer to the Food and Drug Administration's assertion of jurisdiction over tobacco products).

²⁶⁸ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Although the Court may have eschewed deference because it regarded the particular agency involved, the IRS, as nonexpert with respect to health insurance policy, the Court held this out as an additional reason to withhold deference beyond the question's “deep ‘economic and political significance.’” *Id.* A broader-based skepticism of agency decision making has also appeared in other recent decisions. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2706–11 (2015).

²⁶⁹ Freeman & Spence, *supra* note 9; Sunstein, *supra* note 9.

²⁷⁰ Freeman & Spence, *supra* note 9, at 76, 81.

²⁷¹ Sunstein, *supra* note 9, at 15–17; see also *id.* at 19 (advocating a “receptive approach to the *Chevron* principle, allowing adaptations (not violations) of statutory text to changing values and circumstances”).

approach: Deference here follows from agencies' difference from political actors.

Professor Sunstein's argument is somewhat curious, however, in its faith in apolitical factual determinations. Just a few pages prior to advancing this normative claim, he reviews extensive evidence of "partyism," including the way it distorts our ability to process facts.²⁷² Not only do people apply a partisan filter to value judgments and facts alike, but we are also unaware we are doing so.²⁷³ Although certain judgments are less charged than others, partyism calls into question the ability of administrative agencies to reach factual conclusions in ways divorced from "politics." The point is not that agencies are unduly politicized or that officials intend to make political decisions, but only that agency officials are human like the rest of us. While there may be a subset of factual determinations that is truly apolitical in the way Professor Sunstein means, the social science evidence he cites suggests this is a small subset, and the big questions agencies face—about environmental regulation, social welfare, and the like—are unlikely to fall within it.²⁷⁴

Instead of insisting on agencies' technical expertise or democratic accountability in isolation, we might more forthrightly acknowledge the significance of partisanship and respond by "tailor[ing] deference to variety"²⁷⁵: federal agencies might receive deference to the extent their actions incorporate state governance and thus build multiplicity into federal law. Most ambitiously, one could suggest parties be directly folded into the inquiry—for instance, a Democratic federal administration would receive greater deference insofar as it embarked on a project of cogovernance with Republican-led states and vice versa. It is, however, hard to imagine courts expressly embracing this kind of inquiry. A more general focus on state-federal integration could be a useful proxy, while also respecting additional federalism values. In particular, courts might grant greater deference to federal agencies when they furnish states a

²⁷² E.g., *id.* at 10. Partyism stands for the idea that identifying with a political party leads us to be hostile to members of the opposing party. *Id.* at 1–2.

²⁷³ See also, e.g., Carlee Beth Hawkins & Brian A. Nosek, *Motivated Independence? Implicit Party Identity Predicts Political Judgments Among Self-Proclaimed Independents*, 38 *Personality & Soc. Psychol. Bull.* 1437, 1438 (2012) (finding that individuals who identified as Independents nonetheless implicitly identified either with Republicans or with Democrats and preferred policies purportedly proposed by the party with which they identified).

²⁷⁴ See Sunstein, *supra* note 9 at 13–15.

²⁷⁵ *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001). Of course, I mean something different by this phrase than the Court did in *Mead*.

role in setting and administering national policy going forward. While necessarily fuzzy at the margins, this standard would at least apply to a federal agency's incorporation of existing state policy and a federal agency's decision to confer flexible implementation authority on the states.

For some, the suggestion that federalism, in the form of state-federal cogovernance, should be deference-enhancing will seem perverse. As the Clean Power Plan litigation demonstrates, state actors may regard their inclusion in a federal administrative scheme as a red flag that a federal agency is encroaching on a state domain. Or they may understand state-federal cooperation as a suspect form of horizontal aggrandizement.²⁷⁶ Indeed, given partisan politics in particular, states are likely to take opposing positions on nearly all of the legal, as well as policy, questions raised by practices of executive federalism. As this underscores, the intersection of *Chevron* and federalism has both an administrative law dimension and a more classic federalism dimension. In prior work, Professor Heather Gerken and I have attempted to challenge some assumptions about state versus federal power that underlie the federalism debate.²⁷⁷ While the classic view is that federal programs relying on state administration displace the states, integration may in fact be a source of state power. What appears to be federal aggrandizement frequently opens new avenues for states to contest federal decisions and set a national agenda.

