

# The President and the States: Patterns of Contestation and Collaboration under Obama

Jessica Bulman-Pozen\* and Gillian E. Metzger†

\*Columbia University; jbulma@law.columbia.edu

†Columbia University

Current accounts portray President Obama's tenure as dominated by executive policymaking and vigorous challenges from the states. We argue that such accounts overlook how federal-state collaboration has been critical to achieving Obama Administration ends. Partisan polarization has gridlocked Congress and made the President dependent on the states to advance his central policy initiatives. As a result, these initiatives are both more responsive to state demands and more bipartisan than they might appear. After exploring tools by which the President works with the states, we discuss implications for federalism, the separation of powers, and partisan polarization. In particular, the state role in shaping federal regulation raises the possibility that states are both aggrandizing and checking presidential power.

If popular reports and political attacks are any guide, President Obama's second term has been marked by presidential policymaking and sharp state opposition. With Congress incapacitated by polarization, the President has turned to administrative action to achieve his goals, pushing his agenda on the nation under a justificatory "We Can't Wait" mantra. Meanwhile, states have led the opposition to such executive action. Governors refuse to participate in Administration initiatives, and state attorneys general sue the federal executive branch for overreach in a variety of areas.

There is much truth to this account. Congress is gridlocked and unable to enact substantive laws on major policy issues. A number of political and structural factors contribute to legislative paralysis, but the widening ideological divide between the parties and the parties' split control of Congress and the presidency are leading culprits. In the absence of congressional action, federal agencies have employed their powers assertively, often stretching, if not violating, underlying statutes (Freeman and Spence 2014; Metzger 2015). And the White House has been closely involved in administrative initiatives, with the President publicly instructing agencies to act and claiming ownership of the resulting decisions (Watts 2016). Examples of such

presidentially instigated, assertive agency actions include the Department of Education's grant of No Child Left Behind (NCLB) waivers, the Department of Homeland Security's deferred action immigration programs, the Internal Revenue Service's waiver of the employer mandate in the Affordable Care Act (ACA 2012), and the Clean Power Plan by Environmental Protection Agency (EPA).

A number of states have opposed these and other administrative undertakings. Many governors and state legislatures have refused to expand Medicaid pursuant to the ACA; more than half of the states have filed suit over the Administration's executive actions on immigration; in a nearly unprecedented move, twelve states challenged the Clean Power Plan in court before the Environmental Protection Agency had even finalized it, and more than two dozen states are now challenging the final plan (*Texas v. United States*; *In re Murray Energy Corp. v. EPA*; *West Virginia v. EPA*). Just as partisan polarization provides the critical explanation for congressional inaction, it also furnishes the key to such state resistance. Today's Democratic and Republican parties are thoroughly integrated across the state-federal divide, so Republican-led states are leading the challenges to a Democratic President (Bulman-Pozen 2014).

Looked at more closely, however, central initiatives of the Obama Administration are more collaborative, and indeed more bipartisan, than they first appear. Many federal executive undertakings depend on state participation. If for no other reason than to achieve that participation, the Obama Administration has been sensitive to state interests and concerns, including those of Republican-led states. Waivers granted by the Administration have allowed some states to expand Medicaid in ways that deviate from traditional Medicaid and incorporate Republican policy preferences. The Administration's Clean Power Plan incorporates state policy choices into its substantive standards, as does its rule setting out minimum essential benefits for health insurance under the ACA. NCLB waivers were a response to state requests for regulatory relief and built on educational assessment metrics devised by red and blue states alike. And, in declining to enforce the federal Controlled Substances Act with respect to marijuana offenses in Colorado and Washington, the Administration has accommodated those states' decisions to legalize recreational marijuana use.

Even as the President sets policy without Congress and a subset of states vigorously opposes his decisions, then, federal-state collaboration is critical to realizing Administration ends. National policy is increasingly determined by presidentially instigated executive branch action, but it is executive action taken in conjunction with the states. The resultant national policy is responsive to state demands, often accommodating state policy preferences from across the political spectrum. Against a background of polarized national politics and a gridlocked Congress, the state role in shaping federal regulation and federal programs is thus particularly significant. It raises the possibility that states are simultaneously

enabling and checking federal executive branch initiatives, it means that federal policy may be nonuniform and differentiated by state, and it lends the President's initiatives more of a bipartisan character than popular accounts allow.

This article explores the federalism dimensions of contemporary presidential policymaking, situating state–federal collaboration in broader political trends and cataloging various mechanisms of state–federal interaction now being employed. After briefly considering the background of political polarization and executive branch initiative, we describe a number of tools by which the Obama Administration has worked with the states, ranging from granting states waivers from statutory requirements, to incorporating state law into federal regulations, to not enforcing federal law in a policy space shared with the states. As even this abbreviated list suggests, state–federal interactions are diverse and entail shifting allocations of state and federal power. What unifies these many interactions is the core of presidentially instigated executive branch action taken in conjunction with the states.

Such presidential collaboration with the states raises important questions, particularly with respect to feedback effects on the federal government. Does the executive branch's turn to states as sites of federal policymaking further increase presidential power at the expense of Congress, or does it instead introduce new checks and balances into a malfunctioning separation of powers system? Might alliances between a Democratic federal administration and Republican state governments break down the partisan divides that keep Congress on the sidelines? Or, precisely insofar as they provide a workaround to congressional inaction and limit the costs of polarization, are these bipartisan state–federal interactions instead more likely to perpetuate partisan divides in Washington? In the conclusion, we begin to take up some of these questions, offering tentative views and suggestions for further study.

## Political and Structural Context

Interactions between the states and federal administrative agencies are nothing new. Federalism scholars have documented and analyzed these relationships for decades. Against this historical backdrop, however, two particularly distinctive features have emerged during the Obama Administration. First is the near-absence of Congress. Congress's ability to set national policy and to mediate state–federal relations is hobbled by legislative gridlock and partisan-fueled dysfunction. Although statutes remain critical to federal agencies' assertions of authority, legislative requirements and expectations are fading into the background. The federal executive branch is increasingly determining the shape of national programs and state responsibilities without congressional involvement.

The second, related feature is presidential dominance. In the past, the executive branch's engagement with the states has been rooted principally in agency initiatives, including efforts to preempt state law, and the day-to-day exchanges of federal and state administrative officials (Metzger 2008; Galle and Seidenfeld 2008). Today, in contrast, the federal stance towards the states in a number of policy areas is now being set by or under the leadership of the White House. Even as agencies and agency officials continue to undertake relevant actions, such as enforcement or rulemaking, administrative federalism has become decidedly presidential. The shift of power within the federal government from Congress to the executive branch, and within the executive branch from federal agencies to the White House, has important consequences for the operation of contemporary federalism.

### **Congressional Dysfunction**

Little consensus exists in national politics today, save perhaps on the proposition that the political system has become dysfunctional. Congress's ability to enact legislation on major policy matters is at an all-time low, and ideologically driven government shutdowns or threats of shutdown are becoming an annual event. Some of the factors that contribute to this dysfunction are found in the Constitution or are otherwise longstanding, such as the requirement that bills be passed by both houses of Congress and approved by the President and the institutional practice of the Senate filibuster (Binder 2015). But it is the intersection of political polarization with these constitutional and institutional features that has particularly impeded federal legislation.

Increasing political polarization, what some call hyperpolarization, is the defining feature of current politics (Pildes 2014). The ideological gap between the two major parties is growing, with increasingly consistent party divides across a range of policy issues. This gap is asymmetric, in that the Republican Party has shifted to the right more than the Democratic Party has shifted to the left, but greater ideological consistency is evident in both (Hacker and Pierson 2015; McCarty, Poole, and Rosenthal 2006). Although polarization is most acute among political elites, there is corresponding polarization in each party's electoral base. American voters are developing more internally consistent ideological and policy views, and electoral units are becoming more homogeneously partisan (Abramowitz 2010; Jacobson 2013; Persily 2015).

