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Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement

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BEYOND SEPARATION IN FEDERALISM ENFORCEMENT: MEDICAID EXPANSION, COERCION, AND THE NORM OF ENGAGEMENT

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ABSTRACT

National Federation of Independent Business v. Sebelius *may be known, in both the popular and academic commentaries, as the case about the Affordable Care Act's Individual Mandate provision. History may record it as one of the most significant cases in the jurisprudence of cooperative federalism. In invalidating part of the Medicaid Expansion provision, the Roberts Court became the first to invalidate a federal spending statute as unconstitutionally coercive of state governments. This decision has the potential to impact federal-state cooperative arrangements such as No Child Left Behind, and others far beyond the health care context.*

This Article argues that lack of attention to the Medicaid challenge, and the judiciary's previous inability to articulate a framework for coercion, indicates the inappropriateness of our dominant conceptions of federalism enforcement for an age of cooperative governance. To the extent that claims of coercion require us to take into account the national-state interaction over time, they offer the opportunity to transcend current frameworks in federalism enforcement, which disregard the bureaucratic dimension of policy implementation, and operate under a separatist paradigm with respect to national and state authority. Unfortunately, the Supreme Court's decision in National Federation *exemplifies the extent to which federalism enforcement continues to be dominated by each of these conceptions of federalism enforcement. As a result, federalism enforcement remains institutionally and temporally truncated, focusing solely on Congress and legislative enactment to*

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the exclusion of administrative agencies and post-enactment policy implementation. In this framework, the unrealistic norm of separation reigns supreme.

This Article argues that a norm of engagement better exemplifies the relationship inaugurated between states and the national government in the context of cooperative federalism. Medicaid in particular stands as a model of the embedded interactions between states and the national government. This engagement of policy implementation takes place in administrative agencies. The national-state relationship at the agency level involves repeated interaction aimed at the achievement of policy objectives. These repeated interactions demonstrate the need for a norm of federalism enforcement that exemplifies the ways in which states and the national government remain vulnerable in their interaction with one another. Such a norm is available by looking to administrative agency practice and administrative law doctrine. This norm is capable of reorienting Tenth Amendment jurisprudence, and federalism enforcement, more broadly.

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INTRODUCTION

The 2011 Term of the United States Supreme Court reached its climax on its final day. The drama surrounding the Court's most anticipated ruling since *Bush v. Gore*[1] was made all the more significant because it involved the signature legislation of a first-term President in the middle of a closely contested reelection campaign. Unlike the

1 531 U.S. 98 (2000).

Court's decision in *Citizens United v. Federal Election Commission*,[2] which gained in popular fame (or infamy) only after it was decided, the Court's ruling on the Patient Protection and Affordable Care Act ("Obamacare" or "the ACA")[3] was the culmination of a very public march toward the Court, which began only hours after the historic legislation was signed.[4] The decision was so anticipated that two leading news organizations announced the ruling incorrectly in an effort to be the first out of the gate.[5] *National Federation of Independent Business v. Sebelius*[6] marked a significant day in the Supreme Court's assessment of the national government's substantive authority and its relationship with the states.

Even close followers of the ACA litigation would be forgiven in thinking that the only issue to be decided was the fate of the Act's Individual Mandate provision.[7] In both popular and scholarly commentary, the Individual Mandate had become synonymous with the ACA.[8]

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2 558 U.S. 50 (2010).

3 The earliest use of the term "Obamacare" seems to have been in late 2008 in an editorial written in the *Washington Times*. *See* Editorial, *Beware of ObamaCare*, WASH. TIMES, Oct. 26, 2008, *available at* http://www.washingtontimes.com/news/2008/oct/26/beware-of-obamacare/?page=1. The term is a modification of the pejorative used to describe Hillary Clinton's plan to reform health care, Hillarycare. Kiran Moodley, *'Obamacare': More Than Just a Word*, THE ATLANTIC, Feb. 22, 2011, *available at* http://www.theatlantic.com/politics/archive/2011/02/obamacare-more-than-just-a-word/71519/. More recently the term appears to have been adopted by proponents of the ACA, including the President. Peter Baker, *Democrats Embrace Once Pejorative 'Obamacare' Tag*, N.Y. TIMES, Aug. 3, 2012, http://www.nytimes.com/2012/08/04/health/policy/democrats-embrace-once-pejorative-obamacare-tag.html?_r=1&pagewanted=all.

4 The same day that President Obama signed the ACA into law, fourteen states filed suit challenging its constitutionality. *See 14 States File Suit to Block Health Care Law*, CNN.COM (Mar. 23, 2010), http://articles.cnn.com/2010-03-23/justice/health.care.lawsuit_1_mccollum-health-care-individuals-buy-health-insurance?_s=PM:CRIME.

5 *See* Katherine Fung & Jack Mirkinson, *Supreme Court Health Care Ruling: CNN, Fox News Wrong on Individual Mandate*, HUFFINGTON POST (June 28, 2012, 3:52 PM), http://www.huffingtonpost.com/2012/06/28/cnn-supreme-court-health-care-individual-mandate_n_1633950.html.

6 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

7 26 U.S.C. § 5000A (2006).

8 In a *Wall Street Journal* blog discussing the possible rulings of the Supreme Court, Medicaid was not mentioned in any of the four scenarios mentioned. Peter Landers, *Decisions, Decisions: How High Court Could Rule on Health*, WALL ST. J. BLOG (June 22, 2012, 11:42 AM), http://blogs.wsj.com/law/2012/06/22/decisions-decisions-how-high-court-could-rule-on-health/. Health care scholars rightly paid more attention to the Medicaid issue than their constitutional law counterparts. For example Nicole Huberfeld blogged about the Medicaid issues in the ACA litigation before the Court. She recognized it as the "surprise" issue on appeal, but declared that it might be the most decisive issue in the case. *See, e.g.*, Nicole Huberfeld, *Landscape of the Amici Supporting Florida's Medicaid Brief*, CONCURRING OPINIONS (Jan. 27, 2012), http://www.concurringopinions.com/archives/2012/01/landscape-of-the-amici-supporting-florida-medicaid-brief.html.

The only other question addressed by most commentators was the issue of whether a finding of unconstitutionality would be severable from the remainder of the statute.[9] Nevertheless, the ACA included other significant provisions in its pursuit of near-universal health care coverage—including the requirement that states expand their Medicaid-eligible populations.[10] Though the Individual Mandate was often framed as the last great battle over the meaning of "Our Federalism,"[11] the Medicaid Expansion provision directly implicated the states in the plan to ensure health care for all.[12]

The Medicaid Expansion provision requires states participating in the Medicaid program—all fifty states—to expand the eligibility for participation in Medicaid to those whose incomes are at or below 133% of the poverty line. The expansion would increase state Medicaid rolls by an average of 25%.[13] Twenty-six states, led by the Florida Attorney General, challenged the expansion as unconstitutionally coercive. The Court's invalidation of parts of the Medicaid Expansion provision was perhaps the biggest surprise of the otherwise unpredictable decision.[14] By invalidating the ACA's grant of authority to the Secretary of Health and Human Services to withhold all of a state's federal Medicaid reimbursement as a penalty for not expanding Medicaid eligibility, the Roberts Court became the first court to hold a federal spending statute unconstitutionally coercive of state governments.[15] The extent to which the Court has transformed the national-state relationship is unclear.[16] What is clear is that the

9 *Id.*

10 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

11 Younger v. Harris, 401 U.S. 37, 44–45 (1971).

12 Strictly speaking, the individual mandate provision did not implicate the federal-state relationship, in that it required individuals to purchase medical insurance directly, and did not obligate state governments to undertake any activity. For a discussion of the failure of the challengers of the ACA to raise the individual liberty argument, see Jamal Greene's article in this issue, Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 267 (2012).

13 JOHN HOLAHAN & IRENE HEADEN, MEDICAID COVERAGE AND SPENDING IN HEALTH REFORM: NATIONAL AND STATE-BY-STATE RESULTS FOR ADULTS AT OR BELOW 133% FPL, at 41 (2010).

14 Moreover, the two lower courts, each with reputations as conservative courts, rejected the states' coercion claim. *See* Florida *ex rel.* Biondi v. U.S. Dep't of Health and Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd*, 648 F.2d 1235 (11th Cir. 2011).

15 National Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2630 (2012) ("The Chief Justice therefore—*for the first time ever*—finds an exercise of Congress' spending power unconstitutionally coercive.") (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part).

16 For discussion of the ramifications of the Court's ruling, see Samuel R. Bagenstos, *The Anti-Leveraging Principle in the Spending Clause after* NFIB, 101 GEO. L.J. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_*id*=2128977.

Court's position is a sharp break from past precedent, and calls into question the national-state relationship in the administration of one of the central pillars of cooperative federalism.[17]

To understand the context of the Court's ruling on Medicaid Expansion, it is necessary to recognize the ease with which a conservative district court judge dismissed the issue. On January 31, 2011 the United States District Court for the Northern District of Florida held that the Patient Protection and Affordable Care Act's Individual Mandate provision exceeded Congress's Commerce Clause authority, and did not qualify as a tax for purposes of Congress's taxing authority.[18] Judge Roger Vinson, a Reagan appointee, addressed both the state of Florida's Commerce Clause and Spending Clause challenges to the ACA.[19] The states argued that the ACA's choice between expanding eligibility for Medicaid or risking the loss of all federal Medicaid reimbursements was coercive. The states based their claim on the coercion doctrine, to which the Supreme Court has alluded—without much more—throughout its affirmation of congressionally-imposed conditional spending requirements.[20] The district court rejected Florida's Spending Clause challenge.[21]

The district court rejected the state's argument that the states would be worse off financially because of the Medicaid Expansion provision, concluding that disputed issues remained regarding the extent to which the expansion would negatively affect state budgets.[22]

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17 Cooperative federalism is a sharing of authority between the national government and the states. It has played a significant role in environmental law, health care provision for the poor, among other important areas. For a discussion of cooperative federalism, see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001). The Spending Clause has played an important role in cooperative federalism, as it extends the ability of the national government to enlist the assistance of the states in implementing public policy. *See* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 58 (2011).

18 Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

19 There was also a due process challenge to the ACA's individual mandate requiring persons to purchase health care insurance. This claim is more global than the federalism-based claims that primarily shaped Florida's challenge in that it would have prohibited any government—state or national—from imposing a requirement to purchase such insurance. Such an argument would certainly have raised the specter of *Lochner v. New York*. For a discussion of *Lochner*'s status as a problematic precedent, see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

20 *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 209–12 (1987); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 585–93 (1937); *see also* West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281, 286–91 (4th Cir. 2002).

21 *Bondi*, 780 F. Supp. 2d at 1266–70 (granting summary judgment to the government on the Medicaid Expansion issue).

22 *Id.* at 1267.

A holding on these grounds, however, would have required more litigation between Florida and the national government as this would involve a factual dispute.[23] However, the district court foreclosed any further litigation, by holding that Florida had no legal remedy for the ACA's alleged coercion. The court declared that "upon full consideration of the relevant law and the Constitutional principles involved . . . I must conclude that this claim cannot succeed and that the defendants are entitled to judgment as a matter of law."[24] Though Judge Vinson declared his sympathy for state governments, which he perceived as outmatched by the national government where the Spending Clause is concerned, he concluded that without some significant doctrinal transformation, "the states have little recourse to remaining the very junior partner in this partnership."[25]

Judge Vinson's explanation of the law's impotence in the ACA's conditional funding provisions assigned blame to existing case law, which, he argued, had provided little elaboration of how conditions on the receipt of federal grants might undermine state integrity through coercive pressure.[26] Judge Vinson was correct that the Supreme Court had up to that point failed to articulate a coherent conception of coercion in spending clause controversies.[27] Judge Vinson, and others, explained the doctrinal void as the Supreme Court's failure to take the federalism revolution to its rightful conclusion as a mechanism for reining in congressional authority under the Spending Clause.[28]

Criticism of the Rehnquist Court's failure to develop the coercion doctrine appears warranted in the light of the "federalism revival" for

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23 The district court's ruling came on cross motions for summary judgment.

24 *Bondi*, 780 F. Supp. 2d at 1269.

25 *Id.*

26 Vinson is hardly the first to question the efficacy of an anti-coercion principle in Spending Clause jurisprudence. *See, e.g.*, Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989).

27 For a review of the criticisms of the coercion doctrine, see Bagenstos, *supra* note 16, at 372–74.

28 *See* Lynn Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911, 1914–15 (1995) (arguing that the Court must rein in Congress's Spending Clause authority in order to fulfill the principles that underwrote *Lopez*); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 86–88 (1988) (criticizing the Court's decision in *South Dakota v. Dole* as not imposing sufficient constraints on Congress's spending power); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 464–73 (2002) (arguing that "federal subsidization of states subvert key federalism values of diversity, vertical competition and horizontal competition").

which the Court is properly recognized.[29] The Rehnquist Court enforced constraints on national authority in several areas[30]—including limitations on Congress's authority under the Commerce Clause,[31] and increased constraints on Congress's exercise of authority under Section Five of the Fourteenth Amendment.[32] The Court's efforts during this era largely involved delineating the appropriate locus of particular regulatory activity, including determining that the national government's regulation of "noneconomic activity" transcended its authority.[33] Yet, during this period, indeed sometimes within the same case, the Court affirmed the broad scope of congressional au-

29 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, 460 (2003) ("The Rehnquist Court's federalism revival advances a single core purpose: the reduction of national power."). Despite the Rehnquist Court's reputation as having aggressively inserted itself into federalism disputes on the side of state governments, in reality the Court's interventions in the name of federalism were not so uniform. For example, the Court maintained (or expanded) national preemption authority of state law, even in areas where conflicts between state and national law were less than clear. With the exception of its articulation of the anti-commandeering doctrine, the Court failed to articulate any significant protections of states in cooperative aspects of national-state interactions, including conditional funding and mandates on state governments. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

30 *See, e.g.*, JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002) (noting the Rehnquist Court's increased protections for state governments); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995) (same); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71 (1998) (same); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998) (same).

31 *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (invalidating sections of the Violence Against Women Act as exceeding Congress's Commerce Clause power and Congress's remedial power under Section 5 of the Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act as exceeding Congress's Commerce Clause power).

32 *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (striking provisions of Title I of the Americans with Disabilities Act under Section 5 of the Fourteenth Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (striking provisions of the Age Discrimination in Employment Act of 1967 under Section 5 of the Fourteenth Amendment); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627 (1999) (striking the Patent and Plant Variety Protection Remedy Clarification Act under Section 5 of the Fourteenth Amendment). *But see* Tennessee v. Lane, 541 U.S. 509 (2004) (upholding Title II of the Americans with Disabilities Act under Section 5 of the Fourteenth Amendment); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding the Family and Medical Leave Act of 1993 under Section 5 of the Fourteenth Amendment).

33 *Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 567.

thority to establish its policy priorities through other means—including the Spending Clause.[34]

The Rehnquist Court's reluctance to police the "interactive" aspects of the national-state relationship has been noted by federalism scholars.[35] For example, Professor Bradford Clark has described judicial federalism enforcement, saying, "[a]lthough judicial review in federalism cases invalidates statutes that exceed the outer bounds of federal power, it does nothing to constrain the exercise of power *within* those bounds."[36] Clark's description of federalism enforcement suggests two important things about the way we think about it: the first is the dominance of allocation as the primary federalism enforcement mechanism, and the second is the focus on Congress as the primary subject of federalism enforcement. Federalism enforcement as allocation requires the ability to draw "clear" lines; doctrines such as "substantial effects" and "legislative commandeering" have been accepted as allowing for such analytical clarity.

Framed as an allegation that Congress has exceeded its Spending Clause authority, coercion claims are understood as requiring the Court to allocate power. Rather than viewing coercion claims as calls for the allocation, this Article reframes the coercion claim as a call for enforcement that does not rely on the allocation of power between the national government and the states. Understood in this way, it ought to come as no surprise, then, that little popular or scholarly attention has been paid to the challenge of the Medicaid Expansion despite the fact that a successful challenge would have significant impact on the statute's ability to meet the goals of near-universal insurance coverage.[37] The doctrinal void that underwrote the district court's rejection of the states' claim is more comprehensible if we understand the coercion doctrine as raising a different question than was addressed by the bulk of the Rehnquist Court's federalism jurisprudence.

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34 *See, e.g.*, New York v. United States, 505 U.S. 144 (1992).

35 *See, e.g.*, Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327 (2001); *see also* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 15–16 (2009) ("There will always be a role for the federal courts to play in refereeing the respective scope of state and federal authority.").

36 Clark, *supra* note 35, at 341 (emphasis added).

37 Robert Pear, *Court's Ruling May Blunt Reach of the Health Law*, N.Y. TIMES, July 24, 2012, http://www.nytimes.com/2012/07/25/health/policy/3-million-more-may-lack-insurance-due-to-ruling-study-says.html; Stephanie Condon, *States Opting Out of Medicaid Expansion Could Leave Many Uninsured*, CBSNEWS.COM (July 2, 2012, 1:37 PM), http://www.cbsnews.com/8301-503544_162-57465110-503544/states-opting-out-of-medicaid-expansion-could-leave-many-uninsured/.

Less explicit in Clark's statement, but present, is that federalism enforcement need only pay attention to the phase where decisions about substantive power are actually made—generally at the enactment stage in the national legislature.[38] To that extent, Spending Clause jurisprudence has been primarily dominated by conceptions of notice.[39] Federalism problems are legislative problems, and must be handled as such. There is little or no attention paid to how federalism problems develop in the implementation of a specific policy or program.

The Court and the vast majority of the scholarly community have truncated the life of American federalism and its enforcement by their focus on the initial exercise of authority as the only site of federalism enforcement. This Article argues that federalism enforcement should also be understood as regulating national and state interaction that occurs in the policy-implementation stages of governance. This argument is based on the fact that significant aspects of the national-state relationship take place after substantive regulatory authority has been "allocated" at the enactment stage. Interaction between the national government and the states does not cease when it is determined that the national government possesses the authority to regulate in a particular area. Moreover, broad interpretations of the Spending Clause power allow Congress to exceed even enumerated limits on substantive authority, thereby allowing for continued interactions where substantive regulatory authority may not exist. For opponents of the ACA, and broad spending authority, the solution is to impose limits on Congress's exercise of it. By contrast, this Article contends that federalism enforcement's capacity

38 This does not suggest that questions of the possession of power do not take place at the administrative level. As anyone paying attention to the preemption debates over the last few years recognizes, the fight has been about whether agencies are appropriate sites to make decisions about the possession of substantive regulatory authority. The Court in addressing these questions has not offered a definitive answer to this question, but it has been noted that the Court has gone out of its way to hold that Congress, rather than a particular administrative agency, has made the preemption decision. *See, e.g.*, Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) (holding that the Medical Device Amendments preempted state tort regimes); Watters v. Wachovia, 550 U.S. 1 (2007) (holding that the National Bank Act preempted state regulation of subsidiaries of national banks); *see also* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008) [hereinafter Metzger, *New Federalism*] (arguing that the Supreme Court avoided making decisions about agency authority to make preemption decisions in early cases).

39 See Bagenstos, *supra* note 16 (discussing the predominance of clear statement rules in Spending Clause litigation); Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking about Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155 (2004) (same).

must be expanded to include the interactive dimensions of the policy-implementation stage of national-state relations.

The recognition of the opportunity for an expanded conception of federalism enforcement is dependent upon understanding the practice of national-state interactions in the real world. Legal scholars, and others, have provided important descriptions of the interactions between states and the national government in contextualized accounts of the ways in which states and the national government engage in forms of "negotiation" and contestation in the development of policy objectives.[40] One of the most significant aspects of their work is its demonstration of the intertemporal and multi-institutional dimension of policy implementation. That is, their work allows us to see state and national interaction that is more complicated than appears to be the case when thinking solely about federalism enforcement as limited to the constraints on Congress. These descriptions demonstrate national and state dynamics as involving a series of interactions over time, rather than our depiction of them as solely involving a single dispute at a particular moment in time. Seeing interactions as bundled and intertemporal, rather than as merely one-off transactions, confirms that the states and the national government rarely enter into any particular conflict as actors bearing no history of past interactions or future interactions.[41] This means that interactions take into account more than merely the immediate issue, but take into account past and (more importantly) future interactions.[42] The central ambition of this Article, then, is to draw from these "thick" descriptions to offer a corrective to our current thinking about federalism enforcement in areas of state and national interac-

40 NUGENT, *supra* note 35; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Ryan, *Negotiating Federalism*, *supra* note 17.

41 The insight that states and the national government behave in strategic ways in their interactions with one another, has been formalized by the introduction of game theoretic approaches to the federalism literature. *See, e.g.*, Neil S. Siegel, Dole*'s Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. 165 (2008); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public–Choice Explanation of Federalism*, 76 VA. L. REV. 265, 274–90 (1990).

42 Daryl Levinson has described interactions between states and the national government, saying: "Where the longer-term gains from cooperation are high enough . . . the terms of cooperation are clear, and the game continues indefinitely, a cooperative equilibrium may be sustained if each actor adopts a tit-for-tat or similar reciprocal strategy and thus conditions its own compliance on compliance by others." Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 685 (2011). Levinson's argument appears to suggest that interactions of this type might be enforced by the parties themselves. As will be demonstrated below, though Levinson's description might accurately describe the administrative process of policymaking, we have not concluded that this process requires no external enforcement.

tion that move beyond our enslavement to allocating congressional authority as its exclusive mechanism.

Unfortunately, the intertemporal, bundled interactions were effectively ignored in the Supreme Court's treatment of the Medicaid Expansion provision. Both the majority and the dissent framed the issue in terms that were institutionally and temporally truncated: one side acted as if 1965 were the only significant date in the life of the Medicaid program, while the other side acted as though 2010 were the only significant date in the program, as though nothing had come before.[43] From an institutional perspective, they ignored the fact that the Centers for Medicare and Medicaid ("CMS") in the Department of Health and Human Services is the most important institution in Medicaid federalism, both because of its role in the development of state Medicaid plans, and because of the significance of the waiver process in the interaction between states and the national government in the Medicaid program.[44] Missing from all of the Medicaid rulings was any discussion of the bureaucratic dimension of Medicaid policy implementation. Each of the opinions resorted to drawing lines and separating state from national authority as the most effective mechanism for enforcing federalism.

That the Court would resort to line-drawing in the context of the challenge to Medicaid expansion is not surprising, given the coercion claims' roots in the Tenth Amendment.[45] Nowhere is line-drawing more apparent than in Tenth Amendment jurisprudence. Throughout the history of judicial enforcement of the Tenth Amendment, courts and commentators have understood the Tenth Amendment as protecting substantive authority at the state level—whether this is understood as authority over particular subject matters or authority over particular state institutions. The coercion challenge to the ACA's Medicaid Expansion provision forces us to squarely confront the Tenth Amendment. The conceptual dominance of allocation and separation in Tenth Amendment jurisprudence makes it an utterly ineffective tool when addressing issues of national and state interaction, where the issues involve more than a conflict about the posses-

43 For a discussion of the transformation of the Medicaid program in the period between its enactment and the ACA's Medicaid Expansion, see discussion, *infra* at Parts III.B. and C. For a discussion of the way this has affected the Court's decision in *National Federation*, see *infra* at Parts V.A.2 to V.B.1–2.

44 For a discussion of the administrative dimension of Medicaid, see Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 COLUM. J.L. & SOC. PROBS. 91 (2003) (criticizing the discretion that administrative officials receive in the waiver process).

45 Chas C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

sion of substantive authority. Before we abdicate all possibility of federalism enforcement in this area, we might examine other operational paradigms for the Tenth Amendment, drawn from the life of federalism inside the administrative state.