More pertinent here, the traditional federalism premise that cogovernance is disempowering for states also informs *Chevron* doctrine: Current doctrine suggests that the only way federalism may enter the *Chevron* inquiry is to defeat an agency's claim to deference. This position is closely related to assumptions about legislative federalism. Because many judges and scholars see Congress as the proper arbiter of state-federal relations, they believe agency decisions implicating state interests should be removed from the *Chevron* framework altogether or receive diminished deference.²⁷⁸ Even those who defend federal agencies

²⁷⁶ See Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review, 51 *Duke L.J.* 75, 117–28 (2001).

²⁷⁷ See Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 *Yale L.J.* 1256 (2009).

²⁷⁸ See, e.g., *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001); Gersen, *supra* note 8, at 232–33. See generally Metzger, *supra* note 8, at 2071, 2104–05 (citing cases showing that federalism concerns can be addressed at step zero, step one, or

insist merely that *Chevron*'s usual application should not be affected by federalism concerns; they do not suggest that states have a role to play in legitimating judicial deference.²⁷⁹ Like much of the federalism literature, the current approach to *Chevron* thus understands questions of state versus federal authority as straightforward and static: Once the federal government enters a space, it is necessarily empowered and the states disempowered. As I have tried to suggest, however, the ongoing process of cogovernance complicates these assumptions. Negotiation and bargaining, cooperation and contestation, force a reevaluation of state and federal interests.

These forward-looking aspects of executive federalism are the basis for suggesting that state-federal cogovernance merits judicial respect. Building the states into federal regulation may enhance both administrative expertise and democratic accountability, the underpinnings of *Chevron* deference that do not sound in congressional intent as such.²⁸⁰ For

step two, but suggesting courts might subject "agency decisions that burden state interests to greater substantive scrutiny than usually applied" through arbitrary and capricious review).

²⁷⁹ See, e.g., Galle & Seidenfeld, *supra* note 65; cf. Seifter, *supra* note 65 (arguing against a federalism step zero).

²⁸⁰ One might even argue that cogovernance accords with the implicit delegation underpinning of *Chevron*. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (noting that deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"). Insofar as the implicit delegation logic is a question of what-would-Congress-do rather than what-did-Congress-do, believing that Congress would seek to have states and the federal executive together administer federal law may well be better grounded in empirics than assumptions courts are frequently willing to make about congressional intent: When Congress legislates in times of divided government, it tends to split implementation authority among actors, including states and the federal government. See, e.g., David Epstein & Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* 156–57 (1999); see also Sean Farhang & Miranda Yaver, *Divided Government and the Fragmentation of American Law*, 60 *Am. J. Pol. Sci.* 1 (2015) (finding that, under conditions of divided government, Congress is likely to divide policy implementation authority among a variety of actors and institutions). Although this sort of rationale may better accord with existing doctrine, I do not pursue it in the text because it follows from premises of legislative federalism I believe we need to move beyond.

It also bears mention that, insofar as executive federalism advances multiplicity rather than uniformity, federalism-based deference runs contrary to an understanding of *Chevron* that has appeared in the commentary: deference as a device to facilitate national uniformity in federal administrative law. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *Colum. L. Rev.* 1093, 1121 (1987) (arguing that *Chevron* deference usefully commits ambiguous statutory provisions to a single agency's interpretation rather than potentially divergent interpretations of multiple circuit courts).

example, discussions of expertise often treat it as a capacity that is possessed rather than one that develops over time. As the experimentalism literature describes, however, uncertainty pervades most policymaking today. Especially as one moves from broad political commitments to programmatic details, expertise emerges from experience, and from diversified experience in particular.²⁸¹ Incorporating states into national governance may be expertise-enhancing not because states are experts in the first instance, but rather because their participation fosters differentiation and reciprocal learning.

