

## EXECUTIVE FEDERALISM COMES TO AMERICA

Jessica Bulman-Pozen\*

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### INTRODUCTION

Negotiations among state and federal executive branch actors increasingly set national policy in the United States. Governors bargain with White House officials and Department of Health and Human Services appointees over expanding Medicaid and creating health insurance exchanges.<sup>1</sup> The Attorney General reaches agreements with state executives about the legalization of marijuana.<sup>2</sup> State officials work with one another to regulate greenhouse gas emissions and to create shared academic standards; their interstate agreements become the basis for rules promulgated by the Environmental Protection Agency and the Department of Education; and the federal rules in turn devolve significant authority to the states.<sup>3</sup>

These executive negotiations fit uneasily into existing understandings of American governance, and American federalism in particular. The conventional wisdom is that Congress establishes national policy (perhaps with administrative agencies elaborating its statutory schemes) and mediates state-federal relationships. Often it does both at the same time, enacting legislation that confers implementation authority on states together with the federal executive branch. Scholars thus attribute state participation in national policymaking to a legislative act. Some insist that federalism itself comes by the “grace of Congress.”<sup>4</sup>

These days, however, not much at all seems to come by the grace of Congress. As record levels of polarization paralyze the House and Senate, federal legislation has become attenuated from domestic policy concerns. Instead, executive action is critical. But this executive action is not, by and large, the unilateral presidential intervention a

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\* Associate Professor, Columbia Law School. I am grateful to Josh Chafetz, Heather Gerken, Jeremy Kessler, Gillian Metzger, Henry Monaghan, David Pozen, Chuck Sabel, Miriam Seifter, and Bill Simon for their generous engagement with this paper; to Jeffrey Coyle, Alexander Ely, Kevin Hu, and Sarah Sloan for excellent research assistance; and to the William S. Friedman Faculty Research Fund for support.

<sup>1</sup> See *infra* Part II.A

<sup>2</sup> See *infra* Part II.B

<sup>3</sup> See *infra* Part II.C & D.

<sup>4</sup> Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 542 (2011); see also, e.g., Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1569 (2015).

glance at the newspaper would suggest. Nor is it the state-preemptive agency action that 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.

This paper 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"<sup>5</sup>—is pervasive in parliamentary federations, such as Canada, Australia, and the European Union. Given the American separation of powers arrangement, it has been thought absent, even "impossible" in the United States.<sup>6</sup> But the partisan dynamics that have gridlocked Congress and empowered both federal and state executives have generated a distinctive American variant of the practice.

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. 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; in some instances, this amplifies conflict, but it also enables officials to further policy agendas and 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, relationships among the states are critical in formulating national policy. The federal executive builds on interstate agreements and reshapes them in turn.

In addition to describing American executive federalism, this paper offers a qualified defense of the phenomenon. While enhancing the federal executive's capacity to act amid congressional dysfunction, executive federalism also entails the multiplicity and pushback endemic to state-federal relations. Perhaps most notably, it provides a distinct path to policymaking in a time of 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 pursuant to a federal regulation; and they are expanding Medicaid in a variety of ways or

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<sup>5</sup> RONALD L. WATTS, EXECUTIVE FEDERALISM: A COMPARATIVE ANALYSIS 3 (1989).

<sup>6</sup> Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107, 118 n.33 (1992); *see also*, e.g., WATTS, *supra* note 5; Herman Bakvis & Douglas Brown, *Policy Coordination in Federal Systems: Comparing Intergovernmental Processes and Outcomes in Canada and the United States*, 40 PUBLIUS 484 (2010).

not at all. Executive federalism is yielding in the U.S. something akin to Canada's checkerboard federalism or Europe's differentiated integration.<sup>7</sup>

Executive federalism also offers a much-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 smaller conversations reduce the partisan temperature and create more space for intraparty difference. The process of implementation may also raise new issues that unsettle ideological commitments. Moreover, the most criticized aspect of executive federalism abroad—its relative lack of transparency—may be an asset. American scholars of congressional dysfunction increasingly assail transparency as an impediment to negotiation but have not looked beyond Congress to consider less visible venues.<sup>8</sup>

Any governance strategy that leaves Congress on the sidelines has a clear strike against it as a matter of democratic representation. Yet, as recent work in political theory shows, representation is a more complicated process than the law's standard delegate models suggest.<sup>9</sup> 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 further suggest 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*, for instance, judges and scholars have asked only whether federalism concerns should diminish judicial deference.<sup>10</sup> But

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<sup>7</sup> See generally ALKUIN KÖLLIKER, FLEXIBILITY AND EUROPEAN UNIFICATION (2006); ALEXANDER STUBB, NEGOTIATING FLEXIBILITY IN THE EUROPEAN UNION (2002); Herman Bakvis, *Checkerboard Federalism? Labor Market Development Policy in Canada*, in CANADIAN FEDERALISM 197 (Herman Bakvis & Grace Skogstad eds., 2002).

<sup>8</sup> See, e.g., Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 240 (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 (2014); Mark E. Warren & Jane Mansbridge, *Deliberative Negotiation*, in AM. POL'Y SCI. ASS'N, NEGOTIATING AGREEMENT IN POLITICS 86 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

<sup>9</sup> See, e.g., NADIA URBINATI, REPRESENTATIVE DEMOCRACY (2006); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (2001); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003).

<sup>10</sup> See, e.g., City of Arlington v. FCC, 133 S. Ct. 1863 (2013); Gonzales v. Oregon, 546 U.S. 243 (2006); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Gillian E. Metzger, (continued next page)

federalism might instead be deference-enhancing insofar as federal agencies are incorporating and otherwise enabling state policymaking. This claim aligns with recent advocacy for greater deference to agencies in times of political polarization,<sup>11</sup> but it conditions such leeway on state involvement rather than unilateral executive action. Courts might particularly respect agency views that state law is not preempted by federal law.

Executive federalism also raises new questions about Compact Clause doctrine given the ways interstate agreements shape both national policy and state-federal relations. Even as it has generously permitted states to enter into agreements without the federal government's approval, the Supreme Court has framed the relevant inquiry as protecting "federal supremacy."<sup>12</sup> 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. Instead, they will break open the federal government and map separation of powers questions onto federalism doctrine. Federal executive involvement in interstate agreements should make courts look more, not less, favorably on such agreements.

In charting the rise of executive federalism in the United States, this paper seeks to identify a distinctive approach to national governance and to offer a tentative defense of the phenomenon and some doctrinal suggestions. Part I explores how partisan politics is reshaping American institutions and giving rise to a practice long believed impossible in the United States. Part II canvasses several significant policy areas—healthcare, marijuana, climate change, and education—to illustrate the practice of American executive federalism. Moving from the descriptive to the normative, Part III evaluates executive federalism along three dimensions: governance, compromise, and representation. Finally, Part IV takes up a few doctrinal questions, inverting standard arguments about *Chevron* deference and the Compact Clause.

## I. THE SEPARATION OF POWERS, FEDERALISM, AND PARTISAN POLITICS

Both the legal and the political science literature tend to cast Congress as the actor that establishes national policy and manages state-federal relations.<sup>13</sup> 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 allows

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*Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008).

<sup>11</sup> See, e.g., Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014); Cass R. Sunstein, *Partyism*, U. CHI. LEGAL FORUM (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2536084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536084).

<sup>12</sup> E.g., U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460 (1978).

<sup>13</sup> The most notable exceptions to this claim are the literatures on administrative federalism, which I discuss *infra* Parts I.B and Part IV.A, and on waivers, which I discuss *infra* Part II.A.

states to implement federal statutes.<sup>14</sup> Indeed, for a growing group of scholars who argue that state administration of federal law may enhance state sovereignty, American federalism itself comes from Congress.<sup>15</sup>

Partisan polarization undermines this legislative model of American federalism. As Republicans and Democrats are unable to work together in the House and Senate, gridlock leads the federal executive to act without Congress. When the executive does so, however, it does not act alone so much as together with a different set of actors: the states. The same partisan dynamics that shift power from Congress to the executive also make the states critical fora for national politics and generate alliances among state and federal actors. This Part first describes how partisan politics is reshaping both the federal and state governments and the interactions among them. It then suggests that existing models of legislative and administrative federalism fail to capture contemporary dynamics and that a practice from abroad, executive federalism, gives us greater purchase.

#### *A. American Institutions in a Time of Polarization*

The rise of partisan polarization has been the defining political development of the last half century. No longer internally diverse, loose confederations, the Democratic and Republican parties are today cohesive and ideologically distinct.<sup>16</sup> The range of issues on which the parties compete has expanded at the same time as partisan intensity has grown.<sup>17</sup> In recent decades, partisanship and ideology have become closely aligned, national political currents have overwhelmed regional partisan difference, and the parties have become vehicles for rival interest group agendas.<sup>18</sup> Polarization has been asymmetric—Republicans have moved further to the right than Democrats have to the

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<sup>14</sup> See, e.g., MARTHA DERTHICK, KEEPING THE COMPOUND REPUBLIC (2001); DANIEL J. ELAZAR, AMERICAN FEDERALISM (3d ed. 1984); JOHN D. NUGENT, SAFEGUARDING FEDERALISM (2009); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181 (1998); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Young, *supra* note 10; 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 (1954).

<sup>15</sup> Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014) (“[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.”); see also Fahey, *supra* note 4; Gluck, *supra* note 4.

<sup>16</sup> E.g., JOHN H. ALDRICH, WHY PARTIES? A SECOND LOOK (2011); NOLAN MCCARTY ET AL., POLARIZED AMERICA (2006); BARBARA SINCLAIR, PARTY WARS (2006); JEFFREY M. STONECASH ET AL., DIVERGING PARTIES (2003); Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in POLITICAL POLARIZATION, *supra* note 8, at 15; Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83 (2006).

<sup>17</sup> See, e.g., ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER (2010); Layman et al., *supra* note 16; Barber & McCarty *supra* note 16.

<sup>18</sup> See, e.g., ALDRICH, *supra* note 16; Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571 (2012).

left<sup>19</sup>—but each party has become more ideologically cohesive at the federal and state levels alike. With respect to both the separation of powers and federalism, partisanship today trumps institutional affiliations.<sup>20</sup> Because today’s hyperpartisanship stems from “long-term historical and structural forces,” there is good reason to think it is not an aberration but rather our “new normal.”<sup>21</sup> And this is a “new normal” that, broadly speaking, impedes congressional action while facilitating both federal executive and state governance on issues of national concern.

## 1. 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.<sup>22</sup> Americans nationwide give Congress approval ratings in the teens, as commentators bemoan its ability to address critical problems or even to perform basic functions.<sup>23</sup>

Scholars broadly attribute congressional dysfunction to the mapping of polarized parties onto political structures designed without partisanship in mind.<sup>24</sup> Many suggest that our parties are now the ideological, unified, oppositional parties of a parliamentary system, a useful if only partially illuminating comparison.<sup>25</sup> Such parties need not hinder

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<sup>19</sup> See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS* (2012); Jacob S. Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, in *POLITICAL POLARIZATION*, *supra* note 8, at 59.

<sup>20</sup> 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).

<sup>21</sup> Pildes, *supra* note 8, at 819-20; see also Jane Mansbridge, *Helping Congress Negotiate*, in *POLITICAL POLARIZATION*, *supra* note 8, at 263 (suggesting polarization is the “new normal”).

<sup>22</sup> 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/>; 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>.

<sup>23</sup> See, e.g., Gallup, Congress and the President, available at <http://www.gallup.com/poll/1600/congress-public.aspx>; Nathaniel Persily, *Introduction*, in *POLITICAL POLARIZATION*, *supra* note 8, at 3, 7-8.

<sup>24</sup> See, e.g., Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1165 (2014); Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 95 (2014); David Karol, *American Political Parties: Exceptional No More*, in *POLITICAL POLARIZATION*, *supra* note 8, at 208, 208.

<sup>25</sup> E.g., MANN & ORNSTEIN, *supra* note 19, at 102; Levinson & Pildes, *supra* note 20. 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 8, at 146, 151 (“[E]xcessive political fragmentation . . . makes American parties today incapable of functioning as truly

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governance, but ours is not a parliamentary government. Instead, the constitutional separation of powers creates multiple veto points across institutions, while developments such as the filibuster add further barriers within Congress.<sup>26</sup> Although the ways in which such structures complicate the project of governance have long been apparent,<sup>27</sup> they were surmountable obstacles in an era of loose-knit parties when shifting coalitions could be 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.<sup>28</sup> Most obviously, we see 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.<sup>29</sup> Even in areas where a recent Congress (one controlled by a Democratic supermajority, working with a Democratic President) did pass substantial legislation, such as healthcare, subsequent Congresses have failed to offer statutory fixes as problems become apparent<sup>30</sup> or otherwise to oversee the implementation of the statutes.<sup>31</sup> Hyperpartisanship also inhibits congressional action with respect to relatively uncontroversial issues. In our polarized age, partisan conflict has become a sort of “tribalism” or “teamsmanship,”<sup>32</sup>

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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 Pildes’s diagnosis, David Schleicher notes that polarized parties are not uniquely problematic for American government: “no constitutional or electoral system functions particularly well when we see the rise of social groups who care little about achieving incremental legislative success or the norms of political process.” David Schleicher, *Things Aren’t Going that Well Over There Either: Party Polarization and Election Law in Comparative Perspective*, U. CHI. LEGAL FORUM (forthcoming 2015), available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/1461.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/1461.pdf).

<sup>26</sup> See, e.g., Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013) (describing the filibuster in particular as “democratically dysfunctional”).

<sup>27</sup> Indeed, the way in which these structures thwart simple majority rule has often been seen as their genius. See generally Levinson & Pildes, *supra* note 20 (describing this popular view of the separation of powers).

<sup>28</sup> 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.”).

<sup>29</sup> See, e.g., JACOB S. HACKER & PAUL PIERSON WINNER TAKE ALL POLITICS (2011); Binder, *supra* note 24, at 91-98.

<sup>30</sup> To name just two: the drafting error at issue in *King v. Burwell* and the question of how to address *NFIB v. Sebelius*’s holding that the Medicaid expansion must be truly voluntary.

<sup>31</sup> See Gillian E. Metzger, *Agencies and Polarization*, 116 COLUM. L. REV. (forthcoming 2015) (manuscript at 22).

<sup>32</sup> MANN & ORNSTEIN, *supra* note 19, at 51; Barber & McCarty, *supra* note 16, at 20.

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.<sup>33</sup>

The same partisan dynamics polarizing Congress and undermining the bicameralism and presentment process put pressure on the executive branch to act unilaterally.<sup>34</sup> Although unilateral executive action predates the most recent era of polarization,<sup>35</sup> it is especially pronounced in times of congressional gridlock. On the big issues of the day, the executive branch has sought to formulate and implement policy even in the absence of legislative cooperation. Sometimes, it truly acts without Congress; more often, it relies on existing statutory delegations. In virtually all important policy areas, including the environment, education, healthcare, consumer protection, and immigration, Congress has conferred broad discretion on the federal executive branch, which seizes on express grants of authority as well as statutory gaps and ambiguity to press its policy agenda.

