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Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond

ABSTRACT. State implementation of federal law is commonplace, but has been largely ignored by the interpretive doctrines of legislation and administrative law. We have no *Chevron*, federalism canon, or anything else for state implementation, nor any doctrines that ask how Congress's decisions to delegate implementation duties to states should affect how ambiguous statutes should be interpreted. For theories of federalism, state implementation raises a different question, namely, whether this "intrastatutory federalism" – an informal federalism that comes from the inside of federal statutes – is something that doctrine should protect. The prevailing functional and sovereignty accounts of federalism seem less relevant for a federalism that comes at the grace of Congress; this federalism belongs to the domain of statutory interpretation.

This Essay argues that state implementation of federal law plays many different roles, and that those differences should affect both how statutes are interpreted and how they are conceived from a federalism perspective. Sometimes state implementation effectuates traditional federalism values like experimentation, but at other times it seems to serve more nationalizing functions, like statutory entrenchment and even federal law encroachment. This variety poses challenges for legislation doctrine, because the prevailing canons of interpretation are not designed to capture such differences, and it illustrates that the broad category of cooperative federalism is more nuanced than commonly acknowledged.

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INTRODUCTION

On the one hand, legislation theory is a stubborn old dog. Indeed, its appearances are so persistently one-dimensional that they continue to give almost no indication that the states have any role whatsoever to play in interpreting federal statutory law. On the other hand, and at the same time, legislation theory is eagerly exploring its relationship with other domains, including constitutional law and administrative law. Increasingly, scholars are arguing that federal statutes are now the primary way in which quasi-constitutional norms are introduced and that federal agency implementation of those statutes is central to their entrenchment. And yet, putting these two hands together, it becomes evident that legislation's constitutional and administrative explorations have not offered any substantial account of federalism, an omission that implies that the states are irrelevant if one's concern is only with the interpretation and implementation of federal statutory law and the way that national values are created and entrenched in American legal culture.

But make no mistake: every branch of state government is squarely in the midst of creating, implementing, and interpreting federal statutory law. The most obvious manifestation of this is the number of federal statutory cases adjudicated by state courts, a point to which I have called attention in the past.¹ But there is another important dimension to this story, and one with many more players: namely, the federal statutory interpretation that takes place not in the courts, but on the ground, by the state governors, state legislators, and state administrative officials whom Congress increasingly places on the front lines in the implementation—and so by necessity, the *interpretation*—of federal statutory law.²

For all the focus in recent statutory interpretation doctrine and theory on the administrative state and on dialogic interpretation, we have virtually no doctrines or theories that acknowledge, much less account for, the role of state implementers in the hermeneutical project of federal statutory construction.

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1. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898 (2011); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).
 2. By many accounts, "implementation" is the new interpretation, or at least a very substantial part of it. See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2000) ("[A]gencies charged with applying a statute necessarily make all sorts of interpretive choices . . ."); WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

Nor do we have any doctrines that attempt to recognize, much less negotiate, the relationship that is created between state and federal agencies when Congress gives them both concurrent authority to implement federal law but is ambiguous about how that authority should be allocated. Nor still, despite all of our public, doctrinal, and scholarly focus on federalism, do we have any story of what this Essay calls “intrastatutory federalism”—an informal, nonconstitutional federalism narrative that acknowledges the various ways in which Congress uses state implementers to entrench new national programs, and how those choices should color the interpretive role that states play in the development of federal statutory meaning.

Legislation theory and doctrine for the most part have seen the world as one in which federal judges and federal agencies interpret federal statutes and state judges and state agencies interpret state statutes—a world in which the New Deal and Civil Rights Eras marked the beginning of a nationalist legislative agenda that did not include the states and, indeed, was intended to supersede them. This perspective is in dramatic need of correction. From the federal quarantine laws of the 1800s,³ to the family and old-age assistance programs of the New Deal Era, to the environmental statutes of the 1970s,⁴ to the 2010 health reform legislation, state actors have been enacting state laws and regulations, creating new state and local bureaucracies, and participating directly in the federal regulatory process—all as part of their duties to implement federal statutes. But somehow the point that has been emphasized across virtually all other areas of public law—that the “dual” or “separate” spheres model of federalism does not capture the reality of modern American lawmaking—has bypassed theories of how federal laws should be interpreted.

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3. See, e.g., Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1649-50 (2007) (describing early cooperative federalism in quarantine laws).
 4. See generally SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* (1998) (discussing states' role in Old Age Assistance and Aid to Dependent Children programs); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1550 (2007) (“Congress has repeatedly chosen to create regulatory schemes that involve federal, state, and sometimes even local governments.”). The trend toward intergovernmental administration was evident years ago, as Justice Powell noted in his dissent in *Maine v. Thiboutot*, 448 U.S. 1, 22-23 (1980), in which he referred to “literally hundreds of cooperative regulatory and special welfare enactments,” noted that “[s]tates now participate in the enforcement of federal laws governing migrant labor, noxious weeds, historic preservation, wildlife conservation, anadromous fisheries, scenic trails, and strip mining,” and suggested that “federal grants administered by state and local governments now are available in virtually every area of public administration.”

This Essay uses the 2010 health reform statute as its primary case study to introduce these ideas. I have chosen this legislation not because it is unique; this Essay's explorations easily could be done with many other statutes, including the Clean Air Act,⁵ the Clean Water Act,⁶ the Telecommunications Act of 1996,⁷ or the Medicaid statute,⁸ and the legal challenges to the health reform statute certainly complicate this analysis.⁹ I have chosen the health reform legislation, however, because, regardless of whether it is ultimately upheld or struck down, it is the most recent, high-visibility example of the stunningly complex and varied ways that "federalism" manifests from the inside of federal statutes.

The legislation—the Patient Protection and Affordable Care Act (ACA)¹⁰—is the first major piece of national social rights legislation since the 1960s,¹¹ and it is a virtual tapestry of federalism in federal statutory design. Some parts of the ACA are unequivocally designed around a presumption favoring state implementation; some parts are clearly intended to be federally led; and still other parts lie in a gray area, somewhere in between.¹² The statute also posits

5. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (2006)).
6. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387).
7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
8. Social Security Act Amendments of 1965, Pub. L. No. 89-97, tit. XIX, 78 Stat. 286, 343-53 (codified as amended in scattered sections of 42 U.S.C.).
9. A week before this Essay went to print, the U.S. Supreme Court granted certiorari in one of the cases challenging the statute's constitutionality. *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11-400).
10. Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified primarily in scattered sections of 42 U.S.C.).
11. Cf. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1534-35 (2003) (explaining why efforts to pass social rights legislation have failed since the 1960s).
12. For example, the Medicare provisions of the Affordable Care Act (ACA) are almost entirely administered by the federal government, while states are expected to take the lead in implementing the ACA's new insurance-exchange provisions. See *infra* Part III; see also Kate Pickert, *Health Reform: Reluctant States Could Invite a Federal Takeover*, TIME, Nov. 12, 2010, <http://www.time.com/time/nation/article/0,8599,2030932,00.html> (quoting Health and Human Services Secretary Kathleen Sebelius as explaining that "[i]t all starts with the assumption that the states take the lead"). States are the default implementers, but may opt

concurrent regulation by the states and the lead federal administrative agency, the Department of Health and Human Services (HHS), but at times it gives little explicit guidance about which actor—state or federal—should take the lead in various areas or about how much interstate regulatory variation Congress intended to encourage or allow. As just one example, consider the ACA’s requirement that the states establish health insurance exchanges (one-stop shopping portals for small business and individual insurance purchase). Despite the ACA’s explicit mention (six times!) of “state flexibility” in the context of the exchanges,¹³ the states have been afraid to move ahead with implementation out of fear that HHS will nevertheless constrain interstate variation through federal regulation.

Statutes like the ACA reveal descriptive gaps that, in turn, raise new normative questions for both statutory interpretation and federalism. As a descriptive matter, statutes like the ACA substantiate the central role that Congress long has asked the states to play in federal statutory implementation. They also reveal that the typically undifferentiated category of “cooperative federalism” has far more internal nuances than we currently acknowledge. Indeed, the ACA exemplifies how a *spectrum* of federalism can exist even inside a single federal statute and highlights that Congress utilizes the states within statutes in highly varied ways.

As a normative matter, then, statutes like the ACA pose some challenges. For statutory interpretation, the challenge is this: once we recognize that Congress utilizes the states to implement federal statutes, but that Congress’s charge can take many different forms, how should those statutory-design decisions affect how these statutes are interpreted? Should federal agencies have less discretion, for example, to use their regulatory power to constrain interstate implementation variation in statutes that give states a lead implementation role? Does Congress’s purpose for intervening in the first place—the reason Congress decided national legislation was necessary—matter in answering these questions? When, if ever, does Congress’s use of state implementers signal Congress’s assent to—even encouragement of—the idea that that federal statutory law will mean different things in different states?¹⁴

out of implementing the ACA if they wish, in which case the federal government will implement it in that state.

13. See *infra* note 123 and accompanying text.

14. For two classic expositions of the ways in which Congress and the federal courts long have encouraged interstate variation in the meaning of federal law outside of the state implementation context, see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); and Paul J. Mishkin, *The Variousness of “Federal Law”*:

The theories and doctrines of legislation, even as they generally begin from the normative premise that the goal of statutory interpretation should be to effectuate congressional intent, do not currently consider these kinds of questions in the context of state implementation of federal law. We do not ask, for example, whether state implementers should sometimes receive interpretive deference in the same way that federal agency implementers currently do; or whether federal agencies should be constrained from imposing uniformity-inducing regulations when Congress has established a leadership role for the states.

For federalism, the challenge raised by statutes like the ACA is a related one: namely, whether this federal legislative use of state implementers, at least some of the time, is a species of modern federalism that legal doctrine should try to protect. Federalism doctrine and scholarship to date mostly have been preoccupied with questions about sovereignty and the functional arguments about the benefits of decentralization. This Essay posits, however, that there may also be an interpretive dimension to federalism that comes in the context of this more informal, nonconstitutional strand of it once the lines of sovereignty already have been crossed: specifically, the question of how to allocate implementation authority when Congress unquestionably has the power to regulate but gives both state and federal implementers concurrent jurisdiction over the same federal statutory terrain.

It is worth noting at the outset that the idea of resolving questions about the authority of federal statutory implementers through the tools of statutory interpretation – rather than through functional or constitutional inquiries – has an established pedigree in current doctrine, although it has not yet been applied to the states. In *United States v. Mead*, the U.S. Supreme Court effectively held that “Congress indeed has the power to turn on or off *Chevron* deference”;¹⁵ that the question of interpretive deference to federal administrative agencies is one entirely of congressional choice and one that must be divined from the statutory text and structure. Why, then, should we not likewise analyze Congress’s use of state implementers, and the resulting

Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. PA. L. REV. 797 (1957).

15. David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212; see also *United States v. Mead Corp.*, 533 U.S. 218, 236-37 (2001) (examining the role given to federal agencies in statutes as a threshold to *Chevron* deference); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (setting forth the standard for judicial deference to agency statutory interpretations); Barron & Kagan, *supra*, at 212 (“*Mead* represents the apotheosis of a developing trend in *Chevron* cases: the treatment of *Chevron* as a congressional choice, rather than either a constitutional mandate or a judicial doctrine.”).

administrative leeway that they receive, through this same lens of statutory interpretation?

Such is the perspective that a legislation-focused theory of federalism takes. It is a perspective concerned less with formal state sovereignty or the assumed policy benefits of federalism and concerned more with congressional intent and questions about how national power is created and elaborated. It is also a perspective that recognizes that, to the extent that these questions of state-federal regulatory authority are the main federalism questions of the modern age, it will fall upon the doctrines of statutory interpretation, not constitutional law, to address them. This is, after all, a federalism that comes by grace of Congress.

This is *intrastatutory* federalism – and it is messy, varied, and dynamic. This is federalism expressed from the inside of federal statutes rather than through the separation of state and federal law. It is a species of federalism that acknowledges the almost-infinite reach of the regulatory power of the modern federal government, but sometimes still tries to give effect, within that expanse, to traditional federalism values. It is also a brand of federalism that recognizes that state implementation comes in an almost-endless array of forms, ranging from the work conducted by expert state agencies, to the work done by independently elected state officials or legislators, to the work done by multiple states, drafting regulations or working together with federal regulators. In fact, the problem is not really that we do not have a single interpretive theory for state implementation of federal statutory law; the problem is that we do not have multiple theories to truly give effect to the variety of ways in which and reasons why Congress puts states on the front lines and the correspondingly dizzying variety of ways in which states respond.

The Essay's argument unfolds in four parts. First, I aim to substantiate my claim that statutory interpretation is a field premised on the erroneous assumptions that only federal actors interpret federal statutes and that only federal agencies implement them. Legislation's doctrines and theories all either assume clear lines between state and federal law or treat the states as if they do not exist. The canons of interpretation concerning federalism and preemption, for example, aim to protect separate areas of state law, not state flexibility within federal statutory law itself. And with respect to the canons concerning administrative law, we have no "*Chevron* for the states"¹⁶ (or even a *Skidmore* or a *Mead* for the states¹⁷), nor any canons that advise courts to take into account

16. See generally Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999) (proposing such a rule).

17. *Mead*, 533 U.S. at 236-37; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (articulating a less deferential standard based on the agency interpretation's "power to persuade").

Congress's use of state implementers when deciding how much to defer to federal agencies themselves, nor any canons that attempt to negotiate the critical state-federal interagency relationships to which these statutes give rise.

The theories of the field, like the doctrines, also omit this critical feature of federal statutory design. The most curious theoretical gap in this regard appears in recent theories of federal statutory entrenchment, which emphasize a multilayered and dialogic process of administrative statutory elaboration in which the states would seem to be a natural partner. But in all of these accounts, the states are either entirely absent or viewed as obstacles to federal law development that must be overcome.

The second part of the Essay begins to develop a new counternarrative to this story, one in which the states are appreciated, at least some of the time, as key players in the national statutory project. Specifically, I argue that Congress designates the states as implementers for a range of reasons that are both "federalist" and "nationalist" in character. On the federalism side, state implementation sometimes offers Congress a way to acknowledge and give some effect to the states' traditional authority over areas that Congress is now entering. But at other times, state implementation seems to work toward the opposite goal, serving more as a *strategic* tool of what this Essay calls federal "field claiming"—a nationalizing mechanism utilized by Congress to facilitate its takeover of a new field. It is not obvious that the interpretive leeway accorded to state implementers should be the same in both contexts.

The third part of the Essay uses the health reform legislation to explore these ideas. Assuming that the statute survives significant amendment and constitutional challenge,¹⁸ the ACA's implementation milestones over the next three years are sure to bring legal challenges that may force statutory interpretation theory to confront some of the questions already raised in these pages. When, for example, HHS in 2013 must certify each state's health

18. The central legal challenges to the statute do not implicate the ACA's federalism-related provisions but, rather, implicate the so-called "insurance-mandate" provisions, which require most Americans to have insurance, but do not impose any obligations on the states. Although some lawsuits challenging the constitutionality of the ACA have included a claim that the required Medicaid expansion violates the Spending Clause and/or the Tenth Amendment (the ACA's Medicaid expansion does place an obligation on the states because Medicaid is a joint federal-state program), every lower court that has reached that claim has dismissed it. *See, e.g., Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1269 (N.D. Fla. 2011); *cf. Thomas More Law Ctr. v. Obama*, No. 10-2388, slip op. at 50 (6th Cir. June 29, 2011) (holding Tenth Amendment does not protect individuals from federal commandeering). As this Essay went to press, however, the Supreme Court granted argument on the Medicaid question. *See Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11-400) (granting argument on the question).

insurance exchange, how much interstate variation will be tolerated? Who gets to decide if there is a dispute? The state implementers? The federal agencies? The courts? In the preemption context, in areas extending well beyond health reform, commentators long have noted the states' frustration at how little federal agencies consult with them during federal rulemaking processes.¹⁹ Scholars likewise have noted that the way in which federal agencies regulate—specifically how much leeway they leave to states in the interstices of federal regulation—is of critical importance to the shape that federal statutes ultimately take through implementation.²⁰ The obvious question is whether these concerns are highlighted even more in the intrastatutory federalism context, where states are not merely potential targets of preemption but rather have been designated as front-line statutory implementers themselves. What doctrines of interpretation are useful—or need to be invented—for this context? And how, if at all, should “federalism values” figure into the decision?

Part IV begins to consider these doctrinal questions. Some of our existing canons of interpretation may already be suited to address the interpretive questions raised by state implementation—for example, *Mead*'s emphasis on the specific duties assigned to federal agencies as the threshold for deference seems a particularly natural lens through which courts might start to examine the specific roles assigned to both state and federal implementers. Expanding other canons, however, proves more complex. Simply expanding the state-protective federalism canons to include state implementation, for instance, ignores the fact that Congress sometimes utilizes state implementation as a strategy for centralizing, not diffusing, national power. Expanding *Chevron* raises different kinds of concerns, not least that many of the justifications that underlie *Chevron*—including federal-agency accountability to Congress and a preference for federal law uniformity—may not apply as well, if at all, when states are the implementers.

Ultimately, the doctrinal inquiry exposes some limits of these broad presumptions in this context-specific area, and raises more general questions about the continuing utility of the canons of interpretation in a highly varied statutory landscape. The canons are the main doctrines that courts currently

19. See, e.g., Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. (forthcoming 2012) (manuscript at 53) (conducting an empirical study of federal agencies' preemption decisions and noting that “[f]ederal agencies have come under constant criticism for falling short in their efforts to consult with the states . . . especially where preemptive rules are at issue”), available at <http://ssrn.com/abstract=1822588>.

20. See Buzbee, *supra* note 4 (arguing that there are very different regulatory implications of federal agency choices to impose uniformity on the states or to impose only a federal “floor” above which states may regulate).

use to resolve statutory questions concerning both federalism and administrative implementation, but a text-based or purposive approach may be more appropriate.

In areas beyond legislation, too, recognizing intrastatutory federalism reveals large swaths of virtually unexplored doctrinal territory. For example, we have no interpretive theories that distinguish among different kinds of state actors and little understanding of how state agencies interpret statutes. We also have no theories of interpretive deference for other kinds of frequent federal-law implementers, such as private actors, and—perhaps most surprisingly, given the prevalence of state implementation—no consistent understanding of whether state implementation of federal law is to be considered “state” or “federal” action for purposes of establishing jurisdiction and deciding what law applies on judicial review.

This Essay can only begin to address such questions. At times, it will do so in a highly preliminary and intentionally provocative manner, and its general aim is to jump-start a discussion rather than to advance firm conclusions. Its goal also is to continue a project that I have begun elsewhere²¹: namely, to convince others that it is worth constructing a theory of statutory interpretation that takes state actors into account not only on their own terrain, but also as major players in the federal statutory project.

I. FEDERALISM AND FEDERAL LEGISLATION THEORY

Federalism manifests in legislation doctrine and theory almost exclusively as “otherness”—something wholly outside of and separate from the federal legislative process—or as an obstacle. The problem with these conceptions, in addition to the fact that they do not reflect the reality of how many federal statutes are designed, is that they reinforce the notion that the states provide only an alternative to federal statutory law rather than serving as front-line players in the elaboration of federal statutory meaning.

One unfortunate consequence of this limited perspective is doctrinal: the canons of statutory interpretation currently in play are of little use to questions of interpretive primacy, administrative discretion, and intergovernmental relationships when state and federal actors are given concurrent federal statutory implementation duties. Another consequence is theoretical: much recent scholarship (led by the work of Bruce Ackerman, William Eskridge, and

21. See *supra* note 1.

John Ferejohn)²² has focused on the multilayered way in which statutory meaning is elaborated and entrenched—a theoretical shift from court-centricity to an approach that recognizes federal agencies and others as key players in federal statutory elaboration. But that literature almost completely bypasses an entire layer of how many federal statutory texts acquire their meaning: namely, through state-government interpretations of the federal statutes that they are charged with administering.

A third consequence is an impoverished understanding of federalism in the statutory era. Federalism is typically explored either from the perspective of state autonomy or through functional inquiries about the value of policy decentralization and local variation. But in the “Age of Statutes,”²³ more emphasis needs to be placed on how *Congress* perceives the role of the states, and how, if at all, federalism fits into a legal landscape that is unquestionably dominated by national legislation. It seems likely that, in at least some cases, Congress utilizes state implementation to further goals that are not “federalist” at all, but rather, as a way to increase *national* statutory power—as a strategy that deepens and solidifies the reach of the new policies and norms that federal statutes introduce.²⁴

Moreover, although federalism is sometimes still effectuated through constitutional law doctrine—where it appears in its strongest, boundary-defining form—what we are talking about in many cases is not formal constitutional law at all. Rather, when we must choose, for example, between a state and a federal implementer’s interpretation of the federal statute that both are charged to administer, we are talking about questions of congressional intent and federal statutory design. These are questions not about whether the federal government can exert certain powers relative to the states, but rather questions about what happens when the federal government clearly does exert such power, but gives the states a role in effectuating it. As such, our tools to understand and execute this more informal kind of federalism must for the most part be doctrines of statutory interpretation, not constitutional law.

22. ESKRIDGE & FEREJOHN, *supra* note 2; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

23. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1-2, 5 (1982).

24. Heather Gerken’s work makes a related point, but focuses on the role of state-based dissent within national legal structures in the evolution of new federal norms. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7 (2010) (“[B]ecause constitutional theory remains rooted in a sovereignty account, it remains disconnected from the many parts of ‘Our Federalism’ where sovereignty is not to be had. In these areas, institutional arrangements promote voice, not exit; integration, not autonomy; interdependence, not independence. . . . Minorities are instead part of a complex amalgam of state and local actors who administer national policy.” (citation omitted)).

A. Preliminary Matters: Is Intrastatutory Federalism “Federalism” at All?

Before proceeding further, a defense of terminology is in order. This Essay refers to state implementation of federal law within the category of “federalism,” but some will disagree that what I call intrastatutory federalism is “federalism” at all. In an influential series of scholarly works, Malcolm Feeley and Edward Rubin have argued that this phenomenon is merely “decentralization,” and not only has nothing to do with constitutionally anchored state autonomy but in fact is evidence of the extent of national power, because the federal government decides in each case how the implementation work is divided.²⁵ I certainly agree with scholars in this vein both that state implementation of federal statutory law does not implicate the formal boundary-dividing federalism of the Constitution, and that “federalism” in this context can be used as a tool to expand national power. Part II of the Essay further develops these arguments about state implementation as a tool of nationalization.

But even accepting the idea that Congress may use the states in some statutes to expand national power, I want to resist the notions that federalism norms are not being expressed in at least some of these statutes, and that there is no role for interpretive doctrine to play in protecting those norms when statutes are ambiguous about the precise allocation of state and federal implementation authority. These state-based implementation schemes may be our clearest way of expressing the notion that, even in an era of ever-expanding federal government, certain areas of law remain best suited to state regulation, and that there are certain areas in which the states’ traditional expertise, closeness to the citizenry, and varied needs – the classic “federalism values”²⁶ – are particularly important.

Whether this more informal kind of federalism is something that legal doctrine should try to protect is a different question, and one on which the Essay hopes to fuel a debate. But one critical point at the outset is that no one

25. See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 20-29 (2008); see also Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 911 (1994) (“Federalism is not a managerial decision by the central decision-maker, as decentralization can be, but a structuring principle for the system as a whole.”).