This Article turns to administrative agencies as a site of federalism's "life" as a corrective to our obsession with the legislative process as the object of federalism enforcement. Paying attention to the implementation of policy reveals dimensions of the national-state relationship in cooperative federalism that we might miss in focusing solely on the enactment stage. That is, the practice of power might work very differently than is supposed by an abstract conception drawn from legislation.[46] Attention to administrative agencies as the site of federalism practice yields significant insights. It reveals administrative law as a model and source of norms that are capable of reorienting Tenth Amendment jurisprudence from the conceptual dominance of allocation and separation.[47] Underlying administrative law doctrines that effectuate the participation in notice and comment rulemaking and that maximize rational decisionmaking in agency policy choice is a commitment to the norm of engagement. Engagement (as against separation), understood as a behavioral norm,

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46 In recognizing the different valence of power relations, however, I do not reach the same conclusions as Nugent or Bulman-Pozen and Gerken in that the availability of judicial review, and the type of remedy necessary resists a normative commitment to "self-help" as a global solution to federalism enforcement. Along with scholars like Ryan, the discussion below suggests that judicial review might be warranted in some cases, and not in others. However, unlike Ryan, who takes substantive allocations of power as her starting point, this analysis resists this starting point. The resistance arises from a commitment to what I have termed in other projects as the "relational" dimension of the national-state relationship, which suggests that the states and the national government owe a duty to one another, even where we are clear about the possession of substantive authority. For recent discussions of this, see Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511, 524–43 (2011) [hereinafter Copeland, *Federal Law in State Court*]; Charlton C. Copeland, *Ex parte* Young: *Sovereignty, Immunity and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843, 849–56 (2009) [hereinafter Copeland, *Ex Parte Young*]. For other relational conceptions of American federalism, see Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 734 (2004); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experiences*, 51 DUKE L.J. 223, 283–86 (2001).

47 The argument presented here is different from other arguments that have relied on administrative law doctrine to protect state interests. Though these discussions certainly pay closer attention to the policy implementation stage of the national-state relationship, they offer administrative law as an additional layer of protection for state interests. This Article's central argument goes a bit further than this by asserting that not only might we understand federalism concerns as having been transported into administrative law doctrine, but that we might reorient federalism doctrine through the prism of administrative law doctrine.

may offer guidance for reconsidering federalism regulation in spaces of shared policy implementation.[48] This Article serves as a starting point for this conversation, and does not develop the doctrinal pronouncements or tests that such a norm might call for. It is, however, an important first step in rethinking federalism enforcement.

Part I of this Article discusses the role of the Tenth Amendment in federalism enforcement. It demonstrates both the transformation and stability in the Court's Tenth Amendment jurisprudence. The subject matter of the Tenth Amendment's protection has changed from substantive state authority to state political institutions as the embodiment of federalism enforcement. Nevertheless, the Tenth Amendment continues to be deployed to enforce separation of the protected subject matter from entanglement with the national government.

Part II of the Article provides an overview and critique of the political safeguards model, which rejected judicial review of federalism based on the structural protections for state governments in the national political institutions. Much of the political safeguards model is premised upon a conception of federalism enforcement as power allocation. This Part argues that the political safeguards model conceives of national-state interaction as taking place exclusively in the Congress, and only at the time of initial enactment. Such an understanding is an incomplete description of federalism.

Part III provides a history and description of the Medicaid program and its development. It also addresses the process by which the national government and the states make Medicaid policy through waiver. The main objective of this Part is to demonstrate that the multi-institutional and intertemporal dimension of the Medicaid program conflicts with the dominance of the separation of the Tenth Amendment jurisprudence, and the truncation of the dominant models of federalism enforcement.

Part IV discusses the Supreme Court's opinion in *National Federation.*[49] This Part demonstrates the ways in which the three Medicaid Expansion opinions all resort to the dominant framework of separation and truncation of the Medicaid program. This Part also addresses the dominant frameworks for thinking about the Spending Clause and coercion.

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48 Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 23–29 (2007).

49 132 S. Ct. 2566 (2012).

Part V of this Article demonstrates the practice of national-state interaction. However, the primary purpose of this Part is to demonstrate the institutionally and temporally dynamic quality of American federalism. Against the dominant conception of federalism on display in the political safeguards model, which appears to understand federalism as the initial demarcation of substantive regulatory authority that takes place when legislation is enacted, Part V broadens our institutional and temporal dimension of national-state interaction. By focusing on three different cooperative federalism programs—the Occupational Safety and Health Act; the No Child Left Behind Act; and the REAL ID Act[50]—this Part demonstrates that allocation of substantive authority does not correctly explain what takes place between the national government and the states under these circumstances.[51]

To the extent that federalism dynamics largely take place in administrative settings, Part VI argues that administrative law doctrine provides an alternative model for Tenth Amendment jurisprudence beyond separatism.[52] One of the central norms imposed in administrative law is the norm of engagement; both substantive and procedural administrative law doctrine work to protect constitutional val-

50 Both NCLBA and the REAL ID Act have been insightfully addressed by Jessica Bulman-Pozen and Heather Gerken. In fact, my inspiration for discussing them is, in part, because of the differences I highlight. Rather than addressing these statutes from the stage of state-level rebellion or critique, the discussion that follows attempts to demonstrate the ways the temporally-extended dimension of these relationships affects the extent to which outright rebellion or challenge is the sole policy response. Further, to the extent that Bulman-Pozen and Gerken argue that the availability of state-level criticism of cooperative federalism policy justifies the elimination of judicial enforcement as a general matter, I part company with them in seeing this as a more micro-level decision that depends upon context, as will be discussed further.

51 This is not to suggest that the national government and states are not involved in contesting some aspects of sovereign authority; however, as I hope to demonstrate, the conflicts between the states and the national government are better understood as involving what federalism scholar Erin Ryan calls a "tug-of-war." *See* Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 629 (2007) [hereinafter Ryan, *Federalism and the Tug of War Within*].

52 Unlike other scholarly discussions of administrative federalism, this Article does not suggest that agencies are more appropriate sites of federalism decisionmaking. For an insightful defense of agencies' role in federalism decisionmaking, see Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008). Rather, this Article seeks to explore the role that administrative law doctrine—or at least some subset of administrative law doctrine—procedural rules—might be beneficial in reorienting federalism enforcement within even the judiciary. That is, this Article does not seek to challenge, and indeed seeks to bolster, the judicial role in federalism enforcement by augmenting the judiciary's toolkit in particular federalism disputes.

ues by imposing the norm of engagement.[53] This Part demonstrates the significance of the engagement of underlying disputes over the place of federalism in agency decisionmaking by focusing on the judicial review of agency decisions to preempt state law. The Court's decision in *Wyeth v. Levine*[54] represents the way in which the judiciary can protect federalism values in the policy-implementation stage in ways by forcing agency engagement.[55]

I. FEDERALISM AS JURISDICTIONAL SEPARATION

Separation has played a dominant role in conceptualizing federalism in American political and legal history. Federalism, understood as the separation of substantive authority of the state and national government, provides the recipe for the protection of state authority as a constitutional commitment. The separatist dimension of federalism enforcement exists in both the political and legal debates about cooperative federalism. Presidents and congressional representatives have argued against expansive interpretations of Congress's spending authority on the grounds that it would eradicate the jurisdictional separation of states from the national government. Jurisprudentially, the Tenth Amendment has been deployed in an effort to protect the separate spheres of state and national jurisdiction, whether under-

53 There has been a bourgeoning literature on administrative constitutionalism in the last two years, which has informed my understanding of the area. *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) (arguing that the implementation of constitutional norms largely takes place in the administrative state and involves statutory enforcement); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) [hereinafter Metzger, *Ordinary Administrative Law*].

54 555 U.S. 555 (2009).

55 Leading scholars of federalism and administrative law have argued that federalism enforcement might be better approached as a species of administrative law. *See, e.g.*, Metzger, *New Federalism*, *supra* note 38, at 2087, 2091 ("[F]or federalism to have continued vibrancy as a governing principle, it needs to be 'normalized' and consciously incorporated into the day-to-day functioning of the federal administrative state."). This Article might be understood as reversing Metzger's attempt to collapse federalism enforcement into the administrative process. Though my argument has learned a great deal from Metzger's insights, its central claim is that administrative process—more precisely its normative underpinnings—might perform a more useful contribution to federalism enforcement if we attempted to translate them into the framework of federalism enforcement. Federalism enforcement in this understanding maintains an important role in constitutional meaning, but is enhanced by the introduction of a framework that starts with different premises than traditional conceptions of separation. In this respect it avoids the criticism that has been leveled at Metzger's project as undervaluing federalism as a constitutional norm. *See* Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism without Congress*, 57 DUKE L.J. 2111 (2008) (responding to a number of federalism articles, including one by Metzger).

stood as subject matter, core state functions, or core state institutions. In each domain separation is understood as the mechanism by which federalism commitments are enforced.

A. *Federalism's Politics: Allocation in the Debate Over National Authority*

The political debates over the scope of the national spending power preceded the jurisprudential debates by a century. At the earliest, members of the Founding generation articulated opposing positions on the ends to which the national government could expend its treasure. These debates take two forms that shaped the debate's development in the nineteenth century. The first dimension of the debate was about the relationship of the spending power to other constitutionally-enumerated powers—including the taxing and commerce authorities. The second dimension of the debate was primarily concerned with the implications of broad interpretations of the national spending authority. Each dimension emphasizes the separation of state from national authority.

1. *Debating the Spending Power in Early America*

Conventional wisdom assumes that cooperative federalism arose from the constitutional transformations brought on by the New Deal revolution.[56] However, debates about early forms of cooperative federalism date back to the first decades of American history.[57] The single most important factor in cooperative federal arrangements is the national government's access to substantial revenue streams and the breadth of expenditures to which these resources can be put. As such, the scope of congressional taxing and spending authority is central to the debate about the constitutionality over cooperative federalism. Even before national spending authority could be deployed in expansive ways, its exercise had to overcome arguments that it was limited to only those areas within Congress's designated substantive authority. Maintaining a government of limited power meant constraining the Spending Clause power lest national power run amok.

Alexander Hamilton set the stage for debate about the scope of congressional authority by calling for acceptance of a broad interpre-

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56 For a discussion of the longer history of the "new federalism," see KIMBERLEY S. JOHNSON, GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877–1929 (2006).

57 *See, e.g.*, DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH CENTURY (1962).

tation of the national spending power. Rather than reading the spending authority as connected to the constrained Commerce Clause authority, Hamilton connected it to the broader power to raise money. Hamilton argued: "[T]he power to raise money is plenary and indefinite; and the objects to which it may be appropriated are no less comprehensive."[58] Regarding the scope of the "general welfare," Hamilton espoused a similarly broad construction, declaring: "The terms 'general welfare' were doubtless intended to signify more than was expressed or imported in those which Preceded[.] . . . The phrase is as comprehensive as any that could be used; because it was not fit that the constitutional authority of the Union . . . [and] should not be restricted within narrower limits than the "general welfare."[59] Hamilton admitted that the only significant limitation regarding the scope of Congress's appropriation authority was that "the object to which an appropriation of money is to be made be General and not local."[60]

It ought to come as no surprise that Hamilton's interpretation did not engender unanimity even among the Founding Generation, as demonstrated by James Madison's narrow interpretation of the spending authority during his presidency. In a message explaining his veto of the Federal Improvement Plan of 1817, Madison argued that national taxing and spending authority were limited to those subjects that fell within Congress's enumerated powers.[61] Madison argued that interpreting the constitutional provision "to provide for common defense and general welfare," without limitation, would render the attempt to enumerate (and thereby limit) congressional authority a nullity. He further argued that an interpretation of the clause sufficient to legitimize the Act would "have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them . . . ."[62] Finally, Madison argued that to accept the legitimacy of congressional authority would be to undermine the Constitution's status as supreme law, because federal statutes enacted under the taxing and spending

58 "Report on the Subject of Manufacturers," in 1 WORKS OF ALEXANDER HAMILTON 231.

59 *Id.*

60 *Id.* at 233.

61 The legislation subsidized the construction and operation of higher education for students of agriculture and mechanics. *See* WILLIAM JAMES HULL HOFFER, TO ENLARGE THE MACHINERY OF GOVERNMENT: CONGRESSIONAL DEBATES AND THE GROWTH OF THE AMERICAN STATE, 1858–1891, at 15 (2007).

62 James Madison, *Veto of Federal Public Works Bill*, CONSTITUTION.ORG (Mar. 3, 1817), *available at* http://www.constitution.org/jm/18170303_veto.htm.

authority would not be "susceptible of judicial cognizance or decision."[63]

The spending power's scope generated debate well beyond the Founding generation. It carried over into debates about some of the most important pieces of legislation in American history, including the initial attempts to enact the Morrill Land Grant in 1858.[64] The legislation empowered the national government to donate federal land to state governments on the condition that states use the proceeds from the land sales to establish institutions of higher learning to teach "agricultural and mechanical studies," among other areas.[65] Unlike earlier grants to state governments, these grants imposed both restrictions as to the use of sale proceeds and instituted national oversight of state governments. For example, the states were required to report to the national government with respect to their progress and costs of development.

Though the Land Grant legislation passed both Houses of Congress, it was vetoed by President James Buchanan. In one of the most extended discussions by a President regarding conditional grant legislation, President Buchanan explained his veto as based on the Land Grant bill's unconstitutionality.[66] Buchanan argued that Congress was without power to donate public lands to the states for the purpose of establishing institutions of higher learning. Buchanan's argument borrowed largely from Madison's argument of forty years prior that the taxing and spending authority was limited to only those areas that fall within the enumerated powers, or are "necessary and proper" for the achievement of any of those powers.[67] As the provision of education, according to Buchanan, did not fall within an explicitly-granted congressional power, the appropriation of national funds for state

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63 *Id.*

64 For a history of the debates over the Morrill Land Grant legislation, see HOFFER, *supra* note 61, at 24–31.

65 The Land Grant legislation did not represent the first time that the nation's resources had been distributed to state governments. The first national grants to state governments included the distribution of federal lands to state governments, the sale of which was intended for the purpose of financing educational institutions, canals, roads, and other improvements. National aid to states continued in the form of an outright distribution of the national treasury's $28 million surplus to the state governments. These early grants to state governments were marked by minimal conditions and oversight. JANE PERRY CLARK, THE RISE OF A NEW FEDERALISM: FEDERAL-STATE COOPERATION IN THE UNITED STATES 139–43 (1938).

66 CONG. GLOBE, 35th Cong., 2d Sess. 1412–13 (1859).

67 *See* Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548, 568–72 (1923).

governments contravened the constitutionally legitimate scope of Congress's power.[68]

The Court did not directly address the issue of the scope of the General Welfare Clause until the New Deal era. In its decision in *United States v. Butler*,[69] the Court cast its vote with Hamilton. Though the Court did not think it necessary to "review the writings of public men and commentators or discuss the legislative practice"[70] without any analysis, they concluded that Hamilton had the better of the arguments. They concluded that Congress's taxing authority, while not unlimited, was not limited by the Constitution's constraints on Congress's legislative powers.[71] Likewise, the Court concluded that the corresponding appropriations power was "not limited by the direct grants of legislative power found in the Constitution."[72]

2. *Debating Early Cooperative Federalism: Protecting State Separation*

The separation of state authority from national authority was considered a primary mechanism of enforcing the Constitution's federal structure in debates about cooperative federalism programs. Throughout the nineteenth century, opponents of cooperative federalism programs emphasized the extent to which such programs would undermine state sovereignty by threatening their separate existence.

Again, President Buchanan explained his veto of the Land Grant legislation by emphasizing the importance of the separation of state and national authority. He argued that the donation of national lands to state governments was unconstitutional because it would "break down the barriers which have been so carefully constructed in the Constitution to separate Federal from State authority."[73] Further he argued that recognizing such authority in the national government "would be an actual consolidation of the Federal and State Governments, so far as the great taxing and money power is concerned, and constitute a sort of partnership between the two in the Treasury of the United States, equally ruinous to both."[74]

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68 With the post-secession Congress emptied of the most ardent opponents of Morrill Land Grant legislation and broad interpretations of Congress' spending power, the land grant legislation was enacted in 1862.

69 297 U.S. 1 (1936).

70 *Id.* at 66.

71 *Id.*

72 *Id.*

73 CONG. GLOBE, 35th Cong., 2d Sess. 1413 (1859).

74 *Id.*

The constitutional requirement of separation was advanced by congressional leaders as well. Representative William Cobb of Alabama opposed the land grant legislation because it threatened state independence. Arguing against the bill, Cobb declared: "The patronage would be fatal to the independence of the States; with patronage comes the power to control . . . ."[75] Virginia Senator James M. Mason argued that the act amounted to "an unconstitutional robbing of the Treasury for the purpose of bribing the States."[76] He further argued that the long-term consequences of the states' acceptance of the bribe would be that, "[i]n a very short time the whole agricultural interests of the country will be taken out of the hands of the States and subject to the action of Congress . . . ."[77] Though the debate about the scope of the national government's authority under the spending clause was largely a debate between the political branches of the national government throughout the nineteenth century, the separatist paradigm carried over when the Court entered the debate in the twentieth century.

B. Power Allocation in Twentieth Century Tenth Amendment Jurisprudence

The Tenth Amendment jurisprudence of the early twentieth century sought to protect state autonomy by strictly defining state substantive power and separating it from national authority. In *Hammer v. Dagenhart*,[78] the Court invalidated the Keating-Owen Act of 1916 (the Child Labor Act), which prohibited the interstate sale of goods manufactured using child labor. The Court held that Congress's authority to regulate interstate commerce did not extend to establishing minimum ages of employees used in the manufacturing process. The Court separated the labor involved in the production and manufacture of goods in interstate commerce from Congress's authority to regulate the transportation of goods in interstate commerce.[79] That is, the labor used to manufacture an otherwise acceptable good in interstate commerce was separate from the good produced. In addition to this narrow interpretation of Congress's Commerce Clause authority, the Court held that recognizing national authority to regulate child labor would "destroy the local power"[80] in violation of the Tenth

75 CONG. GLOBE, 35th Cong., 1st Sess. 1741 (1858).
76 CONG. GLOBE, 35th Cong., 2d Sess. 718 (1859).
77 *Id.*
78 247 U.S. 251 (1918).
79 *Id.* at 273–74.
80 *Id.* at 274.

Amendment. The centrality of the state's possession of substantive power is exemplified in the Court's declaration, "[t]he maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."[81] The effective enforcement of the Constitution's federal structure depended upon the recognition of dual sovereignties through the strict separation of state and national substantive authority.[82] The protection of federalism through the preservation of jurisdictional space marked the era of dual federalism.

Through the early New Deal period the Court invalidated national legislation based on its conclusion that congressional regulation trampled on a "purely local" power to be exercised by the states. In *United States v. Butler*,[83] about which more will be said below, the Court held that the Agriculture Adjustment Act, which attempted to shore up agriculture prices by paying farmers to reduce their agricultural production, violated the Constitution. Despite the Court's affirmation of Congress's authority to spend beyond the scope of its enumerated power, the Court invalidated the Act on the ground that Congress had sought to regulate activities that were within the realm of state jurisdiction. The *Butler* Court concluded that the purpose of the Act was to regulate agricultural output, an activity that the Court defined as "a purely local activity."[84] Throughout the opinion, the Court reiterated that the United States government was a "dual form of government," the protection of which required the separation of the sovereignty of both the national and state governments as the embodiment of federalism enforcement.

C. Identifying Sovereignty's Core: Allocation in the Post-New Deal Era

1. Protecting Fundamental State Power

The Court's enforcement of the Tenth Amendment lay dormant for nearly four decades. The period from 1937 to 1976 saw the national government expand its regulatory reach to solve problems of

81 *Id.* at 275.

82 For a classic discussion of the era, see Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

83 297 U.S. 1 (1936).

84 *Id.* at 64.

environmental degradation,[85] workplace safety,[86] and educational preparedness.[87] For many, it appeared that the constitutional protections for federalism were dead letter.[88] To the surprise of many commentators, the Court asserted itself, and the Tenth Amendment, as the protectors of state sovereignty in *National League of Cities v. Usery*.[89] Though some identified this as an attempt to return to the "dual federalism" of the past, the scope of the Tenth Amendment's protection was significantly reduced from its heyday. However, the Court remained committed to separation and allocation as the primary motifs in Tenth Amendment jurisprudence.

In *National League of Cities* the Court held that amendments to the Federal Labor Standards Act, which extended minimum wage protection to state and local government employees, violated the Tenth Amendment.[90] The Court rested its conclusion on the Constitution's federal structure, which required the protection of the "separate and independent existence" of state governments.[91] The Court based its decision on the conclusion that the protection of the federal structure would be achieved by the separation and protection of the "essential" functions of state sovereignty.[92] Like the early twentieth century Court, the *National League of Cities* Court held that the "power to determine the wages . . . paid to those whom they employ"[93] was an essential attribute of state sovereignty. So serious was the incursion on the states' domain, the Court reasoned, that "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions . . . we think there would be little left of the States' separate and independent existence."[94]

The *National League of Cities* Court did not rely on older conceptions of "local power" in its invalidation of the minimum wage statutes, as had earlier Courts. Indeed, the Court seemed to accept an expansive interpretation of the national government's authority under the Commerce Clause.[95] Nevertheless, the Court, like its prede-

85 *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006).

86 *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006).

87 *See, e.g.*, No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2006).

88 *See, e.g.*, William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985) (highlighting that *National League of Cities* was the first case in forty years to overturn a congressional statute on federalism grounds).

89 426 U.S. 833 (1976).

90 426 U.S. 833 (1976).

91 *Id.* at 845 (quoting Coyle v. Smith, 221 U.S. 559, 580 (1911)).

92 *Id.*

93 *Id.*

94 *Id.* at 851 (internal quotation marks omitted).

95 *Id.* at 840.

cessor, concluded that the correct method of protecting the Tenth Amendment's guarantee of the state governments' "ability to function effectively"[96] lay in the separation of state hiring activities from other hiring activities to be regulated. Though the Court did not rely on the Tenth Amendment to interpose state authority between the national government and private citizens, it identified state hiring practices as a paradigmatic embodiment of the state's sovereign will.[97] The protection of this will required its separation from interference by national political actors.

The focus on traditional state functions continued to animate even unsuccessful challenges to alleged expansive interpretations of national authority. In her dissent in *Federal Energy Regulatory Commission v. Mississippi* (*"FERC"*),[98] Justice O'Connor also identified the Tenth Amendment as a restraint on congressional action that "would impair a state's ability to function as a state."[99] In *FERC*, O'Connor concluded that Congress's requirement that state public utility commissions consider federally-determined standards would undermine state integrity on the basis that the requirement affected "traditional functions of the State," into whose category she included the regulation of public utilities.[100] O'Connor's dissent marked the path that the Court's protection of state interests would take over the next decade.

2. *Protecting Fundamental State Institutions*

The Court's depiction of the Tenth Amendment as protective of substantive state power expanded to include the protection of state institutions from national interference or commandeering. The debate over the scope of national authority to enlist state institutions in the implementation of national law preceded *National League of Cities* in the lower federal courts,[101] and this issue was raised by Justice O'Connor in dissent in *FERC*. It would lay the foundation for the

96 *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

97 One might reasonably argue that the state challenges to the Individual Mandate are a version of interposition of state authority between the national government and private citizens.

98 456 U.S. 742 (1981) [hereinafter *FERC*].

99 *Id.* at 778 (O'Connor, J., concurring in part and dissenting in part) (internal quotation marks omitted).

100 *Id.* at 753.

101 *See, e.g.*, Brown v. Envtl. Prot. Agency, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977), *remanded to* 566 F.2d 665 (9th Cir. 1977) (examining the tension between the commerce power and state power).