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.<sup>36</sup> 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.<sup>37</sup> Although Congress continues to wield power through appropriations, for example, spending legislation is hamstrung by polarization, and with the shift from annual budgets to continuing resolutions, “congressional influence through appropriations is often felt more through budgetary inaction than actual appropriations legislation.”<sup>38</sup> 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.<sup>39</sup>

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<sup>33</sup> See JOHN B. GILMOUR, STRATEGIC DISAGREEMENT 9 (1995); Binder & Lee, *supra* note 8, at 244; see also Pildes, *supra* note 8, at 808 (calling the failure to meet basic challenges the “Decline of American Government”).

<sup>34</sup> See, e.g., Barber & McCarty, *supra* note 16, at 50; Persily, *supra* note 23, at 8; see also David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014).

<sup>35</sup> See, e.g., Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

<sup>36</sup> 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 (2009). See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>37</sup> See, e.g., Freeman & Spence, *supra* note 11, at 64; Metzger, *supra* note 31, at 9-10.

<sup>38</sup> Metzger, *supra* note 31 at 7.

<sup>39</sup> See, e.g., Richard J. Lazarus, *Flexing Agency Muscle?*, 48 GA. L. REV. 327, 330-32 (2014); Noah Berman, *California’s Darrell Issa Loses Power Along with House Oversight Committee Post*, L.A. TIMES, (continued next page)

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.<sup>40</sup> The president's agenda is especially likely to carry the day for salient political issues.<sup>41</sup> References to the "executive branch" in this paper 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.<sup>42</sup>

## 2. 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. Gubernatorial terms in most states increased to four years, and governors became more likely to serve multiple terms, even as legislative term limits reduced the power of state legislators.<sup>43</sup> Many states placed administrative agencies under the control of the governor and increased the number of gubernatorial appointees.<sup>44</sup> And although most states have a plural executive<sup>45</sup> and impose stronger prohibitions on delegation than at the federal level,<sup>46</sup> governors also frequently enjoy privileges the president does not vis-à-vis the legislature, such as the line item veto.<sup>47</sup> Horizontal relations among states have also enhanced executive power. Interstate agreements entered into by governors and their appointees have in some

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Mar. 20, 2015, <http://www.latimes.com/nation/politics/la-na-darrell-issa-20150321-story.html#page=1>; 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>; *supra* note 55 and accompanying text.

<sup>40</sup> 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 (2008).

<sup>41</sup> See, e.g., Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 23-29 (2009).

<sup>42</sup> See generally Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (arguing that the president has oversight rather than decisional authority).

<sup>43</sup> See, e.g., John M. Carey et al., *Effects of Term Limits on State Legislatures: A New Survey of the 50 States*, 31 LEG. STUD. Q. 105 (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).

<sup>44</sup> See Thad Beyle, *The Governors*, in POLITICS IN THE AMERICAN STATES 220 (Virginia Gray & Russell L. Hanson, eds., 8th ed. 2004).

<sup>45</sup> See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1399-1401 (2008).

<sup>46</sup> 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 (2005).

<sup>47</sup> See *The Governors: Powers*, tbl. 4.4, in THE BOOK OF THE STATES 154-55 (2014), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/BOSTable4.4.pdf>.

instances enabled state executives to govern without legislatures.<sup>48</sup> And organizations like the National Governor's Association have pooled resources and political capital and become powerful forces for lobbying in Washington as well as governing in the states.<sup>49</sup>

Although the relative enhancement of executive at the expense of legislative power is thus apparent at the state as well as the federal level, the way in which political polarization shapes state governments is largely distinct. As in Washington, government is becoming more partisan and more polarized.<sup>50</sup> 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.<sup>51</sup> If the cohesion and polarization of the parties at the federal level impedes legislative-executive collaboration and governance, the cohesion and polarization of the parties at the state level often facilitates governance.

Because the distance between the parties has grown hand-in-hand with cohesion within the parties, single-party governance has become easier as bipartisan governance has become elusive. Thus, 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.<sup>52</sup> As this suggests, the impact of polarization is more often apparent across states—Red Wisconsin and neighboring Blue Minnesota furnish a much-discussed comparison—than within them.<sup>53</sup> 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.

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<sup>48</sup> See JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS* 43-45, 172-76 (2d ed. 2013).

<sup>49</sup> See, e.g., NUGENT, *supra* note 14; Gais & Fossett, *supra* note 43, 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).

<sup>50</sup> Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, (2011).

<sup>51</sup> See Nat'l Conf. St. Leg., *2015 State and Legislative Partisan Composition*, [http://www.ncsl.org/Portals/1/Documents/Elections/Legis\\_Control\\_2015\\_Feb4\\_11am.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2015_Feb4_11am.pdf). Most state legislatures lack supermajority-forcing devices like the filibuster, although a substantial number of states have legislative supermajorities in any event.

<sup>52</sup> See Boris Shor, *State Legislatures and Polarization*, MEASURING AMERICAN LEGISLATURES, <http://americanlegislatures.com/2013/05/21/state-legislatures-and-polarization/>.

<sup>53</sup> See, e.g., Lawrence R. Jacobs, *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](http://www.nytimes.com/2013/11/24/opinion/sunday/right-vs-left-in-the-midwest.html?_r=0).

### 3. The Federal System

Polarized political parties shape 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, 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 polarization—this has more closely married state and federal politics, and state and federal actors. Indeed, 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 a particularly well-trodden one.

In the U.S. today, therefore, 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 at both the state and federal level use the state and federal governments to stage partisan competition.<sup>54</sup> 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 to state governors urging them to resist the Clean Power Plan of President Obama’s Environmental Protection Agency.<sup>55</sup> The most powerful member of Congress thus tried to enlist the states to fight another part of the federal government on partisan grounds. In particular, he addressed his argument to state governors, recognizing that the key players in shaping national policy and the state-federal relationship had become the executives, not the legislatures, 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.<sup>56</sup> More generally, our national parties create connections across the state-federal divide and among various states. These connections matter even when states and the federal government are not working together through a cooperative federalism scheme because state legal autonomy may be a means of furthering a national agenda. Unable to get a national minimum wage increase through Congress, for instance, President Obama encouraged states to act. Seizing on already-underway efforts, and making his argument to the National Governors

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<sup>54</sup> Bulman-Pozen, *supra* note 20.

<sup>55</sup> See Letter to Governors from Senator Mitch McConnell, March 20, 2015, available at <http://www.countoncoal.org/2015/03/20/senate-majority-leader-mitch-mcconnells-letter-to-nations-governors/>.

<sup>56</sup> See *infra* Part II.D.

Association, the President recognized states as critical fora for national governance.<sup>57</sup> In 2014 and 2015, several blue states increased the minimum wage, using state governance to advance a goal shared among Democratic officials at the state and federal levels.<sup>58</sup>

As these two 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 oversimplifies the operation of these partisan connections. As the discussion in Parts II and III will underscore, the partisan dynamic becomes more complicated as it unfolds in a variety of interactions. While the most basic and readily apparent dynamic of partisan federalism is that Democrats and Republicans recognize members of their own party as allies across the state-federal divide, diversity exists among state officials of the same party, especially when they are able to negotiate on their own rather than aggregating their interests through institutions like the Republican or Democratic Governors Associations. National parties help to fuel deep federal-state integration, even as a variety of different and shifting relationships emerge from such integration.

#### *B. Beyond Legislative and Administrative Federalism*

The result of these various trends is the diminishment of Congress in both establishing national policy and mediating state-federal relations. Legislative federalism held sway when Congress brokered distinctive regional interests and worked across weak party lines. But today, Congress is not negotiating policy deals or federalism more broadly. In areas ranging from climate change to education to immigration, polarization means the federal legislature is on the sidelines.

This is not to suggest that legislative federalism exerts no force. There are federal laws on the books in nearly all important domestic policy areas, and many of these laws

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<sup>57</sup> 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 PERSPS. ON POL. 582 (2014). More recently, lobbyists have decreased their spending on federal lobbying and turned their attention to state politicians. See 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>.

<sup>58</sup> 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>; Nat'l Conf. St. Leg., *State Minimum Wages*, <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx>.

provide for state implementation.<sup>59</sup> At some level, then, the federal arrangement continues to be authored by Congress even in an era of executive power. Legislative federalism tends to consist in the initial grant of authority more than in an active Congress monitoring implementation of federal law, but this residue matters: to the extent Congress has spoken to an issue, states and the federal executive alike must define and defend their policy choices with reference to the federal statute.<sup>60</sup>

As these federal statutes age and the federal executive branch and the states must confront novel problems, however, it becomes more difficult to understand the substantive policy choices and the parceling of authority to states and the federal executive as congressional decisions.<sup>61</sup> The Clean Air Act, for example, authorizes both the EPA and the states, led by California, to regulate greenhouse gas emissions,<sup>62</sup> but one cannot suggest this was Congress's particular intent in drafting the legislation,<sup>63</sup> and choices about how to address greenhouse gas emissions will necessarily occur outside the Capitol. Even when a congressional grant of authority is more specific, legislative federalism demands oversight of state and federal actors and the real possibility of renewed intervention.<sup>64</sup> Congress retains the authority to countermand exercises of executive power, but polarization and dysfunction have yielded a largely absent legislature.

If Congress is no longer at the helm, it may be tempting to characterize the contemporary landscape in terms of administrative federalism. In a burgeoning body of work, scholars have explored how federal agencies may allocate power between Washington and the states and thus establish the contours of today's federalism.<sup>65</sup> This paper builds on their insight that the federal executive branch is a critical player in American federalism. But it resists the label "administrative federalism" as denoting too narrow a view of state-federal interaction.

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<sup>59</sup> See 42 U.S.C. § 1396a (2006) (Medicaid); 42 U.S.C. §§ 7401-7642 (2006) (Clean Air Act); No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.); 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.).

<sup>60</sup> Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012).

<sup>61</sup> 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 11.

<sup>62</sup> Massachusetts v. EPA, 549 U.S. 497 (2007).

<sup>63</sup> See e.g., Freeman & Spence, *supra* note 11, at 20-21.

<sup>64</sup> See generally Hills, *supra* note 14; Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).

<sup>65</sup> See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); Mendelson, *supra* note 10; Metzger, *supra* note 10; Miriam Seifert, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633 (2014); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009).

As I have described elsewhere, the administrative federalism literature asks whether federal agencies, and administrative law more generally, may safeguard state autonomy.<sup>66</sup> Even as scholars embrace the administrative state, they hew to core premises of dual federalism, including that the federal and state governments are independent and that federal actors will generally seek to displace state law but may be constrained through legal requirements.<sup>67</sup> As a result, virtually all of the scholarship focuses on a single question: the conditions under which federal agencies may preempt state law. While an important issue (to which I return below<sup>68</sup>), administrative preemption is only a small 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 with one another around the implementation of federal law. State executives may work with each other to generate national policy.

Administrative federalism misses these and other important interactions. Proceeding from dualist and hierarchical assumptions, it cannot capture the messy, integrated nature of today's federalism. Lacking an ally in Congress, the federal executive branch often depends upon state policymaking, just as state executives rely on federal policymaking. As the remainder of this paper seeks to show, the state-federal relationship is more reciprocal, and more political, than the administrative federalism scholarship allows. More apt is a label largely unused in American discourse<sup>69</sup> but familiar abroad: executive federalism.

### C. Looking Abroad

Executive federalism, “the processes of intergovernmental negotiation that are dominated by the executives of the different governments within the federal system,” is a prominent feature of parliamentary federations, such as Canada and Australia.<sup>70</sup> Because

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<sup>66</sup> Bulman-Pozen, *supra* note 61, at 1924-31.

<sup>67</sup> See, e.g., Galle & Seidenfeld, *supra* note 65; Metzger, *supra* note 10; Sharkey, *supra* note 65.

<sup>68</sup> See *infra* Part IV.A.

<sup>69</sup> Significant exceptions are Gais & Fossett, *supra* note 43, and the literature on waiver, see, 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 (2007). Erin Ryan's work has called attention to the significance of the executive branch in state-federal negotiations. E.g., ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2012).

<sup>70</sup> WATTS, *supra* note 5, at 3; see also, e.g., HERMAN BAKVIS ET AL, *CONTESTED FEDERALISM* 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 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

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it follows from executive-empowering parliamentary arrangements at each level of government, executive federalism has long been believed absent, even impossible, in the United States. A leading commentator thus describes executive federalism as “a logical dynamic resulting from the marriage of federal and parliamentary institutions, . . . a dynamic peculiar to, but common to, all parliamentary federations.”<sup>71</sup> The effects of partisan polarization on the American separation of powers and federalism, however, have brought executive federalism to the U.S. The American variant has a distinctive—indeed, nearly opposite—genealogy but emerges as a practice meaningfully similar to the familiar parliamentary version.

In its standard form, executive federalism follows from three principal characteristics of parliamentary federal arrangements. First, at each level of government, the executive is the “key engine of the state.”<sup>72</sup> 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 government, 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.<sup>73</sup> Finally, executive

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to call ‘executive federalism.’); DAVID B. WALKER, THE REBIRTH OF FEDERALISM 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.”).

The comparative federalism literature sometimes uses the term “executive federalism” to denote a different arrangement: the administration of the central government’s laws by local governments, such as the Länder in Germany or the EU member states. *See, e.g.*, Robert Shütze, *From Rome to Lisbon: “Executive Federalism” in the (New) European Union*, 47 COMMON MARKET L. REV. 1385, 1386 & n.4 (2010). This federal arrangement is more akin to traditional understandings of American cooperative federalism notwithstanding distinctions such as the United States’ prohibition on commandeering. *See, e.g.*, Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 173 (2001). While I do not use “executive federalism” in this way, there is frequently overlap between the two understandings. *See, e.g.*, Tanja A. Börzel, *Federalism is Dead – Long Live Federalism!*, EPS FORUM: DEBATING FEDERALISM AND CONSTITUTIONALISM IN THE EUROPEAN UNION (2005) (noting that EU policy is formulated by executives). I return to some related features of EU governance that bear on trends in American federalism below. *See infra* Part III.A (discussing differentiated integration).

<sup>71</sup> WATTS, *supra* note 5, at 1-2; *see also* Field, *supra* note 6 (suggesting executive federalism may be “impossible” in the United States).

<sup>72</sup> THOMAS A. HOCKIN, GOVERNMENT OF CANADA 7 (1976).