Insofar as it makes each party more cohesive, political polarization can enhance the ability of the federal government to enact legislation if a single party is in control. When Democrats held the presidency, the House, and a supermajority of the Senate for a brief period after Obama was sworn in, Congress enacted such substantial legislation as the ACA and the Dodd–Frank Wall Street Reform and Consumer Protection Act. But unified government—and especially unified

government with a filibuster-proof Senate—is rare. While the extent to which divided government alone impedes Congress’s ability to enact significant legislation is a matter of some debate (Ansolabehere, Palmer, and Schneer, unpublished; Binder 2015; Mayhew 2005), few dispute the lethal effects of divided government combined with political polarization. Polarization gives members of Congress little incentive to cooperate with the opposing party. To the contrary, politicians score points with the party’s now more ideological faithful by refusing to compromise (Mann and Ornstein 2012). The result is the collapse of longstanding institutional norms and the dramatic rise of oppositional tactics such as the filibuster and the hold that make passing legislation difficult (Mann and Ornstein 2006; Persily 2015). Congress is unable to enact substantive laws addressing the major policy issues of the day, from the environment, to immigration, to fiscal policy. Indeed, Congress has become largely unable to enact legislation on relatively noncontroversial issues because neither party is willing to hand the other a victory even when a position commands substantial support.

### **Presidential Initiative**

With Congress sidelined, the President has taken the lead in an array of contexts, turning to administrative action to achieve policy goals without new legislation. In doing so, the Obama Administration has taken advantage of the central characteristic of the modern federal government: the presence of broad and ongoing delegations of authority to administrative agencies. In virtually every domestic policy area—including the environment, education, health care, consumer protection, and immigration—Congress has conferred discretion on the executive branch to implement and enforce federal law. Using these extant grants of authority, agencies are pushing policy in significant new directions. The Environmental Protection Agency, for instance, has relied on the Clean Air Act to adopt ambitious regulations with respect to greenhouse gas emissions, while the Department of Homeland Security has relied on the executive branch’s discretion in enforcing the Immigration and Nationality Act to immunize classes of individuals from deportation.

Although agencies have long relied on congressional delegations to formulate policy, recent initiatives are presidentially instigated and controlled to an unprecedented degree. Decisions may officially be located within particular federal agencies, but they are critically shaped through tools of presidential oversight, such as presidential directives and statements, the use of White House policy czars, and centralized regulatory review (Heinzerling 2014; Lowande and Milkis 2014; Saiger 2011; Watts 2016). Such presidential administration is by no means unique to Obama’s tenure; it is part of a broader trend embraced by past administrations as well (Howell 2003; Kagan 2001; Moe and Howell 1999). But the difficulty of

advancing policy through legislation given polarized politics makes presidential resort to administrative measures all the more likely, and all the more significant.

Many initiatives of the Obama Administration are politically contentious and, given political polarization, face largely unified Republican opposition. Unable to forestall executive action through substantive legislation, congressional Republicans have turned to other tools, such as investigations, annual appropriations, appointments delays, and lawsuits. Yet, even these tools are limited in how they constrain the President and federal agencies. Although recent years have witnessed an increase in the use of appropriations riders (MacDonald 2010), polarization has also undermined the regular appropriations process (McCarty 2014). And polarization impedes oversight as committee hearings become a forum for partisan grandstanding.

Somewhat more successfully, congressional Republicans have turned to the states, seeking to rally Republican governors and legislatures to resist the Obama Administration's actions. In one high-profile example, Senate Majority Leader Mitch McConnell sent a letter to state governors urging them to resist the President's Clean Power Plan (Davenport 2015). With polarization growing at the state level, many Republican state leaders have not needed federal prodding to oppose the Administration in key policy domains, including immigration and health care. Through lawsuits and administrative noncooperation, in particular, states have challenged recent presidential initiatives as executive overreach.

### **The Significance of the States**

At first glance, the picture that emerges is one of the President acting alone, using federal administrative agencies to advance Democratic policies that Congress will not enact. Focusing only on the federal government, this picture is accurate, if oversimplified given inescapable diversity within the federal executive branch. But precisely insofar as it encompasses only the federal government, this frame misses a critical feature of these presidential initiatives: the Administration's dependence on the states. Although the most visible role of the states has been their partisan-based opposition to presidential initiatives, these initiatives also require state participation to a remarkable degree. The Administration's need to work with the states to implement federal policy has made it at times very accommodating of state demands. Sometimes the federal executive branch is the first mover that then turns to the states. In other instances, states are taking the initiative in policy advances, and the Administration is either piggybacking on state efforts or getting out of the way so that states can move ahead. Not surprisingly, here too state substantive choices play an important role in shaping policy. Moreover, the Obama Administration appears keenly aware of the important role of the states in

advancing its policy goals, creatively structuring federal programs and regulation around state and local decisions. Beneath a very visible layer of state contestation that replicates national political fights, then, there is an important layer of state–federal negotiation and cooperation.

To be sure, there are some policy areas in which the states figure minimally, if at all. For example, the Obama Administration’s efforts to grant relief to millions of undocumented immigrants primarily rely on federal executive action. Similarly, federal agencies continue to engage in numerous regulatory activities that are not state-focused, such as the extensive rulemaking involved in implementing Dodd–Frank. Yet, even in these federally dominated contexts, the states play some role. A grant of deferred action status has limited impact without state willingness to allow aliens with this status to obtain driver licenses and other benefits (Gulasekaram and Ramakrishnan 2016). And Dodd–Frank expressly authorizes the states to enforce some federal financial regulations as well as to continue their independent financial oversight role (Metzger 2011). More important, the instances in which federal programs operate without the states are few. States provide the critical on-the-ground apparatus for most federal regulation. President Obama and the executive branch are, therefore, limited in their ability to act without the states. The key question is not whether the states are involved, but rather how much influence and leverage they wield.

## Prominent Tools

If federal policymaking involves a series of interactions and significant collaboration among the states and the federal executive branch, what does this look like in practice? In the discussion that follows, we focus on the most prominent recent tools of presidential policymaking in conjunction with the states. Although these tools are diverse, we group them into two categories: extending federal initiatives and seizing on state initiatives. The first category broadly refers to the federal executive’s elicitation of state participation in federal schemes, while the second broadly refers to the federal executive’s harnessing of state laws and policies to serve its ends. This division offers some conceptual clarity, but it is not as binary as this framing suggests. When the executive branch facilitates state participation in federal schemes, for example, it may do so by embracing extant state law. Moreover, both of these categories are often top-down and bottom-up at the same time, with both the federal and state governments generating the terms and substance of federal law and programs. In short, the lines between state and federal policy become blurry. What is clear is that the interests and powers of both state and federal actors are always relevant.

### Extending Federal Initiatives

Contemporary presidential policymaking frequently involves state implementation of federal schemes. Although these federal schemes, and state participation within them, are congressionally authorized, the federal executive branch uses state participation to transform federal policy and extend the reach of federal programs. Waivers and grants are particularly useful tools to achieve state cooperation: A waiver that permits a state to pursue a certain policy goal or a grant that offers federal funds may be the key to obtaining state participation in a controversial program. The federal executive branch may also achieve participation in federal schemes in the face of state resistance by partnering with particular state actors. During the Obama Administration, federal officials have collaborated with certain states and not others. They have also turned to state governors in the face of state legislative opposition and have bypassed state actors to work directly with municipal governments.

Waivers, grants, and the choice of partners are not just mechanisms of presidential empowerment. True, they often enhance presidential power at the expense of Congress. State participation is frequently necessary as a legal or practical matter for the executive branch to achieve its policy goals—for instance, under existing law, only the states can expand Medicaid coverage, so any presidential objective with respect to Medicaid policy must be achieved through state governance. Further, state implementation may transform federal policy as the administration advances extra-statutory objectives by selectively allowing state departures from a federal law. But enlisting the states as participants in federal programs also empowers the states and yields deviations from the federal executive's own preferences. Sometimes this is apparent from the get-go, for example as waivers allow states to chart their own paths. In other cases, state–federal friction becomes apparent only as implementation unfolds. If federalism enables the federal executive branch to shape domestic policy without Congress, it also means that federal executive policy is simultaneously shaped by state preferences and interests.

### Waivers

Waivers have long featured in the federal executive branch's interactions with the states. A variety of laws permit federal agencies to exempt states from particular statutory requirements or to allow states to substitute certain policy choices of their own for codified federal policy. The Reagan, Bush, and especially Clinton Administrations, for instance, granted states waivers from portions of federal welfare law. Indeed, state innovations adopted pursuant to waivers—such as Wisconsin's and Michigan's imposition of work requirements and time limits on benefits—ultimately helped to reshape the federal statutory scheme by



demonstrating the feasibility of new policies (Gais and Fossett 2005; Thompson and Burke 2007).