Court's revitalization of Tenth Amendment jurisprudence for the first time since its reappearance in *National League of Cities.*

In addition to her depiction of the Tenth Amendment as protecting substantive state authority, Justice O'Connor's dissent in *FERC* also depicted the Tenth Amendment as protective of state institutions. O'Connor concluded that Congress's requirement that state public utility commissions consider adoption of federal standards regulating gas and electric utilities constituted a commandeering of state institutions. O'Connor declared: "State legislative and administrative bodies are not field offices of the national bureaucracy."[102] She wrote: "The power to make decisions and set policy, however, embraces more than the ultimate authority to enact laws; it also includes the power to decide which proposals are most worthy of consideration. . . . the [Public Utility Regulatory Policy Act ("PURPA")] chooses twelve proposals, forcing their consideration even if the state agency deems other ideas more worthy of immediate attention."[103] O'Connor rejected the majority's conclusion that the statute's forced consideration of federal policies was less intrusive than outright preemption on two grounds—resource allocation and political accountability. Regarding resource allocation, O'Connor noted that preemption, though silencing the state as a norm articulator, did not divert a state's decision-making process by forcing it to undertake the consideration of national goals, rather than its own priorities.[104] O'Connor wrote: "The States might well prefer that Congress simply impose the standards described in PURPA; this, at least, would leave them free to exercise their power in other areas."[105] For O'Connor, the eviction of states from policy domains through preemption represented an advance over their subordination by the national government when entangled in cooperative governance structures that imposed constraints on the freedom of their decisionmaking.

O'Connor's resource-allocation argument against the imposition of a PURPA's consideration requirement did not convince a majority of the Court. But her *FERC* dissent also rehearsed the argument that "[c]ongressional compulsion . . . blurs the lines of political accounta-

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102 *FERC*, 456 U.S. at 777 (O'Connor, J., concurring in part and dissenting in part).

103 *Id.* at 779.

104 Justice O'Connor's argument had been stated earlier by Richard B. Stewart. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1231–32 (1977) (arguing that mandating state implantation of national policy undermines that state's ability to determine "what goods and services state and local governments should provide their citizens and how these measures should be financed"). *But see* Bulman-Pozen & Gerken, *supra* note 40.

105 *FERC*, 456 U.S. at 787 (O'Connor, J., concurring in part and dissenting in part).

bility and leaves citizens feeling that their representatives are no longer responsive to local needs,"[106] which would meet with greater success in *New York v. United States.*[107] There, O'Connor reiterated her attack on legislative commandeering, arguing that residents choose state officers who share their policy views. If these policy views are anathema to the national norms, they may be preempted, but such preemption of state policy is attributable by state residents to the policy choice of nationally-elected leaders. Legislative commandeering, however, forced "state officials [to] bear the brunt of public disapproval [of a particular policy choice], while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[108] Thus, the effective protection of the state's independence in the federal system, and values of political accountability, required immunizing state legislative bodies from national commands.

The necessity of separation was emphasized even more in the Court's decision in *Printz v. United States,*[109] in which it invalidated a provision of the Gun Control Act that temporarily enlisted state officers to perform background checks on gun purchasers. There, Justice Scalia emphasized the need for the prohibition of state and national bureaucratic coordination on any terms other than choice. The *Printz* Court was even more explicit about the separation of state and national institutions than in *New York,* emphasizing as "incontestable" its conclusion that the Constitution established "a system of dual sovereignty."[110] The *Printz* majority also explained its holding as consistent with federalism's purpose of protecting liberty by preventing the monopolization of power. The ratifications of national enlistment of state administrative resources increase "immeasurably" the national government's power, thereby undermining the "balance" necessary for the prevention of tyranny.[111]

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106 *Id.*

107 505 U.S. 144 (1992).

108 *Id.* at 169.

109 521 U.S. 898 (1997).

110 *Id.* at 918 (internal quotation marks omitted) (quoting Gregory v. Ashcroft 501 U.S. 452, 457 (1991), and Tafflin v. Levitt, 493 U.S. 455, 458 (1990)). For a critique of the Court's dual sovereignty argument for commandeering, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't,* 96 MICH. L. REV. 813 (1998) [hereinafter Hills, Jr., *Cooperative Federalism*] (agreeing with the Court's anti-commandeering doctrine, but on different grounds than a dual sovereignty basis).

111 *Id.* at 921, 922.

II. POLITICAL SAFEGUARDS: THE RE-ZONING OF POWER ALLOCATION

New York and *Printz* are significant, not simply because they represent the continuation of the separatist paradigm, but because they constitute a rejection of the Court's abdication of the judicial enforcement of federalism articulated in *Garcia v. San Antonio Metropolitan Transit Authority*.[112] The *Garcia* Court's withdrawal ceded federalism enforcement to the political process as a sufficient safeguard of state interests. Broadly speaking there are two large camps in the literature and jurisprudence of judicial review of the Constitution's federalism structure. On one side are those who believe that the Constitution's federalism structure can and should be judicially enforced as are other constitutional provisions.[113] On the other side are those who argue that the enforcement of the Constitution's federalism provisions is distinct from the enforcement of individual rights provisions, largely because the political structures protect the states in the constitutional system.[114] Problematically, both proponents and opponents of judicial review of federalism emphasize the initial decision-making phase of the national-state interaction, without addressing subsequent phases or institutions in which state and national relations take place. It is solely on this dimension of these two positions that this Part will focus.

The literature on the judicial review of federalism is dominated by a particular model of federalism enforcement as the allocation of substantive authority between the national government and the states. As stated above, this conception of federalism enforcement has both temporal and institutional biases. It privileges the initial legislative enactment of a particular provision. If a statute falls within Congress's substantive regulatory authority at the time of its enactment, there does not seem to be a point at which the statute might be deemed to be unconstitutional on federalism grounds. Post-enactment policy implementation, which largely takes place between

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112 469 U.S. 528 (1985).

113 *See, e.g.*, Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 101 (2001) (imploring the judiciary to check "congressional aggrandizement of power").

114 *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) [hereinafter Kramer, *Political Safeguards of Federalism*]; Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); 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, 559 (1954).

federal and state administrative officials, does not appear to impact the assessment of whether a statute is consistent with the Constitution's federalism dictates.[115]

A. *Federalism as Power Allocation and Institutional Monopolization*

1. *The Traditional Model: Wechsler and Choper*

Professor Herbert Wechsler begins the final section of his classic treatment of the political safeguards of state interests, saying: "If this analysis is correct, the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well-adapted to retarding or restraining new intrusions by the center on the domain of the states."[116] The problem that has marked Wechsler's project, and continues to mark current "political safeguards" theory, is that the analysis largely confined itself to the national political process, as against the administrative process. Though Wechsler is surely correct to note the role that states might play in preventing "new intrusions" that spring from the legislative domain, the implementation of already-existing policy is perhaps more significant in the interaction between states and the national government than threatening legislation.[117] The institutional confinement of the political process suggests that the only forum for determining national-state interaction is the national legislature.

Though the executive branch is not completely ignored in Wechsler's account,[118] it is not altogether clear that he envisions the executive performing functions that extend beyond participating in the legislative process. He writes: "Since [the President's] programs must, in any case, achieve support in Congress—in so far as they in-

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115 *But see* Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001) [hereinafter Hills, Jr., *The Eleventh Amendment*] (arguing that state bureaucratic actors may be more closely aligned with federal bureaucratic actors than they are with other state-level officials).

116 Wechsler, *supra* note 114, at 558.

117 Arguing from a different political process perspective, Bradford Clark argues that the very difficulty of any lawmaking in the national legislature is, itself, an important structural protection for states, because it makes lawmaking difficult no matter the subject area. Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 340–42 (2001).

118 Wechsler, though recognizing the fact that the modern presidency is the paradigmatic "national" figure, argues that "the mode of his selection and the future of his party require that he also be responsive to local values that have large support within the states." Wechsler, *supra* note 114, at 557–58.

volve new action—he must surmount the greater local sensitivity of Congress before anything is done."[119] Wechsler's focus on Congress as the exclusive site of executive activity fails to consider that the President can achieve policy goals within the administrative state.[120] To that extent, Wechsler's reliance on the double-barreled protection of state governments might be mistaken.

Another example of the institutionally- and temporally-truncated conception of federalism decisionmaking is Professor Jesse Choper's expansion of Wechsler's argument against judicial review. In his treatment of the executive, Choper focuses on the institutional constraints—for example, the role that states play in the nomination process—that incentivize presidential candidates and Presidents to accommodate state interests.[121] However, like Wechsler, Choper argues that the "strongest assurance" that the President will be responsive to state interests is the "need to maintain rapport with Congress."[122] Again, this suggests that the President's role in lawmaking is limited to what takes place between the President and Congress. It does not recognize the arsenal of authority with which the administrative state provides the Presidents who, for any number of reasons, cannot push a legislative agenda through Congress.[123] Indeed, Presidents who have run out of power with a Congress often turn to the administrative state as a site of substantive power. There, the coordination difficulties that make Congress an unhelpful partner often make Congress less capable of radically interfering with policy decisions made at the bureaucratic level.

But more important than either Wechsler or Choper's institutional myopia is the conception of federalism that underwrites it. Their

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119 *Id.* at 558.

120 In fairness to Wechsler, his statement might simply be a fact of the historical period in which he wrote, which may have preceded the apex of the administrative presidency. This is certainly possible, in the light of the fact that the New Deal regulatory apparatus had not reached its full flowering. For a discussion of the presidency and the administrative state, see RICHARD P. NATHAN, THE ADMINISTRATIVE PRESIDENCY (1983). For a more contemporary discussion, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing the significant power that administrative policymaking provides the President). As will be discussed below, the judiciary has not abdicated responsibility for the review of the process and substance of administrative decisionmaking, even though it has, through other doctrines (i.e., *Chevron* deference) deferred to administrative policymaking.

121 Choper, *supra* note 114, at 1563–64.

122 *Id.* at 1564.

123 *See* JOHN D. GRAHAM, BUSH ON THE HOME FRONT: DOMESTIC POLICY TRIUMPHS AND SETBACKS (2010) (discussing the Bush administration's resort to administrative preemption of state tort law after its attempts to achieve tort reform legislation were stymied in Congress).

focus on legislative enactment suggests that federalism decisions are made at a single time and involve a decision about the site of authority; either the national government is empowered by a particular decision or it is not. States either win at the legislative enactment stage or they lose, and losing is defined as failing to prevent national encroachment on substantive authority. This is exemplified in Choper's argument for why judicial review is unhelpful to states.

Choper argues that the judiciary had, at least up to 1977, sanctioned every congressionally-enacted expansion of national authority. Choper noted that *National League of Cities*'s limitations on national authority were so narrow that Congress would find it easy to avoid its restrictions by resorting to other sources of authority under the Spending and Commerce Clauses.[124] While Choper is correct to point out that *National League of Cities* left Congress with multiple sites of substantive regulatory authority, his conclusion that states' interests have not been aided rests on the conclusion that the relationship between the national government and the states is defined exclusively by who has a particular quantum of substantive power. Under Choper's reading, the judiciary's affirmation of the exercise of authority ends all possible routes by which a state's interests might be protected; there is no other basis for the regulation of national-state interaction, either because at that point the state is a servile subject or because the national government is incapable of causing states harm. Again, this description of federalism ignores every interaction beyond the initial statutory enactment as meaningless in the determination of whether the Constitution's federalism values are violated.

2. *Rejecting Political Safeguards and Accepting Allocation*

Some advocates of a judicial role in federalism enforcement have based their arguments on originalist and structural theories of constitutional interpretation.[125] Others have primarily sought to counter the political safeguards thesis.[126] However, like the political safe-

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124 Choper, *supra* note 114, at 1594–1600.

125 *See, e.g.*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1357–91 (1997) (offering historical evidence in support of the argument that the Constitution and its framers intended that there be judicial review of federalism enforcement).

126 *See, e.g.*, John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 103–04 (2004) (arguing that rational ignorance prevents citizens from protecting federalism even when it is in the public interest); Hamilton, *supra* note 111 (exposing historic and empirical deficiencies in the political safeguards thesis); *see also* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (arguing that theories pro-

guards proponents, the advocates of judicial review based on the "failure" of political safeguards argument also advance arguments that conceptualize federalism decisionmaking in institutionally- and temporally-limited frameworks. These scholars have accepted a role for the judiciary in federalism enforcement, but have also accepted that this role will involve only allocation of substantive authority between the national government and the states, involving the invalidation of congressional authority to enact legislation, rather than an enforcement of other sites of state and national interaction.

An example of this argument is the work of Professors John McGinnis and Ilya Somin, who have articulated a principal-agent model to demonstrate the failure of the political process to safeguard federalism values. Specifically, they argue that neither national nor state-level agents have an interest in providing the federalism enforcement that their principals—the citizenry—want.[127] Although McGinnis and Somin have included state actors in their description of the institutional dynamic that impacts federalism enforcement, their analyses of various areas of state-national interaction are not concerned with anything more than the initial decision of whether to enact a statute or not. For example, in criticizing the Supreme Court's failure to rein in Congress's use of conditional spending, McGinnis and Somin argue that spending legislation is enacted because states that favor a particular policy seek to have their policy choice subsidized by the national government by forcing other states to accept their choice through the attachments of conditions on the receipt of federal funds.[128] While this description may be correct in some respects about the origin of conditional spending legislation, it does not explain how spending authority is actually deployed in the implementation of national policy. For McGinnis and Somin, the fact of spending statutes, by themselves, suggests that states are at risk of being dominated by the national government.[129] This suggests that the only protection that states have is at the stage of initial allocation.

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moting process-based theories of federalism enforcement as the exclusive safeguard of the federal system are inconsistent with the Constitution's text, structure and history).

127 McGinnis & Somin, *supra* note 126, at 99–100.

128 *Id.* at 115–18.

129 This is not very far from arguments that Somin has made about the threat the spending authority poses for state governments. *See* Somin, *supra* note 28, at 464–73.

B. Updating Political Safeguards: Larry Kramer's Misdiagnosis

Larry Kramer represents the most sophisticated contemporary update of the political safeguards model. Kramer's defense of political safeguards moves beyond descriptions of the Congress and the Executive as the exclusive institutions in federalism enforcement, to include examination of the role political parties play in national-state interaction.[130] Kramer's conception of the role that parties play in protecting the interests of states sees federalism as contestation against the center. Rather than relying on state institutions, which might prove vulnerable to ideological cooptation by the center, the rise of the political party allows for contestation against the center, thereby offering states a shelter in which their claims might reside.[131]

But what makes political parties a dominant institution in federalism enforcement? Kramer explains that political parties regulate national-state interaction by connecting the fates of national and state officials.[132] Such linked fates are demonstrated by what Kramer describes as the relatively pragmatic philosophical position of American political parties, which values electoral success over ideological commitment. Kramer argues that political parties are motivated to max-

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130 Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1522–41 (1994) [hereinafter Kramer, *Understanding Federalism*]. *See also* Ryan, *Negotiating Federalism*, *supra* note 17; Bulman-Pozen & Gerken, *supra* note 40; Hills, Jr., *Cooperative Federalism*, *supra* note 109. Beyond legal scholarship these discussions have been prominent in political science literature for generations. *See, e.g.*, NUGENT, *supra* note 35; KIMBERLEY S. JOHNSON, GOVERNING THE NEW AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877–1929 (2007); JANE PERRY CLARK, THE RISE OF A NEW FEDERALISM: FEDERAL-STATE COOPERATION IN THE UNITED STATES (1965).

131 Kramer, *Political Safeguards of Federalism*, *supra* note 114, at 268–78 (2000). Kramer's insight allows us to understand the dynamics of federalism's shifting allies. For example, the period from 2003–2007 marked one of the longest periods during which the Democratic Party was in control of no national political institution—White House, Senate, or House of Representatives. It is no shock that during this time, Democrats began to speak more favorably of state interests in the face of federal impositions than at any other time since the Civil Rights Movement, and since the "states' rights Democrats" of the 1960s. Kramer allows us to see federalism as an element of the toolkit of contestation against the center. For discussions of this in my own work, see Copeland, *Ex Parte Young*, *supra* note 46, at 850–51 (2009). Most recently, this is underscored by the fact that of the twenty-six states to challenge the constitutionality of the ACA, twenty-five were Republican Attorneys General. *See* Kevin Sack & Eric Lichtblau, *For Attorneys General, Long Shot Brings Payoffs*, N.Y. TIMES (June 30, 2012), http://www.nytimes.com/2012/07/01/us/politics/for-attorneys-general-health-law-long-shot-brings-payoffs.html?_r=1&adxnnl=1&pagewanted=all&adxnnlx=1346677238-VfJFUcPuaemsFXNbYIr0Mw.

132 For a contemporary example of this phenomenon, see Mike Tobin, *Some GOP-led States Plan to Resist Health Care Law, as Ruling Reins in Medicaid Expansion*, FOXNEWS.COM (June 30, 2012), http://www.foxnews.com/politics/2012/06/29/some-gop-led-states-plan-to-resist-health-care-law-despite-ruling/ (describing Republican state officials' support for Mitt Romney's national presidential campaign).

imize their electoral success across geographical boundaries. This incentive transcends election cycles and transforms the way that states and the national government interact in policy formation and governance. Kramer describes the connections as follows: "[C]andidates at one level accept aid from party organizations at other levels and cultivate party-based relationships with candidates at these other levels. And this, in turn, affects what they do in office."[133] In short, "[political] parties influence[] federalism by establishing a framework for politics in which officials at different levels [are] dependent on each other to get (and stay) elected."[134] Kramer's conception makes more explicit than either Wechsler's or Choper's the fact that political parties introduce a dimension of temporal extension that changes the dynamics of national-state interaction.

Kramer seeks to demonstrate the strength of his thesis by describing how the existence of the Republican Party during the Civil War affected the North's ability to recruit for the Civil War. Kramer argues that the party structure shaped the interactions between states and the central government by creating "a shared desire to see the war successfully prosecuted so as to ensure a Republican victory at both levels in upcoming elections."[135] Kramer compares this to the South where there were no political parties. Kramer argues that the absence of political parties allowed the Confederate states to resist any attempts at centralization by the Confederate government. Kramer writes: "[P]arty connection establishes a bond that encourages government officials to pay attention to each other's needs and inter-

133 Kramer, *Understanding Federalism*, *supra* note 130, at 1529. At the risk of overstating Kramer's claim, he does not see political parties as consciously setting out to "allocate power" between the states and the national government, but that political parties provide perhaps the most significant constraint on national actors' ambitions to override state authority. *Id.* at 1492, 1536.

134 *Id.* at 1536. Critics of Kramer's reliance on political parties argue that he conflates an incidental feature of political parties—decentralization—with an essential characteristic—the objective of maximizing electoral success. Understanding electoral success as a constitutive characteristic of political parties, they argue, would reveal the extent to which decentralization is merely a strategic choice to achieve the goal of the maximization of electoral success. This means that there is nothing inherent in political parties that makes them more likely to support state interests. *See* Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 986–87 (2002) (pointing to the changes that American political parties have undergone to highlight that maximization of electoral success requires parties to transform in ways not amenable to the maximization of state authority in an abstract sense, including the nationalization of political party agendas in the last generation).

135 Kramer, *Understanding Federalism*, *supra* note 130, at 1541.

ests."[136] The enduring bonds that Kramer highlights in political parties might be present in other aspects of national-state interaction, such as emergency relief by the national government.[137] But what is more important is that these models of interaction do not seem capable of serving as models for federalism enforcement for Kramer.[138] Kramer is surely correct to recognize that party affiliation establishes a context and framework for national and state interaction in a temporally-extended relationship that likely has some effect on national-state interaction. What is less clear, in the light of this recognition, is why he remains committed to a conceptual framework that limits federalism enforcement to the allocation of power. For Kramer, the "problem of federalism is, above all, the problem of allocation."[139] However, the description of federalism's life does not provide us with any greater understanding of how parties affect a decision about allocation.

In the above account, Kramer's description of federalism practice is marked by enduring bonds that give rise to mutual solicitude. While these may be quite appropriate descriptions for federalism in practice, Kramer's emphasis on them is inconsistent with a conception of federalism as "allocation." Why has Kramer provided us with such a compelling account of federalism in practice, only to offer an explanation of its regulation by reference to a practice that appears so ill suited? Rather than relying on the received wisdom with regard to what federalism primarily entails, it would have been more helpful had Kramer employed his positive theory of federalism's practice to inform his overarching theory of federalism enforcement. In short, if interdependence and intertemporality are significant constraints on state and national attempts to violate the federalism structure, then why are we not shown how these dimensions of the relationship

136 *Id.* at 1542. Kramer's argument is called into question by the ongoing battle between the Obama Administration and three Democratic state governors over the Secured Communities Program. The Governors of Illinois, Massachusetts, and New York have each sought to withdraw their participation from the program, which aims to remove illegal immigrants from the United States who are guilty of serious criminal offenses. These Governors (and the Mayor of Boston) have argued that the aggressive federal enforcement of the program is disrupting their relationships with immigrant communities and has negatively impacted their efforts to reduce crime in immigrant communities. *See* Jason Buch, *States at Odds Over U.S. Plan*, SAN ANTONIO EXPRESS-NEWS, June 13, 2011, at 11A.

137 For a brilliant discussion of Hurricane Katrina and the national-state relationship, see ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 17–27 (2011).

138 *But see* Copeland, *Federal Law in State Court*, *supra* note 46 (arguing for a model of federalism enforcement as interest-inclusion based on doctrine of federal courts law).

139 Kramer, *Understanding Federalism*, *supra* note 130, at 1544.

might inform federalism's enforcement? The answer seems to be that the embedded nature of the national-state relationship is not capable of judicial enforcement for any number of reasons.[140] However, Kramer's account might have at the very least shifted the perspective of those who think of line-drawing around substantive power as the only aspect of federalism enforcement worthy of note. A rejection of this by Kramer would have been a significant advance in the conversation.

The incongruity between Kramer's descriptive updates of the political safeguards thesis and his conception of federalism enforcement is also demonstrated in his description of administrative implementation of policy. Kramer's recognition of the administrative state as a site of federal-state interaction is a significant advance in the political safeguards model. He emphasizes the role that states play in the implementation of national policy in health care, criminal law enforcement, and other domains. Against claims that states are incapable of protecting their interests in the administrative state, Kramer argues that administrative implementation protects states' interests. As Kramer describes it, federalism values are protected in the administrative state in two ways: (1) state implementation of national policy through cooperative programs; and (2) congressional protection of state governments.

Kramer argues that state implementation of national policy "gives [state and local officials] a degree of control over policy and a voice in Congress."[141] Though Kramer recognizes the fact that federal supervision and potential fund cut-offs threaten states to conform to national commands, Kramer differentiates between these "formal powers"[142] and other exercises of authority. Kramer likens the national government's exercise of authority to that of a manager who deploys her formal authority in ways that "consider the needs and in-

140 These might be comprehensible as areas for judicial enforcement if understood as a form of "common law" constitutional decisionmaking, of the sort that the Supreme Court has engaged throughout its history and as a federalism enforcement mechanism. For a discussion and defense of this, see Copeland, *Federal Law in State* Court, *supra* note 46, at 55–62; *see also* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). For criticisms of this common law practice in the federalism context, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2056 n.234 (2009) (rejecting what he sees as the Rehnquist Court's enforcement of non-textual federalism constraints in areas such as clear statement rules and sovereign immunity); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L. J. 569, 613–15 (1987) (rejecting non-textual basis of the Court's Dormant Commerce Clause jurisprudence).

141 Kramer, *Understanding Federalism*, *supra* note 130, at 1543.

142 *Id.* at 1544.

terests of subordinates." Kramer emphasizes the "mutual dependence" between the national government and the states as an additional guarantee of the state's voice in policy implementation in ways that refute the claim that states are left as mere functionaries in bureaucratic implementation. Though Kramer does not suggest that these factors mean federalism is no longer a concern, but rather that "the fact of sharing and the role of states in administration is an aspect of federalism that needs to be considered in deciding what we do need to worry about."[143] Unfortunately, Kramer does not go further than this insight. He does not identify what needs to be worried about in the light of the fact of state-national "sharing." This is the closest Kramer comes to challenging the allocation framework that dominates federalism enforcement. This Article aims to move from Kramer's insight to identifying, at least in broad outline, some ways in which we might respond to Kramer's challenge.