<sup>73</sup> *See, e.g.*, Richard Simeon & Beryl A. Radin, *Reflections on Comparing Federalisms: Canada and the United States*, 40 PUBLIUS 357 (2010). Indeed, executive federalism has flourished in countries with a small number of provinces or states (Canada has ten provinces and three territories; Australia has six states

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federalism arises because the federal and state or provincial governments are interdependent in practice.<sup>74</sup> This mutual dependence requires “a continuous process of federal-provincial consultation and negotiation.”<sup>75</sup>

Although intergovernmental negotiation is necessary, many parliamentary governments lack constitutional structures established for this purpose. Canada, for instance, does not have a federal institution designed to represent the provinces; instead the Senate is appointed upon the Prime Minister’s recommendation.<sup>76</sup> In part because of this, Canada’s provincial and federal parties are largely distinct.<sup>77</sup> Different parties compete in the provinces than at the federal level, and even those that share a name often lack a common identity.<sup>78</sup> The party structure is thus an aspect of parliamentary federalism as it has developed in Canada: there is tight party discipline at each level of government, but a divide between the two levels, and the parties therefore play little role in brokering the federal-provincial relationship.<sup>79</sup> In the absence of other conduits for negotiation, and given the primacy of the executive at both the federal and provincial levels, federal-provincial interdependence breeds executive federalism.

As this 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 executive depends on provincial executives to

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and three federal territories), an arrangement that tends to fortify decentralization. *See, e.g.*, ALBERT ALESINA & ENRICO SPOLAORE, THE SIZE OF NATIONS 137-53 (2005); Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1 (2011).

<sup>74</sup> WATTS, *supra* note 5; *see also, e.g.*, BAKVIS, *supra* note 70, at 103; SMILEY, *supra* note 70, at 85. The Canadian Supreme Court has recognized this as “flexible” or “modern” federalism. *E.g.*, Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, par. 24-42, 77-78; Tsilhqot’in Nation v. British Columbia, [2014] 2 S.C.R. 256, par. 148-149.

<sup>75</sup> WATTS, *supra* note 5, at 3-4; *see also* Simeon & Radin, *supra* note 73, at 360 (noting that such interdependency means it is “difficult to imagine any policy debate in Canada in which federalism is not at the center”).

<sup>76</sup> The Canadian Supreme Court recently rejected the prime minister’s proposal to make the Senate popularly elected. *See* Reference re Senate Reform, 2014 SCC 32, [2014] 1 S.C.R. 704. It is customary for Canada’s federal cabinet to include a minister from each province. BAKVIS, *supra* note 70, at 123. *See also* Kenneth Wiltshire, *Australia’s New Federalism: Recipes for Marble Cakes*, 22 PUBLIUS 165, 179 (1992) (noting the absence of a Senate-like institution in Australia).

<sup>77</sup> *See, e.g.*, Anthony M. Sayers & Andrew C. Banfield, *The Evolution of Federalism and Executive Power in Canada and Australia*, in FEDERAL DYNAMICS 185 (Arthur Benz and Jörg Broschek eds., 2013).

<sup>78</sup> *See, e.g.*, BAKVIS, *supra* note 70, at 124; Lori Thorlakson, *Patterns of Party Integration, Influence and Autonomy in Seven Federations*, 15 PARTY POL. 157 (2009). *But cf.* Anna Lennox Esselment, *A Little Help from My Friends: The Partisan Factor and Intergovernmental Negotiations in Canada*, 43 PUBLIUS 701 (2012) (suggesting many of the provincial and federal parties are “cousins”).

<sup>79</sup> *See* WATTS, *supra* note 5, at 11; David Cameron & Richard Simeon, *Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism*, 32 PUBLIUS 49 (2002).

achieve its objectives.<sup>80</sup> The resulting policy landscape can be variegated: negotiations between the federal government and the provinces have, over time, yielded what one commentator calls “checkerboard federalism”: different substantive policy, and different configurations of provincial and federal authority, across the provinces.<sup>81</sup> Another notable feature is that interactions among provincial executives, and not only between the provinces and Ottawa, are critical in setting policy; national policy may emerge from horizontal provincial initiatives.<sup>82</sup>

If executive federalism is “a logical dynamic resulting from the marriage of federal and parliamentary institutions,”<sup>83</sup> 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 state-federal relations.<sup>84</sup> As the discussion in Section A argued, however, partisan dynamics have reshaped American institutions. Polarization has diminished the role of Congress and enhanced federal executive power, while also generating stronger ties among state and federal officials.

Put differently, partisan polarization has yielded an American variant of executive federalism. While the familiar version of executive federalism follows from unified governments at the central and local levels and a lack of mediating institutions across the central-local divide, the emerging American version instead follows from internally divided central government but strong connections between federal and state actors. Political parties are a key part of both stories. In Canada, for instance, parliamentary institutions facilitate party government at both the federal and provincial levels, while federated parties perpetuate federal-provincial distance. In the U.S., the separation of powers and supermajority requirements impede party government in Washington, while a national party system generates ties among state and federal officials. Although the parliamentary and American variants of executive federalism emerge from nearly opposite dynamics, there is an institutional convergence: in both systems today, negotiations among executives generate national policy and mediate federalism.

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<sup>80</sup> *E.g.*, Bakvis & Brown, *supra* note 6.

<sup>81</sup> Bakvis, *supra* note 5, at 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).

<sup>82</sup> 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, 541, 544 (2010).

<sup>83</sup> WATTS, *supra* note 5, at 1.

<sup>84</sup> See, *e.g.*, WATTS, *supra* note 5, at 6; Bakvis & Brown, *supra* note 6, at 502; Field, *supra* note 6; Simeon & Radin, *supra* note 73.

## II. EXECUTIVE FEDERALISM

The lens of executive federalism brings into focus several important characteristics of contemporary American governance. This Part uses the examples of healthcare, marijuana legalization, climate change, and education to elaborate these characteristics. First, executives have become dominant at both the state and the federal level in shaping intergovernmental relations and specific national policies. Second, state and federal executives are mutually reliant, and they look to state as well as federal authority as they engage in negotiations. Third, national policy need not be uniform but rather may be differentiated by state. And fourth, horizontal relationships among state actors are critical to state-federal relations and the determination of national policy. As in its foreign manifestations, American executive federalism is both cooperative and contestatory;<sup>85</sup> the federal executive may be able to achieve seemingly out-of-reach goals by collaborating with the states, but it also faces resistance and must accommodate state actors.

### A. *Healthcare*

I begin the discussion with what is in many ways the hardest case for executive federalism: healthcare. The Patient Protection and Affordable Care Act (ACA) is a recent federal statute that offers great substantive detail and parcels out authority among the states and the federal executive. For this reason, healthcare has been the leading example in recent accounts of legislative federalism, the basis for claims that today's federalism comes from Congress.<sup>86</sup> Even here, however, 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 implementation is waiver, permission granted by the federal executive to a state to depart from a statutory provision.<sup>87</sup> With the Medicaid expansion rendered truly optional by the Supreme Court<sup>88</sup>

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<sup>85</sup> Compare, e.g., Cameron & Simeon, *supra* note 28 (describing Canadian executive federalism as “collaborative federalism,” the co-determination of national policy by relatively cooperative bargaining) with BAKVIS, *supra* note 70, at 103 (exploring disagreement in Canadian executive federalism), and WATTS, *supra* note 5, at 15 (same).

<sup>86</sup> See Gluck, *supra* note 4.

<sup>87</sup> See generally Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in THE HEALTH CARE CASE 227 (Nathaniel Persily et al. eds., 2013); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013). Waiver has been the main area in which American executive federalism has been recognized to date, with some scholars defining executive federalism as the transformation of grant programs through waiver. See Thompson & Burke, *supra* note 69, at 972; Frank J. Thompson, *The Rise of Executive Federalism: Implications for the Picket Fence and IGM*, 43 AM. REV. PUB. ADMIN. 3 (2013); see also Gais & Fossett, *supra* note 43, at 508-11; Bryan Shelly, *The Bigger They* (continued next page)

and a Congress that is unwilling to work out statutory kinks, let alone substantially revise the statute, it has fallen to the federal executive branch and the states to shape Medicaid policy. And the federal executive has entered into a variety of compromises with state executives to achieve its overall objective of 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.<sup>89</sup> The states have not always gotten what they want; 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 more balanced negotiations and compromise.

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 and refashioning social programs in collaboration with the federal executive.<sup>90</sup> 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.”<sup>91</sup> Even prior to the ACA, Medicaid policy was also shaped by demonstration and programmatic waivers.<sup>92</sup> In the 1990s, state and federal executives negotiated comprehensive waivers moving Medicaid enrollees from fee-for-service programs into managed care.<sup>93</sup> 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.<sup>94</sup>

The Medicaid expansion is not the only aspect of ACA implementation in which executive federalism is yielding novel policies and institutional arrangements. The creation of health insurance exchanges, for example, has involved an unanticipated fusing of state and federal authority. Although the federal statute offers a binary choice of state or federal exchanges, the Department of Health and Human Services (HHS) responded to

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*Are: Cross-State Variation in Federal Education and Medicaid Waivers, 1991-2008*, 43 PUBLIUS 452 (2013).

<sup>88</sup> National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012).

<sup>89</sup> See, e.g., Dinan, *supra* note 99, at 411, 414-15; 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* Part III.B.

<sup>90</sup> See Thompson, *supra* note 87, at 13.

<sup>91</sup> Gais & Fossett, *supra* note 43, at 508.

<sup>92</sup> See Gais & Fossett, *supra* note 43, at 509; Thompson & Burke, *supra* note 69; Thompson, *supra* note 87.

<sup>93</sup> Thompson & Burke, *supra* note 69, at 979.

<sup>94</sup> *Id.* at 980.

state reluctance by proposing various “partnership” exchanges run by the state and federal governments together.<sup>95</sup> After much back and forth with Governor Gary Herbert, HHS also agreed to allow Utah to continue operating its distinctive exchange for small businesses, so that a preexisting state program was folded into the federal law.<sup>96</sup> 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 for itself based on existing insurance plans in the state.<sup>97</sup> HHS “considered one national definition” but rejected that course in favor of “state flexibility.”<sup>98</sup>

The past few years of ACA implementation thus reveal how state-federal bargaining can remake national policy, often considerably, 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 for a variety of other practical reasons, the federal executive branch makes significant concessions to state demands.<sup>99</sup> The ACA rollout further illustrates the relative ease with which executive federalism may license differences across states with respect to federal policy. State-based diversity is not unique to executive federalism; one of federalism’s traditional selling points is the accommodation of state diversity, and even in the context of federal law, Congress may choose to shelter or promote different state policies.<sup>100</sup> But because it entails many discrete negotiations between state and federal officials that unfold over time, executive federalism is particularly agile at incorporating state differences into federal schemes, even when Congress has not contemplated different state policy choices.

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<sup>95</sup> Dinan, *supra* note 99, at 404-06.

<sup>96</sup> *Id.* at 406-08; see Thompson & Gusmano, *supra* note 89, at 439 (“[F]ederal administrators respected states that had been ahead of the curve in establishing exchanges.”).

<sup>97</sup> See Nicholas Bagley & Helen Levy, *Essential Health Benefits and the Affordable Care Act: Law and Process*, 39 J. HEALTH POL., POL’Y, & L. 441 (2014).

<sup>98</sup> Patient Protection and Affordable Care Act: Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 77 Fed. Reg. 70,644, 70,665 (2012) (notice of proposed rulemaking); see Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,749 (2015).

<sup>99</sup> See generally RYAN, *supra* note 69, at 329-31 (exploring sources of state power in federalism negotiations); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (discussing ways in which states may exercise the “power of the servant”); John Dinan, *Implementing Health Reform: Intergovernmental Bargaining and the Affordable Care Act*, 44 PUBLIUS 399, 419 (2014) (“[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.”).

<sup>100</sup> See, e.g., Clean Air Act 42 U.S.C. § 7543(b) (2006) (granting California a possible waiver from federal preemption of vehicle emissions standards); Gluck, *supra* note 15 (describing how state administration diversifies federal law).

## B. *Marijuana*

Although negotiations about the implementation of federal law often yield substantial changes to statutory schemes, the arrangement flows from a congressional grant of authority. Such arrangements are also fairly understood as legislative federalism, then, insofar as the congressional grant of authority underlies state-federal negotiation; even waiver provisions are delegations from Congress to the federal executive. The executive federalism frame shifts attention from the authorizing moment to the process of implementation, but this shift may be more one of emphasis than conceptualization. Executive federalism does not only emerge from congressional grants of authority, however. Sometimes federal and state executives alike rely on state initiative, state law, and state decisions, with the federal executive branch following the state's policymaking lead. In these instances, premises of legislative federalism are inverted: instead of Congress shaping national policy and state-federal relations, state and federal executives craft national policy, looking to state sources of authority to compensate for Congress's absence.

The Department of Justice's Office of Legal Counsel, for instance, has recognized the ability of states to deputize federal officers to enforce state law. In 1978, OLC opined that even though FBI agents lack federal authority to respond to state law violations, they may have such authority pursuant to state law.<sup>101</sup> The Office recently reaffirmed and extended this opinion, concluding that federal law enforcement officers "may accept the deputation conferred by state law and make arrests for violations of state law."<sup>102</sup> Although OLC stated that federal officers must be acting pursuant to an express grant of authority, the Office reasoned that "there is no requirement that [the officers'] arrest authority come from a federal source"; instead, state deputation laws<sup>103</sup> could provide the express authority.<sup>104</sup>

These sorts of state deputation arrangements are unlikely to attract public notice, or even the attention of top officials, but a recent high-profile negotiation between state and federal executives might be understood as a non-enforcement analogue of state

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<sup>101</sup> Federal Bureau of Investigation—Statutory Jurisdiction—Authority of Agents Concerning Non-Federal Offenses, 2 Op. O.L.C. 47 (1978).

<sup>102</sup> State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments, 35 Op. O.L.C. (March 5, 2012), <http://www.justice.gov/sites/default/files/olc/opinions/2012/03/31/state-local-fleo-stafford-act-deployments.pdf> [hereinafter State and Local Deputation].

<sup>103</sup> See, e.g., N.C. Gen. Stat. § 15A-406 (2010) (authorizing certain federal officers to enforce state criminal law upon request by state law enforcement officers); Ok. Stat. Ann. tit. 19 § 547 (West 2011) ("The sheriff or the undersheriff may in writing depute certain persons to do particular acts.").

<sup>104</sup> State and Local Deputation, *supra* note 102, at 7. OLC further required that any federal action be consistent with federal appropriations law.

deputation: the back-and-forths between governors and the Department of Justice about marijuana legalization.