26. For a leading statement of these classic federalism values, see *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1990) (“[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; . . . it makes government more responsive by putting the States in competition for a mobile citizenry . . . [and it provides] a check on abuses of government power.”).

has identified these questions as ones of statutory interpretation. The Feeley and Rubin project, for example, argues only that federalism should not be a barrier to national legislation; it overlooks entirely the questions that arise once Congress does legislate but uses the states in particular ways within legislation.²⁷

None of this, however, is to say that my descriptive point about state implementation of federal law is new. “Cooperative federalism” appears virtually everywhere else in the public law and political science literature, not only in the federalism field,²⁸ but also in the administrative law literature and in nearly every statute-heavy substantive area.²⁹ But this broader public law

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27. I also resist the notion, implicit in Feeley and Rubin’s work, that state administration of federal statutes must be understood en masse either as nationally controlled decentralization or as “real” federalism. Instead, as elaborated *infra* Part II, I propose that there is a spectrum of federalism apparent in modern statutes that defies such clear categorization.
28. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995) (emphasizing that federalism continues to have meaning even as national power has expanded); Buzbee, *supra* note 4, at 1550; Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181, 182 (1998) (“[N]on-federal governments serve as agencies of the federal government by enforcing federal law with administrative actions and by promulgating regulations to fill the gaps in federal statutes.”). Both legal and political science scholars have meticulously chronicled our national evolution from dual federalism, to “layer cake” federalism, to the more intertwined “marble cake” federalism. Morton Grodzins, *The Federal System*, in GOALS FOR AMERICANS 265 (The American Assembly, Columbia Univ. ed., 1960) (coining the term “marble cake” federalism). For some examples from the political science and public administration literature, see METTLER, *supra* note 4; and DAVID H. ROSENBLUM, *PUBLIC ADMINISTRATION: UNDERSTANDING MANAGEMENT, POLITICS, AND LAW IN THE PUBLIC SECTOR* 106 (1986).
29. For just a few examples, see William W. Buzbee, *State Greenhouse Gas Regulation, Federal Climate Change Legislation, and the Preemption Sword*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 23 (2009) (proposing that federal climate change legislation adopt an anti-preemption norm to allow space for state and local action); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006) (arguing for fluid, overlapping environmental regulatory authority shared between federal and state governments); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. (forthcoming Nov. 2011) (discussing federalism in statutes passed during the Obama administration); Cristina M. Rodríguez, *The Significance of the Local in Immigration Law*, 106 MICH. L. REV. 567 (2008) (advocating a strong role for local policymaking in the area of immigration); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008) (calling for more centralized antipoverty policy because of states’ ineffectiveness as policy laboratories); and Matthew C. Waxman, *National Security Federalism*, 64 STAN. L. REV. (forthcoming 2011) (noting that local actors play an important and largely unrecognized role in national security policy). For a translation of some of these arguments to the local and international law contexts, see Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1625–26 (2006). For a slightly different focus, see Margaret H. Lemos, *State*

literature has its own gaps, in particular the fact that, when it comes to fashioning doctrine, it has been focused mostly on constitutional law issues or on preemption³⁰ (or in the case of administrative law's interest in federalism, administrative preemption³¹). But preemption, as it has been understood, has not generally included the allocation-of-implementation questions raised by intrastatutory federalism. As a result, as Robert Schapiro has put it, cooperative

Enforcement of Federal Law, 86 N.Y.U. L. REV. 698 (2011) (discussing state enforcement, as opposed to implementation, of federal statutes).

30. See, e.g., FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007) [hereinafter FEDERAL PREEMPTION]; PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., 2009) [hereinafter PREEMPTION CHOICE]; ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 95-96, 112 (2009); Buzbee, *supra* note 29; Richard A. Epstein, *What Tort Theory Tells Us About Federal Preemption: The Tragic Saga of Wyeth v. Levine*, 65 N.Y.U. ANN. SURV. AM. L. 485 (2010); Michael Hamburger, *The Dodd-Frank Act and Federal Preemption of State Consumer Protection Laws*, 128 BANKING L.J. 9 (2011); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902 (2009); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008); Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437 (2009); Stephen F. Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323 (2009); Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659 (2009). A notable exception is Erin Ryan, whose work applies bargaining theory to state and federal negotiations over federal statutory implementation. See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (forthcoming 2011); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).
31. See, e.g., Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 N.Y.U. ANN. SURV. AM. L. 611 (2010); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008). This work has focused almost entirely on how much deference should be accorded to federal agencies or on what processes federal agencies might institute to take state preferences into account. It has not generally considered what kind of role the states themselves should have in interpreting federal statutes; what, if any, interpretive deference those state decisions should receive; or the possibility that federal and state agencies might have different and shifting roles within various federal statutes that require a range of doctrines. The tendency of courts and scholars to focus only (or mostly) on the federal agency's interpretive leeway in the administrative preemption context makes sense to the extent that not all statutes are jointly administered by state and federal actors; in such cases, arguments for deferring to state agencies are mostly irrelevant. But concurrent administration raises the issue of concern to this piece.

federalism has offered little in the way of “rules of engagement” for questions of state-federal concurrent jurisdiction.³²

Related to this gap, most of the existing federalism literature has considered federalism from the perspective of the states, or in terms of its benefits for policymaking, or as an alternative to nationalism.³³ This literature also has viewed “cooperative federalism” as an undifferentiated category, when in fact there is much diversity within this category with respect to how exactly these schemes are designed.

This Essay’s project is different. The Essay takes no stance on whether state implementation of federal law and the degree of autonomy that states have within implementation is beneficial as a policy matter. Nor does it argue that state autonomy, for its own sake, is normatively preferable or that states should retain real power, independent of the federal government, in modern federal statutory schemes. Instead, this Essay begins from the premise that the intrastatutory federalism question is entirely in Congress’s hands—that Congress has the choice (usually subject to state acceptance of the task³⁴) whether to bring state implementers into federal statutory schemes. Beginning from that premise, the Essay is focused on the various reasons why Congress

32. SCHAPIRO, *supra* note 30, at 91.

33. See Michael S. Greve, *Preemption Choice in Context*, 26 CONST. COMMENT. 679, 680-82 (2010) (reviewing *PREEMPTION CHOICE*, *supra* note 30) (describing the cooperative literature as positioning “polyphonic” federalism as an alternative to nationalist policies). Typical examples of this scholarship, which are important in their own right, include SCHAPIRO, *supra* note 30, at 96-101, which argues that “polyphonic federalism” retains the idea of the states and federal governments as independently sovereign but also posits that “overlapping” regulation by both can lead to the best policy answers; Buzbee, *supra* note 4, at 1551-54, which emphasizes the different policy implications of federal standards that take the form of “floors” above which states may regulate and those that take the form of “ceilings”; and Gerken, *supra* note 24, which focuses on how nonfederal entities’ interactions with the federal government can lead to beneficial policy outcomes, but still emphasizes the role that dissent by such nonfederal actors plays in moving national policy. Roderick Hills’s work on cooperative federalism also has been extremely influential but does not quite fit into this rubric. For example, he has eschewed taking a position on the normative benefits of state regulation and rather favors a presumption against preemption on the ground that it will encourage Congress to speak more clearly on federalism issues. See Hills, *supra* note 30, at 25 (“[S]tate regulation provides the incentive to motivate business and industry groups to place issues on the federal agenda that would otherwise be buried in committee.”); see also Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. (forthcoming 2012) (on file with author) (arguing that state implementation of federal law serves as a check on national lawmaking authority and thus serves separation-of-powers norms).

34. See *infra* note 144 and accompanying text (noting that, to avoid charges of commandeering, most federal statutes give the states the chance to opt out of federal statutory implementation).

might prefer to rely on state implementation in order to entrench a new federal statutory scheme—and how those congressional decisions should, but do not currently, affect the way that federal statutes are interpreted and theorized.

B. The Absence of Intrastatutory Federalism from the Doctrines and Theories of Statutory Interpretation

Virtually all of the theoretical foundations of statutory interpretation are grounded in the assumption that only federal actors implement federal statutes. This assumption has given rise to a set of doctrines that suffer from the same misconception.

Specifically, the field has had two main areas of theoretical inquiry. First there is a literature primarily focused on the role of judges in federal statutory interpretation, and in particular the role of judges relative to the legislative branch. From this work has emerged both a long-running debate about which interpretive theory (textualism, purposivism, pragmatism, etc.) best captures this role, and also the great variety of specific interpretive doctrines that are deployed in everyday practice—the so-called canons of statutory interpretation.

The second, more recent, area of theoretical inquiry focuses less on the rules of statutory interpretation and more on how federal statutes look, and how they become entrenched. This literature emphasizes the centrality of certain federal statutes in our modern legal landscape.³⁵ It also emphasizes the role that federal agencies play in filling out statutory meaning and of the shift away from the court-centric interpretation that has come about as a result.³⁶

The notion of the states as partners in this world of federal statutory interpretation, however, appears nowhere in either set of theories. Indeed, the fact is that both sets of theories remain mired in a stylized 1960s conceptualization of how federal statutes look. The Civil Rights Act of 1964—which relies on federal-based, not federalism-based administration³⁷—remains legislation's paradigmatic teaching case (and has been held out as the

35. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

36. ESKRIDGE & FEREJOHN, *supra* note 2.

37. States do not implement the federal Civil Rights Act, and the legislation scholarship that has utilized the Civil Rights Act as its paradigm has focused on its implementation only by federal courts and federal agencies. It should be noted, however, that there exists an important parallel landscape of *state* civil rights acts that states do enforce. The federal Equal Employment Opportunity Commission has developed what it calls “work sharing agreements” with these state agencies to facilitate dual enforcement. See *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/facts/qanda.html> (last modified Nov. 21, 2009).

quintessential example of how quasi-constitutional norms emerge from statutes³⁸)—but actually, cooperative federalism existed well before the 1960s.³⁹ And yet that Act—which has been described as the “triumph” of nationalism over federalism⁴⁰—along with some other equally antiquated and federally focused models, is the primary example around which the doctrines and theories of the field have been elaborated.⁴¹

Modern Congress looks very different from the Congresses of forty years ago;⁴² so too does the size and complexity of the modern federal administrative state. But perhaps more importantly, the states’ own administrative apparatuses have evolved significantly over the past several decades. The dramatic increase in the professionalization of state agencies is widely noted, and has made state administrators more attractive and competent implementation partners.⁴³ Cooperative federalism also is a phenomenon that feeds on itself: each federal program that gives money and implementation authority to the states makes those states more reliable, and relied-upon, partners with the federal government. These changes may explain why Congress increasingly utilizes the states for federal statutory implementation, but of course they do not really explain why legislation theory has not yet updated its paradigms to include them.

38. Ackerman, *supra* note 22; Eskridge & Ferejohn, *supra* note 35, at 1237-42; Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 424 (2007).

39. See *supra* notes 3-4.

40. SCHAPIRO, *supra* note 30, at 46 (“The civil rights movement presented yet another struggle about the meaning of federalism, and once again the forces of nationalization triumphed.”).

41. In addition to the Civil Rights Act, leading casebooks have tended to focus on statutes such as the National Traffic and Motor Vehicle Safety Act of 1966, the Endangered Species Act of 1973, the Age Discrimination in Employment Act, and various bankruptcy and criminal law statutes. See LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, *THE REGULATORY STATE* 100-06, 202-13 (2010); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 922-41 (4th ed. 2007); JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 291-300 (2010).

42. See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 1-9 (3d ed. 2007).

43. See Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 YALE L. & POL’Y REV. 1 (1996); Weiser, *supra* note 16, at 8.

1. *The Absence of Intrastatutory Federalism from the Doctrines of Statutory Interpretation and Administrative Law*

The “separate spheres” conception of the states is on vivid display in virtually all of the doctrines of statutory interpretation that have any relevance to the intrastatutory federalism context. These doctrines can be divided into two groups: the canons of interpretation that deal with state–federal relations, and the canons associated with agency statutory interpretation. In the canons about state–federal relations, the states typically are treated as obstacles to federal statutory law. In the canons about administrative law, the states typically are treated as if they do not exist.

It is important to note that the canons are not the only tools of statutory interpretation. Legislative history, consideration of statutory purpose, and textual analysis are other commonly employed interpretive resources. This discussion focuses on the canons, however, because, to date, the canons have been the critical set of interpretive doctrines that courts have used to negotiate statutory ambiguities related to both federalism and agency implementation.⁴⁴ Although some judges have used other tools, such as legislative history, to assist them in determining when certain canons apply, the canons themselves have been the dominant doctrines and the values that they embody have framed the interpretive debate. The Essay later takes up the question whether a more textual or purposive inquiry might complement or even displace the canons in this context.

a. *Canons That Concern State-Federal Relations*

There are only two federalism-related canons of statutory interpretation currently in active deployment, the presumption against preemption and the so-called federalism canon.⁴⁵ The presumption against preemption counsels

44. Indeed, both of the leading traditional theories of interpretation—textualism and purposivism—embrace these canons.

45. Although some scholars might view these two canons as essentially the same, I discuss them separately because legislation scholarship and casebooks generally treat them as distinct. In addition, the Court has articulated two other interpretive rules that implicate federalism, but which are typically discussed in the constitutional law context rather than the statutory interpretation context: one concerning the abrogation of sovereign immunity (seen best in *Atascadero*), and the other concerning the conditions imposed on the states by the federal government through the Spending Power (*Pennhurst*). See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (holding that federal statutes should not be interpreted to abrogate state Eleventh Amendment immunity unless statutes are clear), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807,

that courts should not construe ambiguous federal statutes to preempt a separate (and often, preexisting) area of state law.⁴⁶ The federalism canon directs courts not to construe ambiguous federal statutes to intrude on areas of traditional state authority.⁴⁷

The perception of the states as the “other” takes center stage in both of these canons. Both canons anticipate and try to resolve a conflict between federal statutes and what are understood to be entirely separate areas of state common or statutory law.⁴⁸ The presumption against preemption, for example,

1845 (codified as amended at 42 U.S.C. § 2000d-7 (2006), as recognized in *Lane v. Pena*, 518 U.S. 187, 197-98 (1996)); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”). *Pennhurst* is discussed in Part IV, *infra*. To the extent that these rules are included at all in the statutory interpretation literature, they are usually mentioned only in passing in the leading legislation casebooks. See, e.g., BRESSMAN ET AL., *supra* note 41, at 851-53 (not referencing either case); ESKRIDGE ET AL., *supra* note 41, at 940-41 (including both only in passing in a list of clear statement rules); MANNING & STEPHENSON, *supra* note 41, at 297 (listing *Atascadero* and *Pennhurst*, without elaboration, as establishing a federalism clear statement rule together with *Gregory*); CALEB NELSON, STATUTORY INTERPRETATION 778 (2011) (not including *Pennhurst*, but discussing *Atascadero* and noting it could be understood as “a principle of constitutional law” rather than statutory interpretation). One exception is OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 719-21 (4th ed. 2008), which excerpts both as note cases. For exceptions in the academic literature, see, for example, Peter J. Smith, *Pennhurst, Chevron, and the Spending Power*, 110 YALE L.J. 1187 (2001), which analyzes the conflict between *Pennhurst* and *Chevron*. See also David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197 (2004) (analyzing the same conflict but in the constitutional context of the spending power).

46. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (setting forth the “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”).
47. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1990). Some might also view the canon of constitutional avoidance—which counsels courts, when choosing between two plausible statutory interpretations, to choose the one that avoids constitutional doubts—as a federalism-related canon. I omit the avoidance canon here because it applies to all statutory-interpretation-related constitutional questions, not just to those involving federal-state relations. However, to the extent that the avoidance canon implicates federalism, it is only when the federal statute raises formal constitutional line-drawing concerns, that is, in situations in which the charge is that Congress legislated beyond the scope of its authority. The focus in those cases is unquestionably on the bright-line division of state and federal power, and so likewise rests on a separate-spheres model of federalism.
48. It should come as no surprise that neither canon emerged from a case that involved a cooperative federalist statutory scheme. At issue in *Gregory*—the case in which the federalism canon was first articulated—was whether the federal Age Discrimination in Employment Act applied to state judges, while the case credited with developing the presumption against preemption, *Rice*, involved a purported conflict between the United

is designed to manage the question of when federal law displaces state law,⁴⁹ not what interpretive or other kinds of rules should govern the state-federal relationship when both state and federal actors have interpretive authority within the same federal statute. The federalism canon is likewise of little utility in cases of intrastatutory federalism. The federalism canon is irrelevant once Congress unambiguously enters an area of traditional state authority—that is, once Congress legislates in the field—and the only question is what role the named state actors should play in the implementation of that new federal law.

The Supreme Court has, on rare occasion, recognized the absence of a federalism-related statutory interpretation doctrine to negotiate this context. *AT&T Corp. v. Iowa Utilities Board*, for instance, concerned a dispute between states and the Federal Communications Commission over which actor had primary authority to implement the “local-competition” provision of the federal Telecommunications Act of 1996.⁵⁰ In dissent, Justices Thomas and Breyer each invoked the federalism canon and the presumption against preemption to support the states’ interpretive primacy over this provision of the federal statute.⁵¹ Justice Scalia’s majority opinion, however, recognized that those canons do not fit the intrastatutory federalism context and revealed the gap in statutory interpretation doctrine implicated by cases like these:

[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunication competition away from the States. . . . [I]t unquestionably has. The question is whether the state commissions’ participation in the administration of a new federal regime is to be guided by federal-agency regulations. If there is

States Warehouse Act and a number of Illinois state laws involving the regulation of grain warehouses.

49. Even those who reject the idea of separate-spheres federalism still depict the presumption against preemption as a canon if not about conflict, then at least about competition, rather than cooperation or joint decisionmaking. *Cf.* Hills, *supra* note 30, at 4 (“[T]heories of preemption need to accept the truisms that the federal and state governments have largely overlapping jurisdictions, that each level of government is acutely aware of what the other is doing, and that each level regulates with an eye to how such regulation will affect the other. Federalism’s value, if there is any, lies in the often competitive interaction between the levels of government.”).
50. 525 U.S. 366 (1999). I am grateful to Roderick Hills for this example.
51. 525 U.S. at 411 (Thomas, J., dissenting) (citing the history of Congress leaving this type of regulation up to the states and arguing that the “basic principles of federalism compel us to presume that States are competent” to interpret and apply federal law); *id.* at 420 (Breyer, J., dissenting) (citing cases articulating the presumption against preemption and arguing that “relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority”).

any “presumption” applicable . . . , it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.⁵²

Subsequently, in *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, a case involving state implementation of the Clean Air Act,⁵³ Justice Kennedy, in dissent, proposed a new clear statement rule to fill the gap that *Iowa Utilities Board* identified—specifically, a rule that ambiguous statutes should not be construed to allow federal agencies to constrain state implementation discretion.⁵⁴ Such a rule, Justice Kennedy wrote, was essential “[i]f cooperative federalism is to achieve Congress’s goal of allowing state governments to be accountable to the democratic process in implementing environmental policies.”⁵⁵ But the Court has never adopted such a rule, nor has the statutory interpretation literature acknowledged, much less grappled with, this gap.

b. Canons That Concern Agency Implementation

There are numerous statutory-interpretation canons that concern agency statutory interpretation, and one might expect state implementation to be recognized in these doctrines. These canons, while once the primary concern of administrative law experts, are now unquestionably central components of legislation theory and doctrine.⁵⁶ But here, too, the states are absent.

52. *Id.* at 379 n.6 (Scalia, J.).

53. 540 U.S. 461 (2004). At issue in the case was whether the federal EPA could overrule the Alaska Department of Environmental Conservation’s construction of the term “best available technology” in the Clean Air Act. Under the Clean Air Act, states are given primary control over enforcing national air quality standards, but EPA must approve the state implementation plans. The majority deferred to the interpretation of the federal agency. *Id.* at 502.

54. *Id.* at 506 (Kennedy, J., dissenting) (“Congress . . . knows how to establish federal oversight in unambiguous language.”).

55. *Id.* at 518 (Kennedy, J.) (citation omitted).

56. Evidence of this cross-theory, cross-doctrinal merger of legislation and administrative law is apparent on many fronts, from the increased scholarly focus on theories of “agency statutory interpretation,” see, e.g., Mashaw, *supra* note 2; Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility To Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990), and on the role of agencies in federal statutory entrenchment, see ESKRIDGE & FEREJOHN, *supra* note 2, at 1, to the classroom, where the proliferation of mandatory “legislation-regulation” courses at major law schools bespeaks not only the link among statutes, their implementation, and their interpretation, but also the importance of those relationships.

A brief foray into the central administrative interpretation doctrines will illustrate the point. First, consider the flagship canon of deference to agency statutory interpretations, the *Chevron* doctrine.⁵⁷ One of the most cited cases of all time, *Chevron* has been discussed in upwards of five thousand scholarly articles and remains a central focus for courts, and legislation and administrative law scholars alike.⁵⁸ *Chevron*, however, which directs courts to defer to reasonable agency interpretations when statutory terms are ambiguous, is about interpretive deference only for federal agencies, and there is no analogue for when Congress delegates interpretive work to the states. We have no “*Chevron* for the states”—an idea proposed a decade ago by Philip Weiser,⁵⁹ but which has had little traction in either the academy or the courts.

Next, consider *Mead*. *Mead* was the Court’s effort to cut back on *Chevron* and to “tailor” its breadth.⁶⁰ Inherent in *Mead* was the recognition that different statutes utilize federal agencies in different ways, a recognition that translated into *Mead*’s holding that the details of how federal agencies are employed in statutes should contribute to the level of interpretive deference they receive.⁶¹ But neither *Mead* nor the scholarship nor the case law discussing it says anything about similarly tailoring interpretive doctrine to reflect the multiple and differing ways in which state implementers are utilized and relied upon in federal statutes.

Of further note is the fact that *Mead*’s focus on the details of how agencies are deployed in federal statutes has brought scholarly attention to the fact that Congress sometimes makes “overlapping”⁶² delegations—delegations to multiple agencies within the same federal statute. But even this recent focus on concurrent administrative jurisdiction has mostly failed to acknowledge the

57. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

58. Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1730 (2010); see also Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 n.6 (2010) (counting more than seven thousand references in other cases).

59. Weiser, *supra* note 16.

60. *United States v. Mead Corp.*, 533 U.S. 218, 236-37 (2001) (“The Court’s choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference . . .” (footnote omitted)).

61. *Id.* at 226-27 (“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).

62. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201.

states. Several important new articles have been written about how concurrent implementers should coordinate their work, and whether *Mead* counsels that deference is due to both, or neither, of such agencies,⁶³ but the primary paradigm that has been studied in this literature is the paradigm of multiple delegations to only federal agencies.⁶⁴

Third, consider *Brand X*, the Supreme Court's most recent statement about the centrality of agency statutory interpretation.⁶⁵ Under *Brand X*, later-coming agency interpretations of ambiguous statutes can trump earlier federal judicial interpretations of the same statutes.⁶⁶ As many scholars have noted, *Brand X* was a striking statement about the relationship between federal courts and federal agencies in statutory interpretation—and a remarkable transfer of interpretive power from one to the other—but what it might say about the federalism relationships in this context is potentially even more groundbreaking. Does *Brand X* mean, for example, that a federal agency interpretation can trump a state court's interpretation of what a federal statutory term means? How about a state legislature's interpretation—if the state legislature has passed a law to implement the federal statute based on its

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63. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. (forthcoming 2012) (manuscript at 3), available at <http://ssrn.com/abstract=1778363> (arguing that, even with respect to concurrent delegations to federal agencies, “[t]he problem of ‘shared regulatory space’ is not well understood in administrative law, which focuses on individual agency action and not the interplay among agencies”); Gersen, *supra* note 62, at 221; Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 238 (2011) (arguing that courts should defer to interagency agreements when multiple agencies work out power-sharing under duplicative delegations, but not mentioning delegations to states); Daniel Lovejoy, Note, *The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 879-82 (2002); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 849, 893-94 (2001) (noting, pre-*Mead*, the dispute over whether *Chevron* deference applies when multiple agencies are granted regulatory authority).
64. Gersen, *supra* note 62, at 237, is something of an exception, because he recognizes that state agencies sometimes implement federal law concurrently with federal agencies. For the most part, however, his discussion of state-federal concurrence concerns administrative preemption. See, e.g., *id.* at 244 (reading *Gonzales v. Oregon*, 546 U.S. 243 (2006), to “presume Congress has not delegated law-interpreting authority to issue rules that have the effect of displacing state policy, at least in ‘traditional’ areas of state regulation”).
65. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).
66. *Id.* at 982-83 (“*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.” (citation omitted)).

understanding of a federal statutory term? On the other side, could a *state agency* implementer's interpretation of a federal statute trump a *federal judicial* interpretation of that statute under *Brand X*?