III. MEDICAID: INTERACTION AND THE PRACTICE OF FEDERALISM

As addressed in Part II, scholars have recently turned their attention to policy implementation and the administrative state as an important site of national-state interaction. However, despite its having been at the center of two significant cases of the 2011 Supreme Court Term, the Medicaid program has not received very much attention.[144] Medicaid is often cited as one of the paradigmatic examples of cooperative federalism in American legislative history.[145] Indeed, it is not hyperbolic to declare Medicaid as the most significant federal-state program in American history.[146] Medicaid relies on states to administer programs that provide access to medical care for the indigent, and reimburses state governments for a portion of the costs incurred.

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143 *Id.* at 1546.

144 The first case of the 2011 Supreme Court Term involved the existence of a private right of action against state governments challenging cuts in Medicaid. *See* Douglas v. Indep. Living Ctr., 132 S. Ct. 1204 (2012). In early articles on the challenge to the ACA, there was almost no coverage of the Medicaid challenge. *See, e.g.*, John Schwartz, *The Supreme Court and Obama's Health Care Law*, N.Y TIMES, Dec. 18, 2010, *http://www.nytimes.com/2010/12/19/weekinreview/19schwartz.html?pagewanted=1&ref=affordablecareact* (citing remarks of Professors Randy Barnett, Michael McConnell, and Mark Tushnet, among others, but failing even to mention the Medicaid challenge).

145 *See e.g.*, Elizabeth Weeks Leonard, *The Rhetoric Hits the Road: State Challenges to the Affordable Care Act Implementation*, 46 U. RICH. L. REV. 781, 787 (2012) ("Medicaid is the quintessential cooperative federalism program.").

146 Federal Medicaid spending has grown from approximately $1.2 billion in its first year, to over $330 billion in 2007. It accounts for over 15% of the nation's total health care spending. It has grown faster than Medicare, with an enrollment that is larger than Medicare's since 2001. LAURA KATZ OLSON, THE POLITICS OF MEDICAID 1–2 (2010).

The national government conditions state receipt of federal reimbursement funds on the states' conformance with federal policy. The Medicaid Expansion provision, which will be explained in detail below, follows the same path.

This Part provides a brief history of the Medicaid program as an example of cooperative federalism. This history will provide the descriptive foundation upon which this Article's normative critique of the Court's opinion in *National Federation* rests. It primarily aims to describe the bureaucratic dimension of Medicaid's implementation. This will be done through a description of state interaction with the Center for Medicare and Medicaid Services ("CMS") (formerly the Health Care Financing Administration) in the government provision of medical insurance for the poor.

A. The Road to Medicare: Non-Inevitable Interaction

The Medicaid program was established in 1965 under Title XIX of the Social Security Act.[147] Though it has been suggested that Medicaid was an "afterthought" in the fight to expand healthcare access for the aged, Medicaid did not arise out of this air.[148] What came to be known as Medicaid had its genesis in earlier legislative efforts to provide national support for healthcare access. Given the fact that Medicaid was enacted in the same legislation as Medicare, which was a completely federal entitlement, Medicaid's cooperative structure requires explanation. The legislative precursors of Medicaid provide explanation for Medicaid's ultimate structure.

1. Steps Toward a Federal Role in the Era of Futility

In the late 1930s, progressives attempted to harness the momentum of the New Deal expansion of social support exemplified in the Old Age Survivors Insurance,[149] which ameliorated the risk of age's effects on an individual's financial well-being. In 1937, the Interdepartmental Committee to Coordinate Health and Welfare undertook

147 42 U.S.C. § 1396a (2006).

148 DAVID G. SMITH & JUDITH D. MOORE, MEDICAID POLITICS AND POLICY: 1965–2007, at 34–35 (2008) [hereinafter SMITH & MOORE, MEDICAID POLITICS]. *See also* OLSON, *supra* note 146, at 1 (describing initial beliefs that Medicaid was "Medicare's friendless stepchild, created in [Medicare's] shadow and catering to a politically powerless clientele"). Smith and Moore appear to see more forethought in what became Medicaid as compared to Olson, who describes the program saying: "No one designed [Medicaid]. Rather it is a perplexing Rube Goldberg of incremental adjustments and periodic enhancement or cutbacks, at both the national level and the state level, which rarely work in concert." *Id.*

149 42 U.S.C. § 1396a (2006).

a study of the nation's health needs and national health policy, which it forwarded to President Roosevelt in 1939.[150] The Committee's report included recommendations for cooperative policies, including extending federal grants to states for both the construction of hospital facilities and the provision of medical care to the needy.[151] However, President Roosevelt did not respond energetically to these proposals, instead forwarding the report and recommendations to Congress for "careful study."[152] Senator Robert Wagner, a progressive Democrat from New York, was convinced to introduce legislation that included the Committee's recommendations. Its failure to move out of committee foreshadowed the fate of health care legislation over the next several years.

Again in early 1942 Senator Wagner joined with Senators Murray and Dingell in proposing legislation described as "the most ambitious of Senator Wagner's legislative proposals and the most comprehensive domestic proposal introduced by anyone during the war years."[153] The legislation called for national compulsory health insurance and short and long-term disability insurance. Given President Roosevelt's attention to the war effort, and a less receptive political climate for expansive government programs, the legislation received no significant support and died in committee.[154]

At the end of World War II advocates saw opportunities for expansion of the social safety net; in May 1945 the Wagner-Murray-Dingell bill was reintroduced in Congress. Though the legislation was largely the same, this time its proponents had the support of the White House. President Harry Truman endorsed the legislation, even speaking out on its behalf in his radio address to the nation in 1946. Truman saw the cause of increased access to medical care both as an issue of social security, and also national security, as he learned that one-third of all military draftees were not fit for military service because of "physical or mental deficiencies."[155] As a result, Truman's became the first presidential administration in favor of national health insurance.[156] The forces arrayed against the Wagner-Murray-Dingell legislation—including a coalition of the powerful American Medical Association, southern Democrats, and conservative Republi-

150 SMITH & MOORE, MEDICAID POLITICS, *supra* note 148, at 22–23.
151 *Id.* at 23.
152 *Id.*
153 *Id.* at 25.
154 *Id.* at 24–25.
155 *Id.* at 25–26.
156 *Id.*

cans—successfully defeated subsequent attempts to even get the bill reported out of committee.[157] Even after Truman's 1948 re-election, which included increased Democratic majorities in both the House and Senate, the bill could not get out of committee. Repeated legislative defeats—along with the desire for a return to normalcy after the Great Depression and World War II—stalled the development of a national healthcare policy.[158] Each of these shaped the paths available for advocates of an increased governmental role in protecting access to medical care for vulnerable populations.

2. *The Road Toward Medicaid and Federalism's Interaction*

Even after the post-war economic boom made it possible for working- and middle-class Americans to access medical care through employer-based insurance, the elderly remained outside of medical markets, as insurers avoided including these high-cost customers in their insurance pools.[159] One of the first post-war steps of national health policy was the enactment of the Hill-Burton Hospital Survey and Construction Act. Enacted in 1946, the Hill-Burton Act provided federal grants and federally-guaranteed loans to states for the improvement and construction of hospitals. Hill-Burton played a significant role in reducing the shortage of hospital beds, especially in rural areas.[160] Hill-Burton relied on states to determine how money would be distributed to local and county governments.[161] Another significant legislative step toward Medicaid was the Social Security Amendments of 1950, which provided federal funds to state governments for direct payments to medical care vendors.[162] At the time, states could provide assistance for medical care only by diverting money from a recipient's public assistance stipend. The payments

157 *Id.* at 24.

158 Jonathan Engel notes that by 1952, the issue of government-sponsored health insurance was "notably absent from the American political debate." JONATHAN ENGEL, POOR PEOPLE'S MEDICINE: MEDICAID AND AMERICAN CHARITY CARE SINCE 1965, at 30 (2006).

159 *Id.* at 30–32.

160 Hill-Burton has played a significant role in provision of care to the poor. Under the Act, hospitals receiving Hill-Burton funding were required to treat uninsured patients.

161 SMITH & MOORE, MEDICAID POLITICS, *supra* note 148, at 28.

162 Gloria Nicole Eldridge, The Medicaid Evolution: The Political Economy of Medicaid Federalism, 68 (May 2007) (unpublished Ph.D. dissertation, University of Texas, Austin), http://repositories.lib.utexas.edu/bitstream/handle/2152/3110/eldridgeg33217.pdf?sequence=2.

were paid in cash directly to the recipient, who was then expected to find medical care.[163]

The 1950 Amendments established a federal match on the condition that states submit a plan that provided that medical expenses would be paid directly to service providers.[164] In order to participate, states were required to submit a plan to the Social Security Administration that described the content of services covered under the plan payments. Eligibility for participation in the program depended on a recipient's participation in the Old Age Survivors Insurance (Social Security). Thus, medical expenses would be provided for in addition to a recipient's public assistance support, rather than being deducted from other support, as had been the case previously. The receipt of public assistance benefits was the eligibility requirement for participation in the program. Throughout the 1950s the federal match formula was liberalized. By 1960, 80% of the states had taken advantage of the medical vendor matching funds.[165] Over the decade from 1950 to 1960, federal payments grew from $81 million to $514 million.[166] The 1950 Amendments clearly foreshadowed the Medicare program, not only in the cooperative structure, and federal matching funds, but also in the payment of medical fees directly to service providers. But the very fact of its success in Congress meant that the 1950 Amendments would serve as a prototype for any future expansions of the provision of medical care for the poor.

The final, pre-Medicaid expansion of the government's involvement in guaranteeing access to medical care came in the 1960 amendments to the Social Security Act, known as the Kerr-Mills Act. The Act established a federal matching grant (ranging from 50–80% of the costs, depending on the per capita wealth of the state) to state governments for medical costs of persons over sixty-five not receiving public assistance, but whose incomes were inadequate to provide for their medical necessities.[167] Kerr-Mills expanded the federal government's role in the provision of medical care beyond those receiving public assistance to include those over sixty-five who would meet with financial ruin if they were left to pay their own medical expenses.

As with the 1950 Amendments, Kerr-Mills left many of the most significant decisions up to state governments, including determina-

163 SMITH & MOORE, MEDICAID POLITICS, *supra* note 148, at 34. Smith and Moore argue that the policy pleased no one except opponents of all forms of public assistance.

164 Eldridge, *supra* note 162, at 68.

165 SMITH & MOORE, MEDICAID POLITICS, *supra* note 148, at 35.

166 *Id.*

167 SMITH & MOORE, MEDICAID POLITICS, *supra* note 148, at 39.

tions of eligibility and services covered under the federal match program. While some states were as generous as the federal program allowed, other states, mindful of the costs of even a 20% share, set greater restrictions than required under Kerr-Mills.[168] The services covered under the state plans varied widely. For example, fewer than half of the plans included dental care within covered services, and 25% of the plans covered only hospital care, even to the exclusion of physician services. Many states transferred recipients from Old Age Survivors Insurance-based medical programs (the 1950 Amendments) to the program established by Kerr-Mills. By 1965, forty states had established American Medical Association ("AMA") programs under Kerr-Mills.[169]

B. Medicaid: The Paradigm of Cooperative Federalism

There continued to be concern for elderly access to medical care even after the passage of the Kerr-Mills Act. Rising costs on state governments and the variation among state plans, if states participated at all, led to calls for Medicare. Shortly after the 1960 election, legislation was introduced to provide for the hospital costs of all Social Security beneficiaries. Opponents of Medicare, primarily the American Medical Association, called for an expansion of Kerr-Mills rather than a fully federal Medicare program. President Lyndon Johnson seized upon calls for both an expansion of Kerr-Mills and the establishment of Medicare. Providing medical assistance to the poor through an expanded Kerr-Mills was thought to provide a hedge against the growth of Medicare, and the weakening of the integrity of Social Security by reducing pressure for a universal, single-payer health care system, i.e., Medicare for all.[170] While there was significant debate on Medicare, Medicaid occasioned little debate in Congress.[171] Though for many this is evidence of the Medicaid program's add-on quality; the fundamental structures of the Medicaid program, including its cooperative framework, were the result of legislative developments since the end of World War II. The Social Security Amendments that included Medicare and Medicaid were passed overwhelmingly by the

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168 *Id.* at 41 (reporting that under Kerr-Mills, half the plans did not cover dental care, and one-fourth only covered hospital care).

169 Many poorer states could not afford to participate in Kerr-Mills. *See id.*

170 SMITH & MOORE, MEDICAID POLITICS, *supra* note 148, at 42–43.

171 Judith D. Moore & David G. Smith, *Legislating Medicaid: Considering Medicaid and Its Origins*, 27 HEALTH CARE FINANCING REV. 45, 48 (2005–2006) [hereinafter Moore & Smith, *Legislating Medicaid*] (stating that there was so little debate on Medicaid that the legislative draftsman said "he could scarcely recall working on Medicaid").

House and Senate, and were signed with great fanfare before an audience that included former President Harry Truman.[172]

Medicaid replicated key aspects of both the 1950 Amendments and Kerr-Mills in both its reliance on state governments to administer Medicaid and reimbursement of state governments at rates that depended on their relative wealth measured against the national average. State participation in the Medicaid program has always been voluntary, but if a state chooses to participate in the Medicare program, it is required to comply with certain regulations imposed by both the Medicaid Act and the Secretary of Health and Human Services. Under Medicaid, state governments have had wide discretion in the design of their programs, including discretion to change eligibility standards. Despite the discretion, Medicaid sought to reduce the variability among programs that undermined Kerr-Mills. States participating in Medicaid were required to provide for certain mandatory benefits.[173] Medicaid also imposed a requirement of "statewideness," that obligated the state to identical treatment of all geographic units within the state.

From the very commencement of the state's participation in Medicaid, the state bureaucracy had been drawn into a close interactive relationship with the federal bureaucracy. Medicaid's structure was, at least in part, a product of national bureaucratic experience with state welfare agencies during earlier eras of cooperative welfare policy.[174] In order to participate in the Medicaid program, states were required to submit a Medicaid plan to the Bureau of Family Services and the Division of Medical Services. The state plan must have articulated the optional services, if any, that the state would cover under its Medicaid program, and must have indicated how the state would fulfill its obligations under the Medicaid Act. States were allowed to amend their state plans, but were required to file them with CMS. State plan amendments that constitute material changes to the state

172 The final vote was 307-116 in the House of Representatives and 70-24 in the Senate.

173 The required benefit services are: (1) inpatient hospital care, including hospitalization for mental illness; (2) outpatient hospital care; (3) laboratory and x-ray services; (4) skilled nursing home services; and (5) physician's services. Services such as dental care, prescription drugs, and physical therapy, among others, were included as optional services that the state could elect to provide. Moore & Smith, *Legislating Medicaid*, *supra* note 171, at 50.

174 Smith and Moore note that previous welfare policy programs, including Public Assistance and Kerr-Mills, had brought national and state administrators into contact. They write: "Both federal and state officials had been through the initial implementation of Kerr-Mills with its rituals of advance explanation, letters to governors and state officials, publications and conferences, technical assistance, and advisory groups." SMITH & MOORE, MEDICAID POLITICS, *supra* note 148, at 61.

plan must have been approved by the Secretary of Health, Education, and Welfare. The basic purpose of the state plans was to reduce the effects of "political spoils," racial discrimination, and other biases. The underlying threat from the federal government was that if states did not spend according to the approved plan, including its amendments, their federal reimbursement funds would be terminated.

Termination of state reimbursement funds is easier said than done. David Smith and Judith Moore state that federal withholding of reimbursement funds was rarely used to enforce Medicaid requirements. They liken national and state interaction to long-term relationships saying: "Like kinship or other inescapable unions, much depended in practice on mutual understandings, often unspoken, about how to play the game without breaking up."[175] In light of the difficulty of state exit or federal eviction from the Medicaid relationship, the implementation of Medicaid involved negotiation between state and national bureaucracies. One of the most significant developments in implementation of Medicaid has been the rise of the waiver process as the method by which states and the national government negotiate changes, some significant, in the delivery of medical services at the state level.

Several different presidential administrations have sought to respond to the challenges of national budgetary crises, realign national priorities, and expand insurance coverage through the Medicaid program.[176] Recently, Presidents Bill Clinton and George W. Bush ("Bush Jr.") increasingly sought to expand state discretion by allowing states to apply for waivers to obtain relief from certain Medicaid requirements.[177] Though the waiver process within the Social Security Act was enacted prior to the enactment of Medicaid, it has become a central aspect of the national-state interaction in the implementation of Medicaid. States can apply for two types of waivers under the Medicaid program: program (Section 1915)—demonstration (Section

175 *Id.* at 64.

176 *See, e.g.*, Colleen M. Grogan & Elizabeth Rigby, *Federalism, Partisan Politics, and Shifting Support for State Flexibility: The Case of the U.S. State Children's Health Insurance Program*, 39 PUBLIUS: J. OF FEDERALISM 47, 50–51 (2008) (profiling President Clinton's expansion of Medicaid). For a discussion of other presidential initiatives see Eldridge, *supra* note 162, at 168–82 (discussing presidential policies for Medicaid changes in the Nixon, Ford, and Carter Administrations).

177 *See, e.g.*, Frank J. Thompson & Courtney Burke, *Federalism by Waiver: MEDICAID and the Transformation of Long-term Care*, 39 PUBLIUS: J. OF FEDERALISM 22, 36–38 (2008) [hereinafter Thompson & Burke, *Federalism by Waiver*] (explaining how waivers "flourished" in the Clinton and Bush administrations).

1115) waivers.[178] As the name suggests, states apply for waivers to receive relief from obligations under the Social Security Act in order to improve service or expand access to Medicaid. The Medicaid waiver process demonstrates the significance of bureaucratic implementation in the development of the provision of medical care for the poor. A former Administrator of Health Care Financing Administration ("HCFA"), David Vladeck, reported that in the early 1990s "all the health policy action was taking place in the Medicaid waiver sector."[179]

As stated above, Medicaid's structure allows states considerable discretion in the design of state programs. Nevertheless, states clamored for more programmatic discretion to respond to the increasing costs of health care. Prior to the Clinton Administration, the federal government did not actively encourage state exploitation of the waiver process.[180] Reagan Administration officials feared that the grant of waivers would allow states to shift expenses to the federal government. In response, the Office of Management and Budget ("OMB"), which played an increasingly prominent role in the Reagan bureau-

178 Demonstration waivers—known as Section 1115 waivers—allow states to undertake experimental or pilot programs to try new initiatives in Medicaid. As stated above, these pilot programs have involved expanding the eligibility for Medicaid to include populations not covered by the act—for example, by expanding Medicaid to include the uninsured parents of children eligible for the State Child Health Insurance Program ("SCHIP"). Section 1115 waivers have been marked by a shift in states to move Medicaid recipients from public health insurance programs into managed care programs. These include Florida, Oregon, and Tennessee, among others. These transformations generally included expansions in the class of eligible Medicaid recipients. 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, 979 (2007) [hereinafter Thompson & Burke, *Executive Federalism*]. Program waivers—known as Section 1915 waivers—allow states to restructure their Medicaid programs to allow for alternative health delivery mechanisms. These waivers have allowed state governments to provide home-based health care for aging and mentally ill persons as opposed to the provision of institutionalized services in nursing homes, despite the Medicaid Act's requirement that states provide nursing home care. Section 1915 waivers also relaxed Medicaid's "statewide-ness" obligation by allowing states to restrict the geographic scope of home-based health care services. *See* Thompson & Burke, *Federalism by Waiver*, *supra* note 177, at 24.

179 Interview by Bruce Vladeck and Judy Moore with David Smith, CMS ORAL HISTORY PROJECT 712, at 723 (July 7, 2012), *available at* http://www.cms.gov/About-CMS/Agency-Information/History/downloads/cmsoralhistory.pdf (discussing the growth of Section 1115 waivers during the Clinton Administration).

180 Prior to 1993, the federal government had granted approximately fifty Medicaid waivers. In the Clinton and Bush Administrations, from 1993–2006, over 120 Medicaid waivers were granted. Thompson & Burke, *Executive Federalism*, *supra* note 178 at 980.

cracy,[181] required the HCFA to impose a budget neutrality requirement in their review of state waiver applications.[182] As such there was frustration among governors about the absence of greater flexibility in the administration of the Medicaid program.

Having been elected from the Governor's mansion of Arkansas, Clinton knew firsthand the frustration of having an expensive cooperative program that offered little practical flexibility to state governments.[183] As a result, giving state governments greater flexibility in the implementation of Medicaid was a key priority for Clinton.[184] In addition to the flexibility offered to state governments, to the extent that waivers in the delivery of social welfare benefits allow for experimentation and policy learning, they embody the "laboratories of democracy" justification for federalism.[185] Waivers under the then-Aid to Families with Dependent Children provided the flexibility with which states began to reform welfare.[186] These efforts played an important role in the shape of the national legislation that transformed the program.[187] Ironically, Medicaid waivers played a role in Massachusetts' development of its universal medical insurance program, which included a mandate that was essentially copied in the ACA.[188]

Medicaid waivers have played a significant role in the transformation of Medicaid for nearly two decades.[189] Two of the most significant transformations in Medicaid have been the state-driven expan-

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181 For more on Presidential oversight of agency decisionmaking through the Office of Management and Budget, see Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1060–63 (1986).

182 Thompson & Burke, *Executive Federalism*, *supra* note 178, at 974–75. Effective September 24, 2001, the Health Care Financing Administration changed its name to the Center for Medicare and Medicaid Services ("CMS"). *See* Program Memorandum, Transmittal AB-01-173 (Dec. 5, 2001), *available at* http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/AB01173.pdf.

183 Carol S. Weissert & William G. Weissert, *Medicaid Waivers: License to Shape the Future of Fiscal Federalism*, *in* INTERGOVERNMENTAL MANAGEMENT FOR THE 21ST CENTURY 160–61 (Timothy J. Conlon & Paul L. Posner, eds., 2008).

184 Vladeck & Moore, *supra* note 179, at 722. One of the most significant changes that the Clinton Administration made to the Medicaid waiver policy was revising the Reagan Administration's budget neutrality requirement. Under Clinton, the assessment of budget neutrality would be made over the life of the demonstration covered by the waiver, rather than on an annual basis. Eldridge, *supra* note 162, at 244.

185 For a wonderful discussion of the "laboratories" justification of federalism, see Ryan, *Federalism and the Tug of War Within*, *supra* note 51, at 601–19. Ryan insightfully notes that this justification of federalism is often at odds with other goals.

186 Jocelyn M. Johnston, *Welfare Reform: A Devolutionary Success*, *in* INTERGOVERNMENTAL MANAGEMENT FOR THE 21ST CENTURY (Timothy J. Conlon & Paul L. Posner, eds. 2008).

187 WEISSERT & WEISSERT, *supra* note 183, at 25.

188 *Id.* at 163–64.