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.”<sup>105</sup> In response to medicinal marijuana laws, the DOJ first suggested in 2009 that it would limit its enforcement of the federal Controlled Substances Act with respect to conduct 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, as a general matter, 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.”<sup>106</sup> 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 both state and 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 responded to a request by former DEA administrators that he oppose the initiative by promising to “vigorously enforce” the CSA in California even if the proposition were to pass.<sup>107</sup> A short time later, Deputy Attorney General James Cole also 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

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<sup>105</sup> Sam Kamin, *The Battle of the Bulge: The Surprising Last Stand Against State Marijuana Legalization*, 45 PUBLIUS 427, 429 (2015); see also Cristina M. Rodríguez, Federalism and National Consensus 26 (unpublished manuscript) (“[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.”).

<sup>106</sup> U.S. Dept. 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), available at <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

<sup>107</sup> John Hoeffel, *Holder Vows Fight Over Prop 19*, L.A. TIMES, Oct. 16, 2010, <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>.

comply with state law.”<sup>108</sup> U.S. Attorneys in several states responded to this new memo by indicting medical marijuana dispensary operators.<sup>109</sup>

When Colorado and Washington adopted ballot initiatives in 2012 legalizing marijuana, their governors therefore 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. They approached the DOJ to find out its enforcement intentions, and Attorney General Holder stated that the DOJ would not seek to challenge the state initiatives as preempted and would enforce the CSA in keeping with priorities laid out in a third DOJ memorandum issued the same day.<sup>110</sup> Those priorities included preventing violence and criminal activity, ensuring marijuana was not distributed to minors, and keeping marijuana from being diverted to other states.<sup>111</sup> Holder also noted that he had “asked the United States Attorneys in Colorado and Washington to meet with each of you and with state and local law enforcement to ensure that the federal priorities are clearly understood.”<sup>112</sup> Again, state-federal negotiations also necessitated management of the federal executive branch.

In effect, DOJ officials proposed a compromise: if states controlled the legalization experiment and took steps to minimize externalities of greatest concern to the federal executive, DOJ would let states determine how federal law would be experienced in their borders. But if state legalization interfered with “federal priorities,” the deal would be off—indeed the federal government might at that point not only bring individual prosecutions but also “seek to challenge the regulatory structure itself.”<sup>113</sup> So far, the deal seems to be holding as Alaska, Oregon, and D.C. have also legalized marijuana, DOJ has extended the détente to Indian Country, and DOJ and Treasury have removed additional

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<sup>108</sup> U.S. Dept. of Justice, Office of the Deputy Attorney General, Memorandum for Selected United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

<sup>109</sup> 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>.

<sup>110</sup> Letter from Eric H. Holder, Jr., U.S. Attorney General, to Governors John Hickenlooper and Jay Inslee (Aug. 29, 2013), available at <http://dfi.wa.gov/documents/banks/holder-letter-08-29-13.pdf>; see Kamin, *supra* note 105, at 431, 436-37. Nebraska and Oklahoma have sued Colorado, arguing that its law is preempted by the Controlled Substances Act. *See infra* Part IV.A.2.

<sup>111</sup> U.S. Dept. of Justice, Office of the Deputy Attorney General, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole Memo].

<sup>112</sup> Letter from Eric H. Holder, *supra* note 110.

<sup>113</sup> Cole Memo, *supra* note 111.

obstacles to state legalization by promulgating a joint guidance for financial institutions dealing with marijuana businesses.<sup>114</sup>

Without Congress amending federal law, then, executive federalism has transformed the Controlled Substances Act. 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 a federal statute: as a matter of federal as well as state law, marijuana today is effectively legal for recreational purposes in four states and D.C., legal for medicinal purposes in nineteen additional states, and illegal for all purposes in twenty-six states.

### C. *Education*

The discussions of healthcare and drug policy 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 scholars have studied ways in which states collaborate, through groups like the National Governors Association, to lobby in Washington,<sup>115</sup> the practice of executive federalism pushes us to consider collective state governance. Interstate compacts and informal agreements among state officials both inform federal executive action and are reshaped by such action.

Perhaps most prominently today's education federalism inheres in a mix of agreements among state and federal executives. Although Congress critically shaped the field, it then absented itself; the No Child Left Behind Act (NCLB) was due to be reauthorized in 2007, but Congress has not acted. Against this backdrop, the states and the federal executive branch have together assumed control of national policy. States have collaborated with one another through interstate agreements, and the Department of Education (ED), in close collaboration with the White House, has embraced, further incentivized, and remolded state collaboration in the service of a set of national goals.

Although NCLB increased the federal presence in education, imposing a set of requirements for states to receive funding under the Elementary and Secondary Education

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<sup>114</sup> See Kamin, *supra* note 105, at 432, 436; Dep't of Treasury, Financial Crimes Enforcement Network, Guidance on BSA Expectations Regarding Marijuana-Related Business (Feb. 14, 2014), [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2014-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf) ("This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.").

<sup>115</sup> See, e.g., NUGENT, *supra* note 14; Seifter, *supra* note 49.

Act, it left the content of educational standards and assessment to states.<sup>116</sup> In April 2009, governors and state 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 one year later.<sup>117</sup> The adoption of these standards largely occurred through state executive branches<sup>118</sup> and prodded additional interstate collaboration around implementation.<sup>119</sup>

The development of the Common Core can thus be understood as an instance of horizontal executive federalism consistent with trends over time in interstate collaboration. Interstate agreements, which are generally negotiated by executive officials, have become decidedly more national in orientation over time. Although interstate 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.<sup>120</sup> In the 1920s, in keeping with more general enthusiasms of the day for administrative governance, compacts began to tackle regional rather than simply bilateral issues, to address problems that would evolve over time rather than offer one-shot resolutions, and to establish new institutions, such as commissions or agencies, to furnish day-to-day governance.<sup>121</sup> While the regional consciousness underlying early twentieth-century compacts was often opposed to nationalism,<sup>122</sup> the newest interstate agreements are national undertakings.<sup>123</sup> Today, a wide range of formal and informal interstate agreements seek to address nationwide problems through geographically diverse participation.<sup>124</sup> These agreements exist not only to hold off Washington as the standard

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<sup>116</sup> See, e.g., Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 CALIF. L. REV. 565, 595-600 (2015).

<sup>117</sup> Development Process, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/development-process/>.

<sup>118</sup> Ashley Jochim & Lesley Lavery, *The Evolving Politics of the Common Core: Policy Implementation and Conflict Expansion*, 45 PUBLIUS 380, 383 (2015) (noting that forty states adopted the Common Core through actions by their Chief State Education Officer or Board of Education).

<sup>119</sup> See Kurzweil, *supra* note 116, at 623-24.

<sup>120</sup> See JOSEPH F. ZIMMERMAN, HORIZONTAL FEDERALISM: INTERSTATE RELATIONS 45 (2011). On Compact Clause doctrine, see *infra* Part IV.B.

<sup>121</sup> See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685, 708 (1925). The Port Authority is the best known example of this sort of compact agency.

<sup>122</sup> See, e.g., *id.* at 708.

<sup>123</sup> See, e.g., CAROLINE N. BROUN ET AL., THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS 177 (2006); ELAZAR, *supra* note 14, at 196.

<sup>124</sup> See, e.g., BROUN ET AL., *supra* note 123, at 178; Ann O'M. Bowman & Neal D. Woods, *Expanding the Scope of Conflict: Interest Groups and Interstate Compacts*, 91 SOC. SCI. Q. 669, 671 (2010). Examples of such national compacts include the Multistate Tax Compact, the Interstate Compact for Adult Offender Supervision, the Interstate Compact on the Placement of Children, the Emergency Management Assistance Compact, and the Interstate Wildlife Violator Compact.

explanation would have it,<sup>125</sup> but also to substitute for federal governance in times of federal inaction.<sup>126</sup>

With states producing national governance through collaboration, it is unsurprising that the federal government, and particularly the federal executive branch, would seek to piggyback on state agreements to further national policy goals. As state executives were collaborating on the Common Core, the federal executive branch was grappling with the non-amendment of NCLB and concerns about enforcing federal statutory requirements that no state would be able to satisfy. Relying on money from the Recovery Act and then its broad waiver authority under NCLB itself,<sup>127</sup> the federal executive responded principally by incentivizing states to adopt the Common Core standards.<sup>128</sup> ED 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.<sup>129</sup>

ED also stimulated additional state collaboration through funding to “consortia of states” that would develop assessment systems for the Common Core standards.<sup>130</sup> The resulting consortia—the Partnership for Assessment of Readiness for College and Careers (PARCC), and the SMARTER Balanced Assessment Consortium—are interstate organizations that each claim approximately half the states as members.<sup>131</sup> They are also organizations deeply intertwined with the federal executive branch. In granting funding, ED entered into a “cooperative agreement” with each consortium providing for “communication, coordination and involvement” with ED officials.<sup>132</sup>

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<sup>125</sup> E.g., NUGENT, *supra* note 14.

<sup>126</sup> 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 Bowman & Woods, *supra* note 124, at 670 (finding that states are most likely to join compacts when they have dense interest group systems).

<sup>127</sup> 20 U.S.C. § 7861(a).

<sup>128</sup> In effect, ED 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 116, at 603-04.

<sup>129</sup> See Jochim & Lavery, *supra* note 118, at 382. More than 80% of states have received waivers.

<sup>130</sup> Dep’t of Educ., 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).

<sup>131</sup> Neither consortium’s state membership follows a regional or partisan logic. See Nat’l Conf. St. Leg., *Information Related to the Assessment Consortia*, <http://www.ncsl.org/research/education/common-core-state-standards-assessment-consortia.aspx>.

<sup>132</sup> Cooperative Agreement Between the U.S. Department of Education and the Partnership for Assessment of Readiness for College and Careers (2011), available at <http://www2.ed.gov/programs/racetothetop-assessment/parcc-cooperative-agreement.pdf>; Cooperative Agreement Between the U.S. Department of Education and the SMARTER Balanced Assessment Consortium and the State of Washington (2011), available at <http://www2.ed.gov/programs/racetothetop-assessment/sbac-cooperative-agreement.pdf>.

Negotiation between the federal executive branch and individual states, around the NCLB waivers in particular, has also been an important aspect of education federalism, and it promises to become only more important as the consensus around the Common Core frays.<sup>133</sup> 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 ED, 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.”<sup>134</sup>

This “interesting mix” has largely assumed the form of state-federal coevolution, with interstate action preceding and facilitating federal executive policymaking but also being reshaped by it.<sup>135</sup> Today’s education federalism is constituted by a web of executive agreements—among the states in the Common Core, among the states in the assessment consortia, between the federal executive branch and each state, and between the fed executive branch and the consortia states—suggesting that national policy will continue to be set through co-governance.

#### D. *Climate Change*

Several of the key dynamics at play in the educational context have also become apparent with respect to environmental policy. With Congress long inactive and the Environmental Protection Agency (EPA) beginning to regulate only recently, states have taken the lead in addressing greenhouse gas emissions.<sup>136</sup> Among other programs, thirty-two 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).<sup>137</sup> RGGI is an instance of horizontal executive federalism—New York Governor George Pataki approached other governors in 2003, and a memorandum of understanding created the initiative. Over time, the character of

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<sup>133</sup> See *infra* Part III.B.

<sup>134</sup> Kenneth K. Wong, *Federal ESEA Waivers as Reform Leverage: Politics and Variation in State Implementation*, 45 PUBLIUS 405, 421 (2015).

<sup>135</sup> The ways in which ED has authorized state governance in the service of a set of shared goals, while also retaining a role in monitoring and evaluating diverse state actions, also makes the Race to the Top program a prominent example of experimentalism. See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

<sup>136</sup> See generally Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U.L. REV. 1097 (2009).

<sup>137</sup> See Kirsten H. Engel, *EPA’s Clean Power Plan: An Emerging New Cooperative Federalism?*, 45 PUBLIUS 452, 455 (2015).

the initiative has become more partisan<sup>138</sup> (and arguably less regional as it links to California's program<sup>139</sup>).

In its most recent exercise of authority under the Clean Air Act, the EPA has built quite deliberately on these state initiatives. Responding to a presidential instruction, the agency has adopted a set of significant rules relating to power plant emissions.<sup>140</sup> 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 under conditions of congressional gridlock,<sup>141</sup> 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.<sup>142</sup> In setting emission reduction goals for each state and guidelines for state plans to achieve these goals, the regulations draw on California's cap and trade plan, RGGI, and other state undertakings.<sup>143</sup> As 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."<sup>144</sup>

While incorporating state regulations into federal law is not novel,<sup>145</sup> two related features of the Clean Power Plan are particularly notable. First, the EPA does not build on existing state efforts to create a uniform federal requirement, as it largely has in the

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<sup>138</sup> Republican Governor Chris Christie withdrew New Jersey from RGGI in 2001. *See RGGI, New Jersey Participation*, <https://www.rggi.org/design/history/njparticipation>. Republican legislators in the New Hampshire have also introduced bills to withdraw from RGGI. *See, e.g.*, Rep. Howard Moffett, *Let's Not Let the Environment Be a Partisan Issue*, CONCORD MONITOR, Feb. 17, 2015, <http://www.concordmonitor.com/news/politicalmonitor/15710505-95/my-turn-lets-not-let-the-environment-be-a-partisan-issue>. 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.*, *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>.

<sup>139</sup> *See DALLAS BURTRAW ET AL., LINKING BY DEGREES: INCREMENTAL ALIGNMENT OF CAP-AND-TRADE MARKETS* (2013), available at <http://www.rff.org/Documents/RFF-DP-13-04.pdf>.

<sup>140</sup> EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Aug. 3, 2015, <http://www.epa.gov/airquality/cpp/cpp-final-rule.pdf> (to be codified at 40 C.F.R. pt. 60) [hereinafter Clean Power Plan] [Update to Fed Reg when published].

<sup>141</sup> Freeman & Spence, *supra* note 11, at 28.

<sup>142</sup> In so doing, the agency 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." Presidential Memorandum of June 25, 2013, Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,545, 39, 536 (July 1, 2013).

<sup>143</sup> *See, e.g.*, Clean Power Plan, *supra* note 140, at 373-74, 628-29.

<sup>144</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34850, 34832 (proposed June 18, 2014) [hereinafter Clean Power NPRM]; *see* Clean Power Plan, *supra* note 140, at 83.