Perhaps more important given a backdrop of congressional gridlock, executive federalism suggests that democratic accountability may be furthered through agency action in a more robust way than simple presidential direction. While existing justifications of federal agencies as politically responsive actors cite presidential supervision,²⁸² this is too narrow a focus. In a time of political polarization, especially, overlap and integration are more likely to generate meaningful oversight by other officials and ultimate responsiveness to the public.²⁸³ State-federal integration means that instead of the thin democratic accountability of a President directing agency action on behalf of a national constituency, a variety of state and federal officials act on behalf of overlapping national constituencies. If courts seem increasingly wont, given legislative gridlock, to see agents attempting to govern without principals, they might instead recognize administration by many mutually dependent, democratically responsive actors.²⁸⁴

²⁸¹ See, e.g., Dorf & Sabel, *supra* note 220, at 354–55; Sabel & Simon, *supra* note 145, at 78–79; see also Gersen, *supra* note 8, at 213 (“Agency expertise is neither static nor exogenous, but rather is a function of existing institutional arrangements.”).

²⁸² E.g., Freeman & Spence, *supra* note 9, at 81 (“[P]residents direct [agencies] in response to demands from a national constituency.”).

²⁸³ See Bulman-Pozen & Gerken, *supra* note 277, at 1289–91; cf. Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841, 924–26 (2014) (suggesting that boundary organizations—including those at the border between the federal government and the states—might lead us to rethink traditional rationales for deference, including by conceptualizing accountability in terms of multiple actors).

²⁸⁴ Cf. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 159–60 (2015) (arguing that both Congress and the federal executive should be understood as principals with respect to immigration enforcement). See generally Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* 48, 50 (2005) (proposing replacing our three-branch metaphor for government with a nonhierarchical network metaphor that “portrays modern government as a complex apparatus, where commands can come from multiple sources”).

In this sense, executive federalism offers a way to think about administrative legitimacy that acknowledges contemporary political realities but does not abandon longstanding commitments to both democratic accountability and reasoned decision making. Professor Thomas Merrill has recently argued that the rise of executive power and, in particular, the ways in which “administrative governance is increasingly outrunning legislative authorization” are leading scholars to reconceptualize administrative legitimacy exclusively in terms of process, leaving behind a positivist tradition grounded in legislative authorization of agency action.²⁸⁵ While embracing executive federalism also necessitates a departure from this positivist tradition, the practice cannot be justified in terms of process values alone. Instead, federalism becomes a critical aspect of executive policymaking: Recognizing national administration as a project of cogovernance by state as well as federal actors is what may, in an age of executive power, “meaningfully preserve the understanding that we live under a republican form of government subject to checks and balances.”²⁸⁶

B. Executive Nonpreemption

The most sustained focus of the federalism *Chevron* literature has concerned preemption: When and how may federal agencies preempt state law? Unsurprisingly, courts and scholars have offered various answers. Some suggest *Chevron* deference, others varieties of *Skidmore* deference and still others no deference or a modicum of deference only for particularly subsidiary conclusions rather than the preemption determination itself.²⁸⁷ As with federalism and *Chevron* generally, however, amid such disagreement, commentators have widely assumed that the

²⁸⁵ Merrill, *supra* note 30, at 1958; see *id.* at 1977 (noting that scholars are seeking “to legitimize the exercise of unilateral presidential power by invoking the norms of the process tradition”).

²⁸⁶ *Id.* at 1978.

²⁸⁷ Compare, e.g., *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (*Skidmore* deference), with *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996) (“substantially informed”); see also Galle & Seidenfeld, *supra* note 65, at 2001 (“an amalgam of *Skidmore* and hard look review”); Mendelson, *supra* note 8, at 742 (*Skidmore*); Thomas W. Merrill, Preemption and Institutional Choice, 102 *Nw. U. L. Rev.* 727, 774–76 (2008) (deference only for subsidiary conclusions); Sharkey, *supra* note 65, at 2180 (*Skidmore*); Young, *supra* note 8, at 870–71 (*Chevron* deference for an agency’s substantive interpretations of a statute but not for conclusions about its preemptive effect). See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (courts give only weak deference to the decisions of administrative agencies).

preemption question comes in only one form: whether executive decisions may preempt state law.