There are several other doctrines that make up the Court's spectrum of deference,⁶⁷ including *Auer* deference (deference to an agency's interpretation of its own regulations⁶⁸) and *Skidmore* deference (lesser deference that turns on the interpretation's "power to persuade"⁶⁹). But for the most part, the states do not appear in those doctrines, or in the academic literature discussing them.⁷⁰

Finally, there is an enormous literature on congressional delegations of federal statutory implementation to private actors.⁷¹ But whereas questions about the constitutionality of these private delegations have received much scholarly attention,⁷² almost no attention has been paid to the constitutionality of such delegations to the states.⁷³ And, in fact, even with the attention that has

67. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1089-91 (2008) (arguing that the Court employs "a continuum of deference regimes").

68. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

69. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

70. The exceptions to this exclusion are attempts by a few federal courts to apply something akin to *Skidmore* deference to state agency interpretations of federal statutes—a development elaborated in Part IV—and Ernest Young's suggestion that states be given *Skidmore*-like deference in the administrative preemption context. See Young, *supra* note 31, at 893 & n.129.

71. For leading examples of this literature, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507 (2011); and Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003). See also Eleanor D. Kinney, *Rule and Policy Making Under Health Care Reform*, 47 ADMIN. L. REV. 403 (1995) (detailing the importance of private implementers to the health care sector).

72. See, e.g., Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 187-210 (1989); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority To Assign Federal Powers to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 371-96 (1998); Harold J. Krent, *Framing the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 64-66 (1990); Krent, *supra* note 71, at 523-54; Metzger, *supra* note 71, at 1376-1410; Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 919-29 (1988).

73. See Hills, *supra* note 30, at 183 (summarizing the evolution of the nondelegation doctrine as it pertains to states and noting that "it only has been in the last half-century that the Court has accepted the notion that the states can play a significant role in carrying out federal law" and that "[n]on-federal implementation of federal law has slipped into American

been paid to private delegations, the question of how much interpretive leeway private implementers should have, like that question in the context of state implementation, has flown almost entirely under the radar.⁷⁴ We have no *Chevron*, *Mead*, or anything else, for private implementers either.

Relatedly, it is worth taking note of the emerging literature on “new governance,” which emphasizes regulatory paradigms that shift away from a federal-agency-only model to webs of “multiple stakeholders” that work together toward policy solutions.⁷⁵ Orly Lobel has argued that the new governance model has replaced the New-Deal model of lawmaking and policy implementation. But there have been no doctrinal payoffs from these new descriptive accounts for the statutory interpretation context – no real discussion of Congress’s role in directing or coordinating the work of these multiple implementers, or how their existence might affect how these new regulatory schemes are interpreted.

2. *The Absence of Intrastatutory Federalism from Modern Theories of Statutory Entrenchment*

The more recent legislation-focused scholarship takes a different tack, focusing less on the individual tools of statutory interpretation and more on how statutes are operationalized in the real world and the role that they play in our legal landscape. Salient among these new theories are two themes. First, that some federal statutes are particularly *special* (William Eskridge and John Ferejohn call them “super-statutes” and Bruce Ackerman calls them “landmark statutes,” but the principles are similar). Second, that increasingly, these special statutes, rather than constitutional law, are the primary way in which fundamental (quasi-constitutional) American legal norms are announced and

constitutional practice with relatively little theoretical explanation or justification”); *cf.* *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (“Congress cannot transfer its legislative power to the States – by nature this is non-delegable.”).

74. A recent student note is the first piece, to my knowledge, to inquire whether deference to private implementers might be appropriate in certain circumstances. Aaron R. Cooper, Note, *Sidestepping Chevron: Reframing Agency Deference for an Era of Private Governance*, 99 GEO. L.J. 1431, 1465-67 (2011) (advocating a “persuasive deference” standard based on “how far [the private implementer] departs from rule-of-law values inherent in judicial interpretive methods”).
75. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004) (“The new governance model supports the replacement of the New Deal’s hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals.”).

entrenched.⁷⁶ Unifying these theories is a focus on why and how certain statutes “successfully penetrate public normative and institutional culture in a deep way,” and the relationship of such statutes to formal constitutional law.⁷⁷

And yet these moves, too, have been only partially complete. As is the case with the canons of statutory interpretation, the states appear in these modern statutory theories only in their “separate spheres” capacity. This limited perspective is particularly puzzling because the newer theories are, in large part, premised on the notion that major statutes evolve through dialogic interpretation by many different actors. The states’ role fits rather seamlessly into that story of a multilayered hermeneutic.

Consider, for example, recent work by Eskridge and Ferejohn, perhaps the leading proponents of these new theories of statutory entrenchment and “administrative constitutionalism.” Eskridge and Ferejohn devote hundreds of pages to what makes certain federal statutes “stick,” and the critical role that federal agencies play in this process of entrenchment. A significant doctrinal takeaway from their arguments is their implications for the canons of interpretation: the centrality of administrative implementation in this process, they argue, counsels especially wide latitude for agency statutory interpretation.⁷⁸ The states, however, are nowhere to be seen in their story of administrative implementation. In the Eskridge/Ferejohn account, the states appear only in their old-fashioned Brandeisian role as “laboratories”⁷⁹—an account in which actions by the states serve as the precursor to, or as the inspiration for, the creation of new federal statutes, but never serve to implement federal statutes themselves.⁸⁰

76. See ESKRIDGE & FEREJOHN, *supra* note 2; Ackerman, *supra* note 22, at 1742; Eskridge & Ferejohn, *supra* note 35; Young, *supra* note 38, at 448-55.

77. Eskridge & Ferejohn, *supra* note 35, at 1215. One need not agree with these scholars that some major statutes attain quasi-constitutional status to appreciate their point about the central role that administrative implementation plays in norm elaboration and statutory entrenchment.

78. *E.g.*, *id.* at 1249, 1252.

79. Justice Brandeis famously cast the states as “laboratories of democracy” in his dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

80. ESKRIDGE & FEREJOHN, *supra* note 2, at 225-26. They argue, for example, that the “chain reaction” of states passing married women’s property laws in the 1850s had a “ripple effect” for federal women’s equality, and that states’ refusal to enforce anti-contraception laws in the early twentieth century paved the way for federal expenditures on family planning and the Supreme Court’s decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965). ESKRIDGE & FEREJOHN, *supra* note 2, at 216-20, 228-33.

As another example, consider Ackerman's theory of "landmark statutes," which links federalism and statutory law in a different way. Ackerman emphasizes the prominent role of the states in Article V's provisions on constitutional amendment as a significant barrier to formally amending the Constitution.⁸¹ As a result of those difficulties, he argues, constitutional law today is by necessity shaped through quasi-constitutional means, including landmark federal statutes and major federal-court decisions—two alternatives that Ackerman seems to view as relatively free from the overemphasis on the states that creates obstacles in the formal constitutional amendment context.⁸²

As in the case of Eskridge and Ferejohn's theory, in Ackerman's theory, there is a noticeable hole in its portrayal of the states' role in the legal process that he describes. That hole is particularly conspicuous because Ackerman's theory elsewhere is quite inclusive of the many other parties who help to shape the meaning of landmark statutes.⁸³ But Ackerman has an extremely national-government-centered sense of how federal statutes come to acquire their meaning. He writes, for example, that "[w]hichever cases and landmark statutes you might or might not add [to one's list], I am pretty certain of one thing: all the texts you propose will have been produced by national, not state, institutions."⁸⁴

This, of course, depends on what one means by "produced." State agencies have played critical roles in our understanding of what some federal landmark statutes have come to mean, both through their ordinary implementation efforts and through their aggressive and creative use of temporary waivers from federal statutory schemes that pave the way for change to the underlying statute itself. As just one example, consider the evolution of Medicaid, the federal health-insurance program for low-income populations that is jointly administered by the states. That program began in 1965 with federally mandated coverage of only a very limited population (specifically, low-income children and their caretaker relatives, and certain low-income elderly and

81. See U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . ."); Ackerman, *supra* note 22, at 1742-43.

82. Ackerman argues, for example, that major federal statutes allow a "nation-centered People" to circumvent the "state-centered system of formal amendment." Ackerman, *supra* note 22, at 1743.

83. *Id.* at 1763.

84. *Id.* at 1750.

disabled).⁸⁵ It was the states, however, that dramatically expanded what Medicaid means. Through a series of state administrative actions and waivers from the federal program, states expanded their Medicaid programs to include more populations, and in some cases the entire population of individuals below a certain level of income. Over time, these state efforts transformed Medicaid from a program for only certain “deserving poor” to a program that in many states embraced a universal-access philosophy. That very philosophy—and the same core idea of universal access to Medicaid for all persons under an income threshold—was finally adopted by Congress in 2010, in the health reform legislation. There is no shortage of health-law commentators who have emphasized this critical shift in what Medicaid means, and how earlier state moves were instrumental in reshaping this landmark statute.

Nor is this phenomenon specific to health law. Karen Tani, for example, has written about how federal and state administrators of the original Social Security Act both used the language of “rights” to discuss the benefits conferred by that Act and, in so doing, were instrumental to the constitutional shift in how those benefits were perceived.⁸⁶ Others have documented how aggressive use of state waivers from federal welfare programs produced state-led regulatory experiments that culminated in the 1996 federal welfare reform legislation.⁸⁷

States also play even more direct roles in the production of statutory texts. Interstate groups often draft federal statutory language or federal regulations, either voluntarily or at the specific request of the federal government. In the ACA, for example, Congress expressly required the Secretary of HHS to draft certain regulations “in consultation with” the National Association of Insurance Commissioners (NAIC), an interstate group of state officials, which has assumed a major role in drafting and advising throughout the regulatory process.⁸⁸ The NAIC not only has developed numerous model statutes and

85. *Key Milestones in Medicare and Medicaid History, Selected Years: 1965-2003*, 27 HEALTH CARE FIN. REV. 1 (2005), available at <http://www.cms.gov/HealthCareFinancingReview/downloads/05-06Winpg1.pdf>.

86. See Karen Tani, *Securing a Right to Welfare: Public Assistance Administration and the Rule of Law, 1938-1960* (June 30, 2011) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author).

87. Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 394-95 (2002); Joel F. Handler, *Welfare-to-Work: Reform or Rhetoric?*, 50 ADMIN. L. REV. 635, 642 (1998).

88. See, e.g., Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1333(a)(1), 124 Stat. 119, 207, amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified at 42 U.S.C. § 18053) (“[T]he Secretary shall, in consultation with the National Association of Insurance Commissioners (NAIC),

regulations for states to use when implementing the ACA, but it also has drafted regulations for HHS itself—*federal* regulations.⁸⁹ More generally, Judith Resnik, Joshua Civin, and Joseph Frueh have described how these “translocal organizations of government actors” participate in national lawmaking across many subject areas, and they also have explained how other federally created entities, such as the federal Advisory Commission on Intergovernmental Relations, have helped to give the states a voice in the lawmaking and regulatory process.⁹⁰

The point is that even a theory focused on nationalism, like Ackerman’s, must recognize the role that states play in federal lawmaking. Ackerman’s theory is at least partially motivated by a desire to explain that Americans “have repeatedly adapted state-centered institutions, and constitutional texts, to express national purposes.”⁹¹ This Essay fully agrees with that proposition, and urges only that one of the ways in which we have adapted state-centered institutions for national purposes is by using the states themselves to give meaning to federal statutory law.

II. FEDERALISM AS A TOOL OF NATIONAL POWER: ENTRENCHMENT AND ENCROACHMENT THROUGH STATE IMPLEMENTATION

The next question is how to remedy this theoretical gap, and how to begin to consider what a set of interpretive doctrines that take state implementation

issue regulations for the creation of [multi-state] health care choice compacts under which 2 or more States may enter into an agreement”); *id.* § 1341(b) (to be codified at 42 U.S.C. § 18061) (requiring HHS to act in consultation with NAIC in developing standards related to state reinsurance programs); *id.* § 2701(a)(3) (to be codified at 42 U.S.C. § 300gg) (“The Secretary, in consultation with the National Association of Insurance Commissioners, shall define the permissible age bands [for insurance rating purposes.]”); *see also id.* § 2718(c) (to be codified at 42 U.S.C. § 300gg-18) (requiring that, “subject to the certification of the Secretary, the National Association of Insurance Commissioners shall establish uniform definitions” for the calculation of the medical loss ratio).

89. See Meghan McCarthy, *HHS Releases Long-Awaited Rule for Insurers’ Spending*, NAT’L J., Nov. 22, 2010, <http://www.nationaljournal.com/hhs-releases-long-awaited-rule-for-insurers-spending-20101122> (noting that HHS adopted NAIC’s draft regulation); Press Release, Nat’l Ass’n of Ins. Comm’rs, NAIC Adopts Final Medical Loss Ratio Regulations (Oct. 21, 2010), http://www.naic.org/Releases/2010_docs/naic_adopts_final_mlr_regs.htm; *HHS Adopts NAIC Recommendations for November’s MLR Interim Final Rule*, AISHEALTH (Nov. 25, 2010), <http://aishealth.com/archive/nman112510-2>.
90. Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 776-80 (2008).
91. Ackerman, *supra* note 22, at 1743.

into account would look like. This is an inquiry that requires a closer examination of what roles the states are actually playing in federal statutes, and that examination is the focus of this Part. In particular, the persistence of the “states-as-obstacle” story demands some answers to the question of why Congress delegates to state implementers in the first place when its goal is to effectuate national legal change. It simply cannot be the case that Congress creates state-based federal-implementation schemes on the premise that states are outsiders to federal statutory law, or with the intention that most states will rebel during implementation. Something more integral to the success of the new federal statute seems to be a powerful countercurrent driving the use of the states in at least some cases of federal statutory design.

This Part advances this counter-narrative—one that eschews the prevailing distinction between federalism and nationalism and views them, at least some of the time, as part of a unified project. This narrative identifies intrastatutory federalism as a potential tool not only of federalism but also of *national* power, a specific strategy used by the federal government to strengthen its new federal laws and the federal norms they introduce.

Specifically, this Part speculates as to four ways in which state implementation of federal law can benefit federal lawmaking in this manner: (1) it provides a nationalizing twist on the “states as laboratories” account; (2) it offers a means for deeper entrenchment of federal statutory norms through a broader web of state and local implementers than does federal implementation alone; (3) it offers a low-visibility, low-pressure way for the federal government to enter a field of lawmaking traditionally governed by the states; and (4) it is a way for the federal government to express and give salience to traditional “federalism values” even within a modern federal regulatory scheme. Developing this counter-narrative is a way to begin thinking about federalism from a nationalizing perspective. It is also a necessary first step toward thinking about what kind of legislation, administrative law, or federalism doctrines might emerge from this understanding. The extent to which one might recommend deferring to state agency interpretations of federal law, for example, likely should turn on why Congress uses the state agency implementers in the first place. Part IV explores those doctrinal questions directly; this Part focuses on the link between intrastatutory federalism and nationalism.

It is important to recognize that some of the legislative motivations for state implementation that are outlined here may be in conflict. For example, the idea that state implementation is a useful mechanism for federal statutory encroachment on areas of traditional state authority is in some tension with the idea that Congress uses state implementation to express federalism values. Moreover, there are many other reasons that the federal government uses state

implementers. Chief among such arguments are those focused on the value of policy experimentation, state autonomy, the inability of uniform solutions to fit diverse localities, citizens' greater ability to participate in the local political process, the comparative strengths of the states in certain areas of law, and the fact that pockets of state control serve as important checks on national authority.⁹² More pragmatic arguments also are significant, including the inability of the federal administrative workforce to implement all federal statutes alone; the desire of the federal government to avoid accountability; and the simple fact that, owing to the states' historical monopolies over many fields, the states have developed expertise and infrastructure in many areas now regulated by the federal government.⁹³

Forests have been slain in service of these and other traditional arguments for federalism, and this discussion should not be read to exclude them. But what is different about legislation theory is that it begins from a focus on *Congress* rather than from the kinds of considerations that federalism usually emphasizes. This is one reason that thinking about state implementation of federal law through the lens of statutory design produces a different account of how federalism fits into the story of national statutory power.

A. Nationalizing the "States as Laboratories" Account

Scholarship is awash in Brandeis-inspired reasons why Congress might decentralize policymaking in the states. Chief among these is the role that

92. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1990); see also Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1324-25 (2004) (cataloguing reasons traditionally associated with federalism); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389-404 (1997) (same); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2551-60 (2005) (same).

93. John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1190-92 (1995) (describing the legislative history of the Clean Air Act and noting that legislators "explained that state participation was indispensable: 'If we left it all to the Federal Government, we would have about everybody on the payroll of the United States. We know this is not practical'" (quoting Congressman Harley Orrin Staggers, Sr.)); Ernest A. Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION, *supra* note 30, 249, at 259 (noting that "federal officials are so dependent on the states for information and enforcement resources that they could not realistically carry out" the administration of federal environmental laws on their own). For additional arguments, see, for example, Greve, *supra* note 33, at 681, which argues that state regulators play a role in "compensat[ing] for federal agencies' failures"; and Hills, *supra* note 28, at 186-87, which argues that Congress might "bypass federal executive officials and turn federal money over to non-federal politicians . . . because it distrusts the institutional incentives of loosely supervised appointed policy experts that staff the federal government," thereby "provid[ing] Congress with a weapon with which to discipline the federal bureaucracy."

states play in policy experimentation. Justice Brandeis famously cast the states as “laboratories of democracy,” and the notion that states are useful testers of various policy reforms is ubiquitous.

Often, however, the “states as laboratories” account is the articulated reason for the federal government to stay *out* of an area, for example, the reason why federal law or federal agency regulations should be interpreted not to preempt state law. But what about situations in which, instead, the federal government is not only *in* the field, but brings the states in with it? What is the relevance of the “states as laboratories” account in this context?

There is a place here for an account that is slightly more national in focus and slightly less sanguine about the ability of the states to innovate by themselves. Consider the idea that the federal government might use its own, national legislative power to encourage the very state-based experimentation and decentralization that animates the “states as laboratories” theory. Our current statutory landscape reflects this: scholars have documented numerous federal laws, across contexts ranging from education to telecommunications, that have served as the driving force behind state experimentation.⁹⁴

One reason that federal statutes might be necessary to jump-start state experimentation is that it is not always the case that such experimentation develops organically. States often do not conduct experiments at the levels thought ideal by policymakers. Scholars and courts have offered various reasons for this, among them the disincentives for a single state to bear all the costs of innovation, or the disincentives caused by the risk that businesses will leave a state if it is regulating in a more costly manner than others.⁹⁵ To take just two of many possible examples, consider first the fact that satisfactory

94. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 419-38 (1998) (describing the central role of federalism in experimentalist legislation and offering the cooperative-federalist “Goals 2000” federal education law as one example); Dwyer, *supra* note 93, at 1223 (describing how federal environmental law spurred the modern innovations seen in state environmental policy); Dale B. Thompson, *Optimal Federalism Across Institutions: Theory and Applications from Environmental and Health Care Policies*, 40 LOY. U. CHI. L.J. 437, 473-75 (2009) (describing Medicaid as a federal law that spurs states to act as laboratories of experimentation).

95. See, e.g., Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594, 610-11 (1980) (arguing that states have a tendency to “free ride” on other states’ innovations); Rubin & Feeley, *supra* note 25, at 925-26 (arguing that state governments do not have the incentives or resources to be good experimenters); Super, *supra* note 92 (arguing that states cannot be stand-alone laboratories of experimentation because they depend on federal funding for much of their policy work); cf. Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 947, 952-53 (2011) (arguing that the experiments undertaken by federalism are not tracked scientifically in a way that could produce sound policy guidance).

levels of state innovation in the area of air-pollution control did not occur naturally, even with the promise of federal funds, until Congress passed the major environmental statutes of the 1970s that effectively required the states to take the lead or have their air-quality laws preempted by federal statute.⁹⁶ As a second example, as noted, the availability of state demonstration waivers from the federal Medicaid program spurred states to experiment with innovative delivery and insurance systems for low-income populations.⁹⁷

Federal statutes that delegate administration to the states thus might be a way to compensate for the absence of state policymaking leadership that our federalist-inspired system presupposes that the states will offer. These statutes allow Congress to use national power to incentivize experimentation but still to keep those experiments within the familiar framework of state-led programs.

What's more, such legislation offers the federal government the opportunity to influence the direction of state experiments in ways that state experimentation in the absence of federal law does not. One can see both of these motivations—a desire to encourage more state experimentation and a desire to influence the nature of that experimentation—clearly reflected in the health reform statute, as the next Part elaborates.

B. Federalism as a Tool of National Statutory Entrenchment

State participation also significantly deepens the prevailing theories of federal statutory entrenchment described in Part I. Those theories increasingly focus on the dialogical process of public and governmental engagement, but they have not explored the ways in which state participation might play a pivotal role in that process.

1. Entrenchment Through Polycentricity

Eskridge and Ferejohn, for example, emphasize the importance of dialogic deliberation in statutory interpretation and implementation, a process they

96. See, e.g., *Train v. Natural Res. Def. Council*, 421 U.S. 60, 64–65 (1974) (noting that the state response to early Clean Air Act grant programs was “disappointing” and that “Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970”; but that Congress still left primary regulatory responsibility in state hands, with the “difference [being] . . . that the States were no longer given any choice as to whether they would meet this responsibility”); Dwyer, *supra* note 93; cf. Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 552 (2008) (arguing that federalism does not produce optimal levels of experimentation).

97. See *supra* notes 85–87 and accompanying text.

believe must be “complicated, polycentric, experimental, forward-looking, [and] problem-solving” to succeed.⁹⁸ They and other scholars have argued that federal agencies are the central players in this story, surrounded by a supporting cast of partners in Congress and the federal judiciary who engage them in dialogue along the way.

State implementation clearly strengthens this account. These same virtues of polycentricity, experimentation, and dialogue are precisely the kinds of arguments typically made in favor of *decentralizing* lawmaking to states in the first place. It is impossible to read any of the modern federalism literature without repeatedly encountering those virtues, and adding a layer of state implementers surely increases the complexity and dialogical nature of the deliberative process of entrenchment.

2. *Entrenchment Through the Statutory Bureaucracy*

Less obviously, but perhaps more importantly, decentralizing the administration of federal statutory law may more effectively entrench the new federal statute by creating a much broader and deeper network of institutions and officials – not just federal, but state and local, and across fifty states – who are invested in the new federal statutory scheme, its meaning, and its success.⁹⁹ This is the “professional bureaucracy” theory advanced by Eskridge and Ferejohn, the idea that agencies entrench new federal laws not only through dialogue, but also through their own existence: a bureaucracy of individuals charged with a statute’s success, they argue, offers a crucial element of support, and one that extends beyond the confines and politics of the enacting Congress.¹⁰⁰

Eskridge and Ferejohn include only federal agencies in this theoretical account of bureaucratic entrenchment. When the role of state implementers is

98. ESKRIDGE & FERREJOHN, *supra* note 2, at 21.

99. Young makes a different argument that indirectly goes to this same idea of national statutory entrenchment by state implementers. See Young, *supra* note 31, at 880 (arguing that “state administrators sometimes ‘buy in’ to the national regulatory program and do not vigorously defend state prerogatives”); *id.* 880 n.57 (“In some circumstances, such state officials might well view federal regulators as welcome allies against antiregulatory forces in their home states.”).