189 OLSON, *supra* note 146, at 71–74, 85–92.

sions of Medicaid eligibility in the 1990s through the waiver process. For example, through the waiver process Utah expanded eligibility to previously ineligible populations. The program provided only basic benefits—physical visits and emergency room care, primarily. Many of the expansions were provided for by the increasing introduction of managed care, or the reduction in services. Many of the state innovations that took place during this period were a result of waivers of such Medicaid obligations as statewideness, allowing states to dissect the Medicaid population for different experimental projects. Similarly, states received waiver for the "freedom of choice" requirement that allowed Medicaid recipients to choose between Medicaid and managed care. Waivers allowed states to essentially force recipients into managed care programs. The latest negotiated waiver involves Oregon's comprehensive reform of its Medicaid program to provide a holistic approach to the provision of medical services, including physical, mental, and social work services.[190] The waiver was approved on July 5, 2012, and totaled 120 pages.[191]

Medicaid waivers involved significant "bargaining" and negotiation between state and federal bureaucratic officials. Bruce Vladeck has pointed out that these negotiations often involved "under-the-table deals" and "sheer intimidation."[192] What is important for the purposes of this discussion is the extent to which the waiver process involves the bureaucracy, rather than Congress, in the implementation of significant federalism-implicating policy decisions. Gloria Eldridge transfers authority from Congress to the administrative officials who are involved in the back-and-forth of negotiating policy intricacies with state officials. Though many policy initiatives are approved at the state level with the political support of the Governor and legislative leaders, again the substantive negotiation largely takes place outside of the political spotlight, guided by state officials. The resort to waiver by the executive also represents his conscious attempts to work around Congress in implementing policy. In the aftermath of the failure of health care reform in President Clinton's first term, the waiver process provided an alternative route toward health care reform and increased access to medical care.[193]

190 *Id.* at 85.

191 Oregon Health Plan, No. 21-W-00013/10 and 11-W-00160/10 (Centers for Medicare & Medicaid Services July 5, 2012), *available at* http://cms.oregon.gov/oha/OHPB/Documents/cms-waiver.pdf.

192 Vladeck & Moore, *supra* note 179, at 723.

193 WEISSERT & WEISSERT, *supra* note 183.

C. *Delegating Medicaid Transformation*

Though opponents, joined by the Supreme Court, asserted that the ACA's Medicaid provision was unprecedented, the ACA's requirement that states expand Medicaid eligibility is only the latest in a line of expansions of the program since its enactment, but primarily in the late 1980s and 1990s. The most significant expansions took place as a result of the Consolidated Omnibus Budget Resolution of 1985 ("COBRA"), which required states to extend eligibility to pregnant women and their children, if they qualified for welfare payments.[194] This period also saw allowed expansions of Medicaid eligibility to elderly and the disabled who were not eligible for Supplemental Security Income ("SSI"). After the Democrats regained control of the Senate in the 1987, these optional expansions became mandated on state governments.[195] Further expansions of eligibility decoupled Medicaid eligibility from receipt of public assistance. For example, between 1988 and 1989 the income limits for Medicaid-eligible pregnant women went from 75% of the federal poverty line to 100%. Likewise for children the cut-off for Medicaid eligibility went from 100% to 133%.[196] One of the largest expansions took place in the Budget Reconciliation in 1990, which mandated an expansion of Medicaid to all children through age eighteen with family incomes below 100% of the federal poverty line.[197]

One of the most significant expansions and transformations of Medicaid was the passage of the State Children's Health Insurance Program ("SCHIP") as part of the Balanced Budget Agreement in 1997. Rather than Medicaid's open-ended reimbursement structure, the SCHIP program gave block grants to states to expand coverage to children in families with incomes of up to 200% of the federal poverty level.[198] Under SCHIP, states sought to expand Medicaid-eligible populations to include the parents of insured children. Through the Health Insurance Flexibility and Accountability Initiative, the Bush Jr. Administration encouraged states to extend insurance coverage to

194 SMITH & MOORE, MEDICAID POLITICS, *supra* note 148, at 177. Prior to the Budget Reconciliation the expansion of eligibility to these groups was optional.

195 *Id.*

196 *Id.* at 181.

197 *Id.* at 182.

198 OLSON, *supra* note 146, at 69–71.

adults falling within certain income guidelines.[199] Each of these paved the way for the ACA's Medicaid Expansion provision.

The ACA represents the culmination of the effort to enact universal health care legislation. Medicaid Expansion plays a crucial role in the goal toward universal access to medical care. The ACA instituted several avenues to make universal coverage available. It prohibits insurance companies from denying coverage or increasing premiums for individuals with preexisting medical conditions, or rescinding coverage or failing to renew insurance contracts on the basis of an individual's health status.[200] It provides tax incentives to encourage small businesses to purchase health insurance for their employees.[201] It requires certain large employers to offer health insurance to their employees.[202] It creates health insurance exchanges, which are to be established and operated by states to allow individuals and businesses to purchase health insurance.[203] Most importantly for the challenges to ACA's constitutionality, it also requires that state governments expand Medicaid coverage to include individuals under the age of sixty-five, who are not enrolled in other federal insurance programs, and whose income does not exceed 133% of the federal poverty level. The ACA delegated authority to the Secretary to withhold all federal Medicaid reimbursement funds for states failing to expand Medicaid eligibility. Most prominently, the ACA requires individuals to obtain "minimum essential coverage" through purchase of health insurance—i.e., the Individual Mandate.[204]

The Medicaid expansion will increase—in some cases significantly—the numbers of persons eligible to participate in Medicaid programs.[205] Clearly this means that states will bear an increased financial burden of providing medical care to these individuals. The ACA, however, provides for increased federal funding to assist states in covering those who are "newly eligible" for Medicaid. The ACA sets the

199 Samantha Artiga & Cindy Mann, *Family Coverage Under SCHIP Waivers*, Kaiser Comm'n on Medicaid & the Uninsured (May 2007), http://www.kff.org/medicaid/upload/7644.pdf. As mentioned above, these expansions took place through the waiver process.

200 Patient and Protection Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119-1025, 1101 (2010).

201 *Id.* at § 1421.

202 *Id.* at § 1511.

203 *Id.* at § 1301.

204 *Id.* at § 2001.

205 Studies suggest that states will experience an increase of over 25% in their Medicaid populations as a result of the expansion. *See* John Holahan & Irene Headen, *Medicaid Coverage and Spending in Health Reform: National and State-by-State Results for Adults at or Below 133% FPL*, Table 7 at 41 (May 2010) (Kaiser Commission on Medicaid and the Uninsured).

federal Medicaid reimbursement rate at 100% for the period 2014 to 2016, decreasing gradually every year after 2016 to 90% in 2020, and thereafter.[206] However, the ACA restricts state discretion in changing eligibility standards and coverage during this period. Specifically, the ACA requires states to provide medical assistance that is the "benchmark equivalent" of any insurance program offered in the insurance exchanges.[207] In addition, as a condition of receiving federal reimbursement funds, the states are required to maintain their eligibility standards (i.e., "maintenance of effort") until the state-based health exchanges are declared by the Secretary of HHS to be fully operational.[208]

IV. BEYOND ALLOCATION: FEDERALISM'S BUREAUCRATIC LIFE

The political safeguards model—even in updated form—is built on assumptions about the nature of federal and state relations. Underwriting the model is the belief that both the state and the national government are in competition of substantive regulatory authority. That is, each governmental sphere's behavior is governed by its desire to maximize its substantive authority, or, at least, to minimize incursions on its authority from other spheres.[209] Professor Daryl Levinson has called this governing motif into question, arguing that national and state officials act both to increase their political support and to increase their sovereign control of the policymaking landscape.[210]

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206 Patient and Protection Affordable Care Act, § 2001(a)(3)(B)(1)(A)-(E).

207 A benchmark benefits package can be more limited than the traditional Medicaid package. States have the option of enrolling expansion-eligible Medicaid recipients in such plans. However, the benefits packages available for Medicaid recipients under the expansion must be the equivalent to benefits packages in the insurance exchanges that states might choose to establish. 42 U.S.C. §1396u-7(a)(1), (b)(2)-(3).

208 Patient and Protection Affordable Care Act, § 2001(b). However, the ACA provides for states to apply for a waiver of their maintenance of effort obligations by submitting certification to the Secretary of HHS that the state's budget deficit justifies the eligibility restriction. Letter from Cindy Mann, Dir. Ctr. for Medicare & Medicaid Servs., to State Medicaid Director (Feb. 25, 2011), *available at* http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD11001.pdf.

209 While not expressed as a struggle for power, the state and national tension has been insightfully articulated by Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1449 (1995) (arguing that both the states and the national government have incentives to "cheat" in their adherence to the requirements of the federal structure).

210 The search for sovereign authority might not be as distinct as Levinson suggests if we take the search for substantive authority to be a search for accountability, which may not be very different from a search for political credit for policy successes. For a critique of the obsession with accountability in public law, see Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005).

Levinson's insights are instructive for this argument's purposes because they suggest that the allocation of sovereign authority to either the states or the national government may only be one among other important aspects of American federalism and its enforcement. Nevertheless, the ideas of allocation and separation have been among the most central in the debates over the growth of the national government's authority, and in debates about the constitutionality of regulatory cooperation between the states and the national government. If the accumulation of substantive authority is not central to state conception of effective state autonomy, then how effective are models of federalism enforcement premised solely upon power allocation at the legislative enactment stage?

If state governments measure their effective autonomy by their ability to affect policy outcomes, then federalism enforcement must ultimately take into account the institutions where state policy effectiveness (or impotence) is determined. This Part's primary purpose is to demonstrate the importance of post-enactment decisionmaking in determining the nature of state and national interactions. By looking at three important programs that exemplify three distinct types of cooperative federalism—(1) conditional preemption, (2) conditional grants, and (3) mandates—this Part will extend our knowledge of the administrative dimension of federalism politics. Paying attention to this dynamic is critically important for any effort to reconsider Tenth Amendment jurisprudence. In addition, this Part takes a different track from scholars such as Nugent and Bulman-Posen and Gerken, who have suggested that federal-state interaction in the administrative state might be protected through internal structures and processes that foreclose the need for more formal enforcement mechanisms.

A. Regulatory Federalism as National-State Interaction

Recent federalism scholarship has paid significant attention to the "lived" dynamics of the national-state relationship.[211] The primary focus of much of this scholarship has been the demonstration of the ways in which the national-state government interaction is governed primarily by forms of negotiation and "uncooperation" between state

211 *See generally* Ryan, *Federalism and the Tug of War Within*, *supra* note 51; Bulman-Pozen & Gerken, *supra* note 40; Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006) [hereinafter Ahdieh, *Dialectical Regulation*]; Robert B. Ahdieh, *From Federal Rules to Intersystemic Governance*, 57 EMORY L.J. 233 (2007) [hereinafter Ahdieh, *Intersystemic Governance*].

and national actors over the implementation of national and state policy objectives.[212] Its primary thrust, both descriptively and normatively, appears aimed at bringing attention to the mechanisms that states have at their disposal to protect themselves from what they determine to be national overreaching.[213] This Part's focus on the administrative dimension of national and state interaction highlights the significance of national and state interaction in the implementation of federal policy objectives. As such, it will demonstrate the importance for contextual analyses of cooperative federalism as against abstract conceptions of national and state interaction across wide categories of program structure.

B. Three Examples of National-State Regulatory Interaction

1. Occupational Safety and Health

The Occupational Safety and Health Act of 1970 ("OSHA") is a federal statute that regulates workplace safety. OSHA is an example of a "substitution approach" to national-state interaction.[214] OSHA allows state governments to either establish their own safety regulations under the guidance of national parameters, or allow national regulation and implementation of the regulatory scheme that preempts state law.[215] As such, OSHA represents a version of national-state interaction that allows states to choose whether to "exit" a cooperative regulatory relationship by doing nothing.[216] The OSH Act exemplifies the reliance of the national regulatory regime on state administrative and regulatory capacities for implementing national policy.[217] These programs represent the national government's at-

212 *See generally* Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011); Bulman-Pozen & Gerken, *supra* note 40; Ahdieh, *Dialectical Regulation*, *supra* note 211; Ahdieh, *Intersystemic Governance*, *supra* note 211.

213 *See* NUGENT, *supra* note 35.

214 Frank J. Thompson, *The Substitution Approach to Intergovernmental Relations: The Case of OSHA*, 13 PUBLIUS: J. OF FEDERALISM 59, 61–62 (Fall 1983) [hereinafter Thompson, *Substitution Approach*].

215 29 U.S.C. § 667(b) (2006).

216 As of 1981 only five states had not submitted any plan to OSHA for evaluation. Today there are twenty-one states with approved state plans. *See* GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY 9 (2007); *see also State Occupational Safety and Health Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., *available at* http://www.osha.gov/dcsp/osp/index.html (last visited Sept. 12, 2012).

217 For an insightful discussion of the federalism issues that arise in programs where states are called upon to implement national policy, see Stewart, *supra* note 103 (addressing the

tempt to preserve political and financial capital by enhancing its regulatory capacities without accepting the full costs of either fully displacing state regulatory action, or funding a completely national regulatory program.[218]

The structure of OSHA respects the twin pillars of American federalism—national supremacy and state autonomy—by having established the right of both "eviction" of states from participation in the regulation of occupational safety by the national government, and voluntary "exit" from regulation by state governments. Eviction and exit represent the embodiment of the national government's supremacy and the state's autonomy, respectively.[219] While the existence of these options clearly affects the context in which state and national interaction takes place, they are the edges of such interaction. As such, it is likely more beneficial to pay closer attention to the actual workings of the national-state interaction where separation, though in the background, is not the issue of primary concern.

a. History and Structure of Occupational Safety Regulation

The passage of OSHA in 1970 came in the midst of the expansion of national regulatory authority over several areas of American economic and social life.[220] Prior to the passage of OSHA, the federal government's involvement in the protection of worker safety had been relatively limited.[221] The regulation of the safety of workers and workplaces had been predominantly a state function. By the 1960s, however, workplace safety moved onto the national agenda as a high priority. Several factors affected the prioritization of worker safety at the national level, including increased knowledge of work-related accidents (like mining collapses) and diseases (e.g., black lung).[222] The push by labor unions to make national regulation of workplace safety a legislative priority was the most significant factor in the enactment of OSHA. In 1968, President Johnson drafted a bill empowering the Department of Labor to promulgate standards for workplace safety

limits of certain cooperative federalism arrangements after the Supreme Court's decision in *National League of Cities*).

218 *Id.* at 1200–01.

219 That separation might undermine state autonomy has been emphasized by, among others, Bulman-Pozen & Gerken, *supra* note 40, at 1288, and Neil S. Siegel. *See generally* Bulman-Pozen & Gerken, *supra* note 40, at 1288; Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006).

220 For a history of the rise of the OSHA, see CHARLES NOBLE, LIBERALISM AT WORK: THE RISE AND FALL OF OSHA (1986).

221 *See, e.g.*, Federal Employers Liability Act, 45 U.S.C. § 51 (2006).

222 NOBLE, *supra* note 220, at 70–71.

and to enforce these standards against employers. Though the bill met with resistance from the business community, and was not enacted before the end of Johnson's term, President Nixon, in an attempt to lure working class voters away from the Democratic Party, pledged to support national workplace regulations.[223]

In addition to standard-setting, OSHA is also empowered to enforce its standards against employers in violation of those standards. The historic role of states in the regulation of workplace safety and the Nixon Administration's willingness to accommodate advocates of state sovereignty resulted in OSHA's cooperative regulatory structure.[224] However, scholars have pointed out that OSHA's effective authority with respect to the states is compromised by the fact that it would not have the resources to effectively carry out its regulatory mandate were it to substitute for state resources.[225]

Section 18 of the OSHA structured state participation in standard setting and enforcement of workplace safety regulations. Pursuant to Section 18(b) of the OSHA, a state can assume responsibility for the "development and enforcement of safety and health standards" by submitting a State plan for approval by the Secretary of Labor.[226] Approval of the plan by the Secretary of Labor depends upon several factors, including: the designation of a state agency as responsible for administering the plan in the state; provision of standards and enforcement mechanisms that are "at least as effective" as national standards and enforcement mechanisms, and that state agencies will have qualified staff and adequate funding to carry out their regulatory responsibilities.[227] If a state plan is approved by the Secretary of Labor, then there would be a period of cooperative regulatory control by both the state and national governments.[228] During the period of overlapping regulatory structure, the state's compliance with OSHA standards and its enforcement are monitored by the Secretary of Labor.[229] Once the state program receives final approval, after a period of approximately three years, national regulatory involvement is limited. Pursuant to OSHA, a state plan may be revoked if the Secretary finds, "that in the administration of the State plan there is a

223 *Id.* at 90.

224 For a discussion of the development of cooperative workplace regulation, see HUBER, *supra* note 214.

225 Thompson, *Substitution Approach*, *supra* note 214, at 68–69.

226 29 U.S.C. § 667(b) (2006).

227 29 U.S.C. § 667(c)(1)-(8) (2006).

228 *See* Am. Fed'n of Labor v. Marshall, 570 F.2d 1030, 1034 (D.C. Cir. 1978).

229 29 U.S.C. § 667(f) (2006).

failure to comply substantially with any provision of the State plan."[230] Alternatively a state may simply withdraw from the regulatory program.

b. Administrative Implementation of OSHA

Despite the possibility of state control over workplace safety policy, few have taken the step of actually enacting their own standards for workplace safety, because as early as 1972 OSHA's declared policy was that any state choosing to establish state-specific standards would have to demonstrate that their standards were at least as effective as national standards, unless state standards were "on a word for word basis" identical to standards promulgated by OSHA.[231] Understandably, this has had the effect of limiting the number of states seeking to promulgate separate standards rather than merely enforce OSHA standards. Additionally, states seeking to operate their own programs are required to make substantial financial commitments, as the federal government matches only 50% of the overall costs of operating the program.[232]

OSHA also requires states to articulate their plans for staffing levels so that they could be assessed for adequacy.[233] During the Carter administration, OSHA mandated that states managing their own occupational safety programs significantly increase the number of state safety and health inspectors over a five-year period. OSHA proposed a 36% increase in the number of state safety inspectors over this time period.[234] Indeed, even after the election of Ronald Reagan as President, OSHA required states to increase their safety inspector staffs by 24%. This would have required participating states to make significant "relationship-specific" investments in hiring and training employees, and established a bureaucracy that had particular interests and authority. The state investment in these relationship-specific resources might make the state more vulnerable in a long-term relationship with the national government because the cost of exit becomes higher for the state.[235]

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230 29 U.S.C. § 667(f) (2006).

231 Thompson, *Substitution Approach*, *supra* note 214, at 64.

232 HUBER, *supra* note 216, at 177.

233 *Id.* at 176.

234 Thompson, *Substitution Approach*, *supra* note 214, at 64.

235 For a discussion of the relational impact of asymmetrical investment in relationship-specific assets, and the ways they undermine the authority that one party might have as against another, see CHAD RECTOR, FEDERATIONS: THE POLITICAL DYNAMICS OF COOPERATION 24–31 (2009). Rector's discussion is a political translation of older eco-

However, OSHA's oversight of state programs is constrained in its capacity to impose onerous burdens on state safety regulators because of the difficulty of effectively deploying its ultimate weapon of evicting a state from participation in implementing workplace safety.[236] Though the substitution approach to regulatory federalism suggests a redundant capacity of federal regulators, the costs of establishing redundancy in actuality limits any agency's ability to simply substitute national regulators for state regulators without regard to the impact on program effectiveness. Also constraining OSHA's ability to impose burdens that states consider onerous is the nature of the shared regulatory project—workplace safety. The fact that the shared regulatory project is of a regulatory and enforcement nature might make states less vulnerable if they withdraw from offering such services as additional capacity.[237] Because workers and citizens do not think of the provision of these services until there is a major incident, state withdrawal has fewer political costs than they might in other programs, at least under certain conditions. Contrary to the case of relationship-specific asset investments, this condition reduces the costs of state exit from participation in the cooperative regulation of workplace safety.

The relative ease or difficulty of exit is important for consideration because it impacts the extent to which parties will be empowered to protect themselves in the ways that the literature on bargaining and rebellion suggest. However, reliance on such self-help mechanisms as methods of federalism enforcement may be undermined where there are structural impediments to effective self-protection, such as where relationship-specific investments have been made up front. This is not to suggest that these arguments are wrong in every circumstance, it only suggests that we may want to know more about particular structures and contexts before withholding access to other forms of federalism enforcement.

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nomic literature on the relationship between firms under conditions of asset-specificity. *See, e.g.*, Benjamin Klein, *Why Holdups Occur: The Self-Enforcing Range of Contractual Relationships*, 34 ECON. INQUIRY 444 (1996).

236 HUBER, *supra* note 216, at 174 ("OSHA has little to gain by revoking state delegation.").

237 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, 1245 (2004) (suggesting that the threat of a state being locked into a conditional preemption program is smaller than a conditional spending program); *see also* Thompson, *Substitution Approach*, *supra* note 214, at 68–69 (arguing that it is easier for states to exit regulatory programs, as opposed to welfare or redistributive programs, because regulatory programs generally have less popularity).

2. *No Child Left Behind: Administrative Implementation of Educational Policy*

a. Conditional Policy Implementation: No Child Left Behind

Despite having run a presidential campaign that suggested that the national government's reach had expanded beyond appropriate limits,[238] President George W. Bush made the passage of the No Child Left Behind Act of 2001 ("NCLB") one of his signature domestic policy priorities. The NCLB represents a substantial expansion of national involvement in educational policy in the United States.[239] The NCLB is primarily an amendment of Title I of the Elementary and Secondary Education Act ("ESEA") of 1965.[240] The NCLB amends the most important provision of the ESEA, Title I, which "ensure[s] that all children have a fair, equal and significant opportunity to obtain a high quality education."[241] The NCLB provides federal funding for states whose educational agencies submit a plan to the Secretary of Education.[242] State governments that chose not to submit plans will not receive federal funds distributed pursuant to the NCLB.[243] The NCLB introduced national policy goals, assessment measures, and remediation of state school systems across the United States.

The primary thrust, and much of the subsequent controversy, of the NCLB, has been Title I, Part A of the NCLB.[244] With respect to the establishment of substantive goals, the NCLB requires each state's plan to "demonstrate that [it] has adopted challenging academic content standards and challenging student academic achievement

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238 *See, e.g.*, Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 PUBLIUS: J. OF FEDERALISM 390, 390–412 (2007) (highlighting the anomaly of George W. Bush's centralizing policies during his presidency).

239 *See, e.g.*, Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 886 (2006).

240 Legal historian Tomiko Brown-Nagin has described the ESEA as "the most expansive federal education bill ever passed . . . . [It] revolutionized the federal government's role in education." Tomiko Brown-Nagin, *Elementary and Secondary Education Act of 1965*, ENOTES.COM, http://www.enotes.com/major-acts-congress/elementary-secondary-education-act (last visited Aug. 18, 2012).

241 20 U.S.C. § 6301 (2006).

242 The state plan must be established in consultation with local educational agencies, teachers, principals, pupil services personnel, and administrators. *See* 20 U.S.C. § 6311(a)(1) (2006).

243 20 U.S.C. § 6311(g) (2006).

244 Clearly the primary route by which states received funding under the NCLB, was through the Title I funds. For the 2005–2006 appropriations cycle, NCLB allowed for $22.75 billion in appropriations for state governments, compared with $14.1 billion for the NCLB's 26 other parts. *See* Pontiac v. Spellings, 512 F.3d 252, 255 (6th Cir. 2008).

standards . . . [that apply] to all schools and all children in the State."[245] NCLB requires that the state standards be applicable to every child in the state's public schools. Although the NCLB allowed states to develop the scope of academic areas in which each would establish academic standards, it required that academic standards be established in reading, mathematics, language arts and science.[246]

In addition to both substantive achievement goals and assessment metrics, the NCLB establishes penalties to be imposed by the states against schools (and school districts) that do not meet the Act's achievement goals. The most severe financial penalty levied against a state government is the loss of 25% of federal funds otherwise available to the state for failure to "meet the deadlines established . . . for demonstrating that the State has in place challenging academic content standards . . . and a system for measuring and monitoring adequate yearly progress."[247] States (and local school districts) receiving funds under the NCLB are required to "prepare and disseminate an annual State report card."[248] The reports must include aggregated data regarding student achievement, comparisons between groups of students by race and ethnicity and socioeconomic status, the most recent two-year trend in student achievement, by subject area and grade, and graduation rates of secondary schools.[249]

Beyond the required assessments and the funding penalties, the NCLB requires local school districts to identify schools that fail to meet adequate yearly progress measures for two consecutive years. The school district is obligated to provide targeted assistance to such schools, and to provide the students enrolled in an "identified" school the opportunity to transfer to another public school in the district, including a public charter school. Failure to make adequate progress for three consecutive years results in the institution of a "corrective action" plan for the school. A fourth consecutive year of failure to meet adequate yearly progress results in restructuring of the school, which entails the imposition of an alternative governance plan. Restructuring includes requiring the local school district to reopen the school as a charter school, replace most of the teachers and administrators, enter into a contract with an entity with a track record

245 20 U.S.C. § 6311(b)(1)(A)-(B) (2006).