A focus on executive federalism suggests we should be asking a different question: May the executive branch insulate state action from preemption? The federal executive may seek to preserve state governance as well as to displace it, and this provides an opportunity for state-federal interaction to follow from state initiative. The Supreme Court has recognized that a federal agency's position that state law is not preempted "should make a difference," although the Court has further stated that an agency's pro- and anti-preemption positions merit equal deference.²⁸⁸

The practice of executive federalism suggests instead that federal agencies should receive particular deference for their determinations that state law is *not* preempted.²⁸⁹ While deference to a federal agency's view that state law is preempted will displace state law and thus tend to yield unilateral federal governance, deference to a federal agency's view that state law is not preempted will instead mean that state and federal regulation coexist.²⁹⁰ Because integration is key to executive federalism's legitimate practice, courts should be more accommodating of federal executive determinations that state law is not preempted than that it is.

To make this more concrete, consider the lawsuit filed by Nebraska and Oklahoma contending that Colorado's regulatory regime legalizing marijuana is preempted by the CSA.²⁹¹ The preemption argument is rela-

²⁸⁸ *Williamson v. Mazda Motor of Am.*, 562 U.S. 323, 335 (2011) (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000), in which the executive branch argued for preemption).

²⁸⁹ Such deference broadly accords with the presumption against preemption. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). When an agency seeks to preempt state law, tension arises between the presumption against preemption and administrative deference doctrines. But when an agency seeks to preserve state law, the presumption against preemption and deference to agency interpretation cut the same way. Indeed, notwithstanding the symmetry proposed in *Williamson*, the Court has been more likely to agree with the Office of the Solicitor General when it opposes federal preemption than when it argues in favor of preemption, although the Court has agreed with the Solicitor General in a high percentage of both types of cases. See Michael Greve et al., *Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis*, 22–25 (Univ. of Pa. Law Sch. Inst. for Law & Econ., Research Paper No. 15-6, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567878 [<https://perma.cc/2XXG-RPEZ>].

²⁹⁰ Cf. Bulman-Pozen & Gerken, *supra* note 277, at 1302–07 (discussing the practical implications of federal preemption doctrine).

²⁹¹ Motion for Leave to File Complaint, Complaint, and Brief in Support at 8, *Nebraska v. Colorado*, 135 S. Ct. 2070 (2014) (No. 144), 2014 WL 7474136, at *8.

tively weak in any event.²⁹² But the view of the federal executive that Colorado's regulatory regime is not preempted should matter. It is the federal executive's accommodation of a distinctive state policy that has provided the basis for negotiation and mutual accommodation. While federal preemption of state law would squelch the benefits of governance, compromise, and representation that follow from state-federal integration and overlap, the coexistence of state and federal regimes advances these ends.

C. Interstate Compacts and the Separation of Powers

Because relationships among states are an important force shaping national policy and state-federal negotiations, the future of executive federalism also depends in part on how courts receive interstate agreements. The Supreme Court has generously licensed multistate collaboration, but the integration of state and federal action that underlies executive federalism reveals new doctrinal fault lines. In particular, it destabilizes the idea of a unified federal government and suggests that future litigation about interstate compacts will not concern state versus federal authority so much as the respective roles of Congress and the executive branch in brokering interstate relations.

Compact Clause doctrine focuses on safeguarding federal supremacy. Most notably, a unified conception of federal supremacy underlies the Supreme Court's understanding of when an interstate agreement requires the federal government's approval. Although the text of the Compact Clause would seem to require consent for any interstate agreement—"No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State"²⁹³—the Court has long held that consent is required only when an interstate agreement would aug-

²⁹² The CSA contains a strongly worded savings clause, and a state's legalization of marijuana as a matter of state law does not prohibit individuals from complying with the federal prohibition. 21 U.S.C. § 903 (2012). Moreover, reading federal law to require states to criminalize marijuana would likely run afoul of the prohibition on commandeering. See generally Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 *UCLA L. Rev.* 74, 102–03 (2015) (describing the effect of the anticommandeering doctrine on preemption questions); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 *Vand. L. Rev.* 1421 (2009) (arguing that the states have broad power to legalize conduct prohibited by the federal government).