Waivers have become a more prominent and powerful tool during the Obama Administration. One reason for this is that several recent federal laws have conferred particularly broad waiver authority on the federal executive branch. Until its recent replacement, NCLB permitted the Secretary of Education to “waive any statutory or regulatory requirement of this chapter for a State educational agency” apart from ten specified topics (20 U.S.C. § 7861(a)). Even as NCLB set forth a detailed scheme for states to adopt academic standards, test students, and demonstrate educational progress, it allowed states to rewrite this scheme with the federal executive’s superintendence (Barron and Rakoff 2013). Moreover, even as a replacement to NCLB, the Every Student Succeeds Act, rebukes the Secretary of Education for executive branch overreach, the Act continues to grant the Secretary broad waiver authority (Pub. L. No. 114-95, § 8013). The ACA similarly includes a provision entitled “Waiver for State innovation” that, as of 2017, will authorize the Secretary of Health and Human Services or the Secretary of the Treasury to waive provisions of the ACA governing health care exchanges, the individual and employer mandates, and the minimum coverage requirements for acceptable insurance plans.

Despite these congressional grants of broad waiver authority, the main impetus for federal executive negotiation of waivers with the states has been congressional absence. As critical statutory provisions have revealed themselves to be problematic or unworkable, Congress has not acted, stymied by the forces of partisan polarization and divided government detailed above. Although Congress designed the ACA’s Medicaid expansion assuming full state participation, for example, the Supreme Court held that states could continue to participate in the Medicaid program even if they declined to extend coverage to larger populations (*National Federation of Independent Business (NFIB) v. Sebelius*), leading many states to reject the expansion. Yet—unsurprisingly given polarization and current Republican control—Congress has not responded to this holding. It has, therefore, fallen to the White House and the federal agencies to remake federal policy and find ways to expand Medicaid coverage. They have done so by using waivers to motivate recalcitrant states (Dinan 2014; Thompson and Gusmano 2014). Likewise, Congress did not intervene for many years after it became clear that no state would be able to satisfy NCLB’s progress requirements, and the federal executive branch began to waive certain statutory requirements under agreements with individual states (Kurzweil 2015; Wong 2015).

The federal executive’s reliance on waivers in the face of a passive Congress lends Obama Administration waivers some distinctive features. The traditional waiver is a small-bore exemption granted by career officials within a federal agency on an ad hoc basis (Barron and Rakoff 2013). Although there have been departures

from this model in the past as well, the Obama Administration's waivers deviate notably from these assumptions. First, recent waivers can fairly be attributed to the President and Executive Office of the President, rather than to federal agencies alone. The Centers for Medicare and Medicaid Services granted a variety of Medicaid waivers only after White House officials, including Senior Advisor Valerie Jarrett, negotiated directly with state governors (Dinan 2014). The White House was also involved in the Department of Education's grants of NCLB waivers. Because waivers have been shaping domestic programs that are a critical part of the President's legacy, federal decision-making involves White House officials even when waiver authority has been conferred on a particular administrative agency.

A second, related point is that the federal executive branch is relying on waivers to advance more systematic policy goals rather than to enable case-specific departures from federal law. Such a programmatic approach has been particularly evident with respect to education. In granting forty-three states waivers from NCLB requirements, the federal executive did not simply provide a space for discrete local experimentation. Instead, it required states to adopt a particular regimen of school accountability focused on educational standards, testing, and teacher evaluation (Kurzweil 2015). This regimen was not purely top-down—the federal executive piggybacked on existing state collaboration on the Common Core State Standards, among other state initiatives, as we will discuss below—but it did represent the federal executive's replacement of federal statutory requirements with a different nationwide approach to education policy. Waivers in other areas, such as welfare, have similarly involved a more programmatic approach by the federal executive branch instead of ad hoc carve-outs.

At the same time as the Obama Administration has used waivers to advance broad policy goals, it has also turned to waivers as tools of bipartisan compromise. To achieve large-scale objectives, it has permitted states to adopt positions on discrete issues that are often Republican-aligned and deviate from the Administration's standard approach. Most notably, to facilitate the expansion of Medicaid, the federal executive has allowed states to implement the expansion through private insurance policies, to require co-pays for Medicaid beneficiaries, and to use healthy behavior incentives (Rose 2015; Rudowitz and Stephens 2013). Republican state officials win discrete policy victories, while the Obama Administration wins critical participation in its signature health care program. As partisan polarization gridlocks Congress, negotiations among state and federal officials may open up new spaces for bipartisan compromise.

### **Grants**

The executive branch also relies on financial incentives to achieve state participation in certain federal programs. During the Obama Administration,

competitive grants have become an especially important tool to induce states to adopt particular policies. The number of block grants has declined somewhat since 2009, and Administration officials have consistently advocated for competitive categorical grants in their stead (Dilger and Boyd 2014). Because grants depend on appropriations from Congress, they involve a greater legislative component than many tools of presidential policymaking. But a variety of recent grant programs are notable for the discretion they confer on the federal executive branch. The Obama Administration has used this discretion to elicit state initiatives consistent with its broad objectives, providing funds to the states in targeted ways that often limit the policy choices open to state officials.

The Administration's most high-profile use of competitive grants to states was its Race to the Top (RTTT) program. Before the Department of Education began granting NCLB waivers, it relied on nearly \$5 billion from the American Recovery and Reinvestment Act to administer a competitive grant program. Because the Recovery Act contained little guidance about the program, the Department had substantial discretion to shape the competition. The resulting RTTT program held out the prospect of significant monetary support to prod states to overhaul their education systems consistent with specific Administration priorities, such as the adoption of common educational standards and assessment systems for students and teachers. Forty-six states and Washington DC submitted proposals, and eleven states and DC ultimately received grants (Manna and Ryan 2011). RTTT thus initiated a rewriting of federal education policy without congressional involvement, foreshadowing the more extensive NCLB waiver process that followed. Spearheaded and superintended by the President and the Department of Education, the program used monetary grants to motivate particular state initiatives consistent with federal executive objectives.

The Department of Transportation's Transportation Investment Generating Economic Recovery (TIGER) program has similarly relied on competitive grants to spur states and localities to undertake infrastructure projects. Again, although Congress provided the money for the program, it is the federal executive branch that sets the program's priorities—such as a focus on the environment, urban areas, and access to transportation for poor communities—and chooses grant recipients. In eight rounds of the grants, the Department has funded nearly 400 projects, and it has frequently supported urban and regional undertakings focused on mass transit, biking, and walking instead of highways (Department of Transportation n.d.). The U.S. Commerce Department's Strong Cities, Strong Communities initiative likewise seeks to bolster local economic development through grants administered by selected cities (Economic Development Administration n.d.).

These examples are not simply a story of expanded federal executive authority. Even though the federal executive supports projects that align with its priorities, states and localities devise the projects in the first instance and then carry them out.

As a result, they are able to exercise policy-setting initiative and implementation discretion. Indeed, the lure of federal grant funds may give state and local leaders additional leverage to achieve controversial policies that they favor. This dynamic appeared with RTTT, as a number of jurisdictions used the program to push through teacher accountability measures they had long favored (Manna and Ryan 2011). In short, the tale here is one of mutual empowerment, not just federal imposition: The federal executive branch amplifies its ability to achieve particular ends by conferring funds—but also discretion—on states and localities.

### *Choosing Partners*

As some of the Administration's waivers and grants suggest, the federal executive often partners with specific state actors who share its policy objectives or are best situated to advance these objectives. Sometimes, this has meant working with particular states and not others. For example, although the ACA offers a binary choice of state or federal exchanges, the federal executive has collaborated with a number of states to create "partnership" exchanges. Facing state reluctance to assume all of the responsibilities of running an exchange and eager to have state assistance, the Department of Health and Human Services has reached agreements with a diverse group of states, including Arkansas, Delaware, Iowa, and Michigan, to establish a new hybrid form of exchange: The states handle discrete functions such as plan management or consumer assistance while the federal government handles the remaining functions (Dinan 2014; Jones, Bradley, and Oberlander 2014; Thompson and Gusmano 2014).