246 20 U.S.C. § 6311(b)(1)(C).

247 20 U.S.C. § 6311(g)(1)(A). In addition, the Act explicitly prohibited the Secretary of Education from granting additional waivers or otherwise extending the deadlines by which states were required to comply with the deadlines regarding approval of student achievement standards. § 6311(g)(1)(B).

248 20 U.S.C. § 6311(h)(1)(A).

249 20 U.S.C. § 6311(h)(1)(D)(i)-(viii).

of effectively operating public schools, or allow the state to operate the school.[250]

The NCLB takes the form of many national-state intergovernmental programs over the twentieth century—the conditional spending program.[251] Here, the national government conditions state receipt of federal funds on the state's adherence to national policy objectives. Scholars of conditional spending grants have highlighted the ways in which such grants impact the political agendas within states themselves.[252] The offer of conditional spending grants impacts the political agenda within the state, and has the effect of highlighting a national policy priority, and placing that policy priority on the state's agenda, whether the ultimate decision is to accept or reject federal grant money.[253] One need only look at the most recent education initiative of the Obama Administration, the Race to the Top Program, which held out the promise of money to state governments that chose to undertake "significant" educational reforms.[254] Several state governments accepted the challenge, and enacted plans with the hope that they would be competitive for the billions of dollars in additional federal funding. To be sure, this program provided significant leverage to those factions within state governments to advance a particular policy agenda that most directly aligns with the national policy agenda.

Beyond conditional spending's effect on the state political agenda, it has an impact on the power dynamics within the state. As mentioned above, the offer of federal funds attached to specific policy positions does not merely provide additional leverage to those within

250 20 U.S.C. § 6316(b)(7)-(8).

251 David Freeman Engstrom has carefully distinguished different types of conditional spending programs—dividing among programs that impose "programmatic spending conditions," "cross-cutting conditions," and "preemptive spending conditions." Within the category of programmatic spending conditions, Engstrom distinguishes between those statutes that require states to provide services to a particular group of constituents (e.g., Medicaid) and those that are more broad-based (e.g., the National Minimum Age Drinking Act). Despite the fact that one might describe NCLB as a broad-based programmatic statute, it seems to share characteristics of both types of programmatic spending conditions of which Engstrom speaks. This is significant in the light of the impact, according to Engstrom, that a more targeted conditional spending program has on the state's ability to effectively protect itself against impositions by the national government. *See generally* Engstrom, *supra* note 237.

252 *See, e.g., id.*; Stewart, *supra* note 104, at 1254 (suggesting that federal grants and conditions interfere "with local mechanisms of political decisionmaking").

253 MARTHA DERTHICK, THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS (1970).

254 Greg Toppo, *Race to the Top Education Grants Propel Reforms*, USA TODAY (Nov. 4, 2009), http://www.usatoday.com/news/education/2009-11-04-obamatop04_st_N.htm.

the state whose policy choices align most directly with the national policy objectives, but conditional spending has a significant impact on the internal dynamics of state governance by either establishing or empowering institutions within the state bureaucratic landscape that have a predisposition to the acceptance and advancement of federal policy norms.[255]

Though Bulman-Pozen and Heather Gerken have highlighted state "rebellion" to the NCLB through the passage of resolutions of opposition and litigation, negotiation has marked national and state interaction in the most recent period. Like the Medicaid program, the NCLB empowers the Secretary of Education to grant waivers to state governments for some of the Act's requirements. In order to receive a waiver states must submit waiver application to the Secretary. The waiver must articulate "specific measurable educational goals . . . and the methods to be used to measure annually such progress for meeting such goals and outcomes."

One of the most significant implementation efforts was the Department of Education's decision to include students with disabilities and English-language learners in its measures for determining state accountability.[256] This has resulted in substantial conflict between the states and the Department of Education. Studies show that states with larger numbers of English language learners were much more likely to oppose the implementation of the NCLB than states with fewer such students.[257] One of the first major policy changes to the implementation was the Department of Education's decision to allow states to remove these students from states' assessment measures. The waiver of the NCLB obligations in this specific area foretold the wider use of waivers in the implementation of the NCLB reforms of the previous decade.

Another measure that caused significant impact on state governments was the NCLB's Highly Qualified Teacher requirement ("HQT"). The HQT provision requires that every student be taught by a teacher who is state certified, possesses an undergraduate de-

255 *See generally* KIMBERLEY S. JOHNSON, GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877–1929, at 9 (2007) (discussing the national requirement for states to establish particular bureaus as a condition for state receipt of federal funds).

256 34 C.F.R. § 200.6(b)(4) (2011) (allowing states to classify recently arrived students—ten or fewer months of school in the United States—as Limited English Proficiency, and allowing states to exclude these students from assessments of state proficiency in language arts).

257 *See* Bryan Shelly, *Rebels and Their Causes: State Resistance to No Child Left Behind*, 38 PUBLIUS: J. OF FEDERALISM 444, 444–68 (2008) (noting that states with higher levels of limited English proficient students were more likely to resist NCLB).

gree, and demonstrates mastery of pedagogy in their subject area.[258] States were required to meet this mandate by 2005, but this deadline was ignored by the Secretary of Education in favor of a more state-by-state assessment.[259]

In August 2011, Secretary of Education Arne Duncan announced that he would overrule the central provision of the No Child Left Behind Act by waiving the requirement that 100% of students in the United States be proficient in math and reading by 2014. States would be allowed to apply for waivers from the Act's accountability provisions, but would be granted waivers only if they were deemed to have undertaken efforts to improve student performance. Secretary Duncan's announcement is the latest in the ongoing debate between states and the national government over the implementation of NCLB, especially over national measures of success. An example of the disparity between state and national measures is the fact that by national measures under NCLB, 89% of Florida's schools have failed to meet federal targets, while 58% of Florida's schools received an A under the state's measure of academic success. As of the end of May 2012, the Secretary of Education had approved nineteen waiver applications. An additional eighteen states are in the process of applying for waivers from the Secretary.

While there has been some criticism of a perceived power-grab by the executive, NCLB grants significant authority to the Secretary to approve waivers from the Act's requirements. This is simply the latest round between the Department of Education and state-level education officials to increase student performance. However, it provides a telling example of the central role that agency administrators play in determining national-state interaction through policy implementation.

The most significant implementation mechanism of the most significant education policy in "education federalism" demonstrates the bureaucratic dimension of federalism enforcement. The bureaucracy, as a site of federalism enforcement, embodies the entanglement between state and national policy makers that exemplifies cooperative federalism. This entanglement demonstrates the conceptual inconsistency between the effective protection of state interests and the dominance of separatist commitments in federalism jurisprudence.

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258 20 U.S.C. § 6319(a)(1) (2006); 20 U.S.C. § 7801(23) (2006).

259 Letter from Margaret Spellings, Secretary of Education, to Chief State School Officers (Oct. 21, 2005), *available at* http://www2.ed.gov/policy/elsec/guid/secletter/051021.html.

3. Conditioned Participation/Unconditional Regulation: REAL ID Act

As a response to the 9/11 terrorism attacks, the 9/11 Commission proposed that the national government impose standards for the issuance of identification documents, including birth certificates and driver's licenses.[260] In the Intelligence Reform and Terrorism Prevention Act of 2004,[261] the Congress instituted negotiated rulemaking processes, which included state governments, to establish standards for new driver's licenses. Subsequently, Representative James Sensenbrenner (R-WI), then-Chair of the House Judiciary Committee, continued to pursue the establishment by Congress of national ID standards. Sensenbrenner repackaged his proposal, and included it in a "must pass" bill that the House of Representatives considered in 2005, a supplemental appropriations bill funding the wars in Iraq and Afghanistan.[262]

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260 Though the national government might have chosen to issue a "national" identification (ID) card, this choice was preempted by Homeland Security Act, which denied to the Department of Homeland Security the authority to establish a national ID. The choice not to establish a national ID system was a choice to rely on the state-based ID system. As such the REAL ID Act is an instance of the interactive policy for the implementation of national security interests.

261 REAL ID Act, Pub. L. No. 109-13, 199 Stat. 202(a)-(b) (2005). Some state motor vehicle administrators had favored establishing national standards as a way of forcing some states to enact such standards where they had resisted doing so voluntarily. In fact, state and local agencies had sought federal assistance in developing in adequate security protocols after the 9/11 terror attacks. The failure of states to act together to develop minimum standards for ID security is an example of the sorts of dilemmas that "vanguard" states face whenever they make a choice to implement a particular policy. That is, that the failure of other states to enact similar policies undermines their efforts to move in a particular policy direction. States who seek to move above some minimum to protect or improve environmental quality face similar challenges. These challenges underwrite arguments in favor of national regulation of particular areas. For a general discussion of this as a justification for national legislative authority, see Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010). For a discussion within the context of environmental law, see RICHARD LAZARUS, THE MAKING OF ENVIRONMENTAL LAW (2004).

262 For descriptions of the passage of the REAL ID ACT, see Priscilla M. Regan & Christopher J. Deering, *State Opposition to REAL ID*, 39 PUBLIUS: J. OF FEDERALISM 476, 479–80 (2009); Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 PUBLIUS: J. OF FEDERALISM 390, 397–99 (2007). It is significant that the legislation was enacted as part of a larger legislative package, whose passage was all but guaranteed, in light of its importance in the prosecution of the wars in Iraq and Afghanistan. Even those who believe that the political process is the only institutional site for the protection of state interests might conclude that the REAL ID Act's passage undermines a commitment to a fair political process of federalism politics. That is, that the process has failed in some important way to provide for the protection of state interests in a way that the *Garcia* Court seemed to indicate when it concluded that the judiciary had no role in enforcing legislative federalism. For a reading of *Garcia* that suggests that it commits to a "fair" politics of federalism, see Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001). *See*

In May 2005, Congress enacted the REAL ID Act. The REAL ID Act prohibited federal agencies from accepting any identification card that failed to meet the standards that the Act established.[263] The REAL ID Act imposed "minimum document" requirements that detailed what a state-issued ID had to include to meet the standards for acceptance by a federal agency. These requirements include, a digital photo of the individual, physical security features—e.g., holograms—to prevent tampering or counterfeiting, and the inclusion of common readable technology that included "defined minimum data elements."[264] In addition to the document requirements, the Act imposed "minimum issuance standards" on state departments of motor vehicles. The REAL ID Act also prohibited states from issuing a "federally approved" ID to illegal aliens, which was the practice of at least ten states.

The REAL ID Act requires states to implement the national standards by May 2008.[265] The costs to state governments to implement the REAL ID requirements were estimated at $23 billion over the first five years.[266] The bulk of the costs would arise from the requirement that all of the nation's state-issued ID's be re-issued to comply with the REAL ID Act requirements. The national government has allocated almost $500 million in grants to state governments to defray costs of implementing REAL ID requirements.

How does one characterize the REAL ID Act as a form of national-state interaction? Here, the national government has foregone the exercise of substantive regulatory authority that it likely possesses to simply establish a national identification card. Similarly, the national government is not simply imposing conditions on the receipt of fed-

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also Richard Levy, New York v. United States*: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KANS. L. REV. 493 (1993).

263 One of the most significant restraints imposed by the Act is the prohibition on the acceptance of non-complying state ID's for airline travel.

264 Pub. L. No. 109-13, 119 Stat. 202(a)-(b) (2005).

265 The Department of Homeland Security ("DHS") has given states waivers and extensions on the date by which they are required to have implemented the REAL ID Act standards. To date, the DHS has issued three separate extensions (from the original May 2008 deadline to December 2009, and from December 2009 to May 2011). Most recently, Secretary Janet Napolitano has issued another extension to state governments to comply with the REAL ID, pushing the date to January 2013. *See* Stephen Clark, *Homeland Security Delays Launch of REAL ID Act Again*, FOX NEWS (Mar. 5, 2011), http://www.foxnews.com/politics/2011/03/05/homeland-security-delays-launch-real-*id*/.

266 Regan & Deering, *supra* note 262, at 480 (providing estimates from the National Governors Association, the National Conference of State Legislatures, and the American Association of Motor Vehicle Administrators). The DHS also gave estimates for the cost to states for implementing the REAL ID Act requirements. Its estimates for state costs ranged from $10–14 billion.

eral grant money for the achievement of national policy objectives. Nor is it giving the states the option of regulating according to its specifications lest it occupy the regulatory field. As pointed out above, the national government has attempted to leverage its authority in one area—its authority to determine what identification is acceptable by federal agencies—to impose obligations on state governments to meet nationally-articulated requirements. A state failing to comply with the national identification standards runs the risk of having its state IDs rejected by national agencies.

Scholars have demonstrated the extent to which states have rebelled against the impositions of REAL ID.[267] These demonstrations, and their efficacy, need not lead to the conclusion that state resort to self-help is the sole enforcement of federalism possible in state-national interactions that are dominated by agency decisionmaking.

Each of these examples demonstrates the extent to which policy objectives articulated in the national legislature are predominantly implemented in the context of administrative agencies. These brief descriptions in this Part do not attempt to make a grand claim about the nature of national-state interaction in administrative agencies, but rather asserts that the administrative agency is a principal site of federalism inquiry, and as such must be engaged for any attempt to think about federalism enforcement in a larger context.

V. THE SPENDING CLAUSE AND THE GHOST OF SEPARATION

One might have reasonably understood the Supreme Court's affirmation of Hamilton's broad interpretation of the Spending Clause as a rejection of separation as the dominant motif in federalism enforcement.[268] Legislation enacted pursuant to the Spending Clause has resulted in significantly more inter-jurisdictional governance in significant policy areas from medical care for the poor to educational standards in local school districts. Yet, the specter of separation continues to influence thinking about the Spending Clause. The notice principle—the primary post-*Dole v. South Dakota* Spending Clause constraint—and the scholarly elaboration of the coercion doctrine evidence separation's conceptual dominance in framing the national-state relationship. *Dole*'s notice principle further underwrites the Court's decisive turn toward contract as the governing metaphor for the relationship between the national government and the states in

267 Bulman-Pozen & Gerken, *supra* note 40, at 1282.

268 See discussion in Part I.A.1.

Spending Clause jurisprudence.[269] Further, each of the opinions in *National Federation* collapses the coercion doctrine into another version of the notice analysis, only further enhancing the dominance of the contract metaphor in Spending Clause analysis. Though the contract metaphor itself need not focus exclusively on the initial enactment, ultimately this dominates both Chief Justice Roberts' and Justice Ginsburg's analysis.

Though the Medicaid decision generated three separate opinions—none garnering a majority—each accepts the dominant separatist vision of federalism enforcement. Even where the opinions appear to recognize the significance of the implementation of Medicaid policy, their conclusions ultimately rely on frameworks that emphasize Congress's role as the singly important site of national-state interaction and federalism enforcement. This Part will provide a brief overview of the Supreme Court's Spending Clause jurisprudence, including its coercion jurisprudence, to demonstrate the dominance of the separatist vision. It will also discuss the Court's opinions in *National Federation* as only the latest examples of the temporal and institutional truncation of federalism enforcement.[270]

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269 Certainly the contract metaphor predates *Dole*. But *Dole* reinforces the contract metaphor already present in the jurisprudence. *See* David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496 (2007) (arguing that the clear statement principles of *Dole* exhibit a commitment to a contractarian approach to conditional grants).

270 The Court's failure to transcend the truncated model of federalism enforcement is all the more troubling in the light of the appellate court's decision on Medicaid Expansion. Though the court upheld the Medicaid Expansion provision, it did not reject the possibility that post-enactment actions might underwrite a finding of coercion. The court's decision also relies on a factor that recognizes the intertemporal nature of policy implementation in the regulatory context. Of the four factors underwriting its holding, the court's final factor recognized that the ACA had delegated discretion to the Secretary of Health and Human Services in determining the nature of the penalty to be imposed for a state's unwillingness or inability to act consistently with the demands of national policy priorities. The shift in attention is critical to the extent that it opened federalism jurisprudence to an appreciation of the multi-cited nature of federalism decisionmaking. An appreciation of the intertemporal, inter-institutional nature of federalism decisionmaking also increases the recognition that national-state interactions are embedded in a host of details, and that the attempt to merely identify the site of sovereign authority and to separate it from contamination with other exertions of power is exactly inconsistent with what states may need most. This understanding of the nature of the implantation dynamics of federalism may suggest the development of behavioral norms—whether we term them engagement or other norms—that are cognizant of the deeply embedded nature of national and state interactions and the federalism doctrine that seeks to regulate it. Importantly, at the oral argument on the Medicaid Expansion, both Justices Breyer and Kagan suggested that administrative law was capable of resolving the question of the rationality of the Secretary's exercise of her authority to withhold all federal Medicaid funds. Though they have seemingly abandoned this position, this Article attempts to explain why this po-

A. *Spending Clause Jurisprudence: The Ghost of Allocation*

1. *Spending Clause Case Law*

a. A Brief History of Spending Clause Doctrine

Article One, Section Eight of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The Supreme Court, even at the height of the dual sovereignty era of the early New Deal, interpreted congressional Spending Clause authority broadly. In *United States v. Butler,*[271] the Court resolved a longstanding debate regarding the scope of Congress's authority under the Spending Clause. There, the Court held that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[272]

In *South Dakota v Dole,* the most important Spending Clause case since *Butler,* the Court addressed a challenge to the constitutionality of a federal statute that empowered the Secretary of Transportation to withhold a portion of the state's federal highways funds if the state failed to adopt a minimum drinking age of twenty-one years. South Dakota challenged the statute as a violation of the Spending Clause. The *Dole* Court reaffirmed *Butler*'s holding, saying: "[O]bjectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[273]

Though the Court has interpreted the spending power as transcending the limitations on the legislative power, the Court has declared that the spending power is not unlimited. In upholding the statute in an opinion by Chief Justice Rehnquist, the Court articulated four constraints on the exercise of the spending power. First, the limitation is that the "the spending must be in pursuit of the general welfare."[274] Second, any condition placed upon the receipt of federal funds must be done explicitly—commonly understood as a clear-

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sition is a better framework for enforcing federalism in a cooperative era. *See generally* 648 F.3d 1235 (11th Cir. 2011).

271 297 U.S. 1 (1936).

272 *Id.* at 66.

273 South Dakota v. Dole, 483 U.S. 203, 207 (1987) (internal citations omitted) (quotation marks omitted).

274 *Id.* at 207.

statement requirement.[275] Third, the conditions placed on the receipt of federal funds must be related to federal interest, in particular federal projects or programs—known as the germaneness requirement.[276] Fourth, a condition may not induce a state to violate a separate constitutional provision.[277]

b. The Clear-Statement Principle and Separatist Federalism Enforcement

The most important of the *Dole* constraints has been the clear-statement requirement.[278] The Court has imposed clear-statement requirements in many contexts to protect constitutional values.[279] The roots of the clear statement requirement in the context of spending clause legislation lie in *Pennhurst State School & Hospital v. Halderman*,[280] in which the Supreme Court held that a condition could not be imposed upon a state unless it receives notice. There, the Court analogized legislation enacted pursuant to the spending power to a contract between the national government and the states. The Court concluded that like all contracts, the terms of obligation must be explicit and understood by each party at the outset. The Court declared: "The legitimacy of Congress's power to legislate under the spending clause thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' Accordingly, if Congress in-

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275 *Id.*

276 *Id.*

277 *Id.* at 208.

278 *See e.g.*, Bagenstos, *supra* note 16, at 394 (arguing that the Roberts Court will continue to apply the clear statement rule in Spending Clause enforcement); Engdahl, *supra* note 269. *But see* Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155 (2004) (arguing against clear statement rules as intrusive and overly protective of state governments). Galle's critique suggests that clear statement rules in aid of federalism enforcement over-enforce federalism values and under-enforce other constitutional values, such as commitment to equality principles. *See id.* at 183 ("Probably the most important justification for the clear statement rule is as a second-best tool for judicial enforcement of federalism values."). *See also* Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441 (2008) (critiquing the Court's failure to provide appropriate guidance in its spending clause case law).

279 *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598–629 (1992) (surveying the various applications of the clear statement rule in the Burger and Rehnquist Courts); *see also* Copeland, *Federal Law in State Court*, *supra* note 46, at 545–46 (discussing the Court's use of the clear statement rule in *Gregory v. Ashcroft* to uphold federalism values).

280 451 U.S. 1 (1981).

tends to impose a condition on the grant of federal moneys, it must do so unambiguously."[281]

The clear-notice requirement and the contract metaphor have played a significant role in litigation over the spending clause. Challenges to spending legislation have primarily involved a challenge to the clarity with which particular conditions were declared in enacting legislation.[282] To the extent that the clear-statement requirement reinforces a contract metaphor in Spending Clause disputes, it contributes to the jurisprudential reliance on separation as the foundation for safeguarding the Constitution's commitment to federalism. Its depiction of Spending Clause legislation as an offer to contract emphasizes the independence and voluntary choice of the state governments.[283] Further, the emphasis on clear statements in legislative enactments highlights the inauguration of a particular "agreement" as the most significant temporal determinant of the legitimacy of conditions imposed under the spending clause legislation.

The maintenance of the state's independence and voluntary choice serve as the fundamental dimension of the protection of state governments from being overburdened by national impositions in the Spending Clause context. The state's free and voluntary choice is a constitutive element of its sovereignty. To the extent that the state remains free at the initiation of the "contract," federalism is effectively enforced. The deployment of the clear statement principle appears inconsistent with the possibility that sovereignty might be exercised in contexts where exit is a less than optimal choice. State participation in the implementation of federal policy—whether in the context of environmental policy, occupational safety and health policy, or Medicaid—involves significant state investment of resources that are not easily recouped, which impacts their ability to exit even problematic relationships. Nevertheless, state involvement in policy implementation gives them "voice" in the shape of policymaking in ways that would not be the case if they remained independent of the national government in these arenas.[284]

Though *National Federation* involved the issue of coercion, which is separate from the *Dole* factors,[285] and included the clear-statement re-

281 *Id.* at 17.

282 Samuel R. Bagenstos, *supra* note 16; Engdahl, *supra* note 269.

283 On the centrality of autonomy in liberal contract theory, see MICHAEL J. TREBILOCK, THE LIMITS OF FREEDOM OF CONTRACT 8–9 (1993).

284 For a discussion of the extent to which the ability to decide presents the authority to dissent, see Heather K. Gerken, *Dissenting by Deciding*, 56 STAN. L. REV. 1745 (2005). *See also* Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L. J. 2633 (2006).

285 *See, e.g.*, Bagenstos, *supra* note 16, at 372–79.

quirement, each of the Court's opinions collapsed the clear statement requirement in their discussion of the coercion claim. No opinion is more emblematic of this reliance than Justice Ginsburg's, which is why it merits discussion as a discussion of the clear statement requirement. Justice Ginsburg, writing for herself and Justice Sotomayor, concluded that the ACA's delegation to the Secretary of HHS the discretion to withhold all federal reimbursement funds if a state opted not to expand its eligibility for Medicaid, was not unconstitutionally coercive. Despite her recognition of the implementation stage of Medicaid policy, her opinion rests solely within the framework of the clear statement analysis.