²⁹³ U.S. Const. art. I, § 10.

ment state power at the federal government's expense.²⁹⁴ Embracing “modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy,” the Court has stated that the test for whether consent is required “is whether the Compact enhances state power *quoad* the National Government.”²⁹⁵ Without elaborating the meaning of federal supremacy, the Court has distinguished it from federal interests, noting that “every state cooperative action touching interstate or foreign commerce implicates some federal interest.”²⁹⁶

The Court has never determined what federal approval must look like when it is required, but historical practice has glossed “the Consent of Congress” to refer to Congress “acting in the way in which Congress ordinarily enacts legislation—i.e., subject to presentment [and] veto.”²⁹⁷ For instance, Congress acquiesced to President Franklin Delano Roosevelt's vetoes of two resolutions of congressional consent based on his view that the interstate compacts at issue impinged upon federal authority.²⁹⁸ Today, commentators generally assume that interstate agreements

²⁹⁴ See *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Looking to the “object of the constitutional provision,” the Court reasoned in 1893 that “the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.” *Id.* Nearly one hundred years later, the Court reaffirmed this interpretation. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 (1978).

²⁹⁵ *U.S. Steel Corp.*, 434 U.S. at 460, 473; see also *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (adopting *Virginia v. Tennessee* Compact Clause test).

²⁹⁶ *U.S. Steel Corp.*, 434 U.S. at 480 n.33.

²⁹⁷ Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 *Mo. L. Rev.* 285, 319 n.138 (2003) (emphasis omitted); cf. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015) (“[T]he meaning of the word ‘legislature,’ used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each instance is called upon to exercise. . . . Thus ‘the Legislature’ comprises the referendum and the Governor’s veto in the context of regulating congressional elections.” (internal quotation marks omitted)).

²⁹⁸ See Gregory Harness, *Presidential Vetoes, 1789-1988*, 315, 351–52 (1992), <http://www.senate.gov/reference/resources/pdf/presvetoes17891988.pdf> [<https://perma.cc/A5L7-NS53>] (discussing President Roosevelt’s veto of S.J. Res. 139, 76th Cong. (1939) and H.R. 5945, 77th Cong. (1942) and noting that the veto for H.R. 5945 was unchallenged); Linda Hein, *FDR Vetoes Republican River Compact*, *McCook Gazette* (Oct. 12, 2001), <http://www.mccookgazette.com/story/1046711.html> [<https://perma.cc/398T-JSMN>]. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* 411 (2012) (considering the role of historical practice in determining the scope of presidential and congressional constitutional authority).

requiring federal consent are subject to the President's approval as well as Congress's.²⁹⁹

Doctrine and practice alike have thus framed Compact Clause questions in terms of state versus federal authority. But partisan dynamics have rendered any neat distinction between state and federal authority unstable. Divisions within each level of government and alliances across the state-federal divide suggest that future Compact Clause litigation will instead raise separation of powers questions, focusing on the relative authority of Congress and the federal executive branch.

Two forms of this challenge are already emerging. First, in an attempt to effectively repeal existing federal law without presentment, certain state and federal officials have proposed interstate compacts in areas including healthcare and immigration.³⁰⁰ Because these compacts would alter federal law, proponents concede that they implicate federal supremacy and require congressional consent, but they further insist that such consent should not be understood to include a role for the President. Indeed, compacts are attractive to such proponents precisely insofar as they would marshal the power of a (Republican) Congress to thwart the policies of a (Democratic) President.³⁰¹ Although these compacts appear to be political nonstarters even with a Republican majority in Congress, such campaigns underscore how a view of state versus fed-

²⁹⁹ See, e.g., Frederick L. Zimmermann & Mitchell Wendell, *The Interstate Compact Since 1925*, at 94 (1951) (“[W]hatever the original meaning of the consent requirement may have been with regard to compacts, settled usage now has definitely established the President’s power to participate in the consent process.”); Greve, *supra* note 297, at 319 n.138; Note, *Charting No Man’s Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 *Harv. L. Rev.* 1991, 1993 (1998).

³⁰⁰ Am. Legislative Exch. Council, *Health Care Compact Act: Model Legislation* (Oct. 13, 2011), <https://www.alec.org/model-policy/health-care-compact-act-2/> [<https://perma.cc/SS5J-FGQQ>]; see Robert F. Graboyes & Matthew Mitchell, *Laboratories of Autocracy*, *U.S. News* (Oct. 13, 2015), <http://www.usnews.com/opinion/blogs/policy-dose/2015/10/13/health-care-compact-states-choose-autocracy-over-democracy> [<https://perma.cc/MHC6-QS8Z>]; Terrence Stutz, *Texas Senate Votes for Interstate Compact to Enforce Federal Immigration Laws*, *Dall. Morning News* (May 7, 2015), <http://www.dallasnews.com/news/state/headlines/20150506-senate-votes-to-enforce-federal-immigration-laws-with-interstate-compact1.ece> [<https://perma.cc/42LF-MY3K>].