<sup>145</sup> *See generally* Carlson, *supra* note 136.

past, but rather sets different reduction goals for each of the fifty states depending on state capacity to reduce emissions going forward.<sup>146</sup> One effect of this choice (which I will revisit below) is that those states that have already adopted policies to reduce their carbon footprint, like California and the RGGI participants, must ultimately achieve lower emissions more than states that have not, such as West Virginia and Kentucky.<sup>147</sup>

A second, related feature of the Clean Power Plan is its explicit recognition and encouragement of multistate efforts to address climate change.<sup>148</sup> Even though regions are generally more sensible units than states for addressing environmental issues and enthusiasm for multistate governance is longstanding,<sup>149</sup> 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 federal governance is one way in which “our regions [may become] realities.”<sup>150</sup> The Clean Power Plan embraces existing multistate responses to climate change, such as RGGI, while smoothing the path to future collaborations among states.<sup>151</sup> In response to state comments seeking more flexibility in multistate approaches—for instance, allowing state-specific plans with regionally shared elements<sup>152</sup>—the EPA’s final rule allows for both multistate plans and individual state plans that will be implemented in coordination with other state plans.<sup>153</sup>

Responding to presidential instruction, the EPA’s regulations thus seize on existing state policies as a basis for writing 50-state difference into a federal rule and further encourage states to collaborate with one another in formulating national policy solutions going forward. Against a backdrop of congressional gridlock on climate change, the Clean Power Plan can be understood to substitute state regulatory specificity for federal legislative specificity. Congress’s aged statute has left substantial gaps for the agency to negotiate.<sup>154</sup> Rather than fill them unilaterally, the agency relies on preexisting state efforts and devolves a significant policymaking role to the states, especially insofar as they act in a coordinated manner.

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<sup>146</sup> See Clean Power Plan, *supra* note 140; Engel, *supra* note 137, at 461-62.

<sup>147</sup> See Engel, *supra* note 137, at 466, Freeman & Spence, *supra* note 11, at 36; *infra* Part III.A.

<sup>148</sup> See, e.g., Clean Power Plan, *supra* note 140, at 21, 215, 882-84, 910-21.

<sup>149</sup> See, e.g., Frankfurter & Landis, *supra* note 121.

<sup>150</sup> *Id.* at 729. Interstate compacts are another way. See, e.g., *supra* notes 120-126 and accompanying text; *infra* Part IV.B.

<sup>151</sup> See, e.g., Clean Power Plan, *supra* note 140, at 21, 215, 882-84, 910-21.

<sup>152</sup> See, e.g., Comments from Cal. Air. Resources Bd. on Clean Power Nprm, *supra* note 144, Nov. 24, 2014, at 7, available at [http://www.eenews.net/assets/2015/01/05/document\\_cw\\_01.pdf](http://www.eenews.net/assets/2015/01/05/document_cw_01.pdf) (“California . . . Strongly supports allowing regional plans to be implemented in a modular fashion, under which states might agree to common plan elements.”).

<sup>153</sup> Clean Power Plan, *supra* note 140, at 910-21.

<sup>154</sup> See generally Freeman & Spence, *supra* note 11, at 21.

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I have attempted, in this Part, to explore a few examples of executive federalism in some detail rather than to exhaustively canvass the domestic policy space. It bears mention, then, that similar processes of state-federal negotiation and coevolution are apparent in a variety of other areas, including criminal justice,<sup>155</sup> national security,<sup>156</sup> and immigration.<sup>157</sup> Executive federalism has become a dominant means of creating national policy and managing state-federal relations.

The interactions of state and federal executives have also given rise to some distinct yet closely related phenomena. Most notably, in recent years federal agencies and state attorneys general have collaborated to shape national policy through joint enforcement and litigation efforts. Multistate AG litigation has received substantial attention, as have the transparently partisan efforts of state AGs to challenge federal law.<sup>158</sup> But state AGs 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 AG action has emerged as a leading regulatory strategy in the area of consumer protection. In 2012, the Department of Justice, HUD, and 49 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.<sup>159</sup> In announcing the settlement, Colorado's AG 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."<sup>160</sup> 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, the Department of Justice, and

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<sup>155</sup> See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377 (2006).

<sup>156</sup> See Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012).

<sup>157</sup> See Rodríguez, *supra* note 105.

<sup>158</sup> See, e.g., PAUL NOLETTE, *FEDERALISM ON TRIAL* (2015).

<sup>159</sup> See U.S. DOJ, 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>.

<sup>160</sup> *Id.*

dozens of state attorneys general.<sup>161</sup> Because multistate-federal litigation raises some different questions from the practices I address in this paper, I do not further address this ascendant form of “regulation through litigation,”<sup>162</sup> but mention it here to suggest the variety of forms state-federal executive governance may assume.

### III. A QUALIFIED DEFENSE

Given the ways in which executive federalism departs from traditional understandings of both our separation of powers and federalism, criticisms of the phenomenon 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.<sup>163</sup> But even those more sanguine about federal administrative authority and the integration of state and federal governance 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.

Any plausible claim about the 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, and 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 facilitating governance through state-federal collaboration and the enhancement of 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 institutional 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 Canada’s checkerboard federalism or Europe’s differentiated integration. Second, I argue that executive federalism offers a promising

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<sup>161</sup> See, e.g., Kelly Field, *As Scrutiny Intensifies, For-Profit Colleges Face Threats on Several Fronts*, CHRON. HIGHER ED., May 18, 2015, <http://chronicle.com/article/As-Scrutiny-Intensifies/230215/>.

<sup>162</sup> REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002).

<sup>163</sup> E.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); PHILIP HAMBURGER, *Is ADMINISTRATIVE LAW UNLAWFUL?* (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 123 (1994).

forum for partisan compromise 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 not only be a threat to democratic representation. 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 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 collective problems and aspirations.”<sup>164</sup> 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 push federal authority to the executive branch, but they also create strong links across the state-federal divide.<sup>165</sup> These links may enable something like party government through state-federal cooperation among copartisans, 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 states with opposing positions. The most basic way executive federalism has negotiated these distinct possibilities is by allowing for differentiation within federal policy across states. For instance, waivers under the ACA have fostered Democratic states’ implementation of the Act while permitting departures from federal policy in certain Republican states.<sup>166</sup> States that have legalized marijuana have succeeded in making the federal Controlled Substances Act a nullity with respect to most marijuana offenses within their borders, but the CSA remains operative in states that continue to criminalize marijuana.

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<sup>164</sup> Warren & Mansbridge, *supra* note 8, at 88.

<sup>165</sup> See *supra* Part I.

<sup>166</sup> See also *infra* Part III.B (exploring more complicated bipartisan negotiations around ACA implementation).

The EPA's Clean Power Plan, which provides different emissions reduction targets for each state and allows for state flexibility in meeting these targets, is a more deliberately designed state-differentiated federal policy.<sup>167</sup> The agency appears to be proposing a compromise given sharp ideological disagreement about climate change regulation. Most notably, it has chosen to measure state capacity to reduce emissions in part based on states' own policy decisions. RGGI participants and California have already shown that they are willing to defy the expectations of collective action federalism and create environmental benefits on which other actors may free-ride.<sup>168</sup> The federal executive branch capitalizes on this commitment by asking those states to contribute disproportionately to a national endeavor. Having taken the initiative on their own, these states are now instructed to continue to do so as a matter of federal law. Meanwhile, the EPA's decision to ask less of other states—and its more general granting of flexibility to states to choose how to reach the established targets—must be in part an attempt to pacify opposition in coal-reliant, Republican jurisdictions.<sup>169</sup> Although the proposal has hardly appeased all such constituencies,<sup>170</sup> it may be helping the EPA establish collaborative relationships with state regulators.<sup>171</sup> If the Plan survives legal challenges, we can expect this state differentiation to yield diverse approaches to emissions regulation within a single federal law.

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<sup>167</sup> See *supra* Part II.B.2; *see also* Engel, *supra* note 137.

<sup>168</sup> Commentators have found the states' actions perplexing in this regard. *See, e.g.*, Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVT'L L.J. 54, 56 (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 . . . .”). But as Aziz Huq has noted, these undertakings 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). Or, put slightly differently, California and RGGI’s 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 are 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/>.

<sup>169</sup> See Engel, *supra* note 137, at 453.

<sup>170</sup> *See, e.g.*, West Virginia v. EPA, No. 14-1112 (D.C. Cir. June 9, 2015) (declining to review the legality of EPA’s proposed rule because it was not final agency action).

<sup>171</sup> Cf. Jeff McMahon, *States Ignoring Mitch McConnell, Working on Clean Power Plan: EPA*, FORBES, Apr. 12, 2015, <http://www.forbes.com/sites/jeffmcmahon/2015/04/12/states-ignoring-mitch-mcconnell-epa/>.

Although relatively novel in the United States, state-differentiated federal policy of this sort has analogues abroad.<sup>172</sup> In a variety of federations with stronger traditions of executive federalism, federal policy is often developed in a nonuniform fashion.<sup>173</sup> In Canada, for example, negotiations can yield significant policy variation across the provinces and different degrees of provincial and federal responsibility, sometimes called “checkerboard federalism.”<sup>174</sup> In the European Union, states often work toward shared objectives at varied speeds, or subgroups of states pursue shared policies without full EU participation.<sup>175</sup> This practice of “differentiated integration” or “variable-speed federalism” allows groups of states to create EU policy in the absence of consensus. Sometimes the differentiation is simply a matter of timing: with “multi-speed” integration, a subgroup of states realizes a common policy faster than other states, but all states ultimately participate. 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.<sup>176</sup> 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.<sup>177</sup>

In the EU, Canada, and several other federations, differentiated integration or related forms of checkerboard policymaking arise principally because of strong state sovereignty and consensus rules. Demanding full participation by all member states would foreclose the pursuit of certain policies or water down obligations for all participants.<sup>178</sup> As with executive federalism generally, state-differentiated federal policy arises from distinct

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<sup>172</sup> See Timothy Conlan et al., *Unsafe at Any Speed? The Emergence of Variable Speed Federalism in the United States and the European Union*, APSA 2014 Annual Meeting Paper, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2454136](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2454136) (comparing recent developments in U.S. law to Europe’s multi-speed federalism).

<sup>173</sup> 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 73. The EPA’s Clean Power Plan might be considered the domestic analogue of the Kyoto Protocol in this respect.

<sup>174</sup> Bakvis, *supra* note 7.

<sup>175</sup> See KÖLLIKER, *supra* note 7; STUBB, *supra* note 7.

<sup>176</sup> Douglas Webber, The Politics of Differentiated Integration in the European Union: Origins, Decision Making and Outcomes, MEEUC Working Papers 2012/11, at 1. For instance, the UK, Denmark, and Sweden do not participate in the Eurozone, while the UK and Ireland do not participate in the Schengen agreement removing internal border controls. Meanwhile, non-EU members, including Iceland, Norway, and Switzerland, have opted into Schengen. See Schengen Visa Countries List, <http://www.schengenvisainfo.com/schengen-visa-countries-list/>.

<sup>177</sup> See Conlan et al., *supra* note 172, at 20.

<sup>178</sup> See KÖLLIKER, *supra* note 7; Bradford, *supra* note 173, at 73.

circumstances in the United States. The federal government has legal authority to mandate nationwide policy and to override conflicting state views in the absence of unanimity. Indeed, it was designed to facilitate collective governance without consensus rules.<sup>179</sup> But polarization makes the political realities of American governance more closely resemble those in federations with weaker central governments and stronger subunit autonomy. Frequently, Washington cannot act even when it is legally 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 United States is groping its way toward checkerboard federalism or differentiated integration.<sup>180</sup>

As this account suggests, state-differentiated federal 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.<sup>181</sup> As an initial matter, however, it is worth noting that these preferences likely depend on the partisan composition of each government, rather than something about state versus federal authority as such.<sup>182</sup> 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. The instability of such preferences means that state-differentiated federal policy may deny everyone their preferred policymaking forum at any given moment but better satisfy preferences over time as the partisan makeup of various institutions shifts.

More generally, there is a strong case for state-differentiated federal policy as compared to the alternatives that emerge from a gridlocked Congress. In contrast to unilateral federal executive action, state participation builds contestation into federal policy; it diminishes the specter of unchecked authoritarianism that haunts exercises of

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<sup>179</sup> See generally 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).

<sup>180</sup> See Conlan et al., *supra* note 172.

<sup>181</sup> See *id.* at 27 (arguing that differentiated integration is a second-best solution). *But see* Bradford, *supra* note 173 (defending differentiated integration as a desirable end goal). Casting state-differentiated federal law as a second-best approach raises the question of its feedback effects. Might it, for instance, make Congress even less capable of governing by removing pressure 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.

<sup>182</sup> See Bulman-Pozen, *supra* note 20; *see also* Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops* (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2553285](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553285); Louis Michael Seidman, *Substitute Arguments in Constitutional Law* (2015), <http://scholarship.law.georgetown.edu/facpub/1497>.

executive power.<sup>183</sup> It also incorporates values traditionally associated with federalism, such as diversity and experimentation, into federal policy.<sup>184</sup> In contrast to pure devolution to the states, however, this approach acknowledges the need for national responses to certain problems. It underscores the possibility of, and the responsibility of working toward, national cohesion even in the face of disagreement.<sup>185</sup>

This last point raises the important question whether in the U.S. state-differentiated federal 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 EU, the United States is not in the process of forming a Union, and, apart perhaps from some minor tinkering, the country is not going to alter the composition of its 50-state membership. If the partial adoption of national policy is not bringing more states into closer union but instead allowing some states to disengage from the project of national policymaking, then perhaps in the American context differentiated integration is more akin to differentiated disintegration?

To some extent, this is an empirical question that awaits data: over time, will allowing for state difference within national policy facilitate national policymaking on contentious issues and generate greater nationwide agreement, or will it underlie further state-based dissent against and disengagement from the project of national governance? In the European context, scholars have cited the ultimately centripetal effects of differential integration.<sup>186</sup> 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. Italy, Spain, and Portugal undertook economic reforms in the 1990s to be able to join the Eurozone, for example, while Italy, Spain, Portugal, Greece, Austria, Finland, and Sweden chose to join the Schengen Agreement after holding back at first.<sup>187</sup> One can certainly imagine variations of this dynamic in the United States. For instance, the history of Medicaid furnishes support for the prediction that state resistance to the ACA will dissipate over time.<sup>188</sup> But a defense of differentiated integration in the U.S. should not rest on the assumption that uniformity will necessarily result. 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

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<sup>183</sup> See generally Bulman-Pozen, *supra* note 61.

<sup>184</sup> See generally Gluck, *supra* note 15.

<sup>185</sup> See generally Gerken, *supra* note 99; Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1626 (2014); Rodríguez, *supra* note 105.

<sup>186</sup> See KÖLLIKER, *supra* note 7; STUBB, *supra* note 7; Jan-Emmanuel De Neve, *The European Onion? How Differentiated Integration Is Reshaping the EU*, 29 EUR. INTEGRATION 503, 512 (2007).

<sup>187</sup> De Neve, *supra* note 186, at 512.

<sup>188</sup> See, e.g., SHANNA ROSE, *FINANCING MEDICAID* (2013).

nonparticipating states free-ride, leaving them no incentive to join at a later time.<sup>189</sup> Moreover, partisan polarization has already upset some conventional wisdom about state-federal relationships—for instance, that states always accept federal money<sup>190</sup>—and differentiated federal policy could enhance rather than diminish the partisan disagreement that now drives intergovernmental contestation.