If the Chief Justice's opinion and the joint dissent rest on a dismissal of the implementation of the Medicaid program over the last two generations, Justice Ginsburg's dissent succumbs to the temptation of separatism by simultaneously recognizing the changes in Medicaid over time, without endowing them with any significance for the relationship between the national and state governments. Specifically, Justice Ginsburg's defense of the constitutionality of the Expansion provision, including the withholding of funds, rests on her conclusion that Congress's 1965 notice to the states regarding its authority to change the program provided notice to the state governments that is sufficient to defeat a claim of coercion. To this extent, nothing that takes place after the initial enactment matters for the analytical framework for the determination of coercion, despite the fact that state governments (or the federal government) might be made into the a more vulnerable party over time. Under Justice Ginsburg's analysis, parties must bargain for the full range of changes in the relationship at the initial enacting moment, or forever hold their peace.

For Justice Ginsburg, if Congress had adequately informed the states in 1965 of its reservation of authority to change the Medicaid program, coercion was a theoretical impossibility. Leaving to one side any determination of whether Ginsburg's conclusion was correct in this specific dispute, the larger issue is her unwillingness to accept the theoretical possibility that a cooperative program might *develop* in a way that would actually support a claim of coercion, even where the technical requirements of notice had been met. This is all the more troubling in the light of Justice Ginsburg's recognition of the importance of the dynamics of the national-state interaction at the policy implementation stage.

Ginsburg resists the temptation to disconnect the ACA from the history of Medicaid's transformation since its initial enactment; she points to several enlargements of the program, some of which re-

quired states to comply or risk losing all of their Medicaid funds. However, despite Ginsburg's attention to the interaction between the states and the national government that marks Medicaid's implementation, she accepts state autonomy as the only metaphor for federalism. For example, she points to the Medicaid program as "empower[ing] States to select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies."[286] Ginsburg points to these as examples of the Medicaid program's respect for state autonomy. Though they are surely examples of respect for the role that states play in the effective delivery of medical services for the poor or establishing policies that might work more effectively, attention to the process by which states gained the opportunity to undertake departures from the Medicaid program, might not be defined as state "autonomy." As stated above, states must receive approval from the Department of Health and Human Services to depart from the strictures of the Medicaid program. As Professor Gerken has pointed out, the effective exercise of sovereignty might not involve separation, but rather entanglement with the national government in the implementation of policy.

Though Ginsburg's opinion rhetorically resists the dominance of separatism in her affirmation of cooperative federalism, its analytical reliance on the clear statement framework, and the evidence that satisfies her inquiry, elevates a state's free choice as the sine qua non of the exercise of sovereignty. Ginsburg's reliance on free choice succumbs to the dominance of separatism because sovereignty is equated with some period prior to entanglement. Thus, participation in the Medicaid program becomes a compromised sovereignty or autonomy, justified only because it was freely given away at the initial, unencumbered stage. It becomes impossible, then, to take into account how the contractual relationship has developed through the five decades of the Medicaid program's existence. For Justice Ginsburg, the history of Medicaid's implementation stands only to support the conclusion that Congress spoke clearly in the initial enactment of Medicaid. Moreover, this is the only time frame and institutional actor that presumably matters.

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286 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2632 (2012) (Ginsburg, J., concurring in part and dissenting in part) (quoting Theodore W. Ruger, *Of Icebergs and Glaciers: The Submerged Constitution of American Healthcare*, 75 L. & CONTEMP. PROBS. 215, 233 (2012) (internal quotation marks omitted)).

2. Coercion and the Tenth Amendment

a. Coercion Doctrine and the Specter of Separation

The Supreme Court's initial engagement with the theory of coercion came in *Steward v. Davis*,[287] where the Court addressed a challenge to the constitutionality of the unemployment provisions of the Social Security Act. A private employer challenged the Act as coercive of state governments because it induced states to enact unemployment compensation programs. The plaintiff asserted that state participation in the unemployment compensation fund was the result of national coercion to force state governments to enact unemployment compensation funds. The Court rejected the notion that the existence of an explicit motive by the national government to encourage states to enact unemployment compensation plans amounted to coercion of states. The Court suggested that a theory of coercion of this sort would eviscerate all possibility of choice in response to federal inducements and incentives. However, the Court indicated that even where such coercion might be held to exist, the determination would be one of degree, rather than a determination of the transgression of a bright line rule demarcating a state's free choice from the national government's coercion.

In two contemporary decisions, the Court has reaffirmed, without elaboration, the theoretical possibility that the national government might be guilty of turning pressure into compulsion, thereby transforming inducement into imposition. In addition to the limitations on the spending power discussed above, the *Dole* Court stated "that in some instances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion."[288] In *Dole,* the Court concluded that the withholding of 5% of a state's federal highway funds did not rise to the level of coercion, but merely constituted "relatively mild encouragement . . . to enact higher minimum drinking ages than they would otherwise choose." The *Dole* Court did not offer an explanation of why 5% was insufficiently coercive, or what factors would give a determination of coercion under this framework. However, the focus on financial inducement played a significant role in *National Federation.*

287 Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

288 South Dakota v. Dole, 483 U.S. 203, 211 (1987) (citing *Steward Mach.*, 301 U.S. at 590) (internal quotation marks omitted).

In *New York v. United States*,[289] the Court invalidated a provision of the Low-Level Radioactive Waste Act,[290] which required state governments to either regulate the radioactive waste in their borders, or enact legislation taking title to such waste, thereby assuming liability for damages caused. Although the Court ruled against this provision on grounds that it constituted an unconstitutional commandeering of the state's legislative process, the Court affirmed Congress's ability to achieve its regulatory objectives in other ways, including through the Spending Clause. However, the Court identified the "outright coercion" of state governments as inconsistent with its authority to induce state cooperation in its regulatory objectives. Again, the Court did not elaborate on what such coercion might entail, and did not specify whether it would adhere to the *Dole* inducement framework in determining what might constitute "outright coercion."

The *Dole* Court's treatment of coercion might have provided a framework for regulating state-national relationships in the Spending Clause context. The Roberts opinion collapsed the question of coercion into an inquiry based solely on financial inducement. Even if one concentrated solely on the financial inducement for a state to participate (or continue participating) in a conditional funding program, it is not clear that focusing solely on the percentage of the fund reduction, without more, is the best way to determine coercive behavior. It offered the possibility that the determination of whether a funding condition is coercive might involve the engagement with facts—the state's financial condition, for example—that might contextualize the state and national relationship. The Chief Justice's opinion, while teasing us with the possibility of a contextualized coercion jurisprudence, fails to shake free of the separatist paradigm of clear statement principles.

B. National Federation*'s Missed Moment*

The Court's decision marks the first time in which the Court has actually decided that a statute is unconstitutionally coercive, rather than merely affirm coercion as a theoretical possibility. That coercion is possible is an advance against claims that federalism is exclusively enforced through the allocation of substantive authority between the national government and the states. Disappointingly, the Court's two decisions finding coercion remain beholden to the framework of separation as the sole enforcement mechanism of fed-

289 505 U.S. 144 (1992).
290 *Id.*

eralism. This Part demonstrates how the Court's reasoning on the states' coercion claim missed a significant opportunity to force federalism enforcement to confront the realities of national and state interaction in the modern regulatory state.

1. The Court's Unsettling Middle Ground

The Chief Justice, writing for himself and Justices Breyer and Kagan,[291] held that the ACA's delegation to the Secretary of Health and Human Services the discretion to withhold all federal Medicaid reimbursement money from states choosing not to expand eligibility pursuant to the ACA is unconstitutional coercion of state governments. This holding is monumental in the life of Spending Clause doctrine and the coercion claim, as *National Federation* represents the first time that the Supreme Court has held a Spending Clause statute to be unconstitutionally coercive. The Chief Justice's opinion represents an important step in acknowledging the intertemporal dimension of the Medicaid program in its recognition of the commitments and investments in administrative capacity that state governments have made as participants in the Medicaid program. The Chief Justice's opinion also recognizes that the loss of a significant portion of federal reimbursement funds has a potentially significant detrimental effect on state budgets. However, the Court's reasoning ultimately relies on an analytically disappointing discovery that appears seemingly out of nowhere in Spending Clause jurisprudence. What is most troubling about the solution is not its novelty, but rather its resort to the same separation and truncation as the clear statement requirement and other forms of federalism enforcement. The Court seemed to move in a direction that suggested that it would take post-enactment factors into account, yet could not pull the trigger in articulating a conception of coercion that lives up to this promise.

Chief Justice Roberts' opinion begins with the characterization of the Medicaid program, and Spending Clause legislation more broadly, as a contract between the national government and the states.[292] As such, the Chief Justice's return to the enactment of the ACA might appear inevitable but for the fact that the Chief Justice offered the

291 It is clear that Justices Scalia, Kennedy, Thomas, and Alito did not join the Chief Justice's opinion, but to the extent that the holding, which concluded that the Medicaid Expansion provision was unconstitutionally coercive of state governments, was consistent with the views of seven of the nine Justices, it might be appropriate to deem it the majority opinion.

292 National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2602 (2012). *See also* Bagenstos, *Spending Clause Litigation*, *supra* note 16; Engdahl, *supra* note 269.

possibility of moving beyond what might appear to be a mere facial analysis of the Medicaid Expansion provision. The Chief Justice suggested that where Congress's conditions on states regulated the use of federal funds, there would be no coercion claim. As the donor, the federal government could clearly impose restrictions on the use of its funds. The threat of coercion arises where the federal government goes beyond assuring the appropriate use of its funds to condition receipt of funds on the state's acceptance of a federal policy. To date, the paradigmatic case has been *Dole*, in which a portion of federal highway funds were conditioned on a state's decision to have a legal drinking age of twenty-one years. In such instances, the Chief Justice wrote, the analysis was whether the threat of the loss of 5% of highway funds was coercive.[293] The Chief Justice understood *Dole* as allowing the "inducement" on the ground that the threatened loss was only 5% of a state's highway funds. While this itself is a mere fa-

293 It is important to note how Chief Justice Roberts' articulation of the conditions under which coercion might arise is distinct from that of the leading scholar on the Spending Clause, Lynn Baker. Lynn Baker has offered a "post-*Lopez*" proposal to substitute what she thought as the inadequate *Dole* test. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1962–63 (1995). Baker's proposal is based on a two-step test to determine whether a conditional funding statute violates the Spending Clause. *Id.* The goal of the first step is the determination of the germaneness of the funding condition. *Id.* at 1966. Not to be confused with what she takes to be *Dole*'s "boundless" germaneness test, Baker's proposal limits a germane national interest to one that "is strictly and unambiguously limited by Congress's Article I regulatory powers other than the spending power." *Id.* at 1966. A funding condition that seeks to mandate state action that transcends Congress's regulatory authority is presumptively non-germane, and therefore invalid. *Id.* The second step of Baker's test determines whether a presumption of invalidity is rebutted. *Id.* at 1966–67. Such rebuttal depends on a determination of whether the federal offer of funds is classified as either "reimbursement spending" or "regulatory spending." *Id.* at 1963. Reimbursement spending will rebut a finding of invalidity at step 1, while regulatory spending will not. *Id.* To distinguish between the two, Baker provides hypotheticals based on the post-*Lopez* attempt to encourage states to enact legislation criminalizing gun possession in school zones. *Id.* at 1963–66. A statute that counts as "reimbursement spending" would offer states funds to defer some or all of the costs of prosecuting those charged with gun possession in a school zone. *Id.* A "regulatory" spending statute would condition receipt of federal education funds on the state's provision of universal public education *and* its enactment of a statute criminalizing gun possession in a school zone. *Id.* As stated above, the former statute would be a valid exercise of Congress's spending power for Baker, while the latter statute would not constitute a valid exercise of the power. *Id.* Baker's Article I-based proposal rests a determination of coercion on the existence of non-existence of substantive regulatory power. One might read Chief Justice Robert's distinction between conditions that regulate the use of federal funds and those that regulate more broadly as broader than Baker's, however, it resists the temptation to connect coercion to the exercise of substantive authority. I have criticized federalism jurisprudence's reliance on the existence of substantive authority as conclusive in determining whether the national government or the states have acted inconsistent with their obligations to the other level of government. *See generally* Copeland, *Federal Law in State Court*, *supra* note 46, at 556.

cial analysis, the Court went further to highlight the fact that the "federal funds at stake constituted less than half of one percent of South Dakota's budget at the time."[294] The shift from the 5% at risk to a determination of what the 5% meant for a particular state's budget may not appear important, but it suggests that the Court is paying attention to the financial and budgetary context in which the "inducement" is made.

The Chief Justice continued in the vein of making a contextualized analysis of coercion. The Chief Justice sought to distinguish the inducement at issue in *Dole* from the Medicaid Expansion, saying that "the financial inducement Congress has chosen is much more than [*Dole*'s] relatively mild encouragement—it is a gun to the head."[295] The two grounds for the distinction are, first, the percentage of funds the state is threatened with losing if it chooses to opt out of the Medicaid expansion—up to 100% of all federal Medicaid reimbursement funds. The second distinction is the fact that Medicaid spending accounts for "over 20% of the average state's budget, with federal funds covering 50% to 83% of those costs."[296] The Chief Justice concluded that the threatened loss of at least 10% of a state's budget is so different from the loss of one-half of one percent that it amounts to "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[297] Though it is not clear which distinction is the engine of the Chief Justice's analysis, it is an amplification of *Dole*, which only mentions the loss of 5% of highway funds without addressing the budgetary context into which any assessment of coercion is made.[298]

One might be forgiven in believing that the Court was developing an analytical framework for the coercion claim that pays close attention to context when the Chief Justice points to the investment that states have made in the development of "intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid."[299] The focus on the state's

294 *NFIB*, 132 S. Ct. 2566, 2604 (2012).

295 *Id.* (internal quotations omitted).

296 *Id.*

297 *Id.* at 2605.

298 Justice Ginsburg raises the uncertainty surrounding the Chief Justice's analysis, asking whether it should matter for a coercion claim that Florida, the lead plaintiff, imposes no income tax on its residents. That a state might have the capacity to raise revenue in reasonable ways, she suggests, might have an impact on a coercion analysis. *Id.* at 2640–41 (Ginsburg, J., dissenting).

299 *Id.* at 2604. Here, the Chief Justice's discussion appears to imply the "relationship-specific" asset investment, which may create asymmetries between parties in a relationship

investment in infrastructure suggests a different path in the contract paradigm from contract initiation and notice, to the state's quasi-reliance interest developed over the years of participation in the Medicaid program.[300] This analysis suggests the possibility that the coercion analysis will include an assessment of the context in which the state and national contractual relationship has developed over time, rather than being limited to the time frame of the contract's enactment.

The hope that the Court would articulate a coercion framework more consistent with the actual practice of state and national interaction in the Medicaid program was undermined by the Court's resort to the notice analysis. Rather than develop a theory of coercion that reflects how state vulnerability might be used to the advantage of national policymakers, which would involve a contextual discussion of the ways in which such vulnerabilities might arise and be exploited, the Court opted to anchor its analysis in its conclusion that the ACA represents so fundamental a transformation of Medicaid that it constitutes an entirely new program. Leaving aside the Chief Justice's failure to provide a framework for analyzing when an amendment to a statute constitutes an entirely new statute, the Court's decision to ground its holding in its novel conclusion shifts the analytical frame from the actual workings of the Medicaid program to the point at which Congress made the initial enacting decision.

2. *Context and Separation in the Joint Dissent*

Though Justices Scalia, Kennedy, Thomas, and Alito agree with the conclusion that the Medicaid Expansion provision is unconstitutionally coercive, they wrote separately to emphasize their disagreement with the Chief Justice's decision to sever the penalty provision of the overall Medicaid Expansion provision.[301] Though the joint dissent raises points identical to those in the Chief Justice's opinion, it goes beyond the opinion in its argument for holding the Medicaid Expansion provision unconstitutional. Like the Chief Justice's opinion, the dissent based its conclusion on its assessment that the withholding of all federal Medicaid proceeds would significantly impact

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that makes one party more vulnerable to extractions from the other party. *See supra* text accompanying note 235. But in keeping with the Court's contractarian approach to Spending Clause litigation, it is likely that the Court is relying on a reliance interest argument.

300 *See* discussion of relationship-specific assets as raising vulnerability, *supra* text accompanying note 235.

301 *NFIB*, 132 S.Ct. at 2667–68.

state budgets by withdrawing a significant percentage of federal funds from state governments. However, the dissent went further than the Chief Justice's opinion by grounding its conclusion in what it interpreted as a double loss.[302] That is, the dissent emphasized the fact that Medicaid was funded by taxes paid by individuals, including individuals residing in a state that might decide not to expand its Medicaid eligibility. These same individuals would be required to continue to pay federal taxes, even those supporting Medicaid, which its state would not receive. The dissent translated this into a loss for the state because the fact of federal taxation would constrain the extent to which a state government might increase tax revenues in order to replace the loss of federal Medicaid reimbursement funds. This argument rests on a strange reading of the relationship between state and national citizenship that disregards the fact of connection between the national government and the states.[303]

Though the joint dissent did not question the federal government's right to tax citizens of the United States, it simply declared that it was beyond refutation that federal taxes constrained state taxation. While this is clearly true, it is far from a complete picture of the fiscal relationship between the states and the national government.[304] Though the dissent describes the extent to which federal grants fund significant portions of state Medicaid and educational operations, among others, there is no discussion of the ways in which a state might "cheat" by under-taxing its residents, while depending on the federal government to provide funds for important services. More importantly for this discussion's purpose is the conception that ap-

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302 *Id.* at 2661.

303 By "strange" I do not mean that it is without prior articulation in the Spending Clause debates. Again, Professor Lynn Baker has argued that funding withdrawals that go beyond the regulation of the use of federal funds are almost per se coercive because they siphon money from the state's citizens to underwrite the activities of other states that have accepted the national government's policy choice. Baker suggests that the national taxing power that makes conditional spending possible diminishes the state's tax base, and its access to these tax resources. The penalization of the a state for rejecting, for example, the "regulatory spending" statute discussed above, harms the state doubly, because it is obligated to forego even the portion of tax revenues that were collected within its borders, and the state's ability to raise tax revenue is compromised because its tax base has been encroached upon by the federal tax.

304 "This is all the more remarkable, in light of the dissent's recitation of the federal support for state Medicaid programs that the dissent acknowledges is long-standing." *NFIB*, 132 S.Ct. at 2663. Indeed, the dissent goes on to compare Medicaid to other programs that afford states some portion of federal monetary support, including federal financial support for education. Though the dissent employs this information to support its conclusion that state loss of Medicaid dollars would cripple the state, it fails to recognize the significance of the embedded relationship that its data exemplifies.

pears to underwrite the claim that states have a prior right to the resources of its residents that trumps the national government's right to tax. This reasoning allows the dissent to neglect the ways in which fiscal federalism entangles the state and the national government, and that Medicaid is a paradigmatic example of such entanglement. Further, it appears to let state governments off the hook by not analyzing the justifications for a state's decision not to expand Medicaid eligibility under the generous terms of the ACA. That is, the contextualized analysis the joint dissent appears to accept is only applied to one party in the relationship. Why should the national government be required to forego its exit option with a partner who has no obligation to explain its reasons for exiting parts of the relationship? The joint dissent's conceptual framework of separation is exactly inconsistent with a coercion analysis that might make any demands of state governments in the light of their participation in the Medicaid program for the last generation.

VI. ADMINISTRATIVE LAW AND THE NORM OF ENGAGEMENT

Two significant events have occurred in recent years to bring the administrative state's role in constitutional law to the forefront of legal scholarship. The first is the increased role of agencies in the preemption of state law. The last several years have witnessed several disputes before the Supreme Court addressing the preemptive authority of administrative agencies and the preemptive effect of their decisions.[305] This activity has increased recognition of agencies as sites of federal-state interaction. First, though not as focused as the debates over agency preemption, scholars have drawn attention to the interaction between states and federal administrative actors interact over substantive policies in ways that suggest different forms of federalism enforcement in the administrative state.[306] Second, there has been an increase in discussion of the "constitutional" structures outside of the written constitution, and their role in determining constitutional meaning in the "republic of statutes."[307] Specifically, by calling our attention to the quasi-constitutional qualities of statutory enactments, scholars have sought to stretch the boundaries of constitutional meaning, at least from a popular standpoint. Relatedly,

305 *See, e.g.*, Wyeth v. Levine, 555 U.S. 555 (2009); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) (holding that the Medical Device Amendments preempted state tort regimes).

306 *See, e.g.*, NUGENT, *supra* note 35; Bulman-Pozen & Gerken, *supra* note 40; Ryan, *supra* note 17.

307 *See, e.g.*, ESKRIDGE & FEREJOHN, *supra* note 53.

scholars have called for an increasing reliance on administrative agencies and administrative law as capable of protecting constitutional values in the place of more commonly recognized sites and modes of protection.[308] All of these movements might be understood as a part of the larger "constitution outside of the courts" debate in legal scholarship.

As stated above, this Article clearly accepts important aspects of the call for a more expansive array of institutions capable of generating constitutional meaning. Specifically, the practice of the national-state relationship must be recognized in all of its dimensions and in every site in which it takes place. Agency practice demonstrates dimensions of federalism that are undervalued in dominant thinking about federalism enforcement. As sites where repeated interactions take place over periods of time for the achievement of policy objectives, agencies offer a unique perspective on federalism's bureaucratic life. Agencies owe their very existence to the fact that policy implementation is an involved process that involves repeated attempts to tailor policy to dynamic circumstances, which is at least one of the justifications for congressional delegation to administrative agencies. In this respect, the policy implementation process is a microcosm of the national-state relationship that also involves repeated transactions over periods of time.

The nature of the repeated interactions between state and national administrative actors is one marked by negotiation, threats, political gamesmanship, explanations, justifications, and reasons. Above all it is marked by engagement, whether that be understood in terms of conflict or cooperation, or both simultaneously. One of the most important aspects of national-state interaction in the administrative state involves the iterative development of policy. The examples that we have seen in Medicaid and No Child Left Behind are but two examples of the interaction that takes place in the post-enactment stages of policy implementation. Here, the most potent tool that either the states or the national government have at their disposal is the tool of persuading the other side of the correctness of its position. Indeed, one of the most the important aspects of the waiver process as laid out above is the extent to which it provides the opportunity for ongoing engagement with the objective of reaching agreement on substantive policy change from the status quo. Though I am clearly

308 For defenses of agencies as capable sites of federalism decisionmaking, see Galle & Seidenfeld, *supra* note 52; Metzger, *New Federalism*, *supra* note 38. For a rejection of these arguments, at least in their broad sense, see Benjamin & Young, *supra* note 55.

aware that the waiver process puts a different burden on state governments than on the national government, the structure of negotiation through explanation and information exchange is institutionalized. As such, the practice of national-state relations offers us an opportunity for reconceptualizing federalism enforcement in a way that is consistent with values of interaction, rather than separation. Such a reorientation at least more accurately reflects a significant dimension of the national-state relationship.

Though administrative practice involves interactions that might be best understood as capable of self-policing, administrative law has not left the process to its own devices for enforcement. External enforcement, however, has been of a specific type. The courts have articulated doctrines that are capable of legitimating administrative policymaking in a democracy. Although these doctrines are not directly applicable to the federalism enforcement context, they highlight an underlying principle—identified as engagement—as a model for reorienting federalism enforcement.

This argument differs from other recent arguments that recognize the importance of administrative agencies in the articulation of our constitutional values. Nevertheless, the argument that follows does not claim that agencies ought to be the exclusive site of federalism enforcement. Rather than substitute one form of institutional monopolization for another, the argument put forward rests on the conclusion that administrative law norms might be effectively transplanted into the domain of constitutional adjudication as embodying an alternative to the conceptual dominance of separation. This transplantation will have the effect of transforming the analytical framework for enforcing federalism that sees agencies as constitutional actors whose interactions with state governments might be investigated in determining the constitutional legitimacy of a particular program or policy. That is, the federalism framework that takes engagement seriously will not simply examine the handiwork of Congress as the sole touchstone for a determination of constitutional validity, but may, in certain circumstances, examine the practice of national and state interaction in the administrative state.