100. Ackerman’s theory is not as agency-focused, but he too emphasizes dialogic deliberation and an extended process through which landmark statutes attain their meaning and their status. For Ackerman, the key player is “the public,” which Ackerman laments does not attend to the goings-on of federal legislation often enough for true deliberation to occur, but plays a critical role by effectively ratifying the quasi-constitutional changes wrought by major statutes and cases at the polls. Ackerman, *supra* note 22, at 1805.

acknowledged, however, it becomes clear that this administrative network extends much farther than it does in a federal-only implementation scheme. Indeed, decentralizing implementation typically presses into service not only state agencies but also state legislators and executives (governors, commissioners, attorneys general, and so on), and does so in a way that is far more direct than the initial role played by Congress and the President in federal statutory implementation. This is because, in order to implement federal laws, states often have to pass new laws of their own to create new infrastructures or new enforcement powers, or to authorize existing state agencies and officials to do what federal implementation requires. Again, health reform offers some current examples of this more general phenomenon. For instance, the ACA requires states wishing to receive federal grant money to establish a new state independent office of health insurance consumer assistance; it also requires states to engage in the review of insurance rates—a requirement that necessitated the enactment of new laws in some states where no officer had that authority before the ACA.¹⁰¹

In addition to this mode of intrastate bureaucratic and legislative entrenchment, statutes that utilize state implementation also create important vertical and horizontal implementation networks. On the vertical side, many federalism scholars have argued that state and federal specialist agencies share more connections with and loyalties to one another than they do with their particular level of government. This phenomenon, sometimes called “picket fence” federalism,¹⁰² serves to extend the bureaucratic network outside of the

101. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 2793, 124 Stat. 119, 138, *amended by* Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified at 42 U.S.C. § 300gg-93) (“To be eligible to receive a grant, a State shall designate an independent office of health insurance consumer assistance, or an ombudsman, that . . . receives and responds to inquiries and complaints concerning health insurance coverage with respect to Federal health insurance requirements and under State law.”); NAT’L CONFERENCE OF STATE LEGISLATURES, HEALTH INSURANCE PREMIUM REVIEW GRANTS (1ST ROUND): SUMMARY OF STATE PLANS (2010) (on file with author); Robert Pear & Kevin Sack, *Some States Are Lacking in Health Law Authority*, N.Y. TIMES, Aug. 14, 2010, <http://www.nytimes.com/2010/08/15/health/policy/15insure.html>.

102. Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1236 (2001) (arguing that federal statutes often delegate to “state agency experts in particular policy areas . . . [who] tend to be committed to the mission of the federal statute that they help to implement, and they tend to share a common sense of vocation and professional culture with the federal agency officials who oversee them”); *see also* PAUL E. PETERSON, BARRY G. RABE & KENNETH K. WONG, *WHEN FEDERALISM WORKS* 190 (1986) (arguing that local policy professionals often have greater allegiances to the federal programs they implement than to local concerns).

states vertically to the federal bureaucracy when specialist state agencies implement federal laws in cooperation with their federal counterparts.

The horizontal federalism component of state implementation of federal law further deepens this bureaucratic network. As already noted, states often work together to implement federal law. Such cooperation occurs not only through formal networks like interstate compacts, but also through national organizations of state leaders, such as the National Governors' Association or the National Association of Attorneys General, which lobby the federal government and draft model statutes and regulations relevant to implementation, and also more informal networks of lower-level local officials across states engaged in the same implementation tasks, or through cooperation among officials from the same geographic region. What emerges is a cross-cutting web of vertical, horizontal, and intrastate executive and legislative relationships that together may strengthen support for the statute on which they all are focused.

3. Entrenchment Through Deliberation

This broader and deeper web of state and local officials also may contribute rather robustly to the deliberation that some entrenchment scholars see advanced by federal agency implementation. Perhaps the most obvious way that this will occur is that various state actors will convene and work together to implement a federal statute. But there is another important way that cooperative federalist statutes encourage local deliberation: they require states to *decide* whether to participate in the program in the first place. Because federal legislation designed with a preference for state implementation generally is either entirely voluntary or includes a state "opt out," there is an important component of local deliberation built directly into implementation. To decide whether to participate, state lawmakers and state agency officials must consider what the new statute does, whether it will benefit the state, and whether they believe that the state or the federal government is the more appropriate implementer. They also may have to pass new laws, set up new institutions, and appoint new personnel to effectuate their federal-law duties. At each of these steps, there are potentially important, and sometimes public, moments of deliberation about the new federal statute—moments that, although not moments of public deliberation in the "popular" sense that some

scholars may intend,¹⁰³ certainly are closer to “the people” simply because they happen at a local level.

Of course, not all uses of state implementers will serve the purpose of federal statutory entrenchment. Sometimes state implementation will destabilize a federal statute more than solidify it. In the context of health reform politics, the dominant federalism narrative has been one of precisely this kind of “uncooperative federalism.”¹⁰⁴ And, in fact, the potential for some states to be less eager, less effective, or even rebellious implementers of federal law deepens the puzzle for observers trying to understand why Congress would entrust implementation of its statutes to states in the first place. The point is simply that the states-as-obstacles/states-as-other story cannot be the only one, and that in some cases something more directly benefitting the national legislative agenda must be driving Congress’s statutory design choices.

C. Federalism as a Tool of Federal “Field Claiming” (or Encroachment)

There also might be a more instrumental story to tell, one in which the states are relied upon not for some reason related to the traditional federalism values (as they are to some extent when Congress nationalizes state experiments or looks to state bureaucracies as partners in federal statutory entrenchment) but rather one in which the states are utilized as more direct vehicles of federal regulatory aggrandizement. Specifically, I want to highlight the possibility that Congress might design statutes around state-based implementation for the purpose of *gradual field entry* into areas traditionally dominated by state law. A federal statute that marks new legislative terrain for the federal government but relies—at least in the beginning—on the states to implement it might be a way for the federal government to “claim the field” as one suitable for federal regulation, but at the same time rely on state expertise and state political cover while the federal government gets up to speed.

Statutes like these have political benefits. Most obviously, they allow Congress to leave the initial extent of the federal role vague, a strategy that might make the intrusion more acceptable to legislators who otherwise would resist these moves. To be sure, the fact that the federal government offers states the chance to implement new federal statutes does not diminish the reach of federal legislative authority. But by retaining the states in the lead role for

103. Cf. Ackerman, *supra* note 22, at 1805 (“Most statutes and executive decrees simply don’t proceed from the sustained deliberation typical of our great acts of popular sovereignty.”).

104. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (describing how states use delegated regulatory power to challenge federal power).

implementation, such statutes might be more politically palatable to those who generally resist federal aggrandizement or prefer “smaller” government or local variation.

Giving states the lead role in implementation also might assuage concerns of legislators who are suspicious of, or politically opposed to, the current executive branch’s policy agenda. Particularly in times of divided government, some members of Congress might trust their home-state counterparts more than the administrative appointees of the President to fill in the interstices of new federal programs. Work in the political science realm has, indeed, documented an increase in such delegations toward the states and away from the federal government in times of divided government.¹⁰⁵ Others have documented how Southern congressmen pushed early implementation of federal welfare programs through the states to preserve the political economy of the region.¹⁰⁶ Seen in this light, *varied state implementation*—and in particular, allowing for less aggressive implementation by some states—might, in fact, be a necessary part of the political deal to get some federal statutes passed in the first place. That is, the possibility of state-based dissent that often is described as a pathology in traditional federalism theory may actually be a beneficial safety valve that, on occasion, makes new federal legislation possible.

At the same time, however, these state-led statutes are likely to extend the federal influence further into the field over time. One way in which this may happen is simply that the public will get more comfortable with the idea of federal regulation in the field, thereby allowing for uncontroversial expansion later.¹⁰⁷ Political science and historical accounts of the early years of the welfare provisions of the Social Security Act offer an example of this progression.¹⁰⁸

But there is also a more direct way in which these kinds of statutes contribute to nationalizing statutory power. As stated above, most statutes of this nature have an “opt out” provision for the states.¹⁰⁹ If one or more states

105. See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 154, 157 (1999).

106. See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

107. Cf. METTLER, *supra* note 4, at 225 (noting that the boundaries between federal and state “became much less distinct as policymakers expanded [state-administered] national programs to cover persons previously neglected, and as state and local officials lost much of the discretion through which they had been implementing programs”).

108. See Tani, *supra* note 86.

109. This type of statutory design became dominant in statutes involving state implementation after *Printz v. United States*, 521 U.S. 898, 935 (1997), in which the Court held that “[t]he Federal Government may neither issue directives requiring the States to address particular

do opt out of administering the new federal scheme, the federal government usually must step in. These moments are “field-claiming” opportunities for the federal government: the federal government is provided with a smaller-scale, lower-visibility way (running the program in just a handful of states) to build expertise in an area traditionally outside its purview than taking over an entire new area at once. These opportunities may allow the federal government to build a track record in the area while at the same time acclimating the public to federal government regulation in what was once thought to be state domain.

Over time, it seems likely that these incremental moves will work a subtle shift in the public understanding of the traditional state-federal boundaries. And while the boundaries being moved are not formal boundaries in a constitutional sense, they surely inform and shape our everyday understandings of the state-federal relationship. These “soft” federalism lines, in fact, may be more important to understanding what “federalism” means today than the Constitution, particularly because formal constitutional law no longer frequently operates to police the boundaries of state and federal power.¹¹⁰

D. State Implementation as an Expression of Federalism Values

Finally, it is worth emphasizing the idea that, even within these nationalizing accounts, Congress also might be expressing some “federalism values” in these statutes. That is, even though the formal “Federalism” line has been crossed (with the statute), there may still be some informal federalism that Congress can respect and express by leaving implementation in the hands of the states. The same kinds of federalism values that restrain Congress from formally legislating at all in areas of state authority—the famous “political safeguards of federalism”¹¹¹—also might encourage Congress, when it *does*

problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”

110. Ernest Young has made a parallel point in the preemption context, specifically, that decisions about the reach of federal statutes are “no less ‘constitutive’ of our governmental structure” than the lines drawn in constitutional law cases. These sorts of statutory boundaries, he writes, “have come to dominate the structure of American federalism.” Young, *supra* note 38, at 432; cf. Mishkin, *supra* note 14, at 812 (arguing that federal court decisions whether to incorporate state law to resolve an open question of federal law implicate “vastly important questions of the distribution of power between national and state governments, not in their dramatic aspect of open constitutional conflict, but in their no less important daily workings”).
111. 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, 544 (1954)

legislate, to give the states strong administrative roles in the new federal scheme. Doing so might be a way to compensate for the state autonomy that the new statute takes away, or a way to express that state authority in the area nevertheless remains important.

By way of illustration, consider the following example from health reform: the major point of contention between the House and Senate versions of the bill was whether the states or the federal government would run the new insurance exchanges. As a result of the triumph of the state-led version (the Senate's choice), individuals and small businesses will continue to purchase health insurance through state-governed channels, a result that, at least on the surface, appears consistent with the traditional presumption—legislatively established by Congress itself in the McCarran-Ferguson Act of 1945—that health insurance regulation is an area of state control.¹¹² As a matter of formal legal doctrine, however, an exchange run by the federal government would be no different: federal law (the ACA) basically now regulates how the states will operate their exchanges. But as a matter of how individual Americans encounter the health insurance system—as an expressive and informal matter—a nationally operated system of insurance purchasing would convey something very different about the allocation of state and federal power in this area.

* * *

These accounts hopefully have piqued some interest in the idea that there is a more diverse and stronger story of federal statutory entrenchment to explore than the one that currently prevails in legislation theory and uses only federal players. They hopefully also have provoked some thought on what exactly federalism is in the modern statutory landscape and how it is expressed. Federalism, it seems, is alive and well in the modern regulatory state, but it is a multivariate concept that is much more complicated than any of our traditional paradigms are prepared to deal with.

(arguing that the nature of the political process and the structure of Congress limit national intrusions on state autonomy, making national action “the special rather than the ordinary case”).

112. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Court overruled an earlier precedent and held that insurance was commerce and thus within federal control. The McCarran-Ferguson Act legislatively reestablished this presumption the next year. 15 U.S.C. § 1011 (2006) (“Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”).

One implication of this story about intrastatutory federalism is that no single set of federalism-related doctrines is likely to fit all of the different roles that state implementation serves. For example, to the extent that one understands some uses of state implementation to be expressing informal federalism values, that understanding arguably should inform the level of interpretive leeway that state implementers have to do their work. State participation should be “real” because, otherwise, if states are consigned only to ministerial roles, any federalism being expressed in such statutes would be a façade.¹¹³ On the other hand, to the extent that a statute appears to deploy the states for more centralizing purposes, state implementation discretion may neither be warranted nor reflect Congress’s intention. These nuances make clean doctrinal solutions—for example, the development of a “state-implementation canon”—quite difficult, a point that Part IV takes up in detail.

A second implication of this story is that it illustrates how nimble federal statutes can be when it comes to issues of the state-federal balance. One theme that runs through the literature on the relationship between statutes and constitutional law is the idea that statutes may be better at doing “constitution-like” things than the Constitution because statutes are easier to enact, easier to amend, and can leave room for administrative flexibility. Without detracting from those arguments, we can add that statutes also allow for a more careful calibration of federalism values—Congress can use, or not use, state implementers to pursue different ends in a variety of different specific situations (rather than relying on the clumsy tool of judicial constitutional review to set general boundaries). A statutory theory of federalism thus may enable more specific tailoring and more diversity in how we engage federalism than is possible through the broad lens of constitutional law.

III. HEALTH REFORM’S MANY THEORIES OF STATE AND FEDERAL RELATIONS

Let us turn to a more concrete example. The health reform statute, the ACA, substantiates the real-world importance of state agency implementation as a tool of modern legislative design and also illuminates the need for interpretive doctrines to help navigate this landscape. As discussed below, one

113. Cf. *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting) (“If cooperative federalism is to achieve Congress’ goal of allowing state governments to be accountable to the democratic process in implementing environmental policies, federal agencies cannot consign States to the ministerial tasks of information gathering and making initial recommendations, while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight.” (citation omitted)).

can clearly see in the ACA each of the new federalism theories of legislation introduced in Part II. Again, the ACA is not unique—a similar story could be told about a variety of other statutes, including the Clean Air Act,¹¹⁴ the Clean Water Act,¹¹⁵ the Telecommunications Act of 1996,¹¹⁶ and the Medicaid statute,¹¹⁷ and the evolving politics of the ACA pose challenges for any analysis. But the ACA is a particularly salient and contemporary illustration of the phenomenon that this Essay aims to demonstrate because it has so much “federalism” going on at once.

Specifically, within the ACA alone, there are multiple—and sometimes conflicting—visions of the role of the states. Some provisions in the statute, like those concerning the insurance exchanges, are expressly intended to be “state led”; others, like the Medicare provisions, are unquestionably federally focused; still others, such as the Medicaid provisions and the insurance regulation provisions, lie somewhere in between, with a role clearly foreseen for state and federal regulators acting concurrently.

One important doctrinal question raised by statutes like the ACA, therefore, is this: why do we treat all of these different kinds of implementation provisions alike as a matter of federal statutory interpretation? The main resource that legislation theory currently uses to evaluate this kind of implementation work is the *Chevron-Mead* regime, but, as we have seen, *Chevron-Mead* is not grounded in theories of delegation to states, and is not generally used for state implementation. Instead, *Chevron* operates to bolster the decisions of the federal agency, regardless of what role the states are given in implementation. *Mead*, of course, operates as the gateway to *Chevron*, but, as already noted, federal courts generally do not take into account the role that state agencies have in implementing federal statutes when conducting their *Mead* analysis, or consider whether the states themselves might merit deference. Nor do the traditional federalism canons, as discussed in Part I, account for these kinds of statutory designs.

Virtually everywhere else, statutory interpretation doctrine assumes (even if sometimes fictitiously) that much less important legislative design choices

114. See Dorf & Sabel, *supra* note 94, at 433 (discussing cooperative federalism in the Clean Air Act); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 189 (2005) (same).

115. See Fischman, *supra* note 114, at 189 (discussing cooperative federalism in the Clean Water Act).

116. See Weiser, *supra* note 16.

117. Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 134-35 (2010) (discussing cooperative federalism in the Medicaid Act).

are deliberate and should be effectuated through interpretation. And here, we have evidence from the ACA's legislative history that the choice between state and federal implementation was critical to the statute's passage: the question of the state/federal implementation balance was *the key question* that divided the House and Senate versions of the legislation. Giving the states the leadership role was the concession ultimately required to close the deal.¹¹⁸ Interpretive doctrine should work to effectuate—or at least recognize—the importance of such institutional choices.

To illuminate these concerns through some examples, consider the fact that even though the ACA's structure implies that Congress favored decentralization and state leadership in certain areas of the reform, and even though a number of governors have formally requested more implementation flexibility,¹¹⁹ the statute still gives federal agencies, particularly HHS,¹²⁰ broad discretionary rulemaking authority.¹²¹ The breadth of the delegation and the extent of the overlap between state and federal implementation responsibility

118. The House preferred a new federal-government-run model of insurance provision, and the Senate preferred a state-run model. In the end, it was politics (specifically the replacement of Democratic Senator Edward Kennedy with Republican Senator Scott Brown), not policy, that mandated the resolution. Brown's election deprived the Democrats of their sixtieth vote in the Senate and so subjected any further Senate action on health reform to a filibuster by opposing Republicans. As a result, the already-voted-upon version of the Senate bill—which had opted for state-led insurance exchanges instead of the national model—became the necessary template, and the House ultimately bent to that political reality. The House passed what was essentially the same bill as the bill passed by the Senate before Senator Kennedy's death, and then the two sides worked out minor budget-related differences between the bills using the procedural mechanism known as "reconciliation," in which filibusters are not permitted. See Shailagh Murray & Lori Montgomery, *House Passes Health-Care Reform Bill Without Republican Votes*, WASH. POST, Mar. 22, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html>; *Obama Signs Health Care 'Fixes' Bill*, CNN, Mar. 30, 2010, http://articles.cnn.com/2010-03-30/politics/pol.health.care_1_health-care-student-loan-college-loans.

119. See Letter from Kathleen Sebelius, Sec. of Health and Human Servs., to Governors (Feb. 24, 2011), available at <http://www.kaiserhealthnews.org/Stories/2011/February/25/~media/Files/2011/HHS%20Gov%20Letter%20Feb%2024.pdf>.

120. HHS is the lead agency in the statute, but the Department of Labor and the Internal Revenue Service also have roles. See, e.g., Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, §§ 1511-14, 6605, 9003, 9007, 124 Stat. 119, 252-58, 780, 554-55, amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified primarily in scattered sections of 26 U.S.C. and 29 U.S.C.); *Agency Profiles: Introduction*, HEALTH REFORM GPS (Nov. 15, 2010), <http://www.healthreformgps.org/resources/agency-profiles-introduction>.

121. See CHRIS COPELAND, CONG. RESEARCH SERV., R41180, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (P.L. 111-148) (2010), available at <http://www.shrm.org/hrdisciplines/benefits/Documents/Regulations.pdf>.

already have created numerous areas of interpretive uncertainty. Even as the states have begun to implement the statute, they are not sure how much uniformity HHS will require with respect to how the new state insurance exchanges look, or whether standardized state income-verification techniques (for purposes of federal health insurance subsidies) will be required, or how much discretion states have to review insurance rate increases, or how much flexibility they have in how key statutory terms—such as the critical term “essential health benefits,” which will determine what benefits insurers must offer on the state exchanges¹²²—will be defined. These uncertainties remain despite the fact that the ACA’s text itself mentions “state flexibility” six times in the context of the exchange provisions, simply because HHS’s authority seems so broad.¹²³ Ambiguities of this order are myriad, have been amply detailed by commentators,¹²⁴ and have significantly affected the states’ abilities to begin their implementation work.¹²⁵ A number of states even have concluded that

122. See Sarah Kliff, *In Health Insurance, What Counts as ‘Essential’?*, WASH. POST., Oct. 4, 2011, http://www.washingtonpost.com/blogs/ezra-klein/post/in-health-insurance-what-counts-as-essential/2011/10/04/gIQAAd9cKLL_blog.html (“It’s hard to overstate what a big deal this will be.”).

123. Affordable Care Act § 1311(f), Pub. L. No. 111-148, 124 Stat. 119, 179 (2010); *id.* pt. 3, 124 Stat. at 186; *id.* § 1321 pt. 4, 124 Stat. at 119; *id.* § 1331, 124 Stat. at 199; *id.* § 1412(e), 124 Stat. at 223.

124. As one example, Affordable Care Act § 2794(a)(1), 124 Stat. at 139, requires the HHS “Secretary, in conjunction with States, [to] establish a process for the annual review . . . of unreasonable increases in premiums for health insurance.” The states complained that the term “unreasonable” was ambiguous, *see* Pear & Sack, *supra* note 101, but HHS’s final regulations left the review process mostly in state hands and did not define the term. *See* Mary Ellen Schiener, *HHS Requires Reviews of Big Insurance Hikes*, SURGERY NEWS, May 25, 2011, <http://www.facs.org/surgerynews/2011/hikes0511.html>; *see also* Letter from Republican Governors to Kathleen Sebelius, Sec’y of Health & Human Servs. (Feb. 7, 2011) (requesting more implementation flexibility), *available at* <http://www.kaiserhealthnews.org/Stories/2011/February/10/Text-GOP-Governors-Letter-To-Sebelius>; Ian Spatz, *Defining Essential Benefits: Congress’s Once and Future Role*, HEALTH AFFAIRS BLOG (Feb. 17, 2011, 1:30 PM), <http://healthaffairs.org/blog/2011/02/17/defining-essential-benefits-congress-once-and-future-role> (noting that Congress did not define “one of the most important elements of last year’s health reform law . . . an ‘essential health benefit,’ [which] . . . will determine what health benefits most Americans will get starting in 2014”; that HHS has asked a nongovernmental entity, the Institute of Medicine, to provide a draft definition; and that the states ultimately may have to make some of the critical decisions).

125. This is an especially critical issue for states whose legislatures only meet every other year. In order to make the 2013 deadline for their insurance exchanges to be certified, for example, those states must have passed enabling laws by the end of 2011 and so have been passing those laws in an exceedingly uncertain atmosphere—or not passing them at all. *See* NAT’L GOVERNORS’ ASS’N CTR. FOR BEST PRACTICES, *STATE PERSPECTIVES ON INSURANCE EXCHANGES: IMPLEMENTING HEALTH REFORM IN AN UNCERTAIN ENVIRONMENT 2* (2011), *available at*

their regulatory uncertainty is so great that they must wait for HHS to issue its regulations before beginning implementation—a risky strategy given that the ACA only gives the states until 2013 to get many of the regulations in place.¹²⁶

Statutes like the ACA seem to destabilize the neat, monolithic world that our current theories and doctrines of statutory interpretation assume and the premise—that federal statutes are implemented only by federal agencies—on which they rely. These statutes are a lot more complex from a governance standpoint than the paradigm statutes of legislation theory. Part IV explores the doctrinal implications of this more complex landscape; this Part’s descriptive focus on the ACA’s multiple visions of federal-state relations aims to establish the importance of these relationships.