While the empirics are uncertain, we might nonetheless predict that certain forms of differentiation are more likely to yield integration over time, or even simply to propose certain forms of differentiation as more attractive than others. In particular, the parameters of differentiated integration might vary among 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; as I have noted, if national action is responding to collective action problems, state opt-outs may vitiate participation altogether. Although partial concessions to oppositional states might also mean some states are contributing disproportionately to a collective endeavor—as in the Clean Power Plan—the fact of universal participation should mitigate a “sucker effect” for those states carrying the greatest burden.<sup>191</sup> More deeply, even in polarized times, we should seek differentiation that forces political interaction among those who disagree about policy choices.<sup>192</sup> 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.<sup>193</sup> It may also create new opportunities for negotiation and compromise that reshape partisan dynamics, as I now address.

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<sup>189</sup> See, e.g., KÖLLIKER, *supra* note 7, 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 179.

<sup>190</sup> See Sean Nicholson-Crotty, *Leaving Money on the Table: Learning from Recent Refusals of Federal Grants in the American States*, 42 PUBLIUS 449 (2012).

<sup>191</sup> See generally Mel E. Schnake, *Equity in Effort: The “Sucker Effect” in Co-Acting Groups*, 17 J. MGMT. 41 (1991).

<sup>192</sup> See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 78-99 (2014).

<sup>193</sup> See *infra* Part III.C.

## B. *Compromise: Disaggregated, Nontransparent 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.<sup>194</sup> This literature departs from both proposals to fundamentally alter government structures and proposals to fundamentally remake the parties, for instance through reforms intended to make elected politicians more moderate. Taking our separation of powers system and polarized parties as a given, scholars seeking ways to make governance possible among “enemies, not friends,”<sup>195</sup> highlight the centrality of negotiation.<sup>196</sup> Because this work focuses only 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.<sup>197</sup> Scholars have long noted that “bargaining is the usual mode of intergovernmental relations.”<sup>198</sup> 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 political 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 negotiations, 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.<sup>199</sup> 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

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<sup>194</sup> E.g., POLITICAL POLARIZATION, *supra* note 8.

<sup>195</sup> Mansbridge, *supra* note 21, at 263.

<sup>196</sup> See, e.g., Binder & Lee, *supra* note 8; Mansbridge, *supra* note 21; Pildes, *supra* note 8; Warren & Mansbridge, *supra* note 8.

<sup>197</sup> Pildes, *supra* note 8, at 845.

<sup>198</sup> DERTHICK, *supra* note 14, at 39; see also RYAN, *supra* note 69, at 279 (noting that the “boundary between state and federal power [is] a project of ongoing negotiation across the regulatory spectrum”).

<sup>199</sup> The move to disaggregated, bilateral institutions has also occurred abroad. See, e.g., SMILEY, *supra* note 70, at 98 (noting that negotiations between the Canadian federal government and individual provinces have been more likely to yield agreement).

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 capital. 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 the exchanges and the Medicaid expansion, in particular, opening new routes to bipartisan compromise.<sup>200</sup> 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 more Republican state officials.<sup>201</sup> Today, Arkansas, Kansas, Nebraska, Ohio, and South Dakota, among other red states, have agreed to coordinate with the federal executive.<sup>202</sup> 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 jump start implementation of the law.<sup>203</sup> More recently, 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.<sup>204</sup> Perhaps most notably, CMS negotiated

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<sup>200</sup> See Metzger, *supra* note 31.

<sup>201</sup> See Dinan, *supra* note 99, at 406.

<sup>202</sup> See *id.*; *State Health Insurance Marketplace Types, 2015*, KAISER FAMILY FOUND., <http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/>.

<sup>203</sup> See Shanna Rose, *Opting In, Opting Out: The Politics of State Medicaid Expansion*, 13 THE FORUM 63, 70 (2015); Thompson & Gusmano, *supra* note 89, at 432.

<sup>204</sup> 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

(continued next page)

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.”<sup>205</sup> Other waivers permit states to require copays from Medicaid beneficiaries, to use healthy behavior incentives, and to exclude certain Medicaid benefits such as non-emergency medical transportation.<sup>206</sup> 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.<sup>207</sup>

Although the ACA is a particularly high-stakes example—in terms of partisan controversy, the amount of money involved, and the significance 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.<sup>208</sup> This makes sense insofar as waiver holds out two 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.<sup>209</sup>

Even this bifurcated framing is ultimately 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.<sup>210</sup> Consider, for instance, the way the federal executive branch has altered its position on marijuana enforcement in response to state actions. Or consider how new fights are erupting over the Common Core as states implement the standards. In some respects, the big-picture partisan story with respect to education inverts the healthcare story: the initial NCLB law

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with federal officials, but the legislature passed a bill preventing the expansion. 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. *See ex rel. Cleveland Right to Life v. State of Ohio Controlling Bd.*, 138 Ohio St.3d 57 (2013); Rose, *supra* note 203, at 73-74.

<sup>205</sup> Rose, *supra* note 203, at 66; *see also* Thompson & Gusmano, *supra* note 89, at 433-34.

<sup>206</sup> *See* Robin Rudowitz et al., *The ACA and Medicaid Expansion Waivers*, KAISER FAMILY FOUND. (Feb. 17, 2015), <http://kff.org/report-section/the-aca-and-medicaid-expansion-waivers-issue-brief/>.

<sup>207</sup> *See, e.g.*, Russell Berman, *Why Republicans Are Voting to Repeal Obamacare—Again*, THE ATLANTIC, Feb. 3, 2015, <http://www.theatlantic.com/politics/archive/2015/02/why-republicans-are-voting-to-repeal-obamacare-again/385105/>.

<sup>208</sup> Shelly, *supra* note 87, at 467; *see also* Thompson, *supra* note 87, at 18.

<sup>209</sup> *See* Metzger, *supra* note 31.

<sup>210</sup> *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Sabel & Simon, *supra* note 135.

and state Common Core initiative represented rare triumphs of bipartisanship, rather than the summa of partisan polarization, and the implementation process has highlighted intraparty dispute. At the time of NCLB's enactment, President George W. Bush and Senator Ted Kennedy alike could agree on high-level values like educational excellence and equal opportunity. 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.<sup>211</sup> As the federal executive branch and the states worked out details of education assessment, a classic partisan split emerged, with conservative Republicans resisting a "national takeover" of a state domain.<sup>212</sup>

But as the standards have been implemented and discussions have turned to programmatic details, diverse groups of detractors and supporters have emerged. "[T]heoretical understandings of equity and excellence [have been] replaced by a keen awareness that standards fit hand in glove with testing, accountability, education spending and student privacy."<sup>213</sup> Teacher union opposition to testing has fractured the Democratic coalition, even as more traditional Republicans defend the standards against Tea Party detractors.<sup>214</sup> The hashing out of concrete details creates new fissures—and this makes state-federal bargaining all the more necessary, while also reshaping the expected partisan lineups.<sup>215</sup> The evolution of NCLB waivers and the Common Core underscore the significance of implementation to the formation of national policy and to the possibility of negotiation.

For both healthcare and education, as well as many other policy areas, one feature lubricating 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 governance, 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, Donald Smiley listed as his first "charge[] against executive federalism" that "it contributes to undue secrecy in the conduct of the public's business."<sup>216</sup> Many critics have echoed his complaint, and others have similarly assailed other nations' executive federalism as "an

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<sup>211</sup> See Jochim & Lavery, *supra* note 118, at 380.

<sup>212</sup> An RNC resolution described the Common Core as "an inappropriate overreach to standardize and control the education of our children so they will conform to a preconceived 'normal.'" RNC, *Resolution Concerning Common Core Education Standards*, Apr. 12, 2013, [https://cdn.gop.com/docs/2013\\_Spring-Meeting\\_Resolutions.pdf](https://cdn.gop.com/docs/2013_Spring-Meeting_Resolutions.pdf).

<sup>213</sup> Jochim & Lavery, *supra* note 118, at 399.

<sup>214</sup> *Id.* at 381, 399-400.

<sup>215</sup> See Wong, *supra* note 134; *supra* text accompanying notes 133-134.

<sup>216</sup> Richard Simeon & David Cameron, *Intergovernmental Relations and Democracy: An Oxymoron if There Ever Was One?*, in CANADIAN FEDERALISM, *supra* note 7, at 278 (quoting Smiley).

exercise in horse trading behind closed doors” that occurs beyond “democratic scrutiny and accountability.”<sup>217</sup>

In the United States today, however, a 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.<sup>218</sup> But closed-door interactions have become increasingly 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 with perversely undermining negotiation.<sup>219</sup>

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, disclose meeting minutes, and the like.<sup>220</sup> 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, 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. As a simple matter of politics, we might expect state and federal politicians to trumpet their policy achievements. And the results of these negotiations inevitably become public as 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.<sup>221</sup> 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

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<sup>217</sup> See, e.g., Wiltshire, *supra* note 76, at 180, 167 (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. See Simeon & Cameron, *supra* note 216.

<sup>218</sup> See Binder & Lee, *supra* note 8, at 252-53; Pildes, *supra* note 8, at 847-78; Warren & Mansbridge, *supra* note 8.

<sup>219</sup> 5 U.S.C. § 552; *id. app.* §§ 2-3; see Pildes, *supra* note 8, at 846.

<sup>220</sup> See Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 470-71 (2014).

<sup>221</sup> See Pildes, *supra* note 8, at 848.

should think about what types of publicity may facilitate public oversight without unduly impeding negotiation. One promising standard has been articulated by the American Political Science Association task force on negotiating agreement in politics: “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.”<sup>222</sup>

In considering how to apply this 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.<sup>223</sup> We should also focus on 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.<sup>224</sup> Various memoranda and directives during President Obama’s tenure have more generally created guidelines for public transparency in agency action.<sup>225</sup> The point is not that these practices get 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. As Mark Warren and Jane 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

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<sup>222</sup> Mansbridge, *supra* note 21, at 267; see Warren & Mansbridge, *supra* note 8, at 108; David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

<sup>223</sup> Compare, e.g., Clean Power Plan, *supra* note 140, with Cole Memo, *supra* note 111.

<sup>224</sup> See Thompson & Burke, *supra* note 69, at 994.

<sup>225</sup> See, e.g., Memorandum for the Heads of Exec. Dep’ts and Agencies from President Barack Obama, Re: Transparency and Open Government, Jan. 21, 2009, [https://www.whitehouse.gov/the\\_press\\_office/TransparencyandOpenGovernment](https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment); Memorandum for the Heads of Executive Dep’ts and Agencies, from Peter R. Orszag, Director, OMB, Re: Open Government Directive, Dec. 8, 2009, [https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf).

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.<sup>226</sup>

As this suggests, scholars are likely to view legislative gridlock as a problem for representation precisely because it displaces practical power onto the executive. The focus on legislatures is not incidental, then; democratic representation is defined in terms of legislative bodies.<sup>227</sup>

Insofar as such accounts consider only the federal government, however, they overlook ways in which national representation may be advanced outside of Washington.<sup>228</sup> State participation in national governance tempers the contrast of a multi-member 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 embraces multiplicity. 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 distinctive ways in which this shift might even contribute to democratic representation.<sup>229</sup>

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 multi-member body should have a superior claim

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<sup>226</sup> Warren & Mansbridge, *supra* note 8, at 87.

<sup>227</sup> See, e.g., HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 235 (“We would be reluctant . . . to consider a government representative unless it included some sort of collegiate representative body in a more than advisory capacity.”).

<sup>228</sup> 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 state perspective informs congressional selection, but instead because fifty state governments are themselves fora for national politics.

<sup>229</sup> 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 most Americans at least know who their governor is but cannot name their 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.

to reflecting the people's will than any unitary representative. Hence 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."<sup>230</sup> 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. Executive federalism might be said to approximate the pluralism of the Senate: instead of meeting as a single body, representatives from each state (and both political parties) participate in executive negotiations.<sup>231</sup>

While its plural character makes executive federalism more similar to a multi-member body's governance 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.

First, the practice of executive federalism suggests that governance 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.<sup>232</sup> On a legislative model of representation, deliberation is generally taken to precede policy. But the adoption of various policies may also commence a deliberative process when decisions are manifold and iterative. State choices to expand Medicaid in particular ways

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<sup>230</sup> Warren & Mansbridge, *supra* note 8, at 87.

<sup>231</sup> As the Senate analogy suggests, 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 multi-member bodies but multiple sources of representation. No single institutional arrangement will suffice if multiplicity is a means of representing various "aspects 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* 355, 362 (Ian Shapiro & Will Kymlicka eds., 1997), 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.

<sup>232</sup> *See, e.g.*, Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 *POL. THEORY* 758, 766-67 (2000).

have prompted and informed national discourse about the provision of healthcare, for instance, while state choices to legalize marijuana have changed conversations across the nation about drug policy.<sup>233</sup> While any policy decision might be said to facilitate deliberation, the claim is a hollow one absent the prospect of a new decision. Because, as compared to national legislation, executive federalism furnishes many venues for policymaking and yields decisions that can be amended relatively quickly and 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.<sup>234</sup> As compared to speech, policy choices make more visible what these political interests entail and better organize the claims elected officials make to constituents.<sup>235</sup> Their very concreteness, as compared to more abstract policy discussions, may thus not only furnish a basis for shifting alignments that underlie negotiation, as I have suggested above,<sup>236</sup> but may also enhance democratic representation, as political judgments are reflected in actions.<sup>237</sup>

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 shared agreement. Legislative deliberation is generally understood to yield a single political settlement, if not deep consensus; even on more aggregative or contestatory conceptions, the legislature deliberates so as to promulgate a single law.<sup>238</sup> 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

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<sup>233</sup> 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 of Experimentalist Governance in the EU*, in EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION 1, 6 (Charles F. Sabel & Jonathan Zeitlin eds., 2012).

<sup>234</sup> 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 9, at 24 (“[R]epresentation is not meant to make a preexisting entity—i.e., the unity of the state or the people of the nation—visible; rather, it is a form of political existence created by the actors themselves (the constituency and the representative).”).

<sup>235</sup> *See generally* Michael Saward, *The Representative Claim*, 5 CONTEMP. POL. THEORY 297 (2006).

<sup>236</sup> *See supra* Part III.B.

<sup>237</sup> Cf. URBINATI, *supra* note 9, at 16 (arguing that representation furnishes the demos with an opportunity to “reflect[] on itself and judge[] its laws, institutions, and leaders”).