In other instances, the Obama Administration has elected to work with governors or other state executive branch officials in the face of state legislative opposition. Perhaps, most notably, Republican governors have been more open to the ACA Medicaid expansion than Republican state legislatures, and the federal executive branch has bargained directly with these governors. In Ohio, for example, Governor John Kasich negotiated a premium-assistance plan with federal officials. Facing state legislative opposition, he then exercised a line-item veto and employed a state administrative body to approve a traditional Medicaid expansion without legislative support. The Obama Administration has also worked with the Independent governor of Alaska and the Democratic governors of Kentucky and West Virginia to expand Medicaid over state legislative opposition (Herz 2015; Rose 2015).

Perhaps, unsurprisingly for a Democratic administration, in recent years the federal executive branch has also bypassed state officials to work with local, particularly, urban officials. TIGER grants have frequently supported municipalities and counties, in contrast to more traditional Department of Transportation grants conferred on states, while the Strong Cities, Strong Communities program has

specifically focused on a few cities. This attention to localities has also pervaded the work of the White House Office of Intergovernmental Affairs, which has become a more prominent part of the White House apparatus during the Obama Administration, as illustrated by its relocation to the West Wing (Holeywell 2011).

Even in programs that do not focus specifically on municipal issues, the Obama Administration has sometimes made discrete choices to empower localities over states. The Department of Education did not extend a NCLB waiver to California because the state's governor and board of education resisted certain Administration requirements, including the use of standardized test scores as a component of teacher evaluations. The Department did, however, grant a waiver to a group of California school districts that agreed to the federal conditions. Bypassing the state, the federal executive branch partnered with major municipalities, including Los Angeles and San Francisco, to achieve shared objectives (Wong 2015).

### **Seizing on State Initiatives**

The federal executive relies not only on state and local implementation of federal programs, but also on state and local policymaking. Indeed, several of the examples we have discussed above suggest how state initiatives may be a critical piece of federal initiatives, with the executive branch using grants and waivers to place a federal imprimatur on state policymaking instead of generating entirely new approaches. In advancing its vision of education policy, for instance, the Department of Education leaned heavily on the state-generated Common Core State Standards. While the federal executive furthered a particular agenda through NCLB waivers and Race to the Top grants, it did so in part by piggybacking on an extant interstate collaboration. As these and other examples illustrate, whether the federal executive or a state appears to be taking the initiative may depend on one's vantage point. So too, the relative power of various actors may shift over time, and both the federal executive and the states may stand to gain from working together.

Drawing a binary distinction between federal and state initiatives is therefore fraught; most instances of state–federal collaboration involve both. Nonetheless, the federal executive seizes on state initiatives in some cases more than others, and it may be helpful to identify the different mechanisms by which it does so. Just as the federal executive has a variety of tools for prompting states to participate in federal programs, there are a variety of ways in which it relies on state laws and policies. The President and federal agencies incorporate state policy into federal regulations, urge states to adopt laws governing issues of shared concern when Congress does not act, and provide space for states to set the agenda by not enforcing conflicting federal law in a given area. Harnessing congenial state initiatives can help the

federal executive achieve policy goals, even as this empowers state as well as federal actors.

### *Incorporating State Law*

In formulating federal policy, the President and federal agencies frequently look to state law, seeking out successful policy experiments on which to build. This reliance on state initiatives has become more important in recent years as Congress has failed to update critical statutes, like the Clean Air Act, or to adopt new legislation in many areas. Operating pursuant to broad delegations of authority, the federal executive has turned to the states to generate the specifics of federal programs. As noted above, for instance, the Department of Education relied on the state-generated Common Core standards as part of its RTTT program and NCLB waivers. The federal executive branch thus effectively made the results of an interstate collaboration a substantive component of federal policy.

The Department of Health and Human Services has even more directly incorporated state law into federal regulations in defining “essential health benefits”—the minimum benefits that individual and small-group health insurance plans must provide to participate in ACA health exchanges and other markets. Rather than specify a single federal definition, the agency has provided that each state may set the meaning of essential health benefits by reference to what was covered by any one of a range of plans offered for sale in the state. States, therefore, have latitude to determine the content of the essential benefits requirement within their borders, and the content of this requirement varies from state to state. (Department of Health and Human Services 2013; Centers for Medicare & Medicaid Services n.d.; Giovannelli, Lucia, and Corlette 2014).

Perhaps, the most striking example of the federal executive branch incorporating state initiatives into federal law comes from the Obama Administration’s signature initiative to address greenhouse gas emissions, the Clean Power Plan. Responding to a presidential instruction, the Environmental Protection Agency has promulgated rules governing emissions from power plants pursuant to the Clean Air Act. The federal statute gives little guidance about how to regulate such emissions; in formulating the Clean Power Plan, the agency has instead looked to state policies. Recognizing the leadership of certain individual states and multistate groups, the agency has formulated guidelines for state implementation of the Clean Power Plan that explicitly draw on existing state actions, such as California’s cap and trade plan and the northeastern Regional Greenhouse Gas Initiative. The Plan permits states to continue these extant programs as a means of complying with the federal regulation, and particularly encourages multistate cooperation (EPA 2015). While the agency is turning to states to facilitate the expansion of a federal program, then, one effect of its doing so is to codify state approaches as federal law.

The Clean Power Plan not only incorporates the experiments of vanguard states with respect to climate change policy, but also acknowledges differences among the states in its requirements. In the past, much federal reliance on state law has been in the service of uniformity: Congress or a federal agency looks to a successful state experiment to generate a single federal requirement. One notable exception has been the role of California in setting new car emission standards alongside the EPA, but the Clean Air Act nonetheless requires other states to choose between California's and the federal agency's standards (42 U.S.C., s. 7507). In the Clean Power Plan, however, the EPA has set different greenhouse gas emission reduction goals for each of the fifty states depending in part on state capacity to reduce emissions. The federal executive has, thus, seized on existing state policy as a basis for writing fifty-state diversity into a federal rule. As state policy becomes federal policy, it also remains differentiated by state.

### *State Law as a Complement*

Because state and federal law increasingly occupy the same policy spaces, and because federal law trumps in the event of conflict, one critical move the federal executive can make to facilitate congenial state policymaking is to decline to preempt state law. The paradigmatic case of preemption is a congressional judgment that state law interferes with the operation of federal law. Given the substantial authority conferred on the federal executive branch, however, federal agencies increasingly decide whether state law should be displaced, either directly through administrative action or through arguments to the courts. While the Obama Administration has hardly relinquished its preemption prerogative—witness, for instance, the *Arizona v. United States* (2012) litigation, in which the Administration argued that federal law preempted much of Arizona's recently adopted immigration enforcement initiative—it has more sparingly preempted state law than many of its predecessors.

The broad-strokes decision to permit state and federal law to coexist in the same policy spaces came from the President himself. Shortly after assuming office, President Obama issued a memorandum for the heads of executive agencies stating that preemption provisions should be used less frequently, and more carefully, than in recent years. Responding to perceived agency abuses during the Bush Administration, such as regulatory preamble statements indicating preemptive effect when the rule itself did not contain preemption provisions (e.g., *Wyeth v. Levine*), the President expressed a view that state law could as a general matter “operate concurrently” with federal law “to provide independent safeguards for the public” (White House 2009). It is not surprising that a Democratic administration would seek to curtail preemption without abandoning it as a tool: Many of the state laws that the federal executive sought to preempt during the previous

Republican administration regulated industry in a way Democrats more broadly favored. By leaving more space for state regulation, in other words, the Obama Administration might effectuate its particular policy objectives just as much as a more anti-regulatory administration might by preempting state laws.

Indeed, the Administration has also deployed preemption strategically to facilitate local initiatives that are stymied by state law. In response to a presidential instruction, the Federal Communications Commission recently addressed Tennessee and North Carolina laws that prohibited cities from building their own broadband networks. Finding that these state laws conflicted with its mandate to remove barriers to broadband service, the Commission issued an order preempting them (FCC 2015). As a result, municipal broadband providers may now offer high-speed Internet services in areas such as Chattanooga. The Administration, thus, used preemption to effectuate local policy consistent with the President's open Internet agenda.