A. Brief Overview of the Statute

In the most general terms, the ACA works to substantially reduce the number of the forty-six million Americans who are uninsured and the twenty-five million so-called “underinsured”¹²⁷ and, across a longer term, to improve service delivery and reduce health care costs.¹²⁸ The statute does this through a

<http://www.nga.org/files/live/sites/NGA/files/pdf/1109NGAEXCHANGESSUMMARY.pdf> (“Given that the final federal regulations specifying the policies governing those activities have not been finalized or, in important instances, proposed, states are operating in a highly uncertain environment with looming deadlines.”); Amy Goldstein & N.C. Aizenman, *States Slow To Adopt Health-Care Transition*, WASH. POST, June 5, 2011, http://www.washingtonpost.com/politics/health-care/states-slow-to-adopt-health-care-transition/2011/06/03/AgbZbjjH_story.html (noting that only seven states have adopted laws establishing their insurance exchanges and that other states are “simply waiting for the Obama administration to issue regulations spelling out federal requirements in more detail”).

126. HHS’s recent draft insurance exchange regulations propose giving HHS the power to extend that deadline if merited. See Patient Protection and Affordable Care Act; Exchanges and Qualified Health Plans, 76 Fed. Reg. 136 (July 11, 2011) (to be codified at 45 C.F.R. pts. 155 & 156).
127. Elenora E. Connors & Lawrence O. Gostin, *Health Care Reform—A Historic Moment in US Social Policy*, 303 JAMA 2521, 2521 (2010); see Amy B. Monahan, *Initial Thoughts on Essential Health Benefits*, 2010 N.Y.U. REV. EMP. BENEFITS & EXECUTIVE COMPENSATION 1B, available at <http://ssrn.com/abstract=1646723>. The Congressional Budget Office estimates that the ACA will increase the proportion of Americans with health insurance to 94%. See Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives 9 (Mar. 20, 2010), available at <http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf>.
128. The summary of the ACA provided in this and the following paragraph are drawn, unless otherwise noted, from *Reform Overview: Summary of the Health Reform Legislation*, HEALTHREFORMGPS, <http://www.healthreformgps.org/summary-of-the-legislation> (last visited Aug. 16, 2011).

variety of mechanisms, including through a wide array of insurance reforms designed to make access to insurance easier (including requiring insurers to allow parents to keep children on insurance policies until the age of twenty-six, prohibiting insurers from denying coverage based on preexisting medical conditions, and removing lifetime caps on insurance coverage), and also by creating the new state health insurance exchanges (by 2014) to facilitate the purchase of insurance for those who do not get it through their employer. The exchanges will be run by the states unless they opt out, and will essentially serve as one-stop shopping centers through which citizens can compare insurance programs and be assured that every program on an exchange meets new federal minimum coverage requirements.¹²⁹ To make these reforms economically viable for insurers, the law expands the pool of insured citizens, requiring almost all individuals to have insurance (or be covered through one of the federal assistance programs such as Medicare and Medicaid) by 2014, or pay a tax, a requirement to be enforced by the federal government.¹³⁰

The law also amends many already-operating federal health-assistance programs, including making several reforms to Medicare—the federally run insurance program for the elderly and disabled,¹³¹ and dramatically expanding Medicaid—the federal health-insurance program for low-income individuals

129. The ACA requires all insurance programs on the exchanges to provide a minimum package of “essential benefits,” including mental health and preventative care. *See also* Connors & Gostin, *supra* note 127, at 2521 (“Exchanges will also provide consumers greater purchasing power by allowing individuals or small businesses to join together to purchase insurance.”). These exchanges will be both the way in which individuals and small business will buy their insurance going forward and the exclusive mechanism by which the federal government will distribute income-based subsidies toward the cost of health insurance coverage. A small class of individuals not insured by a government-assistance program, but too poor to afford health insurance, is exempt; undocumented immigrants are also excluded. *See* THE HENRY J. KAISER FAMILY FOUND., SUMMARY OF NEW HEALTH REFORM LAW 1 (Apr. 15, 2011), <http://www.kff.org/healthreform/upload/8061.pdf>.

130. Connors & Gostin, *supra* note 127, at 2521 (noting that the mandate requiring most individuals to have health insurance is designed to “expand the pool of insured individuals, spreading the health risk and thereby decreasing premiums,” and that the ACA imposes “an annual tax penalty reaching the greater of \$695 (\$2085 per family maximum) or 2.5% of household income” on individuals without qualifying coverage).

131. Salient among the Medicare reforms is the closing of the Medicare prescription drug “donut hole”—a set of provisions that worked to require the elderly and disabled to pay out of pocket, after passing a low annual threshold, for several thousand dollars’ worth of prescription drug benefits until catastrophic coverage kicked in at higher levels. *See AARP: Reform Should End “Doughnut Hole,”* UNITED PRESS INT’L (Mar. 22, 2010), http://www.upi.com/Health_News/2010/03/22/AARP-Reform-should-end-doughnut-hole.

that is administered in cooperation with the states.¹³² Outside the areas of insurance access and coverage, however, the ACA's reforms are limited. The ACA deals almost entirely with the insurance questions and leaves mostly for another day the other primary areas of needed reform—delivery and cost control¹³³—or addresses them only preliminarily through a series of pilot programs and demonstration grants.¹³⁴

B. Multiple Theories of State-Federal Relations in the ACA

The complexity of the intrastatutory federalism terrain is on full display in the ACA. The statute, I believe, embraces no fewer than five different visions of the role of the states and their relationship to the federal government. The ACA therefore drives home the points that, when it legislates, Congress has choices among federalism structures; that these choices are deliberate parts of federal statutory design; and that these choices may have different implications for implementation. For example, Congress might choose a “separate spheres” theory and focus on line-drawing between state and federal terrain; this of course is the model for which our current rules of statutory construction, including the preemption and federalism canons, are well equipped. We see that philosophy in the ACA's Medicare provisions, where Congress clearly envisioned a federal-dominance model in which the states are to have little or no role, and also in areas in which Congress chose not to regulate at all, leaving matters such as doctor licensing to the exclusive and historical province of state regulation. But, alternatively, Congress might choose to legislate concurrent

132. The ACA expands Medicaid to include an additional sixteen-to-twenty million individuals, reaching all non-elderly persons with incomes under 133% of the federal poverty level. Connors & Gostin, *supra* note 127, at 2521. The ACA also extends funding for the State Children's Health Insurance Program (SCHIP) to 2015. THE HENRY J. KAISER FAMILY FOUND., MEDICAID AND CHILDREN'S HEALTH INSURANCE PROGRAM PROVISIONS IN THE NEW HEALTH REFORM LAW 1 (Apr. 7, 2010), <http://www.kff.org/healthreform/upload/7952-03.pdf>.

133. Cf. MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY 168 (1999) (arguing that “a health care system is an arrangement for financing, purchasing, and providing health care goods and services” and that a comprehensive solution “requires the orchestration of all three health care functions—finance, purchase, and provision—within the social insurance system itself”).

134. See *Reform Overview*, *supra* note 128 (noting that the Act gives the Secretary of HHS “expanded authority . . . to undertake major pilot programs in health care delivery and organization that can be ‘scaled up’ as evidence of their impact emerges,” and “also establishes two new research bodies to recommend new approaches: the Center for Medicare and Medicaid Innovation and the Patient-Centered Outcomes Research Institute”).

roles for federal and state implementers, and the spectrum of what federalism “does” in those instances—in particular how it serves the national legislative purpose or, instead, traditional federalism values—is of most interest for this Essay’s argument.

1. *Why So Many Different Federalisms?*

Some watchers of health law were not surprised to find the ACA so multifaceted from an institutional-governance perspective. Allocation of responsibility between states and the federal government has long been the dominant institutional question for the health field, but one whose answer has remained unresolved. As a result, over time, various different authority-allocating approaches emerged,¹³⁵ leading many to lament health law’s “fragmentation,”¹³⁶ and creating an environment rife with federalism-related tension because the boundaries between state and federal seemed to be in constant flux.¹³⁷

Indeed, pre-ACA, health law already had embraced both the separate spheres and the concurrent regulatory models of federalism, but the separate spheres model remained dominant. For example, Medicare is a nationalist program that is funded and administrated almost entirely by the federal government. On the other hand, the private market is the means through which most of the population received their health insurance before reform (either buying it directly or through an employer), and the vast majority of private insurance regulation had been left almost entirely to the states.¹³⁸ In

135. See Timothy S. Jost & Mark A. Hall, *The Role of State Regulation in Consumer-Driven Health Care*, 31 AM. J.L. & MED. 395, 397 (2005).

136. See THE FRAGMENTATION OF U.S. HEALTH CARE: CAUSE AND SOLUTIONS 10-15 (Einer R. Elhauge ed., 2010); M. Gregg Bloche, *The Emergent Logic of Health Law*, 82 S. CAL. L. REV. 389, 397-99 (2009); Theodore W. Ruger, *Health Law’s Coherence Anxiety*, 96 GEO. L.J. 625, 628-29 (2008).

137. See HEALTH POLICY, FEDERALISM, AND THE AMERICAN STATES 25-28 (Robert F. Rich & William D. White eds., 1996); Scott L. Greer & Peter D. Jacobson, *Health Care Reform and Federalism*, 35 J. HEALTH POL. POL’Y & L. 203, 206-07 (2010).

138. The most significant pre-ACA intrusion into state regulation of insurance had been the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which, among other things, imposed a federal bar on preexisting-condition exclusions and required that group insurance enrollees have access to a nongroup policy when they leave the group. The Employee Retirement Income Security Act of 1974 (ERISA) also preempted state laws that relate to employee benefit plans, but did not fully preempt state regulation of health insurance. See Peter D. Jacobson, *The Role of ERISA Preemption in Health Reform: Opportunities and Limits*, O’NEILL INST. FOR NAT’L & GLOBAL HEALTH L., <http://www.law>

between were the paradigmatic “cooperative federalism” programs, Medicaid and the State Children’s Health Insurance Program (SCHIP), both of which are state-federal partnerships.¹³⁹

2. *The ACA’s Five Uses of the State-Federal Relationship*

The ACA retains all of these approaches and combines them under the umbrella of a single statute. The result is a statute that uses the federal-state relationship in at least five different ways. Three of these mechanisms are ones with which we already are familiar: (1) federal-only implementation; (2) state-only implementation; and (3) classic cooperative federalism. These are the mechanisms that dominated the field pre-ACA, and the ACA continues to employ them. The Act retains the federal-only model in its provisions governing Medicare and the Veterans Administration Health System; it retains the state-only model in preserving numerous traditional areas of state dominance, such as doctor licensing;¹⁴⁰ and it retains and expands the classic cooperative federalism programs, Medicaid and SCHIP.

But the single term “cooperative federalism” does not seem nuanced enough to capture the additional ways in which the ACA uses concurrent administration. This is because the ACA appears to use the state-federal relationship as more than just a simple labor allocation device. The statute appears to deploy the relationship *strategically*—as a way to expand the federal

.georgetown.edu/oneillinstitute/national-health-law/legal-solutions-in-health-reform/Papers/ERISA.pdf (last visited Sept. 5, 2011).

139. See, e.g., Jerry L. Mashaw & Theodore R. Marmor, *The Case for Federalism and Health Care Reform*, 28 CONN. L. REV. 115, 123 (1995); Robert F. Rich, Cynthia L. Deye & Elizabeth Mazur, *The State Children’s Health Insurance Program: An Administrative Experiment in Federalism*, 2004 U. ILL. L. REV. 107, 109; *A Federal-State Partnership*, STATE COVERAGE INITIATIVES, <http://www.statecoverage.org/node/1422> (last visited Aug. 16, 2011). States participating in Medicaid receive federal matching funds in exchange for implementing a program that abides by federally established guidelines. These programs allowed for and expected state flexibility and variation. See KANT PATEL & MARK E. RUSHEFSKY, *HEALTH CARE POLITICS AND POLICY IN AMERICA* 77 (2006); Lawrence D. Brown & Michael S. Sparer, *Poor Program’s Progress: The Unanticipated Politics of Medicaid Policy*, 22 HEALTH AFFAIRS 31, 33 (2003); *A Federal-State Partnership*, *supra* (“These programs allow, to a certain extent, variation in eligibility levels, benefit structures, payment parameters, and breadth of optional populations covered.”).
140. The ACA does this by not regulating in those areas at all, or by expressly not preempting much of the existing state law in areas that it does cover. See, e.g., Patient Protection and Affordable Care Act of 2010, § 1321(d), Pub. L. No. 111-148, 124 Stat. 119, 187, *amended by* Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified at 42 U.S.C. § 18041) (subsection within new section on insurance exchanges entitled “no interference with state regulatory authority”).

presence into several key areas of traditional state control—and somewhat paradoxically, also *expressively*, as a way to acknowledge the states’ traditional authority over health insurance.¹⁴¹

I want to suggest several terms to capture these additional kinds of federalism-related moves: what I will call “parallel federalism”¹⁴² “field-claiming federalism,” and “hybrid federalism.” Some may see these moves as subsets of the general category of cooperative federalism, while others may prefer to understand them as something distinct, but either way they are relationships that are undertheorized.

a. Parallel Federalism as Both Boundary-Shifting and Federalism-Respecting

The “parallel federalism” model is an animal that has been seen elsewhere (often, for instance, in the environmental context, where it is sometimes referred to as “delegated program federalism” or conditional preemption¹⁴³). Generally, attention to this model has focused on how it empowers the states in the sense that, in many applications, the model seems designed to give the states “autonomy” because states can operate their own programs subject to federal guidelines. But, in truth, this “autonomy” exists only in the “soft-federalism” vein, because it comes at the grace of Congress. And, in fact, there is also a very real, but rarely emphasized, way in which these schemes might be used by Congress to entrench a national legislative agenda in an area of traditional state control.

Under parallel federalism schemes, the states are the default and preferred implementers of the new federal program, but there is a federal “fallback”: the federal government must operate these programs should states prove unable to do so or if they opt out. (This kind of statutory structure, in which states have a choice whether to participate, became increasingly commonplace after the

141. See Leonard, *supra* note 117, at 134-35.

142. HIPAA offered an earlier example of the parallel federalism model but on a much smaller scale. Len M. Nichols & Linda J. Blumberg, *A Different Kind of ‘New Federalism’? The Health Insurance Portability and Accountability Act of 1996*, 17 HEALTH AFFAIRS 3, 25-42 (1998) (“HIPAA allows states three broad implementation choices: (1) pass laws congruent with or stronger than the federal floor specified in HIPAA and enforce them using state agencies; (2) create an acceptable alternative mechanism for eligible persons in the individual market and enforce it with state agencies; or (3) decline to pass new laws or strengthen existing laws and leave enforcement of the HIPAA provisions directly to the federal government.”).

143. See R. Seth Davis, Note, *Conditional Preemption, Commandeering, and the Values of Cooperative Federalism: An Analysis of Section 216 of EPACT*, 108 COLUM. L. REV. 404, 413-15 (2008).

Supreme Court's opinion in *Printz v. United States*, which prohibited federal commandeering of state governments.)¹⁴⁴ The result is often two different systems—one set of state-run federal programs and one set of federal-run federal programs—operating in parallel but not both present or working together in any particular state.¹⁴⁵

In the ACA, parallel federalism appears most clearly in the provisions governing the temporary high-risk insurance pools¹⁴⁶ and the health insurance exchanges. The states are the statute's default implementers of both programs, but the federal government must be available to operate them if the states choose not to do so. And, in fact, two parallel systems already have emerged—one state, one federal—through the operationalization of the high-risk pool provisions: twenty-seven states are running their own high-risk pool programs, and the federal government is running the remainder.¹⁴⁷

Statutory schemes structured in this manner can be simultaneously federalism-respecting and boundary-shifting. For instance, in some states (depending on the implementation flexibility the federal oversight agency gives

144. 521 U.S. 898 (1997). There has been a long-running debate over whether these opt-out structures actually give the states a true choice whether to participate, but those considerations are beyond the scope of this project. See, e.g., Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459 (2003); Bulman-Pozen & Gerken, *supra* note 104, at 1295-1302. Some federal programs allow the states to satisfy their implementation duties by substituting their own state programs (provided they are equal to federal standards) rather than directly implementing the federal program. See Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967) (codified as amended at 21 U.S.C. §§ 601-695 (2006)); Occupational Safety and Health Act, 29 U.S.C. §§ 651-678; USDA FOOD SAFETY INSPECTION SERV., INSPECTION & GRADING OF MEAT AND POULTRY: WHAT ARE THE DIFFERENCES? (2008), http://www.fsis.usda.gov/PDF/Inspection_and_Grading_What_Are_the_Differences.pdf; Occupational Health and Safety Admin., *Frequently Asked Questions About State Occupational Health and Safety Programs*, DEP'T OF LABOR, <http://www.osha.gov/dcsp/osp/faq.html#oshaprogram> (last visited Oct. 19, 2011, 2:44 PM).

145. Of course, for parallel federalism to have this effect, the federal government needs to have the means to actually step in. Roderick Hills, for example, has described how California called the EPA's bluff in this manner when the state opted out of implementing a provision of the Clean Air Act in the 1970s. Hills, *supra* note 30, at 185 n.13 (noting that the "EPA immediately backed down because there was no conceivable way it could implement the plan without California's assistance and cooperation").

146. These are temporary coverage pools for hard-to-insure individuals that bridge the gap between the ACA's enactment and the implementation, beginning in 2014, of its new requirements on insurers, including the requirement that no person may be denied insurance coverage because of preexisting conditions.

147. See *Changes to the Pre-Existing Condition Insurance Plan in Your State*, HEALTHCARE.GOV (May 31, 2011), <http://www.healthcare.gov/news/factsheets/pcip05312011a.html>.

to state implementers), these schemes enable states to run federal programs rather independently, and in that sense reflect some of the traditional federalism values. At the same time, however, in those states that opt out of the federal program, the federal government steps in to take over what was often previously an area of state dominion (for example, health insurance) and does so in a more subtle way than taking over the entire system at once.¹⁴⁸

b. Field-Claiming Federalism

The “field claiming” concept was introduced in Part II in the context of encroachment, and denotes a set of small moves that announce the federal government’s entry into an area of traditional state authority. In the ACA, these moves manifest in both the parallel federalism provisions—because the federal government is operating a limited number of state insurance programs rather than taking over the entire system—and in areas in which the federal government is moving more incrementally into state territory. Here, one is directed to those sections of the Act that place obligations directly on insurance providers, such as requirements that insurers cannot deny coverage to persons with preexisting conditions, which is traditionally an area of state regulation. Also relevant are those sections that remove some preexisting state flexibility over Medicaid eligibility determinations, as are the many sections of the Act that contain federal pilot and demonstration programs in areas of historical state control (such as public health and medical malpractice). In each of these areas, the federal government does not take over entirely or federalize the whole field. Rather, in each case, Congress expressly left the state regulatory structures mostly intact, making explicit, for instance, that the states still control the domain of insurance regulation, except where state regulation conflicts with new federal requirements.

From a boundary-shifting perspective, however, the significance of these moves should not be understated. Even by doing so in a manner that seems respectful of preexisting state authority, these steps make clear that the federal government *can* regulate in these areas and that it is appropriate for the federal government to do so. By subtly opening the door, the federal government paves the way for further and more extensive regulation.

148. The so-called “mini” public option may have the same effect. Cf. Stuart M. Butler, *Why the Health Reform Wars Have Only Just Begun*, HERITAGE FOUND. 1 (July 6, 2010), http://thf_media.s3.amazonaws.com/2010/pdf/hl_1158.pdf (“The ‘OPM alternative’ to the public option, if it remains on the statute book, could lead to a far stronger public option than anyone thought possible. Employers and employees will soon wake up to the fact that the legislation will speed up the erosion of employer-based insurance.”).

c. Hybrid Federalism

It also is worth mentioning a third model of federalism that appears in the ACA, although its novelty and significance is not yet clear. Although not delineated in the statute, HHS's proposed regulations have offered the states what I will call a "hybrid federalism" model for the health insurance exchanges. Under this model—the details of which have yet to be outlined—the states may elect to operate the insurance exchanges but request that the federal government assume certain functions (functions that likely will include some administrative functions).¹⁴⁹ This model appears to be unprecedented in the health context, but how dramatically it ultimately will differ from other existing regulatory programs remains to be seen.

This hybrid model is difficult to classify within the federalism models that this Essay has outlined. In some respects, it appears to be of the classic cooperative federalism variety. In other respects, it seems designed to encourage state autonomy—it encourages states to take the lead in operating the exchanges by giving them the administrative help to make such leadership possible.¹⁵⁰ And, in still other respects, it appears to be a platform for the federal government to illustrate its superior capacity to administer a large health program, including its ability to take advantage of economies of scale.

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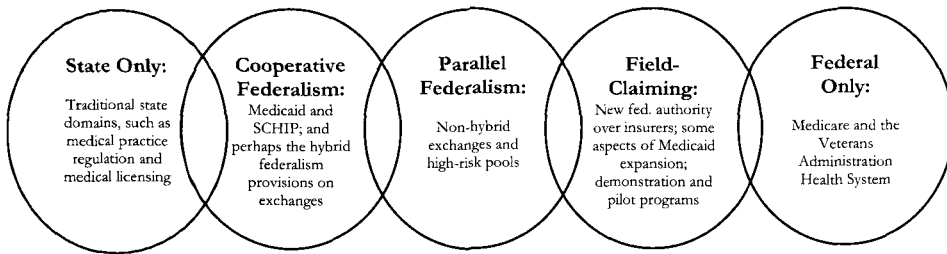
The following diagram offers a visual explanation of the ACA's spectrum of state implementation and how it relates to the federalism theories that have been explored thus far. The categories are depicted as overlapping to emphasize that sometimes they intersect, and that regardless, they are not likely to remain static over time:

149. See Patient Protection and Affordable Care Act; Exchanges and Qualified Health Plans, 76 Fed. Reg. 136 (July 11, 2011) (to be codified at 45 C.F.R. pts. 155 & 156); Chris Fleming, *Larsen Praises State Progress on Exchanges at HA Newsmakers Breakfast*, HEALTH AFFAIRS BLOG (July 21, 2011), <http://healthaffairs.org/blog/2011/07/21/larsen-praises-state-progress-on-exchanges-at-ha-newsmaker-breakfast>; *supra* note 125 and accompanying text.

150. See Fleming, *supra* note 149 (quoting the lead federal regulator on exchanges as saying that this "allows states to continue to play an active role in the development of exchanges, even if they are not ready to take on 100 percent of exchange functions," and noting that HHS has indicated that it will likely treat the implementation deadline flexibly to enable more states to participate).

Figure 1.

MULTIPLE THEORIES OF STATE-FEDERAL RELATIONS IN THE ACA



3. *Experimentation, Entrenchment, and Encroachment Through the ACA’s Federalisms*

Let us now consider in greater detail how the ACA’s various deployments of the states fit into the theories of national experimentation, entrenchment, and encroachment developed in Part II.

a. *States as Laboratories in the ACA*

The ACA’s embrace of a federally-led version of the traditional “states as laboratories” account seems easiest to substantiate. In the health reform context, scholars have long extolled the benefits of state experimentation in the most complex policy areas, such as institutional structure, cost containment, the value of evidence-based medicine, and the merits of bundled medical services. As it turns out, however, those experiments did not happen organically in sufficient number or variety, or with enough success, to accomplish reform.¹⁵¹

The ACA appears designed to remedy the dearth of successful experimentation. The statute’s explicit reference to state flexibility in implementation offers one example of the way in which the statute seems aimed at promoting interstate variation. Another is evident in the ACA’s large

151. Cf. Sara Rosenbaum, *Can States Pick Up the Health Reform Torch?*, NEW ENG. J. MED. 1-3 (Feb. 24, 2010), available at <http://healthpolicyandreform.nejm.org/?p=3088> (“States have had decades to enact broad reforms, yet the record has been one of futility despite enormous effort. . . . [T]he legislative proposals correctly frame health care as too large, complex, and essential to the nation’s well-being to relegate adequate coverage levels to the individual states any longer.”).

number of pilot and demonstration projects, some of which are to be run by states and others by private actors. These projects also exemplify how the federal government can use its power to galvanize an array of “laboratories” that extend even beyond the states.