³⁰¹ See, e.g., Mary Huls, *A Constitutional Approach to Employ the Use of Interstate Compacts to Address Illegal Immigration and Border Security at the State Government Level*, *Clear Lake Tea Party* (Jan. 19, 2015), http://www.clearlaketeaparty.com/a_constitutional_approach_to_employ_the_use_of_interstate_compacts_to_address_illegal_immigration_and_border_security_at_the_state_government_level [<https://perma.cc/ZB7X-E35F>] (“With President Obama bypassing Congress on immigration and border security issues, it only seems fair that a partial solution would be one that bypasses the President.”).

eral authority as such does not capture the most relevant divides. If Congress were to approve, the fight would concern the separation of powers more than federalism.³⁰²

That same reframing also animates a second novel form of Compact Clause argument: a challenge that a particular interstate agreement is invalid without congressional consent precisely because the federal executive played a role in its creation. Such a claim underlies a recent exception to the mantra that “no court, at any level, has ever found an interstate agreement lacking congressional approval to encroach on federal supremacy.”³⁰³ Recently, a Missouri court found that the Smarter Balanced Assessment Consortium was “an unlawful interstate compact to which the U.S. Congress has never consented [and] whose existence and operation violate the Compact Clause of the U.S. Constitution.”³⁰⁴ Although that case has since been deemed moot based on a state appropriations law,³⁰⁵ similar challenges have cropped up in other states,³⁰⁶ and variants of the plaintiffs’ argument are likely to recur.

The main argument in these cases is convoluted, but it may be summarized as follows: Smarter Balanced is an interstate compact that threatens federal supremacy because Congress has provided that the Department of Education may not control state educational policy and yet the Department conditioned federal grants on state participation in assessment consortia.³⁰⁷ In other words, the plaintiffs insist that the acts of one part of the federal government (the executive branch) undermine federal authority (as reposed in Congress), and they see federal execu-

³⁰² See, e.g., Andrew L. Nolan, Cong. Research Serv., *Interstate Compacts and Presidential Presentment of Congressional Consent* (2015) (stating that the proposed Health Care Compact would require presidential presentment).

³⁰³ Duncan B. Hollis, *Unpacking the Compact Clause*, 88 *Tex. L. Rev.* 741, 766 (2010); see also, e.g., Greve, *supra* note 297, at 289.

³⁰⁴ Judgment at 1, *Sauer v. Nixon* (Mo. Cir. Ct. Feb. 24, 2015), No. 14AC-CC00477, 2015 WL 4474833 at *1.

³⁰⁵ *Sauer v. Nixon*, 474 S.W.3d. 624, 630 (Mo. Ct. App. 2015).

³⁰⁶ See Complaint for Declaratory Relief, Preliminary and Permanent Injunction at 2, *Regan v. Otter* (D. Idaho Sept. 29, 2015) (No. 4:15-cv-00455-BLW), <http://idahodnews.wpengine.netdna-cdn.com/wp-content/uploads/2015/09/Common-CoreSBAC-complaint.pdf> [<https://perma.cc/YVU7-Q3NC>]; Mike Nowatzki, Judge Hears Arguments in Lawsuit Over Common Core Tests in N.D., *Grand Forks Herald* (July 27, 2015), <http://www.grandforksherald.com/news/crime-and-courts/3805560-judge-hears-arguments-lawsuit-over-common-core-tests-nd> [<https://perma.cc/V6YC-4QLU>].