The federal executive branch may also turn to state law as a complement to federal regulation for purposes of enforcement, in particular fusing state and federal resources to engage in "regulation through litigation" (Viscusi 2002). The Obama Administration has advanced a policy agenda with respect to consumer protection, for example, not only through rulemaking, but also through enforcement, and not only through federal agency action, but also through collaboration with state attorneys general. There are both political and practical reasons for the partnership: State attorneys general may confer additional, bipartisan legitimacy on certain policy agendas, and they bring significant personnel, experience, and discrete bodies of state law to the table.

For example, state attorneys general critically assisted the Department of Justice and Department of Housing and Urban Development in obtaining a \$25 billion settlement with the nation's five largest mortgage services in 2012. They were also the first movers in suing the credit agency Standard & Poor's under state consumer protection laws for misleading investors by issuing inflated ratings of residential mortgage-backed securities and collateralized debt obligations. Nineteen states and the Department of Justice ultimately entered into a joint settlement with the company. An ongoing collaboration concerns for-profit colleges. Today, a group of federal agencies—including the Department of Education, the Consumer Financial Protection Bureau, and several others—is working with state attorneys general to restrict the operations of for-profit colleges through investigations, enforcement actions, and lawsuits (Field 2015). Because this effort unites federal authority and a well-developed body of state consumer protection law, it is amplifying the power of both federal and state officials to achieve their objectives.



### *State Law as a Substitute*

The federal executive branch has not only relied on state laws and policies to complement federal law, but also to stand in for absent federal law or, more controversially, to substitute for federal laws with which it disagrees. First, the federal executive has increasingly pushed for new state laws to achieve objectives that are stymied in Washington. Although the authority granted to them by federal statutes often gives federal agencies broad room in which to operate, some policy goals are attainable only through new legislation. Even here, however, a gridlocked Congress may sometimes be surmounted by turning to the states, with sub-federal legislation standing in for federal legislation. Unable to get a national minimum wage increase through Congress, for instance, President Obama encouraged states to act, and several increased their minimum wage (Memoli 2014). States and localities also passed laws guaranteeing sick days for workers, family leave policies, and early childhood education programs, even as Congress ignored the President's entreaties to do so. Because both state and federal legislatures have authority to prescribe these policies, state law may achieve the same result as a federal law would have within a particular jurisdiction.

That states and localities are codifying these policies reflects more than coincidence, and even more than the deep integration of today's Democratic and Republican parties across state and federal lines. The President himself reached out to state officials, including at meetings of groups like the National Governors Association and U.S. Conference of Mayors, and the White House and federal agencies have more broadly engaged in outreach and offered technical, financial, and other assistance to state and local actors pursuing shared policy goals. As Senior Advisor Valerie Jarrett put it, "It is a change in the paradigm, where we used to sit passively by waiting for elected officials to come to us. We think we can have a more substantial impact if we collaborate" (Korte 2015). The federal executive branch has increasingly recognized that states may be critical allies in achieving federal objectives without Congress.

In some cases, state law does not substitute for an absent federal law but for an existing federal law that the federal executive branch declines to fully enforce. Of course, federal nonenforcement need not be a matter of deferring to state law; President Obama's controversial immigration executive actions underscore nonenforcement's potentially unilateral character, although even these actions implicate state law insofar as they presume states will grant benefits such as driver licenses to the immigrants affected (Gulasekaram and Ramakrishnan 2016). But federal nonenforcement may also be a matter of allowing state law to occupy a policy space, as recent marijuana policy illustrates. Under the federal Controlled Substances Act, marijuana is a Schedule I drug, meaning that all use and sale of the drug is a federal offense. But a number of states have decriminalized or legalized

the drug under state law, first for medicinal purposes and more recently for recreational purposes as well. The Department of Justice (DOJ) could effectively nullify these state decisions simply by enforcing federal law: State laws legalizing marijuana do not change the federal status of the drug, and the federal government could continue to enforce the Controlled Substances Act even in states that have legalized marijuana. But the DOJ has instead largely declined to enforce the federal law in these states, thereby permitting state policy to become federal policy as well.

A series of negotiations between the DOJ and state officials—and also, it seems, among various DOJ officials, including political appointees in Washington, career Drug Enforcement Administration officials, and U.S. Attorneys—yielded this *détente* (Rodríguez 2014). In 2009 and 2011, the DOJ issued competing memoranda about how it would respond to state legalization efforts, first instructing U.S. Attorneys to focus their resources on prosecuting individuals who were violating state as well as federal law but then stating that it did not intend to shield the use and sale of marijuana from federal enforcement action (Ogden 2009; Cole 2013). After Colorado and Washington adopted ballot initiatives in 2012 legalizing recreational marijuana, their governors asked the DOJ to clarify its enforcement intentions. With apparent presidential support, attorney general Eric Holder indicated both that the DOJ would not seek to challenge the state initiatives as preempted, as it recently had with respect to Arizona’s immigration law, and that it would not vigorously enforce the Controlled Substances Act in those states. The attorney general proposed a sort of compromise: If state officials controlled externalities of concern to the federal government, such as violence and gang activity and distribution of drugs to minors, the DOJ would let state law trump the enforcement of federal law within their borders; but if state legalization began to interfere with federal priorities, the DOJ would escalate its enforcement of the Controlled Substances Act and might even challenge the state regulatory schemes as preempted. To date the deal seems to be holding, and the federal executive branch is effectively deferring to state law (Kamin 2015). Without any amendment to federal law, then, the federal executive branch’s decision to defer to state legalization initiatives and not to enforce the federal prohibition has transformed federal law on the ground.

## Toward Some Conclusions

The state–federal collaborations that mark the Obama Administration’s policy-making are, as we have tried to show, diverse in nature. They are also novel in a variety of respects. Any robust assessment of such “presidential federalism” must await further developments and will require a good deal of nuance. In lieu of conclusions, we use this final discussion to frame some questions that might productively inform future inquiry.

### **Federalism: State Difference or Developing National Consensus?**

In many instances, presidential policymaking in conjunction with the states yields federal law that varies across the country. Waivers allow states to implement federal statutes in diverse ways. The federal executive's choice to allocate grants to, or to partner with, certain states and not others makes federal programs look different in different states. And the federal executive's incorporation of state law into federal regulations or into its enforcement decisions likewise generates state-differentiated federal law.

Negotiations among state and federal actors have thus yielded various versions of federal law in many of today's most significant domestic policy areas. For example, although the ACA is a single federal law, key provisions look different across the country. As of March 2016, nineteen states have not adopted the Medicaid expansion, twenty-four have adopted the standard expansion, and seven are expanding Medicaid pursuant to waivers (Kaiser 2016). Because of these waivers, otherwise applicable provisions of the federal Medicaid statute do not apply in certain states. Similarly, the use of a variety of state–federal partnerships has further diversified the health insurance exchange landscape beyond the ACA's binary provision for state or federal exchanges. And the Department of Health and Human Services' decision to define essential health benefits in terms of existing state plans means that this central term in the ACA has a different meaning across the fifty states.

Environmental policy also varies across the states, and not simply because of ad hoc implementation decisions. The Clean Power Plan expressly codifies, as the main substantive content of a federal regulation, different emissions reduction targets for each state and embraces a variety of state approaches to meeting these targets. And the federal executive branch's decision to defer to state marijuana legalization initiatives means that federal drug law is best understood not as a single law but as many: Although it remains illegal in most states, marijuana is now effectively legal as a matter of both state and federal law for recreational purposes in four states and legal for medicinal purposes in nineteen others.

Such state-based differentiation of federal law raises a host of questions. A basic empirical one is whether this diversity is a precursor to greater national uniformity and consensus or instead an ongoing—and perhaps intensifying—development. There are some reasons to predict the former. State-specific policies may give way to shared solutions as the federal government and the states learn from experience. Consistent with a precept of democratic experimentalism, some recent initiatives that license state variety, such as the Clean Power Plan, explicitly provide for information pooling and mutual learning and evaluation (Dorf and Sabel 1998). It is not hard to imagine that the federal government might monitor different state policies and ultimately seek to impose a tested, successful model on all of the states.

Nor is it hard to imagine that states looking to others' experiments might adjust their own policies. Already, for instance, additional states are considering legalizing marijuana, and the variegation we see today might simply be a way station between criminalization and legalization nationwide. Moreover, states' initial resistance to or limited engagement with federal programs may become fuller participation over time. The history of Medicaid policy in the United States lends some support to this prediction (Rose 2013), as might Europe's experience with differentiated integration: Subgroups of states moving ahead in particular policy areas have tended to pull other states along (Kölliker 2006; Conlan, Posner, Lopez-Santana 2014).