One way to read the ACA, therefore, is as suggested in Part II: a use of national power to promote the assumed benefits of “federalism” that are not naturally occurring to the extent ideal. The ACA also illustrates how the federal government might seek to control the experimentation that it wishes to incentivize. As others have pointed out, had Congress wished to encourage a variety of state experimentation in health governance, it would have simply repealed ERISA as it relates to health plans. ERISA, which was enacted in 1974, has dramatically cabined state health-law experimentation because it preempts state efforts to regulate private employer-sponsored health plans.¹⁵² Instead, in the ACA, Congress left ERISA’s preemption essentially in place and enacted the new statute on top of it; in so doing, Congress limited the kinds of state innovation it purports to encourage mostly to those state experiments explicitly contemplated by the Act’s text (which amounts primarily to experiments centered around the new insurance-exchange concept).¹⁵³

b. States as National Entrenchers in the ACA

The ACA also readily fits the federalism-as-entrenchment model because it requires elaborate infrastructures to be created and implemented at the state and local levels. State agencies, state legislators, and state governors are investing significant time and capital in creating these new infrastructures, appointing new officials, enacting new regulations and authorizing statutes, and enrolling citizens. These efforts already have created a broad web of state and local implementers invested in the statute’s success. It also seems probable that, in at least some states, factors including legislative inertia, path dependence, and the political difficulties attendant to withdrawing popular

152. 29 U.S.C. § 1144(a) (2006). See Michael Serota & Michelle Singer, *Maintaining Healthy Laboratories of Experimentation: Federalism, Health Care Reform, and ERISA*, 99 CALIF. L. REV. 557, 595 (2011) (describing the “uncertainty” states and cities face concerning what kinds of local health reform experiments are permissible under ERISA).

153. Thanks to Jerry Mashaw for driving home this observation. The ACA also allows states to apply for “state innovation waivers” in 2017, which would enable states to move away from the insurance exchange model in favor of a different model provided the new model meets HHS’s criteria. It remains uncertain whether ERISA’s preemption provisions will limit the kinds of programs states can seek to create under the waiver provisions. See Mallory Jensen, *Is ERISA Preemption Superfluous in the New Age of Health Care Reform?*, 2011 COLUM. BUS. L. REV. 464 (discussing how waivers might work with ERISA after 2017).

benefits once they are awarded will create some stickiness for the reforms once they are implemented, even if they are ultimately not permanent at the federal level.¹⁵⁴ Indeed, one governor opposed to the ACA signed an executive order preventing state acceptance of any demonstration money for this very reason—the ability of small-scale demonstration projects to entrench the reforms they contain.¹⁵⁵

Also relevant in this regard is the fact that the Act's reliance on an experienced and professional corps of state health officials for implementation has created an interesting political dynamic observed by several commentators: at the same time that governors (and state attorneys general) in a number of states are publicly opposing the new reforms, their state bureaucracies are moving ahead (with the governors' approval) to implement them.¹⁵⁶ This entrenchment-during-opposition strategy is a predictable consequence of the ACA's implementation timeline: if the states do not have necessary preparations in place by January 2013, the federal government must run the insurance exchanges for them—an outcome many states (especially states in opposition) would not prefer.¹⁵⁷ Many commentators have remarked on the professionalism and commitment of the implementing health officials on the ground—even during their states' more public displays of “uncooperative federalism.” Thirty states already have taken some steps (either legislative or

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154. See, e.g., 2010 *State Implementation of Federal Health Reform (State Activity)*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=20231#Legislative> (last updated Jan. 5, 2011) (compiling list of implementation actions taken by states in 2010).
155. See Janet Adamy & Amy Merrick, *Minnesota Balks at Health-Law Funds*, WALL ST. J., Sept. 1, 2010, <http://online.wsj.com/article/SB10001424052748704421104575464133589351198.html> (describing Governor Tim Pawlenty's concern that those experiments “would speed the transition to federally controlled health care.”).
156. Colleen M. Grogan, *You Call It Public, I Call It Private, Let's Call the Whole Thing Off?*, 36 J. HEALTH POL. POL'Y & L. 401, 409 (2011) (noting that all of the states suing to strike down the ACA are implementing it); Sarah Kliff, *Minn. To Accept Health Care Cash*, POLITICO (Oct. 29, 2010, 2:50 PM), <http://www.politico.com/news/stories/1010/44384.html>; Kevin Sack, *Texas Battles Health Law Even as It Follows It*, N.Y. TIMES, July 27, 2010, <http://www.nytimes.com/2010/07/28/health/policy/28texas.html>. *But see* Kevin Sack, *Republicans Rise to Power, with Enmity for Health Law*, N.Y. TIMES, Nov. 18, 2010, <http://www.nytimes.com/2010/11/19/us/politics/19wisconsin.html> (noting Wisconsin's new Republican Governor-elect asked his predecessor to “temporarily freeze” implementation).
157. Cf. Patient Protection and Affordable Care Act; Exchanges and Qualified Health Plans, 76 Fed. Reg. 136 (July 11, 2011) (to be codified at 45 C.F.R. pts. 155 & 156) (noting HHS's willingness to consider extensions to the deadline).

executive) to implement the bill, and almost every state has applied for federal funds designated to help states establish infrastructures for implementation.¹⁵⁸

c. Nonstate, Nonfederal Implementers

It also is worth noting that states are not the only potential nonfederal entrenchers of the ACA. For example, entities that are quasi-governmental at best, such as the National Association of Insurance Commissioners (the nonprofit that represents the fifty state insurance regulators), and groups that are unquestionably private, such as the Patient-Centered Outcomes Research Institute, are given important regulatory roles.¹⁵⁹ Moreover, the ACA contains many demonstration projects and other incentives for private hospitals and

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158. Robert Pear & Kevin Sack, *Health Law Faces Threat of Undercut from Courts*, N.Y. TIMES, Nov. 26, 2010, <http://www.nytimes.com/2010/11/27/us/politics/27health.html> (quoting a White House official as saying, “I talk weekly to officials in states that have sued us, and in states that have not. I cannot tell the difference between them”); Timothy S. Jost, Professor, Wash. & Lee Univ. Sch. of Law, Remarks at Princeton University, Oct. 2010 (on file with author) (noting that states have been “proceeding on two tracks”).
159. The Patient-Centered Outcomes Research Institute is charged with directing significant government funding outside the government for comparative effectiveness research. Richard S. Saver, *Health Care Reform’s Wild Card: The Uncertain Effectiveness of Comparative Effectiveness Research*, 159 U. PA. L. REV. 2147 (2011). The NAIC is given an important regulatory role throughout the statute. See, e.g., Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1333(a), 124 Stat. 119, amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified at 42 U.S.C. § 18053) (“[T]he Secretary shall, in consultation with the National Association of Insurance Commissioners, issue regulations for the creation of [multi-state] health care choice compacts under which 2 or more States may enter into an agreement”); *id.* § 1341(b), 124 Stat. 209 (to be codified at 42 U.S.C. § 18061) (requiring HHS to act in consultation with the NAIC in developing standards related to state reinsurance programs); *id.* § 2701(a)(3), 124 Stat. 317 (to be codified at 42 U.S.C. § 300gg) (“The Secretary, in consultation with the National Association of Insurance Commissioners, shall define the permissible age bands [for insurance rating purposes].”); *id.* § 2718(c), 124 Stat. 155 (to be codified at 42 U.S.C. § 300gg-18) (requiring that, “subject to the certification of the Secretary, the National Association of Insurance Commissioners shall establish uniform definitions” for the calculation of the medical loss ratio). So, too, increasingly, other nongovernmental groups are taking the lead in drafting regulations and model laws with an eye toward their later adoption by state regulators. The National Academy of Social Insurance, for example, has been working on model laws for states to adopt related to the implementation of their exchanges. See *Developing Health Insurance Exchanges: Design Issues and a Model Statute for the States*, NAT’L ACAD. SOCIAL INS. (Aug. 2010), <http://www.nasi.org/research/2010/developing-health-insurance-exchanges-design-issues-model>.

medical practices—a feature that has galvanized interest by the private medical sector and led to early adoption of many of the statute’s reforms.¹⁶⁰

d. The ACA’s Parallel Federalism and Field-Claiming Moves as Boundary Shifting

Finally, the parallel federalism and field-claiming aspects of the statute are likely to have their own different set of effects relating to entrenchment and encroachment. As stated, the parallel federalism provisions to some extent give states the opportunity to independently administer their own insurance exchanges. But the centralizing forces in the federal government also surely stand to benefit from those provisions. The parallel federalism scheme that has emerged for the high-risk pools already demonstrates this effect: the federal government is now running about half of the states’ pools,¹⁶¹ including in some states in which the leadership has expressed opposition to a “federal takeover” of health care.¹⁶²

160. For example, the statute provides incentives for health providers to merge their practices into “Accountable Care Organizations” (new alliances for doctors and hospitals), and for hospitals and doctors to start “bundling” services. For some health providers, these grants have been incentivizing not only for the immediate influx of funds, but also because some view these demonstration programs as predictive of the federal government’s long-term health agenda. Many providers rushed to implement the reforms even before the regulations were released. See Dale Anderson, *What Do We Do Now?*, 63 TRUSTEE 23, 23 (2010) (“Boards and their CEOs are facing an incredibly challenging strategic choice: should they maintain the current business model or transform their institution into an accountable care organization.”); Robert Pear, *Consumer Risks Feared as Health Law Spurs Mergers*, N.Y. TIMES, Nov. 20, 2010, <http://www.nytimes.com/2010/11/21/health/policy/21health.html> (“[E]ight months into the new law there is a growing frenzy of mergers involving hospitals, clinics and doctor groups eager to share costs and savings, and cash in on the incentives.”); Bruce A. Johnson & Gerald A. Niederman, *Preparing for Health Care Reform: Implications and an Action Plan for Providers*, FAEGRE & BENSON LLP (May 25, 2010), <http://www.faegre.com/showarticle.aspx?Show=11436> (“By understanding the primary areas targeted by new health care legislation and focusing efforts accordingly, health care executives can position their organizations for the transformative changes that lie ahead.”). These early moves have become particularly interesting in light of the fact that the proposed ACO regulations, once they were released, met with enormous criticism from providers. See Jim Spencer & Jeremy Herb, *Mayo Opposes Key Health Reform Provision*, STAR TRIBUNE (Minn.), June 10, 2011, <http://www.startribune.com/business/123668729.html>; Letter from Am. Med. Grp. Ass’n, to Donald M. Berwick, Adm’r, Ctrs. for Medicare and Medicaid Servs. (May 11, 2011), available at <http://www.amga.org/Advocacy/MGAC/Letters/05112011.pdf>.

161. See *supra* note 147 and accompanying text.

162. *Some Republican States Opting Out of High Risk Health Insurance Pools*, KAISER HEALTH NEWS, May 2, 2010, <http://www.kaiserhealthnews.org/Daily-Reports/2010/May/01/high-risk-health-insurance-pools-hhs.aspx> (summarizing news reports from around the country

These provisions also may help turn the state resistance to health reform to the federal government's advantage. The more states that resist, and so choose not to operate their exchanges, the more entrenched the federal model will become—particularly in those very states opposing reform (because the ACA then requires the federal government to run the program in those states).¹⁶³ This possibility seems to have been recognized by several Republican governors who, despite their opposition to the statute, are now moving to implement it to keep the federal government at bay.¹⁶⁴

In fact, the most significant aspect of the ACA simply may be that it has brought the federal government squarely into state terrain. The statute already has worked a subtle, but massive, shift in the traditionally understood health-care federalism boundaries, removing the presumption that health insurance regulation is an area of only state control.¹⁶⁵ This shift comes precisely through the field-claiming moves discussed earlier—limited federal forays into insurance regulation, malpractice, public health, and other traditional state areas, as well as in the federal government takeover of a select number of state insurance systems through the parallel federalism provisions. Regardless of whether the statute is ultimately amended or even struck down (and recall that the challenges to the statute do not contest the federal government's ability to regulate the insurance industry), if, decades from now, our health care system looks more nationalist than it does today, many likely will point to the ACA as the turning point.

that discuss states' objections to the ACA's insurance provisions). Indeed, fourteen states suing to overturn the ACA are letting the federal government operate their high-risk pools. *Compare Changes to the Pre-Existing Condition Insurance Plan in Your State*, *supra* note 147 (listing the states opting out of high-risk pools), with Kevin Sack, *Oklahoma: State Will Challenge Health Care Law*, N.Y. TIMES, Jan. 7, 2011, http://www.nytimes.com/2011/01/08/us/o8brfs-STATEWILLCHA_BRF.html (listing the states suing), and *The States' Lawsuit Challenging the Constitutionality of the Health Care Reform Law*, OFFICE OF THE ATT'Y GEN. OF FLA., <http://www.healthcarelawsuit.us> (last visited Aug. 16, 2011).

163. See Sam Baker, *States Slow in Setting Up Central Piece of Obama Healthcare Law*, THE HILL: HEALTHWATCH (July 6, 2011, 5:40 AM), <http://thehill.com/blogs/healthwatch/health-reform-implementation/169761-states-lag-in-implementing-health-insurance-exchanges> (noting governors who have prevented state agencies from beginning implementation work risk a federal takeover of the state's programs despite "a strong desire to retain control of the program"); Pickert, *supra* note 12 ("In fact, such fierce opposition could itself backfire, inviting more federal control over the implementation of reform in states where leaders buck the ACA."). See generally Leonard, *supra* note 117, at 147 (providing background on how the federal government would take over implementation for states that opt out or do not make sufficient progress).
164. Sarah Kliff, *Republican Governors Move Ahead on Health Exchanges*, POLITICO (May. 29, 2011, 5:31 PM), <http://www.politico.com/news/stories/0511/55856.html>.
165. See *supra* note 112 and accompanying text.

IV. DOCTRINAL IMPLICATIONS

Having substantiated the issue, the harder question is where to go from here. Are there tools of statutory interpretation that can adequately capture the variety of ways in which Congress uses state and federal implementers together within federal statutes? What other kinds of doctrinal questions might be raised by intrastatutory federalism?

This final Part begins to explore these topics, but its goal is to frame an agenda rather than to provide definitive answers. The pages that follow focus mostly on questions that are relevant for statutory interpretation, but they also briefly discuss how the kinds of state and federal relationships being created by these statutes have given rise to questions that extend far beyond legislation doctrine. Unresolved constitutional questions about whether federal law can give state actors powers they do not have under their own state laws offer one important example. Another is whether state implementation schemes are “state law” or “federal law” for purposes of establishing federal question jurisdiction and deciding what law applies on judicial review. Importantly, many of these questions have begun to be raised in the courts, and the cases reveal how intrastatutory federalism presses the limits of a variety of doctrines in ways that are not yet fully understood.

A. Why Statutory Interpretation Doctrine?

Before exploring the ways in which statutory interpretation doctrine might accommodate state implementation, there is an obvious threshold question about whether statutory interpretation doctrine is the right lens through which to be making this inquiry in the first place. Functional arguments have a long pedigree in legal analyses of federalism, and so the idea that courts should instead rely on cues about congressional intent in the intrastatutory federalism context may seem a very different approach to determining the proper allocation of state and federal authority. Moreover, even assuming that congressional intent should be the paramount consideration, it may be the case that judicial intervention is not the most effective strategy for negotiating some of the complex interagency questions that arise. States have other ways, apart from enforcement through interpretive doctrines, to make their voices heard with respect to their duties during implementation. In particular, states can exert political leverage against the federal government—not only through their representatives in Congress,¹⁶⁶ but also through interstate lobbying groups,

¹⁶⁶ Wechsler, *supra* note 111.

such as the National Governors Association, or simply by refusing to implement federal programs that the federal government itself lacks the persons or the expertise to implement alone.¹⁶⁷ It seems possible that some of these behind-the-scenes interactions may be so political in nature as to be inappropriate for judicial review.¹⁶⁸

That said, intrastatutory federalism must nevertheless be understood as a problem of statutory interpretation. Once one concedes that the decision whether to use state implementers is in Congress's hands, that concession places any inquiries about the resulting statute's ambiguities squarely in the domain of statutory interpretation—a domain in which the importance of separation of powers and legislative supremacy has resulted in a modern approach to judicial interpretation of federal statutes that is centered on effectuating congressional intent, rather than utilizing external considerations to resolve ambiguities. This Congress-focused approach is the feature of statutory interpretation that distinguishes it most from common-law and constitutional-law methodologies.

At the same time, the choice between a functional approach and an interpretive approach to intrastatutory federalism is a false one in important ways. Statutory interpretation doctrine itself often incorporates functional considerations through its emphasis on congressional purpose. A judge considering a statute's purpose often will ask the question, "Why did Congress legislate in the first place?" That question typically gives rise to a functional inquiry, although admittedly one seen through the eyes of Congress. I will return to this role for purpose (and functionalism) below, but the point is simply that the familiar functional arguments for and against federalism are not necessarily cast aside in a legislation-based approach to intrastatutory federalism; they just must be linked to Congress.

It also is the case that politicking always plays a role in the world of legislation. But this is as true of how federal agencies operate alone as it is of how state and federal agencies negotiate with one another, and the utility of politics as a separate strategy does not mean that legal doctrine does not have its own productive role. Recent scholarship has illustrated that states have had inconsistent success in making their interests heard in political negotiations

167. See JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* (2009) (discussing the many ways states influence federal lawmaking); Hills, *supra* note 28, at 185 n.13 (discussing California's effective threat to opt out of implementing certain Clean Air Act provisions regarding transportation).

168. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (laying out the political question doctrine).

with federal agencies,¹⁶⁹ a fact that also raises questions about politics as the exclusive venue for negotiating these interagency relationships.¹⁷⁰

B. Which Statutory Interpretation Doctrines?

As discussed, the primary vehicle that courts have used to answer questions about statutory ambiguities related both to federalism and to agency statutory interpretation has been through default presumptions—the federalism canons (federalism/preemption) and the agency deference canons (*Chevron*, *Mead*, *Skidmore*, etc.). This Section begins to explore whether either set of canons, or any canon for that matter, is capacious enough to accommodate the role of nonfederal implementers or whether, alternatively, other interpretive methods, such as textual or purposive inquiries, might be of greater utility.

1. The Federalism Canons and the Problem of Broad Default Rules

At first glance, the federalism canons lend themselves well to an assimilation of state implementation of federal law. These canons already effectuate norms that do not rise to the formal constitutional level.¹⁷¹ Expanding the federalism canons to fit the intrastatutory federalism paradigm—for example, creating a default presumption that, unless Congress is clear, state implementers of federal law should have leeway to fill statutory gaps as they see fit—is not significantly different from other ways in which statutory interpretation doctrine already uses federalism-based default rules to reinforce “soft” federalism norms.

The major problem with this extension, however, is that it assumes, in all cases, that traditional “federalism” values are the ones that interpreters should seek to protect. In other words, it assumes that in all cases, statutes with state implementers should be construed with an eye toward state autonomy. But if one accepts the argument made in Parts II and III that “federalism” performs different functions in different statutes, it is not evident that the state-autonomy version of the federalism canons should be the default presumption in every case. Where Congress uses state implementation to galvanize

169. See Sharkey, *supra* note 31.

170. Cf. Ryan, *supra* note 30 (arguing that the focus should be on whether states have equal bargaining power in these behind-the-scenes negotiations, rather than on federalism doctrines).

171. Both the federalism canon and the presumption against preemption do not stop the federal government from legislating in areas that it cannot constitutionally regulate; rather, those rules simply ask the federal government to speak clearly when it does regulate.

experimentation or to serve other traditional federalism values, such a presumption might be appropriate. But perhaps it would be less so where Congress uses state implementation for purposes of federal encroachment.

This problem of the federalism canons' overbreadth also is reflected in the rather uniform way that both canons currently treat the concept of the "state." As Roderick Hills has pointed out, the term "state" refers to a wide array of different actors, ranging from state legislatures, to independently elected insurance commissioners, to local expert agencies—all of which have different loyalties and levels of accountability.¹⁷² Moreover, sometimes states act in concert with other states for the federal statutory implementation process—and that cooperation itself takes a variety of forms.¹⁷³ There may be arguments justifying different preferences for state autonomy in federal statutory implementation depending on what the "state" is in any given context.

2. *The Administrative Law Canons: Mead as a Vehicle for a Statute-Specific Approach to State and Federal Agency Deference*

The same overbreadth concerns extend to a single default administrative-deference presumption in either direction for state or federal agencies in the intrastatutory federalism context. Congress sometimes delegates to state agencies alone,¹⁷⁴ but it also sometimes delegates to state and federal agencies together, and the respective roles of the agencies vary across statutes. In some statutes, the federal agency simply may be administering massive federal-to-state financial flows, but states may have the clear lead policy role; in other statutes, the federal agency may have an important, often dominant, policymaking role of its own. And in some statutes, like the ACA, several different points on the spectrum may simultaneously be in play.¹⁷⁵ A deference

172. See 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).

173. See generally NUGENT, *supra* note 167 (detailing the variety of ways in which states cooperate and exert leverage).

174. That kind of direct delegation has been identified by others in the environmental and telecommunications law contexts. See Ryan, *supra* note 30, at 33-34 (environmental); Weiser, *supra* note 16 (telecommunications); see also *infra* note 223 and accompanying text (discussing pending House bill that would prevent EPA from second-guessing certain regulatory decisions of state agencies under the Clean Water Act).

175. And, in fact, federal agencies do not always use all the interpretive power that they have. In the health reform context, for example, HHS surely will not be able to interpret every ambiguous term in the ACA—the legislation is too vast and time is too short—and so there necessarily will be opportunities for the state implementers to interpret within the interstices of federal administrative interpretation. In other words, the questions this Essay

theory designed to give real effect to these different roles would have to find a way to accommodate the broad spectrum of regulatory scenarios, and so would have to be more nuanced than a unidirectional presumption.

Notably, in the context of the administrative-deference canons, statutory interpretation already has moved somewhat in this direction. *Mead*, as already discussed, is an effort to constrain the breadth of *Chevron* by looking for more specific cues than mere statutory ambiguity about whether Congress intended the federal agency to have broad interpretive leeway. Others have pointed out that *Mead* lends itself well to the problem of whether *Chevron* applies to overlapping delegations to multiple federal agencies.¹⁷⁶ An extension of this principle, or something like it, to include state implementers—that is, to take into account the specific ways that Congress utilizes state implementers to determine the level of deference the various concurrent implementers should receive—may not be a radically different approach than the one currently in use.

Indeed, a *Mead*-like approach may be the easiest way to incorporate the role of state implementers into familiar interpretive doctrines. A more difficult question is whether, regardless of congressional intent to delegate (the focus in *Mead*), there may be additional reasons external to ordinary statutory interpretation to constrain broad deference to state or federal implementers when they are given concurrent authority.

a. Potential Constraints on Chevron for Federal Agencies

It may be the case, for example, that, even where courts can discern a congressional intent to place federal agencies in the lead implementation role, there are external, federalism-driven reasons to constrain *Chevron* for federal agencies in the intrastatutory federalism context. There are a number of analogous situations in which scholars and judges have questioned whether *Chevron*'s broad transfer of interpretive authority from courts to federal agencies should be tempered due to federalism or other structural considerations.