A. Engagement in Administrative Law Doctrine

A survey of two of the most important doctrines in administrative law points to the centrality of engagement as a means of establishing the legitimacy of administrative decisionmaking. Judicial review of the agency rulemaking process has involved a form of common lawmaking aimed at enhancing the opportunity for effective participa-

tion by stakeholders in agency decisionmaking by overseeing the process by which rules are made.[309] Likewise, the courts have taken a more aggressive posture in reviewing the substance of agency decisionmaking though arbitrary and capricious review.[310] Each of these expansions of judicial review of agency decisionmaking is aimed at protecting agency legitimacy by requiring agencies to: (1) provide forums in which to address the factual, legal, and policy positions of "outsiders;" and (2) provide satisfactory justifications of their substantive policy choices. At their core, each of these underscores to the value of engagement as a mechanism for effectuating influence in democratic governance.[311]

1. Speaking, Listening, and Responding: Engagement and Agency Rulemaking

Students of administrative law are always surprised by the extent to which the courts, understood primarily as the United States Court of Appeals for the District of Columbia Circuit, have policed the rulemaking process without the imposition of explicit tasks to specific

309 5 U.S.C. § 551(5) (2011) ("'[R]ule making' means agency process for formulating, amending, or repealing a rule"). *See also* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY, (2d ed. 1999) (providing a history and discussion of rulemaking).

310 Motor Vehicles Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983). For recent discussions of arbitrary and capricious review, see Nina Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2 (2009).

311 Professor Mark Seidenfeld has argued that judicial enforcement of procedural and substantive obligations on agency decisionmaking reflects the Constitution's commitment to reasoned decisionmaking, broadly understood. Seidenfeld has argued that the judicial willingness to impose obligations on agencies at the notice and statement of basis and purpose stage of rulemaking protect constitutional values of deliberation. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992). Gillian Metzger has described these doctrines, particularly the court's development of hard look review, as undergirded by constitutional values of separation of powers. She has argued that the failure to impose procedural and substantive obligations on agencies would undermine the broad delegations that the Supreme Court has allowed since the New Deal era. Metzger, *Ordinary Administrative Law*, *supra* note 53, at 490–97. This discussion surely accepts the correctness of Metzger's position, but differs from Metzger's position in its emphasis on engagement as a norm of constitutional behavior in the exercise of authority. While Metzger emphasizes the role that separation of powers as a constitutional value plays in underwriting these doctrinal innovations, I have, perhaps, moved a step beyond the text to ground these doctrines in the Constitution's commitment to reasoned governance. The conception of American constitutionalism upon which the engagement principle rests are as easily associated with deliberative or interest-group conceptions of politics. *See, e.g.*, Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

regulatory agencies' comment process.[312] In the 1980s the D.C. Circuit gave expanded meaning to the Administrative Procedure Act's ("APA")[313] requirement that agencies issue both a notice for proposed rulemaking[314] prior to initiating rulemaking, and provide a "concise general statement of basis and purpose."[315] In each of these aspects of the rulemaking process, the court emphasized the importance of effective participation by affected parties.

With respect to the APA's notice requirement, the courts have held that an agency was obligated to provide interested parties with "an accurate picture of [the] reasoning that has led the agency to the proposed rule."[316] Without such a picture, the court wrote, "interested parties will not be able to comment meaningfully upon the agency's rule."[317] The court reasoned that an agency's failure to provide the "technical studies and data" supporting its proposed rules undermined the interests of affected parties and effective decisionmaking by failing to empower participants in the rulemaking process with the information to offer informed criticisms of the agency's assumptions and starting points. Countenance of what it called an agency practice of "hiding or disguising the information that it employs," would turn the comment process—a process that "should be a genuine exchange"—into something different. The court's decision was based upon its conception of what the comment process was supposed to be. In the court's understanding, the "purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rulemaking process." An agency's failure to provide the opportunity for this sort of exchange amounts to a violation of its obligation to provide the opportunity to allow affected parties to engage the agency at the most significant time of its decisionmaking process. The requirement that the agency offer up the foundation of its pro-

312 The absence of explicit, judge-made amendments to the rulemaking process was not for lack of effort. The D.C. Circuit's attempts to impose more formal procedures on informal agency rulemaking was solidly rebuffed by the Supreme Court in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Counsel*, 435 U.S. 519 (1978). For an analysis of the Court's rejection of the D.C. Circuit's attempt to impose additional formal burdens, and its implications for administrative law, see Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1979).

313 Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 500 (2006)).

314 5 U.S.C. § 553(b)(3).

315 5 U.S.C. § 553(c).

316 Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 535, 530 (D.C. Cir. 1982).

317 *Id.*

posed policy means that the agency must make itself vulnerable to outside criticism and attack. It cannot hide behind technical expertise or its commitment to the public interest as substitutes; it must let others in on terms that will allow them to impact the agency's thinking and policymaking.

In addition to the court's protection of the comment stage as a site of meaningful exchange between the agency and affected parties, the courts have enforced the agency's obligation to provide a statement of "basis and purpose" in its final rule. Though the courts have indicated that the statement "need not be comprehensive," they have held that it must "indicate sufficiently the agency's reasons for the rules selected."[318] Much like the court's policing of the adequacy of notice, the court's attention to the agency's responsibility to explain itself appears to be premised on the fact that the agency is bound to explain its decisions to the same parties who have contributed to the agency's decisionmaking. The agency must adequately lay the groundwork for interested parties to speak, but the agency must also speak back in the form of an explanation for its choices. That is, the agency cannot immunize itself from the impact of the interaction with participants in the policy-making process. Further, and perhaps most importantly, the agency's response will be judged based upon its having responded to external inputs. In short, this is quite the opposite of our common conceptions of sovereignty and autonomy that so often guide our frameworks for federalism enforcement, and that were on display in *National Federation.*

2. *Weighing the Response: Engagement and Arbitrary and Capricious Review*

The courts developed administrative law doctrine in the service of agency engagement through the rulemaking process. However, the norm of engagement does not end there. The rise of "hard look" or arbitrary and capricious review expanded the agency's obligation to engage to the realm of an agency's substantive policy choice.[319] Hard look doctrine has its roots in cases in the United States Court of Appeals for the District of Columbia, but gained the approval of the Su-

318 *Id.* at 534–35.

319 The "hard look" requirement began as the agency's obligation to carefully consider the decision before it. The "hard look" requirement transformed into the level of scrutiny that a reviewing court will hold an agency under certain circumstances, such as an agency's change in policy. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

preme Court in *Motor Vehicles Manufacturers v. State Farm*,[320] in which the Court invalidated the National Highway Traffic Safety Administration ("NHTSA") decision to rescind rules mandating passive restraint devices (airbags and automatic seat belts) aimed at improving auto safety.[321] There, the Court overturned part of an agency policy decision on the ground that the agency's policy choice was not supported by the record that it had created. In explaining the scope of arbitrary and capricious review, the Court conceded that it was narrow and should not be understood as substituting judicial judgment for an agency's judgment, however, the Court continued saying: "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[322] Here, the Court relied on the fact that the agency was obligated to make decisions on the basis of its record, which presumably included comments from parties seeking to contribute to the agency's policy-making process.

While the Court in *Vehicle Manufacturers* spent less time on the protection of affected parties or interests, it is clear that the Court's protection of the role that the administrative record plays in the agency's decisionmaking benefits those who have contributed to the record. The Court obligates the agency to engage the record that it has created as the starting point of its explanations of its policy choices. These policy choices must make sense in light of the record that has been produced. It is important to note that the Court's "hard look" is deferential to the extent that it only forces the agency to take seriously the record that it has created. The record is both the product of engagement, and must itself be engaged. The agency must listen, and cannot shut its ears to the contributions of interested parties. But as important as these are, the agency is forced to speak, and in speaking, to explain its decisions by reference to the contributions offered.[323]

320 463 U.S. 29 (1983).

321 For a detailed history of this development, see JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

322 Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

323 *Id.*

B. Federalism and Engagement in the Administrative State

1. Agencies as Sites of Federalism Decisionmaking

This argument rests on the contention that agencies are appropriate sites of federalism decisionmaking. It must be admitted that this status has not been accepted in all circumstances. The Court's case law suggests disagreement and inconsistency regarding whether administrative agencies are deficient forums for federalism decisionmaking. However, there is also case law that appears to recognize agencies as legitimate sites of such authority, where appropriate procedures are followed. Finally, there is case law that suggests that courts have relied on the fact of agency process to rehabilitate what might have been constitutionally questionable statutes. The most common criticism against the legitimacy of agencies to make decisions having an effect on state interests is the claim that agencies do not (and cannot) effectively represent the interests of state governments. These arguments assert that administrative agencies do not possess the structural safeguards that legitimize Congress's assertion of authority in ways that affect state interests. This accepts the argument that Congress's constitutional structure provides the necessary "political safeguards of federalism," which justify Congress's assertion of substantive regulatory authority over areas that implicate state interests.[324] Building on the arguments that Congress's structure provides for the effective protection of state interests, these commentators argue that administrative agencies do not possess the structural protections of state interests of the Congress. Although the Court has never explicitly affirmed the position that agencies are ineligible to serve as sites of decisionmaking that might affect states' interests, several of the Court's cases suggest that agencies are clearly thought of as deficient sites of federalism decisionmaking.

In several recent decisions, the Supreme Court has addressed issues that implicate state interests in decisions made by administrative agencies. In these cases the Court has called into question agency authority to make certain decisions having implications for state governments. For example, in *Rapanos v. United States*,[325] the Court rejected the Environmental Protection Agency's ("EPA") interpretation of its authority to regulate intrastate, navigable waters. The Court

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324 Bradford Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 92 (2003) (arguing against preemption by administrative agencies as inconsistent with the Supremacy Clause).

325 547 U.S. 715 (2006).

concluded that the EPA's interpretation of "waters of the United States" to include non-permanent, man-made wetlands "would authorize the Corps to function as a de facto regulator of immense stretches on intrastate land."[326] The Court declared: "Even if the term 'the waters of the Unites States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity."[327] In short, even if the Court were willing to grant the possibility that the agency's interpretation was reasonable, to the extent that such an interpretation (in the majority's opinion) threatens to significantly displace state regulatory authority, the decision must be made by an institution (Congress) whose bona fides are more legitimate than an agency.[328]

In its decision in *Gonzales v. Oregon*,[329] the Court rebuffed an attempt by Attorney General John Ashcroft to assert control over the determination of the meaning "legitimate medical practice." After the state of Oregon enacted its assisted suicide legislation, then-Attorney General Ashcroft promulgated an interpretive rule that made it a violation of the Controlled Substances Act for a physician to assist in the suicide of another. Though the Court's analysis tracked the analytical framework of the judicial review of agency interpretation of statutes that it administers, i.e., the *Chevron* framework, the Court's analysis was not very different from its discussion in *Rapanos*.[330] In *Gonzales* the Court determined that the Attorney General was ineligible to receive *Chevron* deference because it was unlikely that Congress had delegated authority to him to make rules with regard to the development of standards for legitimate medical practice. Here, the Court did not question the constitutionality of federal reg-

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326 *Id.* at 738.

327 *Id.*

328 Here, too, it must be pointed out that the Court does not only require a decision from Congress, but also imposes the requirement that the statement be "clear." For the federalism-protecting function of clear-statement principles, see Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001). *See also* Eskridge, Jr. & Frickey, *supra* note 279.

329 546 U.S. 243 (2006).

330 The framework articulated in *Gonzales* was a modification of the original *Chevron* two-step analysis. Rather than commencing the analysis with a determination of whether a statute's meaning was clear or ambiguous, the new formula begins with another two-step analysis, asking: (1) whether Congress had delegated to the agency the authority to make rules with the force of law; and (2) whether the agency had acted consistently with such a delegation. *See* United States v. Mead Corp., 533 U.S. 218 (2001); Thomas W. Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

ulatory authority over the manufacture or use of prescription drugs. However, the Court questioned whether the Attorney General had authority to make such a determination in the first instance. Although the Court's decision raised questions about an agency's authority to make decisions implicating state interests, the Court's analysis suggests that the form of the Attorney General's decision, the promulgation of the regulation as an interpretive rule, rather than as a substantive rule that had gone through the notice and comment rulemaking process, played a significant role in the Attorney General's decision.[331] That is, the Attorney General utilized a process that did not require engagement with "outsiders," and appeared to have gone out of his way to sequester itself from outside input.[332]

Further, the Court's constitutional jurisprudence has been impacted by the presence of administrative decisionmaking. For example, in *Gonzales v. Raich*,[333] in which the Court upheld Congress's authority to regulate medical marijuana against a Commerce Clause challenge, the Court held that the fact that marijuana might be reclassified by the Attorney General as something other than a Schedule I drug did not impact its decision about Congress' regulatory authority. Nevertheless, the Court pointed to the availability of a challenge to the administrative determination of the marijuana's classification at the agency level. As stated above, in upholding the Medicaid Expansion provision, the Eleventh Circuit reference to the agency context may have played a larger role in its decision—as it was explicitly listed as a factor against finding coercion—these cases suggest judicial cognizance of the administrative realm of policy decisionmaking that has significant substantive impact on state policy choice. Rather than merely seeing this as the judiciary's endorsement of the administrative law doctrine as the new bulwark against national overreach, this Article argues that we might see this as an invitation to draw upon the insights of administrative law's demand for engagement and interaction as offering insights into federalism enforcement beyond the agency setting.[334] Indeed, it might offer signif-

331 *See* Metzger, *New Federalism*, *supra* note 38 (arguing that the Court's discussion is not altogether clear with respect to whether it is federalism or administrative law doctrine that is carrying the water in *Gonzales*).

332 The *Gonzales* Court also articulated what has come to be known as the anti-parroting principle, which does not accord deference to an agency's interpretation of its own substantive rule, where the rule merely "parroted" the language of the statute. *Gonzales*, 546 U.S. at 257–58. This principle might be related to what I have called the requirement that the agency engage, rather than sequester, itself as the Attorney General had done.

333 545 U.S. 1 (2005).

334 *See, e.g.*, Metzger, *New Federalism*, *supra* note 38.

icant substantive impact on agencies engagement with the questions of preemption of state law.

2. Substance and Procedure in Administrative Preemption

Most recently in *Wyeth v. Levine*,[335] the Court addressed the issue of the Food and Drug Administration's determination that its labeling requirements preempted state common law tort actions based on a drug manufacturer's failure to warn. The Food and Drug Administration's ("FDA") preemption determination had been communicated in the preamble of a rule, rather than in the proposed rule, itself. As such the agency's determination of the preemptive scope of its drug labeling regime had not been submitted to the commentary and criticism of a rule going through the notice and comment process. The Court's analysis of the preemptive scope of the FDA's labeling regime calls into question the legitimacy of administrative agencies as sites of preemption determinations. Although the Court emphasized the FDA's failure to submit its preemption determination to the strictures of public commentary according to Section 553 of the APA, its analysis also called into question the very legitimacy of agencies as sites of federalism politics. The Court declared that it had recognized the authority of agency regulations bearing the force of law to preempt "conflicting" state law, however, it pointed out that even here, "the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption."[336] The Court's statement raises two issues with respect to an agency's authority to make preemption determinations. First, the Court seems to suggest that only conflicts between agency regulations and state law might be recognized as the basis of the preemption of state law. This conclusion would limit the extent to which regulations might preempt state law. Second, the Court's statement suggests that whatever the basis of preemption, the Court cannot accept the agency's preemption determination because the agency has not been designated by Congress as a legitimate site of preemption determinations.

Despite the Court's somewhat dismissive treatment of the agency's authority to make preemption determinations, the agency's opinion was not completely ignored. Although the agency qua agency is not respected, the agency as an expert in policymaking and policy coor-

335 129 S. Ct. 1187 (2009).

336 *Id.* at 1200–01.

dination and implementation can earn deference through the force of its underlying explanations.[337] The Court had previously "given 'some weight' to an agency's views about the impact of tort law on federal objectives when the subject matter is technical and the relevant history and background are complex and extensive."[338] The Court further explained its posture with respect to agencies, saying: "Even in such cases, however, we have not deferred to an agency's conclusion that state law preempted. Rather, we have attended to an agency's explanation of how state law affects the regulatory scheme."[339] Here, there was no basis upon which to accord any weight to the FDA's determination, because the agency had failed to allow for participation by affected parties, and failed to offer any explanation for its conclusion that the federal regulatory regime ought to monopolize the field with respect to drug manufacturers' labeling obligations. The Court emphasized what it called the FDA's "procedural failure" of including its preemption determination in the preamble of the final rule, after the notice for proposed rulemaking explicitly stated that the rule would not result in the preemption of state law.

The Court did not simply rest its rejection of the FDA's preemption on what amounted to a procedural failure, but also highlighted what can only be described as the substantive irrationality of the FDA's preemption determination. The Court's discussion of the substantive dimension of the FDA's decision suggests a model for the breadth of the judicial review of the agency's federalism decision. That is, the agency's decision to withhold funds for failure to expand Medicaid would have to meet the requirement of substantive rationality. This requires a federalism analysis that focuses on the context in which particular decisions are made, rather than on abstract conceptions of autonomy. The Court's substantive review of the FDA's preemption decision provides an example of such a contextualized review.

The Court declared that the preemption determination at issue had "reverse[d] the FDA's own longstanding position without providing a *reasoned* explanation, including any discussion of how state law has interfered with the FDA's regulation of drug labeling during decades of coexistence."[340] Although the Court appeared to frame its

337 *See generally* Merrill & Hickman, *supra* note 330.

338 *Wyeth*, 129 S. Ct. at 1201 (internal quotation marks omitted).

339 *Id.*

340 *Id.* at 1201. There is currently some debate about whether an agency change in policy position should trigger "hard look" review by a court. *See, e.g.*, Motor Vehicles Mfrs. Ass'n.

substantive analysis of the FDA's preemption determination in terms of its reversal of policy, the Court's analysis actually addresses the agency's failure to provide rational responses to the facts that undermine the agency's conclusion that federal regulatory policy ought to monopolize the source of obligations imposed on drug manufacturers. The Court's discussion of the FDA's prior preemption determination, the Court seems to suggest, is rational in the light of particular facts that describe the current relationship between the FDA, the drug industry, and state tort law. These facts, which from the record have not been contested by the agency, undermine the substantive rationality of the agency's substantive decision to reverse course. The Court highlighted the fact that the FDA had limited resources to vigorously police all risks that were identified after a drug was approved, and after the FDA's labeling requirement was imposed. Further, the Court highlighted the information inequality that exists between the FDA and drug manufacturers, who "have superior access to information about their products, especially in the postmarketing phase as new risks emerge."[341] The Court asserted that state tort litigation serves an important role in limiting the information gap between regulatory agencies and private industry because "[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly."[342] The information-disclosing function of state tort law is further enhanced by providing incentives (based on the compensatory function of those injured by particular products) to victims to "come forward with information" not known that may be unknown to both the industry and the regulatory agencies. Tort suits serve a diagnostic function that is important for the successful implementation of Congress' purpose to protect consumer safety.

As articulated above, the Court's rejection of the FDA's preemption determination could hardly be described as merely a judicial policing of the procedural apparatus of agency preemption decisions. The substantive content of the Court's decision demonstrates the rigor with which the Court is willing to analyze an agency's preemption determination. The decision stands as an example of the role that

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v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983). *But see* FCC v. Fox, 129 S. Ct. 1800 (2009).

341 *Wyeth*, 129 S. Ct. at 1202.

342 *See, e.g.*, THOMAS O. MCGARITY, PREEMPTION WAR: WHEN FEDERAL BUREAUCRATS TRUMP LOCAL JURIES (2008) (arguing against preemption on the basis that litigation provides an important "feedback loop" to regulatory agencies); David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95 (2005) (same).

the Court might play in the process of policy implementation of federalism disputes. Such a role would require engagement on the part of both the national government and the states as a basis for determining the federalism legitimacy of their actions. Engagement, at a minimum, entails non-exclusion from significant policy decisions. Rather than forcing separation, federalism enforcement might protect the efficacy of state contributions to policy implementation.

C. Enforcing the Bureaucratic Spending Clause

This part offers a brief sketch of the coercion analysis in the context of the administrative state. At oral argument Justice Breyer suggested judicial review of the Secretary's decision to terminate Medicaid reimbursement funds as an alternative to holding the Expansion provision to be unconstitutional.[343] Though it was not clear whether Justice Breyer's alternative would eliminate coercion as a recognizable constitutional claim, what is clear is that Justice Breyer offered administrative law as the source of an affirmative obligation on the Secretary to make a reasonable decision.[344] What is significant about the Justice's statement is that it requires a contextualized analysis of the impact that the Secretary's decision to terminate all Medicaid reimbursement funds would have on the state government. It is only logical that a determination of the reasonableness of the Secretary's termination decision must take account of the basis of the state's refusal to expand Medicaid eligibility to comport with the ACA's requirements.[345] The state's refusal to expand Medicaid must, itself, be based on the sort of justification that would support a reviewing court's conclusion that the Secretary acted unreasonably by terminating all Medicaid funds. In short, judicial review of the termination decision would require an assessment of the information before the

343 Transcript of Oral Argument at 13–14, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-393).

344 Though "reasonableness" is most associated with step two of *Chevron* review, Breyer clearly intends reasonableness as the baseline of all legitimate agency action. Thus, even what we consider to be substantive review of agency exercise of discretion, i.e., arbitrary and capricious review, is "reasonableness" review. For a discussion of this, see David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010).

345 Justice Breyer's question appears to have suggested that any decision by the Secretary to terminate pre-ACA Medicaid funds would be presumptively unreasonable, but this was not fully explored. However, this interpretation of the Justice's question would beg the question of why a reasonableness assessment would offer anything that a simple declaration of unconstitutional coercion would not provide. Even if the Justice meant that the Secretary's decision to terminate would be per se unreasonable, this discussion suggests that such a conclusion would be perfectly inappropriate for administrative law, which accepts the legitimacy of government action and decisionmaking, but holds such actions and decisions to obligations of reasonableness that are always assessed in context.

Secretary at the time the decision was made. This information would likely include (or not) a state's explanation for why its decision not to expand Medicaid should not be the basis of the termination of federal reimbursement funds. There is no way that the Court can avoid at least some assessment of the state's justification for its refusal to expand Medicaid eligibility.

Judicial review in this context is consistent with the engagement norm outlined above. But such review requires engagement from both the national government and the states. Under this conception of the judicial review of federalism, the states are no freer to disengage than is HHS. In addition, the assessment of reasonableness necessarily takes into account past decisions made by the agency and the states in their temporally-extended interaction. This does not suggest that a state is not free to refuse to expand Medicaid on purely ideological grounds, but that the decision (or explanation) will be assessed in making the determination of whether the Secretary's termination decision in response is reasonable. Such a framework recognizes the state's freedom to refuse to expand Medicaid, but does not treat every state refusal in identical fashion. The Court's current coercion doctrine allows states simply the option to exit as though every termination decision represents the same threat to state sovereignty. The framework articulated in this article rejects such an acontexual conception of federalism and its enforcement, particularly in the regulatory state.

CONCLUSION

National Federation's popularity may be about the Individual Mandate. Yet, its future may depend more on what states decide about participating in the newly-expanded Medicaid program. Regardless of what happens to this particular provision at either the national or state level, *National Federation* stands as both a missed opportunity to offer a conception of federalism that is truer to the practice of "Our Federalism." The unanimity of the Court's acceptance of the dominant separatist paradigm only highlights the extent to which those who dissent from its incomplete conception of federalism must continue to demonstrate its costs for our conceptualization of the national-state relationship, and the actors that shape so much of it. Given debates about the nature of state authority to enforce immigration policy, and the ability of states to regulate against greenhouse gas emissions, conflicts between national and state authority do not threaten to become extinct, or easier. Remaining faithful to our leg-

acy of policy differentiation that federalism allows, may require reorienting our conception of its enforcement for the age it serves.