Yet, a move to less state-differentiated federal policy over time is by no means a given. Indeed, we can easily imagine the opposite: nonuniform federal policy begetting still more diversity. To the extent state differentiation follows from partisan disagreement rather than from a more politically neutral, epistemological uncertainty about the most effective approaches to achieve shared goals, we should not necessarily expect continuous learning from experience to generate consensus solutions. Especially if Congress remains on the sidelines of national policymaking and the federal executive must rely on increasingly out-of-date statutes, waivers and selective reliance on state law may become even more prominent aspects of federal policymaking. And states might be emboldened by their successful negotiations of waivers to seek carve-outs from additional federal statutes—several states have already signaled that they intend to do so in the ACA context, for example, when the ACA's broad waiver provision comes into effect (Newkirk and Olorunnipa 2015). We might also see a cyclical pattern, with diversity on a particular policy giving way to greater uniformity even as a different policy area becomes the locus of new state differentiation.

In addition to the broad empirical question of how state-differentiated federal law will evolve, there are significant normative issues raised by the current disuniformity. Is there something unattractive, perhaps even dangerous, about federal law that differs by state? While state implementation and enforcement of federal law have always entailed some diversity, is it more damaging to national union, the rule of law, or other values to have the content of federal law itself vary? Perhaps it is useful for a newly forming union such as Europe to rely on diversity as a mechanism of integration; it might be something else entirely for an established nation like the United States to allow federal law to differ across the states. State differentiation may appear particularly problematic if it leads to substantial variation in individuals' entitlements, given the contemporary importance of federal statutory enactments and federal programs in defining the meaning of American citizenship (cf. Eskridge and Ferejohn 2013).

At the same time, one might make an affirmative case for state-differentiated federal law even if it is not a path to national uniformity. Given ever-present

complaints about centralization and homogenization, retaining a place for state diversity within federal law might be the way American federalism remains robust in the twenty-first century. State-differentiated federal law might also instantiate certain values associated with federal arrangements, such as experimentation and diversity (cf. Gluck 2014). From a different perspective, state-differentiated federal policy might be the closest thing the United States can achieve to an integrated, national policy in times of sharp political polarization (cf. Gerken 2015; Rodríguez 2014). For those seeking federal solutions, in other words, state differentiation might well be appealing if the alternative is no federal policy at all.

### **The Separation of Powers: Presidential Aggrandizement or New Checks and Balances?**

The issue of state-differentiated federal law poses timeless federalism questions about the balance between states and the federal government, diversity and uniformity, experimentation and national consensus. Presidential partnerships with state actors implicate not only federalism questions, however, but also questions about the separation of powers within the federal government. In particular, does working with the states increase presidential power at the expense of Congress? Does it instead enhance congressional power? Or might it push us to think about separation of powers beyond the branches of the federal government insofar as the states introduce new checks and balances into a malfunctioning federal system?

As we have described, the federal executive branch and the states have sought each other out against a backdrop of political polarization and congressional gridlock. If these political conditions generally enhance the power of the President at the expense of Congress, federalism might simply add tools to the President's arsenal. Cooperating with the states, the federal executive might more easily work around existing statutes, turn to state law to substitute for absent federal legislation, and increase its policy implementation capacity. Relying on the examples we have canvassed above, a case could thus be made that federalism aggrandizes the executive branch vis-à-vis Congress even more than does presidential initiative alone. For instance, the federal executive substantially reshaped federal education policy, exploiting gaps in, if not outright violating, NLCB, and it was able to do so only because it could rely on state policymaking and implementation. Medicaid expansion waivers are generating variants of Medicaid that Congress has not written into law. The Clean Power Plan is turning to states to implement an environmental agenda not clearly provided for by federal legislation. In these and other instances, state governance helps the federal executive branch set the agenda, disrupting the separation of powers assumption that Congress is principally responsible for establishing national policy. Indeed, state governance may even help the federal executive branch subvert existing federal law.

Yet, a study of these and other instances of state–federal collaboration suggests a different dynamic as well: The President’s reliance on the states to achieve policy objectives creates new checks on federal executive action at a time when Congress is not playing its expected role. When the federal executive works with the states, it faces not only cooperation but also resistance. Depending on the particular policy area, this contestation may be more or less pronounced and significant, but some friction is endemic to state–federal relations. As the federal executive seeks to expand Medicaid, for instance, it has negotiated with states that have different policy agendas. In attempting to regulate greenhouse gas emissions, the federal executive branch has tried to accommodate state actors that are skeptical of its reading of the Clean Air Act and resistant to emissions regulation. In some instances, as with the Clean Power Plan, states can be expected not only to push back against the federal executive branch in their own name but to purport to resist federal executive action in Congress’s name as well, insisting that the executive branch is violating a federal statute. While the alleged violation of federal law is often not driving state resistance, it is frequently the state’s most powerful legal argument and is thus resorted to with some regularity (Bulman-Pozen 2012).

The picture that emerges is a messy one. Federalism may simultaneously aggrandize and check presidential power. It may bolster the President’s ability to formulate policy without (or even contra) Congress but also empower states to challenge the President’s fidelity to Congress. It may enhance federal executive power while also complicating any view of such power as unitary. State–federal partnerships may also affect the third branch of federal government, the federal judiciary, which may increasingly be drawn into policing the legality of federal executive action or may instead be sidelined by state–federal agreement.

Our own tentative view is that the checks states introduce into national policymaking are quite significant and should be taken seriously as a constraint on presidential power. Accepting such checks as akin to checks and balances among the branches of the federal government requires some flexibility; states, after all, are not Congress. Moreover, the presence of divided national government may prove an important feature; how much states are able to check presidential power during periods of unified national government, when the President may not feel the same pressure to work around Congress, remains an open question. Yet, in an era when partisan politics and divided government have ransacked the Constitution’s separation of powers framework, looking beyond Washington to consider novel checks-and-balances arrangements may be warranted.

### **Polarization: Paths to Compromise or Cover for Partisan Warfare?**

We end, finally, where we began: with partisan polarization. Collaboration between the President and the states emerges from divided government and ideologically

distinctive, cohesive political parties. An important set of questions thus concerns how such state–federal interaction in turn may affect polarization.

For the many commentators who worry about polarization in the United States today, federalism may be particularly appealing insofar as it opens up new—and largely overlooked—venues for bipartisan negotiation. The implementation of the ACA has involved a series of compromises between the Democratic federal executive branch and Republican-led states. Medicaid expansion waivers have allowed state officials to further particular Republican policies, such as reliance on private insurance policies, even as they advance the broader Democratic goal of Medicaid expansion. Negotiations around health insurance exchanges have similarly involved extensive back-and-forth and mutual accommodation among Democratic federal officials and Republican state officials (Dinan 2014; Thompson and Gusmano 2014). In other policy areas, including education and consumer protection, collaborations among Democratic and Republican officials are commonplace—and offer a sharp contrast to politics in Washington. The development of the Common Core and testing consortia and the federal executive’s reliance on these interstate efforts through RTTT and NCLB waivers involved substantial bipartisan collaboration. And litigation targeting mortgage services and for-profit schools has likewise entailed Democratic and Republican cooperation.

Given the polarization of state as well as federal politicians, it may be surprising that the Democratic Obama Administration has been able to work around a Republican Congress by partnering with Republican-controlled states. But several features of a federal system make this apparent paradox less surprising. To begin with, state–federal interactions offer more opportunities for forging bipartisan compromise. When the President turns to the states rather than Congress, we see a series of disaggregated interactions among officials, with each state providing a discrete opportunity for federal–state engagement. Indeed, given the plural and elected nature of most state executives, such opportunities often exist within states as well. Compared to the need to satisfy a majority in Congress, these individual interactions between particular state and federal officials open up more space for intra-partisan difference and bipartisanship to emerge. Moreover, state–federal negotiations frequently focus on concrete questions of policy implementation rather than grand design, and this may unsettle, or at least allow politicians to eschew, partisan dogmas. Finally, state and federal officials tend to be mutually dependent, even though the forms of their dependencies differ. For instance, the states may rely on the federal executive for funding at the same time as the federal executive relies on the states to achieve its policy goals. These varied interests and dependencies may incentivize and enable bipartisan negotiation.