For instance, some scholars have argued that federal agencies should not be given *Chevron* deference over interpretive matters relating to their own jurisdiction. A similar notion finds its expression in the so-called “major questions” rule, an inconsistently applied presumption that federal agencies

is asking about how state implementers' federal statutory interpretations are to be judged may be unavoidable even when there is a federal agency in the picture, and even when we assume the federal agency has interpretive primacy.

176. See *supra* notes 60–64 and accompanying text.

should receive less or no deference concerning issues that “g[o] to the heart of the regulatory scheme”¹⁷⁷—which courts already have used to reject federal agency statutory interpretations that extend federal power into areas of traditional state authority.¹⁷⁸ And perhaps the most prominent example comes from administrative preemption, a context in which administrative law scholars have disputed at great length whether federal agencies should be accorded *Chevron* deference for decisions to preempt state law through their own regulations.¹⁷⁹

Underlying all of these arguments are constitutionally inspired concerns about the propriety of such delegations; specifically, whether federal agencies are sufficiently expert, neutral, or accountable when it comes to decisions involving major policy questions or the allocation of state and federal responsibility. Scholars who have considered these questions have argued that federalism-related line-drawing is not within the purview of federal agency expertise,¹⁸⁰ or that such decisions are simply too important—too “constitutive

177. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703-08 (1995); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228-34 (1994); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 159-61 (2000)). Another related example comes from recent arguments that federal agencies should not be given so-called *Auer* deference over their own vague regulations. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (questioning *Auer* and arguing that “deferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government”).

178. See *American Bar Ass’n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), in which the court held that, because “[Congress] does not . . . hide elephants in mouseholes,” *id.* at 467 (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)), the court would refuse to construe the Federal Trade Commission’s authority under the Gramm-Leach-Bliley Financial Modernization Act to include authority over the practice of law because that area has been traditionally an area of state regulation. Interestingly, the court applied the federalism canon to the case as part of the *Chevron* “step two” inquiry, even though the states were not co-administrators of the Act, stating:

We see no reason why the [federalism] reasoning should not apply in the present context. The states have regulated the practice of law throughout the history of the country; the federal government has not. This is not to conclude that the federal government could not do so. We simply conclude that it is not reasonable for an agency to decide that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous.

Id. at 472.

179. See *supra* note 31.

180. See, e.g., Mendelson, *supra* note 31, at 740-41 (“Some scholars have argued that granting *Chevron* deference to agency interpretations regarding preemption is inappropriate because

of our governmental structure”¹⁸¹ – to leave in agency hands. And in fact, there is some evidence that Congress is becoming aware of these concerns, at least in the context of administrative preemption. The recent Dodd-Frank financial reform legislation explicitly takes the position that federal agency decisions that preempt state consumer financial laws should receive the lesser, *Skidmore* level of deference, rather than *Chevron*.¹⁸²

Whether similar considerations might justify a limitation on *Chevron*’s breadth for federal agencies in the intrastatutory federalism context cannot be fully resolved here. But it is worth raising the question whether, even where the federal agency is unquestionably placed in a lead role, the concurrent inclusion of a role for the states might raise the stakes from the ordinary deference inquiry to one with heightened structural, even quasi-constitutional, significance.

b. A *Chevron* for the States

On the reverse side, we must ask whether there might ever be a situation in which a “*Chevron* for the states,” or something like it, would be justified. The lesser level of deference accorded by *Skidmore* may seem more obviously appropriate because of an intuition that the common justifications for *Chevron* do not fit well when states are the implementers. And in fact, as discussed below, a few lower federal courts appear to be giving state implementers *Skidmore* deference already.¹⁸³

important questions of state sovereignty would be resolved by institutions that are not properly politically accountable.”).

181. Young, *supra* note 38, at 432. A separate group of scholars is more generous toward federal agencies but advocates procedural mechanisms to ensure that agencies take state interests into account when they make decisions about the balance of power. See Metzger, *supra* note 31; Sharkey, *supra* note 31, at 2186-89.
182. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 1044(a), Pub L. No. 111-203, 124 Stat. 1376, 2014-15 (2010) (to be codified at 12 U.S.C. § 5551) (stating that the Comptroller of the Currency’s decision to preempt a state consumer financial law “shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision”); Sharkey, *supra* note 19, at 66 (describing this as a “*Skidmore* standard”).
183. See *infra* notes 209-213 and accompanying text. In the administrative preemption context, Young similarly suggests the possibility of *Skidmore* deference to states. He argues that deference to state entities may feel “unnatural” but is “not unheard of.” Young, *supra* note 31, at 893; see also *id.* n.129 (noting that federal courts defer to state interpretations of state

This intuition about the degree to which the common justifications for *Chevron* deference translate to state delegates, however, merits further pressure. To the extent that one reads *Mead* as a statement that *Chevron* deference is justified by congressional choice rather than by any of the constitutional or functional justifications that previously have been given for *Chevron*, then there are situations in which a *Chevron*-type rule for state agencies may be appropriate. The most obvious examples are direct delegations to states or broad federal grants in which the given federal agency's role is limited mostly to administering the federal-to-state financial flows.

Some of the other traditional *Chevron* justifications also comfortably fit in the state-implementation context. Most notably, those *Chevron* justifications based on federal agency expertise translate well to state agencies, particularly when states are asked to implement federal laws concerning traditional areas of state control. The other central bases for *Chevron*, however—in particular, arguments for *Chevron* grounded in theories of federal agency accountability and federal law uniformity—translate much less clearly to the state context.

i. Accountability

Consider, first, accountability. *Chevron*'s language about federal administrative accountability posits accountability of at least two different stripes: not only accountability to Congress and the Executive Branch, but also accountability to the public (in the democratic sense).¹⁸⁴ With respect to accountability to the federal government, it certainly is the case that state agencies (and legislators, governors, and all the other state actors who implement federal statutes) are generally not accountable to Congress or the President in the same way as are federal agencies.¹⁸⁵ There are also many different types of state actors—actors that not only often have different principals because of the lack of a unitary executive in most states, but also that each have different relationships with the federal government. Thus, even to the extent that the federal political process creates some accountability between certain state actors and the federal government, it is likely not the case, for example, that a U.S. senator from Alabama has the same relationship with Alabama's independently elected insurance commissioner as she does with its

law, and in the habeas context, federal courts must defer to some degree to state-court applications of federal law).

¹⁸⁴ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

¹⁸⁵ *Cf.* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (explaining the mechanisms that enhance Congress's ability to monitor federal agencies).

governor. Nor is it necessarily the case that a local mayor will have the same relationship with and loyalties to the federal Medicaid program as will a state Medicaid agency's professional administrators.¹⁸⁶

At the same time, however, there is a political economy story about state accountability to the federal government that deserves some attention. In eras of divided government, it has been argued that congressional delegations to state implementers increase¹⁸⁷—a fact that may indicate that members of the party opposed to the President view their home-state implementers as more trustworthy implementers than the President's own appointees. As such, there may be limited circumstances in which accountability through the political parties from Congress down to the states works in ways that are more analogous to the federal-agency accountability story than one might expect.¹⁸⁸

The public accountability question is more complex. Of course, state governments are subject to democratic elections (as are most state courts). But it is not clear that state citizenries are capable of properly discerning whom to hold accountable in an intrastatutory federalist scheme. A state's citizenry not only has to appreciate when its state, and not the federal government, is the accountable implementer, but it must also determine *which electable entity within each state* is responsible. Because most states do not have a unitary executive, some state agencies are accountable to the governor while others, like many state insurance departments or attorneys general's offices, are accountable to their own principals, who are independently elected.

186. For a discussion of the idea that professionalized specialty agencies may have stronger loyalties to the federal programs they administer than they have to local interests, see PETERSON ET AL., *supra* note 102, at 214. Other state actors, however, do not always administer federal programs with national interests—as opposed to state interests and the officials' own interest in reelection—in mind. *See id.* (describing Baltimore's use of "federal programs to advance local political and economic needs, not nationally defined aims and objectives"); Hills, *supra* note 102, at 1227.

187. *See* EPSTEIN & O'HALLORAN, *supra* note 105, at 154, 157; *cf.* George A. Krause & Ann O'M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. ECON. & ORG. 359 (2005) (arguing that party congruence between national and state levels leads to more decentralization, but finding less conclusive evidence with regard to delegations during times of divided government).

188. *See* Larry D. Kramer, *Putting the Politics Back into the Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278-88 (2000).

ii. Uniformity

State implementation of federal law also stands in great tension with the uniformity norm that underlies *Chevron*.¹⁸⁹ Indeed, the very reason that Congress delegates to the states in many circumstances is to produce policy *disuniformity*—that is, to produce federal law that may mean different things in different states. To effectuate that goal, extending interpretive deference to state implementers therefore would have to be justified on an entirely different principle from federal law uniformity.¹⁹⁰ This does not mean that such an extension is inappropriate—we already tolerate much more interstate variation in the meaning of federal law than is often acknowledged—but it does mean that we cannot use the same kind of justification that we use in the case of deference to federal agencies to support it.

iii. Institutional Differences Between State and Federal Agencies

Finally, once we start to pay attention to state agency statutory interpretation, it becomes evident that there has been almost no scholarly work examining how state agencies themselves interpret statutes. There are stark institutional differences between state and federal agencies that may affect how each goes about statutory interpretation.¹⁹¹ One difference, as noted, is the lack

189. See, e.g., Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (arguing that *Chevron* minimizes diverging lower-court interpretations “and thus enhances the probability of uniform national administration of the laws”).

190. The presumption against preemption is a doctrine that favors disuniformity, as is the widespread use of statutory waivers, mechanisms that grant implementing states the ability to opt out of federal requirements and to construct their own programs. See NUGENT, *supra* note 167, at 189-93 (discussing waivers generally); Robert F. Rich & William D. White, *Federalism and Health Care Policy*, 1998 U. ILL. L. REV. 861, 872-76 (discussing state activism in relation to Medicaid waivers); Judith M. Rosenberg & David T. Zaring, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545 (1995); 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) (analyzing the role of Medicaid demonstration waivers in providing for policy experimentation). Federal law (both statutory and common law) also often incorporates elements of state law, a fact which leads to *de facto* interstate variation in the meaning of federal law across states. See Mishkin, *supra* note 14 (discussing when federal courts, in choosing a rule of decision to fill the interstices of federal law, should insist on uniformity and when instead they should incorporate state law as the rule of decision).

191. Cf. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 516-21 (2005) (illustrating how institutional considerations might result in different interpretive practices by federal

of a unitary executive in most states. Another is the fact that many state constitutions have strong nondelegation provisions,¹⁹² which have led about a third of state courts to reject the idea of agency deference for state statutory interpretations entirely.¹⁹³ In those states, the courts apply *de novo* review to all questions of statutory interpretation involving state agencies.¹⁹⁴ Some state agencies do not even have rulemaking authority; and so for federal statutes requiring actions from those kinds of state agencies, the state legislature must act, and that difference—between a state agency’s regulation and a state legislature’s laws—may entirely change the way that courts view the authority of the state implementing action.

It is hard to imagine that structural differences of this magnitude do not have an impact on how state actors go about implementing federal statutes¹⁹⁵ or on how those moves are perceived by courts. Such differences deserve sustained scholarly attention, especially if one begins to consider whether at least some state interpretations deserve interpretive deference.

* * *

We are left in murky territory. Certainly, at least some federal statutory delegations to the states pose a greater risk of uncooperative administration than delegations to federal agencies. That risk of state resistance is undoubtedly important from a “federalism” perspective. The ability of states to opt out of administering federal programs or to administer them disloyally illustrates one kind of “autonomy” that states still retain, and is something that significantly distinguishes them from federal agencies.

agencies and federal courts). State courts and state agencies likely have their own set of interpretive differences as well.

192. See Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federal Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1354-63 (2005).
193. D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 374 (2009).
194. Another third of states have adopted a *Chevron* analogue for state agency interpretations of state law, and the remaining third employ something in between. See Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105, 1109 (2008) (“Existing state models range along a continuum from express adoption of the *Chevron* doctrine to outright rejection of *Chevron*’s applicability.”).
195. For example, it seems possible that, in states with different delegation and deference norms, state agencies might act differently. State agencies accustomed to receiving deference for their state statutory interpretations might be more aggressive and creative in their federal statutory interpretations than state agencies accustomed to receiving no deference at all.

But that same risk also may undermine congressional-intent-based arguments to give state implementers more interpretive leeway over federal law. That is, a lesser level of deference for the states may be more appropriate than *Chevron* not for the reasons articulated in *Mead* (reasons related to congressional intent), but rather, *despite Mead*, because constitutionally derived concerns about delegation and accountability suggest that courts should not transfer—or allow Congress to transfer—ultimate interpretive authority (as *Chevron* does) to state implementers.

But a “*Skidmore* for the states” raises a different set of problems. Most importantly, any lesser level of deference that leaves ultimate interpretive authority with the courts rather than with state administrators will likely result in far more interpretive uniformity than Congress may have intended when it designed the intrafederalist statutory scheme in the first place. That is, courts may be more reluctant to themselves interpret federal law to mean different things in different implementing states than they might be to defer to each state’s own implementing interpretations.

c. What About All of the Other Nonfederal Implementers?

Finally, contemplating an extension of either the federalism canons or something like a *Chevron* for the states raises the inevitable question of deference to all of the other nonfederal, nonstate implementers that Congress utilizes. What really exists is a wide *continuum* of federal delegations, along which the states sit closer to the federal government than many other delegates, including cities, nonprofit entities, and private, for-profit implementers.¹⁹⁶

There may be good justifications for giving state implementers privileged status over other nonfederal implementers. The states’ constitutional status, their representation in Congress, their local democratic accountability, and our already-existing legal propensity to construct doctrines to highlight their importance¹⁹⁷ are all ways in which states differ from most other nonfederal

196. For just a few examples of this vast scholarship, see, for example, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Eleanor D. Kinney, *Rule and Policy Making Under Health Reform*, 47 ADMIN. L. REV. 403 (1995) (detailing the importance of private implementers to the health care sector); and Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

197. For example, the idea that the states might deserve unique treatment in this context finds a possible parallel in the analogous concept of the special standing doctrine that the Supreme Court recently crafted for the states. See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (articulating a “special solicitude” for state standing).

actors. However, for the doctrinal account to be a coherent one, these other delegations must be explored.

3. *The Continuing Utility of the Canons*

By now it should be clear that, with respect to both the federalism canons and the agency deference canons, extending them to the intrastatutory federalism context leads to both under- and overinclusivity problems. A strong default rule (or clear statement rule) giving state implementers interpretive leeway is overinclusive in that it obscures the fact that Congress does not always use state implementers for traditional “federalism” reasons, and also the fact that not all state implementers are the same, equally accountable, or equally empowered. A default rule going in the other direction suffers from the opposite shortcomings—overlooking the fact that Congress’s decision to use state implementers may have a more nationalizing goal.

It is not the purpose of this Essay to advocate for one overarching rule—and, in fact, the idea that one rule could fit all of the different ways that intrastatutory federalism plays out is somewhat antithetical to this project. But this inquiry exposes some important limitations on how useful the canons can be to questions like these. The canons’ broad presumptions seem ill-suited to the variety of statutory design strategies that Congress utilizes. At a minimum, a *range* of presumptions seems required to respond to all of the different kinds of federalism (and everything else) in statutory design.

Alternatively, it may be that, even though the canons have been our primary tool for dealing with these kinds of questions, different methods would be of more assistance. For example, the other familiar tools of statutory interpretation—text, statutory structure, legislative history, and evidence of purpose—might be more helpful in distinguishing among the different kinds of intrastatutory federalism than default rules analogous to the ones we already have. Legislative history or other considerations of statutory purpose, for instance, might illuminate what drove Congress to prefer state implementation in the first place, an inquiry that also would admit more functional considerations than a canon-based inquiry.

Close textual analysis also could reveal important differences across statutes, perhaps highlighting federalism- or nationalism-related statutory “cues.” For example, the ACA mentions “state flexibility” six times in the

context of the insurance exchanges;¹⁹⁸ the Clean Air Act similarly sets forth that the states shall have the “primary responsibility” over air quality standards.¹⁹⁹ Phrases of this nature can assist interpreters in determining how much leeway state implementers should have.

Still another familiar textual device is close examination of statutory structure. In both the ACA and the Clean Air Act, for example, there are certain provisions that indicate broad delegations to the lead federal agency, and others that appear designed to require the federal agency to approve state action if certain specified criteria are met, a structural difference that may indicate congressional intent to confer less federal administrative leeway in the latter situation than in the former. These differences, too, might assist interpreters. The U.S. Supreme Court, at least in the context of the Clean Air Act, has on occasion proved itself capable of discerning such differences,²⁰⁰ but it has not generally extended this approach to other contexts.

Of course, one could combine this kind of statute-specific inquiry with the familiar *Mead-Chevron-Skidmore* analysis. Indeed, this type of investigation might be exactly what a *Mead*-inspired doctrine for intrastatutory federalism should look like. *Mead* asks courts to take a closer look at how Congress utilized the agencies in the statutes at hand, and a close textual, structural, and purposive inquiry may be the best way of doing so.

That said, there are real questions about whether courts would be willing, or even able, to do this kind of detailed investigation. Modern statutes are long and exceedingly complex. Institutional competence questions loom large and, in fact, judicial unwillingness or inability to engage in inquiries of this nature is one important reason why we have the default presumptions embodied by the

198. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, §§ 1321, 1331, 1412, 124 Stat. 119, 186, 199, 231, amended by Health Care and Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (to be codified at 42 U.S.C. §§ 18041, 18051, 18082).

199. Clean Air Act § 107(a), 42 U.S.C. § 7407(a) (2006) (“Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.”).

200. See, e.g., *Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976) (noting that the Clean Air Act “sets out eight criteria that an implementation plan must satisfy” and holding that EPA cannot add to those requirements). The ACA has a similar structure in its provision concerning HHS approval of state applications for waivers out of the insurance exchange requirement. Affordable Care Act § 1332, 124 Stat. at 203 (to be codified at 42 U.S.C. § 18052).

canons in the first place.²⁰¹ As a result, we are left caught in the middle of the kind of context-specific inquiry that seems appropriate here and the need for interpretive guidelines that courts actually can use. This tension cannot be resolved in this Essay, but, notably, it may implicate the continuing utility of the canons in other contexts as well. In areas ranging from preemption to ordinary policy choices, the same problems of underinclusive and overinclusive default presumptions are likely to manifest once one recognizes the varied nature of the statutory landscape.²⁰² An important and overarching question for statutory interpretation, then, is what, if any, useful role these broad default presumptions can continue to play.

C. Practical Applications

Although I have fleshed out most of the Essay's considerations at a high level of abstraction, they are not merely academic. Questions about precisely what kinds of relationships are created in intrafederalist statutory schemes have already started coming up in the courts. These cases reveal additional doctrinal gaps that extend well beyond questions of interpretation and also implicate fundamental understandings of state-federal relations, including questions concerning federal power over state actors and federal court jurisdiction.

1. Tensions Between Chevron and the Federalism Presumptions

One potential problem for a canon-based approach to intrastatutory federalism is that the federalism and the agency deference canons, as currently conceived, are in deep tension with one another. The tension arises from the

201. There might be other ways of going about this inquiry that could give courts more assistance. For example, new typologies that break up the broad "cooperative-federalism" category might be constructed to help courts differentiate among the uses of state implementation, which in turn would inform their *Chevron-Mead* determinations. Alternatively, courts could abandon all hope of discerning congressional intent and simply adopt a bright-line default rule with the goal of forcing Congress to speak more clearly. Hills has proposed such a rule in the preemption context, *see supra* note 31, but thus far we have little evidence that Congress responds to or legislates against the background of such rules. *See* Victoria F. Nourse & Jane Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600-01 (2002). The assumption of this Essay is that political considerations are likely to result in the details of these delegations being left ambiguous, so some interpretive doctrine is necessary.

202. Thomas Merrill already has made a similar suggestion in the preemption context for the default rules for different statutory schemes. *See* Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION, *supra* note 30, at 166.

fact that any potential use of the federalism canons to give state implementers federal statutory policymaking leeway may come into direct conflict with *Chevron* if a federal agency also is given authority to interpret the statute. *Chevron* might counsel an entirely different result—deference to the federal agency’s statutory interpretation, regardless of how that affects state implementation preferences.

This tension already has been observed in several lower federal courts²⁰³ in the context of whether states accepting federal funds for federal statutory implementation can have their policymaking leeway restricted by federal agency regulations. The Supreme Court, in *Pennhurst State School and Hospital v. Halderman*, crafted a version of the federalism canon that counsels courts to construe ambiguities in federal spending statutes in favor of the states,²⁰⁴ and proceeds from the assumption that states should not be bound by conditions of which they were unaware when they agreed to administer a federal program. As Peter Smith has noted, however, federal agencies routinely administer these federal spending statutes, and often use their interpretive tools to fill in statutory ambiguities after the statute has been enacted. In such cases, *Chevron* may come into conflict with *Pennhurst*, if later-coming agency regulations impose restrictions on the states that were not evident from the statutory text.²⁰⁵

The Fourth Circuit, in a case concerning interpretation of the federal Individuals with Disabilities Education Act, relied on *Pennhurst* and the federalism canon to hold that federal agencies could not so constrain this type of state “autonomy” to implement federal law.²⁰⁶ Other federal courts have come out the other way.²⁰⁷ In one recent case, which involved a dispute between a state and a federal agency over the definition of “case management services” in the Medicaid statute, a Massachusetts district court deferred to the federal agency but noted that “a tension is ripening between our administrative

203. Two scholars have also discussed it. See Engstrom, *supra* note 45, at 1216; Smith, *supra* note 45.

204. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”).

205. Smith, *supra* note 45, at 1189 (“Does congressional ambiguity in defining the terms of the condition foreclose, under the *Pennhurst* doctrine, the court from considering the agency’s interpretation? Or should the court apply traditional canons of statutory construction—including deference to agency interpretations of ambiguous statutory provisions—to determine if the agency’s interpretation can bind the state grant recipient?”).

206. *Va. Dep’t of Educ. v. Riley*, 106 F.3d 559, 561-72 (4th Cir. 1997) (en banc), *superseded by statute*, Amendments to the Individuals with Disabilities Education Act of 1997 § 612, Pub. L. No. 105-17, 111 Stat. 37, 60-72 (codified as amended at 20 U.S.C. § 1412 (2006)).

207. See Engstrom, *supra* note 45, at 1216 (discussing cases).

state and a state's sovereign power to accept conditions imposed upon it through federal spending programs. . . . *Pennhurst's* clear-statement requirement and *Chevron's* deferential presumption are thus at odds with each other."²⁰⁸

2. Courts That Have Considered a *Chevron* for the States

In another set of cases, the question of whether federal courts should accord state implementers *Chevron* deference has explicitly been raised. Many courts have refused to give *Chevron* deference to state implementers of federal statutes—including the Medicaid Act, the federal Telecommunications Act,²⁰⁹ and the federal housing statutes—on the ground that the traditional *Chevron* justifications do not apply to the states. The Ninth Circuit, for example, has argued that “*Chevron's* policy underpinnings emphasize . . . the need for coherent and uniform construction of federal law nationwide. Those considerations are not apt to a state agency.”²¹⁰ The Fourth Circuit, in contrast, has applied *Skidmore*-type deference to state-agency federal statutory interpretations on the justification that, in such statutes, “States’ continuing exercise of authority . . . forms part of a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment and have the freedom to do so.”²¹¹ The Third Circuit has applied something like a *Mead* inquiry to this question, looking closely at the federal statute to determine the respective authority given to state and federal

208. *Massachusetts v. Sebelius*, 701 F. Supp. 2d 182, 190 (D. Mass. 2010). In this case, it was unclear whether the court applied *Chevron* or *Skidmore* deference. Note that, because *Pennhurst* only applies to conditions on federal spending, the tension between the canons has been mostly limited to that context, but would arise often if a new version of the federalism canon were developed to effectuate a more general presumption of state interpretive leeway. Cf. *Virginia v. EPA*, 108 F.3d 1397, 1409-10 (D.C. Cir. 1997) (refusing to construe ambiguous statutory language to give the EPA authority to condition approval of state implementation plans on the use of particular control measures, and citing the federalism canon for the proposition that “[w]e would have to see much clearer language to believe a statute allowed a federal agency to intrude so deeply into state political processes”).