<sup>238</sup> *See generally* Hayward, *supra* note 234, at 124-25.

new interests, new coalitions, and new judgments of existing policies, but it need not eliminate difference.<sup>239</sup>

Critical to accepting executive federalism as plural and deliberation-facilitating is recognizing it as a large-scale arrangement, the legitimacy of which inheres not in discrete relationships between particular constituents and elected officials but rather in the “over-all structure and functioning of the system, the patterns emerging from the multiple activities of many people.”<sup>240</sup> Colorado’s legalization of marijuana cannot be seen as only relevant to residents of Colorado, nor can RGGI’s regulation of emissions be seen as only relevant to residents of Northeastern states. Rather, we must accept state decisions as a part of national policymaking and recognize that individuals may have representative relationships with political actors they are not eligible to vote for—or, at least, a meaningful connection to decisions that emerge from beyond their designated territorial districts. Both claims are plausible because of the very partisan dynamics shaping executive federalism.<sup>241</sup>

I have elsewhere suggested that today’s partisan politics generates a “federalist variant of surrogate representation.”<sup>242</sup> Because states are key players in national politics, their policy decisions are often directed at, and have consequences for, the national public.<sup>243</sup> Thus, individuals in one state may in some sense be represented by another state and thus by politicians with whom they have no electoral connection. Federalist surrogate representation may arise even when states engage in autonomous governance without any federal involvement given how partisanship bridges the state-federal divide. But the ways in which states may help to represent a national polity are particularly pronounced in the case of executive federalism because interactions among state and federal actions establish national policy. When the federal executive considers how to respond to state educational initiatives, or Arkansas negotiates an exception to Medicaid, the implications for a national public are more immediate and readily apparent than when a state acts on its own. Federalist surrogate representation thus elaborates on a suggestion in the political theory literature that constituencies are not fixed, preexisting entities but are rather created by representative relationships and claims.<sup>244</sup> Constituency need not be

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<sup>239</sup> Cf. Sabel & Zeitlin, *supra* note 233, at 4 (“In the EU . . . deliberative decision making is driven by the discussion and elaboration of persistent difference.”).

<sup>240</sup> PITKIN, *supra* note 227, at 221-22.

<sup>241</sup> 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 (2008).

<sup>242</sup> Bulman-Pozen, *supra* note 20, at 1132; see Mansbridge, *supra* note 9, at 522-23.

<sup>243</sup> Bulman-Pozen, *supra* note 20, at 1133-34.

<sup>244</sup> See, e.g., URBINATI, *supra* note 9, at 24; YOUNG, *supra* note 9, at 130-131; Hayward, *supra* note 234, at 112; Saward, *supra* note 235.

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.<sup>245</sup>

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.<sup>246</sup> 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.”<sup>247</sup> 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. Because the opinion defends his contributions in terms of representation but never explains why McCutcheon is properly seen as a constituent, 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, multi-venue undertaking, and territorial districts cannot fully define constituencies.<sup>248</sup> 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.<sup>249</sup> I do

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<sup>245</sup> For descriptions of this practice, see LANI GUINIER, TYRANNY OF THE MAJORITY 130 (1995); Mansbridge, *supra* note 9, at 522-25; and Robert Weissberg, *Collective vs. Dyadic Representation in Congress*, 72 AM. POL. SCI. REV. 535 (1978). A similar embrace of surrogate representation also infuses dormant Commerce Clause doctrine. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1055 (3d ed. 2000) (“[T]he presence of an in-state surrogate who may assert the claims of burdened out-of-state interests serves to lower the level of Commerce Clause scrutiny.”).

<sup>246</sup> 134 S. Ct. 1434 (2014).

<sup>247</sup> *Id.* at 1462.

<sup>248</sup> *See* Bulman-Pozen, *supra* note 20, at 1133-34.

<sup>249</sup> *See, e.g.*, GUINIER, *supra* note 245; Richard Briffault, *Of Constituents and Contributors*, U. CHI. L. FORUM (forthcoming 2015); Joseph Fishkin, *Who Is a Constituent?*, BALKINIZATION, Apr. 3, 2014, <http://balkin.blogspot.com/2014/04/who-is-constituent.html>.

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 an official's ability to speak for her electoral constituents,<sup>250</sup> federalist surrogate representation may be ideological or affective rather than transactional.

Accepting that executive federalism may facilitate national representation does not mean that we should embrace it in all of its forms. For instance, an obvious risk of executive as compared to legislative forms of representation is that it may collapse into unilateralism, inhibiting the expression of 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. A critical question is thus how to ensure co-governance by state and federal officials so that executive federalism does not become simply federal executive governance. In the next Part, I turn to some doctrines bearing on this issue.

#### IV. DOCTRINAL INVERSIONS

Executive federalism does not operate in all domains. State and federal executives cannot, for instance, negotiate about the debt ceiling or hammer out most aspects of foreign policy. This paper has nonetheless suggested that executive federalism is already at work in shaping many aspects of domestic policy and that this may be a salutary development. A critical question that I have thus far bracketed is to what extent the courts will constrain the phenomenon. Already, plaintiffs are contending that the Clean Power Plan exceeds the EPA's authority, that Colorado and Washington's legalization of marijuana is preempted, and that the Common Core testing consortia are unconstitutional interstate compacts. More lawsuits are sure to come. While judicial oversight is an important safeguard against the abuse of executive power—and while many of these lawsuits might themselves be understood as part of the contestation executive federalism inspires—here I argue that courts should give breathing room to at least some forms of executive federalism.<sup>251</sup>

First, I consider how courts should review federal agency decisions involving the states. Judges and scholars have devoted ample attention to the intersection of federalism

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<sup>250</sup> See Briffault, *supra* note 249 (offering evidence that politicians are responsive to their contributors at the expense of their electoral constituents).

<sup>251</sup> Executive federalism potentially implicates a large number of doctrines. One important area I do not explore, for instance, is state separation of powers and the relative authority of state legislatures and executives. See generally Fahey, *supra* note 15; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999).

and *Chevron*, but they have only asked whether federalism concerns should diminish judicial deference. I suggest, instead, that federalism should be deference-enhancing insofar as federal agencies are incorporating or facilitating state governance. My claims are loosely aligned with recent literature advocating more leeway for agencies in times of political polarization and congressional gridlock, but I argue that deference should be amplified when the federal executive is integrating the states into governance rather than going it alone. Building on this broader *Chevron* point, I further suggest that deference may particularly be warranted for agency views that state law is *not* preempted by federal law.

I then turn to horizontal relationships among states. Even as it has given a permissive reading to the Compact Clause, the Supreme Court has held that compacts impinging on “federal supremacy” require the “Consent of Congress,”<sup>252</sup> and the elected branches of the federal government have understood such consent to require presidential approval as well. Partisan dynamics put pressure on this unified conception of the federal government. As recent developments suggest, the critical doctrinal fights going forward are unlikely to be waged in terms of state versus federal power. Instead, they will disaggregate the federal government and map separation of powers questions onto federalism doctrine. Federal executive involvement in interstate agreements, I suggest, should make courts look more, not less, favorably on such agreements.

#### A. *Chevron and the States*

Doctrine concerning how the federal government and states interact widely begins from the premise of legislative federalism. Courts assume that Congress is striking deals with states, figuring out how state and federal law interact, and shaping cooperative federalism schemes by apportioning state and federal authority. I have argued that this is a faulty description of current government functioning and that executive federalism has eclipsed legislative federalism in critical respects. This different premise about national policymaking and state-federal relationships suggests a new approach to *Chevron* and federalism questions. In particular, we might shift from a principal-agent model of delegation and accountability to a less hierarchical, more polyarchic understanding of administrative power.

##### 1. Deference-Enhancing Federalism

Administrative law cases and scholarship frequently address the intersection of *Chevron* and federalism. While offering a variety of approaches, they share a critical understanding: that the only way federalism may enter the *Chevron* inquiry is to defeat the federal executive’s claim to deference. Some insist that Congress is the only arbiter of state-federal relations and contend that agency decisions implicating state interests should be removed from the *Chevron* framework altogether at step 0, while others advocate a

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<sup>252</sup> U.S. CONST. Art. I, sec. 10; U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 460 (1978).

more jaundiced view of agency action at step 1 or step 2.<sup>253</sup> Still others have come to the defense of federal agencies, arguing that they are as well-suited as Congress to mediate the state-federal relationship and that *Chevron*'s usual application should not be affected by federalism concerns.<sup>254</sup> But even agency defenders have assumed there is a one-way ratchet.

The phenomenon of executive federalism suggests a distinct possibility: federalism might *enhance* the federal executive branch's claim to deference. Let me be clear at the outset that this is a relatively modest claim. The argument is not that federal agencies should be able to thwart congressional instruction. But as the *Chevron* doctrine indicates, statutes fail to address particular issues altogether, they are vague or ambiguous in addressing others, and they endure over time as circumstances change. As Jody Freeman and David Spence have noted, "given the extent of congressional dysfunction noted by political scientists, and the aging regulatory statutes in the U.S. Code, courts 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."<sup>255</sup>

Such indeterminacy could be understood to cut against deference. Courts reviewing agency determinations in the face of large statutory gaps or an awkward fit between an old statute and a new question might, that is, be especially inclined to withhold deference. Indeed, recent statements in Supreme Court opinions suggest a more general wariness about agencies making significant decisions. Considering an EPA interpretation of the Clean Air Act, for instance, the Court found the agency's interpretation "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."<sup>256</sup> 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 *Chevron* deference because it disagreed

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<sup>253</sup> See, e.g., *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Gersen*, *supra* note 10. See generally *Metzger*, *supra* note 10, at 2071, 2014 (citing cases showing that federalism concerns can be addressed at step zero, step one, or 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).

<sup>254</sup> See *Galle & Seidenfeld*, *supra* note 65; cf. *Seifert* *supra* note 65 (arguing against a federalism step zero).

<sup>255</sup> *Freeman & Spence*, *supra* note 11, at 63.

<sup>256</sup> *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014). But cf. *EPA v. EME Homer City Gen.*, 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").

with an agency's position<sup>257</sup>—it determined that the question of whether tax credits are available on federal exchanges was too important to leave to an administrative agency.<sup>258</sup>

There is, however, a strong argument for granting more deference to agencies when they are addressing novel problems in times of polarization and legislative gridlock. With an unclear mandate from the enacting Congress and little to no prospect of intervention from the current Congress, a lack of deference means that courts themselves are engaging in the complicated interpretive project, with the policymaking role this necessarily entails.<sup>259</sup> *Chevron*'s emphasis on democratic accountability and expertise suggest, for many scholars, why agencies are superior to courts in making such decisions, although, in keeping with the *Chevron* opinion itself, scholars have offered two very different reasons for deference. Freeman and Spence, for instance, focus on the relatively greater 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.”<sup>260</sup>

Others advance a view of agencies as expert bodies that are relatively insulated from political forces. For example, Cass Sunstein 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.”<sup>261</sup> The reason for this, he maintains, is that such deference takes decisionmaking out of politics in the “simple or crude sense” and instead privileges a technocratic focus on facts.<sup>262</sup> This argument for deference is thus distinct from the democratically-accountable-agencies approach; deference here follows from agencies' difference from political actors.

Sunstein's argument is somewhat curious, however, in its faith in apolitical factual determinations. Just a few pages prior to making this normative claim, he has reviewed extensive evidence of “partyism,” including the way it distorts our ability to process

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<sup>257</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

<sup>258</sup> *King v. Burwell*, No. 14–114 (U.S. June 25, 2015). Although the Court may have eschewed deference because it regarded the particular agency involved, the IRS, as non-expert with respect to health insurance policy, *see* slip. op. at 8, a broader-based skepticism of agency decisionmaking has also appeared in other recent decisions. *See, e.g.*, *Michigan v. EPA*, No. 14–46 (U.S. June 29, 2015).

<sup>259</sup> See generally *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

<sup>260</sup> Freeman & Spence, *supra* note 11, at 76; *see also id.* at 81 (“[P]residents direct [agencies] in response to demands from a national constituency.”)

<sup>261</sup> Sunstein, *supra* note 11, at 16; *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”).

<sup>262</sup> *Id.* at 15–17.

facts.<sup>263</sup> Not only do people apply a partisan filter to value judgments and facts alike, but we are also unaware we are doing so.<sup>264</sup> 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 agency 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 are truly apolitical in the way 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 be purely technical.

Instead of insisting on agencies’ democratic accountability or technocratic expertise in isolation, we might more forthrightly acknowledge the significance of partisanship and respond by “tailor[ing] deference to variety”<sup>265</sup>: federal agencies might receive enhanced deference to the extent that their actions incorporate state governance and thus build multiplicity into federal law.<sup>266</sup> Most ambitiously, one could suggest that parties should be folded into the inquiry—for instance, a Democratic federal administration would receive greater deference insofar as it embarked on a project of co-governance 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 nonetheless be a useful proxy, while also respecting additional federalism values. In particular, courts should grant federal agencies greater deference when they furnish states a role in administering national policy going forward. While necessarily fuzzy at the margins, this standard should at least apply to a federal agency’s incorporation of existing state policy, as in the case of the CMS regulations embracing Utah’s small business exchange or HHS’s specification of essential health benefits, and a federal agency’s decision to confer flexible implementation authority on the states beyond what is specifically required by statute, as in the Clean Power Plan.

For some, the suggestion that federalism, in the distinctive form of state-federal co-governance, might be deference-enhancing will seem not only odd but perverse. As the Clean Power Plan litigation demonstrates, certain state actors are apt to regard their

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<sup>263</sup> 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.

<sup>264</sup> 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 (2012).

<sup>265</sup> *United States v. Mead Corp.*, 533 U. S. 218, 236 (2001). Of course, I mean something different by this phrase than the Court in *Mead*.

<sup>266</sup> Because there is not some quantifiable amount of *Chevron* deference that agencies receive, one might argue that this is the same argument the literature has already considered, i.e., the possibility that federalism concerns should not dilute deference. Even if a quantum of deference cannot be specified, however, I mean to argue for enhanced deference.

inclusion in a federal administrative scheme as a federalism problem. They might regard a federal agency's provision for state governance in its regulations as a red flag that it is encroaching on a state domain. Or they might understand state-federal cooperation as an inherently suspect form of horizontal aggrandizement, whereby the federal executive branch and certain states team up to disadvantage others.<sup>267</sup> Such views assume that questions of state versus federal authority are simple 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 co-governance complicates these assumptions.<sup>268</sup> Negotiation and bargaining, cooperation and contestation, force a reevaluation of state and federal interests.

These forward-looking aspects of co-governance are the basis for suggesting that federalism should be deference-enhancing as compared to unilateral federal executive action. Building multiplicity and state integration into federal regulation has implications for both democratic accountability and expertise. As I have argued above, state-federal co-governance may give rise to more robust national representation and accountability. This is not the thin democratic accountability of a president directing agency action on behalf of a national constituency. But as most accounts of administrative accountability acknowledge, that is too narrow a focus. In a time of political polarization and partyism, especially, overlap and integration are more likely to generate meaningful oversight by other officials and ultimate responsiveness to the public.<sup>269</sup> Instead of seeing a world of agents without principals, as the Court seems wont to do, we might see a world of many interconnected and mutually dependent principals.<sup>270</sup>

So too, discussions of expertise often treat it as static rather than as a capacity that develops over time. As the experimentalism literature underscores, 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.<sup>271</sup> Incorporating states into federal governance may be expertise-enhancing not because states possess expertise in the first instance but rather because their role in federal governance fosters differentiation and reciprocal learning.