As this suggests, joint state–federal efforts are not purely harmonious. To the contrary, disputes about Medicaid expansion, the Common Core, and other policy areas in which we see state–federal negotiation are commonplace. What is notable,

however, is that this disagreement does not neatly track standard party lines. Instead of unified partisan opposition, we see discrete disagreements among officials of the same party, as well as points of bipartisan consensus. For example, Democratic and Republican officials cooperated in formulating education policy, even as both Democratic and Republican officials resisted aspects of the Common Core and testing plans.

While compromise among state and federal officials of different political parties may be valuable in its own right, an important question concerns the feedback effects of such compromise on national politics. Is federalism a tool for defusing polarization within the federal government or something closer to the opposite? Should we expect bipartisan negotiations of state and federal executives to help break down partisan divides in Washington, or—because they provide a workaround to congressional inaction and limit the costs of polarization—are these state–federal collaborations instead more likely to perpetuate partisan division and acrimony at the federal level?

As with the effects of state-differentiated federal law, this is a thorny empirical question that awaits time and close study. Early evidence offers potential support for both hypotheses. For instance, it seems reasonable to understand the last decade of education federalism as helping to disrupt partisan alignments enough to yield the recent Every Student Succeeds Act, a rare instance of federal legislative bipartisanship. Reaching back in time, one might similarly read the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 as a story of bipartisan state–federal executive negotiations facilitating an ultimate compromise among a Republican Congress and Democratic President. After the Republican governors of Michigan and Wisconsin, negotiated waivers with the Democratic Clinton Administration, certain of their policy experiments, such as work requirements, became part of the federal legislation agreed to by Speaker of the House Gingrich and President Clinton alike (Gais and Fossett 2005; Thompson and Burke 2007).

At the same time, we can imagine bipartisan negotiations and compromise among state and federal officials having little effect on Congress—or offering cover for still more vitriolic partisan fighting. Although the agreements that state and federal executives have reached about Medicaid expansion and other aspects of the ACA might suggest a route to greater bipartisanship on health reform, the conversation in Congress has not yet changed: Republicans still vote with some regularity to repeal the ACA, and the Act remains a major source of partisan division. It may be that the relatively recent bargains on Medicaid expansion have not had time to influence congressional debate. But it may also be that compromises between the President and the states free members of Congress to engage in symbolic politics and leave the work of governing to others. Just as the Supreme Court's decisions in *NFIB v. Sebelius* and *King v. Burwell* (2015) might be



understood to have saved Congress from having to act, executive state negotiations might likewise be a safety valve. Or alternatively, it might be that state–federal bargains have little impact on federal politics, at least in some policy contexts.

Probing the feedback effects of federal–state bipartisanship on national political polarization will take time, and is likely to produce murky results. Federalism may prove a useful mechanism for moving our nationally polarized politics forward. But any sustained consideration of state–federal collaboration must be open to the possibility that it has the opposite effect and may further entrench the partisan divides that currently debilitate Congress.

## Note

The authors would like to thank Nicholas Caros, Jeffrey Coyle, Hilary Oran, Nicole Smith, and Jamie Wolfe for research assistance.

## References

- Abramowitz, Alan I. 2011. *The disappearing center: Engaged citizens, polarization, and American democracy*. New Haven, CT: Yale University Press.
- Affordable Care Act. 2012. 42 U.S.C. § 18052.
- Ansolahehere, Stephen, Maxwell Palmer, and Benjamin Schmeer. 2015. Divided Government and Significant Legislation: A History of Congress from 1789–2010 (unpublished manuscript), available at: [https://dl.dropboxusercontent.com/u/156214/ansolahehere\\_palmer\\_schmeer\\_divided\\_government.pdf](https://dl.dropboxusercontent.com/u/156214/ansolahehere_palmer_schmeer_divided_government.pdf) [https://perma.cc/9FXS-NLUR] (accessed March 14, 2016).
- Arizona v. United States*. 2012. 132 S. Ct. 2492.
- Barron, David J., and Todd D. Rakoff. 2013. In defense of big waiver. *Columbia Law Review* 113(2): 265–345.
- Binder, Sarah. 2015. The dysfunctional Congress. *Annual Review of Political Science* 18(May): 85–101.
- Bulman-Pozen, Jessica. 2016. Executive federalism comes to America. *Virginia Law Review* 102: 953–1030.
- . 2014. Partisan federalism. *Harvard Law Review* 127(4): 1077–1146.
- . 2012. Federalism as a safeguard of the separation of powers. *Columbia Law Review* 112(3): 459–506.
- Centers for Medicare & Medicaid Services. n.d. Information on Essential Health Benefits (EHB) Benchmark Plans, available at: <https://www.cms.gov/CCIIO/Resources/Data-Resources/ehb.html> (accessed March 14, 2016).
- Cole, James M. 2013. Memorandum for All United State Attorneys on Guidance Regarding Marijuana Enforcement. August 29, 2013, available at: <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (accessed May 4, 2016).

- Conlan, Timothy, Paul L. Posner, and Mariely Lopez-Santana 2014. Unsafe at Any Speed? The Emergence of Variable Speed Federalism in the United States and the European Union. APSA 2014 Annual Meeting Paper, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2454136](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2454136) (accessed May 4, 2016).
- Davenport, Coral. 2015. Republican Governors Signal Their Intent to Thwart Obama's Climate Rules. *New York Times*, July 2, available at: [http://www.nytimes.com/2015/07/03/us/republican-governors-signal-their-intent-to-thwart-obamas-climate-rules.html?\\_r=0](http://www.nytimes.com/2015/07/03/us/republican-governors-signal-their-intent-to-thwart-obamas-climate-rules.html?_r=0) (accessed May 4, 2016).
- Department of Education. n.d. Title 1 Waivers: California, available at: <http://www2.ed.gov/nclb/freedom/local/flexibility/waiverletters2009/index.html?exp=2#ca> (accessed March 14, 2016).
- Department of Health and Human Services. 2013. Patient Protection and Affordable Care Act; Standards Related to Essential Health, Actuarial Value, and Accreditation. *Federal Register* 78 (37): 12834–12872.
- Department of Transportation. n.d. TIGER Discretionary Grants, available at: <http://www.ops.fhwa.dot.gov/Freight/infrastructure/tiger/index.htm> (accessed March 14, 2016).
- Dilger, Robert Jay, and Eugene Boyd. 2014. *Block grants: Perspectives and controversies*. Washington, DC: Congressional Research Service.
- Dinan, John. 2014. Implementing health reform: Intergovernmental bargaining and the Affordable Care Act. *Publius* 44 (Summer): 399–425.
- Dorf, Michael C., and Charles F. Sabel. 1998. A constitution of democratic experimentalism. *Columbia Law Review* 98 (2): 267–473.
- Economic Development Administration. n.d. Strong Cities, Strong Communities, available at: <http://www.eda.gov/challenges/sc2challenge/> (accessed March 14, 2016).
- Environmental Protection Agency. 2015. Carbon pollution emissions guidelines for existing stationary sources: Electric utility generating units. *Federal Register* 79 (117): 34830–34958.
- Eskridge Jr., William N., and John Ferejohn. 2013. *A Republic of statutes: The new American Constitution*. New Haven, CT: Yale University Press.
- Federal Communications Commission. 2015. Memorandum Opinion and Order. February 26, 2015, available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-25A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-25A1.pdf) (accessed March 14, 2016).
- Field, Kelly. 2015. As Scrutiny Intensifies, For-Profit Colleges Face Threats on Several Fronts. *Chronicle of Higher Education*, May 18, available at: <http://chronicle.com/article/As-Scrutiny-Intensifies/230215/> (accessed May 4, 2016).
- Freeman, Jody, and David B. Spence. 2014. Old statutes, new problems. *University of Pennsylvania Law Review* 163: 1–93.
- Gais, Thomas, and James Fossett. 2005. Federalism and the executive branch. In *The executive branch*, eds. Joel D. Aberbach and Mark Peterson, 486–522. Oxford: Oxford University Press.