209. See Weiser, *supra* note 16.

210. *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997) (quoting *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989)) (brackets in original deleted).

211. *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 449 (4th Cir. 2007); see also *Clark v. Alexander*, 85 F.3d 146 (4th Cir. 1996) (giving deference to a local authority).

implementers.²¹² Still other federal courts have applied a middle-ground approach, giving state implementers *Chevron* deference provided that the state implementation policies first have been approved by a federal agency.²¹³ In those cases, however, *Chevron* seems to “pass through” the federal agencies to the states, and does not seem to be given to the states *qua* states.

3. *Whether Federal Statutes Can Empower State Implementers To Do What State Law Does Not Authorize*

In the states, constitutional conundrums related to the fuzziness of the line between state and federal in this context have emerged. One of the most interesting and important of these questions is whether federal law can give state actors powers that they do not have under their own state laws.

Federal delegations to state agencies offer one clear example of this question. As Jim Rossi has pointed out, when Congress delegates to state agencies, it does not seem to consider the fact that some state constitutions prohibit agency delegations entirely.²¹⁴ What to make, then, of those federal delegations? Do they imbue state actors with administrative authority that they otherwise do not have under state law?

But this puzzle extends far beyond the delegation question. In the health reform statute, for example, Congress required the states to review insurance rates and enforce many of the statute’s new insurance regulations, even though more than half of the states claimed that their laws did not give any state actors authority to undertake those tasks.²¹⁵ Some state insurance agencies have been unable to obtain the necessary authorizing state legislation and are unwilling to proceed without it.²¹⁶ Other states have taken the position that the ACA

212. *MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 516-17 (3d Cir. 2001) (citing *Mead* and comparing the rulemaking power the federal statute gave to state and federal agencies, respectively).

213. See, e.g., *Perry v. Dowling*, 95 F.3d 231, 237 (2d Cir. 1996) (“In these circumstances, in which the state has received prior federal-agency approval to implement its plan, the federal agency expressly concurs in the state’s interpretation of the statute, and the interpretation is a permissible construction of the statute, that interpretation warrants deference.”); Weiser, *supra* note 16, at 12-13 (collecting and summarizing cases).

214. See Rossi, *supra* note 192, at 1347-48.

215. See HEALTH INSURANCE PREMIUM REVIEW GRANTS (1ST ROUND), *supra* note 101; Pear & Sack, *supra* note 101.

216. See, e.g., Robert Pear, *Federal Auditors Will Soon Review Health Insurance Rates in 10 States*, N.Y. TIMES, July 25, 2011, <http://www.nytimes.com/2011/07/26/health/policy/26health.html> (describing states that have concluded they do not have rate-review authority, and where

effectively gives them inherent federal authority to implement it—that is, that federal law empowers state actors to create and implement state implementation programs for federal statutes. Similar questions about the ability of federal law to empower state actors beyond the confines of state law have been noted with respect to many other statutes—for example, in the context of whether federal housing laws can empower local housing agencies to use procedures that state laws prohibit.²¹⁷ These are important structural questions about the interaction of state and federal constitutional law that remain mostly unanswered.

4. *Confusion About Whether State or Federal Law Is Created by State Implementation Actions*

Finally, intrastatutory federalism also has given rise to some profound uncertainties about what *kind* of law is being created when state actors implement federal law. What is a state implementation plan for a federal statute? State law or federal law? These are critical questions for purposes of establishing jurisdiction in state or federal court and also for establishing which law applies on judicial review. Vermont, for example, already has announced its intention to apply for a statutory waiver from the ACA's insurance provisions. Assuming such a waiver is granted by HHS, will the resulting Vermont insurance scheme—which will be enacted by the Vermont state legislature, signed by the State's governor, and implemented by the State's agencies—be treated as state or federal law for purposes of judicial review? Will challenges to the Vermont program give rise to federal question jurisdiction or be hearable only in Vermont court? Will interpretive decisions be given federal-level deference or the deference given Vermont agencies under its own state law?

These kinds of questions already have arisen in the context of other statutes, including with respect to state implementation plans of environmental,

state legislation conferring that authority has failed, and noting that the federal government will take over rate-review functions in some states as a consequence).

217. See *Comm'r of Labor & Indus. v. Lawrence Hous. Auth.*, 261 N.E.2d 331 (Mass. 1970) (raising the question of whether federal housing statutes could empower the local housing authority to engage in procedures state law prohibited); see also, e.g., *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995) (holding that the federal Indian Gaming Regulatory Act could not give the State Governor authority to form compacts with Indian tribes concerning gambling because state law prohibited him from entering into such compacts); Hills, *supra* note 172, at 1207-08 (discussing *Clark* and other cases); Rossi, *supra* note 192 (discussing this problem in the environmental context).

telecommunications, and other health statutes.²¹⁸ The U.S. Supreme Court also is paying attention: it decided a case last term concerning when state implementation of federal law gives rise to federal question jurisdiction, and recently heard arguments in a case that raised a related issue.²¹⁹

Two kinds of questions continually recur in cases of this nature. The first concerns jurisdiction: what kinds of courts—state, federal, or both—have the power to hear cases involving state implementation of federal law? The second concerns enforcement: who has the power to police how states execute their federal implementation duties or how the federal-state implementation relationship works itself out? As it turns out, the answers to both kinds of questions remain in flux. With respect to jurisdiction, the boundaries between state and federal remain exceedingly blurry at these lines of regulatory overlap, and courts have been inconsistent in deciding when or whether state implementation of federal law gives rise to federal question jurisdiction.²²⁰

218. See *infra* note 220.

219. See *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011) (upholding federal-court jurisdiction over suit by a state agency implementing a federal statute against another agency in the same state for noncompliance with the federal statute); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009) (considering whether, where a federal statute does not include a private cause of action, individuals may bring a federal case under the Supremacy Clause asserting that a state agency has not faithfully implemented the federal statute), *cert. granted*, 131 S. Ct. 992 (2011).

220. See, e.g., *Arkansas v. Oklahoma*, 503 U.S. 91, 111 (1992) (holding that “state water quality standards—promulgated by the States with substantial guidance from the EPA and approved by the Agency—are part of the federal law of water pollution control” and “at least insofar as they affect the issuance of a permit in another State, the [state] standards have a federal character”); *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990) (holding that the now-repealed Boren Amendment to the Medicaid statute created a federal right enforceable by a 42 U.S.C. § 1983 action in federal court, brought by providers against the state), *superseded by statute*, Pub. L. No. 105-33, 111 Stat. 251, 507 (1997); *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273 (5th Cir. 2010) (holding that state enforcement of an “interconnection agreement” entered into pursuant to its regulatory authority under the federal Telecommunications Act of 1996 does not give rise to a federal question); *Concourse Rehabilitation & Nursing Ctr., Inc. v. Wing*, 150 F.3d 185 (2d Cir. 1998) (ruling that the New York State Department of Social Services did not comply with the provisions of its own state Medicaid program when contracting with a nursing home did not raise a federal question); *Washington v. EPA*, 573 F.2d 583, 586 (9th Cir. 1978) (holding that a state’s action in issuing or denying a permit cannot be deemed action by the federal EPA), *superseded by regulation on other grounds*, 40 C.F.R. § 125.3 (1979); RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 772 (6th ed. 2009) (discussing the provision of the Clean Air Act that appears to give federal courts jurisdiction over state-law implementation plans and noting that the reach of federal jurisdiction in such cases remains a “live” question); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1751 n.317 (2001) (“To date, the federal courts are split on whether they enjoy jurisdiction to

With respect to enforcement, the predominant question has been whether these cases can get before the courts in the first place. The Supreme Court is currently considering a case involving California's implementation of the federal Medicaid program—a case in which individuals have argued that the Supremacy Clause gives them a right to challenge, in federal court, California's implementation of the statute.²²¹ On the other side, California and the federal government have argued that intrastatutory federalist statutes are special—that they confer enforcement authority mostly, if not entirely, on the federal agency and so cannot be policed by individuals in court.²²²

In the shadow of these cases, one wonders whether courts will continue to have any substantial role in the intrastatutory federalism context. Such questions are well beyond this Essay's scope, but to the extent that one views judicial involvement in (and monitoring of) these interagency relationships as beneficial, it may be necessary for federal jurisdictional doctrine, like statutory interpretation doctrine, to evolve to address intrastatutory federalist regimes.

D. Toward a More Complete Theory of Intrastatutory Federalism

The foregoing suggests that a mere extension of our current doctrines may not answer all of the interpretive questions raised by state implementation of federal statutes. Entirely new doctrines, grounded in different justifications, may be required if the goal is to develop a more complete theory. This Essay already has pointed in some of these directions. The purpose of this final Section is to highlight two additional areas that seem particularly deserving of attention, but surely others could be suggested.

1. Interagency Statutory Interpretation

The first area requiring additional exploration is the relationship between state and federal agencies. At the moment, we have no interpretive doctrine or

review issues of state law raised in relation to interconnection agreements.”). Another manifestation of these uncertainties is evident in the debate over “overfiling” in the environmental law context—the ability of the federal EPA to file an enforcement action where the state already has an EPA-approved enforcement plan in place. *Compare* *United States v. Power Eng'g Co.*, 303 F.3d 1232 (10th Cir. 2002) (deferring, pursuant to *Chevron*, to EPA's statutory interpretation that overfiling is permissible), *with* *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (stating that duplicative enforcement is impermissible).

²²¹. See *Maxwell-Jolly*, 131 S. Ct. 992.

²²². This position is, in large part, based on a theory that federal Spending Clause legislation creates contract-like relationships between state and federal agencies that make it different from ordinary regulatory legislation.

theory that acknowledges that, in addition to the agency/court statutory-interpretation relationship, there is a critical, state-federal interagency relationship that not only is complex but also is where the central issues of interpretation are being worked out. Statutory interpretation theory is very court-centric, but it may be that giving real effect to Congress's choice of implementer requires a radical change in focus to this agency-agency relationship.

One can imagine new interpretive presumptions that might reinforce the centrality of these interactions—a presumption, for example, that when Congress creates a state-led implementation scheme, federal regulations should be understood only as broad guidelines for state implementers unless Congress specifically states otherwise, or a presumption of deference to state agency interpretations of federal regulations, unless Congress states otherwise. The state's obligation might be to interpret the federal guidelines reasonably, but not uniformly, and the federal agency might not be permitted to substitute its own best judgment for the state agency's implementation approach as long as the state's approach was a reasonable application of federal regulations.

This type of scheme (or some variation of the concept) could profoundly affect how interagency decisions are made and reviewed, and encourage a more experimentalist approach to state implementation. Looking to health reform, for instance, consider the confrontations expected in 2013, when HHS will certify the states' health insurance exchanges. Under current legal doctrine, HHS has much discretion to reject state implementation proposals. Any judicial review of such denials is likely to be exceedingly deferential to HHS, with the primary question being whether HHS's interpretations of the health reform statute and its own regulations are reasonable. But things might look very different if, instead, the question for judicial review was not whether *HHS's interpretation of the ACA* was reasonable but rather whether *state agencies' interpretations of HHS's regulations* were reasonable. Similarly, judicial review also would look quite different if, instead of focusing on federal agencies' discretion in general, the focus was on how much discretion federal agencies have to impose administrative uniformity across the implementing states.

Such a reconceptualization of the interagency relationship might reduce the risk, which has been noted in a variety of contexts,²²³ that state agencies will be

223. The Supreme Court came close to formally recognizing these concerns in *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004). In that case, the majority had rejected the petitioner's claim that the Clean Air Act's cooperative federalism structure prevented the EPA from interfering with the state's "best available control technology" determinations. Justice Kennedy's dissent for four Justices took issue with the idea that the EPA could come in at any time and trump longstanding state agency implementation decisions:

“chilled” out of regulatory innovation for fear of later federal-agency disapproval. It also would effectively temper the presumption of deference that courts often accord to federal agencies’ interpretations of their own vague regulations. That presumption – sometimes called “*Auer* deference” – has come under increasing criticism in other contexts due to concerns that have obvious relevance for the intrastatutory federalism context; namely, that it gives regulated parties little notice of the rules with which they must comply and allows federal agencies unconstrained administrative discretion.²²⁴

This is admittedly a highly cursory sketch of what a theory of interagency statutory interpretation might look like, and there are certainly other ways that it might take shape. Erin Ryan, for example, has recommended conditioning deference to a federal agency’s preemptive regulations on the “fairness” of the intergovernmental bargaining that goes on behind the scenes between state

These state employees, who no doubt take pride in their own resourcefulness, expertise, and commitment to the law, are the officials directed by Congress to make case-by-case, site-specific, determinations under the Act. Regulated persons and entities should be able to consult an agency staff with certainty and confidence, giving due consideration to agency recommendations and guidance. After today’s decision, however, a state agency can no longer represent itself as the real governing body. . . . This is a great step backward in Congress’s design to grant States a significant stake in developing and enforcing national environmental objectives.

Id. at 516 (Kennedy, J., dissenting).

These concerns are already apparent in the health reform context, in those states that have refused to move forward with implementation without more detail from HHS. As another example, there is a bill currently pending in Congress that would amend the Clean Water Act to bar the EPA from amending or issuing a new water quality standard for a pollutant without a state’s consent when a state already has adopted a standard (with prior EPA approval). In the words of the executive summary provided by the bill’s sponsor, it “would prevent unilateral actions by the EPA that second-guess the decisions of the state regulatory agency” and remedy the “atmosphere of regulatory uncertainty.” *Legislative Digest: H.R. 2018*, GOP.GOV, <http://www.gop.gov/bill/112/1/hr2018> (last visited Oct. 13, 2011). The bill passed the House of Representatives on July 13, 2011 and is pending in the Senate. See Clean Water Cooperative Federalism Act of 2011, H.R. 2018, 112th Cong. (as passed by House, July 13, 2011).

224. See *supra* note 176 and accompanying text. Interagency deference thus might serve as a kind of “safe harbor” for states that choose to regulate in the interstices of federal regulation, by preventing later federal regulations from trumping reasonable moves by the states, or by de-incentivizing vague federal regulations. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 669 (1996) (arguing that deference to a federal agency’s own regulations “disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it”).

and federal agencies.²²⁵ In addition, there are interesting examples from the way in which the European Union has tried to give effect to its own federalism that might illuminate some of the questions raised here.²²⁶

There is also an entire terrain of how state and federal agencies negotiate and implement state waivers from federal statutory programs that seems to be a particularly rich area of interagency relations about which rather little is known. It is interesting to note, for example, that granting waivers is one way in which federal agencies can use their regulatory authority to give state implementers *more* flexibility than Congress might have intended. This use of waivers has been widely discussed from a policy perspective in the context of the Aid to Families with Dependent Children statute, Medicaid, and just recently, No Child Left Behind.²²⁷ From a statutory interpretation perspective,

225. See Ryan, *supra* note 30.

226. In particular, there may be fruitful comparisons to be made here with the concepts of “proportionality” and “subsidiarity,” which have become important to the European Union’s efforts to give effect to its own federalism. “Subsidiarity, as the EU defines it, creates a presumption against taking more powers away from the nation-state.” Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT’L L.J. 616, 635 (1994); see *id.* at 617-18 (quoting Treaty on European Union, art. G § 5, Feb. 7 1992, 1992 O.J. (C 191) 1) (noting that the European Community treaty defines it as stating that “the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”). Interesting parallels might also be made here to the arguments in Part II regarding federalism as a tool of national power. For example, Marquardt warns that the subsidiarity principle might also be

fundamentally corrosive to rather than supportive of the sovereignty of the nation-state. The institutional quick fix may support the nation-state in the short run, but the underlying logic of subsidiarity reduces the claim of rightful governance to a technocratic question of functional efficiency that will eventually undercut the nation-state’s claims to loyalty.

Id. at 618.

With respect to proportionality, see Giuseppe Ciavarini Azzi, *Better Lawmaking: The Experience and the View of the European Commission*, 4 COLUM. J. EUR. L. 617, 621 (1988), which defines the proportionality principle as “[w]hen exercising its powers, the Community must, where various equally effective options are available, choose the form of action or measure which leaves the greater degree of freedom to the Member States, individuals or businesses concerned.” For a more general discussion, see Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008). More detailed comparisons are far beyond the scope of this project.

227. See Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 594 (2004); Sam

however—and even from the perspective of constitutional law—these moves have not been deeply analyzed. Is this type of deployment of federal agency discretion, for example, any more or less objectionable than agency regulations that unduly restrain state implementation flexibility? How relevant is congressional intent in this context? We do not have a clear conception of how these interagency relationships work or what role the law should play in policing them.

2. *Theories of Modern Legislation and the Challenge of Aspirational Statutes*

The second area ripe for further inquiry would be to develop a more nuanced account of the ways in which modern statutes differ from legislation's paradigms. This Essay has illustrated one way—their reliance on nonfederal implementation—but there are many others, and updating our understanding of what federal statutes look like should be a critical part of any future research agenda.

As one important example of the kinds of questions that might be pursued in such an inquiry, the concept of statutory ambiguity seems fundamentally different in at least some modern statutes than it does in legislation's typical models. Many modern statutes have a real “aspirational” quality. That is, many do not seem designed to solve a problem as much as they seemed designed to *identify* one, and to set a process in motion to generate information about how the problem ultimately might be addressed. The ACA certainly typifies this trend. For example, the portion of the ACA concerning its most important new service delivery model, the accountable care organization, is six pages long, with all of the detail left to the regulatory process. (The draft regulations implementing those six pages are already more than one thousand pages.²²⁸) The statute also appears to have more pilot projects and demonstration programs than any statute in history, and commentators have widely acknowledged that it authorizes these many experiments as a way of identifying the main unresolved questions for the field.

One way to confront the interpretive difficulties that arise in the context of broad, aspirational statutes is as we often already do—to defer to the federal agency. But another way might be to treat these major kinds of ambiguities differently from how we treat the more limited gaps. As noted earlier, to the extent that current doctrine does make this distinction, it sometimes withholds

Dillon, *Obama To Waive Parts of No Child Left Behind*, N.Y. TIMES, Sept. 22, 2011, <http://www.nytimes.com/2011/09/23/education/23educ.html>.

228. David Nather & J. Lester Feder, *1,000+ Pages of Health-Care Rules?*, POLITICO (Mar. 29, 2011, 5:22 PM), <http://www.politico.com/news/stories/0311/52170.html>.

agency deference entirely for gaps implicating “major questions.” In those cases, courts provide the interpretation themselves—a strange result, given that courts are even less well-suited than federal agencies to decide critical policy matters that Congress itself cannot decide. Perhaps what might be required instead is an entirely different set of interpretive rules—rules designed to favor not a unilateral federal-agency or federal-court decision, but rather rules designed to send these statutes back to Congress for more details, or more radically, to encourage a multilateral problem-solving process.

Importantly, statutory interpretation would not be alone in this new process-creating endeavor. Cooperative federalism scholars and scholars of “experimentalism” long have argued that many modern regulatory problems are too complex for federal administrators to solve themselves. They also have argued that federal rules, operating alone, may be too rigid to facilitate the kind of experimentalist administration and complex problem-solving that is needed.²²⁹ This also is a theme of the new governance literature discussed earlier,²³⁰ and quite interestingly, one that also has emerged in the contract-law context. Ronald Gilson, Charles Sabel, and Robert Scott recently identified the emergence of “contracts for innovation,” which are contracts that, rather than specify particular products, set out collaborative processes for the development of products that cannot yet be identified.²³¹

Changes extending beyond Congress seem afoot in the way we now regulate and innovate, and the fact that private ordering is ahead of legal doctrine in recognizing them is what one might expect. A similar shift in interpretive doctrine—one that would effectuate a more multilayered and collaborative vision of federal statutory elaboration—would require a dramatic departure from the law’s current preferences for simplicity, clear boundaries, and definitive answers.²³²

229. See William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity*, in *PREEMPTION CHOICE*, *supra* note 30, at 98, 108; Dorf & Sabel, *supra* note 94; see also David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 *MINN. L. REV.* 1796, 1798–99 (2008) (arguing that the “multifaceted” and complex problems that arise in environmental regulation require that those problems be addressed by “more than one level of government”).

230. See Lobel, *supra* note 75.

231. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 *COLUM. L. REV.* 431 (2009).

232. See Buzbee, *supra* note 30, at 100.

CONCLUSION

This exploration cannot conclude without acknowledging all of the other state-based players that it has left out. This Essay's focus has been on state implementation of federal law, but that is just one piece of a far more intricate statutory federalism landscape. A complete theory of federalism in legislation would require many additional connections.

The relationship between state and federal courts when they interpret one another's statutes (as they do every day) is perhaps the most important connection, and the one to which I have called attention in the past.²³³ But one also should not forget that there are connections to be explored on the legislative side as well. Federal and state legislatures often "borrow" statutes from one another, enacting new statutes modeled on the other's, or incorporate aspects of the other's law in their own statutes (for example, the requirement in federal bankruptcy law that a federal debtor's total liability depends on the validity of the debtor's liens under state lien statutes). Questions about the interpretation of such borrowed and incorporated statutes are numerous and complex: Do these statutes "come" with their old judicial interpretations? Can the meaning of federal law be changed over time by the evolution of the state law that it incorporates? The nature of these vertical relationships between state and federal legislation remains mostly a puzzle. What's more, there also is "horizontal statutory federalism" out there, a virtually unexplored landscape of how states both borrow from and interpret one another's statutes, how they work together to implement new federal statutes,²³⁴ and how they converge (or not) on the meaning of uniform laws.

In some ways, it is odd that we do not have this more complete picture of federalism in statutory interpretation already. All of the leading theories of statutory interpretation are virtually steeped in theories of structural constitutional relationships.²³⁵ Each interpretive theory rests on a particular conception of separation of powers—the role of the judicial branch in relation to Congress and the executive branch when the meaning of statutes must be derived. Making sense of the relevant vertical relationships seems a natural extension of that focus. But vertical separation of powers,²³⁶ even though it is

233. See sources cited *supra* note 1.

234. John Nugent and Judith Resnik, Joshua Civin, and Joseph Frueh have done the most to develop this point. See NUGENT, *supra* note 167; Resnik, Civin & Frueh, *supra* note 90.

235. See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law.").

236. Cf. Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 17 (2003) (seeking to "expand the dominant contemporary

central to many of the questions that these pages have raised—questions ranging from the interpretive deference due to state delegates to questions about what kind of law is created through these intrafederalist statutory schemes—remains mostly uncharted water in the legislation context.

A truly complete theory of federal legislation would include such an account of federalism. Most likely, it actually needs several of them. The states participate in the creation, interpretation, and implementation of federal statutory law in numerous ways, and we cannot understand the Age of Statutes, or appreciate its complexity, without them.

understanding of the constitutional separation of powers to include the ‘vertical’ separation of powers between state governments and the national government”).