³⁰⁷ See, e.g., Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction at 16–17, *Sauer v. Nixon* (Mo. Cir. Ct. Feb. 24, 2015), No. 14AC-CC00477; Complaint for Declaratory Relief, Preliminary and Permanent Injunction, *supra* note 306, at 9–10.

tive “instigation” of interstate cooperation as rendering suspect such cooperation.³⁰⁸ As this suggests, the plaintiffs are not actually advancing an argument about the Compact Clause; their claim is that the federal executive branch is violating federal law. The cases nonetheless offer a quirky illustration of a pervasive point: The Supreme Court’s traditional treatment of “federal supremacy” and “the National Government” as coherent categories is no match for today’s politics.

As courts are increasingly asked to consider the distinct roles of various federal government actors, they might take federal executive involvement with an interstate agreement to be a source of reassurance. As an initial matter, if the federal executive and a state enter into an agreement with one another, this sort of state-federal compact should not require express congressional approval at all.³⁰⁹ More generally, even when the federal executive does not enter into an agreement, it may “prompt, react to, rely on, or take advantage of an interstate agreement”³¹⁰ in the way that EPA has done with RGGI or that the Department of Education did with the Common Core and the assessment consortia. Under current doctrine, such executive involvement is irrelevant: If the interstate agreement interferes with federal supremacy, congressional consent will be required, and if it does not, it is immaterial whether the federal executive branch condones or condemns it. Given the vague contours of “federal supremacy,” however, it will not always be clear whether an interstate compact has implications for federal supremacy. And even as courts have broadly blessed interstate agreements in the absence of federal approval, federal awareness of and interaction with such interstate agreements may be salutary. In these intermediate

³⁰⁸ Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction at 1, *Sauer v. Nixon* (Mo. Cir. Ct. Feb. 24, 2015), No. 14AC-CC00477.

³⁰⁹ See *Applicability of Compact Clause to Use of Multiple State Entities Under the Water Resources Planning Act*, 4B Op. O.L.C. 828, 830 (1980), 1980 WL 20996 [hereinafter *Applicability of Compact Clause*] (“[T]he Compact Clause, by prohibiting unconsented agreements with other states or with foreign powers, at least by negative implication contemplates that federal-state agreements need not be submitted for consent. . . . It would also run counter to the fundamental constitutional principle of separation of powers to give either house of Congress the equivalent of a veto over agreements concluded by an executive branch agency.”). This is not to suggest the federal executive branch has *carte blanche* to enter into such agreements. But the relevant legal question in such cases will be whether the federal executive is operating within its lawful authority in the first instance, not whether Congress has agreed to a particular state-federal concordat on the back end.

³¹⁰ Brief of Appellants at 33, *Sauer v. Nixon* (Mo. Ct. App. May 26, 2015) (WD 78430), 2015 WL 3615028.

spaces, courts might give states more leeway to enter into interstate agreements insofar as the federal executive branch is prompting or relying on their actions—in particular, insofar as the federal executive is incorporating such state action into federal governance.

This suggestion parallels the arguments above for granting the federal executive branch greater deference when it brings states into federal regulation.³¹¹ Just as the more top-down approach to executive federalism yields cooperation, contestation, and negotiation, so too may the more bottom-up variant of executive federalism that comes from state initiative yield these benefits. On this view, the federal executive's involvement with interstate agreements serves not so much to “protect the federal interest”³¹² as to provide a basis for ascertaining and reconsidering state and federal interests. If interaction and overlap are part of the legitimate practice of executive federalism, the federal executive's engagement, even in informal ways, with interstate collaboration should not render these agreements suspect but rather should help to validate them.

CONCLUSION

Executive federalism has come to America, upsetting assumptions about federalism and the separation of powers alike. Today, alliances across levels of government rival those within each level, and intergovernmental executive negotiations establish national policy. The judiciary is being asked to invalidate key practices of executive federalism, but courts should permit these practices insofar as they entail state-federal cogovernance. Because the party system undergirds its rise, executive federalism is a form of policymaking potentially well suited to today's polarized politics. Although it poses new challenges for democratic representation, it may yield deliberation among government officials and the broader public grounded in concrete decisions. By facilitating state-differentiated national policy, it may enable partisan differences to be expressed concretely instead of grinding government to a halt. And by fostering bilateral, iterative, and relatively nontransparent interactions, it may open paths to compromise that seem out of reach in today's Congress.

³¹¹ See *supra* Section V.A.

³¹² Applicability of Compact Clause, *supra* note 309, at 830.