- Galle, Brian and Mark Seidenfeld. 2008. Administrative law's federalism: Preemption, delegation, and agencies at the edge of federal power. *Duke Law Journal* 57: 1933–2022.
- Gerken, Heather K. 2015. Federalism and nationalism: Time for a détente? *St. Louis University Law Journal* 59: 997–1044.
- Giovannelli, Justin, Kevin W. Lucia, and Sabrina Corlette. 2014. *Implementing the Affordable Care Act: Revisiting the ACA's essential health benefits requirement*. Washington, DC: The Commonwealth Fund.
- Gluck, Abbe. 2014. Our [National] federalism. *Yale Law Journal* 123: 1996–2043.
- Gulasekaram, Pratheepan, and Karthick Ramakrishnan. 2016. The President and immigration federalism. *Florida Law Review* 68.
- Hacker, Jacob. S., and Paul Pierson. 2015. Confronting asymmetric polarization. In *solutions to political polarization in America*, ed. Nathaniel Persily, 59–70. New York: Cambridge University Press.
- Heinzerling, Lisa. 2014. Inside EPA: A former insider's reflections on the relationship between the Obama EPA and the Obama White House. *Pace Environmental Law Review* 31 (Winter): 325–369.
- Herz, Nathaniel. 2015. Walker Says He'll Use Executive Authority to Expand Medicaid in Alaska. *Alaska Dispatch News*, July 16, available at: <http://www.adn.com/article/20150716/walker-says-hell-use-executive-authority-expand-medicaid-alaska> (accessed May 4, 2016).
- Holeywell, Ryan. 2011. Office of Intergovernmental Affairs: More Influential Than Ever. *Governing*, October, available at: <http://www.governing.com/topics/politics/white-house-office-intergovernmental-affairs-more-influential.html> (accessed May 4, 2016).
- Howell, William G. 2003. *Power without persuasion: The politics of direct presidential action*. Princeton, NJ: Princeton University Press.
- In re Murray Energy Corp. v. EPA*, 788 F. 3d 330 (D.C. Cir. 2015).
- Jacobson, Gary C. 2013. Partisan polarization in American politics: A background paper. *Presidential Studies Quarterly* 43: 688–708.
- Jones, David K., Katharine W.V. Bradley., and Jonathan Oberlander., 2014. Pascal's Wager: Health insurance exchanges, Obamacare, and the Republican dilemma. *Journal of Health Politics, Policy and Law* 39: 97–137.
- Kagan, Elena. 2001. Presidential administration. *Harvard Law Review* 114: 2245–2385.
- Kaiser Family Foundation. 2016. Status of State Action on the Medicaid Expansion Decision. February 24, available at: <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/> (accessed February 24, 2016).
- Kamin, Sam. 2015. The battle of the bulge: The surprising last stand against state marijuana legislation. *Publius* 45 (Summer): 427–451.
- King v. Burwell*. 2015. 135 S. Ct. 2480.
- Kölliker, Alkuin. 2006. *Flexibility and European Unification: The Logic of Differentiated Integration*. Lanham, MD: Rowman & Littlefield Publishers, Inc.

- Korte, Gregory. 2015. To Get Around Congress, Obama Turns to City Halls. *USA Today*. May 26, available at: <http://www.usatoday.com/story/news/politics/2015/05/25/obama-state-and-local-strategy/27602149/> (accessed February 24, 2016).
- Kurzweil, Martin A. 2015. Disciplined devolution and the new education federalism. *California Law Review* 103(3): 565–633.
- Lowande, Kenneth S., and Sidney M. Milkis. 2014. “We Can’t Wait”: Barack Obama, partisan polarization and the administrative presidency. *The Forum* 12 (1): 3–27.
- MacDonald, Jason A. 2010. Limitation riders and congressional influence over bureaucratic policy decisions. *American Political Science Review* 104(4): 766–782.
- Mann, Thomas E. and Norman J. Ornstein. 2012. *It’s even worse than it looks: How the American Constitutional System collided with the new politics of extremism*. New York: Basic Books.
- . 2006. *The broken branch: How Congress is failing America and how to get it back on track*. New York: Oxford University Press.
- Manna, Paul, and Laura L. Ryan. 2011. Competitive grants and educational federalism: President Obama’s race to the top program in theory and practice. *Publius* 41(3): 522–546.
- Mayhew, David R. 2005. *Divided we govern: Party control, lawmaking, and investigations, 1946–2002*. 2nd ed. New Haven, CT: Yale University Press.
- McCarty, Nolan. 2014. The Decline of Regular Order in Appropriations: Does It Matter?, available at: <http://ssrn.com/abstract=2537444> (accessed March 14, 2016).
- McCarty, Nolan, Keith T. Poole, and Howard Rosenthal. 2006. *Polarized America: The dance of ideology and unequal riches*. Cambridge, MA: MIT Press.
- Memoli, Michael A. 2014. Democratic Governors Join Obama in Push for Higher Minimum Wage. *Los Angeles Times*, February 21, available at: <http://articles.latimes.com/2014/feb/21/news/la-pn-obama-governors-minimum-wage20140221> (accessed May 4, 2016).
- Metzger, Gillian E. 2015. Agencies, polarization, and the states. *Columbia Law Review* 115(7): 1001–1046.
- . 2011. Federalism under Obama. *William & Mary Law Journal* 53(2): 567–619.
- . 2008. Administrative law as the new federalism. *Duke Law Journal* 57(7): 2023–2109.
- Moe, Terry M., and William G. Howell. 1999. The presidential power of unilateral action. *Journal of Law, Economics, & Organization*. 15(1): 132–179.
- National Federation of Independent Business, et al v. Sebelius*. 2012. 132 S. Ct. 2566.
- Newkirk, Margaret, and Toluse Olorunnipa. 2015. Tennessee Shows How Republicans Learned to Embrace Obamacare. *Bloomberg Business*, February 3, available at: <http://www.bloomberg.com/news/articles/2015-02-03/tennessee-shows-how-republicans-are-learning-to-love-obamacare> (accessed May 4, 2016).
- Ogden, David. W. 2009. Memorandum for Selected Attorney Generals on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, October 19, available at: <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> (accessed May 4, 2016).

- Persily, Nathaniel. 2015. Introduction. In *Solutions to Political Polarization in America*, ed. Nathaniel Persily, 3–14. New York: Cambridge University Press.
- Pildes, Richard H. 2014. Romanticizing democracy, political fragmentation, and the decline of American Government. *Yale Law Journal* 124(3): 804–852.
- Rodríguez, Cristina M. 2014. Negotiating conflict through federalism: Institutional and popular perspectives. *Yale Law Journal* 123(6): 2094–2133.
- Rose, Shanna. 2015. Opting in, opting out: The politics of state medicaid expansion. *The Forum* 13(1): 63–82.
- . 2013. *Financing medicaid: Federalism and the growth of America's health care safety net*. Ann Arbor, MI: University of Michigan Press.
- Rudowitz, Robin, and Jessica Stephens. 2013. Analyzing the Impact of State Medicaid Expansion Decisions. *Kaiser Commission on Medicaid and the Uninsured*, available at: <https://kaiserhealthnews.files.wordpress.com/2013/08/8458-analyzing-the-impact-of-state-medicaid-expansion-decisions2.pdf> (accessed May 4, 2016).
- Saiger, Aaron J. 2011. Obama's "Czars" for domestic policy and the law of the White House Staff. *Fordham Law Review* 79(6): 2577–2615.
- Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).
- Thompson, Frank J., and Courtney Burke. 2007. Executive federalism and medicaid demonstration waivers: Implications for policy and democratic process. *Journal of Health Politics, Policy and Law* 32: 971–1004.
- Thompson, Frank J., and Michael K. Gusmano. 2014. The administrative presidency and fractious federalism: The case of Obamacare. *Publius* 44 (Summer): 426–450.
- Viscusi, Kip W., ed. 2002. *Regulation Through Litigation*. Washington, DC: Brookings Institution Press.
- Watts, Kathryn A. 2016. Controlling presidential control. *Michigan Law Review* 114(5): 683–745.
- West Virginia v. EPA*. Case No. 15-1363 (D.C. Cir.)
- White House. 2009. Presidential Memorandum Regarding Preemption, available at: <https://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-preemption> (accessed March 14, 2016).
- Wong, Kenneth K. 2015. Federal ESEA waivers as reform leverage: Politics and variation in state implementation. *Publius* 45 (Summer): 405–426.
- Wyeth v. Levine*. 2009. 555 U.S. 555.