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<sup>267</sup> See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 117-28 (2001).

<sup>268</sup> See also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

<sup>269</sup> See *id.* at 1289-91.

<sup>270</sup> Cf. Adam Cox & Cristina Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. (forthcoming) (arguing that immigration enforcement should be reconceptualized as involving both Congress and the federal executive as principals, rather than Congress as a principal and the federal executive as its agent).

<sup>271</sup> See, e.g., Dorf & Sabel, *supra* note 210; Sabel & Simon, *supra* note 135; see also Gersen, *supra* note 10, at 213 ("Agency expertise is neither static nor exogenous, but rather is a function of existing institutional arrangements.").

## 2. Executive Non-Preemption

The most sustained focus of the administrative federalism literature has concerned preemption: When and how may federal agencies preempt state law? Unsurprisingly, courts and scholars have offered various answers, dividing particularly over how to review agency preemption determinations that occur outside of a notice-and-comment rule. Some suggest *Chevron* deference, others *Skidmore* deference, and still others no deference or a modicum of deference only for particularly subsidiary conclusions rather than the preemption determination itself.<sup>272</sup> As with federalism and *Chevron* generally, however, amid such disagreement, commentators have widely assumed that the 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 as well: 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.<sup>273</sup> 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.<sup>274</sup> The practice of executive federalism suggests that courts should grant particular deference to the federal executive's view that state law is not preempted. Because integration is key to executive federalism's legitimate practice, that is, courts should be more accommodating of federal executive determinations that state law is not preempted than that it is. While deference to a federal view that state law is preempted will displace state law and thus tend to yield unilateral rather than multiple governance in a particular area, deference to a federal view that state law is not preempted will instead mean that state and federal regulation coexist.<sup>275</sup>

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

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<sup>272</sup> Compare, e.g., *Wyeth v. Levine* 129 S. Ct. 1187, 1202 (2009) (*Skidmore* deference), with *Medtronic v. Lohr* 518 U.S. 470, 495(1996) ("substantially informed"); see also *Galle & Seidenfeld, supra* note 65; *Mendelson, supra* note 10; *Thomas W. Merrill, Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727 (2008); *Sharkey, supra* note 65; *Young, supra* note 10.

<sup>273</sup> See *supra* Part II.

<sup>274</sup> *Williamson v. Mazda Motor*, 562 U.S. 323, 335 (2011) (citing *Geier v. American Honda Motor Company*, 529 U.S. 861, 883 (2000), in which the executive branch argued for preemption).

<sup>275</sup> Cf. *Bulman-Pozen & Gerken, supra* note 268, at 1302-07.

Controlled Substances Act.<sup>276</sup> The preemption argument is weak in any event. The CSA contains a strongly worded savings clause, and Colorado's legalization of marijuana does not prohibit individuals from complying with the federal prohibition. Moreover, reading federal law to require states to criminalize marijuana as a matter of state law would likely run afoul of the prohibition on commandeering.<sup>277</sup> But the view of the federal executive that Colorado's regulatory regime is not preempted should also 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 even in times of polarization.

As with federalism and *Chevron* deference generally, the claim here is not that the federal executive branch should be empowered to preserve state governance in the face of conflicting federal law. Instead, this argument recognizes that most preemption decisions require not only an interpretation of federal and state law but also an understanding of how these laws interact, an understanding that often depends on how the laws are implemented.<sup>278</sup> In the face of this complexity, some degree of deference toward agency views is warranted.<sup>279</sup> And especially given the ostensible presumption against preemption, a federal agency's determination that state and federal governance may coexist warrants particular deference. Both this more general underpinning of preemption doctrine and the practice of executive federalism suggest that executive non-preemption is more compelling than executive preemption.

#### B. *The Compact Clause*

Just as questions about state-federal relationships inform doctrine concerning the federal executive's authority, so too do they inform doctrine concerning state relationships with one another. Because such horizontal relationships have emerged as an important force shaping national policy and state-federal negotiations, the future of executive federalism depends in part on how courts receive interstate agreements. While the Supreme Court has generously licensed multistate collaboration, the integration of state and federal governance that underlies executive federalism reveals new doctrinal

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<sup>276</sup> Motion for Leave to File Complaint, Complaint, and Brief in Support of Petitioner States of Nebraska and Oklahoma, Dec. 2014, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/12/Neb.-Okla.-original-suit-vs.-Colorado-12-18-14.pdf>.

<sup>277</sup> See generally Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); 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).

<sup>278</sup> See generally Metzger, *supra* note 10; Seifter *supra* note 65.

<sup>279</sup> Even most skeptics of executive preemption accordingly recognize a place for courts to respect agency views on particular points. See, e.g., Merrill, *supra* note 272, at 759, 779 (concluding that courts should make preemption decisions but "draw on the expertise of agencies in helping to understand the pragmatic variables that bear on the preemption decision").

fault lines. In particular, such integration destabilizes the idea of a unified federal government and suggests that future litigation about interstate compacts will revolve not around state versus federal authority but rather around 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"<sup>280</sup>—the Supreme Court has long held that consent is required only when an interstate agreement would augment state power at the federal government's expense.<sup>281</sup> 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."<sup>282</sup> Nearly one hundred years later, the Court reaffirmed this interpretation. Embracing "modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy," the Court held that the test for whether consent is required "is whether the Compact enhances state power *quoad* the National Government."<sup>283</sup> Although the Court has not elaborated the meaning of federal supremacy, it has been clear that such supremacy is distinct from federal interests because "every state cooperative action touching interstate or foreign commerce implicates some federal interest."<sup>284</sup>

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 not to Congress alone but instead to Congress "acting in the way in which Congress ordinarily enacts legislation—i.e., subject to presentment [and] veto."<sup>285</sup> For instance, Congress

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<sup>280</sup> U.S. CONST. Art. I, sec. 10.

<sup>281</sup> See U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978); Virginia v. Tennessee, 148 U.S. 503, 519 (1893). The Court has also liberally construed congressional consent to include post-hoc and implied forms of acquiescence. See, e.g., Cuyler v. Adams 449 US 433, 441 (1981). And it has suggested that many interstate arrangements do not amount to "Agreement[s] or Compact[s]" within the meaning of the Compact Clause at all. See, e.g., Northeast Bancorp, Inc. v. Bd. Of Governors, Fed. Reserve System, 472 U.S. 159 (1985) (outlining four compact indicia).

<sup>282</sup> Virginia, 148 U.S. at 519.

<sup>283</sup> U.S. Steel Corp., 434 U.S. at 473; see also New Hampshire v. Maine, 426 U.S. 363 (1976).

<sup>284</sup> U.S. Steel Corp., 434 U.S. at 473, 480 n.33; see Cuyler, 449 U.S. at 440.

<sup>285</sup> Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 319 n.138 (2003) (emphases omitted); cf. Ariz. St. Legislature v. Ariz. Indep. Redistricting Comm'n, No. 13-1314, slip op. at 19 (U.S. June 29, 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 (continued next page)

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.<sup>286</sup> Today, commentators generally assume that, when federal consent is required, interstate agreements are subject to the president's approval as well as Congress's.<sup>287</sup>

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 disaggregate the branches of the federal government and challenge the respective roles of Congress and the executive branch in both mediating interstate relationships.

Two forms of this challenge are already beginning to emerge. First, in an attempt to effectively repeal existing federal law outside of the bicameralism and presentment process, certain state and federal officials have proposed interstate compacts in areas including healthcare and immigration.<sup>288</sup> Because these compacts seek to alter federal law, proponents concede that they implicate federal supremacy and thus require congressional consent, but they insist, against historical practice, that such consent should not be understood to include a presidential veto. 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.<sup>289</sup> Given the dynamics canvassed

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Legislature' comprises the referendum and the Governor's veto in the context of regulating congressional elections.”).

<sup>286</sup> See Linda Hein, *FDR Vetoes Republican River Compact*, MCCOOK GAZETTE, Oct. 12, 2001, <http://www.mccookgazette.com/story/1046711.html>. 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).

<sup>287</sup> See, e.g., FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, at 94 (1951) (“The Compact Clause itself requires only the consent of Congress, but ‘settled usage’ has granted the President veto power over consent”); Greve, *supra* note 285, 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).

<sup>288</sup> See Health Care Compact, <http://www.healthcarecompact.org>; Terrence Stutz, *Texas Senate Votes for Interstate Compact to Enforce Federal Immigration Laws*, DALLAS MORNING NEWS, May 6, 2015, <http://www.dallasnews.com/news/state/headlines/20150506-senate-votes-to-enforce-federal-immigration-laws-with-interstate-compact1.ece>.

<sup>289</sup> 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](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) (“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.”).

above, these compacts appear to be political nonstarters even with a Republican majority in Congress, but such campaigns underscore how a view of state versus federal authority as such does not capture the most relevant divides. If these compacts were to be adopted by Congress, the fight would concern the separation of powers more than federalism.<sup>290</sup>

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.”<sup>291</sup> This year, a Missouri court found that the Smarter Balanced Assessment Consortium is “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.”<sup>292</sup> As that judgment is being appealed, similar challenges are cropping up in other states.<sup>293</sup> The court did not offer a rationale for its judgment, but the plaintiffs’ argument can be understood as follows: Congress has provided in federal law that the Department of Education may not create a national curriculum or control state educational policy; the Department of Education conditioned certain federal grants for states on their participation in assessment consortia such as Smarter Balanced; Smarter Balanced is thus an unconstitutional compact because it undermines the authority of the federal government, as expressed in federal statutes.<sup>294</sup>

Although the plaintiffs repeatedly invoke state sovereignty, their Compact Clause claim is not that the federal government has encroached on a state domain or even that coordinated state action undermines individual state sovereignty.<sup>295</sup> Instead, on their

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<sup>290</sup> See, e.g., Justin Wingerter, *Nonpartisan Agency’s Analysis Finds Kris Kobach’s Health Care Compact Proposal Isn’t Constitutional*, July 16, 2015, TOPEKA CAPITAL J., <http://cjonline.com/news/2015-07-16/nonpartisan-agencys-analysis-finds-kris-kobachs-health-care-compact-proposal-isnt> (reporting that the Congressional Research Service issued a memorandum stating that the Health Care Compact would require presentment).

<sup>291</sup> Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 766 (2010); see also, e.g., Greve, *supra* note 285, at 289.

<sup>292</sup> Sauer v. Nixon, No. 14AC-CC00477 (Cole County, MO, 2015), available at <http://www.moagainstcommoncore.com/Sauer%20v.%20Nixon%20-%20Judgment.pdf>.

<sup>293</sup> See, e.g., 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>.

<sup>294</sup> See Memorandum in Support of Plaintiffs’ Motion for Preliminary Injunction, Sauer v. Nixon, No. 14AC-CC00477, available at <http://www.scribd.com/doc/241382665/Memo-in-support-of-PI-in-Sauer-v-Nixon> [hereinafter Sauer Memo].

<sup>295</sup> The plaintiffs also argue that Smarter Balanced threatens to undermine the sovereignty of other states because the widespread adoption of Common Core standards through such consortia “threatens to make it exceptionally difficult for non-member states to resist adopting Common Core, or for member states to opt out of Common Core.” Sauer Memo, *supra* note 294, at 9. This argument is foreclosed by

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argument, state sovereignty is subsumed within federal sovereignty: insofar as state sovereignty is impaired by Smarter Balanced, this undermines “the authority of the federal government, because it effectively circumvents 50 years of Congressional policy.”<sup>296</sup> Moreover, just as state sovereignty is actually a proxy for federal sovereignty in the plaintiffs’ argument, so too is part of the federal government (the executive branch) cast as undermining federal sovereignty. The fact that the states have cooperated with each other does not violate Congress’s prohibition on federal control of state decisions; rather, the involvement of the Department of Education in “instigat[ing]” such state cooperation makes it suspect.<sup>297</sup>

As this necessarily convoluted explanation may underscore, the plaintiffs are not ultimately advancing an argument about the Compact Clause. Their actual claim is that the federal executive branch is violating federal law. The case nonetheless illustrates how unstable an idea of “federal supremacy” has become, especially insofar as it is contrasted with enhanced state power.<sup>298</sup> The 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 not a source of concern but rather a source of reassurance. As an initial matter, if the federal executive and a state (or states) enter into an agreement with one another, this sort of state-federal compact should not require express congressional approval at all.<sup>299</sup> 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.

More generally, even when the federal executive does not enter into an agreement with the states, it may “prompt, react to, rely on, or take advantage of an interstate agreement”<sup>300</sup> in the way that ED has done with the Common Core and the assessment

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Supreme Court precedent. *See U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 478 (1978) (holding that “pressure” does not encroach on state sovereignty or impact the federal structure).

<sup>296</sup> Sauer Memo, *supra* note 294, at 7.

<sup>297</sup> *Id.* at 1.

<sup>298</sup> *See generally U.S. Steel Corp.*, 434 U.S. at 460 (discussing “modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy”).

<sup>299</sup> *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) [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.”); *see also INS v. Chadha*, 462 U.S. 919 (1983).

<sup>300</sup> Brief of Appellants, *Sauer v. Nixon*, at 33, 2015 WL 3615028 (Mo. App. W.D.) (May 26, 2015).

consortia or that EPA has done with RGGI. The defendants in the Smarter Balanced litigation resist the suggestion that the federal executive's instigation or approval of an interstate agreement is a problem, but they do not regard it as helpful either; for them, it is simply irrelevant.<sup>301</sup> This is a fair posture given current doctrine: if Smarter Balanced is not the sort of interstate agreement that requires federal consent, 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 obvious whether an interstate compact has implications for federal supremacy. And even as the 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 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 branch is incorporating such state action into federal governance. This suggestion parallels the arguments I have made above for granting the federal executive branch an additional degree of deference when it brings states into federal regulation.<sup>302</sup> Just as this 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,"<sup>303</sup> as to provide a basis for ascertaining and grappling with such interests. The process of co-governance should force state and federal actors alike to reconsider assumptions about state versus federal interests. If interaction and overlap are the keys to the legitimate practice of executive federalism, as I have argued, the federal executive's engagement, even in informal ways, with interstate collaboration should not render these agreements suspect but 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 integration and mutuality. Because the party system undergirds its rise, executive federalism is a form of governance 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 policies. By facilitating state-

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<sup>301</sup> *See id.*

<sup>302</sup> *See supra* Part IV.A.

<sup>303</sup> Applicability of Compact Clause, *supra* note 299, at 830.

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.